

KEYWORD: Foreign Preference; Foreign Influence; Personal Conduct; Criminal Conduct

DIGEST: Board does not conduct a de novo review of an Administrative Judge's decision; rather Board addresses material issues raised by the parties. As to questions of law, Board's scope of review is plenary. Under the DoD Directive 5220.6, neither a DOHA Administrative Judge nor the Board has the authority or discretion to ignore, disregard, or decline to apply a memorandum promulgated under Section 5.1 of the Directive by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I). Prior DOHA decisions on foreign passport cases are superseded by ASDC3I memo to the extent those decisions are inconsistent with the guidance provided by the ASDC3I memo. Adverse decision affirmed.

CASENO: 00-0009.a1

DATE: 09/26/2001

DATE: September 26, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0009

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Richard Murray, Esq.

Administrative Judge Claude Heiny issued a decision, dated May 24, 2001, 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 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 issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it is based on an August 16, 2000 memorandum issued by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 20, 2000 to Applicant. The SOR was based on Guideline C (Foreign Preference), Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

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

A hearing was held on October 30, 2000. At the hearing, Applicant was notified about and given a copy of the ASDC3I memo. The Administrative Judge issued a written decision, dated May 24, 2001, 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 the Administrative Judge's adverse security clearance decision.

Appeal Issue

The Administrative Judge's findings and conclusions about the matters covered by SOR paragraphs 2 (Guideline B), 3 (Guideline E), and 4 (Guideline J) are not at issue on appeal. Accordingly, the Board need not address or consider those findings and conclusions to deal with this appeal.

Relying on the ASDC3I memo, the Administrative Judge concluded Applicant's continued possession of a foreign passport mandated an adverse security clearance decision. On appeal, Applicant makes several, interrelated arguments: (1) the Administrative Judge erred by accepting the ASDC3I memo as legally binding; (2) the ASDC3I memo constitutes "secret law" that cannot be applied in Applicant's case; (3) Applicant was not given sufficient notice of the ASDC3I memo; and (4) Applicant's stated intention to allow his foreign passport to expire is sufficient justification for making a favorable security clearance decision in his case. Applicant's arguments raise the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it is based on the ASDC3I memo.

Applicant asks the Board to review his appeal issue *de novo*. Department Counsel contends "Applicant is incorrect in urging *de novo* review of the [Administrative Judge] Decision." Applicant's position is the correct one. The Board does not conduct *de novo* review of an Administrative Judge's decision. *See, e.g.*, ISCR Case No. 00-0683 (September 17, 2001) at p. 2. ⁽¹⁾ In this case, Applicant is not asking the Board to conduct *de novo* review of the Judge's May 24, 2001 decision. Rather, Applicant is asking the Board to conduct *de novo* review of a legal issue (*i.e.*, the legal effect of the ASDC3I memo). As to questions 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).

Applicant relies on some DOHA decisions in support of his arguments. Applicant's reliance on those decisions is misplaced. Two of the decisions cited by Applicant are Administrative Judge decisions that were reversed on appeal. ⁽²⁾ One of the decisions cited by Applicant [ISCR Case No. 99-0594 (March 9, 2000)] involves alcohol abuse under Guideline G and is essentially irrelevant to this appeal. Another case cited by Applicant [ISCR Case No. 99-0629 (March 21, 2000)] is not persuasive because it predates the ASDC3I memo. In ISCR Case No. 99-0424 (February 8, 2001) at pp. 5-6, the Board discussed the legal effect of the ASDC3I memo and concluded that "the ASDC3I memo effectively supersedes any prior Board decision or Hearing Office Administrative Judge decision to the extent the decision is inconsistent with the guidance provided by the ASDC3I memo."

The Administrative Judge did not err by accepting the ASDC3I memo as legally binding on him. Under Section 5.1 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. The ASDC3I memo falls within the scope of Section 5.1. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 5 n.1. Under the Directive, neither a DOHA

Administrative Judge nor this Board has the authority or discretion to ignore, disregard, or decline to apply the ASDC3I memo. Indeed, DOHA Administrative Judges and this Board must make decisions "in accordance with policy, procedures, and standards established by [the] Directive." Directive, Section 5.2.14.

Applicant relies on the Board's decision in ISCR Case No. 99-0452 (March 21, 2000) in support of his arguments. However, that case is distinguishable. In that case, the Administrative Judge unilaterally relied on a dated, internal Department of Defense memorandum that: (i) was not made known or available to the applicant or Department Counsel before the Judge issued his written decision; (ii) on its face, was of questionable applicability to security clearance adjudications; and (iii) was effectively superseded by the promulgation of the Adjudicative Guidelines. Furthermore, there was no indication that the memorandum relied on by the Judge in that case had been adopted or approved by the ASDC3I. In this case, the ASDC3I memo: (i) was made known and available to applicant at the hearing; (ii) on its face, is applicable to security clearance adjudications; and (iii) was promulgated by the ASDC3I under Section 5.1 of the Directive.

The record below does not provide any explanation for why Applicant was not provided with a copy of the ASDC3I memo before the hearing. In any event, despite the short notice Applicant received about the ASDC3I memo, he did not ask the Administrative Judge for a continuance. Furthermore, Applicant does not articulate or specify any legally cognizable right of his that was prejudiced by him not receiving a copy of the ASDC3I memo earlier. Moreover, Applicant seeks relief that the Board cannot give him: a decision reversing the Judge's adverse decision and granting him a security clearance despite his continued possession of a foreign passport, in contravention of the ASDC3I memo.

Applicant's stated intention to allow his foreign passport to expire did not require the Administrative Judge to make a favorable security clearance decision in his case. The ASDC3I memo makes clear that it is DoD policy that possession and use of a foreign passport are security disqualifying and can be mitigated only if "the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." *See* ISCR Case No. 99-0481 (November 29, 2000) at p. 5. Merely keeping a foreign passport until it expires does not satisfy either of the two mitigating conditions listed in the ASDC3I memo.

Finally, to the extent that Applicant's arguments seem to suggest that he has a right to have his security clearance adjudicated by the standards applicable before the ASDC3I memo was promulgated, they lack merit. *See* ISCR Case No. 99-0424 (February 8, 2001) at pp. 6-8 (rejecting claim that ASDC3I memo cannot be applied to an applicant's conduct that occurred before the memo was promulgated).

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: 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. For example, the Board is limited to reviewing material issues raised by the parties on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Also, the Board does not make its own factual findings *de novo*; rather, the Board reviews a Judge's findings under the scope of review set forth in Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. ISCR Case No. 99-0597 (reversed by Board on December 13, 2000) and ISCR Case No. 99-0601 (reversed by Board on January 30, 2001).