

DATE: May 4, 1999

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 98-0592

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

#### FOR APPLICANT

#### *Pro Se*

Administrative Judge Jerome H. Silber issued a decision, dated December 28, 1998, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel 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.

Department Counsel's appeal presents the following issues: (1) whether some of the Administrative Judge's factual findings are erroneous; (2) whether the Administrative Judge erred in his application of various provisions of the Adjudicative Guidelines; and (3) whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law.

#### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 18, 1998 to Applicant. The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence).

Applicant submitted an answer to the SOR, in which he indicated "I will abide by a decision without a hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, and he submitted a response to the FORM. The case was then assigned to the Administrative Judge for determination.

The Administrative Judge subsequently issued a written decision 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 that favorable decision.

#### **Administrative Judge's Findings and Conclusions**

Applicant is a 51-year-old man employed by a defense contractor. Applicant was born in a foreign country (FC), where he attended college and was employed by the defense ministry. Applicant has never held a political office or been in military service in FC. Applicant is not eligible to vote in FC elections.

From 1972 to 1982, Applicant was married to an FC national, who currently lives in the United States with their teenage daughter. From 1983 to 1991, Applicant was married to a United States citizen. He had two sons by that marriage, who are United States citizens by birth and live with their mother in the United States. Applicant married his current wife, a United States citizen, in 1996.

Prior to 1984, Applicant traveled to the United States on several occasions, using an FC passport. Applicant emigrated to the United States in 1984, becoming a permanent resident alien. Applicant applied for United States citizenship in 1994 and became a naturalized United States citizen in 1997. Applicant got a United States passport in 1998. Applicant has not been in FC since 1984. Applicant renewed his FC passport in 1993.

Applicant has an adult sister and two adult brothers who are FC nationals living in FC. Applicant corresponds with his siblings 3 or 4 times a year. Applicant's siblings are not employees, associates, or representatives of the FC government, and they do not understand the type of work in which Applicant has been engaged.

Applicant has no financial, business, banking or property interests in FC. Applicant has no educational, medical, social security, social welfare, or retirement benefits in FC. Applicant owns a home in the United States, and has an excellent credit history.

The Administrative Judge concluded that the nature, extent, seriousness and circumstances of Applicant's conduct "are of minimal present security significance," and further concluded that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

## Appeal Issues<sup>(1)</sup>

1. Whether some of the Administrative Judge's factual findings are erroneous. Department Counsel makes the following arguments in support of its contention that the Judge's factual findings are erroneous: (a) there is no record evidence to support the Judge's finding concerning that FC has a democratic form of government and has been in alliance with the United States for more than 50 years; (b) the Judge improperly relied on a favorable credibility determination as a substitute for record evidence; and (c) the Judge erred by making findings that rely on uncorroborated statements made by Applicant.

(a) Administrative Judge's finding concerning FC. Department Counsel's first argument is unpersuasive because it has two flaws. First, it may prove problematic for an Administrative Judge to take administrative notice of the form of government of a given foreign nation because that nation's form of government is in question or in transition (*e.g.*, because of secession, civil war, foreign occupation, or gaining independence from another nation). However, in this case, it is obvious and indisputable that FC has a democratic form of government. It would be untenable to suggest otherwise.<sup>(2)</sup>

Second, Department Counsel is judicially estopped from challenging the Judge's finding that FC has been in alliance with the United States. During the proceedings below, Department Counsel indicated that FC was an ally of the United States. *See* FORM at p. 4. Having taken that position during the proceedings below, Department Counsel is barred from contending the Administrative Judge erred by finding FC is an ally of the United States. *See* ISCR Case No. 95-0705 (May 16, 1997) at pp. 3-4 (discussing and applying doctrine of judicial estoppel).

Department Counsel correctly notes that even friendly countries can attempt to gain unauthorized access to classified information. Furthermore, the Board has noted that "[n]othing in Criterion B or Criterion C requires that the foreign country in question have interests that are inimical to the interests of the United States." ISCR Case No. 97-0699 (November 24, 1998) at p. 3. Although the Administrative Judge's findings about the nature of FC's form of government and its friendly relationship with the United States are not dispositive under either Criterion B or Criterion C, they are a legitimate part of a common sense determination regarding the "whole person." However, reading the Judge's decision as a whole, the Board is not persuaded that the Judge's finding that FC is an ally of the United States is pivotal to his favorable security clearance decision.

(b) Improper use of credibility determination. Department Counsel's second argument also lacks merit. Department

Counsel correctly notes that a favorable credibility determination is not a substitute for record evidence. However, Department Counsel fails to demonstrate the Administrative Judge committed that kind of error in this case. Department Counsel conflates an insufficiency of the evidence argument with an argument that the Judge impermissibly used a credibility determination in lieu of record evidence. Even if the Board were persuaded to conclude that Applicant's written statements are insufficient, in light of the record as a whole, to support the Judge's findings in this case (Directive, Additional Procedural Guidance, Item 32.a.), such a conclusion would not mean the Judge impermissibly relied on a credibility determination as a substitute for record evidence. In short, Applicant's statements are evidence. Whether they are both credible and persuasive is a separate determination.

Department Counsel also argues the Administrative Judge erred by finding Applicant's statements credible. In support of this Department Counsel cites to one apparent inconsistency between a statement in Applicant's answer to the SOR and a statement in a written statement Applicant gave to a federal investigator. For the reasons that follow, this argument falls short of demonstrating the Judge erred.

The Administrative Judge has the primary responsibility for weighing the record evidence and making findings of fact. Directive, Additional Procedural Guidance, Item 25. When making factual findings, the Judge must consider the record evidence as a whole. Directive, Section F.3. The presence of conflicting record evidence does not diminish the Judge's fact-finding responsibility. *See, e.g.*, ISCR Case No. 97-0630 (May 28, 1998) at p. 2. Indeed, the Judge often must weigh conflicting record and decide which evidence is more credible or persuasive in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 95-0576 (May 7, 1996) at p. 3. The single inconsistency cited by Department Counsel is not of a kind or degree that compelled the Judge, as a matter of law, to reject Applicant's statements in their entirety.

Nor does the Board find persuasive Department Counsel's contention that the Administrative Judge erred because he relied on some statements by Applicant that "were mere hearsay." There is no general prohibition against using hearsay evidence in making a security clearance decision. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 7 (citing federal cases). The question is not whether the Judge relied on hearsay evidence in making findings of fact, but rather whether it was arbitrary and capricious for him to do so in this case.

An Administrative Judge's findings of fact are subject to review on appeal. Directive, Additional Procedural Guidance, Item 32.a. The Board will not disturb a Judge's findings of fact unless there has been a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at pp. 3-4. As long as the Judge's findings reflect a reasonable, plausible interpretation of the record evidence, they will not be disturbed on appeal. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 4 (upholding Judge's findings that "reflect a reasonable, plausible interpretation of the record evidence"); ISCR Case No. ISCR Case No. 97-0625 (August 17, 1998) at p. 6 (rejecting Judge's finding that "does not reflect a reasonable interpretation of the record evidence as a whole"). In this case, the Board does not have to agree with the Judge's weighing of the evidence to conclude Department Counsel has failed to demonstrate the Judge weighed Applicant's statements in a manner that is arbitrary, capricious, or contrary to law.

Department Counsel notes that Applicant made conflicting statements about having financial interests in FC and contends those conflicting statements render clearly erroneous the Administrative Judge's finding that Applicant has no financial interests in FC. Applicant's admission that he is eligible for a retirement pension from a private FC company when he reaches age 65 (FORM, Item 5) renders erroneous the Judge's finding that Applicant has no financial interests or retirement benefits in FC. However, this error is harmless under the particular facts of this case.

(c) Lack of corroboration. There is no general rule that prohibits an Administrative Judge from relying on an applicant's uncorroborated statements in making his findings of fact. *See, e.g.*, ISCR Case No. 95-0578 (October 2, 1996) at p. 2. However, the Judge must consider the record as a whole and use common sense (Directive, Section F.3.) in evaluating the absence of corroborating evidence. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 4 n.2 ("[A]n Administrative Judge is not required to accept un rebutted evidence uncritically or without considering it in light of the record evidence as a whole."); ISCR Case No. 97-0752 (December 4, 1998) at p. 5 (under some circumstances, it is appropriate for Judge to consider absence of corroborating evidence when weighing a witness's testimony). Accordingly, Department Counsel's argument is not persuasive to the extent that it contends the Judge should have rejected Applicant's statements solely because those statements were not corroborated.

2. Whether the Administrative Judge erred in his application of various provisions of the Adjudicative Guidelines.

Department Counsel contends the Administrative Judge erred by applying Foreign Preference Mitigating Condition 1, Foreign Preference Mitigating Condition 2, and Foreign Influence Mitigating Condition 3. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate harmful error by the Judge.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines. Directive, Section F.3. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 3. Although a Judge has the discretion to deviate from the literal language of pertinent Adjudicative Guidelines, the Judge must articulate a rational basis for doing so. *See, e.g.*, ISCR Case No. 97-0825 (January 7, 1999) at p. 3; ISCR Case No. 97-0803 (June 19, 1998) at p. 2. Furthermore, the mere presence or absence of Adjudicative Guidelines for or against clearance is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6; ISCR Case No. 98-0111 (November 13, 1998) at p. 4.

Foreign Preference Mitigating Condition 1.<sup>(3)</sup> The record evidence clearly shows Applicant engaged in the exercise of FC citizenship for many years after his birth. Given that record evidence, it was error for the Administrative Judge to apply Foreign Preference Mitigating Condition 1. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 3 (Administrative Judge "should not apply Adjudicative Guidelines that lack support in the record evidence"). Accordingly, it was arbitrary and capricious for the Judge to apply Foreign Preference Mitigating Condition 1 in this case. However, as discussed earlier, the mere presence or absence of an Adjudicative Guideline for or against clearance is not solely dispositive of a case. Therefore, the inapplicability of Foreign Preference Mitigating Condition 1, standing alone, does not preclude a favorable decision in this case. Since Applicant's exercise of FC citizenship occurred before he became a naturalized United States citizen in 1997, Applicant's conduct prior to his naturalization could not, legally or logically, be considered the exercise of dual citizenship. *See* ISCR Case No. 97-0356 (April 21, 1998) at p. 4 (discussing significance of an applicant's use of foreign passport and voting in foreign elections before applicant became a naturalized United States citizen). *See also* Foreign Preference Mitigating Condition 2 ("[I]ndicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship").

Foreign Preference Mitigating Condition 2.<sup>(4)</sup> The Administrative Judge did not act in an arbitrary and capricious manner by applying Foreign Preference Mitigating Condition 2. Apart from Applicant's retention of an FC passport after he became a naturalized United States citizen in 1997, the record evidence shows that Applicant's exercise of dual citizenship occurred prior to his naturalization as a United States citizen. Considering the particular facts of this case, it was not arbitrary and capricious for the Judge to conclude that Applicant's mere retention of an FC passport (which he had obtained before becoming a naturalized United States citizen) did not warrant an adverse decision. *See* ISCR Case No. 97-0356 (April 21, 1998) at pp. 5-6 (discussing circumstances under which mere possession of foreign passport after applicant became naturalized United States citizen might not raise security concerns).<sup>(5)</sup>

Department Counsel's argument concerning Applicant's retention of FC citizenship is not persuasive because it ignores certain practical realities of Applicant's dual citizenship. In order to become a naturalized United States citizen a person is required to take an oath<sup>(6)</sup> which includes the following language: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen . . ." 8 C.F.R. Section 337.1 (Oath of allegiance)(language tracks statutory language found in 8 U.S.C. Section 1448(a)). Although the United States requires a person to take the oath of allegiance in order to become a naturalized United States citizen, a foreign country may not recognize or accept that person's renunciation of citizenship in that foreign country. *See, e.g., Sadat v. Mertes*, 615 F.2d 1176, 1184 (7th Cir. 1980)(noting that some nations do not accept United States oath as ending their claim over naturalized Americans).<sup>(7)</sup> Using common sense (Directive, Section F.3.), it does not seem reasonable to draw a negative security inference from the fact that an applicant is not in a position to force a foreign country to accept the naturalized applicant's renunciation of his or her foreign country citizenship. However, Applicant has not engaged in conduct that constitutes the exercise of dual citizenship since he became a naturalized United States citizen.<sup>(8)</sup> In view of the foregoing, Department Counsel's argument is not persuasive.

Foreign Influence Mitigating Condition 3.<sup>(9)</sup> Department Counsel argues: (a) the Administrative Judge erred by applying Foreign Influence Mitigating Condition 3 because it cannot be applied in a case where the applicant's foreign<sup>(10)</sup>

contacts are family members; and (b) the Judge's decision not to apply Foreign Influence Mitigating Condition 1 was outcome determinative.

As discussed earlier in this decision, the mere presence or absence of an Adjudicative Guideline for or against clearance is not solely dispositive of a case. Accordingly, it is untenable for Department Counsel to contend that the Judge's decision to not apply Foreign Influence Mitigating Condition 1 is outcome determinative.

Nothing in the plain language of Foreign Influence Mitigating Condition 3 precludes its application when the foreign citizens in question are immediate family members, a cohabitant, or associates of an applicant. Department Counsel's argument to the contrary is not persuasive.

3. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable decision is arbitrary, capricious, and contrary to law because the Judge: (a) failed to properly weigh the record evidence; (b) reached conclusions that were contrary to, or unsupported by, the record evidence; (c) did not properly apply pertinent provisions of the Adjudicative Guidelines; and (d) did not give a satisfactory explanation for his deviations from the Adjudicative Guidelines.

For the reasons set forth earlier in this decision, Department Counsel's arguments have failed to demonstrate the Administrative Judge committed harmful error. The Board need not agree with the Judge's decision to conclude that it is sustainable in light of Section F.3. of the Directive and the pertinent Adjudicative Guidelines.

## Conclusion

Department Counsel has failed to meet its burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's December 28, 1998 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. Applicant's reply brief contains some factual assertions that go beyond the record evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. The Board notes that Applicant had the opportunity to respond to the SOR. and the opportunity to respond to the FORM (including the right to submit additional information for consideration by the Administrative Judge).

2. The Administrative Judge's finding about FC's "regard for the due process rights of its inhabitants" goes beyond what

is permissible under administrative notice. However, the Judge's error on this point is harmless under the particular facts of this case.

3. "[D]ual citizenship is based solely on parents' citizenship or birth in a foreign country."

4. "[I]ndicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship."

5. As the Directive advises (Foreign Preference Disqualifying Condition 2), use of a foreign passport could raise security concerns sufficient to warrant a reconsideration of Applicant's security eligibility. *Cf.* ISCR Case No. 98-0320 (April 8, 1999)(discussing effect of prior favorable security clearance decision, including the effect of security significant conduct that occurs after prior adjudication).

6. Applicant's reply brief notes the oath required to become a naturalized United States citizen and contends it has relevance that has been ignored in his case. There is no record evidence that Applicant took the oath. However, United States citizenship cannot be conferred through naturalization except by compliance with the statutory requirements. *INS v. Pangilinan*, 486 U.S. 875, 883-84 (1988). Accordingly, there is a rebuttable presumption that Applicant was not granted naturalization as a United States citizen unless he complied with the statutory requirements, including taking the required oath.

7. There is no record evidence indicating whether FC would accept the United States oath of allegiance as effectuating renunciation of FC citizenship. There is no record evidence that Applicant has told FC officials of his naturalization as a United States citizen. Whether Applicant retains his FC citizenship is a matter of FC law, not Applicant's belief of his citizenship status. However, for purposes of deciding this appeal, the Board will accept Applicant's stated belief that he retains FC citizenship.

8. *But see* footnote 5 of this decision.

9. "[C]ontact and correspondence with foreign citizens are casual and infrequent."

10. "[A] determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk."