



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
_____)	ADP Case No. 07-06039
SSN: _____)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Stephanie Hess, Esquire, Department Counsel
For Applicant: *Pro Se*

March 24, 2008

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted her Questionnaire for Public Trust Position (SF 85P), on May 28, 2003. On November 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline C (Foreign Preference) for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on December 12, 2007, and requested a hearing before an Administrative Judge. DOHA received the request on January 15, 2008, and assigned it to me on the same day. DOHA issued a Notice of Hearing on January 25, 2008, and I convened the hearing as scheduled on February 13, 2008. The Government offered Exhibits (Ex.) 1 through 3, which were received without objection.

Applicant testified and submitted Exhibits A and B, without objection. DOHA received the transcript of the hearing (Tr.) on February 22, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In her Answer to the SOR, dated December 12, 2007, Applicant admitted all the factual allegations in the SOR.

Applicant is 39 years old, married with one child, and works for a defense contractor in the health insurance business. Applicant was born in Romania to parents of German descent. Their ancestors moved to Romania during the 1500s. Applicant, her parents and siblings, were able to immigrate from Romania to Germany in 1979. In 1988, Applicant married her American husband, finished her professional education in Germany in hotel management, and moved to the United States. Her family remained in Germany, but her brother lives in Vienna, Austria. (Tr. 21, 22, 31-33; Exhibits 1, 2, A)

Applicant has a German passport, issued in April 1998, and due to expire in April 2008. Applicant intends to renew her German passport. At the same time she renews her passport, she intends to obtain a German passport for her daughter. Applicant was told by her employer she had to apply for U.S. citizenship in July 2004, if she wanted to retain her job working on the military insurance program. Applicant applied for U.S. citizenship on her own time, and obtained her U.S. citizenship in August 2005. Applicant does not have a U.S. passport. (Tr. 15, 16, 19, 23, 33; Exhibits 1-3)

Since moving to the United States in 1989 with her husband, Applicant returned to Germany three times on visits to her family. She plans on making another trip in 2008 using her German passport. Her last trip to Germany was in 1998. (Tr. 15, 16, 32; Exhibits 1-3)

Applicant retains her German passport for several personal reasons. One reason is that she wants to visit her family in Germany with her daughter, so four generations of Germans would have a reunion. She also wants to retain her German heritage, evidenced by her passport. She was raised as a German, and by having the passport she knows she will have a home outside of the United States if she leaves the United States. Next, no valid reason has been given to her by any American authority to persuade her to surrender her German citizenship and passport. She believes that, "As a German, I am also responsible for carrying a German passport." She also thinks that with her German passport she would not be regarded as a stranger in Germany when she visits her family. She also sees a sentimental value in retaining her German citizenship, evidenced by her German passport. Applicant was concerned that if she has to go to Germany to provide care for her aging parent for a long period of time, it is easier for her to go and stay using her German passport than trying to get visas and other documents for permission from the German authorities. Applicant also had a

concern about what she would tell a German customs or police officer about traveling to Germany without her German passport. (Tr. 18-20, 30, 35; Exhibit 3)

Applicant claims she has a preference for the United States. She enjoys her job, and her resume shows she has worked her way up in her employer's organization. (Tr. 24; Exhibit A)

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally

permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶9:

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.

The guideline notes several disqualifying conditions that could raise security concerns. Under AG ¶10(a)1, “the possession of a current foreign passport,” is the only one applicable in this case. Applicant possesses a German passport, which she has retained since she immigrated to the United States. She does not have a U.S. passport, and does not intend to apply for one, at least until this case is decided. She wants to use the German passport to easily travel back to Germany to visit her parents. It does not expire until April 21, 2008. She intends to renew this passport when it expires in 2008. Applicant expressed concern at the hearing as to what she would tell the German authorities if she attempted to enter Germany for a visit without a German passport, particularly for a long visit to care for her aging parents.

After the Government raised a potential disqualification, the burden shifted to Applicant to rebut or mitigate the allegations. The guideline also includes examples of conditions that could mitigate security concerns arising under the Foreign Influence guideline. Under AG ¶11, there are six potential Mitigating Conditions (MC); however, none of them are applicable in this case. Although Applicant is now a U. S. naturalized citizen, she refuses to surrender or destroy her German passport, and, the MC requires the passport be destroyed or invalidated before the Government grants a trustworthiness determination.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶2(a): “(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I conclude that AG subparagraphs 2-5, and 7-9 apply under the "whole person" concept. In the present case, there is much information about positive attributes of Applicant's life and work history.

However, they are insufficient to outweigh the fact Applicant refuses to destroy or invalidate her German passport. She retains it voluntarily, making the decision as an adult, retains it and intends to renew it, and will continue to retain and use it in the future, despite her U.S. citizenship. Her motivation is to keep her German heritage and citizenship, and her connections to her family who reside in Germany and Austria. In fact, the evidence strongly suggests that she prefers Germany over other countries, including the United States. While she stated her preference for the United States, she made more statements about: her sentimental attachment to her German heritage than the United States; the need for her German passport to make long visits to Germany where she would not be seen as a stranger if she had her German passport; making visits to her family as a German with four generations of Germans being at a family reunion; concern about what to tell a German officer where her German passport was if she surrendered it in the United States; and as a German, she has a responsibility to carry a German passport. All such statements persuade me Applicant considers herself more German than American, coupled with her act of retaining and soon renewing her German passport while she has no U.S. passport.

Accordingly, Applicant did not provide sufficient evidence to mitigate the security concerns raised under foreign preference. Guideline C is decided against her. The "whole person" concept is decided against her for the same reasons.

Formal Findings

Formal findings for or against 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 APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

PHILIP S. HOWE
Administrative Judge