Date: __August 12, 1997

In re:

Applicant for Security Clearance

ISCR OSD Case No. 96-0461

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Deputy Chief Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On April 29, 1997, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 granted, continued, denied, or revoked. In a written statement, dated May 20, 1997, and signed and sworn on May 24, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The undersigned Administrative Judge was assigned the case on June 16, 1997, and received the case file on June 26, 1997. The hearing was held on July 24, 1997. The Department Counsel presented six exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of the presentation of eight exhibits and the testimony of three witnesses besides his own. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on August 1, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following single criterion: paragraph 1, Criterion D (sexual behavior). The Applicant has admitted the factual alleg-ations contained in subparagraph 1.b. of the SOR. Except as noted herein, the Applicant's admission is hereby incorporated as a finding of fact.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 28-year-old computer modeler employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant worked part-time at a grocery store from August 1985 (when he was 17 years old) until March 1990. In March 1990 he enlisted in military service and served 4½ years until September 1994 when he was honorably discharged. In 1990, upon returning from boot camp, the Applicant married his wife. At that time he was nearly 22 years old, and his wife was 18 years old. They had a daughter later in 1990. Tr pages 86-87, 154.

While in military service, the Applicant and his wife engaged, from about 1992 to the date of his discharge in 1994, in various sexual relations with other women, including two other couples, that he described as *ménage à trois* activities. Exh. 2, pages 14-15. The Applicant never in engaged in sexual relations with another man during these activities. Generally, the Applicant's wife and the other woman would engage in sexual relations, following which he and his wife would then engage in sexual intercourse. Generally, he and his wife would not simultaneously engage in sexual relations with the other woman. Tr pages 63, 88, 147, 151-153; *but see* exh. 2, page 6. The Applicant and his wife became involved in these activities after attending an advertised "seminar" on *ménage à trois* activities. They chose voluntarily to attend the seminar and engage in these activities with persons they met who also had attended the seminar. Tr page 147. They were aware at the time that state law criminalized neither adultery nor oral sex between consenting adults, but that nonconsensual oral sex was a criminal offense. Tr pages 184-185.

The initial *ménage à trois* experience of the Applicant and his wife on July 30, 1992, involved a neighbor whom they did not meet in the seminar. The neighbor had been friends with the Applicant's wife for some time, and the Applicant made the initial recruitment overture. Tr pages 158-159. Sometime during the Applicant's *ménage à trois* experience with his wife and the neighbor, the latter objected to continuing, whereupon the applicant and his wife forcibly attacked the neighbor sexually, including an effort by the Applicant to force the neighbor to put her mouth on his penis.[(1)] The neighbor filed a complaint, and the Applicant and his wife were arrested on August 11, 1992. The Applicant was charged with assault with intent to orally copulate. He and his wife were charged with false imprisonment, sexual battery, and conspiracy to commit a crime. The neighbor declined to pursue the charges the following month, and the case was closed without prosecution. Exh. 5. The Applicant received a letter of reprimand from his command; the letter was removed from his personnel file prior to discharge.[(2)] Tr page 65. Subsequent to his military discharge, the Applicant and his wife have not engaged in *ménage à trois* activities and do not intend to do so in the future.[(3)] Tr pages 64, 88, 156-157.

The Applicant was discharged from military service on September 6, 1994. Exh. H. He was refused part-time reemployment with the grocery store and complained to the U.S. Department of Labor's Veterans' Employment and Training Service. The grocery store was then forced to rehire the Applicant under the Uniformed Services Employment and Reemployment Rights Act (38 USC § 4321 *et seq.*) at the hourly rate to which he would have had been entitled if he had not enlisted in 1990. He was reemployed in November 1994 on a part-time basis. However, he was routinely assigned janitorial and other tasks well below the task level normally assigned others at his hourly rate. Tr pages 67-74. The Applicant was fired about July 12, 1995, ostensibly because the manage-ment had "received complaints from female associates" and that the Applicant had "admitted [his] behavior."[(4)] In fact, he was told at the time of his dismissal that he was being fired for sexual harassment in the workplace based upon a report of indecent exposure. Exh. 2, page 12; *contra* the SOR answer. The store made no report to the police. The Applicant has consistently denied that he exposed himself indecently at work or that he otherwise sexually harassed anyone there. What happened occurred one evening when he and a female co-worker were making sexually explicit jokes with each other and talking about the *ménage à trois* activities in which each had engaged. She had asked him to find some frozen dough for her, and they went to the frozen food section and located the dough. The Applicant wiggled the stiff dough in front of his zippered crotch, pretending it was his penis. She laughed and gave no indication of any offense, distress, or even disapproval. She had once before even offered to perform oral sex on the Applicant. Exh. 2, pages 9-12; tr pages 66-74, 90-92, 169-171, 175-180, 182, 186-187.

Neither the Applicant nor his wife have ever received professional counseling or treatment for mental or personality disorder although the Applicant received the normal sexual harassment briefing in the military service. Tr pages 89, 183-184.

The Applicant has won praise from his employers since November 1994 for his trustworthi-ness, high moral standards, diligence, and leadership. Exhs. C and D. He has perfect driving and credit records. Exhs. E and F.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluation of an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

CRITERION D - SEXUAL BEHAVIOR

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion. The adjudicator should also consider guidelines pertaining to criminal conduct (criterion J); or emotional, mental, and personality disorders (criterion I), in determining how to resolve the security concerns raised by sexual behavior. (Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance)

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;

(4) sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

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;

CRITERION I - EMOTIONAL, MENTAL, AND

PERSONALITY DISORDERS

Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability or stability.

