

DATE: April 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08324

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

James Victor Kosnett, Esquire

STATEMENT OF THE CASE

On September 28, 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 November 12, 2001, and requested a hearing. The case was received by the undersigned on January 2, 2002, and a Notice of Hearing was issued on January 8, 2002. A subsequent Notice of Hearing was issued on January 23, 2002.

A hearing was held on February 27, 2002, at which the Government presented four documentary exhibits. Testimony was taken from the Applicant, who called four additional witnesses and also submitted fourteen exhibits. The transcript was received on March 8, 2002.

FINDINGS OF FACT

The Applicant is 35, married and has a Bachelor of Science degree in Electrical Engineering. He is employed by a defense contractor as a Test Quality Engineer, and he seeks to retain a Confidential-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued 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 criterion 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 has engaged in actions which show that he may have a preference for a foreign country over the United States.

The Applicant was born in a Foreign Country (FC). He moved to the United States in 1990 in order to further his education. He became an American citizen on March 28, 1997. (Government Exhibit 4.) When he first arrived in the United States, he had a passport issued by FC. That passport expired in October 1995. (Applicant's Exhibit K.) In March 1996, the Applicant applied for and received a passport from FC, which was due to expire in March 2002. (Government Exhibit 3 at 1.) Subsequent to his naturalization, the Applicant applied for and received a United States passport in July 1997, which is due to expire in 2007. (Government Exhibit 3 at 2.)

The evidence of record shows that when the Applicant traveled to FC in December 2000, he used his American passport. (Applicant's Exhibit J.) There is no evidence that he used his FC passport after he became an American citizen, or that he engaged in any other activities as a dual citizen after his naturalization.

The Applicant was sent a copy of the Memorandum dated August 16, 2000, from the Assistant Secretary of Defense for Command, Control, Communication and Intelligence, entitled, "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline." (Money Memorandum.)

The Applicant's FC citizenship was terminated at the request of the Applicant on December 24, 2001. (Applicant's Exhibit L; Transcript at 90-92, 120-121.) The Applicant testified that he surrendered his FC passport to the FC consulate on January 22, 2002. He further testified that the consulate would not give him any evidence of the surrender. (Transcript at 90, 121.)

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On October 13, 1998, the Applicant completed an official DoD questionnaire in which he stated that, in the preceding seven years, he had not had an active passport that was issued by a foreign government. (Government Exhibit 1, question 15.) This statement was a false answer to a material question concerning the Applicant's possession of a foreign passport.

The Applicant maintains that his failure to admit the existence of two official passports issued by the FC government was a mistake, and nothing more. The Applicant stated, for example, "Right at that moment [when he filled out the questionnaire] because I thought both [FC] Citizenship and [FC] Passport were cancelled or expired. In the past seven years, I had not used it all. And after I got my American Citizenship, [FC] Citizenship didn't mean anything to me. So, at that moment, I answer no. That's the reason why." (Transcript at 96.)

Under cross-examination by Department Counsel, the Applicant's explanations for why he did not admit his possession of two separate active FC passports within seven years of October 1998 were vague and confusing. On page 99 of the transcript the Applicant stated that he answered "no" to the question "because I didn't plan to use it [FC passport]." On the same page he was asked, "Are you saying you thought you couldn't use it [FC passport] before you became a citizen?" The Applicant answered, "It's very hard for me to answer that question - how do I say this - I didn't plan to go back. I didn't plan to use it [FC passport]. So, it's very hard for me to answer you that question."

After a colloquy concerning the fact that the Applicant had knowledge he had an active FC passport before he became an American citizen, he was asked this question:

Q But what I am asking you is what was the misunderstanding? It is not clear what the misunderstanding was why you would have said yes if you would have known that within the last seven years not only had you had a Passport from another country, but you had actually used that to go to another country. So, what was your thinking that made you say no instead of yes?

A I think my answer is I don't know.

(Transcript at 101.)

The Applicant's supervisor and a close friend testified on his behalf. The supervisor testified that, when asking the supervisor for a letter of recommendation, "[The Applicant] had made the statement that this proceeding was coming about because he made the mistake of checking the wrong box about having another passport." (Transcript at 29-30.) The Applicant's friend also testified that the Applicant, just a few days before the hearing, had told him that he had made a mistake on his questionnaire by saying "no" when he should have said "yes." (Transcript at 44.)

Mitigation. The Applicant's wife, pastor, supervisor and friend all testified on his behalf. All stated that the Applicant is a trustworthy person. The supervisor specifically testified that the Applicant is conscientious and reliable. (Transcript at 25.)

The Applicant's other manager submitted a letter on his behalf, in which she states, "The Applicant is a fine young man with strong work ethics, who is honest and trustworthy with a kind a gentle nature and has proven to be a positive asset to the department and to the company." (Applicant's Exhibit B.) A friend from the Applicant's church, who has known him for ten years, also submitted a letter on the Applicant's behalf. He states that the Applicant "is kind and trustworthy, demanding the highest integrity from himself. (Applicant's Exhibit N.)

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)

Conditions that could raise a security concern:

- (1) The exercise of dual citizenship;
- (2) Possession and/or use of a foreign passport;

Conditions that could mitigate security concerns include:

- (1) Dual citizenship is based solely on parents' citizenship or birth in a foreign country;
- (4) Individual has expressed a willingness to renounce dual citizenship.

Guideline E (Personal conduct)

Conditions that could raise a security concern:

- (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

Conditions that could mitigate security concerns:

(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 have falsified security documents, and/or may have acted in a way that shows a preference for another country over the United States. Conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

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 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 possessed an FC passport after he became an American citizen (Guideline C); and that he made false material statements to DoD (Guideline E).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is

sufficient to overcome the Government's case against him, except in part. Under Paragraph 1 (Guideline C), the Applicant has successfully mitigated the Government's concerns. Once he was informed of the requirements of the Money Memorandum, the Applicant took the required actions to comply with them. He has returned his FC passport to the FC consulate, and he has renounced his FC citizenship. The evidence of record does not show that he engaged in any other acts which could be construed as the exercise of dual citizenship. Paragraph 1 is found for the Applicant.

The Applicant has not, however, mitigated the allegations contained in Paragraph 2 of the SOR. The Applicant's answer to Question 15 of the questionnaire was false. It was up to the Applicant to provide a rational, reasonable, believable and credible explanation as to why this happened. He did not. I have carefully considered all of the testimony of the Applicant, his witnesses, and the documentary evidence. At the end of the day, the question still is why the Applicant's questionnaire (Government Exhibit 1), which shows all of the evidence of being carefully filled in by the Applicant, should have only this one, relevant question answered wrong? In my opinion, the evidence is insufficient to prove that it was a mistake, as opposed to an intentional act. Accordingly, the Applicant has not met his burden with regards to this allegation.

The Government relies heavily upon the integrity and honesty of clearance holders, and it is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about material aspects of his or her personal background. Guideline E is found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's evidence opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraph 2 of the Government's Statement of Reasons. As set forth above, Paragraph 1 is found for the Applicant.

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: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: 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