DATE: February 15, 2005

In Re:

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

Applicant for Security Clearance

CR Case No. 03-24723

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Lawrence R. Fieselman, Esquire

SYNOPSIS

This 42-year-old systems engineer sexually molested his daughter for six years (1993 - 1999), when she was 10 - 16 years old. The molesting stopped only when he was arrested and convicted on two counts, for which he served 365 days in jail and is still on probation. He has also solicited prostitutes. No mitigation has been established. Clearance is denied.

STATEMENT OF THE CASE

On June 22, 2004, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

By a reply to the SOR that was dated July 14, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on August 12, 2004. A Notice of Hearing was issued on August 23, 2004, setting the hearing for September 13, 2004. To accommodate counsel's scheduling problem, the case was continued to September 15, 2004. At the hearing, the Government introduced four exhibits, which were marked and admitted as GX 1 - 4. Applicant testified, called another witness, and introduced five exhibits, which were marked and admitted as Applicant's Exhibits (AX) A - E. The final transcript was received at DOHA on September 29, 2004.

FINDINGS OF FACT

Applicant is a 42-year-old system engineer for a defense contractor. The December 4, 2003 SOR contains two allegations under Guideline D (Sexual Behavior) and one allegation under Guideline J (Criminal Conduct). In his January 6, 2004 Response to the SOR, Applicant *denies* that Guidelines D and J are "issues" but admits subparagraphs

1.a., 1.b., and 2.a. As I understand his language, he is admitting the factual information alleged, but denying that the information has any impact on his security clearance eligibility. The admitted parts of the allegations are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the evidence of record, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline D (Sexual Behavior)

1.a. - Applicant was arrested on or about September 15, 2000, in State A, and charged with Counts I (Sexual Abuse of a Child) and II (Lewd or Lascivious Acts with a Child under 14). He was found guilty on both counts, sentenced to 365 days in county jail, five years probation, to register as a Sex Offender, to attend and complete a Sex Offender program, and to pay restitution to the victim of $15,442.69, to cover her medical and mental health costs;

1.b. - Applicant has solicited prostitutes.

Guideline J (Criminal Conduct)

2.a. The information set forth in SOR 1.a and 1.b. above constitutes criminal activity.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that

creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Sexual Behavior - Applicant clearly and specifically admits to the charges alleged in SOR 1.a., 1.b.,and 2.a. In his response to the SOR, Applicant's admissions are accompanied by a statement/claim that his conduct, as alleged, does not reflect on "his loyalty to the United States," nor did it "threaten the national interest or security of the United States"

Under DoD Directive 5220's Guidelines, Sexual Behavior becomes a security concern when it "involves a criminal offense, indicates a personal or emotional disorder, subjects the individual to undue influence or coercion, or reflects a lack of judgment or discretion."

In his sworn statement to the Defense Security Service (DSS) of April 21, 2003, Applicant admits the molesting of his own daughter for up to six years prior to his 1999 arrest. The molestation began as sodomy and then became intercourse on the average of about once a week (Tr at 27) or as many as six to eight times a month (Tr at 41) for six years. It is hard to imagine what effect this volume of sexual abuse must have had on his daughter. It speaks volumes, however, on the depth of his betrayal of his obligations as a father.

Applicant ties his state of mind during those six years into what he describes as his being molested as a child by his older sister, which he says "mentally allowed my own thoughts to think of my daughter as my sexual equal. I took full advantage of the situation and performed the ultimate selfish act upon my daughter" (GX 2). He adds to his explanation the claim that his wife was an alcoholic (Tr at 38) and they were in a "noncommunicative situation and had sexual relations "once every three months" (GX 2). So he used his daughter as a sexual outlet, beginning when she was about 10, with insertion of a finger and moving up to intercourse. This situation continued for six years, and ended only when he was out of town and the daughter told her mother about what he was doing.

This case is far different from sexual activity between consenting adults. What Applicant did violated standards generally accepted by our society, prohibiting incest and, because of his daughter's age, statutory rape. In addition, the record evidence demonstrates that the state in which Applicant and his daughter lived at all relevant times considered Applicant's conduct over a six-year period to violate two separate criminal statutes, which could have been treated as felonies (GX 3). Applicant served one year in county jail and is still on the probation ordered by the court, and which is due to end in August/September 2005 (Tr at 31, 32). He is still prohibited from having any contact with his daughter, except with the court's permission, and he is required to take periodic polygraph examinations (Tr at 32, GX 2, GX 3, GX 4, and AX C).

