

DATE: March 19, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-18866

## **DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Catherine M. Engstrom, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Married forty-one year old engineer had two teenaged step-daughters. Concerned the oldest girl was using drugs and engaging in sexual activity in the home with older men, he purchased a spy camera in 1999 to observe her illicit activities, observing both girls from April to October 1999. While observing, he became sexually aroused and masturbated one to five times per week. In October 1999, he stopped and removed the camera. The step-daughters discovered the camera in February 2000, told their mother, who then threw Applicant out of the house and the marriage. Applicant did not mitigate the security concerns. It is not clearly consistent with national security to continue Applicant's security clearance. Clearance is denied.

### **STATEMENT OF THE CASE**

On August 8, 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 of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines E (Personal Conduct) and D (Sexual Behavior) 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 Applicant, and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated September 10, 2002, with a cover letter from his then attorney, dated September 13, 2002, Applicant responded to the allegations set forth in the SOR. He requested his case be decided on the written record, in lieu of a hearing. Applicant admitted to the use of the spy camera and the sexual gratification. He denied he lied to the special agent of the Defense Security Service. He offered matters in mitigation and explanation of the facts and circumstances.

On December 17, 2002, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM)<sup>(1)</sup> was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. He submitted an additional statement (unsworn) and supporting documentation on February 4, 2003. The case was assigned to me on February 12, 2003 as the Administrative Judge for this case.

### **FINDINGS OF FACT**

Applicant admitted the allegations of Paragraph 1.a. under Guideline E (Personal Conduct), and Paragraph 2.a. of Guideline D (Sexual Behavior) of the SOR, which were based on the sexual conduct of Applicant observing computer pictures of his teenage step-daughters in the home bathroom. He denied the allegation under Paragraph 1.b. Guideline E concerning anything he told the Defense Security Service investigator on November 22, 2000<sup>(2)</sup>. These admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make these additional findings of fact:

Applicant is a forty-one year old engineer working for a defense contractor. He currently has a secret clearance and seeks to retain it. Applicant has a masters degree in physics, and is a software engineer. He is a adjunct professor at a local university teaching physics. He is also involved with a planetarium as a speaker at the public planetarium shows. (Items 3 at 1, 3b at 1, 7 at 1, and Response at 2).

Applicant has been married three times, has one daughter by his first marriage, and three step-daughters from the first two marriages, and three step-sons in his current marriage. The two step-daughters who are parties to the actions which are the subject of this SOR are the children of Applicant's second wife. That marriage lasted from 1991 to 2000. Applicant is married to his third wife. They were married on July 31, 2000. She has three sons who live with their father. His wife submitted an affidavit that she notices no sexual problems and they are happily married. She also states Applicant has expressed to her his acknowledgment of his wrongdoing and his contrition. (Items 3 at 1-3, 3c at 7, 3i at 1 and 2, 7 at 2-3, 8 at 1-14, 9 at 1-4, and Response with Item 4 at 1-4).

After reading her diary, Applicant and his second wife became concerned about the drug and sex activities of the oldest step-daughter, who was 17 when these actions occurred. Applicant purchased a spy camera and connected it to his computer in his attic office at the family home. His wife did not consent to the use of the camera and did not know of its use. Applicant used the camera to look at both step-daughters while they showered and used the bathroom, and looked into the oldest step-daughter's bedroom, observing nothing more there than her studying. The camera was not used to look into the bedroom of the youngest step-daughter. Applicant put 15 minutes of pictures on his computer hard drive during the period of his use of the spy camera, from April to October 1999. He did not videotape any of the step-daughters' activities, and did not show, sell, transfer, or otherwise release to any third party anything he recorded. He later deleted the pictures from his computer. In October 1999 he removed the camera and did not record any more pictures of the step-daughter. While observing the step-daughters in the bathroom, he became sexually stimulated and masturbated from one to five times per week during this time period while watching these scenes. He developed a guilty conscience and in October 1999 ceased the observing and recording on the hard drive. He removed the camera and put it in a box. Applicant also eavesdropped on telephone conversations. All of Applicant's actions occurred in his marital home. Applicant took his younger step-daughter out to dinner and questioned her about intimate details of her life, ostensibly to warn her about "boys" and what could happen to her. (Items 3a at 1-6, 3c at 1-7, 8 at 1-4 and 9 at 1-4, and Response Item 4 at 1-4).

In February, 2000, the step-daughters discovered the camera, traced it to the computer, and told their mother. These three persons became offended and upset. They confronted Applicant, and his wife ordered him to leave the family home. He departed, after deleting other sexually explicit pictures he had downloaded onto the hard drive of his computer. A divorce later occurred and a final protective order was entered by a court on March 31, 2000. Comparing the two protective orders in the file, I can find no difference between them, and find both contain language stating the protective order is "necessary for the prevention of family violence. Applicant was not criminally prosecuted for what he did. (Item 3e at 1-5, 3f at 1-5, and Response Item 4 at 1 to 11).

Applicant sought mental health counseling in February 2000 to determine if he had a sexual addiction. The mental

health professional did not find any sexual addiction. The documents submitted by Applicant about this treatment in the file disclose only two sessions of 50 minutes duration each and Applicant's self-diagnostic forms. There is no evidence in the file that the psychologist consulted by Applicant considered the exact nature and extent of Applicant's spying on his two step-daughters in the bathroom, although two lines concerning the situation appear on the

progress notes. Those comments are not a complete diagnostic assessment which could be persuasive that Applicant's actions were correctly evaluated and a treatment plan prepared and implemented. I do not find these documents to be persuasive. (Items 3c at 7 and 3h at 1 to 16).

Applicant gave several interviews to one or more investigators of the Defense Security Service. The file contains several statements from Applicant to an investigator, some of them being signed and dated, and others not signed or dated. The Department Counsel refers to Item 3 to support the SOR allegation of an untruthful statement made on November 22, 2000, but I cannot find any document or reference in the file, except for the SOR, to any investigatory interview on that date. Applicant denies any lies or misrepresentation, and there is no evidence of any kind in the file to rebut his denial or support the allegation. (Items 1 at 1 and 2, 3c 1-7, 3d at 1-4, 5 at 1 and 2, 7 at 1-11, 9 at 1-4 and 10 at 1 and 2, and Response with its Item 5 at 1 and 2).

Applicant submitted numerous letters of support from co-workers, totaling 15 in all, with some duplications between the SOR answer and the Response submissions. Additionally, Applicant's present wife submitted a letter of support. Applicant's first step-daughter submitted a statement of support and affection. The oldest step-daughter in Applicant's second marriage, upon whom he conducted his observations, sent Applicant a letter of forgiveness and love. Applicant is respected in his professional work, and has the support of those who know him. (Items 3g at 1 to 6, and Response Items 2 at 1-13, and 3 at 1-3).

Applicant objected to the use of the chronology submitted with the SOR as being redacted. He submitted a copy without the redactions. I read both and give more weight and credence to the unredacted chronology. The chronology supports the sequence of events set forth in these Findings of Fact. (Items 8 at 1-14 and Response Item 4 at 1-11).

### POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or other behavior specified in the Guidelines.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Guideline E - Personal Conduct:** Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(2) Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions

of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

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

- (2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
- (3) Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medial authority, or other official representative in connection with a personnel security or trustworthiness determination;
- (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.

**Conditions that could mitigate security concerns include:**

- (2) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;
- (3) The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;
- (5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

**Guideline D - Sexual Behavior:** 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 a lack of judgement or discretion.

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

- (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (2) Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder;
- (3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

**Conditions that could mitigate security concerns include:**

- (2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
- (3) There is no other evidence of questionable judgment, irresponsibility, or emotional instability;
- (4) The behavior no longer serves as a basis for coercion, exploitation, or duress.

Under the provisions of the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, I can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. Likewise, I have attempted to avoid drawing any inferences that are based on mere speculation or conjecture.

**CONCLUSIONS**

Upon consideration of all the facts in evidence, under the appropriate legal precepts and factors, I conclude the following with respect to the Guidelines:

Regarding Guideline E and Paragraph 1.a., the facts are well established from Applicant's several statements. Disqualifying Condition (DC) 4 applies to Applicant's personal conduct, his sexual actions, because they could have subjected him to coercion, exploitation or duress and affect his personal, professional, or community standing or render him susceptible to blackmail. Applicant's actions seem to be known in his work area and among close acquaintances by the number of letters he submitted in support of his security clearance renewal. But the spying and sexual activity for the six month term in 1999 has to have affected his community standing, along with those same reasons for his divorce.

