

DATE: September 26, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-19512

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a naturalized US citizen. His possession of a valid foreign passport, without return of the passport to the issuing government or official approval for possession by the United States Government, violates DoD Directive 5220.6, Guideline C, as clarified by the Assistant Secretary of Defense in a memorandum dated August 16, 2000. Clearance is denied.

STATEMENT OF THE CASE

On May 31, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant with instructions and four enclosures. The SOR details 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 Applicant. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In an answer notarized on June 20, 2002, Applicant responded to the SOR, and he elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the Government's File of Relevant Material (FORM) was provided to the Applicant on July 5, 2002, and he was afforded thirty days to file objections and submit further material in refutation, extenuation, or mitigation. Applicant received the FORM on July 15, 2002, but he submitted no additional information. The case was assigned to me on August 26, 2002.

FINDINGS OF FACT

The Applicant is sixty-three years old, and he is employed by a defense contractor as an engineer. He seeks a DoD security clearance in connection with his employment in the civilian defense industry. The Government opposes the Applicant's request for a security clearance on the basis of allegations set forth under Paragraph 1 of the SOR. The

following findings of fact are entered as to the allegations.

Paragraph 1 (Guideline C- Foreign Preference). The Government alleges that the Applicant is ineligible for clearance because he possesses a valid and unexpired foreign passport which is evidence of his preference for a foreign nation.

The Applicant was born in the United Kingdom, and in 1956 he received a diploma from a British college of technology. He married in 1963, and in 1964 he and his wife emigrated to the United States where they lived as resident aliens with British passports, last renewed in June 1993. Applicant's British passport remains in his possession and does not expire until June 2003. Applicant and his wife became naturalized US citizens on November 18, 1993, and five days later, on November 23, 1993, Applicant was issued a US passport.

On March 15, 2000, Applicant completed an SF86 Security Clearance Application (FORM, Item 4) as part of his request for a DoD security clearance. Question 15 of the SF86 asks Applicant "In the last 7 years, have you had an active passport that was issued by a foreign government?" Applicant answered "Yes" and identified his British passport. On the questionnaire, Applicant added that this passport was issued to him in June 1993, five months before he obtained US citizenship.

On July 24, 2001, Applicant provided to DoD a signed sworn statement in which he discusses his simultaneous possession of US and British passports. (FORM, Item 5.) Applicant states that he has used only his US passport for foreign travel since obtaining US citizenship. (Applicant's SF86, Question 16, reflects overseas travel to six foreign countries since he received a US passport.) Applicant states he has no intention of using his British passport and he will not renew it after it expires in 2003. Applicant further states he has never been asked to relinquish his British passport, but he would do so if it were a condition of access to classified information.

Thereafter, DOHA issued to Applicant an SOR dated May 31, 2002, which informs Applicant that his possession of a valid British passport is evidence of his preference for a foreign country over the United States. (FORM, Item 1.) Applicant responded to the SOR in a letter dated June 20, 2002. (FORM, Item 3.) In his response, Applicant concedes that he continues to possess a valid British passport.

Applicant explains that he was issued the British passport before obtaining US citizenship, and he kept it only for travel to the UK in emergency circumstances such as a family funeral. Applicant asserts his belief that this satisfies the meaning of Mitigating Condition E2.A3.1.3. pertaining to Guideline C - Foreign Preference. Applicant further asserts that he renounced British citizenship when he became a naturalized US citizen, and thereby he is entitled to the benefit of itigating Condition E2.A3.1.3.4 of Guideline C which relates to renunciation of dual citizenship. (The Government's SOR does not raise an issue of dual citizenship in this case.)

Applicant claims credibly that he has never used his British passport, and he will render it invalid "by cutting off a corner of the cover." However, Applicant does not state that he has made an effort to surrender his passport to British authorities, nor does he claim that his possession of a British passport is officially approved by the US Government.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's request for access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline C - Foreign Preference. *The concern:* When and individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Disqualifying Conditions applicable:

2. Possession and/or use of a foreign passport.

Mitigating Conditions applicable:

2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

Memorandum of clarification. The application of Guideline C is further clarified by a Memorandum of August 16, 2000, issued by the Assistant Secretary of Defense (C3I) and furnished to the Applicant as Enclosure 4 to the Government's SOR. The Memorandum states that possession of a foreign passport is not mitigated by "the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country." The Memorandum further states "[C]onsistent application of the guideline requires that any 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.*" (Emphasis supplied.)

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

CONCLUSIONS

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 reliable information indicates an Applicant for clearance may have a preference for a foreign country which could be in conflict with his duty to the United States. On a commonsense basis, this unfavorable circumstance might lead to a compromise or loss of classified defense secrets.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

In this case it is concluded that Disqualifying Condition 2 of Guideline C has application and must be considered against the Applicant. The basis for application of this Disqualifying Condition is self-evident. Applicant readily concedes that he currently possesses a valid British passport although he is a naturalized citizen of the United States. The Government's burden of proof is thereby satisfied.

In his response, Applicant asserts that he is entitled to the benefit of Mitigating Condition 2 because his foreign passport was issued before he obtained United States citizenship. He also argues that his possession of a foreign passport is based upon personal convenience (emergencies such as family funerals), but he is nevertheless willing to mutilate the passport and thereby render it invalid. In the absence of the Assistant Secretary's memorandum of clarification, Applicant's arguments might have merit for consideration in his behalf.

The Memorandum makes it clear, however, that simultaneous possession of US citizenship and a valid foreign passport is not mitigated by personal convenience, nor is it mitigated by a conditional offer to mutilate the foreign passport and arguably render it invalid. It is clear DoD policy that a security clearance can not be issued in such cases unless (1) the foreign passport is surrendered to the issuing foreign government or (2) its possession is officially approved by the

United States Government. Applicant does not submit proof that he meets either of these two requirements.

In view of Applicant's status as a naturalized citizen of the United States and his continued possession of a valid foreign passport without official US Government approval, Applicant's request for a security clearance can not be granted.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline C: AGAINST THE APPLICANT.

Subpara. 1.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 Applicant's request for a security clearance.

Burt Smith

Administrative Judge