

DATE: April 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23806

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 6, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference), and Guideline B (Foreign Influence). Administrative Judge Martin H. Mogul issued an unfavorable security clearance decision, dated November 23, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge made an erroneous finding of fact when he found that Applicant's Greek identification card could be used for various rights pertaining to Greek citizenship; (2) whether the Administrative Judge erred in applying certain Adjudicative Guidelines disqualifying conditions in Applicant's case; (3) whether the Administrative Judge erred in not applying certain Adjudicative Guidelines mitigating conditions in Applicant's case; (4) whether the Administrative Judge failed to apply the "whole person" concept when considering Applicant's case; and (5) whether the nature of Greece's relationship with the United States renders arbitrary and capricious the Administrative Judge's unfavorable security clearance determination under Guideline B. For the reasons that follow, the Board affirms the Administrative Judge's 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: 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. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge made an erroneous finding of fact when he found that Applicant's Greek identification card could be used for various rights pertaining to Greek citizenship. The Administrative Judge found that Applicant's Greek identification card could be used for rights pertaining to Greek citizenship such as voting and potential travel within the European Union. On appeal, Applicant asserts that Department Counsel produced no evidence to support the finding and that his own testimony lacked certainty on the point. After review of the record as a whole, the Board concludes that the Judge's finding is not sustainable. However, considering the record as a whole, the Judge's error is minor and no material conclusion reached by the Judge was affected by the erroneous finding of fact. Therefore, Applicant has not established error that would warrant remand or reversal in this case.

2. Whether the Administrative Judge erred in applying certain Adjudicative Guidelines disqualifying conditions in Applicant's case. Applicant argues that the Administrative Judge erred when he applied disqualifying conditions against him. Specifically, Applicant asserts: (a) under the Foreign Preference Guideline, the Judge erred by concluding there was negative, unmitigated security significance in his possession of a Greek identity card, his possession of a Greek driver's license, his voting in a Greek election, and his potential obligation to serve in the Greek military; (b) the Directive does not list possession of a foreign country identification card or a foreign driver's license as disqualifying conditions; (c) the Judge failed to take into account that his initial obtaining of a Greek identity card, his voting in a Greek election, and his paying property taxes to the Greek government were not voluntary activities; and (d) the Judge erroneously applied Foreign Preference Disqualifying Condition E2.A3.1.2.6⁽²⁾ to Applicant's payment of property

taxes to Greece as there is no record evidence that Applicant was using his Greek citizenship to protect property interests there. Applicant's contentions have mixed merit.

When a party challenges an Administrative Judge's application of the Adjudicative Guidelines, the Board has to decide whether the party has shown the Judge: (i) reached conclusions not supported by substantial record evidence, (ii) acted in a manner that is arbitrary or capricious; or (iii) acted contrary to law. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4.

Concerning Applicant's first argument, the Board need not engage in a detailed discussion of the Administrative Judge's analysis or Applicant's arguments on appeal. After a review of the totality of the record evidence in this case, the Board is satisfied that the Judge reached a sustainable conclusion that certain actions of Applicant in the exercise of his Greek citizenship—viewed in their entirety—constituted unmitigated acts of foreign preference.

Applicant's complaint that the Directive does not list possession of a foreign country identification card or a foreign driver's license as a basis for denial of a security clearance is not persuasive. The Adjudicative Guidelines are not designed to enumerate every set of facts or circumstances that might give rise to a security concern on the part of the government or that might mitigate such concerns. Rather, the Adjudicative Guidelines stake out parameters into which more specific facts and circumstances may be categorized. It is the Statement of Reasons, not the Adjudicative Guidelines, that places applicants on notice as to which of their actions or circumstances raise security concerns. In this case, Applicant's possession of a foreign identification card and a foreign driver's license fall under the Adjudicative Guidelines rubric of the exercise of dual citizenship. Applicant has failed to establish error.

Applicant argues that his Greek identification card was obtained for him by his parents when he was 14 years old and that he had no choice in the matter. He argues that he was required by law to vote in a Greek election in 1999 because of his presence in the country as a Greek citizen at that time. He argues that he has no choice in the matter of paying property taxes to the Greek government for property he owns in Greece. Applicant then asserts that inasmuch as these actions were and are involuntary, the Administrative Judge erred by not concluding that the security concerns raised by them were mitigated.

