



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



In the matter of:)
XXXXXXXXXXXXXXXXXXXXXXXXXXXX) ISCR Case No. 15-01212
Applicant for Security Clearance)

Appearances

For Government: Alison P. O'Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

09/28/2016

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ I grant Applicant's clearance.

On 27 August 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B, Foreign Influence.² Applicant timely answered the SOR, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 7 June 2016, and I convened a hearing 7 September 2016. DOHA received the transcript 15 September 2016, and the record closed.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-3, and hearing exhibits (HE) I-II.

²DoD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the SOR allegation. He is a 47-year-old senior strategic technical engineer employed by a defense contractor since May 2015. He has been continually employed in similar positions since he retired from the military in December 2006. He was briefly unemployed from April 2014 to May 2015 (GE 3; Tr. 27). He has been married since February 1988, and has several adult children, along with an adopted step-child, with his wife. His wife is a naturalized U.S. citizen, born in Germany. Applicant and his wife own a house in Germany worth nearly \$700,000. Applicant reported this foreign interest, his foreign travel, and his affair with a foreign national on his November 2011 clearance application (GE 1).

Applicant enlisted in the United States (U.S.) military in July 1986, at age 17, and served honorably on active duty for over 20 years, retiring in paygrade E-7 in December 2006. His father was career military. Applicant seeks to retain the clearance he has held, as needed,³ since shortly after enlisting—including the industrial clearance he has held since December 2007 (GE 1).

From May 2008 to October 2014, Applicant engaged in an extra-marital affair with a Ukrainian citizen. They met at a salsa party while they were both deployed overseas, he as the chief operations manager for a Government contractor, she as an employee of another U.S. Government agency (AGA), with whom she held a clearance (Answer).

Applicant and his paramour were co-located until December 2008, when Applicant undertook other overseas assignments for his company. They maintained daily telephone contact until May 2009, when she went to work for the same company, and they were both assigned to the same contract in a different country. She left the company in August 2011 and returned to Ukraine until early 2012, when she returned to work for AGA. Except for that brief hiatus, she has been employed with AGA for the last 17 years (GE 3). When Applicant and his paramour were not co-located, they maintained regular communication by telephone and computer. Their relationship ended in October 2014, from growing apart. Applicant ended the relationship (Tr. 23, 36).

During the time Applicant and his paramour were together, they often traveled together, including many short trips to Ukraine between March 2010 and October 2012, during which he met her parents. Applicant notified his company, including security officials, of his foreign contact in early 2010. He later informed his wife. Applicant acknowledged that his infidelity caused stress in his marriage, but he and his wife

³His clearance was suspended from November 1997 to 2001, while he was treated for depression (GE 1; Tr. 27-28).

remain together (Tr. 24-25). He has given conflicting information about whether the question of divorce ever arose.⁴

The United States established diplomatic relations with Ukraine in 1991, following its independence from the Soviet Union. The United States attaches great importance to the success of Ukraine's transition to a modern democratic state with a flourishing market economy. U.S. policy is centered on realizing and strengthening a democratic, prosperous, and secure Ukraine more closely integrated into Europe and Euro-Atlantic structures. The U.S.-Ukraine Charter on Strategic Partnership highlights the importance of the bilateral relationship and outlines enhanced cooperation in the areas of defense, security, economics and trade, energy security, democracy, and cultural exchanges. It also emphasizes the continued commitment of the United States to support enhanced engagement between the North Atlantic Treaty Organization (NATO) and Ukraine. To fulfill one of the key tenets of the charter, the two countries have established the Strategic Partnership Commission.

Ukraine is a republic with a political system composed of three branches of government. In February 2014, the parliament voted to remove President Yanukovich from office after he fled the country. This followed three months of massive anti-government protests on Kyiv's central square (the Maidan) over his decision to postpone signing political and trade agreements with the EU, in favor of closer ties with Russia, as well as his violent responses to the protests. Later in February 2014, Russian armed forces intervened militarily in Crimea, which Russia occupied and purported to "annex" in March 2014. Additional unrest and civilian deaths occurred when pro-Russian protesters in eastern and southern Ukraine seeking more autonomy from the national government, clashed with government forces. In May 2014, President Poroshenko was elected, which signaled a strong democratic mandate for change in Ukraine.

The Russian occupation of Crimea has displaced more than 18,000 Crimeans and caused numerous human rights abuses. Russia has been accused of orchestrating attacks by Ukrainian separatists. Ukraine has also been cited for abuse of persons in custody, harsh prison conditions and a corrupt judiciary, societal violence against women, children, and ethnic minorities, and human trafficking.

Despite attempts to cease hostilities and establish peace through political dialog, the government's efforts have been largely rejected and the situation in Ukraine remains precarious. Violent clashes between Russia-backed separatists and Ukrainian forces continue in eastern regions of the country. In addition, Russian military forces continue to occupy the Crimean Peninsula, supply weapons and material support to the separatists, and are present on the eastern border of Ukraine.

