

DATE: October 17, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0454

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated November 10, 1999, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's adverse security clearance 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by not issuing a favorable security clearance decision based on application of Section 2-203 of the National Industrial Security Program Operating Manual; and (2) whether the Administrative Judge failed to adhere to the Directive and issued a decision that is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 30, 1999 to Applicant. The SOR was based on Criterion C (Foreign Preference). A hearing was held on September 15, 1999. The Administrative Judge issued a written decision, dated November 10, 1999, 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 that adverse decision.

On March 22, 2000, the Director, DOHA, issued an e-mail message that read "Effective immediately and until further notice there is an across the board moratorium on the issuance of any decisions in cases involving any dual citizenship issues. This applies to actions by security specialists, Department Counsel, Administrative Judges, and the Appeal Board." On April 11, 2000, the Director, DOHA issued an e-mail message that read "This is to provide further guidance as to the moratorium on dual citizenship cases issued on Wednesday March 22nd. Effective immediately the moratorium applies only to decisions to clear or issue an SOR by a security specialist, decisions to clear or deny by an Administrative Judge and decisions to affirm, reverse or remand by the Appeal Board in cases involving an Applicant's use and/or possession of a foreign passport." Copies of the March 22 and April 11, 2000 e-mail messages were provided to Applicant and the processing of this appeal was held in abeyance.

By letter dated September 1, 2000, the Board informed the parties that the Deputy General Counsel (Legal Counsel) had (1) provided the Board with a copy of an August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline" (hereinafter "ASDC3I memo"), and (2) advised the Board that the moratorium imposed on March 22, 2000 had been lifted. A copy of the ASDC3I memo was provided to the parties with the September 1, 2000 letter.

Through the September 1, 2000 letter, the Board also gave both parties the opportunity to: (1) express their views on the ASDC3I memo and how it applies to this case; and (2) to respond to the other party's submission. Department Counsel made a submission on September 7, 2000, in which it contended that the ASDC3I memo should be applied to this case. The Board received no submission from Applicant concerning the ASDC3I memo or Department Counsel's position on the ASDC3I memo. By letter dated September 26, 2000, the Board advised the parties that each had been given the opportunity to respond to the September 1, 2000 and that no further submissions would be accepted by the Board.

Appeal Issues

1. Whether the Administrative Judge erred by not issuing a favorable security clearance decision based on application of Section 2-203 of the National Industrial Security Program Operating Manual. Approximately six weeks after the hearing was held, the Administrative Judge *sua sponte* issued an order, dated November 1, 1999, in which he reopened the record and asked the parties to address the question of whether Section 2-203 of the National Industrial Security Program Operating Manual (NISPOM) or a particular provision of DoD 5200.2-R were applicable to this case. The parties made submissions in response to the Judge's November 1, 1999 order. When issuing the decision in this case, the Judge concluded he lacked authority to dismiss the case against Applicant for lack of jurisdiction (Decision at p. 4).⁽¹⁾

On appeal, Applicant contends that the Administrative Judge erred by not making a favorable security clearance decision in this case based on application of Section 2-203 of the NISPOM, which reads: "**Reciprocity.** Federal agencies that grant security clearances (TOP SECRET, SECRET, CONFIDENTIAL, Q, or L) to their employees or their contractor employees are responsible for determining whether such employees have been previously cleared or investigated by the Federal Government. Any previously granted PCL⁽²⁾ that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required, shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency." Department Counsel contends that Section 2-203 of the NISPOM is not applicable in this case. Both parties make arguments concerning the significance of a November 3, 1999 memorandum by the Director, Defense Office of Hearings and Appeals ("Director's Memorandum"), which was made part of the record as part of Department Counsel's response to the Judge's November 1, 1999 order. Resolution of Applicant's and Department Counsel's arguments poses several complex, difficult legal questions concerning the applicability of the Director's Memorandum.

Federal courts have indicated that they will avoid deciding difficult or complex legal questions unless it is unavoidable to do so in order to resolve the appeals before them. *See, e.g., Norton v. Mathews*, 427 U.S. 524, 523 (1976)(court can reserve judgment on difficult jurisdictional questions when case can be resolved on alternative grounds); *National Treasury Employees Union v. Federal Labor Relations Authority*, 139 F.3d 214, 221 (D.C. Cir. 1998)(court should avoid making an unnecessary ruling); *Hindes v. FDIC*, 137 F.3d 148, 166 (3d Cir. 1998)(appellate court need not decide difficult jurisdictional issues when it can decide case on another dispositive issue). That reasoning can be applied, by analogy, to appeals under the Directive.

In this case, the Board can resolve the issue of the applicability of NISPOM Section 2-203 without needing to decide the issue of the applicability of the Director's Memorandum. Applicant's appeal argument is based on a reading of the language of NISPOM Section 2-203. Department Counsel, in its reply brief, also makes an argument based on a reading of the language of NISPOM Section 2-203 that does not rely on the applicability of the Director's Memorandum. Resolution of this appeal issue can be accomplished by addressing those arguments without deciding the issue of the applicability of the Director's Memorandum.

The Board has previously held that Section 2-203 of the NISPOM requires the Defense Office of Hearings and Appeals

to provide reciprocity to security clearance adjudications made by other federal agencies, provided those adjudications satisfy the conditions specified in Section 2-203. *See* ISCR Case No. 98-0320 (April 8, 1999) at pp. 3-4. In this case, the Board concludes that Section 2-203 does not mean that a federal agency (such as the Defense Office of Hearings and Appeals) is barred from reopening or reconsidering its own security clearance decisions. The obligation to give reciprocity to security clearance decisions made by other federal agencies does not limit or control the authority of a federal agency to reopen or reconsider its own decisions.⁽³⁾ To use an analogy: the obligation of state courts to give full faith and credit to the judgments of other state courts (under Article IV, Section 1 of the United States Constitution) does not limit or control the authority of state courts to reopen or reconsider their own decisions.

2. Whether the Administrative Judge failed to adhere to the Directive and issued a decision that is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's decision is arbitrary, capricious, and contrary to law because the Judge: (a) failed to apply Foreign Preference Mitigating Condition 1; and (b) found Applicant's dual citizenship has negative security significance.

(a) Foreign Preference Mitigating Condition 1.⁽⁴⁾ Applicant cites the Board's decision in ISCR Case No. 97-0356 (April 21, 1998) for the proposition that Foreign Preference Mitigating Condition 1 is applicable "without regard to whether the Applicant exercised the privileges of foreign citizenship." Applicant's reliance on that Board decision is somewhat misplaced because it is distinguishable on its facts.

The Board recently has modified its earlier rulings concerning Foreign Preference Mitigating Condition 1. Specifically, in ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3, the Board concluded that Foreign Preference Mitigating Condition 1 can be applied where an applicant's dual citizenship falls within the literal language of Mitigating Condition 1 regardless of whether the applicant exercised the rights or privileges of foreign citizenship.

The Administrative Judge found that Applicant, who is a United States citizen by birth, has foreign country (FC) citizenship based on his mother's FC nationality. Given that finding, Applicant was entitled to have the Judge apply Foreign Preference Mitigating Condition 1. However, that application is not dispositive 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 1 does not relieve a Judge of the obligation to consider any record evidence that might be indicative of a foreign preference under Criterion C. As will be discussed later in this decision, the record evidence provides a sufficient basis for the Board to affirm the Judge's adverse security clearance decision notwithstanding consideration of Foreign Preference Mitigating Condition 1.

(b) Security significance of Applicant's dual citizenship. Applicant contends it was arbitrary and capricious for the Administrative Judge to enter formal findings in favor of Applicant with respect to SOR 1.b. (possession of FC passport) and SOR 1.c. (retention of FC passport), but against him with respect to SOR 1.a. (dual citizenship). Applicant's argument is not a frivolous one, but it does not demonstrate harmful error by the Judge.

The ASDC3I memo indicates that it "applies to all cases in which a final decision has not been issued as of the date of this memorandum." Under Directive, Additional Procedural Guidance, Item 36, a security clearance decision that has been appealed is not final until the appeal has been withdrawn (Item 36.d.) or the Board affirms or reverses the Administrative Judge's decision (Item 36.e.). Accordingly, the ASDC3I memo applies to this case.

The ASDC3I memo indicates that possession or use of a foreign passport is a disqualifying condition -- with "no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law,⁽⁵⁾ or the identity of the foreign country" -- and that the "only applicable mitigating factor addresses the official approval of the United States Government for the possession or use [of a foreign passport]."⁽⁶⁾ Application of the requirements of the ASDC3I memo to the particular facts and circumstances of this case mandates reversal of the Administrative Judge's formal findings in favor of Applicant with respect to SOR 1.b. and SOR 1.c. because the record shows Applicant possesses a foreign passport and there is no record evidence that Applicant's possession of a foreign passport is sanctioned by the United States within the meaning of Foreign Preference Mitigating Condition 3.

Even if the ASDC3I memo were not applicable to this case, the Board would conclude that the Administrative Judge's

decision should be affirmed because Applicant has failed to demonstrate harmful error.

Applicant's reliance of some Administrative Judge decisions in other cases is misplaced. Those decisions do not demonstrate the Judge erred in this case, and they are not binding on the Board in deciding this appeal. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 4 (discussing precedential value of Administrative Judge decisions). Furthermore, Applicant's reliance on the Board's decision in ISCR Case No. 90-1550 (March 25, 1990) is misplaced, because the Board never addressed the merits of the foreign preference issues in that case and did not make any statements in its decision resembling those Applicant claims the Board did. Applicant's characterization of the Board's decision in ISCR Case No. 90-1550 is groundless.

Applicant is correct in asserting that it is difficult to reconcile the Administrative Judge's analysis of the different SOR allegations in this case. Applicant is correct in arguing that his Applicant's dual citizenship (SOR 1.a.), standing alone, is not sufficient to warrant an adverse security clearance decision. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at p. 5 ("Under Criterion C, the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions."). Although the Judge seems to be basing his adverse security clearance decision on his adverse formal finding under SOR 1.a., a reading of his decision as a whole shows the Judge articulated reasons concerning the security significance of Applicant's actions that would support adverse formal findings under SOR 1.b. and SOR 1.c., not the Judge's favorable formal findings with respect to those SOR paragraphs. The Judge concluded that this case is not simply one based on Applicant's status of a dual national with FC citizenship and his possession of an FC passport based on mere sentiment, respect for his FC heritage, or symbolism. That conclusion reflects a plausible, reasonable interpretation of the record evidence, which shows Applicant obtained an FC passport (and wants to retain it) in order to protect his ability to claim the rights and privileges of an FC citizen. By seeking to protect his ability to claim the rights and privileges of an FC citizen, Applicant is demonstrating an interest in FC citizenship that clearly goes beyond mere sentiment, respect for his FC heritage, or symbolism. The absence of any sinister motive on Applicant's part does not negate or reduce the negative security significance of his conduct. *See, e.g.*, ISCR Case No. 99-0254 (February 16, 2000) at pp. 3-4 ("[T]he fact an applicant has indicated he or she is acting based on personal reasons that do not suggest a sinister motive does not mean that the applicant's actions lack negative security significance.").

Department Counsel did not cross-appeal the Administrative Judge's formal findings under SOR 1.b. and SOR 1.c. However, in support of its contention that the Judge's adverse decision should be affirmed, Department Counsel argues the Judge's adverse decision can be upheld: (a) for reasons that go beyond Applicant's status as a dual national and his mere possession of an FC passport, and (b) because close cases must be resolved in favor of the national security, not in favor of an applicant. Department Counsel's argument for alternate grounds for affirming the Judge's adverse decision is legally permissible. Even in the absence of a cross-appeal, the non-appealing party is entitled to urge affirmance of the decision below on the basis of any matter supported by the record, even if the argument relies on matters overlooked, ignored, not relied on, or even rejected by the lower tribunal. *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *Olsen v. Correio*, 189 F.3d 52, 58 n.3 (1st Cir. 1999); *United States v. Sandia*, 188 F.3d 1215, 1217 (10th Cir. 1999); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 349 n.3 (6th Cir. 1998); *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730, 738 (7th Cir. 1998). *Accord* ISCR Case No. 99-0454 (March 21, 2000) at p. 9.

For the reasons given earlier, the record evidence would support adverse formal findings against Applicant under SOR 1.b. and SOR 1.c., as well as the Administrative Judge's adverse formal finding under SOR 1.a. The Administrative Judge's adverse security clearance decision can be affirmed on these alternate grounds.

Conclusion

Applicant has failed to meet his burden of demonstrating error that warrants remand or reversal. For the reasons stated in this decision, 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. Because the Administrative Judge concluded he lacked authority to act, he had no legally supportable basis for discussing the merits of the issues raised by his November 1, 1999 order. Once a Judge concludes he or she lacks authority to act, the Judge should merely explain how the Judge decided the threshold question of his or her authority.
2. According to Section 1-300 of the NISPOM, a PCL is an employee's personnel clearance.
3. NISPOM Section 2-203 is titled **Reciprocity**. Inherent in the concept of reciprocity is the existence of another person, party or entity. *See, e.g.*, definition of "reciprocity" in *Black's Law Dictionary* (6th edition, West, 1990) at p. 1270. A person, party, or entity does not give reciprocity to its own actions.
4. "[D]ual citizenship is based solely on parents' citizenship or birth in a foreign country."
5. Under Section E.1 of the Directive, the ASDC3I has the authority to, *inter alia*, establish adjudicative standards, oversee the application of such standards, and to issue clarifying guidance and instructions. Guidance from the ASDC3I concerning adjudicative standards supersedes any interpretation of those standards by the Board. Therefore, the ASDC3I memo effectively overrules those portions of two Board decisions [ISCR Case No. 99-0452 (March 21, 2000) at pp. 8-9 and ISCR Case No. 98-0476 (December 14, 1999) at pp. 2-3] which held that an applicant's use of a foreign passport may be extenuated or mitigated when the applicant acted out of legal necessity.
6. The ASDC3I memo refers to a mitigating factor that involves "the official approval of the United States Government for the possession or use [of a foreign passport]." That language is construed as referring to Foreign Preference itigating Condition 3 ("[A]ctivity is sanctioned by the United States").