When appropriate, a credentialed mental health professional (credentialed mental health professional: licensed clinical psychologist, licensed social worker, or board certified psychiatrist), acceptable to or approved by the government, should be consulted so that potentially disqualifying and mitigating information may be fully and properly evaluated.

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

None applicable.

Conditions that could mitigate security concerns include:

None applicable.

CRITERION J - CRIMINAL CONDUCT

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

(1) any criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns include:

(1) the criminal behavior was not recent;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

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 consequences involved.

e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledgeable participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security 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, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum ***quantum*** of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below.[(5)]

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance.[(6)]

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Government established its case with regard to Criterion D.

The Applicant engaged in criminal conduct of a sexual nature on July 30, 1992, and engaged in *ménage à trois* activities until the summer of 1994. This conduct falls within the scope of DC #1 and DC #4 identified on page 5 ***supra***. The latter activities reflects a lack of discretion or judgment. The Applicant testified that he was unaware that third persons (and the Government) could properly label the Applicant and his wife as "swingers" or find their "free love, alternate life-style" objectionable. Tr pages 88, 156. They stopped engaging in *ménage à trois* activities three years ago simply because they "grew out of it" and because they returned home and now have a daughter nearly seven years old. Tr pages 153-154.

On the other hand, neither the Applicant nor his wife have ever received professional counseling or treatment for mental or personality disorder. There is no evidence of a psychiatric diagnosis. Although the criminal conduct occurred more than five years ago, the *ménage à trois* activities occurred only some three years ago and should be considered recent. See MC #2 and MC #1 on pages 5-6 ***supra***. More compelling is the evidence that the Applicant, subsequent to discharge from military service, continued to joke about *ménage à trois* activities with a co-worker and demon-strated continuing questionable judgment. *See* MC #2 and MC #3 on page 5 ***supra***. Therefore, SOR ¶ 1.a. and ¶ 1.b. are concluded adversely to the Applicant.

Based on the findings of fact the undersigned Administrative Judge concludes that the Applicant is unlikely to engage in *ménage à trois* activities in the future and, therefore, concludes SOR ¶ 1.c. favorably to the Applicant.

Furthermore, the evidence is too skimpy to conclude that the Appellant's conduct created a hostile or offensive working environment at the grocery store within the scope of the term "sexual harassment." The Equal Employment Opportunity Commission has defined that term. Its regulations provide:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting

such individual, or

(3) such conduct has the purpose or the effect of unreasonably interfering with an individual's work performance or creating an intim-idating, hostile or offensive working environment.

Title 29 C.F.R. § 1604.11(a) (1986), cited in *Broderick v. Ruder*, 685 F.Supp. 1269 at 1277 (D.D.C. 1988). The Applicant did not commit indecent exposure nor did he engage in sexual harassment within the regulatory meaning of that term,[(7)] notwithstanding the Applicant's extremely poor judgment in conducting himself at work in July 1995, and gave management a pretext to fire him. Therefore, SOR ¶ 1.d. is concluded favorably to the Applicant.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 6 ***supra***, be considered, as appropriate, in making this decision. The nature, seriousness, and recency of the conduct all militate against and reflects unfavorably on the Applicant as does his age. His was a knowledgeable, voluntary participation. While the likelihood of a recurrence of the proven sexual misconduct is minimal, the deviation from applicable norms under the Directive greatly outweighs the mitigating evidence. The fact that he showed subsequent poor judgment in 1995 on the job joking about *ménage à trois* activities demonstrates the continuing security significance of his sexual behavior.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion D: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

DECISION

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

Jerome H. Silber

Administrative Judge

1. The Applicant has consistently contended that no force was involved on that occasion and that his *ménage à trois* activities then were wholly consensual and welcomed by the neighbor. This contention is rejected after weighing the conflicting evidence.

2. The Applicant had an excellent service record. Exhs. B and G.

3. In a signed sworn statement dated September 22, 1995, the Applicant stated with regard to *ménage à trois* activities, "However, generally these were very positive experiences for us, and I do not rule such activities out for us in the future." Exh. 2, page 15. His SOR answer notes that he had written this sentence as a "defensive rebuttal" to what he perceived to have been the investigator's attempt to belittle and morally judge him. The Applicant's account of his perception is credible, notwithstanding that it is probable that the perception was erroneous.

4. Exh. 3 (dated August 19, 1995).

5. The rule has been restated as requiring "that security clearances should be revoked [***sic***] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). ***Cf.*** with regard to the ***quantum*** of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

6. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

7. Sexual harassment is, therefore, considerably more narrowly circumscribed conduct than that implied by Depart-ment Counsel:

The government would submit that this sort of conduct clearly falls within the realm of sexual harassment. As your Honor is well aware, in today's day and age, both government and industry probably spend considerable sums of money defending themselves from sexual harassment charges relating to a supervisor who asked a female employee for a date, or asks her to go get a cup of coffee, or gives her an office that's too small, or a telephone that's the wrong color, or some other circumstance like that, which is perceived to be a slight.

Tr page 170. The point is that good judgment requires reasonable diligence to avoid frivolous complaints of sexual harassment.