

DATE: May 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23232

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

John F. Mardula, Esquire

Roberts, Abokhair & Mardula

SYNOPSIS

The Applicant had a months-long sexual relationship with a Filipino national in 2000-2001. He also sent money to this person over the following year and a half. He has since terminated the relationship with this person, and no longer sends her money. His friends, co-workers and family all know about the relationship; therefore he is no longer vulnerable to coercion or pressure. The Applicant's spouse is a British citizen. However, neither she nor their daughter nor her parents are agents of a foreign power. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On September 12, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) 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.

The Applicant responded to the SOR in writing on October 24, 2002, and requested a hearing. In his Answer the Applicant admitted the allegations in the SOR, with explanations. The case was received by the undersigned on January 15, 2003, and a Notice of Hearing was issued on March 3, 2003.

A hearing was held on March 24, 2003, at which the Government presented two documentary exhibits. Testimony was taken from the Applicant, who called four witnesses and also submitted ten exhibits. The transcript was received on April 10, 2003.

FINDINGS OF FACT

The Applicant is 61, married and has Master's degrees in Civil Engineering and Architecture. He is employed by a defense contractor as an architect, and he seeks to obtain a Top Secret-level DoD security clearance in connection with his employment in the defense sector. The Applicant has never held a security clearance.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has immediate family members, or persons to whom he is bound by affection, who are not citizens of the United States.

The Applicant, who is a native-born American citizen, has been married to a British citizen since September 1980. His wife has always lived in the United Kingdom during their marriage. He and his wife have one daughter, now age 22. The daughter is a dual citizen of the United States and the United Kingdom. She currently lives in Italy.

The Applicant and his wife have lived apart for most of their married life. The Applicant lived with his wife in England from 1980 to 1983. At that time he decided to move to the United States for better work opportunities. His wife elected not to follow him and stayed in England. The Applicant lived and worked in the United States from 1983 to 1987. From 1988 until 1993, the Applicant again lived with his wife and worked in England. In 1993, the Applicant returned to the United States for work. Once again, his wife elected not to come with him. He has not lived in the United Kingdom since then. The Applicant sees his wife and child on the average of once per year, usually around Christmas time. He sends his wife money on a monthly basis for her support and that of his daughter. He has maintained a bank account in England since first living there. He keeps the account open in order to facilitate the transfer of funds to his wife.

The Applicant and his wife are happy with the relationship and have no plans of getting a divorce. Concerning their relationship the Applicant states, "I think my wife and I have a genuine respect for each other and actually like each other a lot, so as I think I said in my response to the statement of reasons, sex has not been really important in our relationship for a long time." (Transcript at 108.)

The Applicant's wife is a part-time teacher. His in-laws are retired and are in their 80s. None of the above have worked for the British government. His wife owns her flat in England. The Applicant has no ownership interest in the property.

In 2000 and 2001, the Applicant had an intimate relationship with a woman who is a citizen of the Philippines. This relationship will be discussed in further detail under Paragraph 2, below.

Paragraph 2 (Guideline D - Sexual Behavior). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in sexual behavior which might subject him to undue influence or coercion, or reflects a lack of judgment or discretion.

In 2000 the Applicant was sent by his firm to manage a project in the Philippines. In November of 2000 the Applicant met a woman (Ms. A). Eventually the Applicant and Ms. A became intimate, and the two of them had a sexual and emotional relationship until the Applicant left the Philippines in August 2001. Once the Applicant left the Philippines, he and Ms. A continued to speak often on the telephone and he would send her money on a monthly basis. After the issuance of the SOR, the Applicant stated that he realized the importance the Defense Department put on his continuing a relationship with this person. Accordingly, on December 31, 2002, the Applicant called Ms. A and told her that their relationship was over and that he would not be sending her any more money. (Transcript at 95.) The Applicant reaffirmed this decision in writing with a letter to Ms. A, dated March 1, 2003. (Applicant's Exhibit D.)

While in the Philippines, the Applicant opened a joint bank account with Ms. A. This was to allow for the easy transfer of funds from the United States. This bank account was closed in July 2002, when Ms. A opened an individual bank account. Between September 2001 to December 2002, the Applicant sent approximately \$15,000 to Ms. A in the Philippines. (Transcript at 99-100.)

The Applicant has notified his wife (Applicant Exhibit E), daughter (Applicant Exhibit F), supervisor (Applicant Exhibit G, Transcript at 63-64), work associates (Transcript at 36-37, 51-52) and friends (Transcript at 25-26), about this relationship, as well as a one time sexual encounter that occurred with another woman in 1984.

Mitigation.

The Applicant's direct supervisor, as well as two other work associates, testified for the Applicant. They describe him as a deliberate, logical person with a lot of integrity. All three of them had knowledge of his relationship with the woman in the Phillippines and stated that they continued to believe that he is eligible for access to classified information. Two of these people have security clearances themselves. His direct supervisor, who has known the Applicant since 1988, spoke forcefully for the Applicant, indicating that he is a person she would trust with an important matter in her personal life. (Transcript at 70.)

A lifelong friend of the Applicant also testified. This person has known the Applicant for 55 years. His testimony was very laudatory with regards to the Applicant. Three other long term (more than 20 years) friends of the Applicant submitted written statements on his behalf. (Applicant's Exhibits H, I and J.) All four of these people recommended him for a position of trust without reservation.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline B (Foreign influence)

Conditions that could raise a security concern:

(1) An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;

Conditions that could mitigate security concerns include:

(1) A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;

Guideline D (Sexual behavior)

Conditions that could raise a security concern:

(3) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
 (4) sexual behavior of a public nature and/or that which reflects a lack of discretion or judgment.

Conditions that could mitigate security concerns:

(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.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be subject of foreign influences, or be involved in sexual behavior that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

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 granting of a security clearance. If such a 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 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.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant's immediate family (wife, daughter and in-laws) are citizens of the United Kingdom (Guideline B); and that the Applicant was involved in a long-term sexual relationship with a Filipino national while he was in the Phillipines (Guideline D).

The Applicant, on the other hand, has successfully mitigated the Government's case. Turning first to his family relationships. It is obvious that the Applicant and his wife do not have a close marital relationship. They have lived apart for the majority of their marriage, including the last ten years. While it is arguable whether any marital relationship can be called "casual and infrequent," this one comes pretty close. Certainly there is considerable emotional distance between the Applicant and his wife. His financial interests in England are very small, mainly concerned with getting money to his wife and daughter. There is no evidence that his wife or in-laws are agents of a foreign power. His daughter, as stated above, is a citizen of the United States. He has successfully mitigated Paragraph 1 of the SOR.

The Applicant has also mitigated the sexual behavior allegation. He frankly admitted that he engaged in a months-long relationship with Ms. A while in the Phillipines. He did not have a security clearance at that time. Since he was informed of the potential security significance of this conduct, he has informed his wife, daughter, friends, supervisor and co-workers of the facts of this relationship, as well as of a prior one-time encounter in 1984. He testified credibly and believably that he has completely terminated contact with this woman. Accordingly, the behavior no longer serves as a basis for coercion, exploitation or duress. In addition, the record contains no other evidence of questionable judgment, irresponsibility or emotional instability. Paragraph 2 of the SOR is found for the Applicant.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.e.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. through 2.c.: 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.

Wilford H. Ross

Administrative Judge