DATE: March 21, 2000

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 99-0452

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Robert R. Gales issued a decision, dated September 24, 1999, 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 favorable security clearance decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred in his application of Foreign Preference Mitigating Conditions 1 and 3; (2) whether the Administrative Judge erred by relying on a 1983 memorandum from the Director, Security Plans and Programs, Office of the Under Secretary of Defense addressed to the Director of the Defense Investigative Service; (3) whether the Administrative Judge erred by referring to Applicant's loyalty; (4) whether the Administrative Judge erred by failing to consider the likelihood of continuance or recurrence of Applicant's use of a foreign country passport; (5) whether the Administrative Judge erred by creating and applying an arbitrary spectrum of proof with respect to Foreign Preference itigating Condition 4; (6) whether the Administrative Judge erred by giving substantial weight to Applicant's expressed willingness to renounce his foreign country citizenship because of the conditional nature of his statements; and (7) whether the Administrative Judge erred by failing to give due weight to the security significance of Applicant's obtaining and using a foreign country passport after becoming a naturalized United States citizen.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated June 30, 1999. The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence). A hearing was held on August 19, 1999. The Administrative Judge issued a written decision, dated September 24, 1999, 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 the Judge's favorable security clearance decision.

Appeal Issues[(1)]

1. Whether the Administrative Judge erred in his application of Foreign Preference Mitigating Conditions 1 and 3. Department Counsel contends: (a) the Administrative Judge erred

by applying Foreign Preference Mitigating Condition 1[(2)] because Applicant's dual citizenship is not basely solely on birth; and (b) the Judge erred by applying Foreign Preference Mitigating Condition 3[(3)] because the Judge failed to give any explanation for his citation of Mitigating Condition 3 and there is no record evidence to support its application in this case. These contentions have mixed merit.

(a) In addressing the applicability of Foreign Preference Mitigating Condition 1 in this case, the Board has reviewed its prior decisions. Prior Board decisions have analyzed that Mitigating Condition in terms of whether an applicant with dual nationality has exercised the rights and privileges of foreign citizenship before or after the applicant has become a naturalized United States citizen.[(4)] Upon further consideration, the Board concludes that the literal language of Foreign Preference Mitigating Condition 1 means that it can be applied if "dual citizenship is based solely on [an applicant's] parents' citizenship or birth in a foreign country" without regard to whether an applicant has exercised the rights and privileges of foreign citizenship. Of course, if an applicant has exercised the rights and privileges of foreign citizenship, such conduct must be analyzed under other pertinent Foreign Preference Adjudicative Guidelines, as well as Section F.3. of the Directive, and the weight accorded Foreign Preference Mitigating Condition 1 must be appropriate given those other Adjudicative Guidelines. In this case, it was not error for the Judge to consider and apply Foreign Preference Mitigating Condition 1.

(b) The Administrative Judge's citation of Foreign Preference Mitigating Condition 3 without explanation seems to be arbitrary and capricious. However, the Board reviews a Judge's decision as a whole, not just isolated sentences of the decision, to determine the Judge's findings and conclusions. *See, e.g.*, ISCR Case No. 99-0417 (February 24, 2000) at p. 5. Reading the Judge's decision as a whole, it appears that the Judge's citation of Foreign Preference Mitigating Condition 3 was made in connection with his reliance on a 1983 memorandum that is the subject of the second appeal issue. As will be discussed later in this decision, the Judge's reliance on that 1983 memorandum was arbitrary, capricious, and contrary to law. Because the Judge could not rely on that 1983 memorandum, the Judge failed to articulate a sustainable basis for his reliance on Foreign Preference Mitigating Condition 3 in this case.

2. Whether the Administrative Judge erred by relying on a 1983 memorandum from the Director, Security Plans and Programs, Office of the Under Secretary of Defense addressed to the Director of the Defense Investigative Service. In the decision (at p. 10), the Administrative Judge refers to a memorandum from the Director, Security Plans and Programs, Office of the Under Secretary of Defense[(5)] to the Director, Defense Investigative Service. The Judge quoted a passage from that memorandum in apparent support of the Judge's conclusion (Decision at p. 11) that Applicant's use of an FC passport was for personal convenience and, therefore, not having any security significance.[(6)]

Department Counsel contends the Judge erred because: (a) the Administrative Judge did not give the parties notice of his intent to rely on the 1983 memorandum, thereby depriving the parties of any opportunity to comment on that memorandum or present evidence in response to it; and (b) the 1983 memorandum is not applicable to adjudications under the current Adjudicative Guidelines. Department Counsel's contention has merit.

