

December 28, 2001

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-00878

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On April 19, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on May 19 and July 23, 2001, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on August 13, 2001. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on September 18, 2001, and submitted no response. The case was received by the undersigned on October 22, 2001.

FINDINGS OF FACT

The Applicant is 60, married and has a Master's degree in Business Administration. He is employed by a defense contractor as a staff scientist, and he seeks to obtain or retain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in such a way as to show a preference for another country over the United States.

The Applicant was born in Foreign Country 1 (FC1) in 1941. He has lived permanently in the United States since 1971. (Government Exhibit 5 at 1.) The Applicant became a naturalized American citizen in 1982. He is a dual citizen of the United States and FC1 because of his birth in FC1.

The Applicant had a FC1 passport which expired in 1995. In November 1999 the Applicant renewed his FC1 passport, which will expire in ten years. (Government Exhibit 3.) He explained his reason for obtaining an FC1 passport, "After retirement I plan to spend considerable time wondering around [FC1 and environs] and considered that it would be more convenient to do this using [FC1] passport. This is my sole reason for obtaining a [FC1] passport at this time. It is valid until November 19, 2009, so there is a considerable time that this will be valid after I retire, probably at age 65 or possibly before." (*Ibid.*)

The Applicant was sent a copy of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence dated August 16, 2000, with the subject, "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline." ("Money Memorandum") (Government Exhibits 2 at 3, 6.) In response the Applicant states, "I have investigated with the [FC1] Embassy the possibility to surrender this passport. I can do this if this will make the decision on this case easier. After surrender of the passp[o]rt I would receive a document from them that they had received the passport." (Government Exhibit 3.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline C (Foreign preference)

Condition that could raise a security concern:

(2) Possession and/or use of a foreign passport;

Conditions that could mitigate security concerns include:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes

- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be a dual citizen and have a current passport from a foreign country.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...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."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting or continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant is a dual citizen with FC1 and that he possesses a current, valid passport from FC1. The Applicant has stated that he is willing to surrender the passport, but as of the date the record closed he has not done so. The Money Memorandum requires that, "[A]ny clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." (Government Exhibit 3.) (Emphasis supplied.) The Applicant has notice of this requirement and has not fulfilled it. Therefore, he is not eligible for a security clearance at the present time.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraphs 1.a. and 1.b.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross

Administrative Judge