DATE: January 5, 1998

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 97-0177

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

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 by Change 3, issued a Statement of Reasons (SOR), dated April 7, 1997, to the Applicant that detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, denied or revoked.

A copy of the SOR is attached to this decision and is included herein by reference.

On May 21, 1997, Applicant responded to the allegations set forth in the SOR and requested a decision without a hearing. However, on July 15, 1997, Applicant submitted a letter requesting a hearing before an Administrative Judge. This case was assigned to me on July 16, 1997. A Notice of Hearing was issued on October 3, 1997, scheduling the hearing for October 16, 1997, on which date the hearing was conducted at DOHA's Western Hearing Office in Woodland Hills, California. This Administrative Judge received the transcript on October 31, 1997.

FINDINGS OF FACT

After a thorough review of all of the evidence in this case, including Applicant's responses to the SOR, and upon due consideration of all of the evidence in the case record, this Administrative Judge makes the following findings of fact as to the Criterion D (Sexual Behavior), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct) allegations in the SOR:

* Applicant is a 34-year-old maintenance supervisor (Tr at 42) who has been working for a defense contractor since October 1995 (Ex 1).

* Applicant was arrested on December 18, 1992 and charged with (1) Lewd Act Upon A Child, a felony under applicable state law, and (2) Child Molesting, a misdemeanor, three counts. Applicant pleaded guilty to Count 1 and

was fined $504, ordered to pay $25 per month probation supervision fee and placed on five years supervised probation. The remaining three counts were dismissed. The crime for which Applicant was convicted is considered a "serious felony" under applicable state law and Applicant was required to register as a "sex offender" (Ex 5 at 18). The supervised probation was scheduled to terminate in April 1998. However, in April 1997, Applicant returned to court and persuaded the Judge to change the status of the remaining year to unsupervised probation (Tr at 48) (Ex 5 and 6).

* Applicant inappropriately and sexually touched female minors in at least 1990 and 1992.

* In a statement to a Deputy Sheriff in 1992, relating to his 1992 arrest, Applicant falsified material facts by denying that he sexually or inappropriately touched any of the four girls named as victims in that case.

* In a sworn statement provided by Applicant to an agent of the Defense Investigative Service (DIS), dated March 27, 1996 (Ex 4), Applicant falsified material facts in that he denied touching the breast of a minor female during 1992 (the offense for which he had been arrested) when he had, in fact, done so.

* In a second sworn statement provided by applicant to DIS, dated July 15, 1996 (Ex 3), Applicant falsified material facts in that (1) he denied touching the private parts of any minor females during 1992, and (2) he denied deliberately touching the breast of a minor female in 1990, when he had, in fact, done so.

POLICIES

General Policy Factors (Whole Person Concept)

The adjudication process established by DOD Directive 5220.6 is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an Applicant's conduct; the circumstances or consequences involved; the age of the Applicant; the presence or absence of rehabilitation; the potential for coercion or duress; and the probability that the conduct will or will not recur in the future. (Directive 5220.6, Section F.3., as expanded in Enclosure 2, at page 2-1). I have considered and assessed each of the above factors in my overall evaluation of Applicant's security clearance suitability and conclude that none of them, individually or collectively, warrants a finding favorable to Applicant's suitability for security clearance.

Each security clearance case presents its own facts and circumstances. It should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Even though 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 poor judgment, irresponsibility or emotionally unstable behavior.

Specific Criterion Factors

In addition to the General Guidance discussed above, an Administrative Judge must also evaluate the evidence under the specific Additional Procedural Guidance found at Enclosure 2 of the Directive (in this case, Criteria D, E, and J). Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Sexual Behavior (Criterion D)

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.

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;

(2) compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high risk behavior, or that which is symptomatic of a personality disorder;

(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.

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.

Personal Conduct (Criterion E)

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

(1) reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

(3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel or trustworthiness determination;

(4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or pressure; and

(5) a pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns include:

None

Criminal Conduct (Criterion J)

A history or pattern of criminal activity creates doubts 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;

(2) a single serious crime or multiple lesser offense.

Conditions that could mitigate security concerns include:

None

In addition, under the provisions of Executive Order 10865 and the Directive, a decision to grant or continue an applicant's 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 by the Directive, the Administrative Judge 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. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

A person who seeks access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. When the facts proven by the Government raise doubts about an Applicant's judgment, reliability or trustworthiness, the Applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S.

