DATE: May 10, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-09212

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 14, 2003, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 14, 2005, after the hearing, Administrative Judge John Grattan Metz, Jr. denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge's overall unfavorable determination under Guideline D was arbitrary, capricious, and contrary to law, and whether the Administrative Judge's overall unfavorable determination under Guideline E was arbitrary, capricious, and contrary to law. We reverse the Administrative Judge's decision to deny the clearance.

I. Whether the Record Supports the Administrative Judge's Factual Findings.

A. Facts

The Administrative Judge found the following:

In late 1996, during a period when Applicant and his wife were experiencing marital difficulties, Applicant met a woman 12 years his junior at an on-line chat room. The woman was a citizen of the United Kingdom living and working in the United States for one year as an au pair. Applicant and the woman met in person and began a 3-4 week affair during which they had sexual relations at a hotel three times. They also had intimate contact at Applicant's office. The affair ended in mid-January 1997, after which Applicant maintained e-mail contact with the woman until sometime in 1999.

Applicant's wife was unaware of this affair until sometime after December 2001. Applicant went through marital counseling between December 2001 and June 2002 during which time Applicant's wife became aware of the relationship but not the specific details. In December 2004, Applicant's wife stated that she had full knowledge of her husband's extra-marital affair that took place in December 1996 and January 1997.

Applicant speaks a number of foreign languages, including Ukrainian and Russian. Applicant attended formal language training from June 1990 to July 1991 while in the Army. In 1999, he discovered Russian-language chat rooms on the internet and began to use them to maintain his proficiency in Russian. From July 2001 to September 2001, he attended a language school in Ukraine to learn Ukrainian and strengthen his Russian. He maintains monthly/bi-monthly contacts with several Ukrainians he met while in language school. He asserts that none of these foreign contacts have ever queried him about his work as a defense contractor. He continues to visit Russian-language chat rooms on the internet. He has not advised his company security officers about his ongoing chat room contacts with foreign nationals.

Applicant had his special access revoked by another government agency in October 2000 because of his affair with the foreign national, his continuing contacts with foreign nationals via e-mail and in internet chat rooms, and because of Applicant's self-medication of his depression, by adjusting his depression medications before consulting with his physician.[(1)]

The following additional record evidence was not mentioned by the Administrative Judge in his findings of fact, but is pertinent to the issues raised by Applicant on appeal: Applicant did not have sexual relations in his office with the woman from the United Kingdom. In his office, they engaged in kissing and some otherwise unspecified sexual conduct. Applicant was not working on classified information while the woman was in his office and it was not against company policy to have visitors at the office. Applicant's conversations with the foreign contacts via e-mail and the internet involved only casual, mundane conversations about everyday life. Applicant attempts to be judicious and discreet while on line and does not disclose any information about his job. In about ninety percent of the cases, his interaction with the foreign contact would taper off after a couple of weeks because Applicant and the contact would run out of things to talk about. Applicant has spoken to only one of the foreign acquaintances he met in language school within the past year. Applicant still engages in Russian language chat at work but no longer does it as frequently from his home. Applicant made a total of approximately two dozen of these contacts between January 2004 and the date of the hearing (December 13, 2004).

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent necessary to resolve the issues raised on appeal, the Judge's findings of fact will be discussed below in conjunction with the analysis of his ultimate conclusions.

II. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United* States *v. State Farm Mut. Auto. Ins.* Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

On appeal, Applicant asserts that it was arbitrary and capricious for the Administrative Judge to conclude that the government established a case under Guideline D (Sexual Misconduct). Applicant's argument has merit.

In his conclusions section, the Administrative Judge cited three Guideline D disqualifying factors as a basis for his conclusion that the government had established its case. The first of these, ¶ E2.A4.1.2.1, involves "[s]exual behavior of a criminal nature, whether or not the individual has been prosecuted." The Judge makes reference to Applicant's "adulterous affair" when citing this provision. While adultery has historically been proscribed under the criminal law in some jurisdictions, there is no record evidence in this case establishing that Applicant committed a violation of any applicable law when he engaged in the affair. Moreover, adulterous relationships between consenting adults, while not laudatory behavior, cannot be said to be the type of behavior "of a criminal nature" contemplated by the Directive in the absence of specific evidence of a criminal violation. There was no basis in the record for the Judge to apply ¶ E2.A4.1.2.1 in this case.

The second disqualifying factor cited by the Administrative Judge, ¶ E2.A4.1.2.3, contemplates "[s]exual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress." The Judge concluded that Applicant's wife may not be fully aware of the specifics of Applicant's affair, and that Applicant may, therefore, still be subject to coercion, exploitation, or duress. The conclusion was based on the Judge's assertion that Applicant's wife's one sentence assertion that she was fully aware of the circumstances [of the affair] is undercut by Applicant's statement that she was not aware of the specifics. On appeal, Applicant argues that the statement of the wife is not undercut by the statement of Applicant since the two statements were not made at the same time. Applicant's statement that his wife was not aware of the specifics of the affair was made as part of his answer to the statement of reasons in December 2003 and references the state of his wife's knowledge during marriage counseling in 2002. The wife's affidavit, entered into the record as Applicant's Exhibit A, is dated December 9, 2004 and in it she indicates that she has "full knowledge" of the extra-marital affair. As suggested by Applicant on appeal, the Applicant's statement cannot be said to "undercut" the statement of the wife, as the two statements are not contemporaneous and the Judge fails to articulate a basis for rejecting the representations made by Applicant's wife in the most recent statement. Applicant argues that there was no basis in the record for the Judge's conclusion that Applicant was still vulnerable to coercion given the record evidence of Applicant's wife's knowledge of the affair. The Board agrees. The word "affair" has a specific meaning in the common vernacular, and Applicant's wife's use of the term indicates knowledge of Applicant's sexual relations with a woman outside his marriage. The Judge fails to explain how any more detailed knowledge on the part of the wife would change Applicant's posture regarding the potential for exploitation. Given the nature of the record evidence, the Judge has failed to articulate a rational basis for his conclusion that Applicant is still vulnerable to coercion and that ¶ E2.A4.1.2.3 applies to the case.

The Administrative Judge also specifically applied ¶ E2.A4.1.2.4 to the case ("Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment"). The Judge concluded that Applicant's affair "occurred at work and other public places." On appeal, Applicant asserts that there was no evidence that there was anything "public" about Applicant's affair. Applicant acknowledges that he and his paramour kissed and engaged in other unspecified sexual contact in his office, and had sexual relations in a hotel. Applicant argues that there is no evidence of the kind of open, notorious, and known-to-the-public sexual behavior contemplated by the Directive in this case. This argument has merit. The Administrative Judge articulates no specific, rational basis for why Applicant's activities with the woman in his office were "public" or why a hotel room can be accurately described as another public place. The Judge's reliance on the "sexual behavior of a public nature" prong of ¶ E2.A4.1.2.4 is not reasonably supported by the record evidence.

¶ E2.A4.1.2.4 includes consideration of sexual behavior which reflects a lack of discretion or judgment. Applicant argues that the Administrative Judge did not rely on this particular component of ¶ E2.A4.1.2.4 when deciding the case under Guideline D. Applicant correctly points out that the Judge did not make explicit mention of a "lack of discretion or judgment" in concluding that the government had established its case under Guideline D. The Board need not decide whether the Judge included lack of discretion or judgment in his Guideline D analysis to review the issue since Applicant's sexual behavior was also the subject of a specific allegation under Guideline E, which references, among other things, conduct involving questionable judgment. The Judge's resolution of Applicant's sexual behavior under Guideline E is also an issue on appeal. The Board will address the issue of the Judge's conclusions regarding Applicant's sexual behavior as a manifestation of poor judgment in subsequent paragraphs.

