

DATE: February 3, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0612

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR GOVERNMENT

Pamela C. Benson, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On September 11, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "Safeguarding Classified Information Within Industry," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, "Defense Industrial Personnel Security Clearance Review Program" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to 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 Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated September 30, 1997, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on a written record, in lieu of a hearing. Department Counsel submitted the Government's written case on November 18, 1997. A complete copy of the file of relevant material (FORM)⁽¹⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. His response, dated January 4, 1998, offered no objections or denials, but merely sought understanding and compassion. The case was initially assigned to Administrative Judge John G. Metz, Jr. on January 14, 1998, but due to caseload considerations, was subsequently reassigned to, and received by, this Administrative Judge on January 27, 1998.

FINDINGS OF FACT

Applicant has admitted some of the factual allegations pertaining to personal conduct under Criterion E, as well as the allegation pertaining to criminal conduct under Criterion J. Those admissions are incorporated herein as findings of fact. He has denied the remaining allegations.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:⁽²⁾

Applicant is a thirty-two year old male employed by a defense contractor, and he is seeking to retain the TOP SECRET clearance which had previously been granted to him.

Applicant has been married on two occasions. His first marital relationship commenced in December 1986, and continued until September 1993.⁽³⁾ He has three children from that union. He remarried in February 1994.⁽⁴⁾ During the course of his first marriage, Applicant engaged in at least one sexual *ménage à trois* as well as at least one extramarital affair.⁽⁵⁾ There is no evidence to rebut his contention that no subsequent extramarital sexual activity occurred.

Commencing in 1996, Applicant underwent a personnel security investigation associated with his security clearance eligibility and suitability. He completed a Questionnaire For National Security Positions (SF 86) on July 18, 1996.⁽⁶⁾ At some point during the course of the Defense Investigative Service (DIS) investigation, Applicant's former spouse was questioned, and it was apparently revealed that Applicant had engaged in at least one sexual *ménage à trois* as well as at least one extramarital affair. Also, Applicant called his former spouse to inform her that, in response to a question from DIS as to the cause of their divorce, he had stated it was caused by his former spouse having an affair⁽⁷⁾-- a fact which was untrue.⁽⁸⁾ He asked her not to reveal his sexual *ménage à trois* or his extramarital affair(s).⁽⁹⁾ He also told her that if he lost his security clearance, he might lose his job, and "inferred" that he might not be able to pay future child support.⁽¹⁰⁾ While Applicant may not acknowledge that his inference constituted a "threat" against her, and, as noted by Department Counsel, upon realizing her potential future monetary loss, the former spouse subsequently recanted the allegation pertaining to the "threat,"⁽¹¹⁾ I find that the context in which it was made does render it a clear inducement or "threat."

On January 3, 1997, Applicant was interviewed by a DIS Special Agent, and as part of the subsequent signed statement of that same date, Applicant denied ever having engaged in either extramarital affairs or in a sexual *ménage à trois* during the course of his marriage to his former spouse.⁽¹²⁾ Furthermore, he denied ever asking or telling his former spouse to lie about the cause of the divorce. To support his contentions, Applicant indicated a willingness to undergo a polygraph examination.⁽¹³⁾ He certified and swore that his statement was true, complete, and accurate, but it was false. He had lied, falsified, omitted, and concealed his true history of personal conduct as it pertained to his extramarital affairs and sexual *ménage à trois*, or his efforts to conceal the true cause of his divorce. Applicant later attributed his omission and concealment to personal embarrassment and shame, as well as the fact that he had attempted to put things he was not proud of behind him.⁽¹⁴⁾ He claimed that his deception was not "done in self interest," but was "purely emotional."⁽¹⁵⁾

On July 17, 1997, Applicant was again interviewed by a DIS Special Agent, and as part of the subsequent signed statement of that same date,⁽¹⁶⁾ Applicant finally admitted having engaged in extramarital *affairs* as well as a sexual *ménage à trois* during the course of his marriage to his former spouse; admitted that he "may" have asked his former wife not to reveal anything about those relationships; and acknowledged that he had "inferred" that if he lost his security clearance and job, he might be unable to continue making child support payments.

Applicant has been employed by his current employer since December 1996. Prior to his current employment, he served on active military duty from June 1989 through February 1996. The quality of his performance has not been characterized.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead,

acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision--an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Personal Conduct - Criterion E]: Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

- (1) reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;
- (3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;

Conditions that could mitigate security concerns include:

None apply.

[Criminal Conduct - Criterion J]: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

- (1) any criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns include:

None apply.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽¹⁷⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant

or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Criterion E, the Government has established its case. Examination of Applicant's actions reveals a pattern of conduct involving questionable judgment, untrustworthiness, and unreliability. At some point during the period commencing in December 1986 and continuing until September 1993, Applicant engaged in extramarital sexual behavior which, if known to others, could have caused him to be vulnerable to undue influence or coercion. In this instance, the Government has chosen not to allege such sexual behavior under Criterion D, but instead chose to proceed under two other criteria.