As a general rule, the parties are entitled to know what information an Administrative Judge is relying on in making a decision. There are some narrow exceptions to this general rule: official or administrative notice, and matters known to an agency through its cumulative expertise. *See* DISCR Case No. 90-1550 (March 25, 1992) at p. 5 (citing federal cases). *See also* Kenneth C. Davis and Richard J. Pierce, Jr., 2 *Administrative Law Treatise* (3rd Edition), Section 10.6 (Little Brown & Co., 1994); Jacob A. Stein, Glenn A. Mitchell and Basil J. Mezines, 4 *Administrative Law,* Section 25.01 (Matthew Bender, 1999). The 1983 memorandum cited by the Judge in this case does not fall under either of those two exceptions.

Unlike a federal statute or a published DoD directive or regulation, there is no indication that the 1983 memorandum is publicly available. The 1983 memorandum, an internal DoD memorandum that does not appear to be publicly available, is not the kind of document for which official or administrative notice would be appropriate.[(7)] Accordingly, it was arbitrary, capricious, and contrary to law for the Judge to try to justify his decision based on the 1983 memorandum.

Department Counsel also argues the purported 1983 memorandum is not applicable because (a) it was directed to the Defense Investigative Service, which does not adjudicate security clearance cases; and (b) a 1983 memorandum cannot trump the language of Adjudicative Guidelines promulgated in 1992 (and modified after 1992). Both arguments are persuasive. A memorandum directed to security investigators has questionable value with respect to determining how security clearance adjudicators are to decide security clearance cases. Furthermore, no internal memorandum can supersede or override the provisions of a pertinent DoD directive or regulation. Whatever authoritative value the 1983 memorandum may have when it was issued, it was effectively superseded when DoD promulgated the Adjudicative Guidelines.[(8)]

Finally, the Administrative Judge's reliance on the 1983 memorandum also was misplaced because the record evidence in this case simply does not support the Judge's finding that Applicant used an FC passport for his personal convenience. Without such a factual predicate, the Judge had no rational basis for trying to rely on the 1983 memorandum.

3. Whether the Administrative Judge erred by referring to Applicant's loyalty. The Administrative Judge referred favorably on Applicant's loyalty to the United States (Decision at pp. 9 and 11). Department Counsel cites to Section 7 of Executive Order 10865 and prior Board decisions in support of its contention that the Judge erred by referring to Applicant's loyalty. Department Counsel's contention has merit, but the record evidence shows that with regard to the Judge's references to loyalty there were procedural anomalies that require discussion.

Through interrogatories, DOHA asked Applicant about his loyalty to the United States (Exhibit 1 at p. 3). At the hearing, Department Counsel asked Applicant if his "primary loyalty" was with the United States (TR at 62). And, Department Counsel did not object when Applicant asked a character witness her opinion about Applicant's loyalty (TR at 65). Furthermore, Applicant did not object to questions concerning his loyalty during the proceedings below. Such incidents might suggest that DOHA and Applicant "opened the door" on eliciting evidence about Applicant's loyalty to the United States. Normally, it would be unfair for a party to "open the door" on a matter during the proceedings below and then complain on appeal that a Judge addressed that matter in making a security clearance decision. However, the error of the parties did not authorize the Judge to ignore Section 7 of Executive Order 10865 by making any determination as to Applicant's loyalty. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at p. 8 (holding Judge erred by referring to Applicant's loyalty in foreign preference case). The prohibition of Section 7 does not pertain to a procedural or evidentiary right that might be deemed waived by a party's mistake in "opening the door" to a subject matter that should not have been allowed to be raised in the proceedings. Mistakes by the parties cannot confer authority on a Judge to consider an applicant's loyalty in making decisions under Executive Order 10865.

