KEYWORD: Guideline C

DIGEST: Applicant was born in the United States and served an enlistment in United States Air Force. Later he moved to Israel where he acquired citizenship and was conscripted into the Israeli Army. He returned to the United States and served a twenty year career in the United States Army. In 2002 he returned to Israel and voted in 2003 Israeli Parliamentary elections. In 2007 Applicant sent a letter to the Israeli embassy renouncing his citizenship. The Directive presumes there is a nexus or rational connection between proven conduct under any guideline and an applicant's security eligibility. Hearing Office decisions are not binding on other Hearing Office Judges or on the Board. Adverse decision affirmed

CASENO: 06-05903.a1

DATE: 10/15/2007

DATE: October 15, 2007

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Nichole Noel, Esq., Department Counsel
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
D. Christopher Russell, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 16, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision–security 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 May 7, 2007, after the hearing, Administrative Judge Noreen A. Lynch denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed properly to consider and weigh the record evidence and whether her adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

Applicant was born in the United States but moved with his family to Europe when he was 13 years old. Graduating from high school in 1970, he moved to Israel in 1975 to attend college, following an enlistment in the U.S. Air Force. While there "he was conscripted into the Israeli army from 1977 until May 1978." Decision at 2. Applicant acquired Israeli citizenship by virtue of "the Israeli Law of Return."[1] *Id*. at 3. He has maintained dual citizenship from the mid 1970s forward, although on March 11, 2007, he signed a letter "renouncing his Israeli citizenship."[2] *Id*. Additionally, he surrendered his Israeli passport by mailing it to the Israeli Embassy on the day of the hearing.

After his service in the Israeli military, Applicant returned to the U.S., joining the U.S. Army for a 20-year career. In November 2002, he returned to Israel for what he characterized as a "vacation" or "sightseeing time," traveling with a "one-year temporary" Israeli passport. *Id*. In 2003 he voted in an Israeli parliamentary election.

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 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.

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[1]"The Law of Return made after the reestablishment of the state of Israel allowed any Jew to come to Israel and receive automatic citizenship . . . I was naturalized as an Israeli citizen in 1976 when I went to Israel to study in the University of Tel Aviv. If I were offered a U.S. government job requiring a security clearance prior to being naturalized, I probably would not have become a naturalized Israeli citizen." Government Exhibit 2, Interrogatory Response, April 28, 2006.

[2]This letter is addressed to the U.S. Department of Defense and states, "I hereby notify the Department of Defense that I am going to renounce my Israeli citizenship." AE D. At the hearing, Applicant testified "I mentioned at least two, maybe three times that I would be willing to give up my Israeli citizenship, renounce it . . . I'd like to keep it for cultural and religious reasons, but I will give it up because it is not conducive with this work environment . . . And I will do it. I – I've got no remorse. I will do it." Tr. at 34.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Once 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* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

Applicant contends that the Judge did not consider certain pieces of record evidence, including the relative extent of Applicant's ties with Israel and the United States, his character references, his service in the U.S. military and honorable discharge therefrom, and other similar matters. However, a Judge is presumed to have considered all the evidence, and there is nothing to indicate that she did otherwise in this particular case. *See* ISCR Case No. 05-14488 at 4 (App. Bd. Aug. 10, 2007). *See also* ISCR Case No. 02-29373 at 4 (App. Bd. Mar. 2005).

Applicant contends that the Judge erred as to the length of time he spent in the Israeli military, asserting that it was only 5 ½ to 6 months rather than the arguably longer time contained in the findings of fact. Assuming without deciding that the Judge's finding is error, we conclude that it would not have changed the outcome of the case. *See* ISCR 01-23362 at 2 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 at 5 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 at 5 (App. Bd. Aug. 26, 2002). Therefore, it is harmless.

Applicant argues that the Department Counsel did not present substantial evidence on the question of whether Applicant's having voted in the Israeli election was contrary to the interests of the United States, with the result that the Judge impermissibly shifted the burden of persuasion to Applicant. This argument is without merit. The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-28935 at 3-4 (App. Bd. Jun. 28, 2005); ISCR Case No. 02-31188 at 4 (App. Bd. Mar. 8, 2005). One potential Guideline C disqualifying condition (DC) is "voting in a foreign election."[3] SOR paragraph 1(c) alleges that Applicant "voted in the 2003 Israeli elections, while residing in Israel from November 2002 until March 2003." Neither the Adjudicative Guidelines nor the SOR make conflict with U.S. interests an element of this DC which Department Counsel must affirmatively prove by substantial evidence before the burden of persuasion shifts to Applicant. In any event, Applicant admitted this allegation in his response to the SOR, relieving Department Counsel of her obligation to produce evidence concerning it. This admission is enough to shift the burden of persuasion to Applicant. Therefore, there is no error in the Judge's treatment of the parties' burdens in this case.

Applicant points to some cases by Hearing Office Judges which he contends support granting him a clearance. The Board gives due consideration to these cases. However, such decisions are binding neither on Hearing Office Judges nor on the Board. *See* ISCR Case No. 03-26115 at 3 (App. Bd. Apr. 5, 2007).

[3]Directive¶ E2.10(a)(7).

We have evaluated the Judge's decision in light of the record as a whole. She considered both the fact that Applicant surrendered his Israeli passport and that he expressed an intent to renounce Israeli citizenship. However, she concluded that such relatively belated actions, having taken place close to or on the day of the hearing, were not sufficient to outweigh "his long term attachment to Israel," and his "recent outreach" to that country. This outreach was evidenced by his having moved back there in 2002 with an Israeli passport and having voted in an Israeli election. While Applicant may disagree with the weight which the Judge assigned to the evidence, "an ability to argue for a different interpretation of the evidence . . . is not sufficient to demonstrate that the Judge . . . reached conclusions that are arbitrary, capricious, or contrary to law." ISCR Case No. 06-17714 at 2 (App. Bd. Jul. 3, 2007).

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, 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