

KEYWORD: Guideline C

DIGEST: Applicant retains her German passport for personal reasons. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. Lack of impartiality is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. Proof of error, standing alone, does not demonstrate the Judge was biased or prejudice Applicant has not met this heavy burden of persuasion.

The Board's jurisdiction and authority in Applicant's case is limited to reviewing it for compliance with the Directive. The Board does not have the jurisdiction or authority to entertain challenges to the wisdom, legality or constitutionality of provisions of the Directive. . Nor does the Board have jurisdiction or authority to pass judgement on the wisdom or desirability of the guidance provided by the Under Secretary of Defense for Intelligence. The Board does not have jurisdiction or authority to adjudicate an applicant's rights under provisions of the U.S. Code. The Board has reviewed the record in this case and concludes that the Applicant was provided with the rights set forth in the Directive

CASENO: 07-06039.a1

DATE: 07/08/2008

DATE: July 8, 2008

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In Re: )  
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 ----- ) ADP Case No. 07-06039  
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 Applicant for Public Trust Position )  
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**APPEAL BOARD DECISION**

## **APPEARANCES**

### **FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On November 27 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 24, 2008, after the hearing, Administrative Judge Philip S. Howe denied Applicant's request for a trustworthiness designation. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's adverse trustworthiness decision was the result of bias, and violated Applicant's constitutional or statutory rights; and whether the Judge's adverse trustworthiness decision is arbitrary, capricious or contrary to law. Finding no error, we affirm.

The Judge made sustainable findings as follows: Applicant is 39 years old, married with one child, and works for a defense contractor in the health insurance business. Applicant was born in Romania to parents of German descent. Their ancestors moved to Romania during the 1500s. Applicant and her parents and siblings were able to immigrate from Romania to Germany in 1979. In 1988, Applicant married her American husband, finished her professional education in Germany in hotel management, and moved to the United States. Her family remained in Germany, but her brother lives in Vienna, Austria. Applicant admitted all the factual allegations in the SOR.

Applicant has a German passport, issued in April 1998, and due to expire in April 2008. Applicant intends to renew her German passport. At the same time she renews her passport, she intends to obtain a German passport for her daughter. Applicant was told by her employer she had to apply for U.S. citizenship in July 2004, if she wanted to retain her job working on the military insurance program. Applicant applied for U.S. citizenship on her own time, and obtained her U.S. citizenship in August 2005. Applicant does not have a U.S. passport.

Since moving to the United States in 1989 with her husband, Applicant returned to Germany three times on visits to her family. She plans on making another trip in 2008 using her German passport. Her last trip to Germany was in 1998.

Applicant retains her German passport for several personal reasons. One reason is that she wants to visit her family in Germany with her daughter, so four generations of Germans would have a reunion. She also wants to retain her German heritage, evidenced by her passport. She was raised

as a German, and by having the passport she knows she will have a home outside of the United States if she leaves the United States. Next, no valid reason has been given to her by any American authority to persuade her to surrender her German citizenship and passport. She believes that, “As a German, I am also responsible for carrying a German passport.” She also thinks that with her German passport she would not be regarded as a stranger in Germany when she visits her family. She also sees a sentimental value in retaining her German citizenship, evidenced by her German passport. Applicant was concerned that if she has to go to Germany to provide care for her aging parent for a long period of time, it is easier for her to go and stay using her German passport than trying to get visas and other documents for permission from the German authorities. Applicant also had a concern about what she would tell a German customs or police officer about traveling to Germany without her German passport.

Applicant states that she has a preference for the United States. She enjoys her job, and her resume shows she has worked her way up in her employer’s organization.

Applicant’s appeal brief contains new evidence in the form of additional explanations, such as her statements that: “I will use my German passport when I travel to Germany in the future ” and “my German connections are strong and important to me . . .” Applicant’s Brief at 2. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29.

(1) Applicant argues that the Judge’s denial of a trustworthiness designation under the Directive was the result of bias, and amounts to national origin discrimination under Title VII of the Civil Rights Act of 1964. Neither of these arguments have merit.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether an applicant personally believes the Judge was unfair, but whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question his fairness. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Lack of impartiality is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased or prejudice. *See, e.g.*, ISCR Case No. 04-03834 at 2 (App. Bd. Jul. 2, 2007). Applicant has not met this heavy burden of persuasion, in that she fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness, impartiality, or professionalism of the Judge. *See, e.g.*, ISCR Case No. 03-00740 at 2 (App. Bd. Jun. 6, 2006).

The Board's jurisdiction and authority in Applicant's case is limited to reviewing it for compliance with the Directive.<sup>1</sup> See Directive ¶¶ E3.1.28 through E3.1.35; ISCR Case No. 04-01961 at 3 (App. Bd. Jul 12, 2007). The Board does not have the jurisdiction or authority to entertain challenges to the wisdom, legality or constitutionality of provisions of the Directive. See ISCR Case No. 03-23190 at 3 (App. Bd. Jul. 12, 2007) citing DISCR Case No. 90-0208 at 6 (App. Bd. Oct. 24, 1991)(no Board authority to hold that the Directive is unconstitutional); DISCR Case No. 99-0457 at 6 (App. Bd. Jan. 3, 2001) citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)(adjudication of constitutionality of statutes is beyond the jurisdiction of administrative agencies). Nor does the Board have jurisdiction or authority to pass judgement on the wisdom or desirability of the guidance provided by the Under Secretary of Defense for Intelligence. See, e.g., ISCR Case No. 99-0457 at 5 (App. Bd. Jan. 3, 2001). Likewise, the Board does not have jurisdiction or authority to adjudicate an applicant's rights under provisions of the U.S. Code. See, e.g., ISCR Case No. 02-33144 at 4-5 (App. Bd. Sep. 7, 2004). The Board has reviewed the record in this case and concludes that the Applicant was provided with the rights set forth in the Directive.

(2) Applicant also argues that the Judge's adverse decision should be reversed because the Judge did not give sufficient weight to Applicant's assertions of loyalty and allegiance to the United States, and the "positive attributes of [her] life and work history." These arguments do not demonstrate that the Judge erred.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable trustworthiness decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. See, e.g., ADP Case No. 06-14978 at 2 (App. Bd. Jan. 18, 2008). An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ADP Case No. 06-22100 at 2 (App. Bd. Jan. 17, 2008).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's trustworthiness concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice 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,

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<sup>1</sup>Applicant's case is subject to the Adjudicative Guidelines of the Directive. See Memorandum of the Under Secretary of Defense for Intelligence, dated August 30, 2006, "Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005)."

168 (1962). Therefore, the Judge's ultimate unfavorable trustworthiness decision under Guideline C is sustainable.

**Order**

The decision of the Judge denying Applicant a trustworthiness designation is AFFIRMED.

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