

DATE: December 13, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-01295

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Kathryn M. Braeman issued a decision, dated September 10, 2001, in which she 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's adverse security clearance decision is arbitrary, capricious, or contrary to law; and (2) whether the Board should remand the case with directions on how Applicant can address the security concerns in his case.

### **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) and Guideline B (Foreign Influence).

Applicant submitted an answer to the SOR, in which he indicated that he did not want a hearing in his case. A File of Relevant Material (FORM) was prepared and a copy of the FORM was provided to Applicant. No response to the FORM was received from Applicant. The case then was assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated September 10, 2001, in which she 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 Issues

The Administrative Judge entered findings and conclusions favorable to Applicant with respect to the matters covered by SOR paragraph 2 (Guideline B, Foreign Influence). Those favorable findings and conclusions are not at issue on appeal.

1. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge made the following pertinent findings of fact: (a) Applicant is a dual citizen of the United States and a foreign country (FC); (b) Applicant has had an FC passport since 1967 and his current FC passport will not expire until 2005; (c) Applicant has traveled often to FC and uses his FC passport to enter and leave FC; (d) Applicant has been told he needs his FC passport to enter and leave FC; (e) Applicant does not believe he can renounce his FC citizenship, and believes there is no formal procedure or mechanism to return his FC passport; and (f) Applicant does not intend to relinquish his FC passport because he believes it is a manifestation of his FC citizenship, and he sees no reason to relinquish his FC passport.

The Administrative Judge concluded that Applicant's use and continued possession of an FC passport warranted an adverse security clearance decision in light of the August 16, 2000 memorandum by 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."

On appeal, Applicant does not challenge the Administrative Judge's factual findings. However, Applicant argues: (a) he is not willing to destroy his FC passport because it would be illegal for him to do so, but he is willing to surrender his FC passport to an official U.S. government agency if such an action would allow him to obtain a security clearance; (b) the fact that he has had a U.S. security clearance for six years without a security violation should be an important mitigating factor in his case; (c) if he were to give up his FC citizenship at this point in time, such an action would raise substantial concerns regarding his character; (d) he became a U.S. citizen by choice and is proud to be an American; and (e) he seeks the opportunity to serve the United States in his chosen profession. Applicant's arguments fail to demonstrate the Administrative Judge erred.

Applicant's offer to surrender his FC passport, made for the first time on appeal, constitutes new evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, Applicant's first argument does not demonstrate the Administrative Judge erred. The ASDC3I memorandum makes clear that it is DoD policy that possession and use of a foreign passport are security disqualifying and can be mitigated only if "the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." Given the record evidence that Applicant possesses a current FC passport and intends to continue to possess and use it, the Judge properly concluded that the ASDC3I memorandum mandated an adverse security clearance decision.

Under Section 5.1 of the Directive, the ASDC3I has the authority to, *inter alia*, establish adjudicative standards, oversee the application of such standards, and to issue clarifying guidance and instructions. The ASDC3I memo falls within the scope of Section 5.1. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 5 n.1. Under the Directive, neither a DOHA Administrative Judge nor this Board has the authority or discretion to ignore, disregard, or decline to apply the

ASDC3I memo. Indeed, DOHA Administrative Judges and this Board must make decisions "in accordance with policy, procedures, and standards established by [the] Directive." Directive, Section 5.2.14. Because application of the ASDC3I memorandum is dispositive of Applicant's security eligibility, Applicant's remaining arguments do not demonstrate the Judge erred.

2. Whether the Board should remand the case with directions on how Applicant can address the security concerns in his case. In the alternative, Applicant asks the government to provide him with "clear direction regarding how I might proceed to address the issues that [the Administrative Judge's] decision was based upon."

The Administrative Judge found that Applicant was provided a copy of the ASDC3I memorandum (Decision at pp. 2-3). Applicant does not challenge that finding and nothing in his appeal brief indicates that he did not receive a copy of the ASDC3I memorandum.

Nothing in the ASDC3I memorandum indicates or suggests that an applicant should or must destroy a foreign passport. Rather, the ASDC3I memorandum refers to surrender of a foreign passport. Surrender of a foreign passport involves returning it to the issuing authority or whatever other person or entity is authorized by law to accept surrender of a foreign passport. *See* ISCR Case No. 99-0480 (November 28, 2000) at p. 8. Therefore, the ASDC3I memorandum is not satisfied by an offer to: (a) destroy a foreign passport; (b) place a foreign passport in escrow with the security department of a defense contractor; or (c) give a foreign passport to DOHA or another department of the United States government. *Id.* Accordingly, no useful purpose would be served by remanding this case as requested by Applicant.

### **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