

KEYWORD: Guideline C

DIGEST: A person who bears arms for a country demonstrates a willingness to risk life and limb for that country which is strong evidence of a profound commitment to the interests of that country. A willingness to bear arms for a foreign country raises serious security concerns about an applicant seeking access to classified information. These concerns apply here, where, after moving abroad, Applicant voluntarily served in the armed forces of a foreign country for almost ten years, obtained foreign citizenship in order to facilitate his entry into the armed forces, held a foreign security clearance, held an intelligence-related position in the foreign military, accepted the foreign military's largesse to obtain a graduate degree, and anticipates the receipt of a benefit as a result of his foreign military service. Applicant's eventual return to the U.S. and his eventual (after the passage of significant additional time) renunciation of foreign citizenship and surrender of his foreign passport are insufficient to vitiate the concerns raised by the voluntary choices he made. On this record, the Judge erred by concluding that Applicant had established a case in mitigation under Guideline C. Favorable decision reversed.

CASENO: 08-05869.a1

DATE: 07/24/2009

DATE: July 24, 2009

In Re:)	
)	
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)	ISCR Case No. 08-05869
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 16, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 24, 2009, after the hearing, Administrative Judge Mary E. Henry granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issue on appeal: whether the Judge erred by concluding that Applicant mitigated the case against him under Guideline C. For the following reasons, the Board reverses the Judge's favorable decision.

Whether the Record Supports the Judge's Factual Findings

A. The Judge made the following pertinent findings of fact:

Applicant was born and raised in the United States. At age 18, he enlisted in the U.S. Army. He served on active duty for three years. While on active duty, he held a sensitive compartmented information (SCI) clearance. Applicant joined the Army reserves. Applicant married his first wife, who was an Australian citizen. He received a bachelors degree and returned to active duty as a second lieutenant. He served on active duty for three more years and held a security clearance as an officer.

Applicant's first wife became very homesick. She told Applicant that she intended to return to Australia with their daughter. To preserve his family, Applicant agreed to move to Australia. The Army honorably discharged him in 1988 and two weeks later, he moved to Australia with his family. Once there, he could not find permanent employment quickly. In 1988, Applicant contacted the Australian Army recruiting office and asked about joining the military. As a condition for giving him a commission, the Australian Army required him to apply for Australian citizenship, which he did. Upon proof of his application, the Australian Army commissioned him in 1989. Australia granted him citizenship in 1990. He never renounced his U.S. citizenship and maintained dual citizenship with the U.S. and Australia. He also maintained both a U.S. and Australian passport. The Australian Army paid for Applicant's graduate school education and required him to serve an

additional 18 months of military service. For a time, Applicant held a top secret clearance in an intelligence-related position while in the Australian Army.

As a citizen of Australia, Applicant paid taxes and voted in elections, because voting is compulsory for Australian citizens. Applicant never owned property in Australia. While in the Australian Army, Applicant contributed money to a superannuation program, which is similar to a 401k. The Australian Army also contributed to this program. At age 55, Applicant is entitled to take a lump sum payment from the program, and he plans to do same. As of 2009, the retirement fund was valued at \$87,255. He will not receive a monthly retirement benefit from the Australian government or the Australian Army.

In 1996 Applicant and his first wife separated. He remained in Australia and in the Australian Army for two more years. In 1998, he resigned from the Australian Army and returned to the United States. He and his first wife divorced in 2001. Applicant's children from his first marriage live in Australia. Some of his children are dual citizens of Australia and the U.S. One child is a citizen of Australia, and Applicant is working toward obtaining U.S. citizenship for this child.

Applicant has held an Australian passport along with his U.S. passport. For many years, because of convenience, he used his Australian passport to enter and exit Australia and his U.S. passport to enter and exit the U.S. Since moving out of Australia, he has returned several times to visit his children. His last visit was in 2007.

In 2003, Applicant held a contractor position with a federal agency. When the agency learned that he claimed dual citizenship, it advised him that he could not work for them unless he renounced his Australian citizenship. Within a week, Applicant notified the Australian embassy that he wanted to renounce his Australian citizenship and he turned in his passport. The Australian government accepted his renunciation and declared him not a citizen of Australia. At that time, his Australian passport immediately became invalid.

