

DATE: March 31, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0618

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Pamela C. Benson, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On September 24, 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, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on October 21, 1997, and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on November 25, 1997 and is credited with receiving it on December 1, 1997. He provided no response within the time permitted (30 days) by the Directive. The case was assigned to this Administrative Judge on January 22, 1998.

STATEMENT OF FACTS

Applicant is 48 years of age and employed by a defense contractor (Company A). He has held a security clearance at the level of secret since October 1992 and seeks to retain the same.

Summary of Allegations and Responses

Applicant is alleged to have (a) been arrested in September 1975 while stationed abroad, and charged with Indecent Act with a Minor, received a written reprimand, and advised to seek counseling, (b) asked an eight-year old to perform fellatio on him, and on two other occasions masturbated in front of the juvenile in approximately 1975, which resulted in his 1975 arrest, (c) been arrested on February 15, 1995 in State A and charged (1) with third degree, sexual offense (two counts), (2) fourth degree, sexual offense (two counts), (3) assault and battery (two counts), and (4) child abuse (two counts), found guilty of fourth degree, sexual offense (two counts), in violation of Art. 27, Sec. 464 (I), Ann. Code

of State A, an sentenced to one year in jail (suspended), awarded five years of supervised probation (to continue until 2002), fined \$830.00, including court costs, ordered to enroll and complete a sex offenders program, and have no contact with any female under 16 years of age, the remaining counts were *nolle prossed*, and he was registered as a sex offender in State A, (d) been receiving counseling from Ms. X, a certified professional counselor in State A, from approximately September 1996 to at least June 1997, for a diagnosed Pedophilia condition, with treatment expected to be on-going until completion of his probation or such time as it is recommended to the court that he has been rehabilitated, and (e) exposed himself, fondled minor females, and permitted these minors to watch pornographic movies in his home, with varying frequency, which resulted in his 1995 arrest.

Additionally, applicant is alleged to have engaged in a history or pattern of criminal activity (based on his sexual behavior) which casts doubt about his judgment, reliability and trustworthiness.

For his response to the SOR, applicant admits most of the allegations. He denies (a) asking an eight-year old to perform fellatio on him and (b) being without good judgment, reliability and trustworthiness, citing his current attending a sex offender program under the counseling direction of Ms. X, which he allegedly volunteered for prior to his court appearance on his 1995 sex offense charges, and his much decorated military service and demonstrated loyalty to his country.

Relevant and Material Findings

Applicant was first arrested on sex-related charges in 1975: On charges of Indecent Act with a Minor. He had exposed himself to a young girl while he was in the military and stationed abroad. Before his arrest, he tried to force an eight-year old girl to perform fellatio on him (according to applicant's own statement given to police, ex. 8, at 80), and on two other occasions (both in 1975) he had masturbated in front of the same juvenile (*see* exs. 6 and 8). For his cited conduct, he received a written reprimand and was advised to seek psychological counseling (*see* exs. 3, 6 and 7). Applicant enrolled in a counseling program designed to address deviant sexual behavior (such as applicant's), but terminated the program once the charges were dropped.

Applicant was arrested for a second time on a sex related offense on February 15, 1995 after exposing himself to two young minors. He was convicted of Fourth Degree, Sexual Offense (two counts), in violation of Art. 464 (a)(I) of Ann. Code of State A and sentenced on May 14, 1997, to one year in jail (suspended), awarded five years of probation (to continue to 2002), fined \$830.00, including court costs, ordered to enroll and complete a sex offenders program, and have no contact with any female under 16 years of age (*see* exs.5, 6 and 9) The remaining counts were *nolle prossed*, and applicant was registered as a Sex Offender in State A.

Prior to his scheduled court appearance on his 1995 charges, applicant volunteered for participation in a court-approved counseling program for sex offenders. Since September 1996 1997, applicant has been receiving counseling from Ms. X (a certified professional counselor in State A) in a program that is still continuing and promises to do so at least until the completion of his probation, or such time as it is recommended to the overseeing court that he has been rehabilitated as to any disposition to commit sexual offenses. Ms. X diagnosed applicant with a pedophilia condition (*see* exs. 3 and 6)

For the period between his two arrests on sex-related charges (*viz.*, in 1975 and 1995), applicant is of record in participating in sex-related offenses against young girls in 1993 and 1994. No sex-related offenses on young girls can be attributed to him, however, for the period spanning 1975 and 1992 on the record presented.

Applicant has a good military record by all visible accounts with service that includes Vietnam duty. Faithfulness and loyalty to country are not in issue.

POLICIES

The Adjudicative Guidelines outlined in the Change 3 amendments to the Directive list policy considerations to be made by judges in the decision making process. These considerations include Disqualifying Conditions and Mitigating Conditions, which should be assessed before deciding whether or not a security clearance should be granted, continued or denied. The Directive does not require the assessment of these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for

assessing extenuation and mitigation set forth in the Directive, which are intended to assist judges in reaching a fair and impartial common sense decision for recommendation.

Viewing the issues raised and evidence as a whole, the following Adjudicative Guidelines are pertinent herein:

Sexual Behavior (Criterion D)

Disqualifying Conditions:

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

Mitigating Conditions: None.

Criminal Conduct (Criterion J)

Disqualifying Conditions:

1. Any criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime or multiple lesser offense.

Mitigating Conditions: None.

