

DATE: September 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09212

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR.

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's demonstrated sexual behavior and poor judgement disqualify him for a security clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 14 October 2003 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of sexual behavior and personal conduct. ⁽¹⁾ Applicant answered the SOR on 26 October 2003, initially requested an administrative decision, but in July 2004 requested a hearing. DOHA assigned the case to me 27 August 2004 and I convened a hearing on 13 December 2004. DOHA received the transcript on 21 December 2004.

FINDINGS OF FACT

Applicant admitted the Guide D allegation and all the Guideline E allegations except 2.a.; accordingly, I incorporate his admissions as findings of fact. He is a 42-year-old senior principal employed by a defense contractor since May 1993, seeking to retain the industrial clearance he has held since approximately 1991.

In late 1996, Applicant became enamored with on-line chat rooms. During this time, he and his wife of sixteen years were experiencing marital difficulties. Applicant met a woman twelve years his junior on-line. She was a citizen of the United Kingdom (UK) living in the U.S. for a year as an au pair. They met in person and began a 3-4 week affair, during which time they had sexual relations three times. They had intimate contact at Applicant's office, ⁽²⁾ and sexual relations at a hotel. The affair lasted until the middle of January 1997, when it ended by mutual consent. Applicant had e-mail contact with the au pair until she returned to the UK in February 1997, at the end of her au-pair year. He last had contact with her by e-mail sometime in 1999.

Applicant's wife was unaware of this affair until sometime after December 2001. Applicant and his wife went through marital counseling between December 2001 and June 2002 (AE A), during which time Applicant asserts that his wife

"became aware of the relationship, but not of specific details (Answer)." In December 2004, Applicant's wife stated her knowledge of the affair in a single sentence: "I have full knowledge of my husband's extra-marital affair that took place during several weeks in Dec (sic) 1996 and Jan (sic) 1997." (AE A).

Applicant speaks a number of foreign languages, including Russian. He began learning Russian at a community college and with a private tutor in 1988-1989 (GE 2) and attended the Defense Language Institute from June 1990 to July 1991 while in the Army (GE 1). 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 (GE 2, AE B). 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 (GE 4). He has not advised his company security officers about his on-going chat room contacts with foreign nationals (Tr. 65).

Applicant had his special access revoked by another government agency in October 2000 after multiple polygraphs because of his affair with the foreign national and his continuing contacts with foreign nationals by e-mail and in internet chat rooms. ⁽³⁾

POLICIES

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline D (Sexual Behavior) and Guideline E (Personal Conduct).

BURDEN OF PROOF

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government. ⁽⁴⁾

CONCLUSIONS

The government established a Guideline D case by demonstrating that Applicant engaged in an adulterous affair ⁽⁵⁾ that his wife was unaware of until at least December 2001 and may not be fully aware of now. ⁽⁶⁾ This affair occurred at work and other public places. ⁽⁷⁾

Applicant failed to mitigate the security concerns raised by his sexual behavior. While the behavior occurred several years ago and has not recurred, ⁽⁸⁾ Applicant was not an adolescent and was substantially older than his paramour. His wife's one-sentence statement that she is fully aware of the circumstances of the affair is undercut by Applicant's statement that she was not aware of the specifics, suggesting that he may still be subject to coercion, exploitation, or

duress. In any event Applicant has the burden of demonstrating that he cannot be influenced by his past sexual behavior and he has done so only partially at best. ⁽⁹⁾ I resolve Guideline D against Applicant.

The government established a Guideline E case and Applicant did not mitigate the security concerns. His adulterous affair, undertaken a matter of days after his first contact with this foreign national and in public places, demonstrates extraordinarily poor judgement inconsistent with access to classified information ⁽¹⁰⁾ and leaves him potentially subject to coercion. ⁽¹¹⁾ His on-going contacts with foreign nationals by e-mail and in chat rooms provides a potential avenue to elicit information, a risk of which Applicant remains largely unaware or unconcerned. The internet contacts raise even greater security concerns because internet chat rooms are an environment where it is impossible to know the true identity of the person you are dealing with. I resolve Guideline E against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline D: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Paragraph 2. Guideline 4: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the 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 a security clearance for Applicant. Clearance denied.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. Applicant's answer asserts that he did not have sexual relations in his office, but acknowledges that "kissing and some intimate contact occurred." He repeated this explanation at hearing (Tr. 32, 45), but also suggested that he had sexual relations with her in the office (Tr. 45).
3. The government was also concerned by Applicant's apparent self-medication of his depression, by adjusting his depression medications before consulting with his physician. GE 3 demonstrates that this issue no longer retains any security significance.
4. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
6. E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
7. E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
8. E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

9. E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

10. E2.A5.1.2.1. Reliable, unfavorable information . . .

11. E2.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community or render the person susceptible to blackmail;