



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 09-03470
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel

For Applicant: *Pro se*

October 28, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, and exhibits, I conclude that Applicant has not mitigated the security concerns related to foreign influence, sexual behavior, and personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP) signed on January 29, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On February 5, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline D (Sexual Behavior) of the adjudicative guidelines (AG).² In his Answer to the SOR, signed and notarized on February 17, 2010, Applicant admitted all the allegations under Guidelines B and D, and denied allegation 1.a. under Guideline E. Department Counsel was prepared to proceed on May 20, 2010, and the case was assigned to me on May 28, 2010. DOHA issued a Notice of Hearing on June 16, 2010, and I convened the hearing as scheduled on July 7, 2010. I admitted four Government exhibits, marked as Government Exhibits (GE) 1 through 4. Applicant testified and offered two exhibits, which I admitted as Applicant's Exhibits (AE) A and B. DOHA received the transcript (Tr.) on July 15, 2010.

Procedural Rulings

At the hearing, the Government requested I take administrative notice of certain facts relating to the Russian Federation (Russia). The facts are summarized at pages one through seven of the request, and supported by ten documents, U.S. government reports, pertaining to Russia. The documents are included to provide elaboration and context for the summary. I take administrative notice of the facts included in the reports. They are limited to matters of general knowledge, not subject to reasonable dispute.

Applicant objected to GE 2, his statement of April 2009, because he had mistakenly provided two inaccurate facts. He corrected those facts at the hearing and I admitted the document into the record. (Tr. 17-18)

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 57 years old, has worked for the same defense contractor since 1993. He currently works as a commissioning manager for that company. He submitted a security clearance application in September 2003 to request his first security clearance.

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the adjudicative guidelines implemented by the Department of Defense on September 1, 2006.

He received a secret clearance in 2004 and has held it continuously since then. He submitted a second security clearance application in 2009. (GE 1, 4; Tr. 30, 44)

Applicant was born in Kiev in the Soviet Union in 1953. He grew up in Ukraine when it was part of the Soviet Union. He was a member of the Communist party's youth organization. He received his engineering degree from the Soviet Merchant Marine Academy in 1975. He served three years in the military reserves. He last visited the area when he went to Ukraine in May 2010. (GE 1; Tr. 25-28, 30, 42, 44)

Applicant's mother, who is deceased, was a translator. His father, who was born in Ukraine, is a mechanical engineer. When Applicant's father lived in the Soviet Union, he was a member of the Communist Party. He and Applicant's stepmother are now U.S. citizens, and have lived in California for the past eight years. Applicant's sister also lives in California. Applicant has no blood relations in Russia or Ukraine. (GE 3; Tr. 25-28)

Applicant came to the United States in 1978, and became a naturalized U.S. citizen in 1984. In the 1980s, he lived in Ohio, where he met a Canadian citizen who was born in Russia. She left the Soviet Union when she was eight years old. They married in 1980 and have two daughters, 21 and 27 years old, and a son, 19 years old, all born in the United States. They divorced in about 1996. The children lived primarily with Applicant after the divorce. (GE 1; Tr. 28-30)

In 2001, Applicant married his current wife. She and her daughter, Applicant's stepdaughter, were born in Moscow and are dual U.S.-Russian citizens. Applicant's stepdaughter is now 14 years old and lives with Applicant and his wife. Her father lives in Moscow and she has contact with him when she visits Moscow. Applicant's wife was previously married to a Russian military pilot; she did not have children with him. She holds a masters degree in geophysics and was working as a geophysicist when they met. Currently, she does not work outside the home. Her parents, who are divorced, are Russian citizens living in Moscow. Applicant last visited his in-laws in Moscow in 2005. His father-in-law visited Applicant in the United States in 2007. Applicant's wife and her daughter last visited her parents in Moscow in 2009. His mother-in-law is retired, but formerly worked for an oil institute, and his father-in-law is an assistant director of an oil institute. The oil institute is a government entity. Applicant gets along with them, but does not communicate with them often. He has talked with them by phone once or twice. He has no other relatives in Russia, but does keep in touch with some friends there once or twice per year. (GE 1, 3; Tr. 28-36, 42-43)

