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Applicant for security clearance

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November 5, 1996

ISCR OSD Case No. 96-0103

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Martin H. Mogul, Esq. *Pro se*

Department Counsel

STATEMENT OF THE CASE

On April 1, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued the attached Statement of Reasons (SOR) to (Applicant), which detailed 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.

The Applicant responded to the SOR in writing on April 24, 1996, and requested a hearing. The case was assigned on May 24, 1996, and received by the undersigned on June 4, 1996. A Notice of Hearing was issued on June 14, 1996.

A hearing was held on August 13, 1996, at which the Government presented three documentary exhibits, and called one witness. Testimony was taken from the Applicant, who called one additional witness and also submitted one exhibit. The transcript was received on August 27, 1996.

FINDINGS OF FACT

The Applicant is 26, single and a high school graduate. He is employed by a defense contractor as an AutoCAD operator, and he seeks to retain a Confidential-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony. The allegations in this case involve a single course of conduct, so they will be discussed together.

Paragraph 1 (Criterion J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

Paragraph 2 (Criterion D - Sexual behavior). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual misconduct.

Paragraph 3 (Criterion E - Personal conduct). The Government alleges in this paragraph that the information presented under Criteria J and D will also support an adverse finding of questionable judgment, unreliability and untrustworthiness under Criterion E. Accordingly, the findings entered under Paragraphs 1 and 2 will also be considered in resolving the issues under Paragraph 3 as well.

In approximately January 1994, when the Applicant was 23,⁽¹⁾ he became romantically involved with a 14 year old female (Girl).⁽²⁾ This relationship eventually involved sexual intercourse. At the time they met, up to when he first began to have intercourse with the Girl, the Applicant believed she was 16.

On February 15, 1994, the Applicant and the Girl were caught by police "making out" in the Applicant's car in a public park. It was at this time that the Applicant found out that the Girl was 14 years old. They had already engaged in intercourse at least once by this time. The next day the Applicant received a phone message from the Girl's mother. In that message, the Applicant was told to stay away from the Girl and that the mother would be "filing charges" against the Applicant for having sex with the Girl. The Applicant subsequently learned that the Girl's mother had placed her on birth control ("The Pill"). The Applicant interpreted this act as permission for him to have sexual intercourse with the Girl. Although he now knew her age, he had intercourse with her at least one more time.

The Girl and the Applicant were subsequently questioned by the police in March and April 1994. In August 1994, the Applicant was charged with Child molestation in the Third Degree, a felony in the State in which it occurred. Child Molestation in the Third Degree is defined as sexual contact between a person, who is at least 48 months older than the victim, and another person who is at least 14 years old but less than 16 years old and not married to the perpetrator.

The Applicant plead guilty to the above charge in November 1994. After a sexual offender evaluation, the Applicant was sentenced in April 1995 to serve five months in jail on work release (he actually served 100 days); he was fined, placed on three years formal probation and ordered to attend sex offender treatment. As of the date of the hearing the Applicant was still on formal probation and was attending sex offender treatment.

In addition to the facts of the incident, there are other facts pertinent to the decision. The Applicant testified that he did not know, until he was questioned by police in April 1994, that his conduct was against the law. He explained that sexual relationships between men in their 20s and young teenage females was common in the country his mother is from. The Applicant, however, is an American citizen, his father is a native-born American, and the Applicant has lived in the United States most of his life. The mother of the Girl is also from this other country. He further testified that, when he received the call from the Girl's mother, he did not equate the term "filing charges" with the Girl's age. The Applicant also stated that he had lunch with the mother, and felt that he had been accepted as a proper "boyfriend" of the Girl. He also stated that he believed that this acceptance extended to permission to have sexual relations with the Girl, though he admits that there was no specific statement of approval.

In the Presentence Investigation of the Applicant, the investigator states, "(The Applicant) indicated during this interview that he was eventually aware of her (the Girl's) true age and also aware that engaging in sexual intercourse with a 14 year old was illegal." (Government Exhibit 2 at page 7.) A Victim Impact Statement filed by the Girl's mother does not confirm that the Applicant received permission for his sexual contact with the Girl. Rather, in that statement, "The victim's mother indicates that (the Applicant's) manipulation in molesting her 14 year old daughter had added a tremendous amount of stress on her family. . . . Her daughter began to rebel against her and her husband's parental authority. . . . She went on and related that she believes (the Applicant) is a 'menace to society' and that he should be held accountable for his actions." (*Ibid.*)

A "Psychosexual Evaluation and Treatment Plan" (Government Exhibit 3) was prepared of the Applicant. The Applicant was determined not to be a pedophile or compelled in his attraction to underage women. The Evaluation states, "It is evident (the Applicant) does not experience guilt and remorse as a result of his illegal sexual involvement with an underage person, but he does recognize the illegality and inappropriateness of his decision making and behavior." (Government Exhibit 3 at pages 5 - 6.) The evaluator also stated:

"It is evident to me that (the Applicant) is an immature man, who presents much like an adolescent, rather than a young adult. There is no question his judgment has been impaired, but the question remains whether he is capable of learning from and profiting by past experience. I have no doubt he has been affected by the consequences attendant to arraignment, plea and anticipatory anxiety regarding disposition. Frankly, I would be surprised if he would repeat past mistakes and involve himself with another underage person in the future." (Government Exhibit 3 at page 6.)

