

DATE: April 8, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02052

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Robert J. Tuidor, Esq., Department Counsel

**FOR APPLICANT**

Jennifer L. Plitsch, Esq.

Applicant has appealed the October 24, 2002 decision of Administrative Judge John G. Metz, Jr., in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 erred by finding that Applicant expressed an interest in preserving his French pension; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

**Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 11, 2002. The SOR was based on Guideline C (Foreign Preference). A hearing was held on June 26, 2002. The Administrative Judge issued a written decision, dated October 24, 2002, 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 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 finding that Applicant expressed an interest in preserving his French pension. With one exception, Applicant does not challenge the Administrative Judge's findings of fact. Applicant does contend the Administrative Judge erred by finding that Applicant expressed an interest in preserving his French pension. (1) Applicant argues that there is no record evidence to support this finding by the Judge, and that the Judge ignored the record evidence that Applicant's company pension has been structured so that Applicant would not receive any benefit from his French pension.

Applicant's appeal argument focuses on one sentence in the decision below. On appeal, the Board will not review isolated sentences in an Administrative Judge's decision. Rather, the Board will review a decision in its entirety to discern what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 00-0311 (March 8, 2001) at p. 2. The sentence cited by Applicant on appeal is not the only place in the decision that the Judge referred to Applicant's French pension. Elsewhere in the decision (at p. 3), the Judge found that "The portion of [Applicant's] total pension attributable to his years of French employment is small, and has been structured by the company to be essentially a wash transaction." That passage shows the Judge did not ignore the record evidence that Applicant claims he ignored. Furthermore, the Judge also specifically noted that Applicant's statements about having an interest in preserving his French pension had occurred in the past (Decision at p. 9 n.7). Given the record evidence in this case, the Judge's challenged finding is sustainable.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's decision is legally flawed because: (a) the Judge failed to consider the favorable evidence presented by Applicant and focused only on the possibly negative evidence; (b) the Judge failed to properly evaluate Applicant's case under the whole person concept; (c) the Judge erred by not addressing Foreign Preference Mitigating Condition 1; (d) the Judge failed to weigh properly the evidence that Applicant's French citizenship did not stem from emotional ties or loyalty to France, while Applicant's U.S. citizenship is based on "emotions and principles" and his long-standing ties with the United States since he left Egypt; (e) the Judge gave undue weight to his erroneous finding about Applicant's French pension; (f) the erroneous nature of the Judge's decision is demonstrated by DOHA decisions in other cases where applicants were granted a security clearance despite having stronger ties to foreign countries than the ties Applicant has to France; (g) the record evidence shows Applicant's preference is for the United States, not for France; and (h) it was arbitrary and capricious for the Judge to find Applicant "to be a trustworthy individual of impeccable integrity" and still make an adverse security clearance decision. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. (2)

(a) There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Apart from that rebuttable presumption, a reading of the decision below shows that the Judge considered and took into account the favorable evidence Applicant presented. The fact that the Judge did not give that favorable evidence as much weight as Applicant would have liked does not demonstrate the Judge simply ignored it. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 10 ("Merely because a Judge concludes that favorable evidence presented by an applicant is not sufficient to outweigh or overcome the unfavorable evidence, such a conclusion does not demonstrate the Judge ignored or disregarded the favorable evidence."); ISCR Case No. 98-0761 (December 27, 1999) at p. 3 ("[M]erely because the Judge found Applicant's evidence to be unpersuasive does not mean the Judge simply ignored that evidence.").

(b) Applicant correctly notes that the Administrative Judge was obligated to consider his security eligibility under the whole person concept. *See* Directive, Section 6.3; Enclosure 2, Items E2.2.1 and E2.2.3. As noted earlier in this decision, the Board does not review a case *de novo*. The question on appeal is not whether the Board agrees or disagrees

with the Judge's specific reasoning and analysis, but rather whether the Judge's reasoning and analysis fall within the range of reasonable, legally permissible decision-making entrusted to the Judge under the Directive. Apart from Applicant's obvious dissatisfaction with the result of the Judge's reasoning and analysis under the whole person concept, Applicant has failed to make a persuasive showing that the Judge did not apply the whole person concept in making his decision.

(c) Applicant cites Foreign Preference Mitigating Condition 1, <sup>(3)</sup> argues his French citizenship was "the result of his foreign birth and inability to maintain United States residency," asserts that he has reduced emotional ties with France because he obtained French citizenship as a matter of convenience, and claims the Administrative Judge failed to address Foreign Preference Mitigating Condition 1. Applicant's argument is not persuasive.

Under the particular facts of this case, Applicant is not entitled to application of Foreign Preference Mitigating Condition 1. Applicant's French citizenship was not the result of his parents' citizenship or Applicant's birth. Applicant became a French citizen, as an adult, by voluntarily obtaining naturalization as a French citizen. It is untenable for Applicant to fault the Judge for not discussing a mitigating condition which, on its face, clearly does not apply to the facts of this case.

(d) Applicant argues that the Administrative Judge erred by failing to weigh properly the evidence that Applicant's French citizenship did not stem from emotional ties or loyalty to France. The record evidence indicates Applicant acted out of reasons of convenience and expediency in obtaining and maintaining French citizenship. <sup>(4)</sup> Applicant's reliance on the evidence that his French citizenship was and has been based on convenience and expediency does not have the security significance that Applicant seeks to place on it. For purposes of Guideline C, a foreign preference can be shown by an applicant's exercise of the rights and privileges of foreign citizenship for reasons of personal convenience or expediency. *See, e.g.*, August 16, 2000 memorandum by Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Guideline" (noting Guideline C contains no mitigating factor related to an applicant's personal convenience). *Also see, e.g.*, ISCR Case No. 01-00677 (May 21, 2002) at p. 5.

The Administrative Judge had to consider and weigh Applicant's statements about his motivations and emotions concerning his U.S. citizenship and his French citizenship. However, the Judge was not compelled to consider Applicant's statements in isolation or accept them uncritically. Rather, the Judge had the discretion to consider and weigh such statements in light of his assessment of the record evidence as a whole. Applicant's arguments do not persuade the Board that the Judge acted in an arbitrary or capricious manner when considering and weighing Applicant's statements on this aspect of the case.

(e) Absent a showing that an Administrative Judge acted in an arbitrary or capricious manner, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 01-11192 (August 26, 2002) at p. 5. When considered in light of the decision below in its entirety, the Judge's statements about Applicant's French pension do not reflect an arbitrary or capricious weighing of the record evidence. Furthermore, the Judge's statements about Applicant's French pension do not appear to be essential or pivotal to his analysis of the case under Guideline C. Applicant's appeal arguments to the contrary are not persuasive.

(f) Applicant's reliance on Administrative Judge decisions in other cases is misplaced. It is legally permissible for Applicant to cite Administrative Judge decisions in other cases as persuasive authority. However, just as the decisions of one trial judge are not legally binding precedent on other trial judges, the decisions of Hearing Office Judges in other DOHA cases are not legally binding precedent on the Judge in this case. Furthermore, the decisions of Hearing Office Judges are not legally binding precedent on the Board in any case. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 4 (discussing precedential value of Administrative Judge decisions). Accordingly, the Board need not address, distinguish or otherwise comment on the particular DOHA decisions cited in Applicant's appeal brief.

(g) The Administrative Judge had to consider and weigh Applicant's statements about his preference for U.S. citizenship over that for his French citizenship. However, the Judge was not compelled to consider Applicant's statements in isolation or accept them uncritically. Given Applicant's conduct in exercising the rights and privileges of French citizenship after Applicant became a naturalized U.S. citizen, the fact that Applicant has been a naturalized French

citizen since 1971 but a naturalized U.S. citizen only since 1998, and Applicant's conditional willingness to renounce French citizenship, the Judge had a rational basis for concluding he had unresolved doubts under Guideline C that precluded a favorable security clearance decision.

(h) The Administrative Judge's finding that Applicant is a trustworthy individual with impeccable integrity did not, as a matter of law, preclude the Judge from making an adverse security clearance decision. The Judge articulated reasons why, despite his favorable finding about Applicant's trustworthiness and integrity, Applicant's conduct and circumstances raised security concerns under Guideline C. The Judge's articulated reasons are not arbitrary or capricious, and they provide a rational basis for his expressed doubt as to Applicant security eligibility. Given the Judge's expressed doubt, he acted properly by resolving it in favor of the national security. *See Directive, Enclosure 2, Item E2.2.2* ("Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."). *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988)(noting it is proper for federal government to err, if it must, on the side of national security when making security clearance decisions).

### **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

1. The Administrative Judge's challenged finding appears in the Conclusions section of his decision. However, "[t]he labels of fact and law used by an [Administrative Judge] are not controlling. Findings of fact will be considered as such even if they appear outside the section of the determination labeled 'Findings.'" ISCR Case No. 87-2214 (March 2, 1989) at p. 5.

2. 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. *See, e.g., ISCR Case No. 99-0228* (March 12, 2001) at p. 5.

3. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."

4. *See, e.g.*, Hearing Transcript at p. 67 (Applicant stating he maintained French passport "for convenience") and p. 69 ("I became a French citizen because I needed it for convenience purposes . . . . I was an Egyptian living in Europe and I needed to travel around and that's the only reason I acquired the French citizenship. I could have become as well another - - acquired another nationality, from my perspective. Had I lived longer and fulfilled the requirements in Belgium, in Canada or in any of the other places I had lived in.")