⁴During his June 2014 subject interview (GE 3), Applicant reported that he asked his wife for a divorce, but she refused. However, he testified (Tr. 38-39) that he never asked her for a divorce.

In December 2015, the State Department issued a warning to U.S. citizens to defer all travel to Crimea and the eastern regions of Donetsk and Luhansk oblasts. Separatist groups have threatened, detained or kidnapped persons, including U.S. citizens, and violent clashes have caused over 9,000 deaths. There are reports of abuse against local populations that oppose separatist goals.

The United States has stood by Ukraine as Russia has sought to stymie its new democratic government. The leaders of the past who controlled Ukraine for decades are fighting back using their control of the media, state owned enterprises, Rada (parliament) deputies, the courts and the political machinery, while holding old loyalties and threats over the heads of decision-makers to block change.

Since the start of the crisis, the United States has committed over \$760 million in assistance to Ukraine, in addition to two, \$1 billion loan guarantees. U.S. advisors serve in almost a dozen Ukrainian ministries and localities and help deliver services, eliminate fraud and abuse, improve tax collection, and modernize Ukraine's institutions.

Since November 2015, the United States has noted that Ukraine has largely stabilized its currency and is rebuilding its reserves; seen some modest growth in the economy; approved a 2016 budget in-line with IMF requirements; passed civil service reform to create competition and transparency; stood up an independent Anti-Corruption Bureau and Special Prosecutor; and, has begun to decentralize power and budget authority to local communities to improve services and policing for its citizens.¹⁵ The Ukrainian government has not been known for targeting U.S. citizens for human rights abuses or intelligence collection.

Policies

The adjudicative guidelines (AG) list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline B (Foreign Influence).

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 substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to 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 judgement, 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.⁵

Analysis

Under Guideline B (Foreign Influence), an applicant’s foreign contacts and interests may raise security concerns if the individual 1) has divided loyalties or foreign financial interests, 2) may be manipulated or induced to help a foreign person, group, organization, or government in a way contrary to U.S. interests, or 3) is vulnerable to pressure or coercion by any foreign interest. Foreign influence adjudications 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, whether the country is known to target U.S. citizens to obtain protected information and/or is associated with a risk of terrorism.⁶

Evaluation of an individual’s qualifications for access to protected information requires careful assessment of both the foreign entity’s willingness and ability to target protected information, and to target ex-patriots or current citizens to obtain that information, and the individual’s susceptibility to influence, whether negative or positive. More specifically, an individual’s contacts with foreign family members (or other foreign entities or persons) raise security concerns only if those contacts create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.⁷ Further, security concerns may arise through connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information.⁸ In addition, security concerns may be raised by a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.⁹ Finally, failure to report, where required, association with a foreign national may raise security concerns.¹⁰

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

⁶AG ¶6.

⁷AG ¶7(a).

⁸AG ¶7(c).

⁹AG ¶7(e).

¹⁰AG ¶7(f).

Concerning potential mitigating factors, AG ¶ 8(a), “the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.,” largely mitigates the Applicant’s circumstances regarding his former Ukrainian paramour.

Applicant has had no contact with his paramour since October 2014, when he ended their relationship. He had no other contacts with Ukraine. While Applicant’s contacts with his paramour over the six-plus years of their affair cannot be considered casual and infrequent during the course of the affair, that contact ended nearly two years ago, with apparently no lingering aftereffects. This includes the fact that he and his wife are still married.

The record contains little information about the paramour’s connections to Ukraine. However, she was vetted by AGA, and has been employed by it for 17 years. Moreover, Applicant’s conduct demonstrates that he understands his security obligations completely, and acted on that knowledge. He reported his involvement with a foreign national to his company and its security officers without apparent adverse action. He reported that involvement on his most recent clearance application.

Ukraine and the U.S. have significant bilateral relations since Ukraine obtained its independence in 1991. U.S. policies have focused on encouraging Ukraine’s democratic growth, strengthening its ties to western Europe and Euro-Atlantic structures, and helping Ukraine fend off Russian efforts to keep Ukraine in the Russian sphere of influence. Moreover, Ukraine is not known to be a significant collector of protected U.S. information.

A heightened risk of undue foreign influence may also be mitigated under AG ¶ 8(b), where “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.” Applicant’s sense of loyalty or obligation to his former paramour is presently non-existent. Furthermore, there is no sense of loyalty to a foreign group, government, or country. Moreover, Applicant has persuaded me that he can be expected to resolve any conflict of interest in favor of the United States, in whose service he has been employed since July 1986.

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a). Applicant’s connections to Ukraine ended in October 2014. It cannot be said that he demonstrated any signs of being subject to foreign influence during his affair—which he fully disclosed to the relevant parties. He can hardly be considered to be subject to foreign influence now that that affair has ended. After considering all the

facts and circumstances, I find it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Accordingly, I resolve Guideline B for Applicant.

Formal Findings

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph a: For Applicant

Conclusion

Under 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 Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge