DATE: September 30, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-05948

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Department Counsel

FOR APPLICANT

Jon L. Roberts, Esq.

SYNOPSIS

Although a court accepted the prosecutor's motion to nolle prosequi aggravated sexual battery charges against the Applicant, the evidence establishes that his admitted misconduct is of a criminal nature. That misconduct as well as his later admitted misconduct involving his daughter, none of which has been mitigated, also reflects a lack of discretion or judgment and could cause him to be vulnerable to coercion, exploitation, or duress. Clearance is denied.

STATEMENT OF THE CASE

On October 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 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 Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On November 2, 2002, DOHA received Applicant's response to the SOR, in which he requested a hearing. The case was assigned to me on January 13, 2003. A notice of hearing was issued on February 14, 2003 and the hearing was scheduled for March 12, 2003. On March 11, 2003, a delay was requested by Applicant's counsel, who stated that he had been retained on that date and needed time to prepare for the hearing. A notice of hearing was again issued on arch 13, 2003 and the hearing was held on April 3, 2003. During the hearing, 12 Government exhibits, five Applicant exhibits, and the testimony of four Applicant witnesses, including Applicant, were received. On April 4, 2003, Applicant submitted an additional exhibit to which Department Counsel had no objection. I marked it as Applicant Exhibit F and have included it in the record. The transcript (Tr) was received on April 10, 2003.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 50-year-old computer scientist employed by a defense contractor and is seeking a security clearance. Applicant is married and has five children, including one daughter who was born on May 13, 1990.(1)

Beginning in 1994 or 1995 and continuing through 1996, Applicant became sexually aroused on as many as nine occasions by rubbing cream on his daughter's vagina.(2) On at least one occasion, Applicant inserted his finger into his daughter's vagina with the intent of sexually arousing her.(3)

Between 1994 and 1996, Applicant took dozens of showers with his daughter.(4) On more than one of these occasions, Applicant became sexually aroused.(5) He masturbated on at least one occasion as a result of becoming sexually aroused while taking a shower with his daughter.(6)

On another occasion in 1996, Applicant rubbed his daughter's vagina through her pajamas after she had joined him and his wife in bed.(7)

On or before February 20, 1997, Applicant took a polygraph examination administered by a federal intelligence agency. As a result of the disclosure of his activity with his daughter, Applicant was not approved for a Top Secret clearance and his Secret clearance was revoked.(8)

As a result of information concerning the polygraph examination supplied by the United States Justice Department to the department of social services for the county in which he resides, the sheriff's office for that county began an investigation of Applicant in late April or early May 1997.(9) On May 27, 1997, Applicant was indicted on two counts of Aggravated Sexual Battery against his daughter.(10)

Applicant entered a guilty plea to lesser misdemeanor charges under a plea bargain agreement. However, the judge refused to accept the plea.(11)

On February 26, 1998, the court accepted the prosecutor's motion to nolle prosequi the charges against the Applicant.(12)

Applicant began receiving counseling from a psychotherapist, who is a licensed clinical social worker, in May 1997. He continued to receive such counseling on normally a weekly basis until November 1999.(13)

In 2001, Applicant applied ointment to his daughter's breasts on multiple occasions. He became sexually aroused on at least one of these occasions.(14)

Applicant is an active and highly regarded member of his church.(15)

POLICIES

The burden of producing evidence initially falls on the Government to present evidence, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Directive E3.1.14. Once the Government meets its burden, the burden then shifts to the applicant to present evidence to refute or mitigate the

Government's evidence and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. Directive E3.1.15.

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment

should include the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive E2.2.2.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying , as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline D: Sexual Behavior

Sexual behavior is a 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:

Sexual behavior of a criminal nature, whether or not the individual has been prosecuted (Disqualifying Condition 1);

Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress (Disqualifying Condition 3);

Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment (Disqualifying Condition4).

Conditions that could mitigate security concerns include:

The behavior was not recent and there is no evidence of subsequent conduct of a similar nature (Mitigating Condition 2);

There is no other evidence of questionable judgment, irresponsibility, or emotional instability (Mitigating Condition 3);

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

CONCLUSIONS

The evidence of Applicant's misconduct with respect to his daughter establishes both Disqualifying Condition 1 and Disqualifying Condition 4. Beginning in 1994 or 1995, when his daughter was three or four years of age, and continuing through 1996, when she was six years of age, Applicant became sexually aroused on as many as nine occasions by rubbing cream on his daughter's vagina. On at least one occasion, Applicant inserted his finger into his daughter's vagina with the intent of sexually arousing her. During the same time period, Applicant took dozens of showers with his daughter. On more than one of these occasions, Applicant became sexually aroused. He even masturbated on at least one occasion as a result of becoming sexually aroused while taking a shower with his daughter. Such actions on Applicant's part not only reflect a lack of discretion or judgment but they are of a criminal nature.

Despite experiencing a criminal indictment for his actions and receiving counseling from a psychotherapist for two and a half years, Applicant continued to engage in such misconduct four years later. He applied ointment to his daughter's breasts on multiple occasions and became sexually aroused on at least one of these occasions.

