

DATE: November 7, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-07629

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On June 26, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on July 25, 2001.

The case was received by the undersigned on September 19, 2001. A notice of hearing was issued on September 24, 2001, and the case was heard on October 11, 2001. The Government submitted documentary evidence, and called one witness to testify. The Applicant also called two witnesses to testify on his behalf. The issues raised here are whether the Applicant's sexual behavior, and related personal conduct militates against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 50 years of age, has an Associate of Arts Degree, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant (Transcript (TR) at page 4 lines 6~16).

Guideline D - Sexual Behavior & Guideline E - Personal Conduct

1.a.~1.i. and 2.a.~2.c. The Applicant engaged in voyeurism, and sexual activities in public places, such as exposing himself to other men and participating in masturbation, from about the mid 1980's until two months prior to his hearing; i.e., August of 2001 (TR at page 23 line 18 to page 27 line 1, Government Exhibit (GX) 2 at page 1, and GX 6 at page 1). He engaged in this activity despite holding a Top Secret security clearance from 1995 to 1998, and a Secret security clearance from 1998 until the date of his hearing. In May of 1995, he was arrested, and subsequently found guilty of

Disturbing the Peace (GX 2 at page 2, GX 5, GX 6 at page 1, and GX 7). He had exposed himself to an undercover police officer which resulted in his arrest (TR at page 40 line 12 to page 42 line 20, and at page 43 line 24 to page 44 line 7). The Applicant had engaged in similar activities prior to his arrest "[h]alf a dozen times" (TR at page 42 line 21 to page 43 line 2).

From May of 1995 until November of 1996, and again from mid 1998 until the Fall of 1998, the Applicant voluntarily attended Sexual Compulsive Anonymous (SCA) meetings for treatment of what was diagnosed at that time as being a sexual compulsive disorder (TR at page 31 line 3 to page 32 line 8, GX 2 at page 3, and GX 6 at page 1). From March of 1996 until June of 1997, he also participated in group therapy for his then diagnosed sexual compulsive disorder (TR at page 28 line 20 to page 31 line 3, GX 2 at page 3, and GX 6 at page 1). Furthermore, from June of 1996 until March of 1997, the Applicant received treatment from a psychiatrist (TR at page 32 lines 9~25, and GX 2 at page 3).

Although the Applicant would prefer not to engage in voyeurism, and sexual activities in public places, he continues this activity (TR at page 37 line 24 to page 40 line 9, and at page 49 lines 8~16). He has, however, recently been diagnosed by a psychologist as not being "sexual compulsive" (Applicant's Exhibit (AppX) B).

Mitigation

The Applicant offered the very laudable testimony of a friend (TR at page 74 line 5 to page 77 line 18), and of his pastor (TR at page 78 line 24 to page 83 line 8). The Applicant's children and many of his associates know of his sexual activity (TR at page 49 line 17 to page 53 line 23, and at page 60 lines 2~11). He would willingly divulge his sexual activity to others rather than be subject coercion, exploitation or duress.

POLICIES

Enclosure 2 and Section E2.2 of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Sexual Behavior

Conditions that could raise a security concern:

3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Condition that could mitigate security concerns:

4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

Personal Conduct

Condition that could raise a security concern:

4. 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;

Condition that could mitigate security concerns:

5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or

duress;

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out a case under Guideline D (Sexual behavior), and Guideline E (Personal conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

Personal conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; and sexual behavior in a public place, reflects a lack of judgment and discretion. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places.

CONCLUSIONS

The Applicant engaged in inappropriate sexual behavior over a period of about 15 years, and only two months prior to this hearing he continued to engage in improper sexual conduct. In the last five or six years, the Applicant received psychiatric treatment, attended SCA meetings, and participated in group therapy sessions, yet he can give no assurance that he will not continue this conduct. He has held a security clearance since 1995, and since his arrest that same year was clearly appraised of the Government's concerns. Still, he can give no assurance that he will not continue to engage in this activity. This activity shows extreme poor judgement, unreliability and untrustworthiness. I must therefore conclude that the Applicant's inappropriate sexual behavior is of present security significance. Guideline D is therefore found against the Applicant.

Although I find the Applicant's inappropriate sexual behavior to reflect a lack of judgement and discretion, I do not conclude that he is subject to possible coercion. The Applicant's children and many of his associates know of his sexual activity, and he would willingly divulge his sexual activity to others. Guideline E is therefore found in favor of the Applicant.

The Applicant has thus not met the mitigating conditions of Criterion D, and of Section E2.2 of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Criterion D.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant
- f. Against the Applicant.
- g. Against the Applicant.
- h. Against the Applicant.
- i. Against the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant
- c. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge