

KEYWORD: Guideline C; Guideline B

DIGEST: Applicant had not satisfied the criteria set forth in FCMC 11(e). His passport had not been destroyed or rendered unusable or otherwise invalid. Neither had it been surrendered to a “cognizant security authority.” The passport was in the possession of Applicant’s own attorney. The record will not sustain a conclusion that Applicant has mitigated the security concerns arising out of his possession of a foreign passport, and the Judge’s holding to the contrary is error. Applicant’s failure to mitigate appears to be, in part, a result of his compliance with instructions by the Judge, with the apparent concurrence of Department Counsel. Under the circumstances, the Board concludes that the best corrective action is to remand the case to the Judge for a new decision. On remand the Judge is permitted to reopen the record on the motion of either party.

CASENO: 07-04529.a1

DATE: 07/24/2008

DATE: July 24, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-04529
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT
Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 21, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 14, 2008, after the hearing, Administrative Judge Wilford H. Ross granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.¹

Department Counsel raised the following issues on appeal: whether certain of the Judge's findings of fact were supported by substantial record evidence; and whether the Judge erred in his whole person analysis. Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant was born in Germany. From 1985 until 2000 he was an officer in the German military. Between 1995 and 1998 he served in the United States as part of an officer exchange program. Applicant married an American citizen in 1997 and had a daughter. However, they subsequently divorced. Applicant's daughter and his ex-wife live in the United States.

After leaving the German military Applicant began working for a U.S. defense contractor. He became a U.S. citizen in 2004. He holds a U.S. passport. He also has a German passport, which he obtained in 2004 and which is valid until 2014. Upon being advised about U.S. concerns over his having dual citizenship, he "took steps to renounce his German citizenship . . . On February 20, 2008, the Applicant's counsel submitted the Applicant's Application to Renounce German Citizenship to the German Consulate-General . . . Applicant's counsel took possession of the Applicant's German passport at the hearing in order to have it available to surrender to the German authorities after the Certificate of Renunciation has been issued. *The passport cannot be surrendered to the German authorities before that time.*" Decision at 3. (emphasis added)

¹The Judge's favorable decision under Guideline B is not at issue in this appeal.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"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." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel argued on appeal that the finding highlighted above is not supported by substantial record evidence. In making this finding, the Judge relied on a document submitted by Applicant, a copy of the form, in German with an English translation, whereby he expressed his intention to renounce his German citizenship. The pertinent section of that document reads as follows: "I will turn in my German passport/ID document at the time of receipt of my Certificate of Renunciation." Department Counsel stated, "[A] reasonable reading of the record establishes only that German authorities expected individuals who had renounced their German citizenship to surrender their German passport (a benefit of German citizenship) upon finalization of citizenship renunciation. The German process, as established by the record, did not preclude surrender of the passport contemporaneously with renouncement of citizenship." Brief at 10. The Board has examined the record and finds Department Counsel's position persuasive. We find nothing in the record to support the view that Applicant's actual receipt of a certificate of renunciation from the German government was a condition precedent to his surrender of his passport. The record does not sustain the challenged finding.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion

in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

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. 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Despite the implication of the Judge's challenged finding, there is no basis to conclude that Applicant was, in fact or in law, precluded from complying with the provisions of FCMC 11(e). This provision mitigates the Foreign Preference security concerns arising from possession of a foreign passport, when “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated . . .” Directive ¶ E2.11(e). At the end of the hearing, the Judge advised Applicant's attorney “to take possession of [Applicant's] passport and the [citizenship renunciation] application . . . I notice that this application says that you're not really supposed to surrender the passport to them until you get your certificate of renunciation . . . What I'd like you to do . . . is check with the German Consulate in Los Angeles, which I assume is where this goes . . . [a]nd see what they're willing to take. If they'll take the passport now, do it. Otherwise, I want you to take possession of it until such time as it is surrendered. [Applicant's Attorney]: I will do that, your honor. [Department Counsel]: Your Honor, are you going to be leaving the record open for that entire period of time? [Judge]: . . . Once he has possession of the passport, I don't think we have to worry about it . . . when are you going to send it in to Los Angeles? [Applicant's Attorney]: I'll do it within 24 hours. [Judge]: Fine. Let's leave the record open until the end of next week for documentation and see how long this takes.” Tr. at 133 - 135. Subsequently Applicant submitted Exhibit N, a copy of the signed renunciation certificate, along with a letter from his attorney to the German consulate, advising that Applicant “will forward his German Passport to your office upon receipt of the Certificate of Renunciation.” Exhibit N at 4.

In her appeal brief, Department Counsel persuasively argued that, at the time of the close of the record, Applicant had not satisfied the criteria set forth in FCMC 11(e), which are broad. His passport had not been destroyed or rendered unusable or otherwise invalid. Neither had it been surrendered to a “cognizant security authority.” The passport was in the possession of Applicant's own attorney, rather than surrendered to a person authorized to perform responsibilities pertinent to national security. The record before us will not sustain a conclusion that Applicant has mitigated the security concerns arising out of his possession of a foreign passport, and the Judge's holding to the contrary is error. However, in this case, we note that Applicant's failure to mitigate appears to

be, in part, a result of his compliance with instructions by the Judge, with the apparent concurrence of Department Counsel. Under the circumstances, the Board concludes that the best corrective action is to remand the case to the Judge for a new decision. On remand the Judge is permitted to reopen the record on the motion of either party to present any additional evidence they deem appropriate to resolve the issues identified herein.

Order

The Judge's favorable security clearance decision is REMANDED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board