Mitigation. In his testimony at the hearing, the Applicant states that he now feels guilt about his actions. He also states that he now believes his conduct was inappropriate. The Applicant showed remorse about his conduct and stated it would not happen again.

A co-worker of the Applicant also testified. This person states that the Applicant has been totally forthcoming about this criminal situation to his superiors and co-workers. This person further states that the Applicant is reliable and believable, a very hard worker.

Applicant's Exhibit A is a letter from the Applicant's sex abuse counselor. In this letter it is stated:

"On all substantive matters pertaining to treatment, including attendance, punctuality, financial responsibility, level of effort, quality of presentation, and depth of treatment gains, (the Applicant) has been a model client. Furthermore, there is no evidence that (the Applicant) has sexually abused persons other than the victim of the committing offense, or that he is sexually predatory or at risk to victimize others. His sexual abuse of the 14-year-old occurred within the context of a romantic relationship and was not physically forceful in any way. Rather, in the 53 sessions I have worked with (the Applicant), I have learned that his sexual misconduct may be explained most parsimoniously in terms of emotional immaturity and questionable judgment. This behavior is, of course, inexcusable, and no one is more aware of this than (the Applicant)." (Applicant's Exhibit A at page 1.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Criterion J (Criminal conduct)

Conditions that could raise a security concern:

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

- (2) the crime was an isolated incident.

Criterion D (Sexual behavior)

Conditions that could raise a security concern:

- (1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (3) sexual behavior that causes an individual to be vulnerable to undue influence or coercion;
- (4) sexual behavior of a public nature and/or that which reflects a lack of discretion or judgment.

Condition that could mitigate security concerns:

- (4) the behavior no longer serves as a basis for undue influence or coercion.

Criterion E (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 pressure.

Condition that could mitigate security concerns:

- (5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or pressure.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an

Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in sexual behavior and criminal conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a *prima facie* case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has engaged in criminal activity of a sexual nature (Criteria J and D); and that this evidence indicates questionable judgment, untrustworthiness, unreliability, or an unwillingness to comply with rules and regulations by the Applicant (Criterion E).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against him. This is a close case. The Applicant is a young man who has made a terrible error of judgment, for which he is already paying a high price. Based on his conduct, and how he has changed because of his conduct, I must decide if he is currently eligible for a security clearance.

The Applicant and his therapist state, and I accept as true, the assertions that the Applicant will no longer interest himself sexually in underage females. This point, however, is merely the beginning of the analysis. The next, and important, question is whether the questionable judgment which led the Applicant into this situation in the first place has been eliminated. After a thorough review of the record, I must conclude that it has not.

The Applicant has continually, up to the hearing, attempted to transfer to other people the ultimate responsibility for his actions in having a sexual relationship with a 14 year old child. He has talked about the fact that the Girl deceived him about her true age, he argues that he was given permission from the Girl's mother to have a sexual relationship with her underage daughter, he asserts that he did not realize that sex with a 14 year old was illegal, and he alleges that a police officer informed him that such sexual relationships were legal as long as they were done with parental approval. Finally, while he states that he now realizes sexual relationships such as this are improper for an adult and damaging to the child, he continues to maintain that it is culturally allowable in some countries.

None of these explanations, even if all of them are true, excuse his conduct or show that he is currently eligible for a clearance. While the Girl may have deceived him about her age at first, the fact is he knew of her age before the last time they had intercourse. As for the mother's alleged "permission," the Applicant interpreted actions designed for the Girl's protection as permission for him to continue his sexual misconduct. His statement that he did not know it was illegal for him to have sex with a 14 year old high school student is virtually beyond belief. There is evidence that he did know that it was illegal to have intercourse with a 14 year old before the last time the two of them engaged in it. In

addition, at age 23 he had an obligation to know the basic laws of the country of which he is a citizen. As for the allegation that he was told by a police officer that such conduct was legal with parental permission, a review of the statute in question reveals no such excuse. It is also important to remember that he remains on formal probation for another two years. Finally, while child sex may be more prevalent in other parts of the world, it is neither prevalent nor accepted in this country. Rather, it is criminal.

The fact that the Applicant probably will not have sexual intercourse with underage girls only answers part of the question. In the final analysis, I am, frankly, unconvinced that the lack of maturity, poor judgment and unreliability the Applicant showed while engaged in this outrageous course of conduct has been corrected. On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Paragraph 3: 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 the Applicant.

Wilford H. Ross

Administrative Judge

1. The Applicant's date of birth is August 4, 1970.
2. The girl's date of birth is December 29, 1979.