DATE: June 25, 2002

In Re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 01-00938

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Department Counsel

FOR APPLICANT

August Bequai, Esq.

SYNOPSIS

Applicant's denial of inappropriate sexual contact with his minor daughter (over a period of more than two years) is not persuasive. His efforts to discredit an October 1998 signed, sworn statement, and the damaging admissions contained in it, are severely undermined by significant portions of the statement that are consistent with and corroborated by a July 1998 signed, sworn statement. Clearance is denied.

STATEMENT OF THE CASE

On March 19, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program"* (Directive), dated January 2, 1992, as amended and modified, issued a Statement or Reasons (SOR) to Applicant. It detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended referral to an Administrative Judge to determine whether he should be granted a security clearance.

Applicant answered the SOR in writing on April 3, 2002, and requested a hearing before a DOHA Administrative Judge. Because of caseload considerations, the case was assigned to this Administrative Judge on April 15, 2002, after having been previously assigned to another Administrative Judge. On June 4, 2002, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to continue Applicant's security clearance. The Government's case consisted of seven exhibits and one witness. Applicant relied on 17 exhibits, on his own testimony, and on the testimony of one additional witness. A transcript (TR) of the proceeding was received on June 12, 2002.

FINDINGS OF FACT

The SOR alleged sexual misconduct under Guideline D and personal conduct (falsification) under Guideline E.

Applicant had allegedly had inappropriate sexual contact with his minor daughter between 1995 and 1997; he allegedly had thoughts "about sexually molesting a child;" he allegedly made an attempt never to be alone with his children because he did not trust himself; and he allegedly falsified a material fact when he denied during having thoughts "about molesting a child" during a DSS interview. In his answer to the SOR, Applicant admitted, with explanation, that he had thoughts about molesting a child. Applicant denied all other allegations in the SOR.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a 42-year-old computer programer for a DoD contractor. He has worked for his current employer since May 1996 (Gov. Exh. 1). Previously, he had served in the United States military from April 1979 to May 1985 and worked for one other DoD contractor. He was granted a top secret personal security clearance as early as 1980 and currently holds a top secret personal security clearance and has access to sensitive compartmented information (SCI) (Gov. Exh 1). Applicant's suitability to retain his personal security clearance and SCI access have become an issue because of his admissions of sexual misconduct.

Information of Applicant's possible involvement in sexual misconduct had been forwarded to the Defense Security Service (DSS) by another federal agency. During 1997 interviews with an investigator from another federal agency, Applicant disclosed (incident to polygraph examinations) that he had recently stopped rubbing his minor daughter's private parts with mineral oil when she indicated she liked it and did not want him to stop. Applicant had allegedly admitted during the same interview that he had thoughts about sexually abusing "a child" which he did not act on (Tr. 34). During the earlier interview, he had also admitted he attempted never to be alone with his children because he did not trust himself around them (Tr. 35).

After receiving the above information, the DSS first questioned Applicant about sexual misconduct in June 1998. At the conclusion of the interview, he provided a signed, sworn statement[(1)] (Gov. Exh. 2) which includes these statements about the polygraph examinations (with the other agency) and the sexual misconduct allegations:

During the first exam I broke down and cried. I cried because of something that my daughter had said to me about a week prior to the exam. I was checking her genitalia to ensure she was keeping herself clean. Both my wife and I did this about once ever week or so to ensure she did not get an infection or soreness due to lack of proper wiping after using the toilet. (My daughter) was red and irritated so I told her to clean up in the bathroom with the shower and then I would put some oil on the area where she was sore. As I was applying the oil she responded that she enjoyed the feeling and asked me to continue putting more oil around her groin. It was the first time she responded that way and it made me feel very uncomfortable. At that moment I decided that I would not help with her hygiene but instead I would leave that to my wife.

Applicant was interviewed by a second DSS special agent in October 1998. During this interview, he denied that he experienced thoughts about molesting a child. After the second DSS interview in October 1998, he included this information in a signed, sworn statement (Gov. Exh. 3):

I have one daughter ( ) who was born ( ) 1992. As previously discussed with DSS and (other federal agency), I periodically (weekly to monthly) checked by daughter ('s) genitalia between about 1995 and May 1997 to make sure she was clean and not sore. My wife could have also done this sometimes. I would estimate that about once a month when (his daughter) would tell me she was sore, I rubbed a Vitamin E oil over the outer vaginal area. This was done at (my daughter's request).

Approximately, one month before I stopped doing this in May 1997 (my daughter) started showing signs that she was enjoying the sexual feeling she received when I rubbed her genitalia with lotion. Sometimes (my daughter) would request this (use of oil) claiming her genitalia was sore or irritated. There were a few times, my wife and I refused to rub her vaginal area after we checked and saw that it was fine. There was one instance in ( ) 97 when I was rubbing oil on (my daughter's) genitalia that she verbally expressed that she was enjoying it.

At his administrative hearing, Applicant's wife of 17 years, Ms. A, testified that he (Applicant) had never sexually

abused their daughter (Tr. 96-97) and had never been investigated by state officials for sexual misconduct (Tr. 91); their daughter is an above average student who has never manifested any indicia of a sexually abuse child (Tr. 101). Ms. A is attuned to the evils and the indications of child sexual abuse because of her work experience (Tr. 99-100); she would have recognized sexual abuse if her daughter had been a victim; and she would asked her husband to leave if he were the perpetrator (Tr. 105-106, 129). However, Ms. A also testified their daughter did not have a perpetual rash or soreness problem in her groin/vaginal area that required bi-weekly/monthly application of mineral oil (Tr. 117-119). She could recall only one occasion when their daughter's groin area was inflamed or sore and required the medicinal application of mineral oil.(Tr.119-120). Ms. A also testified her husband was very meticulous in reading every word of a contract whenever they purchased a home (Tr. 129). She had reviewed Government Exhibit 3 and concluded the handwriting was different from her husband's (Tr. 124-125).

During his testimony at the administrative hearing, Applicant denied ever sexually abusing his daughter and attempted to distance himself from, and to discredit the information contained in the October 1998 signed, sworn statement: He did not deny signing the document (Tr. 141); however, he asserted the allegations contained in Government Exhibit 3 were "absolutely" inaccurate (Tr. 152). More specifically, he implicitly contended Government Exhibit 3 was not factual because he did not have the freedom to get up and leave the interview room whenever he wanted to (Tr. 174); he was not allowed to take his medications (Tr. 141, 148); he became hypoglycemic during the interview and had a very bad headache (Tr. 139, 148); he did not read the statement which the DSS special agent had typed up before he signed it (Tr. 141); he did not read it because he did not think it was a "legal" document (Tr. 149); he did not remember if he had been advised of his right to talk with an attorney before, during, and after questioning (Tr. 150); he used the word groin rather then "genitalia" to describe the area where he applied oil to his daughter (Tr. 154, 156); the DSS special agent took dates out of context and she misquoted words from their interview (Tr. 155-156).

Applicant's testimonial efforts to discredit the admissions he made in the October 1998 signed, sworn statement were not persuasive. The similarities between his July 1998 signed, sworn statement (Gov. Exh. 2) and the October 1998 signed, sworn statement (Gov. Exh. 3) are greater than the differences. In both statements, Applicant indicated he had regularly "checked" his daughter's private areas and in both statements, he uses the term: "genitalia." While Government Exhibit 3 includes greater detail in identifying a specific time frame during which Applicant "checked" his daughter and applied oil to her genitalia, Government Exhibit 2 corroborates sufficient portions of Government Exhibit 3 to discredit Applicant's assertion Government Exhibit 3 is "absolutely" inaccurate. Applicant places himself in the same situation with respect to his daughter's private parts (in both documents), and more significantly, he used the term "genitalia,"a word he claimed never to have used (Tr.153-154). Applicant's testimony that he did not read his October 1998 statement because he was not feeling well and did not think it was a legal document is not credible. Government Exhibit 3 is less than one full page; even with a bad headache, Applicant could have read it in less than two minutes.

The record evidence supports a finding Applicant applied mineral oil to his minor daughter's private parts as often as monthly for more than two years. Since there is no persuasive evidence of a medicinal or therapeutic need for this monthly application--the explanation Applicant had given in his two signed, sworn statements, Applicant's motive for doing what he did is suspect. The most obvious and most logical motive for his actions, and the motive which best explains his efforts to discredit the admissions in his October 1998 signed, sworn statement, is that he touched his minor daughter inappropriately for personal sexual gratification.

Applicant has submitted documents from medical professional who have seen him and his daughter in a professional capacity and who have observed no evidence of sexual abuse (on his daughter) and no aberrant behavior by Applicant (Applicant Exhibits A, B, and C). Likewise, he had submitted statements from educators who have observed "no signs" of abuse neglect or abnormal behavior by Applicant's daughter (Applicant's Exhibits K, L, and P).

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth

in Section E2.2. of the Directive. In that vein, the Government no only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guideline apply to this case:

SEXUAL BEHAVIOR

(Guideline E)

The Concern: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

Conditions that could raise a security concern and may be disqualifying include:

E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

Conditions that could mitigate security concerns include:

E2.A4.1.3.3. There is no other evidence of questionable judgment, irresponsibility, or emotional stability.

PERSONAL CONDUCT

(Guideline E)

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;

E2.A5.1.2.3. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information (withheld) was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government established its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about Applicant's judgment,

reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSION

Having considered the record evidence in accordance with appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guideline D. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2, as well as those referred to in the section dealing with Adjudicative Process, both in the Directive.

A security concern is raised by Applicant's admissions he applied mineral oil to his minor daughter's private areas as often as monthly for more than two years.[(2)] Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

Applicant's efforts to discredit his damaging admissions in the two signed, sworn statements are not persuasive. In the June 1998 statement which Applicant personally prepared, he admitted "checking her genitalia...about once every week." The October 1998 statement includes additional information and details about Applicant's sexual contact with his daughter but is sufficiently similar to the earlier statement so as to significantly undermine his claim the DSS special agent misquoted, distorted, or embellished information he provided during the second interview. Applicant's reliance on his wife's testimony to discredit allegations he had sexually abused their daughter is somewhat misplaced. Although his wife was obviously sincere in stating her belief Applicant has not sexually abused their minor daughter, she also testified their daughter did not have a persistent rash in her private areas which required constant monitoring and the monthly application of mineral oil.

Because there is minimal evidence Applicant and Ms. A's daughter had regular or recurring symptoms that required the application of mineral oil for medicinal or therapeutic reasons, Applicant did what he did for reasons not born of parental love and concern. His statements admitting his improper and regular contact followed by his attempt to discredit these statements raise serious questions about the nature and extent of his illicit contact with his daughter, his current state of denial regarding that contact, and his susceptibility to coercion, exploitation or duress because of that contact. The circumstances of this case establish Applicant's inappropriate touching of his minor daughter and rule out motives for that touching other than that of personal sexual gratification. Guideline D is concluded against Applicant

The facts do not support a conclusion Applicant falsified a material fact when he repudiated an earlier admission that he had "thought" about molesting a child. Touching a child's private areas for personal sexual gratification is against the law; thinking aberrant thoughts about children is properly considered repulsive by most members of society, but it is not against the law. An individual who divulges his most intimate thoughts--which he has not acted on--in a cathartic confessional session incident to a polygraph examination is not disclosing material facts, and his subsequent repudiation of his confession is not a falsification of a material fact. Guideline E is concluded for Applicant

FORMAL FINDINGS

Formal findings as required by Section 3, Paragraph 7, of enclosure 1 of the Directive are hereby tendered as follows:

Paragraph 1 (Guideline D) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Paragraph 2 (Guideline E) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance and SCI access.

John R. Erck

Administrative Judge

1. In his hand-written preface to the typed statement, Applicant refers to "my typed statement." (Gov. Exh 2); he admitted during his hearing that he had typed this statement himself (Tr. 169).

2. A security concern is not raised by Applicant's admission he has had thoughts about molesting a child. Under Guideline D, sexual behavior, not sexual thoughts, are identified as raising a security concern.