518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

An Applicant's admission of the information in a specific allegation 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 Reason. I note in this case that, although Applicant's response to the SOR admits only allegation 1.a., and denies all other allegations, during the hearing Applicant explained his denials and indicated that he did, in fact, admit all four of the Criterion D and E allegations previously denied (Tr at 49-52). If the Government meets its burden (by an Applicant's admissions and/or by other evidence) and establishes 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 a specific criterion in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the credibility of Applicant's testimony, this Administrative Judge concludes that the Government has established its case as to all SOR Criterion D, E, and J allegations. I also find there is a nexus or connection between the proven allegations and Applicant's eligibility for security clearance, since security clearance worthiness is a twenty-four-hour a day, seven day a week requirement. The question remains whether Applicant has adequately mitigated or extenuated the impact of the Government's case. For the reasons discussed below, I conclude that Applicant has not adequately demonstrated mitigation or extenuation.

The three criteria cited in the SOR are interrelated in that the allegations start with alleged sexual misconduct about which applicant attempted to mislead the Government during two interviews with DIS. Both Applicant's 1990 and 1992 sexual misconduct and his 1996 falsifications to DIS qualify as criminal violations under applicable state and federal law, respectively.

Starting with the 1992 conviction, which Applicant admits, the record evidence establishes that Applicant, then 29, was a counselor at a church sponsored "all-girls camping trip" (Ex 6). On the last day of the trip, several girls entered Applicant's van and were telling stories. Applicant began giving the girls back rubs, but then he began rubbing one girl's breast and "butt" and then moved his hand toward her vagina (Id.). During a phone call made by the above female minor (Ms A) to another female minor who had been in the van (Ms B) (recorded by the police), the second girl said that Applicant had attempted to fondle her on two occasions, once by rubbing her breasts and a second time by "attempting to fondle her vaginal area" (Id).

A similar recorded call was made by Ms B to Applicant, who "tried to push the blame back on the girls, by stating that they were all rubbing each other's backs (Id.). One girl was 13 at the time the offense occurred. The other girls were about the same age or a little older. The oldest girl was about 16 (Id). When interviewed separately by the police, one of the girls (Ms C) stated that Applicant "was giving her a back rub and then started rubbing her sides and tried to grab her breast," but "she was able to pull away" (Id.). Ms C also stated that she had been talking to the fourth girl (Ms D), who said that Applicant "had been rubbing her leg and tried to put his hand down the front of her shorts" (Id. at 69). According to Ms C, Ms D also said that "this had occurred once before, about two years ago (i.e., 1990), on a previous church-sponsored campout involving [Applicant] in the same type activity" (Id.).

When Applicant was first interviewed by the local sheriff, he admitted spending some time in his van with the girls and giving each one a back rub. However, he "emphatically denied any intentional or accidental touching of the private parts of any of the girls" (Id.).

When Applicant was first contacted by DIS, on March 27, 1996, Applicant stated that he had given each girl a "brief back rub" (Ex 4 at 1). The sworn statement contains no indication of anything else being done by Applicant except for the back rub (Id. at 1-3). Applicant related a contact by a bishop of the church about the incident, but Applicant told the bishop only about the back rub (Id. at 1-2). Likewise, Applicant told a Sheriff's investigator who subsequently asked

him about the incident only about giving back rubs (Id. at 2). The same sworn statement also recounts Applicant's court appearance and pleading guilty (after a plea bargain) to one count of lewd/lascivious behavior (Id. at 2). Applicant explained that he agreed to plead guilty only after being told by his lawyer that "giving a girl under age a back rub was a crime" (Id. at 3). In context, this explanation lacks credibility.

During a second interview with DIS, on July 15, 1996 (Ex 3), Applicant again contended that he "did give back rubs to four minor youths," but "never touched any of their private areas (breasts or vagina) as alleged by any of them in 1992/August" (Id. at 1, 2). Applicant then admitted that "the only time [he] had touched any minor youth's private area was in 1990." According to Applicant, during a girls camping trip, a 15-year-old girl (whose name as given by Applicant identifies her as the same person identified as Ms D, above, in the discussion of Applicant's 1992 arrest), and another girl ran into his tent in an effort to hide from their group leader, apparently as part of a game. With the two girls laying next to him one on each side, Applicant placed his arms across each of them in an attempt to hide them. Applicant says that he kept his hands over the two girls "for about 15 minutes," but that he did not realize until the end of that period that his hand was "across [Ms D's] breast" (Ex 3 at 3, 4).

It was only during a third interview with DIS, on September 16, 1996, that Applicant admitted that his "prior statements [were] not totally 100 per cent honest regarding the full extent of what happened during the incident with the four juvenile girls in 1992, as well as what happened in 1990 during another incident. The reason for this is that I was somewhat embarrassed to discuss or admit some of what happened" (Ex 2). During this interview, Applicant, for the first time, admitted to "totally using bad judgment on a couple of occasions in the past, and realize that I was mentally too promiscuous during an incident in 1990, when I was a counselor, and again in 1992 during the incident which resulted in my arrest and plea bargain" (Id. at 1).

