



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



In the matter of:)
)
) ISCR Case No. 08-11321
)
)
Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esq., Department Counsel
Applicant: *Pro Se*

August 14, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to classified information is denied.

History of Case

On July 16, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On April 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security 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); 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 April 24, 2009, and requested a hearing before an administrative judge. DOHA assigned the case to me on May 26, 2009, and issued a Notice of Hearing on June 16, 2009. I convened the hearing as scheduled on July 8, 2009. The Government offered Exhibits (GE) 1 through 3 into evidence, which were admitted without objection. Applicant testified, but did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on July 15, 2009.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, and 1.c.

Applicant is 53 years old and was born in the United States. He graduated from a U.S. university in 1979 with a bachelor's degree in mechanical engineering. He is divorced, and has a 35-year-old stepson and a 20-year-old biological son with his former wife. His wife and sons were born in the United States.

Applicant has worked as an engineer in the aerospace industry for 29 years. In July 2008, he obtained his current position with a federal contractor. He is a state licensed professional engineer. About 25 years ago, he held a secret security clearance.

Applicant worked in Canada from December 1992 through 1999. At his employer's suggestion, he obtained Canadian citizenship in 1998, and ceased using a Canadian work permit, which made his travels to and from Canada easier. He worked in Canada until 1999, when he was laid off. He then returned to a job in the United States, but continued to maintain Canadian residency until 2002 when he divorced. His wife and biological son also became Canadian citizens in 1998. All three of them hold dual citizenship with the United States and Canada. His son and former wife continue to reside in Canada. He works and resides in the United States. (Tr. 23-26)

Applicant enjoys certain benefits as a result of his Canadian citizenship. His son attends a Canadian university for a fraction of the cost of tuition at a U.S. institution, which saves Applicant money. Applicant has access to free Canadian health care should he need it in the future. (Tr. 39) He has a Canadian retirement fund with an estimated value of \$18,000. He has two Canadian bank accounts to which he transfers money for his son and ex-wife. (Tr. 42-43) He voted in one Canadian election in 1998. (Tr. 43)

In September 2007, Applicant applied for a Canadian passport after a border official advised him that his Canadian identification card could no longer be used to gain entry into the country. He uses the passport because it allows him to travel easily between the United States and Canada. (Tr. 40) He intends to renew the passport when it expires in 2012. (Tr. 39) He has no intention of relinquishing his Canadian citizenship or passport. (Tr. 46-47) He intends to maintain both as long as his son resides there.

In his closing argument, Applicant asserted that he is a more patriotic U.S. citizen and less of a security risk because of his experiences living in Canada. He appreciates the opportunities and freedoms of the United States when compared to other countries. (Tr. 52)

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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department counsel and 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

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 describes four conditions that could raise a security concern, two of which may be disqualifying in this case:

(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;
- (6) seeking or holding political office in a foreign country;
- (7) voting in a foreign election; and

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

Applicant was born in the United States. In 1998, he became a citizen of Canada. He resided there from approximately 1992 to 2002. He obtained a Canadian passport in 2007 that expires in 2012. His son attends a Canadian university, which benefits

Applicant because of the lower tuition costs. He intends to use the Canadian health care system in the event he becomes ill. He maintains a Canadian bank account for convenience. He voted in an election in 1998. Based on that evidence, the Government produced substantial evidence of disqualifying conditions under AG ¶¶ 10(a)(1), 10(a)(3), 10(a)(4), 10(a)(5), 10(a)(7) and 10(b).

After the Government produced substantial evidence of those conditions, the burden shifted to Applicant to produce evidence and prove mitigation. AG ¶ 11 provides six conditions that could mitigate security concerns under this guideline:

- (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 above conditions apply. Applicant was born in the United States, not Canada. He has no intention of renouncing his Canadian citizenship or surrendering his Canadian passport. He intends to exercise his rights as a Canadian citizen, in particular access to its health care system. He did not present evidence that his security office approves his use of his Canadian passport to travel to and from the country. There is no evidence that the United States Government encouraged him to vote in 1998.

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.

According to 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. Applicant is a 53-year-old, mature man, who works for a federal contractor. Applicant's conduct of potential concern under Guideline C resulted from choices he made in 1998 when he decided to become a Canadian citizen while residing there, and again in 2007 when he decided to obtain a Canadian passport for ease of travel. Although he has not resided in Canada since 2002, he continues to exercise his rights as a Canadian citizen. Although he professes strong loyalty to the United States, he has no intention of renouncing his Canadian citizenship or surrendering his passport because of the benefits and advantages that they provide him. Consequently, Applicant's preference is conflicting because he voluntarily chooses to reap the benefits offered by both countries and is unwilling to declare his undivided commitment to one country because of the potential loss of benefits from the other. Applicant has clearly made an economic choice that establishes his commitment to Canada, yet he also wants to ensure he maintains whatever benefits he can derive from the U.S. Subsequently, he is reluctant to relinquish ties to Canada despite the adverse implication it may pose to his employment.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under 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: AGAINST APPLICANT

Subparagraphs 1.a through 1.c: Against Applicant

Conclusion

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

SHARI DAM
Administrative Judge