

DATE: March 12, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0605

## **DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Michael H. Leonard, Esq., Department Counsel

#### **FOR APPLICANT**

Carter A. Robinson, Esq.

### **STATEMENT OF THE CASE**

On September 9, 1997, 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 13, 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. Applicant filed his Answer to the SOR on October 1, 1997. Applicant elected to have his case decided on a written record. The Government provided a copy of the File of Relevant aaterial (FORM) on December 1, 1997. Applicant received the FORM on December 9, 1997. He filed a Response to the FORM on January 5, 1998. The case was received by the undersigned for decision on January 5, 1998.

### **RULINGS ON PROCEDURE**

Official notice has been taken of the state criminal, sexual misconduct statutes.

### **FINDINGS OF FACT**

The Following Findings of Fact are based on the FORM, Applicant's Answer and his Response to the FORM. The SOR alleges criminal conduct (Criterion J) and sexual behavior (Criterion D). Applicant denied paragraph 1 because he believes he did nothing which would constitute criminal conduct. However, he admitted subparagraph 1a which alleges the arrest, conviction and sentence for sexual misconduct. He also denied the legal criterion of sexual misconduct as alleged by paragraph 2, and the factual allegation (2a) in support. Applicant is 68 years old and employed by a defense contractor. He seeks a secret clearance.

Applicant was arrested on February 18, 1997 for violation of the state misdemeanor, sexual misconduct statute.<sup>(1)</sup> Applicant pleaded guilty to sexual misconduct and received a fine \$300.00, court costs of \$118.00, and a suspended

sentence of seven days in jail.<sup>(2)</sup> Although Applicant denied he committed sexual misconduct, the evidence warrants a finding of sexual misconduct by Applicant under 1a of the SOR.<sup>(3)</sup> First, the narrative report accompanying the arrest report describes that sexual misconduct was observed by at least one police officer. Second, there is no evidence to infer or suggest the police officer had any reason to lie or fabricate the account of what he saw.<sup>(4)</sup> Third, Applicant's explanation for the events before the arrest is not credible and fails to persuade me that the officers' account is incorrect or otherwise erroneous.<sup>(5)</sup> Fourth, Applicant pleaded guilty.<sup>(6)</sup>

Applicant provided four positive character references. The first reference has observed Applicant's honesty since 1992 and would recommend him for a position of trust. The second reference has known Applicant professionally since 1983, and praised his technical expertise and honesty. The third reference lauded Applicant's knowledge of accounting, his strong work ethic, and his commitment to his family. Applicant's wife has been married to him for 35 years and commended his trustworthiness.

Applicant's Response to the FORM presents no new evidence, but rather argues alternatively that the criminal act, if it did occur, should not bar Applicant's application for security clearance for two reasons. First, according to Applicant, the desire to avoid publicity is a legitimate reason for pleading guilty to a criminal act that did not occur. Second, even if the sexual activity did occur, the activity does not represent a serious violation of the law because the act was isolated and Applicant demonstrated good judgment by attempting to find secluded spot away from public scrutiny before participating in the conduct. Applicant's arguments ignore the fact that Applicant has failed to take responsibility for his action.

## **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:

### **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.

### **Criminal Conduct (Criterion J)**

#### **Factors Against Clearance:**

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

#### **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;
4. sexual behavior of a public nature, and/or that reflects lack of discretion an

#### Factors for Clearance:

None.

#### **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall common sense 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 **criminal conduct** (Criterion J) and **sexual behavior** (Criterion D), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, 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**

Applicant's actions establish criminal conduct within the scope of Criterion J because Applicant violated state criminal law. The criminal act was recent because it occurred on February 18, 1997. Although the criminal act was isolated, there is no evidence of rehabilitation as Applicant continues to deny the act ever occurred. (7) Had Applicant forthrightly confronted his conduct, Applicant's favorable character compliments about his job performance and his honesty would have easily mitigated the adverse inferences engendered by this isolated behavior. However, Applicant's unwillingness to reveal what actually happened in February 1997 casts a cloud of doubt over Applicant's overall judgment that cannot be simply excused or ignored by the positive character evidence.

The state criminal statute sets forth the definition and punishment for sexual misconduct. Applicant violated the state criminal law by engaging in sexual misconduct in violation of the statute. The activity occurred on a public trail close to a parking lot. In addition, the misconduct demonstrates a lack of discretion and judgment.

The conduct was recent but isolated. Again, if Applicant had provided the truth about what actually happened, then the isolated nature of the conduct, the absence of any other evidence of questionable judgment, irresponsibility, or emotional instability, would have outweighed the questionable judgment surrounding this conduct.

The general policy factors under the whole person concept identify nine variables which should be also be evaluated to determine an applicant's suitability for access to classified information. As with the mitigating factors for criminal conduct and sexual behavior, the recency of Applicant's sexual misconduct is mitigated by the isolated nature of the conduct. On the other hand, because Applicant denies that the conduct occurred, there is insufficient evidence to assess rehabilitation or other pertinent behavioral changes to confidently rule out that the past conduct will not recur in the future.

#### **FORMAL FINDINGS**

Having weighed and balanced the specific policy factors with the general policy factors (whole-person concept), Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (**criminal conduct**): AGAINST THE APPLICANT.

a. Against the Applicant.

Paragraph 2: (**sexual behavior**): AGAINST THE APPLICANT.

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.

Paul J. Mason

Administrative Judge

1. Item 5 is an arrest report with narrative of circumstances leading to arrest of Applicant sexual misconduct.
2. Item 6 reflects that Applicant was advised of his procedural rights on entering either a plea of not guilty or a plea of guilty. With a documented understanding of those rights, he pleaded guilty and was sentenced.
3. In reaching the factual findings, I must evaluate the reasonableness of an explanation, the internal consistency (or inconsistency) of the explanation, and whether the explanation has any external support from independent sources.
4. The narrative reflects that on a walking trail at a parking area, Applicant had the penis of the other male in his mouth and he also had his pants unzipped with his penis exposed.
5. Applicant was walking along the trail for a short time when he met a man who was sitting on a rock above the trail. After talking with the man he felt he had to urinate. Applicant unzipped his pants and pulled out his penis and urinated. The other man stated he had to go and jumped down in front of Applicant. Instantaneously, two police officers appeared and placed him under arrest.
6. Applicant's various explanations for pleading guilty, e.g., not being represented by counsel of his choice, being influenced by two sources to plead guilty in order to reduce the chances of the case being publicized in the media, underestimating the severity of the charge, concern for negative impact of media coverage on his family, whether evaluated individually or together, appear to be after-the-fact rationalizations for Applicant's sexual behavior.
7. Mitigating factor 3 does not apply to the circumstances of this case because there is no evidence Applicant was pressured or coerced into violating the law. Mitigating factor 4 does not apply because Applicant voluntarily engaged in the act and there is no independent evidence indicating that the factors leading to the violation are unlikely to recur.