



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-01267
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gregg A. Cervi, Esquire, Department Counsel  
For Applicant: *Pro Se*

November 25, 2008

**Decision**

HARVEY, Mark W., Administrative Judge:

Applicant used and continues to possess a currently valid Polish passport, which he renewed in 2005 for travel to Poland after he became a U.S. citizen. He voted in a Polish referendum after becoming a U.S. citizen. Security concerns pertaining to foreign preference are not mitigated. Eligibility for a security clearance is denied.

**Statement of the Case**

On January 15, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Item 4). On June 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him (Item 1), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006. The SOR alleges

security concerns under Guideline C (Foreign Preference). The SOR 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On July 21, 2008, DOHA received Applicant's response to the SOR allegations, and he notified DOHA that he wanted to have an administrative judge decide his case without a hearing (Item 3). A complete copy of the file of relevant material (FORM), dated September 5, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.<sup>1</sup> Applicant did not provide additional documents within the 30 days. On November 19, 2008, the case was assigned to me.

### **Administrative Notice**

I took administrative notice of some basic facts concerning Poland, as well as Poland's relationship to the United States.<sup>2</sup> These facts are unnecessary for resolution of security concerns involving foreign preference. However, facts about Poland's government and relationship to the United States are pertinent mitigating information under the whole person concept. Poland is a democracy and an important ally of the United States and these factors among others are described *infra* in the section of this opinion labeled "Poland."<sup>3</sup>

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<sup>1</sup>Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated September 9, 2008, and Applicant's receipt is signed and dated September 11, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

<sup>2</sup>Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information from the internet. See, e.g. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents). In this case the source for the facts is the U.S. Department of State, Bureau of European and Eurasian Affairs, June 2008, "Background Note: Poland," (Administrative Judge's exhibit (AJ Ex.) I, which is available at <http://www.state.gov>).

<sup>3</sup>"[A]n ALJ has a heightened obligation to assist a *pro se* claimant, in particular to "assist [him or her] affirmatively in developing the record." *Carroll v. Secretary of Health and Human Services*, 872 F.Supp. 1200, 1204 (E.D.N.Y. 1995) (citing *Smith v. Bowen*, 687 F.Supp. 902, 906 (S.D.N.Y. 1998)). "Especially where an unrepresented claimant's record is inconsistent and incomplete, an ALJ must 'scrupulously and conscientiously probe into, inquire of and explore all the relevant facts.'" *Id.* (citing *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980)). See also *Garrett v. Richardson*, 363 F. Supp. 83 (E.D.S.C. 1973) (discussing administrative law judge's responsibility to obtain reports for full and fair hearing).

## Findings of Fact<sup>4</sup>

Applicant admitted the SOR allegations with brief explanations (Item 3). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 34 years old and has worked for a government contractor since February 2000 as an engineer. He has never been married and does not have any children. He earned a master's degree in electrical engineering in 2000. Applicant and his parents were born in Poland. Applicant became a U.S. citizen in January 2001 (Item 5 at 18). His parents became U.S. citizens in 2004, and currently live in the United States. The remainder of his family lives in Poland (Item 5 at 14).

### Foreign Preference

Applicant received a U.S. passport in March 2001 (Item 4). In July 2005, Appellant renewed his Polish passport, and it remains valid until July 2015 (Item 5 at 2-3). A copy of his Polish passport is attached to DOHA interrogatories (Item 5 at 21). The FORM and SOR ¶¶ 1.b and 1.c allege that Appellant was unwilling to surrender his currently valid Polish passport (SOR ¶ 1.e). Appellant admitted these allegations were true (Item 3). He used his Polish passport when visiting Poland and used his U.S. passport when visiting other countries. Applicant's SOR response states as of March 26, 2008, he was unwilling to surrender his Polish passport and explained he needs his Polish passport to travel to Poland. Applicant has not surrendered his Polish passport to his security officer, destroyed it in the presence of his security officer, or otherwise invalidated or relinquished it.

In the last seven years, Appellant traveled to Poland in 1999, 2001, 2002, 2003, 2004 and 2006 (Item 1). In July 2003, Appellant voted in the referendum regarding Poland's accession into the European Union (Item 5 at 6; SOR ¶ 1.f). Appellant is interested in Polish politics and has attended lectures at universities and meetings at the Polish Embassy with high-level Polish government officials (Item 1).

### Poland<sup>5</sup>

Poland is a democratic, constitutional republic with checks and balances among the president, prime minister, courts and parliament. The constitution includes judicial review, the legislative process and civil rights such as free speech, press and assembly (AJ Ex. at 1).

