DATE: May 19, 1997

In RE:

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

Applicant for security clearance

ISCR OSD Case No. 96-0527

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On September 24, 1996, 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, amended by Change 3, February 16, 1996, issued a 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on October 18, 1996.

Applicant elected to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the File of Relevant Material (FORM) on December 9, 1996. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received a copy on December 16, 1996. Applicant's reply was due by January 16, 1997. The case was received by the undersigned for resolution on April 22, 1997.

RULINGS ON PROCEDURE

The FORM list of documents identifies the last two (2) exhibits in the list as Item 21 and Item 22. However, both exhibits are incorrectly marked Item 20. They shall be correctly labeled Item 21 and Item 22 respectively.

FINDINGS OF FACT

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges criminal conduct (Criterion J), sexual behavior (Criterion D), and personal conduct (Criterion E). Applicant admitted subparagraph 1a

and denied the remaining allegations with accompanying explanations.

Applicant is 56 years old and employed in ---------- for a defense contractor. He seeks a secret level clearance.

On July 25, 1994, Applicant admitted he was originally charged with three counts of Sexual Assault on a Child By One in a Position of Trust, a third degree felony, as to acts occurring between the dates of February 1, 1993 and December 31, 1993. On June 8, 1995, Applicant admitted he was charged with a fourth count of Criminal Attempt - Sexual Assault on a Child,[(1)] which had been added to the first three counts; and, Applicant pled guilty to the fourth count and the first three counts were dismissed. (Item 9, subparagraph 1a). On August 29, 1995, Applicant was sentenced to three years probation, required to pay $2095 in fines and to seek mental health evaluation, and required to comply with terms and conditions for convicted sex offenders. (Item 10).[(2)]

As set forth in 2a, Applicant sexually fondled his daughter on at least 4 occasions from November 1992 to about December 1993.[(3)] Regardless of whether sexual arousal was or was not an issue during treatment does not negate the fact Applicant engaged in sexual misconduct with his daughter. Whether or not Applicant touched his daughter between the legs does not change the facts regarding his unlawful behavior in touching her breasts for sexual gratification.[(4)]

Applicant admitted on January 16, 1996 to an Agent of the Defense Investigative Service (DIS) that his parents, siblings, other family members, and professional associates were unaware of his arrest in July 1994. (Item 4). Significantly, Applicant notified his employer by letter on June 19, 1995, he had been charged with sexual assault and attached a synopsis of events along with other related documents. (Item 6). Even though Applicant waited more than a year to inform his employer, and the Government was not notified until a year after he told his employer, I find Applicant has taken sufficient action to prevent himself from becoming the subject for undue influence or coercion.

As set forth in subparagraph 3a, Applicant gave an untruthful account of his sexual misconduct to court authorities when he repeatedly stated he touched her accidentally and not for the purpose of gratification.[(5)] In the initial investigation with the sheriffs' detective in January 1994, Applicant denied he ever touched any part of his daughter's body. (Item 11).[(6)] Applicant never admitted to the social service agency personnel he intentionally touched his daughter's breasts. (Item 12). Applicant stated that the court's sentence was based on incorrect information, including Applicant's denial he had deliberately touched his daughter. (Item 4). Applicant even admitted he did not know what the sentence would have been if the court had known Applicant had not told the social workers and therapists the truth.

The letter dated October 15, 1996, is from Applicant's social worker (Ms. A), indicating Applicant has been consistent with court-ordered individual and group therapy treatment since June 1995, when he transferred from another program. Even though Applicant's misconduct involved only one victim, I find the conduct still represents a pattern under the Directive because the same conduct occurred more than once over a period of time.

The letter dated April 12, 1995, from the former guardian ad litem (Ms. B), contains favorable evidence about Applicant's cooperation with the social services agency and treatment before civil charges were filed in early 1994 and treatment throughout the remainder of the civil and criminal process. However, Ms. B's lack of medical expertise attenuates the weight to be assigned her opinions concerning possibility of recidivism by Applicant.

The Sex Offender Evaluation report, dated August 13, 1995 (Item 3), indicates Ms. A's sources of information utilized in formulating observations and conclusions, and also makes recommendations regarding future treatment. It is noteworthy that Ms. A recognized that while progress had been made by Applicant in therapy, there were still some issues regarding behavioral controls and relapse prevention that should receive additional treatment.[(7)]

Applicant was honorably discharged from the service in 1966. He is active in community and church activities and has been president of his ---------- association on two occasions.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security

clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criminal Conduct (Criterion J)

Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was formally charged.

2. a single serious crime or multiple lesser offenses.

Factors for Clearance:

None.

Sexual Behavior (Criterion D)

Factors Against Clearance:

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

Factors for Clearance:

None.

Personal Conduct (Criterion E)

Factors Against Clearance:

1. Reliable, unfavorable information provided by associates, coworkers, neighbors, and other acquaintances.

5. a pattern of dishonesty....

Factors for Clearance:

None.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful

consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under Criterion J (criminal conduct), Criterion D (sexual behavior), and Criterion E (personal conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. A rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, but, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

The Government has established criminal conduct within the scope of Criterion J. Applicant engaged in sexual misconduct on at least 4 occasions between November 1992 and December 1993 by touching his daughter's breasts for sexual gratification. Although the conduct occurred approximately four years ago, Applicant did not enter his guilty plea to the attempted sexual assault until June 8, 1995, and he was not sentenced until August 29, 1995.[(8)] The crime was not an isolated event because Applicant repeated the behavior at least four times. Applicant was not forced or pressured into touching his daughter's breasts. Because of Applicant's decision not to be truthful with the therapists and court personnel, I am unable to state with complete confidence the conduct will not be repeated.