Applicant credibly testified he believed he was not going against the U.S. by joining the Australian Army. He always considered himself a U.S. citizen and the U.S. his homeland. He wants his children to have dual citizenship with the U.S. and Australia. Former commanders and co-workers recommend him and believe that he would never betray classified information. They do not doubt his allegiance to the U.S.

B. Discussion

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime*

Comm'n, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

As Department Counsel does not specifically challenge the Judge's findings of fact, the issues raised on appeal are more appropriately analyzed in terms of challenges to the Judge's conclusions. This analysis is included in the following section.

Whether the Record Supports the Judge's Ultimate Conclusions

A. Conclusions

The Judge reached the following pertinent conclusions: The government established a case for disqualification under Guideline C, but Applicant mitigated the security concerns. Specifically, Guideline C Mitigating Conditions 11 b¹ and 11 e² apply. Applicant left Australia almost 11 years ago and since that time he has not exercised a right of citizenship except to hold and use his Australian passport when visiting Australia. Six years ago, Applicant renounced his Australian citizenship, Australia no longer considers him a citizen, and his Australian passport became invalid. Since returning to the U.S., Applicant has exercised his rights of U.S. citizenship. His recent actions support his testimony that he always considered himself a U.S. citizen and indicate his preference for the U.S.

Under the whole person concept, the Judge concluded that the mitigating evidence was more substantial. Applicant made his decision to join the Australian Army and obtain Australian citizenship not for personal financial gain, but as a means to provide for his family and not be dependent upon his wife's parents. Upon his return to the U.S., he did not immediately renounce his Australian citizenship but continued to use his Australian passport, a benefit of Australian citizenship, to visit his children in Australia. Since his return to the U.S., he has exercised his rights of U.S. citizenship, which shows a preference for the U.S. He made the decision to renounce his Australian citizenship because he considered himself a U.S. citizen first. He returned to the U.S. after his marriage ended for the same reason. Applicant has not indicated any intent to return to Australia and has worked to obtain U.S. citizenship for his children. While his decision 20 years ago to apply for Australian citizenship and join the Australian Army raises some concerns about his eligibility to hold a security clearance, these concerns are outweighed by the actions he has taken in the last 10 years.

B. Discussion

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'"

¹"[T]he individual has expressed a willingness to renounce dual citizenship."

²"[T]he passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)). “[N]o one has a right to a security clearance. . . The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of national security.’” *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). The Appeal Board may reverse a Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3.

Department Counsel contends that the Judge’s decision is not sustainable because she used a piecemeal analysis to conclude the government’s case was mitigated, failed to assign adequate weight to an essential element of the case, namely the implications of Applicant’s voluntary decision to serve in the Australian Army and voluntarily obtain Australian citizenship, and reached an ultimate decision that runs contrary to the record evidence. Department Counsel’s arguments have merit.

Department Counsel correctly notes that the Judge applied and relied upon two Guideline C Mitigating Conditions that dealt exclusively with renunciation of dual citizenship and relinquishment of foreign passports (see pg. 6 of this Decision) and therefore had no applicability to Applicant’s decision to voluntarily serve in the Australian Army, which raises separate, significant security concerns. Similarly, Department Counsel contends that the Judge analyzed the record in this case piecemeal by concentrating on Applicant’s ultimate renunciation of Australian citizenship and passport surrender without properly considering the larger picture presented by the record and without properly assessing the overall pattern of Applicant’s conduct, which suggests equivocal preferences regarding the U.S. and Australia. A reading of the Judge’s decision convinces the Board that the Judge either failed to consider or did not reasonably assign weight to the profound consequences of a voluntary decision by a U.S. citizen to serve in another country’s military.

