

DATE: March 19, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16419

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

-----, Personal Representative

Administrative Judge Claude R. Heiny issued a decision, dated October 10, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed.

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

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by concluding Applicant's possession and use of an Egyptian passport was mitigated under Guideline C; and (2) whether the Administrative Judge erred by concluding Applicant's family ties with relatives in Egypt were mitigated under Guideline B. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated December 26, 2001. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on June 6, 2002. The Administrative Judge issued a written decision, dated October 10, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from the Judge's favorable 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 also* 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 the same record. 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

1. Whether the Administrative Judge erred by concluding Applicant's possession and use of an Egyptian passport was mitigated under Guideline C. The Administrative Judge concluded that Applicant's possession and use of an Egyptian passport has been mitigated by his actions to formally renounce his Egyptian citizenship and surrender of his Egyptian passport. Department Counsel contends the Judge erred because: (a) the Judge misapplied Foreign Preference Mitigating Condition 4; (b) the Judge erred by accepting a form of legal necessity defense as mitigating of Applicant's renewal of his Egyptian passport; (c) the Judge's decision contains no explanation for his conclusion that Applicant had mitigated the conduct covered by SOR subparagraph 1.d; (d) the Judge failed to give due weight to the security significance of the facts and circumstances of Applicant's use of his Egyptian passport in his most recent trip; and (e) the Judge's finding of mitigation fails to take into account the totality of Applicant's actions. Applicant counters Department Counsel's arguments by asserting: (i) the record evidence supports the Judge's application of Foreign Preference Mitigating Condition 1; (ii) the Judge's favorable conclusions under Guideline C reflect an overall commonsense decision based on consideration of all the record evidence; (iii) Applicant's conduct under SOR subparagraph 1.d does not demonstrate a foreign preference; and (iv) it was not arbitrary, capricious, or contrary to law for the Judge to enter formal findings in favor of Applicant with respect to SOR subparagraphs 1.c and 1.d.

(a) Department Counsel contends the Administrative Judge erred by giving undue or controlling weight to his application of Foreign Preference Mitigating Condition 4. ⁽¹⁾ Given the record evidence in this case, the Administrative Judge had a sufficient basis to apply Foreign Preference Mitigating Condition 4. However, the applicability of Foreign Preference Mitigating Condition 4 is not solely dispositive under Guideline C. *See, e.g.*, ISCR Case No. 01-20906 (January 10, 2003) at pp. 6-7 (discussing need for Judge to exercise sound judgment in applying pertinent provisions of Adjudicative Guidelines). Given the record evidence in this case, it would be arbitrary and capricious for the Judge to enter formal findings under Guideline C solely based on application of Foreign Preference Mitigating Condition 4. Under the whole person concept, Applicant's recent actions to renounce his Egyptian citizenship had to be weighed in light of the record evidence as a whole, including record evidence that Applicant used his Egyptian passport to evade or circumvent legitimate United States customs and border inquiry about his trip to Egypt after September 11, 2001. A reading of the decision below indicates the Judge applied Foreign Preference Mitigating Condition 4 in a mechanical manner that failed to take into account record evidence that undercut the weight that reasonably could be given to that mitigating condition.

(b) Department Counsel correctly notes that the Board has held that legal necessity is no longer extenuating or mitigating of an applicant's possession and use of a foreign passport after the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) promulgated the August 16, 2000 memorandum on foreign passports. *See, e.g.*, ISCR Case No. 99-0532 (February 27, 2001) at p. 6. However, nothing in the decision below indicates the Administrative Judge found Applicant's possession and use of an Egyptian passport was extenuated or mitigated because of legal necessity. Accordingly, this claim of error is not persuasive.

(c) Department Counsel contends the Administrative Judge's decision contains no explanation for his conclusion that Applicant had mitigated the conduct covered by SOR subparagraph 1.d. Although the Judge made a factual finding concerning SOR subparagraph 1.d and applied Foreign Preference Disqualifying Condition 1 to Applicant's conduct (Decision at p. 6), the Judge did not state whether he found Applicant's conduct under SOR subparagraph 1.d was extenuated or mitigated and the Judge did not enter a formal finding, favorable or unfavorable, with respect to SOR subparagraph 1.d. The Judge's failure to do so constitutes a violation of his obligation to make findings and reach conclusions about the SOR allegations. *See* Directive, Additional Procedural Guidance, Item E3.1.25. Because the

Judge made a favorable security clearance decision, it can be inferred that the Judge concluded that Applicant's conduct under SOR subparagraph 1.d was extenuated or mitigated. However, Department Counsel correctly notes the Judge's decision contains no discussion or explanation of how or why the Judge reached such a favorable conclusion with respect to SOR subparagraph 1.d. Without such a discussion or explanation in the decision, the Board is unable to discern whether the Judge analyzed that aspect of the case in a rational manner or in an arbitrary and capricious manner.

(d) The Administrative Judge found the following: (i) between mid-December 2001 and mid-January 2002, Applicant visited Egypt; (ii) Applicant's father advised him not to use his U.S. passport when traveling in Egypt because of the father's fear that it would be dangerous to do so; (iii) Applicant followed his father's advice and used his Egyptian passport to enter and exit Egypt; and (iv) Applicant felt that he might be unfairly detained upon reentering the United States if he had an Egyptian stamp on his U.S. passport (Decision at p. 3). Department Counsel contends the Judge's favorable conclusions under Guideline C are arbitrary and capricious because Applicant's conduct on that trip

"demonstrates a specific attempt to *avoid* being identified as a United States citizen, to hide his United States citizenship, and to be identified as a citizen of another country. Furthermore, Applicant used his foreign passport to enter and leave Egypt after September 11, 2001 in order to avoid U.S. officials seeing an Egyptian stamp in his U.S. passport." (italics in original)

Department Counsel's claim of error is persuasive.

Given the SOR allegations in this case, the facts and circumstances of Applicant's possession and use of an Egyptian passport are relevant to an evaluation of his security eligibility. Under the whole person concept, an Administrative Judge must consider all available information, both favorable and unfavorable, concerning an applicant's conduct and circumstances. Furthermore, a Judge must consider the nature and seriousness of an applicant's conduct, the recency and frequency of the applicant's conduct, and the applicant's motivation(s). *See* Directive, Section 6.3; Enclosure 2, Item E2.2.1. Prior to September 11, 2001, any effort to deliberately prevent U.S. customs or border officials from seeing information that is potentially relevant to the execution of their duties would reflect serious misconduct that raises troubling questions about an applicant's intentions and motivations. Engaging in such misconduct after September 11, 2001 is aggravating because Applicant knew that there were well-founded increased security concerns at the borders of the United States. Applicant's situational, ad hoc use of the rights and privileges of Egyptian citizenship to evade or circumvent legitimate United States customs and border inquiry into his trip to Egypt raises serious security concerns under Guideline C. *See, e.g.,* ISCR Case No. 99-0424 (February 8, 2001) (reversing favorable security clearance decision where applicant used a foreign passport and exercised the rights and privileges of foreign citizenship to remove his children from the jurisdiction of a state court in United States to evade or thwart legal process in a child custody battle). Given the evidence that Applicant used his Egyptian and U.S. passports to conceal from U.S. officials his trip to Egypt, it was arbitrary and capricious for the Judge to fail to discuss that aspect of this case or explain why he did not consider Applicant's conduct security-significant. *See, e.g.,* ISCR Case No. 99-0228 (March 12, 2001) at p. 5 ("An Administrative Judge's decision can be arbitrary and capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion.").

(e) Department Counsel also contends the Administrative Judge's favorable conclusions fail to take into account the totality of Applicant's actions. The Board agrees. Our reading of the decision below persuades us that the Judge engaged in a piecemeal analysis of Applicant's conduct and circumstances that do not reflect application of the whole person concept.

2. Whether the Administrative Judge erred by concluding Applicant's family ties with relatives in Egypt were mitigated under Guideline B. The Administrative Judge concluded that Applicant's family ties with relatives in Egypt were mitigated under Guideline B because his immediate family members are dual citizens in the United States who are not agents of a foreign power or in a position to be exploited by a foreign power, and his contacts and correspondence with other relatives who are Egyptian citizens living in Egypt are casual and infrequent. Department Counsel contends the Judge erred because: (a) the record evidence does not support application of Foreign Influence Mitigating Condition 1;

and (b) the record evidence does not support the Judge's favorable conclusions under Guideline B. In response to Department Counsel's arguments, Applicant responds: (i) there is no record evidence that Applicant is in a position to be exploited by a foreign power; (ii) because Applicant's father holds a security clearance, he must have been determined to be free of foreign influence, and therefore, Applicant also must be found to be free of foreign influence; and (iii) the record evidence as a whole support the Judge's formal findings in favor of Applicant under Guideline B.

The Administrative Judge concluded Applicant's immediate family members, who are dual Egyptian-U.S. citizens living in the United States are not agents of a foreign government or in a position to be exploited by a foreign power. The Judge applied Foreign Influence Mitigating Condition 1 ⁽²⁾ to Applicant's immediate family members. With respect to Applicant's other relatives living in Egypt, the Judge concluded Applicant's contacts with them were minimal and warranted application of Foreign Influence Mitigating Condition 3. ⁽³⁾ Department Counsel contends the Judge erred because the record evidence does not support application of Foreign Influence Mitigating Condition 1, and the record evidence does not support the Judge's favorable conclusions under Guideline B.

The Board does not find persuasive Applicant's argument that because his father holds a security clearance, he must have been determined to be free of foreign influence, and therefore, Applicant also must be found to be free of foreign influence. The facts and circumstances of the adjudication of Applicant's father's security eligibility are not part of the record evidence in this case. Absent such record evidence the Board declines to assign the significance to Applicant's father's possession of a security clearance that Applicant suggests. Furthermore, even if the Board were to assume, solely for purposes of deciding this appeal, that appropriate federal officials made an affirmative determination as the security eligibility of Applicant's father with a full understanding of the family's overseas connections, such a determination would still not automatically benefit Applicant. Applicant's security eligibility must be determined by evaluating the particular facts and circumstances of his case. There is no basis in the record for the Board to assume Applicant's situation is interchangeable with his father's.

The Board does not have to agree with the Administrative Judge's findings and conclusions about Applicant's family ties to decide that Department Counsel has not met its burden on appeal of demonstrating the Judge erred with respect to this aspect of the case. Department Counsel's appeal arguments are not persuasive.

Conclusion

Department Counsel has met its burden on appeal of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable 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

1. "Individual has expressed a willingness to renounce dual citizenship."
2. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States."
3. "Contact and correspondence with foreign citizens are casual and infrequent."