

DATE: February 27, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-01331

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Williams S. Fields, Esq., Deputy Chief Department Counsel

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge John G. Metz, Jr. issued a decision, dated October 16, 2001, 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 issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated May 3, 2001. The SOR was based on Guideline C (Foreign Preference). A hearing was held on August 14, 2001. The Administrative Judge issued a written decision, dated October 16, 2001, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse security clearance decision.

### **Scope of Review**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural

Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

### **Appeal Issue**

Applicant does not specifically challenge the Administrative Judge's findings of fact about his possession and use of a foreign country (FC) passport. However, Applicant argues: (1) the facts and circumstances of his possession and use of an FC passport do not demonstrate a foreign preference under Guideline C; (2) the Administrative Judge failed to give due weight to Applicant's hearing testimony that he is willing to renounce his FC citizenship if the Department of Defense will find that it is clearly consistent with the security interests of the United States that he do so; (3) the Judge gave undue weight to the record evidence that Applicant may be eligible for retirement benefits from FC; (4) favorable security clearance decisions have been made in other DOHA cases that are similar to Applicant's case; and (5) Applicant's life and work in the United States show that he would not allow any foreign preference or foreign influence to affect his ability to safeguard classified information, and would never betray the United States in any way.

Applicant's first and fourth arguments rely on favorable security clearance decisions made by DOHA Administrative Judges in four cases: ISCR Case No. 99-0062 (September 15, 1999); ISCR Case No. 99-0295 (November 16, 1999); ISCR Case No. 99-0452 (September 24, 1999); and ISCR Case No. 99-0511 (December 30, 1999). For the reasons that follow, the Board concludes those decisions do not show the Judge erred in this case.

First, although decisions issued by Hearing Office Administrative Judges may be cited as persuasive authority, they are not legally binding on the Administrative Judge in this case or on the Board in any case. *See, e.g.*, ISCR Case No. 98-0619 (December 27, 1999) at p. 4 (discussing precedential value of Administrative Judge decisions). Therefore, the four Administrative Judge decisions cited by Applicant are not dispositive of the merits of his case.

Second, the favorable decision in ISCR Case No. 99-0295 was reversed by the Board on October 20, 2000, and the favorable decision in ISCR Case No. 99-0511 was reversed by the Board on December 19, 2000. Accordingly, those Administrative Judge decisions are not persuasive authority to the Board.

Third, although the Board affirmed the favorable decision in ISCR Case No. 99-0452, the Board did not affirm the passage from the Administrative Judge's decision cited by Applicant to support his argument that his possession and use of an FC passport do not demonstrate a foreign preference. The portion of the Judge's decision relied on by Applicant was specifically found to be based on an analysis that was arbitrary, capricious, and contrary to applicable legal authority. *See* ISCR Case No. 99-0452 (March 21, 2000)(Board decision) at pp. 3-5. Furthermore, the Board has held that the negative security significance of an applicant's conduct which falls under Guideline C (Foreign Preference) is not negated or diminished merely because an applicant engages in such conduct for personal reasons or personal convenience. *See, e.g.*, ISCR Case No. 99-0424 (February 8, 2001) at p. 13. Accordingly, Applicant cannot rely on the passage he cites from the Judge's decision in ISCR Case No. 99-0452.

Fourth, the four Administrative Judge decisions cited by Applicant predate the issuance of the August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) concerning the possession and use of foreign passports. The ASDC3I memorandum superseded any prior Administrative Judge decision and any prior Board decision concerning the possession and use of a foreign passport. *See, e.g.*, ISCR Case No. 00-0009 (September 26, 2001) at p. 3; ISCR Case No. 99-0532 (February 27, 2001) at p. 6.

Applicant's second, third, and fifth arguments also fail to demonstrate the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The record evidence shows that Applicant has possessed and used an FC passport to enter and exit FC. As of the date of the hearing, Applicant still possessed an FC passport. The Judge correctly concluded Applicant's continued possession of an FC passport falls under the terms of the ASDC3I memorandum, and that application of the ASDC3I memorandum mandated an adverse security clearance decision in this case. Because application of the ASDC3I memorandum is dispositive, the Board need not address the merits of

Applicant's second, third, and fifth arguments.

Even if the Board were to construe Applicant's appeal arguments as raising the issue of the wisdom or desirability of the ASDC3I memorandum, the result would be the same. The ASDC3I memorandum is legally binding on DOHA Hearing Office Administrative Judges and the Board, and its wisdom or desirability is not subject to being litigated in these proceedings. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 6.

### **Conclusion**

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

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