The Board has noted that a person who is willing to bear arms for a country demonstrates a willingness to risk life and limb for that country. Such a willingness is strong evidence of a profound, deeply personal commitment to the interests and welfare of that country. *See, e.g.*, ISCR Case No. 00-0317 at 4 (App. Bd. Mar. 29, 2002). Accordingly, a willingness to bear arms for a foreign country raises serious security concerns about an applicant seeking to be granted access to U.S. classified information. *Id.* Obviously, these concerns (perhaps in amplified form) would apply to the instant case where, after moving abroad, Applicant voluntarily served in the armed forces of a foreign country as an officer for almost ten years, obtained citizenship in that foreign country in order to facilitate his entry into the armed forces, held the security clearance of a foreign country while in that country’s service, held an intelligence-related position while serving in the military of a foreign country, accepted the largesse of the foreign country’s military to obtain a graduate degree, and anticipates the receipt of a benefit in the form of a sizable lump-sum payment as a result of his foreign military service. Given these circumstances, Applicant had a heavy burden to establish mitigation of these expressions of foreign preference. Applicant’s eventual return to the U.S. and his eventual (after the passage of significant additional time) renunciation of Australian citizenship and surrender of his Australian passport are insufficient to vitiate the concerns raised by the

voluntary choices he made in Australia. On this record, the Judge erred by concluding that Applicant had established a case in mitigation under Guideline C.

While the Judge's analysis of the case was somewhat broader under the whole person concept than it was under her discussion of Guideline C, it still fails to address adequately the significance of Applicant's Australian citizenship and military service, and offers matters in mitigation that are inadequate to overcome the government's case against Applicant. The Judge made much of the fact that Applicant became an Australian citizen and joined its military not for personal financial gain, but as a means to provide for his family. While the preservation of his family may have been the nobler goal, the actions taken by Applicant to effectuate that goal nevertheless placed him in a position where, over a period of many years, his personal interests and the interests of another country took priority over those of the United States. The Judge's analysis on this point, which essentially treats Applicant's motive as an important matter in mitigation, fails to recognize that the desire to provide for one's family can be a significant incentive for one to take actions adverse to U.S. interests. Also, the Judge mentions the fact that Applicant did not immediately renounce his Australian citizenship upon his return to the U.S. and instead continued to use his Australian passport to visit his three children in Australia. Assuming these facts are being proffered as matters in mitigation, the Judge fails to explain how Applicant's retention of Australian citizenship and use of an Australian passport for five years following his return to the United States, a period where his earlier concerns about holding his family together were rendered moot by changed circumstances, could possibly alleviate any concerns about Applicant's manifestations of foreign preference.³

Using a whole person analysis, the Judge concluded that concerns over Applicant's decision to apply for Australian citizenship and join the Australian Army were "outweighed by the actions he has taken in the last 10 years, which show a preference for the U.S., not Australia."⁴ This conclusion is not supported by the record evidence. As discussed in the preceding paragraph, for nearly half of that ten year period, Applicant maintained his Australian citizenship and possessed and used an Australian passport after reestablishing residency in the U.S. Thus, the record contains objective evidence indicating that Applicant was equivocal or ambivalent about where his preferences lay for a significant period of time. The record also indicates that Applicant took no steps to renounce his Australian citizenship or surrender the Australian passport until these actions became a condition precedent to maintaining employment in a contractor position with a U.S. federal agency.⁵ These facts undercut the Judge's conclusion that Applicant has demonstrated a preference for the U.S. during the last ten years.

³The Judge does not explain how Applicant's retention of Australian citizenship after his return to the U.S. was instrumental in furthering his efforts to visit his children in Australia, when, presumably, Applicant could travel to Australia freely as a citizen of the U.S.

⁴Decision at p. 10.

⁵According to the record evidence, this situation did not arise until the agency in question found out about Applicant's Australian citizenship sometime after he had established a contractor relationship with them.

There is insufficient evidence in this case to sustain a conclusion that Applicant has mitigated his numerous actions indicating a foreign preference. The overall record raises significant doubts that the Judge should have resolved in favor of the national security. *See, e.g.*, ISCR Case No. 98-0331 at 8 (App. Bd. May 26, 1999). The Judge's favorable decision is not sustainable.

Order

The decision of the Administrative Judge granting Applicant a security clearance is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board