But that DC is not counter-balanced by why Applicant did what he did, the duration of it, whether he stopped voluntarily, whether criminal actions were initiated, and what remedial steps

Applicant took to prevent or reduce reoccurrences, which is Mitigating Condition (MC) 5. Looking at the totality of the evidence and the Guidelines, the spying, the sexual self-stimulation after watching the bathroom activities of the girls, the six month duration of the spying, the secrecy, the reading of a diary, the intimate questions to the youngest step-daughter, all indicate a personality disorder which has not been addressed and remediated by Applicant under professional guidance and diagnosis. He has not taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. His actions regarding his step-daughters were a reprehensible invasion of privacy not warranted by the circumstances. It is significant that the mother of the two girls did not condone or endorse his actions. Applicant took it upon himself to engage in this spying, and he could not explain to the investigator why he found the girls' urination and defecation to be sexually stimulating, as the investigator states in Item 10. There may be a personality disorder or emotional problem which has not been diagnosed or treated. The professional's letter in Item 3h, page 1, is not persuasive on this issue, and is inadequate in view of the continued nature of the actions. While his actions became known to his supervisors, his co-workers, his present wife's co-workers, by Applicant's disclosures, his actions are so serious and offensive that there must be a diminution of his professional standing and community regard as a result of the entire event.

Regarding paragraph 1b of the SOR, I looked through the file numerous times seeking some evidentiary reference to a statement made on November 22, 2000 by Applicant to a Defense Security Services investigator. I could never find it. The FORM, at page 7, footnotes 33 and 35, refer to Items 1,3,9 and 10 when referring to the interview on November 22, 2000. I examined those documents and could not find a reference. Item 1 is the SOR, a series of official accusations, not evidence. Item 3, which was subdivided into Items 3a through 3i, does not contain a November 22, 2000 statement or summary of one such statement. Item 9 is Applicant's statement of February 5, 2001. Item 10 is the investigator's summary dated February 7, 2001. Neither refers to or summarizes a November 22, 2000 statement. I could not find any summary of a conversation, draft of a statement clearly identified as being made on November 22, 2000, or any other reference in the file. I cannot guess or speculate what was said or done on that date by the Applicant and any investigator. Applicant denies the allegation. The Government has not presented any evidence to support that allegation. I find for the Applicant and DC 3 of Guideline E cannot apply for the above reasons.

Regarding Guideline D, Paragraph 2.a., the only evidence is Applicant's own repeated admissions. Although he was not criminally prosecuted for his actions, a prosecution is not required by the Guideline. Applicant's Response contains, in Item 1, a copy of Section 21.15 of the state penal code, not making the spying for sexual gratification illegal until September 1, 2001, two years after Applicant's spying and sexual activity. But Applicant did not produce any evidence that under some other provision of his state's criminal code he could not have been prosecuted. He recorded images of nude children on his computer, spied to obtain those pictures, and eavesdropped on telephone conversations. Under any state's child protection and criminal statutes those types of actions would be criminal, that is forbidden conduct as declared by the legislative authority of the state. DC 1 would apply, therefore. Applicant's repeated actions over a six month period shows a compulsive sexual behavior or one which is symptomatic of a personality disorder. Applicant's psychologist's statement from two years ago does not address that situation. DC 2 does apply for these reasons. DC 3 would apply even though Applicant's actions are known in his workplace and community. The offensive and sensitive nature of Applicant's actions involving underage girls are of a type which could subject him to coercion, exploitation, or duress.

Looking at the totality of the facts and circumstances under Guideline D, I think MC 2 does not apply, because although this activity was nearly four years ago, it did occur over a six month period, so it is not isolated. It was not a one time occurrence. There is no evidence of any repeated activity of this nature that is evident in the file, but Applicant has not been placed in that situation. The fact that he engaged in the actions he did at all is cause for serious concern about his judgment, his sense responsibility and his emotional stability. Therefore, MC 3 does not apply. MC 4, likewise does not apply for the reasons stated in the previous paragraph.

### **FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E: Against the Applicant

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2 Guideline D: Against the Applicant

Subparagraph 2.a.: Against the Applicant

### **DECISION**

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

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Philip S. Howe

Administrative Judge

1. The Government submitted ten items in support of its contention.
2. Applicant submitted five items in support of his Response.