

KEYWORD: Foreign Preference

DIGEST: Applicant, a dual citizen of the United Kingdom and the United States, possesses an active passport issued by the United Kingdom. Accordingly, Applicant is unable to mitigate the foreign preference security concern that exists in this case. Clearance is denied.

CASE NO: 04-10201.h1

DATE: 06/08/2006

DATE: June 8, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10201

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of the United Kingdom and the United States, possesses an active passport issued by the United Kingdom. Accordingly, Applicant is unable to mitigate the foreign preference security concern that exists in this case. Clearance is denied.

STATEMENT OF THE CASE

On May 18, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline C (foreign preference). Applicant submitted a response to the SOR that was received by DOHA on June 8, 2005, admitted all SOR allegations while denying those facts created a security concern, and requested a decision be issued on the written record. By letter dated September 23, 2005, Applicant notified Department Counsel that he had changed his mind and was requesting a hearing (Appellate Exhibit I).

The case was assigned to me on January 19, 2006. A notice of hearing was issued on February 13, 2006, scheduling the hearing for February 28, 2006.⁽²⁾ The hearing was conducted as scheduled. The government submitted two documentary exhibits that were marked as Government Exhibits (GE) 1 and 2, and admitted into the record without objection. Applicant testified, called one witness to testify on his behalf, and submitted seven documentary exhibits that were marked as Applicant's Exhibits (AE) 1-7, and admitted into the record without objection.

The record was held open to allow Applicant time to submit additional documentation in support of his position. Applicant submitted two additional documents that were marked as AE 8 and AE 9, and admitted into the record without objection. The transcript was received by DOHA on March 8,

2006.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is 61 years old and has been employed as an operation concept analyst by a defense contractor since September 1997. He retired from the U.S. Navy as a Master Chief (paygrade E-9) in 1994. He then resided and worked part-time as a consultant in Germany until September 1997, where his wife was assigned as a civilian employee of the U.S. Army. Applicant was awarded a bachelor of science degree in general studies in 1985. The testimony and letter provided by two managers at Applicant's present employer vouch for his trustworthiness, loyalty, and integrity.

Applicant held security clearances for approximately 40 years, including a top-secret clearance until 1993, when it was downgraded because his assignment no longer required that level clearance. According to Applicant's former squadron commander, a retired rear admiral, Applicant served in the squadron as a senior sensor operator engaged in sensitive anti submarine warfare missions. He was cleared for access to nuclear weapons beginning in April 1969. The admiral attested to Applicant's loyalty to the U.S. and to his worthiness to be entrusted with classified information (AE 2).

Applicant was married in August 1968. That marriage ended in divorce in April 1989. He has been remarried since January 1992. Applicant has five children ranging in age from 13 to 35. Applicant's wife is still employed by the U.S. Army and is presently working in Italy. Applicant was uncertain where he and his wife will reside when they retire, but they have considered living in Italy.

Applicant was born in the Canal Zone in 1944. His father was a citizen of the United Kingdom and his mother a citizen of the United States. Applicant has dual citizenship with the U.S. and U.K. based upon his father's citizenship. Applicant obtained a U.K. passport in October 1997 that will not expire until October 2007. He has used the U.K. passport to travel in Europe for reasons of convenience.

Applicant is fully aware of the provisions, meaning, and effect of the ASD(C3I) Memorandum, dated August 16, 2000 (the Money memo). I discussed the contents of the Money memo with him at length during the hearing and provided him additional time following the hearing to submit proof he had surrendered his U.K. passport if he chose to do so. Instead of surrendering the U.K. passport, Applicant sent a letter to Department Counsel on March 9, 2006, in which he stated:

After long and careful consideration of the option presented at the hearing by Administrative Judge Henry Lazzaro, carefully reading again the Money Memo of August 6, 2000, and discussions with my family, I have come to the conclusion that I will not surrender my UK passport. . . .

* * *

Instead, this hearing has made me realize that it is now the right time to retire from (employer's name omitted), although just a bit sooner than I had planned.

* * *

Therefore, I have submitted my retirement request to management at (employer's name omitted) to be effective as soon as possible, but no later than May 31, 2006. My only request is that my current clearance remains in place until I depart the program and company. (AE 8)

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline C, pertaining to foreign preference, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁵⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSION

Under Guideline C, when an 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 (DC) 1: *The exercise of dual citizenship* and DC 2: *Possession and/or use of a foreign passport* are acts that demonstrate a foreign preference. Applicant is a dual citizen of the U.S. and U.K., and has exercised his U.K. citizenship by obtaining and using a U.K. passport.

Applicant is unquestionably a loyal U.S. citizen. He served this country for many years as a member of the U.S. Navy, attained the highest enlisted rank, retired honorably, and was entrusted with highly classified and sensitive information for much of his Navy career. Further, Applicant's U.K. citizenship is solely the result of his father's citizenship. Mitigating Condition (MC) 1: *Dual citizenship is based solely on parents' citizenship or birth in a foreign country* applies.

Applicant would be able to mitigate the foreign preference security concerns that exist in this case except for the Money memo which mandates: "consistent 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."

Applicant currently retains and is unwilling to surrender his U.K. passport. He was fully informed of the meaning and effect of the Money memo and given the opportunity to surrender his U.K. passport if he chose to do so. Rather than surrender the passport, Applicant chose to retire from employment with a defense contractor. Thus, he has failed to mitigate the foreign preference security concern caused by his acquisition, use, and retention of a U.K. passport. Guideline C is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline C: Against Applicant

Subparagraphs a-c: Against 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 Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Actual oral notice of the date and place of the hearing was provided to Applicant by Department Counsel sometime prior to February 13, 2006.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

10. *Egan*, 484 U.S. at 528, 531.

11. *Id.* at 531.

12. *Egan*, Executive Order 10865, and the Directive.