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<sup>4</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Items 3 (response to SOR) and 5 (responses to DOHA Interrogatories) are the sources for the facts in this section unless stated otherwise.

<sup>5</sup>See Administrative Notice, *supra*.

Poland is a member of the World Trade Organization and European Union (AJ Ex I at 6). Poland became a full member of the North Atlantic Treaty Organization (NATO) in March 1999 (AJ Ex. I at 7). “Poland’s top national security goal is to further integrate with NATO and other west European defense, economic, and political institutions while modernizing and reorganizing its military” (AJ Ex. I at 7). Poland is receiving U.S. assistance in the modernization of defense forces including acquiring F-16 multi-role fighters and C-130 cargo planes, High Mobility Multipurpose Wheeled Vehicles (HMMWVs), and other important U.S. military materials.

Poland and the United States have had warm bilateral relationships since 1989, and work closely together in a variety of diplomatic and military endeavors:

Every post-1989 Polish government has been a strong supporter of continued American military and economic presence in Europe. As well as supporting the Global War on Terror, Operation Enduring Freedom in Afghanistan, and coalition efforts in Iraq, Poland cooperates closely with American diplomacy on such issues as democratization, nuclear proliferation, human rights, regional cooperation in central and eastern Europe, and UN reform.

AE I at 8. Clearly, the United States and Poland are close political, military and diplomatic allies in many areas.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and

endures throughout off-duty hours. 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant security concern is under Guidelines C (Foreign Preference) and B (Foreign Influence).

#### **Foreign Preference**

Under AG ¶ 9 the security concern involving foreign preference arises, “[W]hen 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.”

AG ¶¶ 10(a)(1) and 10(a)(7) describe conditions that could raise a security concern and may be disqualifying. These conditions state, “10(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport; . . . and (7) voting in a foreign election.”

Applicant renewed his Polish passport after becoming a U.S. citizen. He continues to possess a Polish passport that will continue to be valid until 2015, establishing AG ¶ 10(a)(1). He voted in a Polish referendum in 2003, establishing AG ¶ 10(a)(7).

AG ¶ 11 provides conditions that could mitigate security concerns:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority.

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and

(f) the vote in a foreign election was encouraged by the United States Government.

None of the mitigating conditions apply. Security officials did not authorize Applicant's use of the Polish passport and he did not invalidate or relinquish his Polish passport as described in AG ¶¶ 11(d) and 11(e).<sup>6</sup> His Polish passport was not surrendered to his security officer. Applicant's vote in the Polish referendum was not encouraged by the U.S. government. He obtained the Polish passport and voted in the Polish referendum after he became a U.S. citizen.

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<sup>6</sup>In the decretal paragraph, I find “For Applicant” with respect to SOR ¶ 1.a because it essentially summarizes why the other SOR allegations are a security concern and does not include factual allegations about security concerns.

## Whole Person Concept

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the “whole person” concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole person concept, the administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1:

- (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.

Under Directive ¶ E2.2.3, “The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration” of the guidelines and the whole person concept.

There are significant factors supporting approval of Applicant's access to classified information. Applicant's foreign preference concerns relate to Poland, a member of the World Trade Organization, European Union and the North Atlantic Treaty Organization with a democratic, republic form of government. Poland is a close ally of the United States on battlefields in Afghanistan and Iraq. The United States has provided sophisticated military technology to Poland, showing the close, trusting nature of the military and diplomatic relationship between Poland and the United States. Applicant has been a U.S. citizen since 2001. When he became a U.S. citizen, he took an oath of allegiance to the United States. His parents live in the United States and have become U.S. citizens. There is no evidence of any performance or work-related problems. He is a law-abiding U.S. citizen, who has been contributing to the U.S. national defense.

The foreign preference security concerns are more substantial. After becoming a U.S. citizen in 2001, Applicant voted in a Polish referendum in 2003 and renewed his Polish passport in 2005. He has used his Polish passport for his 1999, 2001, 2002, 2003, 2004 and 2006 visits to Poland. He did not relinquish or surrender his Polish passport to Polish officials or security officials.

After carefully weighing the evidence, I conclude Applicant has failed to carry his burden of mitigating the foreign preference security concerns. I take this position based

on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors” (See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006)) and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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:	For Applicant
Subparagraphs 1.b to 1.f:	Against Applicant

### **Conclusion**

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 eligibility for a security clearance for Applicant. Clearance is denied.

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Mark W. Harvey  
Administrative Judge