

DATE: April 21, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0737

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Michael Leonard, 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 December 11, 1997, to the 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 the Applicant and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

On January 9, 1998, the Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned to me on January 21, 1998. A notice of hearing was issued on February 11, 1998, and the case was heard on March 3, 1998. At the hearing six Government exhibits (Gov. Ex.) and five Applicant exhibits (App. Ex.) were admitted into evidence. Testimony was taken from the Applicant. A transcript of the hearing was received by this office on March 18, 1998.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following findings of fact:

The Applicant is a 40-year-old male transvestite (Tr. 45) who cross dresses⁽¹⁾ every day. He feels comfortable being a male, but enjoys wearing women's apparel. Cross dressing makes him feel he is a whole person. (App. Ex. B) He wears women's undergarments to work, under his business attire. He has never gone to work fully attired as a woman. Some nights, after work, he wears women's clothes for a couple of hours. Other nights he doesn't. (Tr. 43) Once a week he engages in cross dressing in public by dressing fully in women's attire, both under and outer garments, and attending church. Sometimes he has gone to the mall or to the grocery store with his wife while he was wearing women's casual attire. (Tr. 52) While cross dressing he is known as "Kathy." While dressed in male attire he uses his first name. At the

hearing, he acknowledged he was wearing feminine undergarments under his suit. (Tr. 52) There was no evidence from the Applicant's outward appearance he was wearing female undergarments at the time.

The Applicant foresees no change in his behavior. He believes his frequency of wearing women's clothing will not increase or decrease. (Tr. 45) His cross dressing is known to his mother, wife, pastor, friends, family, co-workers, (App. Ex. D) and employer/supervisor. (Tr.33) The Applicant has been involved with the Boy Scouts in a two-day event once a year for the past two years. His involvement also includes attendance at some planning meetings for the event. (Tr. 36) He has not informed his superiors at the Boy Scouts about his behavior.

The Applicant began wearing feminine undergarments at age eight or nine. At age eleven, his mother discovered him dressed in her undergarments. At age 16-18, he began to purchase various articles of feminine undergarments. Once or twice a week he would wear the articles a few hours at night or on weekends. During his early twenties his cross dressing continued, and he frequently wore feminine undergarments under his clothes. In 1982 he began to purchase, make, and wear feminine outer garments and cosmetics.

The Applicant did not disclose his habit to his first wife before they got married. He was 20, she was 19. The marriage lasted from 1978 to 1983. After five years of marriage his wife no longer wanted the marriage to continue. (Tr. 47) He discussed his cross dressing up-front with his second wife. She was okay enough with it to get married but was never really comfortable with it. His second marriage lasted from 1984 to 1989. He cohabited with another woman from 1988 to 1993.

In June 1988, the Applicant was involved in a mock wedding ceremony⁽²⁾ at his church. In the ceremony he wore a wedding dress, and his female cohabitant dressed in a tuxedo. All the bridesmaids were males dressed in female attire. At the time of the ceremony both the Applicant and his co-habitant were married to other people. Later the Applicant and his co-habitant renewed their vows at another church. There was never a legal marriage between the Applicant and his cohabitant.

The Applicant told his current wife about his behavior early in their relationship, prior to their marriage in June 1996. His current wife is comfortable with his cross dressing activities and is fully supportive of him. (Tr. 47) If someone threatened to blackmail him, he would simply admit to his activities. He freely admits his activities to those who question him about his cross dressing. The Applicant has never denied his habit. The Applicant has never been arrested for his behavior.

The Applicant spent 19 years (App. Ex. C) in the Army National Guard as a security policeman. While in the national guard, he informed his peers, but not his chain of command about his habit. Prior to annual training periods he would allow the hair on his arms and legs to grow back. The Applicant never tried to deceive the national guard about his behavior. On December 16, 1993, the Applicant underwent a psychiatric evaluation (Gov. Ex. 4) conducted by a US Government employed psychologist, and a diagnosis of transvestism with a poor prognosis was rendered. Although the psychiatrist found the Applicant's stability was questionable with respect to potential setup for blackmail, he also found the Applicant qualified for retention in the national guard.

On February 28, 1994, the Applicant was sent an "Intent to Revoke Security Clearance" letter. (Gov. Ex. 5) The reasons for revoking Applicant's clearance included financial matters, criminal and sexual misconduct, his cross dressing, falsification of a personnel security questionnaire and official personnel forms. The Applicant made a written rebuttal to the letter. (App. Ex. B) On June 15, 1994, a Revocation of Security Clearance letter was issued by the U.S. Army Central Personnel Security Clearance Facility. The Applicant never received the formal document revoking his clearance until he saw it during the Defense Security Service (DSS)⁽³⁾ interview in May 1997. In October 1994, the Applicant was processed out of the national guard at the end of this enlistment. He received an honorable discharge but was barred from reenlisting in the guard.

