

DATE: December 20, 1999

In Re:

SSN -----:

Applicant for Security Clearance

ISCR Case No. 99-0018

DECISION ON REMAND OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On January 8, 1999, 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 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 determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on February 12, 1999.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on May 24, 1999. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on June 7, 1999, and Applicant's Response was received on June 28, 1999. It included a two page letter, dated June 13, 1999, from a clinician, which addressed the Applicant's rehabilitation. **The Government indicated in writing on July 6, 1999, that it had no objection to the Applicant's Response.** The case was received by the undersigned for resolution on August 6, 1999. A Decision was issued on August 9, 1999, finding for the Applicant.

On December 6, 1999, the Appeal Board issued a Decision and Remand Order (Order), stating that **"the Judge should explain how he weighs the clinician's letter in light of the record as a whole, including Applicant's probationary status and Applicant's probation violation"** (Order at page 4). In the body of its opinion, the Appeal Board also asks that I address the issue of recency (Order at pages 2 and 3).

On December 8, 1999, the Government, by electronic facsimile, offered an evidentiary brief for my consideration. That same day I issued a Show Cause Order to the Government, asking it to "show good cause why I should **now** consider this argument, as the Government had ample opportunity to posit such an argument when the case was first before me" (Emphasis in original). By electronic facsimile dated December 15, 1999, the Government responded to the undersign's

Show Cause Order. I have considered the Government's response, and find that it has failed to show good cause why I should consider the Government's untimely brief. As the Government has failed to show good cause, the case is ready for my Decision on Remand. The issues raised here are whether the Applicant's admitted sexual behavior and related criminal conduct militate against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the File of Relevant Material and Applicant's Response. The Applicant is 30 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Criterion D - Sexual Behavior & Criterion J - Criminal Conduct

1.a., and 2.a.~2.d. In early 1997, the Applicant, on two separate occasions, brushed the back of his hand against the breasts of two 15 year old girls when handing them his baby (Government Exhibit (GX) 10 at page 1). In March of 1997, he "extended . . . [his] hand toward a female student [of] about 24 years old, to touch her, [he] then asked if he could touch her breasts. She refused, so . . . he did not" (GX 10 at page 1). Again, "in about Mar 97 . . . [he] brushed the breasts of two sisters, ages about 13 and 15 years old, five or six times, with . . . [his] hands during a basketball game, trying to make it seem unintentional" (GX 10 at page 2). For the last incidents, the Applicant was charged with, and pled guilty to, Lewdness Involving a Child (GX 4 at page 7, GX 5 at pages 2~3, and GX 6). He was placed on probation, and as part of its terms he was to have no unsupervised contact with a female under the age of 18 (GX 6). In June of 1997, however, he violated the terms of that probation when he "intentionally brushed the breasts of a 17-year-old girl . . . five or six times, trying to make it feel unintentional" (GX 10 at page 2). He was ordered to serve an additional 54 days in jail, and he was again placed on probation (GX 6). He is currently on probation.

Mitigation

The Applicant is remorseful for his conduct (Response at page 1); and as stated in a rather lengthy two page letter dated June 13, 1999, he has successfully completed a rehabilitation program (Response at page 2~3). In part, the Clinical Director of the facility where the Applicant received his rehabilitation offered the following:

He has always done willingly whatever I have asked of him as a therapist. He has not only completed the expectations, but has done it in a manner **demonstrating a deep desire to make sure that nothing like this would ever happen again.**

* * *

In all areas of therapy, . . . [the Applicant] has shown a dedication and determination to be successful in his therapy. This will serve to make him a better father, husband, neighbor, and employee. He has always shown a high level of honesty and integrity in his therapy. **He has participated in community programs to assist his neighbors to resolve any questions they might have** since his crime was disclosed through the Internet.

At the conclusion, I would say that having successfully completed his therapy, . . . [the Applicant's] chances of reoffending in such a manner has been greatly reduced to where **his risk is non-existent.** He is a better person for the work he has completed and I believe if allowed to continue his employment is capable of holding the strictest of confidence in assignments given. (Response at pages 2~3, emphasis supplied)

POLICIES

Enclosure 2 and Section F.3. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither 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 clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions

most pertinent to evaluation of this case are:

Criminal conduct

Conditions that could raise a security concern:

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

- (1) the criminal behavior was not recent;
- (5) there is clear evidence of successful rehabilitation.

Sexual behavior

Condition that could raise a security concern:

- (1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

Condition that could mitigate security concerns:

- (2) the behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

As set forth in the Directive, "[e]ach clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, 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 make out a case under criterion D (Sexual behavior), and criterion J (Criminal conduct); 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 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 be repeated, and that the Applicant presently qualifies for a security clearance.

Sexual behavior which involves a criminal offense, reflects a lack of judgment and discretion. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

In early 1997, the Applicant admittedly engaged in inappropriate criminal sexual behavior over a period of about six months. This conduct thus occurred more than two years ago (the date of the Applicant's Response to the Government's FORM ends the time line used for adjudication purposes in this case). The question which must be answered is whether this conduct is "recent," within the meaning of Criminal Conduct Mitigating Condition 1, and of Sexual Behavior Mitigating Condition 2. The Appeal Board has correctly refused to establish a "bright line" as to what constitutes "recency." Each case must be decided on its own merits, "in light of the record evidence as a whole" (Order at page 4). I conclude that under the facts of this particular case, more than two years is a sufficient passage of time to conclude the Applicant's past criminal and sexual behavior is not recent. There is absolutely no evidence of subsequent criminal sexual behavior during the intervening two plus years. The community in which he lives is well aware of his past misconduct, and there is clear evidence of successful rehabilitation.

I have given much weight to the un rebutted two page letter report from the Applicant's clinician, who states, un categorically, that the Applicant has successfully rehabilitated himself. I concur in this assessment, as there is absolutely no evidence to the contrary. As noted in my findings of facts, I am aware that the Applicant violated the terms of his original probation, for which he was duly punished, and that "he was again placed on probation" (Decision at page 2). Based on the totality of the record evidence and applying the whole person concept, I conclude that, as there is un rebutted evidence that the Applicant has successfully rehabilitated himself, the Applicant's admitted inappropriate sexual behavior, and related criminal conduct, are distant enough in the past as not to be of present security significance.

The Applicant has thus met the mitigating conditions of Criteria D and J, and of Section F.3. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Criteria D and J.

FORMAL FINDINGS

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

Paragraph 1: FOR THE APPLICANT

a. For the Applicant.

Paragraph 2: FOR THE APPLICANT

a. For the Applicant.

b. For the Applicant.

c. For the Applicant.

d. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

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

Richard A. Cefola

Administrative Judge