I have carefully considered Applicant's evidence in mitigation. His exhibit A is a signed statement by Mr. A, a Section Head at Applicant's employer. Mr. A sees Applicant as an "outstanding employee" who is "trustworthy and loyal" and gives him high marks in "technical performance." He concludes by recommending Applicant for a security clearance. What is missing from this document is any indication the writer was aware of Applicant's sexual and criminal misconduct. A signed statement from a Department Manager at Applicant's employer

does relate that Applicant notified the company of his arrest in 1999 and "voluntarily resigned"

(AX B). Applicant was rehired after his release from jail and has been working ever since. Although the basis for the arrest is not specified in the letter, it appears the writer *was* aware of the reason. Therefore, I have given some weight to the writer's opinions

I have also considered two reports by a County Sex Offender Treatment Program, one dated April 15, 2004 (AX C) and the other dated July 15, 2004 (AX D). Both reports end with conclusions that Applicant is "making good progress and will continue to benefit from sex-offender-specific treatments [as he transitions into greater freedoms]. This last phrase appears in the July 15, 2004 report, which notes Applicant has been granted additional contact with his daughter. Granting these opinions some weight, I must still conclude they do not come near outweighing the massive and objective adverse evidence of record. A serious question remains as to whether Applicant is actually on the road to rehabilitation or is simply responding to the pressure imposed by his probation and concern about his security clearance.

Applicant's Exhibit C also references a polygrapher's opinion that Applicant took a polygraph examination in January 2004, and answered truthfully when denying any current "deviant thoughts or behaviors." The introduction of the polygraph report (AX E) was objected to by Department Counsel, and denied by me, on the basis of DoD policy against such use (*see*, Official Notice document 1 and Tr at 18 - 24).[(1)]

Disqualifying and Mitigating Conditions

Not only did Applicant engage in the particularly egregious sexual behavior described in the record, he was held accountable for his conduct through the criminal justice system of his state, after he pleaded guilty to both charges. Given the facts and circumstances shown by the record, DC 1 (Sexual behavior of a criminal nature); DC 3 (sexual behavior that causes an individual to be vulnerable to undue influence or coercion; and DC 4 (sexual behavior of a public nature and/or that which reflects lack of discretion or judgment) are all applicable and persuasive.

I have reviewed the mitigating conditions and conclude that MC 2 does not apply in Applicant's favor. As discussed above, the sexual misbehavior spanned six years, from about 1993 to 1999 and ended not by any action or change of mind by Applicant, but only when he was arrested (GX 2). From this evidence I conclude that Applicant did not voluntarily stop his abusive conduct and that said misconduct would have continued for an indefinite period. Experience and common sense suggest that the longer and more extensively an individual is engaged in a pattern of negative conduct, the longer the time and the need for successful professional help that is necessary to overcome the weight of the history of negative conduct.

Applicant sexually molested his minor daughter to the point that she has required substantial medical and mental health care. The court imposed a no contact requirement on his probation because of his high risk, thoughtless, hurtful, and illegal behavior. Applicant and his daughter and former wife now get together on Christmas and there have been joint therapy sessions (Tr at 36, 37). He is aware of the harm he has caused her (Tr at 51). Still, Applicant stands convicted of two serious offenses, for which he was incarcerated for one year and placed on five years probation, still in force. On this basis, I conclude that although six years have passed since his last act of sexual misconduct, the passage of time without recurrence is still insufficient to mitigate the security concerns arising from such egregious misconduct.

1.b. - Applicant's solicitation of prostitutes, although relatively minor in context, is yet additional evidence of Applicant's inability to control his sexual behavior and his opening himself to additional legal and moral problems, and exposure to coercion by other individuals.

Criminal Conduct - a history or pattern of criminal activity created doubt about a person's judgment, reliability, or trustworthiness. In this case, the criminal conduct is the same as that described in SOR 1.a

Disqualifying and Mitigation Conditions

Disqualifying Condition (DC) 1- any criminal conduct, regardless of whether the person was charged, and DC 2 - a single serious crime or multiple lesser offenses are applicable. I conclude that the acts cited in SOR 1.a. qualify as "serious" crimes, and not lesser offenses.

Mitigating Conditions - None apply under the facts of this case. I consider the misconduct to be still too recent (MC 1); clearly not an isolated offense (MC 2);and there is no clear evidence of successful rehabilitation, particularly since Applicant is still under the pressure/coercion of being on probation and concerned about a security clearance (MC 5).

Summary - After considering the entire record, and as a trier of fact, I am required to consider Applicant's statements in

light of the record evidence as a whole. I conclude that Applicant's explanations in mitigation do not come close to rebutting the clear inferences s to be drawn from his history of sexual and criminal misconduct. I have carefully considered Applicant's other evidence offered in mitigation such as work evaluations and letters of recommendation. I have given them the weight to which I think they are entitled. Simply put, I do not find that any or all of them mitigate the seriously bad judgment he demonstrated and the harm done to his minor daughter. He betrayed her trust in a way and over a period that requires a great deal of rehabilitation on his part before he will be able to rise to the level of trust required of anyone seeking access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline E (Sexual Behavior) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 2.a. Against 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 grant or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. In any case, even if polygraphs in the abstract might be admissible, it would not be so in the present case since there no evidence of its scientific acceptance, nor of the training, expertise, and techniques of the polygraph examiner In the case.