There is meaningful evidence of Applicant's treatment since early 1994, consisting of individual and group therapy for Applicant and other members of his family, which weighs in Applicant's favor. According to Ms. A, Applicant consistently participated in ongoing treatment with her consultation service since June 1995. Although the treatment, as Applicant's other treatment, was court-ordered, Applicant has always demonstrated a willingness to confront sensitive issues. However, the most important objective of any type of rehabilitative treatment, whether it is treatment for alcoholism or drug abuse, is to identify the issue and then gain the necessary insight or understanding that the underlying conduct is illegal, so that the conduct will not be repeated. In view of the repeated references in Ms. A's reports (Items 3, 21) to the court in 1995 and 1996 about Applicant's inability to understand the inappropriateness of his behavior and the recommendation for additional treatment, and Applicant's present belief he did nothing criminal, Applicant's evidence of rehabilitation is insufficient to satisfy mitigating factor number 5 of the criminal conduct criterion.

Applicant's sexual behavior was criminal and clearly reflects a lack of good judgment. All parents have a fiduciary duty or obligation to care and provided for their children. Applicant violated that obligation or duty by exploiting his child for sexual gratification. The conduct was recent even though there is no evidence of subsequent conduct of a similar nature or any other criminal record. The continuing lack of insight into the illegality of his sexual misconduct leaves some lingering concern whether Applicant could repeat the conduct in the future.

Applicant's failure to provide the court authorities with the truth about his sexual misconduct is aggravated by the pattern of documented dishonesty he demonstrated in the course of the civil and criminal process. Applicant lied to agency personnel and police officials throughout the civil proceedings. He lied to court personnel, including the judge, and other personnel, throughout the criminal proceedings. Next, he supplied false information to his therapists and social workers. Applicant's repeated falsifications have a logical connection to his poor judgment and untrustworthiness. The falsifications were recent (October 1996, Answer) and not isolated because Applicant concealed the truth from January 1994 to January 1996 (Item 4) when he decided to tell all the facts about the sexual misconduct.[(9)]

Even though Applicant waited almost two years before telling the truth in January 1996, he still did not volunteer the truth until he was confronted with the conviction and other records of the crime. There is no evidence Applicant received improper advice from authorized personnel or that the falsifications were based on advice from counsel. While Applicant provided truthful information in January 1996, he has since repudiated his admissions regarding both the

criminal nature of the conduct and his intentional failure to provide honest information to the medical or court personnel. Considering seriousness of Applicant's sexual misconduct and his intentional attempts over the last three years to conceal the true facts of his illegal behavior, Applicant's positive evidence falls short of meeting his ultimate burden of persuasion under Criterion J, Criterion D and Criterion E.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (Criterion J): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

Paragraph 2 (Criterion D): AGAINST THE APPLICANT.

a. Against the Applicant.

b. For the Applicant.

Paragraph 3 (Criterion E): AGAINST THE APPLICANT.

a. Against the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

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.

Paul J. Mason

Administrative Judge

1. In his Answer, Applicant denied the fourth count was added. Rather, the fourth count was presented to him as a part of a plea bargain. Applicant's explanation is irrelevant to his plea of guilty and the underlying sexual misconduct. (Item 9; Item 4).

2. Applicant's criminal conduct also represents sexual misconduct as set forth in subparagraph 2a.

3. Contrary to Applicant's claims, he did not pass a polygraph examination. (Item 12). In the polygrapher's opinion, Applicant was deceptive when asked the first of three questions (the second and third question responses were considered inconclusive) whether he ever reached under the victim's shirt and touched her naked breasts. (Item 12). Applicant's other explanations are rationalizations and falsehoods for the sexual misconduct he clearly admitted in when he stated (in his sworn statement), "...I touched the [victim's] breast as I was covering her. On each of those occasions, her nightgown was up around her neck...After I entered her room, I took advantage of the situation. I did have sexual intent when I touched [victim's] breasts...I only received short term gratification from touching her breasts." (Item 4). He was willing to take a polygraph examination to corroborate the contents of Item 4.

4. As shall be discussed in Conclusions, Applicant's plea of guilty to attempting to engage in sexual misconduct does not mitigate the significance of the sexual misconduct with his daughter on at least four occasions.

5. While Applicant claimed in his sworn statement (Item 4) he told Ms. A about his intentional sexual misconduct, her

sex offender evaluation, dated August 13, 1995 (Item 3), does not indicate she knew his actions were intentional. On the contrary, in the evaluation Applicant maintained his behavior was unintentional and the only reason he pled guilty to the crime was because of his daughter's perception, **rather than his own perception**, he was molesting her. [emphasis added]. Even after a careful review of her letter dated October 15, 1996, I am unable to find unequivocally that Applicant told her he intentionally touched his daughter's breasts.

6. During the interrogation with the detective, Applicant noted his daughter's reputation for honesty.

7. Ms. A found that Applicant had a difficult time realizing in December 1995 his behavior was sexually inappropriate. (Item 21).

8. He is not scheduled for discharge from probation until 1998.

9. As noted in Findings of Fact, he also expressed his willingness to take a polygraph examination.