Applicant further argues that, even if the government established a case under Guideline D it was arbitrary and capricious for the Administrative Judge to conclude that the case was not mitigated. Applicant notes that the Judge concluded " . . . that the behavior occurred several years ago and has not recurred." Despite this conclusion the

Administrative Judge qualified his application of ¶ E2.A4.1.3.2[(2)] by stating that Applicant was not an adolescent at the time of the affair and was substantially older than his paramour. The Judge failed to articulate how these facts undercut the application of a mitigating factor which deals with the lack of recency and non-recurrence of the conduct. Overall, the Judge failed to articulate a rational basis for why a one-month affair that was more than eight years old at the time of the hearing was not otherwise mitigated. Additionally, part of the Judge's conclusion that the conduct under Guideline D was not mitigated was based on his finding that Applicant was still subject to coercion, exploitation and duress because of his wife's lack of full awareness regarding his affair. As indicated in preceding paragraphs, there is no basis in the record for the conclusion that Applicant is still subject to coercion, exploitation and duress because of his affair.

Applicant argues on appeal that it was arbitrary, capricious, and contrary to law for the Administrative Judge to conclude that the government established a case under Guideline E. Applicant's contention has mixed merit. Regarding Applicant's affair, there is sufficient record evidence for the Judge to conclude that Applicant's sexual behavior in December 1996 and January 1997 was reflective of poor judgment under Guideline E. Regarding Applicant's e-mail and internet contacts with foreign nationals, the record evidence indicates that Applicant made the contacts to keep his language skills current and did little more than engage in mundane dialogue about inconsequential, day-to-day trivia with these contacts. Given the record evidence, including the fact that Applicant does not divulge meaningful information about himself and has not told any contact where he worked, or what he did for a living, the Judge failed to articulate a sustainable rationale for his conclusion that Applicant's establishment of these foreign contacts was indicative of questionable judgment, unreliability, or untrustworthiness. Similarly, the Judge's conclusion that Applicant remains unaware or unconcerned about his foreign contacts is not sustainable. There is record evidence demonstrating that Applicant is aware of the potential risk of using e-mails and internet chat rooms in this setting, and has governed himself accordingly. There was an insufficient evidentiary basis for the Judge to conclude that a case had been established against Applicant under Guideline E as a result of his engaging in limited, innocuous conversations with foreign nationals.

Applicant also argues that it was error for the Administrative Judge to conclude that the government's case under Guideline E was not mitigated. Regarding Applicant's affair, while it is reflective of poor judgment at the time it occurred, and therefore provides some basis for the establishment of a case against Applicant under Guideline E, the Judge fails to articulate a rational basis for his conclusion that this eight-year-old lapse in judgment, which was of short duration, which has not recurred, and is no longer a source of potential vulnerability, has continuing security significance. The Judge failed to adequately explain why Applicant's conduct in engaging in the affair was not mitigated, given the record evidence.

Applicant argues that it was error for the Judge to find against Applicant on the statement of reasons subparagraph that alleges his security clearance with another agency was revoked in October 2000. Applicant accurately points out that the 2000 revocation was based largely on the same underlying adverse facts that exist in the present case, with the additional fact that this 2000 revocation was based, in part, on alleged abuse of prescription medicine by Applicant. The Administrative Judge in the present case found that Applicant's alleged abuse of prescription medicine no longer retained security significance. Thus, the 2000 revocation was based on much[(3)] the same adverse information as the present case. Moreover, the 2000 revocation predated Applicant's wife attaining knowledge of Applicant's brief 1996-1997 affair. Given these facts, the Judge failed to articulate a reason why the 2000 clearance revocation by another agency has security significance independent of the underlying reasons for the revocation.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the nonappealing party has made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, the Judge's adverse clearance decision is not sustainable, and it is unlikely that correction of the errors would produce a sustainable decision consistent with the Judge's September 14, 2005 decision. Therefore, the decision must be reversed.

Order

The decision of the Administrative Judge denying Applicant a clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The manner in which Applicant used his prescription medicines did not have security significance for the Administrative Judge, and is not an issue on appeal.

2. "The behavior was not recent and there is no evidence of subsequent conduct of a similar nature."

3. The Judge found that Applicant attended a language course outside the U.S. subsequent to the 2000 security clearance revocation. However, the Judge never discussed what security significance, if any, that attendance might have.