In February 1998, the Applicant was given a psychological assessment. (App. Ex. A). It was the voluntary action of the Applicant to seek a more current assessment. The Applicant was found to be a very bright individual with perfectionist tendencies, dependable and trustworthy, with the capacity for good judgment, within normal ethical limits, emotionally a stable person, with a great deal of self-confidence, no feeling of guilt or shame about his cross dressing, in control of

his cross dressing behavior, and with no significant levels of psychopathology. The Applicant's psychological profile indicated, in the examiner's opinion, that the Applicant was not vulnerable to undue influence or coercion. There is no fear of disclosure nor a potential setup for blackmail. This opinion is opposite to the finding of the Army's psychiatric evaluation done four years earlier.

POLICIES

The adjudication process 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 which 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 extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See Directive 5220.6, Section F.3. and Enclosure 2.* Because each security case presents its own unique 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. Moreover, although 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 questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

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.⁽⁴⁾

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

- (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 lacks of discretion or judgment.

Conditions that could mitigate security concerns include:

- (3) there is no other evidence of questionable judgment, irresponsibility, or emotional instability.
- (4) the behavior no longer serves as a basis for undue influence or coercion.

CRITERION J - CRIMINAL CONDUCT

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

None Applicable

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 defect in judgement, reliability or stability.

When appropriate, a credentialed mental health professional,* 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

* * *

In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which 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.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, then the applicant must remove that doubt with substantial evidence in explanation, mitigation, or extenuation, or refutation, sufficient to demonstrate that despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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 is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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.

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a *prima facie* case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance. The Government has met its burden in this case.

The Applicant has been involved in cross dressing activities for many years. He first dressed in his mother's undergarments when he was eight or nine years old. His behavior makes him feel he is a whole person. Currently he daily wears feminine undergarments under his business attire. On Sundays he dresses fully in women's clothes, both under and outer garments, and attends church. He also goes to the mall or the grocery store during the week wearing casual women's clothing. He has no intent to change his current behavior. In the past, his cross dressing behavior contributed to end of his first two marriages. It also contributed to the revocation of his security clearance and his ineligibility to reenlist in the national guard.

Currently, the most important people in his life: his friends, family, pastor, and co-workers know of his cross dressing behavior. Because his behavior is known to these individuals, his cross dressing does not serve as a basis for undue influence or coercion. (Mitigating Factor # 4) His full disclosure to these people eliminates the possibility his behavior would be a potential setup for blackmail. If ever threatened with blackmail, he would freely admit to his behavior. At the hearing, and throughout the investigation the Applicant was very candid about his cross dressing.

In December 1993, the Applicant underwent a psychiatric evaluation which reached the diagnosis of transvestism, with a poor prognosis. In February 1998, the Applicant sought to undergo a psychological assessment. The assessment referenced his transvestitism and indicated the Applicant was in control of his cross dressing behavior, choosing the place and time when he cross dresses. The assessment found the Applicant to be a very bright individual, emotionally

stable, dependable and trustworthy, with a great deal of self-confidence and no significant levels of psychopathology. It was the opinion of the examiner that the Applicant was not vulnerable to undue influence or coercion. I also find the Applicant is not vulnerable to undue influence or coercion. Both the Applicant and his wife are comfortable with the Applicant's transvestitism. Although the Applicant's cross dressing behavior is unusual and not main stream conduct, it does not rise to the level of evidencing questionable judgment, irresponsibility, or emotional instability. (Mitigating factor # 3)

Criterion J, Criminal Conduct, does not apply because the Applicant was never arrested and it was not established his cross dressing behavior violated any law. Criterion I, Emotional, Mental, and Personality Disorders, does not apply to the Applicant. An Army "State Psychiatrist" rendered a diagnosis of transvestism and indicated the Applicant's stability was questionable with respect to potential set up for blackmail. But the diagnosis failed to disclose a disorder that could result in a defect in psychological, social, or occupational functioning. In fact the state psychiatrist found the Applicant qualified for retention in the Army National Guard. There is no information suggesting the Applicant's current behavior indicates a defect in his judgment or reliability. There is no showing that either the Army state psychiatrist or the Ph.D., American Board of Forensic Examiners Diplomat, who did the more recent psychological assessment were credentialed mental health professionals⁽⁵⁾ as defined by the Directive.

For the reasons stated, I conclude that the Applicant is suitable for access to classified information.

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: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Claude R. Heiny

Administrative Judge

1. The Applicant defines "cross dressing" as wearing female clothing, either entirely or wearing a single item of women's apparel under what otherwise would be considered men's clothes. (Tr. 42-43)
2. There was no marriage license, and the minister did not pronounce the couple "man and wife."
3. Until November 25, 1997 the DDS was called the Defense Investigative Service (DIS).
- 4.

⁰ 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.

5. Credentialed mental health professional is a licensed clinical psychologist, licensed social worker, or board certified psychiatrist.