The Board notes that the literal language of Section 7[(9)] could be construed as prohibiting loyalty determinations only when an adverse security clearance decision is made, but not when a favorable security clearance decision is made. The Board rejects such a construction of Section 7 because it could result in anomalous or absurd situations: (a) Such a construction of Section 7 could result in a situation where an applicant could be questioned about his or her loyalty, so long as the answers were used only if a favorable decision were made. The possibility of such an after-the-fact use of loyalty by a Judge would place the parties in the untenable position of trying to decide whether to object to loyalty questions during the proceedings; (b) Such a construction of Section 7 could result in a situation where an Administrative Judge could make an unfavorable loyalty determination about a particular applicant in the context of an overall favorable security clearance decision, thereby depriving an applicant of any legal recourse to challenge the unfavorable loyalty determination because, in the absence of a government appeal, the applicant would not have standing to appeal the favorable decision to the Board; (c) Such a construction of Section 7 could lead to an absurd situation where a Judge could make a loyalty determination in the context of an overall favorable security clearance decision and the Board could be asked to address a challenge to the Judge's loyalty determination, but the Board could not rule that the Judge was correct or in error unless the final decision was favorable to the applicant; (d) Such a construction of Section 7 could lead to the injection of loyalty issues into DOHA proceedings, contrary to the underlying purpose of Section 7. The Board declines to construe Section 7 in a manner that could lead to such anomalous situations. *See, e.g., Marques v. Fitzgerald*, 99 F.3d 1, 5 (1st Cir. 1996)("[A] statute may not be construed in a manner that results in absurdities or defeats its underlying purpose."); *Yerdon v. Henry*, 91 F.3d 370, 376 (2d Cir. 1996)(court should reject party's interpretation of statute that would lead to absurd or futile results that are plainly at variance with the policy of the statute as a whole).

4. Whether the Administrative Judge erred by failing to consider the likelihood of continuance or recurrence of Applicant's use of a foreign country passport. Department Counsel contends the Administrative Judge erred by failing to consider the record evidence that shows Applicant is likely to use his FC passport in the future. Department Counsel argues the Judge erred because the likelihood or continuance or recurrence is a factor to be considered under Section F.3. of the Directive and page 2-3 of the Adjudicative Guidelines.

Given the Administrative Judge's conclusion that Applicant's use of his FC passport did not have security significance, it is not surprising that the Judge did not address this factor. After all, it would to be superfluous for a Judge to expressly consider whether an applicant is likely to repeat conduct that the Judge concludes has no negative security significance.

5. Whether the Administrative Judge erred by creating and applying an arbitrary spectrum of proof with respect to Foreign Preference Mitigating Condition 4. The Administrative Judge posited a spectrum of proof with respect to Foreign Preference Mitigating Condition 4[(10)] (Decision at p. 9), which Department Counsel challenges as arbitrary. Department Counsel's appeal argument on this issue is problematic.

Department Counsel's brief indicates "Although we do not dispute whether there was a sufficient basis [for the Judge] to apply [Foreign Preference Mitigating Condition] 4 to this case, the Judge erred by creating and applying an arbitrary spectrum of proof with respect to [Mitigating Condition] 4. Because this Judge and other judges may use the spectrum of proof in future cases, the issue has practical importance for this and other cases, and it should be decided by the Appeal Board." Having essentially conceded for purposes of this appeal that the Judge had a sufficient basis to apply Mitigating Condition 4, Department Counsel's argument is reduced to asking the Board to render an advisory opinion for guidance in future cases. The Board declines to render such an advisory opinion. *Cf.* ISCR Case No. 99-0201 (October 12, 1999) at p. 2 (Board does not have general, supervisory jurisdiction or authority over Hearing Office Administrative Judges). By declining to render an advisory opinion on this subject, the Board expresses no opinion, express or implied, on: (a) the Judge's reasoning concerning the application of Foreign Preference Mitigating Condition 4, or (b) Department Counsel's arguments challenging the Judge's analysis of Foreign Preference Mitigating Condition 4 in this case.

6. Whether the Administrative Judge erred by giving substantial weight to Applicant's expressed willingness to renounce his foreign country citizenship because of the conditional nature of his statements. The Administrative Judge concluded "Applicant's professed willingness to renounce his [FC] citizenship should be given substantial weight even though he has not yet commenced the formal process" (Decision at p. 9). Department Counsel challenges this conclusion, arguing the Judge's conclusion runs contrary to the record evidence. Department Counsel has mixed merit.

There is record evidence that supports Department Counsel's argument that Applicant's statements about his willingness to renounce his FC citizenship are conditional. Department Counsel is also correct when it points out that Applicant said in February 1998 that he intended "to maintain my dual citizenship and exercise my dual citizenship rights because by renouncing my citizenship to [FC] it would interfere with my ability to interact with my sister [name omitted] and her children in [FC]" (Exhibit 2). Furthermore, Department Counsel is correct in arguing the Judge's conclusion on this point is not consistent with his factual finding that Applicant is willing to renounce his FC citizenship "in order to keep his clearance and his job" (Decision at p. 5).

However, the Department Counsel's argument does not take into account the record evidence that Applicant became a naturalized United States citizen in 1986. Under applicable federal law, a person who becomes a naturalized United States citizen must take an oath of allegiance in which the person swears allegiance to the United States and renounces allegiance to any foreign leader, state or sovereignty. *See* 8 U.S.C. Section 1448 (Oath of renunciation and allegiance). *See also* ISCR Case No. 97-0356 (April 21, 1998) at p. 5; ISCR Case No. 98-0592 (May 4, 1999) at p. 6. It was not arbitrary or capricious for the Administrative Judge to take into account the significance of Applicant's taking the oath of allegiance as part of the process of becoming a naturalized United States citizenship.

Furthermore, Department Counsel's argument goes too far to the extent it seeks to make Foreign Preference Mitigating Condition 4 a prerequisite for a favorable security clearance decision. The Board has specifically held that the presence or absence of Adjudicative Guidelines Disqualifying or Mitigating Conditions is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at p. 5. Nothing in the Directive indicates or suggests that an applicant

cannot be granted a security clearance unless the applicant meets the specific Adjudicative Guidelines Mitigating Conditions under pertinent Criteria. Department Counsel's argument ignores the fact that an Administrative Judge also must evaluate an applicant's case under Section F.3. of the Directive.

7. Whether the Administrative Judge erred by failing to give due weight to the security significance of Applicant's obtaining and using an FC passport after becoming a naturalized U.S. citizen. Department Counsel contends the Judge failed to give due weight to the security significance of Applicant's obtaining and using an FC passport after becoming a naturalized U.S. citizenship. In support of that contention, Department Counsel argues a doctrine of necessity should be rejected because: (a) Applicant has the choice of renouncing his FC citizenship and, thereby, not subject himself to FC legal requirements; and (b) if Applicant feels compelled to comply with FC law, such a decision "raises serious questions about the appropriateness of his continued access to classified information." Applicant argues, in his reply brief, that he is required to obtain and use an FC passport whenever he goes to FC.[(11)] These arguments by the parties raise the issue of whether legal necessity may be considered as extenuating or mitigating of Applicant's use of an FC passport.

Department Counsel's arguments are problematic. First, the Board rejects Department Counsel's proffer of FC law on appeal because the Board cannot take administrative notice of foreign law. *See* DISCR Case No. 90-1550 (March 25, 1992) at p. 4 (noting special problems arising when Judge researches issue of foreign law without notice to the parties).[(12)] Furthermore, by raising a specific provision of FC law for the first time on appeal, Department Counsel is asking Board to do something similar to what they criticize the Judge for doing with respect to the 1983 memorandum. Accordingly, the Board declines to consider Department Counsel's proffer of FC law in connection with this appeal. Second, as discussed earlier in this decision, satisfaction of Foreign Preference itigating Condition 4 is not a mandatory condition for a favorable security clearance decision. Furthermore, Department Counsel goes too far by asking the Board to effectively rewrite Mitigating Condition 4 by interpreting it to require actual renunciation of dual citizenship. *Cf.* ISCR Case No. 98-0476 (December 14, 1999) at p. 4 (an Administrative Judge does not have authority or discretion to alter the language of an Adjudicative Guideline). Third, Department Counsel's argument fails to take into account the significance of Applicant's oath of allegiance when he became a naturalized United States citizen. Fourth, there is a serious flaw with Department Counsel's argument that an applicant's willingness to obey foreign law with respect to passports raises a security concern. As a practical matter, *any* United States citizen (even one who does not have dual nationality) is expected to obey the laws of a foreign country when the United States citizen travels to that country. (Similarly, foreign citizens who travel to the United States are expected to obey the laws of the United States.) When a United States citizen yields to the legal necessity of obeying the laws of a foreign country to which he or she travels, that conduct cannot reasonably be construed as evidence of a foreign preference. Otherwise, every United States citizen who travels to a foreign country (whether as a tourist, business person, diplomat, military member, member of a ship or airplane crew, or in some other capacity) would be deemed to demonstrate a foreign preference within the meaning of Criterion C unless they refuse to obey any law of the foreign country to which they travel. The Board declines to accept an argument that leads to such an untenable result. Of course, the applicability of legal necessity in a given case does not relieve a Judge of the obligation to consider any other evidence relevant to determining whether an applicant's conduct or situation gives rise to security concerns under Criterion B.

Under the particular facts of this case, the record evidence of Applicant's use of an FC passport based on legal necessity does not support a conclusion that Applicant's conduct demonstrates a foreign preference within the meaning of Criterion C.

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. Correiro*, 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). Accordingly, the fact that the Administrative Judge did not consider or rely on Applicant's claim of legal necessity when analyzing Applicant's use of an FC passport does not preclude the Board from affirming the Judge's favorable conclusion about the security significance of Applicant's use of an FC passport based on the alternate ground of legal necessity.

Conclusion

Department Counsel has demonstrated error below. However, the errors demonstrated by Department Counsel do not warrant remand or reversal. For the reasons set forth in this decision, the Board affirms the Administrative Judge's favorable security clearance decision on an alternate ground.

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 findings and conclusions under Criterion B are not at issue on appeal.

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

3. "[A]ctivity is sanctioned by the United States."

4. *See* ISCR Case No. 97-0356 (April 21, 1998) at p. 7 and ISCR Case No. 98-0592 (May 4, 1999) at pp. 5-6. The Board notes its discussion of Foreign Preference Mitigating Condition 1 in these two case is somewhat inconsistent. The inconsistency of its discussion of Mitigating Condition 1 in those cases need not be reconciled because the Board's ruling in this case supersedes the Board's discussion of Mitigating Condition 1 in those two cases.

5. Department Counsel's appeal brief refers to the Under Secretary of Defense as the issuer of the 1983 memorandum, but the Administrative Judge's decision specifically describes the memorandum as being from the Director, Security Plans and Programs, *Office of the Under Secretary of Defense* (italics added).

6. There is no copy of the 1983 memorandum in the case file. The only "evidence" of the memorandum is the Administrative Judge's discussion of it in the Decision (at p. 10). Without a copy of the actual memorandum, there is no way to determine the memorandum's distribution, the accuracy of the language quoted by the Judge, or whether the language quoted by the Judge is taken in or out of context. *Cf.* ISCR Case No. 95-0817 (February 21, 1997) at pp. 6-7 (Judge erred by allowing applicant to place a partial copy of document into evidence over Department Counsel's argument that entire copy of document should be placed into evidence if Judge allowed any part of document into evidence).

7. Official publication of government documents can give rise to the notion of constructive notice to the public, a concept that has been applied by federal courts with respect to federal statutes or matters published in the Federal Register and Code of Federal Regulations. In light of the Electronic Freedom of Information Act Amendments of 1996,

Public Law 104-231, 110 Stat. 3048 (amending 5 U.S.C. 552) and the wide-spread availability of Internet access to the public, the Board concludes that official or administrative notice may be taken, in appropriate cases, of official documents posted by federal departments or agencies on their Web sites. There is no indication that the 1983 memorandum has been posted on the DoD Web site.

8. A policy memorandum promulgated by Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) pursuant to Section E.1. of the Directive could interpret provisions of Directive, including the Adjudicative Guidelines. There is no indication that the 1983 memorandum was adopted or approved by the ASDC3I pursuant to Section E.1. of the Directive. Furthermore, such a policy memorandum would have to be available to the public in order to avoid running afoul of the legal principle that a federal agency cannot base its decisions on "secret law" that is unknown or unavailable to the affected members of the public. *See, e.g., Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983); *Taxation with Representation v. Internal Revenue Service*, 646 F.2d 666, 679 (D.C. Cir. 1981).

9. "Any determination under this order *adverse to an applicant* shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (italics added)

10. "[I]ndividual has expressed a willingness to renounce dual citizenship."

11. Department Counsel's appeal brief essentially concedes that the record evidence permits an inference that FC officials identify all persons who are FC nationals and require them to use an FC passport to enter and leave FC. In this regard, the Board notes an earlier appeal in a foreign preference case contained record evidence that indicates the State Department Web site provides information about dual citizenship and the policies and practices of other countries (including the foreign country involved in this case) concerning the use of foreign passports by persons who are dual nationals of the United States and a foreign country. In order to further administrative and judicial economy, fairness to all parties, the legal principle that an administrative agency may draw upon the lessons learned through adjudication of cases that come before it, and the desirability of consistent adjudication of similar cases, it would seem appropriate that the adjudication of foreign preference cases involving questions of the policies and practices of other countries on the use of passports by dual nationals should take advantage of relevant publicly available information from the State Department Web site.

12. In attacking the Administrative Judge's reliance on a 1983 memorandum, Department Counsel questioned the current applicability of that memorandum, in part, because of its dated nature. Department Counsel proffers a provision of FC law that is dated 1980, which raises a similar question about its current relevance.