During the 1992 incident, at which time Applicant was about 29 years old, Applicant allowed himself to become involved in a situation with four girls in their low teens in which the "situation was somewhat playful, and mentally was somewhat titillating in that it did involve contact of a physical nature" (Ex 2 at 1). He claimed to have allowed himself to be "egged on during the incident," impliedly by the girls, and that he "let [his] hands linger in private areas, such as the top of the buttocks, and around the breast areas of these girls" (Id.). Finally, he states that while he "was not seeking to have a sexual experience with any of these girls, [he] sort of mentally got carried away" (Id.).

During the same interview with DIS, Applicant also admitted that as to the 1990 incident involving Ms D, who was 15 at the time, he "deliberately let his hand linger in her breast area" (Ex 2 at 1).

As to both the 1990 and 1992 incidents, Applicant claimed he "never grabbed any of the girl's breasts, vagina or buttocks, *but only sort of touched a little of the edges of the butt and breast area"* (emphasis added) (Id. at 1). He also now admitted that "in the context of these sexual or titillating conversation [with the girls in 1992] there was talk of smo[o]ching or kissing, and possibly the word french kiss was used or talked about" (Id. at 2). At the hearing, Applicant attempted to qualify his statement in Exhibit 2 by claiming that the girls had been talking about "smooching" and "french kissing," but not him (Tr at 57). This is directly contrary to his denials in the previous interview with DIS (Ex 3 at 4). Applicant also admitted "playfully talk[ing] about running off with the girl or girls, and playing strip poker, but this talk was all done in a teasing manner, and never with serious intentions on [his] part" (Ex 2 at 2). Applicant's explanations lack credibility.

In the context of what he had said earlier, as outlined above, his testimony at the hearing came across as self-serving and sometimes contradictory. Given his admissions to DIS in his most recent interview (Ex 2), Applicant's seeking to claim lies, conspiracy, and ulterior motives on the part of his victims (Tr at 30) only detracts from his contention that, while he made a series of errors in judgement and conduct, those errors were relatively minor and excusable. It is true that claims of sexual misconduct, in the abstract, may be easily made but hard to disprove. However, in the context of the total information available in this case, I conclude that the information provided by each girl to the Deputy Sheriff in 1992, made separately and successively, corroborates each other. I also find that Applicant's final admissions to DIS in 1996 (Ex 2) substantially corroborate what the girls told the sheriff in 1992.

In addition, Applicant seeks to support his position as to his security clearance eligibility by

qualifying exactly where he touched the girls (Tr at 33). If there is a distinction between touching only the side and tops of a girl's breasts and buttocks, and touching the girl's upper leg but not her vagina, it is only a matter of degree, and it is likely that this matter of degree is what allowed Applicant to escape even more serious criminal charges.

As to Criterion J, I conclude from the evidence that both his state criminal conviction (Ex 5 and 6) and his falsifications of material facts in his first two sworn statements to DIS constitute "criminal activity" under the pertinent state and federal statutes.

To the degree that Applicant seeks to persuade this Administrative Judge that the girls were making up stories in an attempt to obtain money from the church that organized and ran the camps where the 1990 and 1992 incidents occurred, the evidence does not support such a proposition. Among the factors leading to this conclusion are (1) the information provided to the Deputy Sheriff by the girls in 1992 has been substantially supported by Applicant's admissions as to what happened (Ex 2 and transcript of hearing), and (2) if the girls were making up stories, they could easily have claimed even more serious conduct by Applicant than is found in the record (Ex 6).

Although the information establishing Applicant's sexually inappropriate behavior in 1990 and 1992 is obviously serious by itself, that behavior is now over four years old, and Applicant's probation on his criminal conviction is scheduled to terminate in mid-1998. What connects that past sexual misconduct to the question of Applicant's present suitability is the series of 1992 and 1996 falsifications about what he did in 1990 and 1992. The record shows that he failed to tell the whole truth in 1992, when he first spoke to a sheriff's deputy (Ex 5), or when he spoke with DIS on two occasions in 1996 (Ex 3 and 4). Finally, I find a current connection in what I consider to be Applicant's continuing denial of responsibility and his seeking to shift blame to the young female victims of his conduct (Tr at 33, 34, 36).

This pattern of sexual misconduct and falsifications is thus both longstanding and current. The same pattern establishes and continues the connection or nexus between that 1990 and 1992 misconduct and Applicant's present eligibility for access to classified information. This is not even a case where an argument (albeit unsuccessful) can be made that Applicant's behavior in the private sector, however serious, should not have an effect on his eligibility for a security clearance.

The series of falsifications to DIS goes directly to the heart of the security clearance process, since truthful information being provided to DIS investigators is a fundamental requirement for the integrity of the process. In simple language, if an Applicant cannot be trusted to tell the truth while seeking to obtain a clearance, how can he be relied upon to properly handle classified information if he is granted that clearance. The answer is that there can be no such reliance under these circumstances. These shortcomings continue to raise the possibility of Applicant's being susceptible to undue influence or coercion in the future.

I note that the court documents in Applicant's 1992 conviction include a March 18, 1993 referral of Applicant to a Dr. O for preparation of a report under the state's sexual offender statute (Ex 5 at 24). The record does not contain a copy of the doctor's report[(1)] but, on May 10, 1993, the sentencing order contains provisions that during his five years probation, Applicant "not chaperone any female youths, . . . not be alone with minor females without supervision, . . . [and] not associate with

females under the age of eighteen except in the presence of a responsible adult who is aware of the nature of [Applicant's] background and current offense and who has been approved by the Probation Officer" (Ex 5 at 25, 27).

It is not clear how diligently Applicant has complied with the court order. He admits that since his conviction for the 1992 offense, he has "always [been] involved in the church, with the youth programs" (Tr at 43). In addition, in the July 1997 letter within Ex B, a neighbor states that Applicant has been in the neighbor's house, taking care of the neighbor's daughter, while the remainder of the family was gone. While there is no evidence of any improper activity, it appears that Applicant may not have been completely complied with the court's order. In addition, there is no substantive record of Applicant's successful completion of any formal program aimed at helping him control his impulses, and there is certainly no substantive evidence of rehabilitation.

As to Applicant's exhibits, offered in mitigation (Ex A, from Applicant, and Ex B, 26 letters of recommendation from

others), I have carefully studied them and correlated their contents. Without exception, all of the documents from other individuals praise Applicant as a good and trustworthy man; a kind man who is generous with his time in helping others; a loving father and husband; an understanding and caring person; a fun loving man who likes to tease and joke around; a natural leader among the youth; an excellent role model; a caring, loving, moral and sensitive individual, with a great love for mankind; and having a moral character beyond reproach. I note that all but one of 26 individual letters are dated in 1993, indicating they were likely intended by Applicant to be used in the sentencing and/or probation process after his criminal conviction.

Only the first letter in Ex B, dated July 10, 1997, is somewhat current. The other letters were clearly written at a time when all of the information presently known, including Applicant's 1996 admissions, was still being withheld by applicant. The July 1997 letter states that Applicant "has shared with me and [his employer] the things which happened in the past and has never tried to deceive us or

hide facts." As with the other letters, it is not clear exactly what the author had ben told by Applicant about the nature of the 1990 and 1992 misconduct, the 1996 falsifications, or the contents of the April 1997 SOR.

In fact, none of the letters contain any information about Applicant's misconduct and there is no way of knowing what he told the authors of the 1993 letters. To the degree that the Ex B letters provide a positive image of Applicant, the weight to be given them is minimized by the denial and falsifications by Applicant that preceded those letters (the 1992 sheriff's report, Ex 6), and the 1996 falsifications that followed (Ex 3 and 4).

In applying my findings of fact and conclusions to the Specific Criterion Factors cited above, the evidence supports the existence of Criterion D (Sexual Behavior) Disqualifying Factors 1 - 4. At the same time, the evidence indicates the applicability of Mitigating Factor 2, in that the last act of sexual misconduct was in 1992. However, because of the continuing falsifications relating to the sexual misconduct, this Mitigating Factor is not enough to outweigh the Disqualifying Factors.

As to Criterion E (Personal Conduct), the evidence establishes the applicability of Disqualifying Factors 1, 3, 4, and 5. The evidence does not support the existence of any Mitigating Factors. Likewise, as to Criterion J, Disqualifying Factors 1 and 2 are clearly applicable while no Mitigating factors are supported by the record.

The totality of the evidence establishes Applicant's lack of integrity and untrustworthiness (a 29 - 31 male counselor taking sexual advantage of minor females in his charge), and blatantly poor judgment (including an inability to resist the temptation he admits feeling). Particularly when viewed together with his failure to demonstrate rehabilitation, the evidence compels the conclusion that Applicant is presently an unsuitable candidate for 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:

Paragraph 1. Criterion D Against the Applicant

Subparagraph 1.a Against the Applicant

Subparagraph 1.b. Against the Applicant

Paragraph 2. Criterion E Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Paragraph 3. Criterion J Against the Applicant

Subparagraph 3.a. Against the Applicant

Subparagraph 3.b. 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. Applicant presented no evidence of such a report, although in his closing argument, he mentioned that he "had a psychiatric report from when I went to court. That was fine" (Tr at 80).