

DATE: December 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05721

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant is a dual citizen of Canada and the United States. She has made a decision not to renounce her Canadian citizenship in order to be able to obtain medical treatment from the Canadian government, if necessary. She also continued to retain her Canadian passport, despite the knowledge that the Government required her to surrender it. Finally, the Applicant did not show that her Canadian relatives are not agents of a foreign power or in a position to be influenced by a foreign power. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On April 23, 2003, 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 17, 2003, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on August 7, 2003. 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 August 22, 2003, and submitted no additional information. The case was received by the undersigned on September 23, 2003.

FINDINGS OF FACT

The Applicant is 49, married and has a nursing degree. She is employed by a defense contractor as an administrative assistant, and she seeks to retain a DoD security clearance in connection with her 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 and the exhibits.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has a status, or has engaged in conduct, which shows a preference for another country over the United States.

The Applicant was born in Canada. She became a naturalized American citizen in 2000. The Applicant has taken no measures to renounce her Canadian citizenship. She argues in her Answer to the SOR that such conduct on her part is unnecessary stating, "Canada has to my knowledge, never used coercion and exploitative methods against its citizens. As a mature 49-year-old adult I am fully capable of resisting any such pressures." (Government Exhibit 3 at 1.)

The Applicant was issued a Canadian passport in 1998, before she became an American citizen. This passport expired on July 20, 2003. In May 2003, the Applicant explained her retention of the Canadian passport after becoming an American citizen:

The reason I retain my Canadian passport is that I have had serious cancers twice. The cost of treatment for these life-threatening illnesses is very great in the United States. I am fortunate to have immigrated from a country rich enough to provide free first class medical care for all its citizens. In the event I should experience a 3rd bout of cancer, and not be able to afford medical care in the US, I would be able to return to Canada for treatment.

The Applicant has been provided copies of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline." (Money emorandum.) One was sent to her with the SOR, another with the FORM.

Paragraph 2 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has immediate family members who are not citizens of the United States, or may be subject to duress.

As stated above, the Applicant was born in Canada. Since the Applicant filled out the Security Clearance Application (Government Exhibit 5), her mother has passed away. Her father is a Canadian citizen. Subparagraph 2.b. of the SOR is factually incorrect. The Applicant has two step-brothers and one step-sister, all three of whom are Canadian citizens. She states that her two brothers are independently wealthy and able to resist any possible pressure put on them. (Government Exhibit 3 at 2.)

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 guideline. 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; (E2.A3.1.2.1)
- (2) Possession and/or use of a foreign passport; (E2.A3.1.2.2)

(4) Accepting educational, medical, or other benefits, such as retirement or social welfare, from a foreign country. (E2.A3.1.2.4)

Conditions that could mitigate security concerns include:

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

Guideline B (Foreign influence)

Conditions that could raise a security concern:

(1) An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country. (E2.A2.1.2.1.)

Conditions that could mitigate security concerns include:

(None of the mitigating 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 guidelines 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 foreign connections that demonstrates 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 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 has immediate family members who are not American citizens. In addition, the Government has also shown that the Applicant is a dual citizen of Canada and the United States, had an active Canadian passport at the time the SOR was issued, and showed no indication of surrendering it.

The Applicant, on the other hand, has not successfully mitigated the Government's case. Turning first to Guideline C. The Applicant remains a dual citizen of Canada and the United States and expresses an intent to retain that status into the future in order to be able to obtain medical benefits. While she has the right to do so, her dual status makes it impossible for me to conclude that the Applicant has a clear preference for the United States. Subparagraph 1.a. is found against the Applicant.

The passport issue is a bit more complicated. At the time the SOR was issued and the Applicant filed an Answer, she had a valid Canadian passport. However, by the time the record closed in August 2003, the passport had expired. The Money Memorandum has been interpreted to apply to expired passports, as well as those that are active. In addition, the Applicant's personal situation, sympathetic though it is, indicates that she will in all likelihood renew her Canadian passport. Under the particular circumstances of this case, the expiration of the passport does not equate to surrender of the passport. Subparagraph 1.b. and Paragraph 1 are found against the Applicant.

With regards to Guideline B, the Applicant has not supplied sufficient information for me to find that her Canadian relatives are not agents of a foreign power or in a position to be subjected to influence by a foreign power. Paragraph 2 and both of its subparagraphs are found against the Applicant.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 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.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.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