

DATE: August 12, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-04237

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Applicant has appealed the May 15, 2003 decision of Administrative Judge Martin H. Mogul, 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 issue of whether the Administrative Judge's adverse 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 October 10, 2002. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on March 3, 2003. The Administrative Judge issued an adverse security clearance decision dated May 15, 2003. [\(1\)](#)

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 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 Issue

On appeal, Applicant does not challenge the Administrative Judge's findings that Applicant: (1) has held and used a Greek passport; (2) continues to hold a Greek passport; (3) does not intend to surrender that passport; and (4) is unwilling to renounce his Greek citizenship. Rather, Applicant:

(a) notes he has had a security clearance in the past without any indication that he has mishandled classified information; (b) asserts he has contributed to the national security in the past and can continue to contribute to it; (c) states his Greek citizenship arises from his birth in Greece to United States citizens and does not indicate any foreign preference; (d) points out that Greece is a democratic country and an ally of the United States; and (e) contends the Judge applied the August 16, 2000 memorandum concerning foreign passports ("ASDC3I memorandum")<sup>(2)</sup> without regard to the evidence of Applicant's character, background, prior service to the United States, and potential to contribute to the war on terrorism. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.<sup>(3)</sup>

The fact that Applicant has held a security clearance does not give him any vested right in retaining a security clearance. *See, e.g.*, ISCR Case No. 01-21528 (July 26, 2002) at p. 3. Furthermore, the absence of any security violations by Applicant does not preclude an adverse security clearance decision in his case. The federal government does not have to wait until a person commits a security violation before it can deny or revoke access to classified information. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Accordingly the Administrative Judge's adverse decision is not rendered arbitrary, capricious, or contrary to law by either Applicant's past history of holding a security clearance or the absence of any showing that Applicant has committed a security violation.

Whether Applicant is able to contribute to the national security is not relevant or material to assessing his security eligibility. An applicant's technical expertise (or lack thereof) is not a measure of whether the applicant demonstrates the high degree of judgment, reliability, and trustworthiness that must be possessed by persons entrusted with classified information. In deciding whether to grant or continue access to classified information, the government must consider whether an applicant's conduct and circumstances pose a risk of deliberate or inadvertent disclosure of classified information. An applicant's technical expertise and contribution to defense programs do not make the applicant less likely to deliberately or inadvertently disclose classified information; an applicant's lack of technical expertise and absence of any contribution to defense programs do not make the applicant more likely to deliberately or inadvertently disclose classified information. *See* ISCR Case No. 01-19879 (October 29, 2002) at p. 3.

Obtaining, possessing, or using a Greek passport involves the exercise of the rights and privileges of Greek citizenship. Given Applicant's actions in obtaining, possessing, and using a Greek passport, the Administrative Judge had a rational basis to conclude Applicant's actions demonstrate a foreign preference within the meaning of Guideline C.

The Board does not find persuasive Applicant's argument that the Administrative Judge erred by applying the ASDC3I memorandum. The ASDC3I memorandum requires that any clearance be denied or revoked unless an applicant surrenders a foreign passport or obtains official approval for its use from the appropriate agency of the U.S. Government. Neither exception applies in this case. The ASDC3I memorandum is legally binding on the Administrative Judge and the Board. Neither a Hearing Office Judge nor the Board has the authority or discretion to ignore, disregard, or fail to apply the ASDC3I memorandum in cases where it is applicable. Furthermore, neither a Hearing Office Judge nor the Board can review or pass judgment on the wisdom or desirability of that memorandum. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 6. The evidence cited by Applicant on appeal cannot justify either the Judge below or the Board ignoring, disregarding, or failing to apply the ASDC3I memorandum in light of the record evidence that Applicant still possesses a Greek passport.

Finally, the ASDC3I memorandum concerning foreign passports does not distinguish or differentiate among foreign countries. Accordingly, Applicant's argument about the nature of Greece's government and its relationship with the United States fails to demonstrate error by the Administrative Judge.

### **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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Formal Findings section of the Administrative Judge's decision lists unfavorable formal findings with respect to Guideline B and favorable formal findings with respect to Guideline C. The Board concludes that is a typographical error because, reading the Judge's decision in its entirety, it is obvious the Judge reached favorable conclusions with respect to the SOR subparagraphs under Guideline B (Foreign Influence) and unfavorable conclusions with respect to the SOR subparagraphs under Guideline C (Foreign Preference).

2. On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) issued a memorandum entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline."

3. The Administrative Judge's findings and conclusions with respect to the SOR subparagraphs concerning Guideline B (Foreign Influence) are not at issue on appeal. Accordingly, the Board need not address Applicant's appeal argument about the absence of any security threat posed by his family members living in Greece.