



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



In the matter of:)
)
) ADP Case No. 08-04186
)
)
Applicant for Public Trust Position)

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro Se*

March 4, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant has mitigated the Foreign Preference trustworthiness concerns. Eligibility for access to sensitive information is granted.

On October 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline C, Foreign Preference. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); 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 November 7, 2008, and requested a hearing before an administrative judge. The case was assigned to me on January 30, 2009. DOHA issued a Notice of Hearing on February 4, 2009, and the hearing was convened as scheduled on February 23, 2009. The Government offered Exhibits (GE) 1 through 2, which were received without objections. Applicant testified on his own behalf

and did not offer any exhibits. I granted Applicant's request to keep the record open to submit additional information. Applicant submitted a document, which was marked as AE A and was admitted without objection. Department Counsel's memo is marked Hearing Exhibit (HE) I. DOHA received the transcript of the hearing (Tr.) on March 2, 2009.

Findings of Fact

Applicant is a 44-year-old credentialing specialist. He was born in Barbados and completed his high school education and some college there. He visited the U.S. on different occasions and married a woman in the U.S. in 1990. He moved to the U.S. permanently in 1993 and was a permanent resident until 2006 when he became a naturalized U.S. citizen. His daughter was born in the U.S. in 1990. Although she may hold dual citizenship with Barbados because of her parent's status, no affirmative action has been taken to have her recognized as such. Applicant voluntarily served in the military in Barbados for four years in the rank of private. He no longer has any obligation or commitment to the military.¹

Applicant holds a Barbados passport issued to him in 2001, which will expire in 2011. His mother and some other family members live in Barbados. Some of his family members are also U.S. citizens. Applicant kept the passport after becoming a U.S. citizen so he would be able to show proof of his Barbados citizenship when visiting there and so he could access health services with ease, if necessary. Since becoming a U.S. citizen he has not been the recipient of health benefits in Barbados. He intends to retire in Barbados and may be eligible for certain benefits if he retained his citizenship. He has not voted in an election in Barbados. Since becoming a U.S. citizen he has visited Barbados one time and used his U.S. passport.²

Applicant stated he is willing to renounce his Barbados citizenship.³ Subsequent to his hearing Applicant surrendered his Barbados passport to a security official at his place of employment. A confirmation letter was received and stated:

[Contractor] will secure [Applicant's] passport in (sic) until either [Applicant] request[s] his passport be returned to him or he leaves the company. [Contractor] will notify the DOHA with all requests [for] [Applicant's] passport while employed with [Contractor].⁴

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for

¹ Tr. 18-32.

² Tr. 16, 27-44.

³ Tr. 17-18, 32-33, 45.

⁴ AE A

. . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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 [sensitive] 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 trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference is as follows:

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.

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying: I have specifically considered the following:

(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; (2) military service or a willingness to bear arms for a foreign country; (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country; (4) residence in a foreign country to meet citizenship requirements; (5) using foreign citizenship to protect financial or business interests in another country; and

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

At the time of his hearing Applicant held a Barbados passport and considered himself a dual citizen of Barbados and the U.S. He maintained his foreign passport so he could access medical care, if necessary, while visiting Barbados. This is a right of its citizens. Applicant never had to access this benefit, so I find he did not accept a benefit from Barbados. However, under the circumstances, I find his actions of possessing a current foreign passport falls within disqualifying conditions (a) and (b).

I have considered all of the mitigating conditions under AG ¶ 11 and especially considered:

(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; and

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

Applicant's dual citizenship is not based solely on his birth in Barbados. He has actively considered himself a dual citizen prior to his hearing. He kept his foreign passport after he became a U.S. citizen. I find AG ¶ 11(a) and (c) do not apply. At his hearing he expressed his willingness to renounce his Barbados citizenship. He has also surrendered his Barbados passport to his security officer. Therefore, I find AG ¶ 11(b) and (e) apply.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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) 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 public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Applicant is a naturalized U.S. citizen. He intends on returning to Barbados one day to retire. He has expressed his willingness to renounce his dual citizenship and has surrendered his foreign passport. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising under the guideline for Foreign Preference.

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:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Carol G. Ricciardello
Administrative Judge