The nature of Applicant's misconduct could cause him to be vulnerable to coercion, exploitation, or duress. Therefore, Disqualifying Condition 3 also applies. Applicant submits this is not the case because he has not been shy in revealing and discussing the allegations in this case with others, including members of his church. He contends that this demonstrates that he is not subject to coercion. This misses the point. Vulnerability under Disqualifying Condition 3 is not limited to blackmail but "it includes situations where a person is vulnerable to influence, however subtle or

noncoercive, that could be exploited to induce a person to act in a manner that is inconsistent with the national security interests of the United States." ISCR Case No. 98-0265 at 3(App. Bd. March 17, 1999) [citing DISCR Case No. 88-1833 at 5 (App. Bd. Nov. 15, 1990)]. The nature of Applicant's misconduct is the type of behavior that could make him vulnerable to coercion or undue influence within the meaning of Disqualifying Condition 3

Applicant testified that he applied medication to his daughter's vagina when she experienced vaginal itching.[(16)] He also testified that he later applied ointment to her breasts because of scratches she inflicted on them due to itching.[(17)] To refute or mitigate the case against him Applicant relies on the testimony of his psychotherapist, who is a licensed clinical social worker. Although I find his psychotherapist qualified as an expert witness to provide a professional opinion with regard to Applicant's actions, I do not find his testimony convincing. With regard to Applicant's conduct set forth in the SOR, his psychotherapist concludes that "there was nothing sexual or erotic or whatever in his intentions."[(18)] This included the instances of Applicant applying ointment to his daughter's breasts in 2001. His psychotherapist found Applicant's action "was paternal and not sexual."[(19)]

The opinion of Applicant's psychotherapist is contradicted and outweighed by other evidence of record. Applicant's admissions establish that his actions toward his daughter were sexual in nature. Applicant admitted to becoming sexually aroused on as many as nine occasions that he rubbed cream on his daughter's vagina. He also admitted to sexual arousal on more than one occasion that he took a shower with his daughter, including one instance in which he masturbated following the shower. Applicant further admitted to becoming sexually aroused while applying ointment to his daughter's breasts.

In an apparent effort to explain Applicant's admissions, his psychotherapist testified that Applicant was very sensitive and prone to react to intimidation from authority figures. He suggested that such a person could have convinced Applicant that what he did was wrong.[(20)] Based on Applicant's testimony, especially his response to cross examination, I did not find him to be a person who is easily intimidated.

Applicant's psychotherapist testified that Applicant's experience with the law enforcement authorities in was "very traumatic for him."[(21)] If this was the case, it would appear that Applicant would have been careful to avoid behavior that could place him in that situation again. However, Applicant admitted to subsequently rubbing cream on his daughter's breasts on multiple occasions, one of which resulted in him experiencing "sexual thoughts."[(22)] In addition to being further evidence with respect to his sexual misconduct with regard to his daughter, such conduct raises serious doubt as to whether Applicant demonstrates the judgment required of persons handling classified information.

Although Applicant argues that Mitigating Condition 2 applies, this argument ignores the facts. Although Applicant's actions which resulted in criminal charges occurred seven years ago, his conduct involving her breasts was of a similar nature and he engaged in that only two years ago. Applicant's also relies on Mitigating Condition 3. Although there may be no other evidence of questionable judgment, irresponsibility, or emotional instability on the part of Applicant, any mitigation this affords is far outweighed by the nature of his misconduct.

Applicant also attempts to demonstrate that his daughter does not show any evidence of having been sexually abused. His evidence is a letter from a licensed clinical social worker (LCSW), who bases her assessment on a 50 minute interview of Applicant's daughter.[(23)] As the record reflects, this LCSW was not subject to cross examination and she works as "an independent contractor" at the counseling center operated by Applicant's psychotherapist.[(24)] In addition, her letter does not reflect that she has specific knowledge of the misconduct in which Applicant engaged. Although Applicant's psychotherapist testified that she had access to his file on Applicant, he acknowledged earlier in his testimony that his file does not contain any of the police reports concerning Applicant.[(25)] Although the LCSW includes a copy of her resume with her letter, a sufficient foundation has not been established to determine that she is qualified to give an expert opinion as to whether a person has been the victim of sexual abuse. Moreover, any such opinion is contradicted and outweighed by other evidence in the record. Applicant's misconduct has been amply established through his own admissions.

I conclude that the record supports findings against Applicant under Guideline D, including findings against Applicant

under both SOR ¶ 1.a and SOR ¶ 1.b.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline D: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

DECISION

In light of all the evidence in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Signed

Roger E. Willmeth

Administrative Judge

1. Govt Ex 1 at 5.

2. Govt Ex 8 at 1.

3. Govt Ex 12 at 2; Tr 50. Although Applicant had no objection with regard to Govt Ex 12, I have not considered the results of a polygraph examination of Applicant contained therein in reaching my findings of fact and conclusions. However, I have considered his post polygraph admission.

4. Govt Ex 10 at 5.

5. Govt Ex 3 at 2.

6. *Id.*

7. Govt Ex 3 at 2; Govt Ex 10 at 6-7.

8. Govt Ex 9 at 2.

9. Govt Ex 3 at 1.

10. Govt Ex 2 at 2; Govt Ex 6 at 2.

11. Govt Ex 7 at 2.

12. Ap Ex C.

13. Tr 75; Govt Ex 7 at 2.

14. Govt Ex 8 at 2.

15. Ap Ex B.

16. Tr 37.

17. Tr. 36

18. Tr 77.

19. Tr 79.

20. Tr 91.

21. Tr 78.

22. Govt Ex 8 at 2.

23. Ap Ex D.

24. Tr 87.

25. Tr 75-76.