As part of his job, Applicant traveled abroad. In 2005, while in Moscow, he met a travel agent who was a Russian citizen. They kept in touch by email and talked by telephone two to three times per week. In about summer 2005, they began a sexual relationship. Applicant's wife was unaware of the affair. He and the travel agent had sexual relations four times in locations where Applicant was traveling for his job, including Russia, Germany, Poland, and Ukraine. Applicant made travel and hotel arrangements so that he and the agent could meet. He testified that he told her he was a

mechanical engineer, but provided no details of his job. Applicant noted in his written statement that he ended the relationship in 2006. However, he testified that the last time he had contact with her was "Right after my second polygraph, which was probably early 2007."³ At that time, he telephoned her to say they could not continue the relationship. (GE 2; AE A; Tr. 36-39, 41, 53-55)

In 2006, Applicant started sending money to the travel agent because she told him she had been diagnosed with bone cancer. He sent \$100 to \$200 several times to pay for medication. He did not otherwise support her or send money to any of her relatives. Between 2006 and 2007, he sent her a total of about \$1,000. (Tr. 38, 53-54)

Also in 2006, Applicant was being submitted by his company on a contract with a federal agency. In preparation, he was required to take a polygraph examination. In total, four polygraph examinations were administered to Applicant between 2006 and 2007. He took the first one in about November 2006. Applicant did not disclose his illicit relationship during the first polygraph examination because the polygrapher was a female and he did not feel comfortable discussing it with her. He admitted at the hearing that he did not disclose it to her because he was embarrassed and ashamed of it. He disclosed the affair during his second polygraph examination, because it was administered by a man, and he "...felt more comfortable to tell him about that." He explained in his written statement of April 2009, "I did not deliberately withhold this information. I was not attempting to hide the issue because I did admit it to the polygrapher." Applicant testified that he had a security briefing one time regarding handling classified documents. He also had briefings before traveling on business warning against revealing classified information to foreign nationals. He testified that he did not disclose the foreign relationship to his facility security officer because he did not know it was required. As of the date of the hearing, Applicant's wife did not know about his affairs. He testified that "It wouldn't be very pleasant if she found out about it." (GE 2; Tr. 22, 39-41, 49, 51, 56-59)

At the hearing, Applicant denied having any other sexual affairs while married to his current wife. He then admitted that he had one in New York in 2003. He noted that it occurred before he held a security clearance. The woman with whom he had this sexual relationship was a Russian citizen. He testified that she is now a naturalized U.S. citizen, but he was unsure if she was a U.S. citizen at the time of their affair. (Tr. 41, 46-47)

Applicant provided performance evaluations from his current employer that cover 1997-1998, 1998-1999, 2000, 2004, 2006, and 2007-2008. They show that in most categories on which he was rated, he achieved a "4" rating, indicating he consistently met and sometimes exceeded the performance standards. He also received a "5" in some categories, indicating that he often exceeded performance standards. He was praised for his extensive engineering background, and mentoring of younger staff. He is described as "a man of his word" who is calm and level-headed, and in 2007-2008, his

³ Applicant provided conflicting statements about whether the affair ended in 2006 or 2007.

work was described as key to the “high level of quality at the conclusion of testing and acceptance.” (AE B)

Administrative Notice

The Russian Federation (Russia)

I take administrative notice of the following facts about Russia, which appear in official U.S. government publications.

The Russian Federation (Russia) is composed of 21 republics. It achieved independence with the dissolution of the Soviet Union on August 24, 1991. It has a centralized political system, with a bicameral legislature, a weak judiciary, and power concentrated in the president and prime minister. Russia’s large population of more than 142 million people is both multinational and multi-ethnic. Russia is a nuclear superpower which, since the dissolution of the Soviet Union, continues to develop politically, socially, and economically.

The United States and Russia share certain common strategic interests. Of interest to both states are counterterrorism and the reduction of strategic arsenals. Both share a common interest in controlling the proliferation of weapons of mass destruction and the means to deliver them. The Cooperative Threat Reduction (CRT) program was launched in 1992 to provide for the dismantlement of weapons of mass destruction in the former Soviet Union. The CRT program was renewed in 2006 for seven years, until 2013.

Since 2003, U.S.-Russian relations have often been strained. Tensions between the United States and Russia increased in August 2008, when Russia sent its army across an internationally recognized boundary in an attempt to change by force the borders of Georgia, a country with a democratically-elected government. Russia’s assault on Georgia followed other troubling signs: threats against Poland, including the threat of nuclear attack; suspicious poisonings and killings of journalists and those deemed “undesirable,” including the President of Ukraine; the apparent use of energy resources to apply political pressure against Ukraine, Lithuania, and the Czech Republic; and the creation in Russia’s state-controlled media of an “enemy image” of the United States.

There have been recent encouraging signs that Russia is prepared to be more cooperative with the United States, as illustrated by President Medvedev’s agreement last summer to support air transit through Russia of military cargo in support of operations in Afghanistan, and Moscow’s willingness to engage with the United States to reduce the nuclear threat from Iran.

The Russian Federation’s intelligence capability is significant and focuses on collection of information from the United States. Russia has targeted U.S. technologies and has sought to obtain protected information from them through industrial espionage.

Russian espionage specializes in military technology and gas and oil industry expertise. As of 2005, Russia was one of the most aggressive collectors of sensitive and protected U.S. technology. In addition to its technology collection and espionage activities against the United States, Russia supports missile programs and nuclear and biotechnology projects in other countries. Russia has provided missile technology to China, Iran, Syria, and Venezuela. These technologies can be used in the construction of weapons of mass destruction. Despite U.S. concerns, Russia continues to construct nuclear reactors in Iran.

Russia's internal problems include terrorism and a poor human rights record. Human rights abuses, as reported by the United States Department of State, include: reports that the government or its agents committed politically motivated killings and other arbitrary killings; credible reports that law enforcement engaged in torture, abuse and violence; extremely harsh and life-threatening prison conditions; and arbitrary arrest and detention. The State Department has warned U.S. citizens of safety concerns related to travel in Russia.

The U.S. Department of State reports allegations that Russian government officials and others conduct warrantless searches of residences and other premises and electronic surveillance without judicial permission. This surveillance includes Ministry of Internal Affairs and Federal Security Office monitoring of internet and e-mail traffic. Additionally, Russian law enforcement agencies have legal access to the personal information of users of telephone and cell phone services. In addition, adults must carry internal passports when traveling within the country, and must register with local authorities within a certain time after arriving at a new location.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines B, E, and D.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case.

Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring that each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his 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.⁷

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern under Guideline B:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. I have considered all the disqualifying conditions, and find that the following are relevant to the case:

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

The possession of close family ties with a resident or citizen of a foreign country is not, of itself, disqualifying under Guideline B. However, the country in question must be considered. Russia has focused its significant intelligence capability in an aggressive program of targeting the United States to collect information from the United States. Applicant has close ties to his immediate family members – his wife and stepdaughter -- and currently shares living quarters with them. They maintain Russian citizenship, and travel to Russia to visit family. Such ties represent a heightened risk of exploitation and support application of AG ¶ 7(a) and (d).

I have considered the mitigating conditions under Guideline B, ¶ 8, especially the following:

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Relationships with immediate family members are presumed to be close, unless the evidence demonstrates otherwise. Here, the record does not provide any indication of distance between Applicant and his wife and stepdaughter. In evaluating mitigation under AG ¶ 8(b), I considered the extent of Applicant's U.S. ties, including his three decades living in the United States, his 26 years as a U.S. citizen, his three adult children who were born in the United States, and his years of working for a federal defense contractor. However, Applicant also is bound by ties of affection to his wife and his young stepdaughter, who maintain Russian citizenship. His wife and stepdaughter have relationships with Applicant's in-laws, travel to Moscow to visit them, and were there only months before the hearing.

Significantly, the fact that Applicant chose to begin a close relationship with another Russian citizen, despite holding a security clearance, raises serious doubts about his willingness to place U.S. government interests before his own. He maintained a secret relationship with a foreign citizen for more than a year. In addition, his willingness to provide his girlfriend with funds demonstrates that he had strong ties of affection and obligation to her. Given his conduct, and Applicant's current ties to Russian citizens, I cannot confidently conclude he would resolve a conflict of interest in favor of the United States. AG ¶¶ 8(b) and 8(c) do not apply.