There is little dispute surrounding Applicant's pattern of subsequent deceptive actions or his purposes, for he has admitted the essential elements of the allegations. Notwithstanding his certification, oath, and affirmation that his responses and statements were true and accurate, Applicant lied, falsified, omitted, and concealed his true history of personal conduct as it pertained to his extramarital affairs and sexual *ménage à trois*, and his efforts to conceal the true cause of his divorce. This is not a situation where there was inadvertent or accidental oversight, but rather calculated and deliberate omissions of relevant information which Applicant chose not to reveal simply because he felt it necessary to protect his interests or to avoid embarrassment. I cannot accept those deceptions, or the explanations as justification for same.

Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's offenses therefore pose a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system. First, he engaged in unacceptable sexual behavior; then he falsely denied such behavior, under oath, to a DIS Special Agent during a personnel security investigation; and then he attempted to suborn perjury by coercing his former spouse to lie in his behalf. Those actions generated certain consequences.

Applicant had clear opportunities to clean up his act, but he chose to lie, and attempted to get another to support his lie. He has chosen to place his self-interests above those of the country, and in so doing, has sundered the fiduciary relationship which he had with the Government by virtue of his acceptance of his responsibilities attendant to his security clearance. He has taken that special relationship and effectively dashed the trust and confidence which he had previously enjoyed. The evidence leaves me with grave questions and doubts as to Applicant's continued security

eligibility and suitability. Under the circumstances, that security-eligibility and suitability, in the face of the negative inferences to be drawn, is suspect and, considering the nation's security is at stake, is to be resolved against him. Thus, I conclude that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded against Applicant.

With respect to Criterion J, the Government has established its case. Statements made by an applicant for access to classified information encompass matters within the jurisdiction of the Department of Defense, and are provided for under Title 18, United States Code, Section 1001.⁽¹⁸⁾ Applicant lied under oath to a DIS Special Agent conducting a personnel security investigation. Applicant's explanations for failing to accurately relate his history of personal conduct, especially as it related to his extramarital affairs and sexual *ménage à trois* during the course of his marriage to his former spouse, as well as his attempt to induce his former spouse to falsely corroborate his lies, simply will not justify or exonerate such actions. I conclude, therefore, that Applicant's felonious conduct--misrepresentation, falsification, omission, and concealment (deception) of his personal conduct, was material and made in a knowing and willful manner in contravention of Title 18, United States Code, Section 1001.

While a person should not be held forever accountable for misconduct from the past without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future. Without more, I simply do not believe that the period of time from the acknowledged falsification--that which occurred in January 1997, and remained in place until the eventual admissions in July 1997, is sufficient to persuade me that recurrence of such criminal conduct is unlikely. Consequently, I conclude that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegation 2.a. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not suitable for access to classified information.

FORMAL FINDINGS

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

Paragraph 1. Criterion E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Criterion J: AGAINST THE APPLICANT

Subparagraph 2.a.: 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.

Robert R. Gales

Chief Administrative Judge

1. The Government submitted seven items in support of its contentions.

2. Applicant has been afforded several opportunities to furnish detailed scenarios of his personal conduct history, and in doing so, his stories have been inconsistent. He initially denied specific conduct, subsequently admitted it, and

eventually refined his comments to again deny portions of it. In reconstructing his history, I have created a mosaic of his various admissions, along with other evidence, and I find this mosaic to represent the actual facts.

3. *See* Item 4 at 5.

4. *Ibid.*

5. *See* Applicant's Response to the file of relevant material, dated January 4, 1998; Item 3 (Applicant's Response to SOR) at 1; and Item 6 (Applicant's sworn statement of subject, dated July 17, 1997) at 1. In fact, while Applicant sometimes characterized his activities as including "an extramarital affair," his sworn statement of July 17, 1997 altered the description to "I did have *affairs*. . . ." (emphasis added).

6. *See* Item 4 (Questionnaire For National Security Positions, dated July 18, 1996)

7. *See* Item 5, *supra* note 7 at 2. Applicant later stated that he had made the call merely as a courtesy to inform her as to his response. *See* Item 3, *supra* note 5 at 1.

8. *See* Attachment to Item 3 (letter from former wife, dated September 30, 1997) at 2.

9. *See* Item 6, *supra* note 5 at 1. Applicant denied telling his wife to lie, but acknowledged that he "may have asked" her not to say anything about his sexual *me'nage a`trois* or his extramarital affair(s). *Ibid.*

10. *Ibid.*

11. *See* Attachment to Item 3 (letter from former wife), *supra* note 8 at 1.

12. *See* Item 5 (Statement of Subject, dated January 3, 1997) at 1.

13. *See id.* at 2.

14. *See* Applicant's Response to the file of relevant material, *supra* note 5.

15. *Ibid.*

16. *See* Item 6, *supra* note 5.

17. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

18. The cited provision provides, in relevant part, as follows: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up a . . . material fact . . . shall be fined not more than \$10,000 or imprisoned not more than five years, or both."