

DATE: April 4, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0057

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Kevin J. O'Leary, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated October 3, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law when he closed the record in this case; and (2) whether the Administrative Judge erred by failing to consider the totality of the facts and circumstances of Applicant's case.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) dated February 17, 2000 to Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on April 11, 2000.

By letter dated June 9, 2000, the Applicant was advised that, effective March 22, 2000, there was a moratorium on the issuance of decisions in cases involving the possession or use of a foreign passport. On August 31, 2000, the Administrative Judge issued an Order, in which he: (1) provided Applicant with a copy of an August 16, 2000 memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline"; (2) advised Applicant that the ASDC3I memorandum applied to Applicant's case; (3) reopened the record to allow either party the opportunity to request a hearing; (4) gave the parties the opportunity to submit additional documentary evidence before 5:00 p.m. on Monday, October 2, 2000; and (5) indicated that the record in the case would close at 5:00 p.m. on Monday, October 2, 2000 if neither party requested a hearing.

On September 19, 2000, Applicant submitted to the Administrative Judge, by fax, a request that the record in his case be held open so that he could surrender a foreign passport he possessed and forward documentation of that surrender. On

September 21, 2000, Department Counsel submitted to the Judge a response to Applicant's request, indicating that Department Counsel "has no objection to the record being held open for a brief period of time so that Applicant can submit additional documentary evidence relating to his foreign passport. Accordingly, Department Counsel requests that the Judge establish a date certain for closure of the record, not later than 30 days from the date of the Applicant's request."

On September 22, 2000, the Administrative Judge issued an Order, in which he ruled that any document received from the parties after 5:00 p.m. on Monday, October 2, 2000 would not be

admitted into evidence. On October 3, 2000, the Administrative Judge issued his decision in this case.

Administrative Judge's Findings

Applicant was born on an island that was then a possession of a foreign country. The island later became an independent country (hereinafter referred to as FC). Applicant emigrated from FC and became a naturalized U.S. citizen in 1974. Under the laws of FC, Applicant is considered to be an FC citizen because he was born there.

Applicant enlisted in the U.S. military in 1968 and served more than 21 years. Applicant retired as an officer (O-3) with a commendation medal.

In 1972, Applicant married a woman who was born in FC and who became a naturalized U.S. citizen in 1979. Applicant has two sons who are U.S. citizens. Applicant's widowed mother became a naturalized U.S. citizen in 1967. Applicant has five half-siblings who are U.S. citizens, four half-siblings who are FC citizens living outside the United States, and three half-siblings who are FC citizens living as permanent resident aliens in the United States.

Applicant visits his relatives in FC on a regular basis. Applicant has traveled to FC about once a year during the period 1993-1999.

When entering FC, persons traveling with passports issued by countries other than FC experience lengthy immigration lines. While Applicant was on active duty with the U.S. military, he did not experience those delays because he entered FC simply by showing his military identification card. After retiring from the U.S. military, Applicant had to go in the long alien tourist lines whenever he traveled to FC. Strictly for personal convenience, Applicant applied for and received an FC passport in September 1992. Applicant used the FC passport to enter FC. Applicant used his U.S. passport to enter a foreign country other than FC.

Applicant inherited from his father about three acres of undeveloped land in FC. Applicant does not have to pay real estate taxes on that land and he does not know its market value. Applicant has a savings account in FC with a balance of just more than \$800. Applicant does not own any stock or have any other financial interest in FC firms. Applicant has an estimated net worth in excess of \$223,000 in the United States.

Administrative Judge's Conclusions

Applicant's dual citizenship is based on his birth in FC and his naturalization as a U.S. citizen. Applicant exercised his FC citizenship, after he became a naturalized U.S. citizen, when he applied for an FC passport and used it repeatedly to enter FC. The fact that Applicant got and used the FC passport to enter FC merely for personal convenience does not satisfy his burden of overcoming the government's case against him. Guideline C is concluded adversely to Applicant.

Applicant's family ties with FC and his financial interests in FC do not demonstrate foreign influence that presents a current security concern. Guideline B is concluded favorably for Applicant.

It is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

1. Whether the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law when he closed

the record in this case. Applicant contends the Administrative Judge erred by closing the record and failing to consider Applicant's post-hearing submission about his surrender of the FC passport, thereby prejudicing Applicant's right to have a full and complete record developed in his case. In support of this contention, Applicant: (a) notes that Department Counsel did not oppose an extension of time that would have allowed Applicant until October 19, 2000 to make his submission documenting his surrender of the FC passport; (b) assumes that the Judge "meant to allow the Applicant two additional weeks to present evidence"; and (c) points to decisions by Hearing Office Judges in other foreign passports case involving the surrender of a foreign passport as proof that the Judge's action was prejudicial to Applicant. Department Counsel contends: (i) the Judge did not err by deciding to leave the record open until October 2, 2000, and (ii) in the alternative, any error by the Judge was not prejudicial because Applicant did not make his submission until after October 19, 2000.

The Administrative Judge had discretion in setting a deadline for allowing a post-hearing submission. *See* Directive, Additional Procedural Guidance, Item E3.1.10 ("The Administrative Judge may rule on questions on procedure, discovery, and evidence and shall conduct all proceedings in a fair, timely, and orderly manner."). *See also* ISCR Case No. 99-0597 (December 13, 2000) at pp. 5-6 (discussing parameters of Judge's discretion in deciding whether to allow a post-hearing submission). The Judge was not required to grant Applicant an open-ended extension of time. Furthermore, the absence of an objection by Department Counsel to an extension of time for Applicant until October 19, 2000 did not compel the Judge to grant Applicant such an extension. Applicant's speculation about what the Judge meant to do about granting Applicant additional time is undercut by the reality of the Judge's actions in closing the record and issuing his written decision. *Cf.* DISCR Case No. 87-1812 (March 16, 1989) at p. 7 n.6 (plain language of issued decision overrides any argument that Hearing Examiner made a "Freudian slip" and did not mean what he actually wrote). The Board does not have to agree with the Judge to conclude he acted within the bounds of his discretion in adhering to his original October 2, 2000 deadline for receiving submissions from the parties.

Even if the Board were to assume solely for purposes of deciding this appeal that the Administrative Judge erred by not giving Applicant until October 19, 2000 to make his submission, Department Counsel's alternative argument has merit. The document Applicant wanted to submit for the Judge's consideration is dated October 23, 2000. Since Applicant could not submit a document dated October 23, 2000 by October 19, 2000, it would not have mattered even if the Judge had set October 19, 2000 as the deadline for submissions from the parties.

2. Whether the Administrative Judge erred by failing to consider the totality of the facts and circumstances of Applicant's case. Applicant challenges the Judge's adverse conclusions under Guideline C (Foreign Preference), contending the Judge erred by not considering the totality of the circumstances of his case. In support of this contention, Applicant argues: (a) his military service, his work with two government contractors, and testimony by his witnesses demonstrate he has a preference for the United States; (b) the facts and circumstances of Applicant's use of an FC passport do not demonstrate he prefers FC over the United States; (c) FC is a country friendly to the United States and poses no more than a minimal security risk; and (d) under the whole person concept, Applicant does not pose a risk of foreign influence that presents a current security concern. ⁽¹⁾ Department Counsel contends Applicant's case falls within the scope of the August 16, 2000 ASDC3I memo concerning the possession and use of foreign passports and that as late as October 19, 2000 Applicant had not submitted proof that he no longer possessed an FC passport.

The ASDC3I memo addresses security clearance adjudications in cases involving the possession and use of a foreign passport. Applicant's case involves the possession and use of an FC passport. The ASDC3I memo indicates that it "applies to all cases in which a final decision has not been issued as of the date of this memorandum." The ASDC3I memo was applicable at the time this case was pending before the Administrative Judge. *See* ISCR Case No. 99-0424 (February 8, 2001) at pp. 6-8 (discussing why application of ASDC3I memo to case pending when that memo was issued does not violate *Ex Post Facto* Clause or *Due Process* Clause).

In its reply brief, Department Counsel relies on applicability of the ASDC3I memo to Applicant's case. Even in the absence of a cross-appeal, the non-appealing party is entitled to urge affirmance of the decision below on the basis of any matter supported by the record, even if the argument relies on matters overlooked, ignored, not relied on, or even rejected by the lower tribunal. *See, e.g.,* ISCR Case No. 00-0244 (January 29, 2001) at p. 7. Department Counsel correctly notes that, as of the close of the record below, there was no evidence that Applicant had surrendered his FC passport. Furthermore, there is no record evidence that Applicant had presented any evidence that his possession and use

of an FC passport were approved by an appropriate agency of the United States government. The Judge's failure to mention or discuss the ASDC3I memo does not negate or nullify the applicability of that memo to Applicant's case. Application of the ASDC3I memo mandates an adverse decision in this case.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below that warrants remand or reversal. The Board affirms the Administrative Judge's adverse security clearance decision on alternate grounds.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Applicant's argument that he does not pose a risk of foreign influence is moot because the Administrative Judge reached favorable conclusions under Guideline B (Foreign Influence), and those favorable conclusions are not at issue on appeal.