In his findings of fact, the Administrative Judge recognized that the Greek identification card was issued to Applicant when he was 14 years old. The Judge went on to find that Applicant continues to retain an active identification card and that the card has no expiration date. It was this second finding of fact, which involves voluntary activity after Applicant became of legal age, that the Judge focused on when concluding that the identification card raised a foreign preference concern. With regard to voting and paying taxes, while the activities themselves might be considered involuntary in light of the record evidence in the case, they are a consequence of other activities by Applicant—travel to Greece as a Greek citizen and ownership of property in Greece—that the Judge could find voluntary in nature. Applicant has failed to establish that the Judge erred by not considering the alleged involuntariness of Applicant's exercise of Greek citizenship as a basis for mitigation.

Applicant argues that the Administrative Judge erred by applying Foreign Preference Disqualifying Condition E2.A3.1.2.6 ("Using foreign citizenship to protect financial or business interests in another country") to the circumstance of his paying property taxes to the Greek government for property he owns in Greece. In support of his argument Applicant asserts that there is no record evidence of a requirement that a person must be a Greek citizen to own property in Greece and there is no evidence to suggest that he would not have been subject to taxation by Greece if he were not a Greek citizen. Applicant's contentions have merit.

Applicant's descriptions of the record evidence concerning the requirements for payment of property taxes is accurate. Given the lack of record evidence that the payment of property taxes on property located in Greece is a special obligation imposed only on Greek citizens by virtue of their citizenship (and the lack of record evidence that there is no corresponding requirement for owners of property in Greece who are not Greek citizens), there is no basis in the record for the Judge to conclude that Applicant is using his status as a Greek citizen to protect or maintain his property there. Application of Foreign Preference Disqualifying Condition E2.A3.1.2.6 is therefore not supported by the record in this case. However, the Board deems this error harmless as the Administrative Judge's adverse security clearance decision is sustainable on other grounds.

3. Whether the Administrative Judge erred in not applying certain Adjudicative Guidelines mitigating conditions in Applicant's case. Applicant contends the Administrative Judge should have concluded that he presented evidence sufficient to extenuate or mitigate the fact that he holds dual citizenship with Greece and the United States and has ties to Greece. In support of this contention, Applicant argues the Judge should have concluded his situation was extenuated or mitigated under various Adjudicative Guidelines mitigating conditions. Specifically, Applicant contends the Administrative Judge should have concluded: (a) his Greek citizenship was based solely on his parents' citizenship and should therefore have been mitigated by Foreign Preference Mitigating Condition E2.A3.1.3.1⁽³⁾; (b) the evidence established his willingness to renounce his Greek citizenship and Foreign Preference Mitigating Condition E2.A3.1.3.4⁽⁴⁾ should have been applied in mitigation; and (c) with regard to a 650 square foot apartment Applicant owns in Greece, the Judge should have applied Foreign Influence Mitigating Condition E2.A2.1.3.5.⁽⁵⁾

The Administrative Judge found that Applicant was born in the United States to Greek parents and acquired Greek citizenship as a result of the citizenship status of his parents. The Board has concluded that Foreign Preference Mitigating Condition E2.A3.1.3.1 can be applied where an applicant's dual citizenship falls within the literal language of Mitigating Condition E2.A3.1.3.1 regardless of whether the applicant exercised the rights or privileges of foreign citizenship. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 4. Given the Judge's finding, Applicant was entitled to have the Judge apply Foreign Preference Mitigating Condition E2.A3.1.3.1. However, application of that mitigating condition does not determine the outcome of the case. The mere presence or absence of any given Adjudicative Guideline disqualifying or mitigating condition is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at p. 5. And, as indicated in ISCR Case No. 99-0452 (March 21, 2000) at p. 3, the applicability of Foreign Preference Mitigating Condition E2.A3.1.3.1 does not render irrelevant any other record evidence that might be indicative of a foreign preference under Guideline C. As was stated earlier in this decision, the Judge found that Applicant had engaged in the exercise of various rights and privileges of Greek citizenship and concluded that such exercise raised security concerns that had not been mitigated. Those findings and conclusions are sustainable. Thus, the record evidence provides a sufficient basis for the Board to affirm the Judge's adverse security clearance decision notwithstanding the applicability of Foreign Preference Mitigating Condition E2.A3.1.3.1.

Considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to conclude the record evidence did not warrant application of Foreign Preference Mitigating Condition E2.A3.1.3.4 and Foreign Influence Mitigating Condition E2.A2.1.3.5. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred by deciding that application of these two mitigating conditions was not warranted in light of the record evidence in this case. Moreover, Applicant's argument with regard to Foreign Influence Mitigating Condition E2.A2.1.3.5 is based, in part, on the assertion of facts that are not part of the record below. The Board cannot consider new evidence on appeal. *See*, Directive, Additional Procedural Guidance, Item E3.1.29.

4. Whether the Administrative Judge failed to apply the "whole person" concept when considering Applicant's case.

Applicant claims that when considering SOR allegations 1.a.,⁽⁶⁾ 1.d.,⁽⁷⁾ and 2.f.,⁽⁸⁾ the Administrative Judge committed error by not applying the whole person concept. In support of his argument he cites facts he claims support a favorable security clearance determination. Applicant's contention is not persuasive.

To the extent Applicant's argument asserts the Administrative Judge ignored evidence favorable to Applicant, it runs afoul of the rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome merely because Applicant is able to point to favorable evidence that he claims the Judge should have afforded more weight. *See, e.g.*, ISCR Case No. 02-15935 (October 15, 2003) at p. 6. Merely because a Judge makes adverse findings and draws adverse conclusions, it does not follow that the Judge is failing to apply the whole person concept or is weighing the evidence, both favorable and unfavorable, in a manner that is arbitrary, capricious or contrary to law. The question is not whether the Judge's findings and conclusions are favorable, unfavorable or mixed; rather, the question is whether the Judge's findings and conclusions reflect a reasonable interpretation of the record evidence as a whole that adequately takes into account the totality of an applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 02-06194 (July 15, 2004) at pp. 3-4. In this case, the Judge's findings about Applicant's exercise of Greek citizenship, his voting in a Greek election, and his ownership of property in Greece and his conclusions about the ultimate security significance of these facts reflect an interpretation of the record evidence that is consistent with the whole person

concept.

5. Whether the nature of Greece's relationship with the United States renders arbitrary and capricious the Administrative Judge's unfavorable security clearance determination under Guideline B. In support of his appeal argument regarding SOR allegation 2.f. (dealing with Applicant's property interest in an apartment in Greece), Applicant asserts that Greece has never been hostile towards the United States. He states that, to the contrary, Greece is a United States ally and a member of NATO. Nothing in Guideline B (Foreign Influence) indicates or suggests that it is limited to countries that are hostile to the United States. *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6; ISCR Case No. 00-0489 (January 10, 2002) at p. 12. The United States has a compelling interest in protecting and safeguarding classified information from any person, organization or country that is not authorized to have access to it, regardless of whether that person, organization or country has interests inimical to those of the United States. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see, e.g.*, ISCR Case No. 97-0699 (November 24, 1998) at p. 3. Additionally, the Board has warned "against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." *See, e.g.*, ISCR Case No. 00-0317 (March 29, 2002) at p. 6. Moreover, history shows that foreign countries not considered to be hostile to the United States have obtained unauthorized access to United States classified information.⁽⁹⁾ Therefore, Applicant's argument that Greece is a friendly ally to the United States does not demonstrate the Judge erred in his resolution of the case under Guideline B.

Conclusion

Applicant has failed to establish harmful error below. Therefore, 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. Numerous subparagraphs alleged in the SOR were found in favor of Applicant (subparagraphs 1.b. and 1.c. under the Foreign Preference Guideline, and subparagraphs 2.a. through 2.e. under the Foreign Influence Guideline). Those favorable findings are not at issue on appeal.

2. "Using foreign citizenship to protect financial or business interests in another country."

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

4. "Individual has expressed a willingness to renounce dual citizenship."

5. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."
6. "You exercise dual citizenship with Greece and the United States."
7. "You voted in the Greek national elections in 1999 for the election of representatives to the European Union Parliament."
8. "You inherited a 650 square foot apartment located in Greece in November 1999. The apartment is rented for \$300.00 per month and your father keeps the proceeds from the rent."
9. In a publicly available study of American espionage cases during the period 1947-2001, it was noted that there have been espionage cases where countries that were friendly or neutral to the United States have sought or received sensitive information, including (in alphabetical order): Ecuador, Egypt, El Salvador, France, Ghana, Greece, Israel, Japan, Liberia, Netherlands, Philippines, Saudi Arabia, South Korea and Taiwan. *See Espionage Against the United States by American Citizens 1947-2001* (PERSEREC Technical Report 02-5, July 2002) at pp. 22 and 62. A copy of the report is available at the Web site of the Office of the National Counterintelligence Executive (<http://www.nacic.gov/archives/index.html>). The Office of the National Counterintelligence Executive was established by the Counterintelligence Enhancement Act of 2002, P.L. 107-306, Title IX, Sections 901-904.