Burdens of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's suitability for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Put another way, the judge cannot draw inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controversial fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's inability to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSION

Applicant comes to these proceedings with a good military record, but also with a considerable history of sexual misbehavior with minor children, some of a volitional nature and some the result of diagnosed pedophilia. From at least 1975, applicant exhibits a persistent pattern of engaging in inappropriate sexual behavior with minors. His most recent misconduct with two young minors (*i.e.*, in 1995) netted him a conviction of fourth degree sexual assault and five years of probation, an imposed \$830.00 fine, court ordered enrollment and completion of a sex offenders program, and

registration as a sex offender in State A. Diagnosed by his professional counselor with a pedophilia condition, applicant promises to remain in the counseling program until his probation is concluded (not expected until 2002). While applicant might be eligible for early reduction of his probation, this is by no means certain or even likely from the presented record.

Applicant's conduct (sufficiently proven in this case) raises sufficient moral and trust questions about his overall character to be security significant. The parental-child bond fixes firm responsibilities on the parent to care and protect his children and is certainly expansive enough to include relationships involving influential adults and minors who acquaint them (as here). Children look to their parents and influential adults for their physical and emotional sustenance. Applicant's actions by all accounts betray the presumed trust placed in him to keep minors in his company out of harm's way. Applicant's betrayals of trust cannot be discounted when appraising his suitability for executing the fiducial duties imposed upon him as a condition to his being afforded access to classified information. *Cf. Stahlans v. NSA*, 678 F.2d 482 (4th Cir. 1982) (upholding removal of NSA employee from position of trust based on the employee's sexual misconduct with his minor daughter); *Swann v. Walters*, 620 F. Supp. 741 (DDC 1984) (upholding removal of federal employee from position of trust, which involved protection of sensitive information, based on employee's sexual misconduct with minor children that resulted in felony conviction).

Besides the adverse moral/trust implications of his conduct, applicant's condition has psychiatric ramifications that have required and will continue to require professional monitoring and counseling. His condition is diagnosed as a pedophilia condition that exposes him to risk to the community (if not controlled) and serious enough to impair his judgment, trust and stability. And applicant's acts are covered by a host of factors under the Adjudication Guidelines for conditions and conduct covered by Criterion D: DF 1 (sexual behavior of a criminal nature), DF 2 (compulsive or addictive sexual behavior) and DC 4 (sexual behavior of a public nature).

Considered together, applicant's diagnosed condition and covered conduct is security significant and raises enough concerns about applicant's suitability to access classified materials to enable Government to meet its initial burden. Government must be able to repose absolute trust in those it privileges to have access to facilities that house classified information. *See Snepp v. United States*, 444 U.S. 507, 511n.6 (1980). Applicant is fully subject to these imposed fiducial requirements, even if he does not handle classified materials himself.

Applicant, to his credit, sought counseling, even his voluntary submissions (both in 1975 and 1995) were influenced by pending court proceedings. And he does appear to be making some headway in recognizing and coming to grips with his pedophilia disposition and avoiding vulnerable situations with children where he might be at risk to recurrent abuses. How much progress he has made cannot be discerned, however, on this written record. Without evidence of more concrete progress with his counseling, he cannot take advantage of any of the mitigation conditions covered by the Adjudicative Guidelines (for sexual misconduct). Based on this presented administrative record, it would be premature to conclude that his condition has been corrected to the point where risks of recurrence are no longer present.

In balance, conclusions warrant that applicant remains exposed to risks of recurrence and can demonstrate only recent efforts to become fully committed with working with a licensed counselor dedicated to helping him control his pedophilia tendencies. At least from this record, Ms. X (his treatment counselor) has not been willing to conclude that applicant is no longer at risk to inappropriate sexual behavior around minors, and is not likely to do so in the near future for so long as his probation is pending. Applicant will need more time to make a persuasive case that he is fully rehabilitated and no longer at risk to indulging in deviant sexual behavior involving minor children that acquaint him. Applicant fails to carry his own evidentiary burden on the record presented in this administrative record and is not entitled to favorable conclusions under paragraph 1 (Criterion D) of the SOR.

Applicant's sexual misconduct with minors that resulted in military and civilian law enforcement encounters (in 1975 and 1995, respectively) invite separate consideration of applicant's actions as criminal conduct. His 1975 and 1995 adjudications on charges of sexual offenses involving minors, while not classed as felonies in the respective jurisdictions, are covered by several factors in the Adjudicative Guidelines (for criminal conduct): DC 1 (any criminal conduct) and DC 2 (any serious crime or multiple lesser offenses). And while applicant is to be credited with making progress with his counseling, he has not to date completed his counseling or probation and cannot be linked with either isolated or strictly belated criminally related conduct under the Adjudicative Guidelines. Nor can applicant yet be

credited with successful rehabilitation for so long as his counseling and probation continue. In the process, doubts about his ability to avoid recurrent criminal behavior in the future remain. So long as applicant is considered to remain at risk to recurring sexual misconduct, he is exposed to continuing doubts as well about his ability to avert future confrontations with law enforcement authorities. At base, applicant continues to show increased awareness and progress in controlling his emotional urges to sexually misbehave with minors, but he has not reached the stage of rehabilitation where risks of recurrence can be safely discounted. Applicant fails to carry his evidentiary burden, and paragraph 2 (Criterion J) of the SOR is concluded unfavorable as well.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors enumerated in F.3 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, this Administrative Judge makes the following FORMAL FINDINGS:

CRITERION D (SEXUAL MISCONDUCT): AGAINST APPLICANT

CRITERION J (CRIMINAL CONDUCT): AGAINST 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 applicant's security clearance.

Roger C. Wesley

Administrative Judge