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern about personal conduct:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise security concerns and may be disqualifying. The following conditions are relevant:

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Applicant had a sexual liaison with two foreign nationals while he was married. He kept both relationships secret from his wife. The first occurred in 2003, before he was granted a security clearance. The second was initiated while he was traveling on government business, working for a defense contractor overseas, and holding a security clearance. He maintained that relationship for more than one year. He did not inform his security officer of his relationship. He did not inform the polygrapher during his first polygraph examination. He only informed the government at a subsequent polygraph examination. As of the date of the hearing, he still had not disclosed these relationships to his wife, and he did not indicate any intent to do so. Under the Appeal Board's jurisprudence, Applicant's behavior made him vulnerable to coercion during all the time that his conduct remained hidden from his company.⁸ He remains vulnerable, because his wife is still unaware of his infidelities. AG ¶ 13(c) applies.

AG ¶14 provides the following relevant mitigating conditions:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant's conduct is unmitigated. Applicant's conduct ended approximately three years ago. However, it did not occur under unusual circumstances, as it happened

⁸ See, ISCR Case No. 91-0259 at 5 (App. Bd. Oct. 7, 1992).

on business trips, which are part of Applicant's work assignments. The fact that he engaged in two separate extramarital affairs raises doubts about his trustworthiness. Most significant is the fact that Applicant has not demonstrated rehabilitation by disclosing his affairs to his wife. He remains vulnerable to coercion because his wife is still unaware of his conduct. AG ¶ 14(b) and (c) do not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Guideline E allegations implicate the following disqualifying conditions under AG ¶ 16:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

As discussed *supra*, Applicant concealed his extramarital affairs in New York in 2003 and in Europe between 2005 and 2007. He does not want his wife to learn about his liaisons. He engaged in the most recent relationship while he held a security clearance. He did not disclose his foreign contacts to his FSO. Applicant is vulnerable to exploitation because disclosure would affect his marital relationship. AG ¶ 16(e) applies.

Under AG ¶ 17, the following mitigating conditions are relevant:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's offense was not minor. He violated his wife's trust and the government's trust. The fact that he did not disclose his most recent affair until 2009, during a polygraph examination, indicates he disclosed the affair due to the security process, rather than as an effort toward rehabilitation. His conduct casts doubt on his trustworthiness. Moreover, Applicant has taken no steps to eliminate his vulnerability to coercion in relation to his wife, who remains unaware of his infidelity. AG ¶ 17(c) and (e) do not apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a):

(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's history includes many positive elements: he has long been a U.S. citizen; has raised three children who are native U.S. citizens; he has provided service to the government through his many years working on federal contracts; and has maintained a solid record of performance on the job. However, numerous facts weight against granting Applicant a security clearance. He has close family ties to his wife and stepdaughter, who are dual U.S.-Russian citizens. They have ongoing relationships with Applicant's in-laws in Moscow. Concerns remain under Guideline B because of these ties to Russia, a country that poses a heightened risk of exploitation.

Applicant's affairs with foreign nationals also raise serious concerns. At the time Applicant began his affair with the Russian national in New York, he was 50 years of age. When he began the affair with the Russian national in Europe, he was 52. Applicant was a mature and responsible adult, yet did not exercise good judgment or trustworthiness. His trustworthiness is also undermined by the fact that he consciously

decided not to disclose his affair with a foreign national to the polygrapher during his first polygraph examination. Moreover, Applicant made a conscious and voluntary decision to engage in a sexual relationship with a foreign national while he held a security clearance. Finally, Applicant has not demonstrated rehabilitation, or eliminated his vulnerability to coercion, because he has not disclosed his extramarital affairs to his wife.

A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has not satisfied the doubts raised under the guidelines for foreign influence, personal conduct, and sexual behavior. Such doubts must be resolved in favor of the Government.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.c.	Against Applicant
Paragraph 2, Guideline E	AGAINST APPLICANT
Subparagraphs 2.a. – 2.b.	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraph 3.a.	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge