

KEYWORD: Guideline C; Guideline B

DIGEST: Applicant's brief relies on an interview summary prepared by the security clearance investigator. The quoted language is not a judgment by the investigator, it merely summarizes Applicant's assertion during the interview. Adverse decision affirmed.

CASENO: 09-01793.a1

DATE: 09/28.2010

DATE: September 28, 2010

In Re:)
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-----) ISCR Case No. 09-01793
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)
Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

James R. Fleisher, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 31, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and

Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 15, 2010, after the hearing, Administrative Judge Philip S. Howe denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge's findings of fact were based upon substantial record evidence; whether the Judge erred in his application of the Guideline C disqualifying conditions (FPDC) and the Guideline B disqualifying conditions (FIDC); whether the Judge erred in his application of the pertinent mitigating conditions; whether the Judge's whole-person analysis was in error; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law.¹ Consistent with the following discussion, we affirm the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is an engineer working for a Defense contractor. He was born in Iran, but he moved to a European country in the late 1970s to attend college. He received a Bachelor's degree and a Master's degree from universities in that country, where he lived from the late 1970s until the late 1990s. He became a citizen of this European country and earned retirement benefits due to his having worked there for ten years.

He left this country in the late 1990s and moved to the U.S. He became a U.S. citizen in the late 2000s. Applicant holds citizenship in Iran, the European country, and the U.S. He also has passports from these three countries. He has traveled to Iran several times after moving to the U.S. "Applicant traveled to Iran after he received the SOR . . . knowing that his travels to Iran and possession of the Iranian passport were a security concern to the U.S. Government." Decision at 3.

His wife is an Iranian citizen living with him in the U.S. His mother is a citizen and resident of Iran. Applicant speaks to her over the telephone once a month. He also has siblings who are citizens of Iran. One of them has a spouse who "may work" in an Iranian military office. Decision at 4. He speaks with his siblings several times a year.

Iran and the U.S. have not had diplomatic relations since 1980. Iran supports both international terrorism and violent opposition to the Middle-East peace process. It has intervened in the internal affairs of Iraq. The U.S. has designated Iran as the most active state sponsor of terrorism.

Discussion

Factual Sufficiency

¹The Judge found in Applicant's favor regarding SOR ¶ 1(c), a Guideline C allegation, which stated, "You maintain your [European country] citizenship to protect your interest in social security benefits you earned while employed [there]." Accordingly, this allegation is not at issue in this appeal.

Applicant contends that certain of the Judge's findings of fact are not based upon substantial record evidence.² Specifically, he challenges the Judge's finding that he had traveled to Iran after having received the SOR in his case. We can find no record evidence of Applicant's having traveled to that country after July 31, 2009, the date of the SOR. Therefore, Applicant is correct that the Judge's finding is in error. However, Applicant's last trip to Iran occurred after his security clearance interview and after receipt of DOHA interrogatories, which should have placed him on notice of security concern arising from his use of foreign passports. Accordingly, we conclude that this error by the Judge is harmless. *See* ISCR Case No. 09-00629 at 2 (App. Bd. Jul. 30, 2010).

Applicant also challenges the Judge's finding that he had never stated that he would renounce his foreign citizenships. Again, Applicant is correct. He stated during the hearing that he would renounce his European country citizenship should that be necessary. Tr. at 64. He also advised the security clearance investigator that he would be willing to renounce both citizenships if required. Interview Summary at 3, 8, contained in Government Exhibit 2, Interrogatories, dated April 15, 2009. However, in light of the totality of the record evidence, we conclude that, even if he had not made this factual error, the Judge's ultimate decision would have been the same. Therefore, this error is harmless.

Judge's Treatment of the Disqualifying Conditions

Applicant contends that the Judge erred in concluding that the record evidence establishes security concerns under Guideline C.³ Specifically, he argues that FPDC 10(a)(1)⁴ is not applicable because he does not currently possess his foreign passports. Rather, he had turned them over to his facility security officer (FSO) prior to the hearing. He also argues that FPDC 10(a)(3)⁵ is not applicable because he has not actually received any retirement benefits from the European country. However, Applicant's arguments rely on an overly technical reading of the Directive. The disqualifying conditions are examples of the kind of circumstances that can give rise to security concerns. They are not to be considered exhaustive. *See* ISCR Case No. 08-11788 at 3 (App. Bd. Jul. 28, 2010). In this case, Applicant's citizenship in two foreign countries; his prior holding of

²We review the Judge's findings of facts to determine 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

³See Note 1 above. The only Guideline C allegations at issue in this appeal are the two which alleged that Applicant exercises dual citizenship between the U.S. and Iran and the European country respectively insofar as he possesses current passports from those countries.

⁴Directive, Enclosure 2 ¶ 10(a)(1): "possession of a current foreign passport[.]"

⁵Directive, Enclosure 2 ¶ 10(a)(3): "accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country[.]"

foreign passports;⁶ his renewal of his Iranian passport at each opportunity, even after obtaining U.S. citizenship; and his apparently vested right to future social security payments from a foreign country constitute sufficient evidence of foreign preferences for the Judge to apply disqualifying conditions under Guideline C.

Applicant also challenges the Judge's conclusion that the Government had established Guideline B disqualifying conditions. However, the Iranian citizenship of his wife and the Iranian citizenship and residence of several of Applicant's close relatives, to include in-laws, is sufficient to raise Foreign Influence concerns. *See* ISCR Case No. 01-26893 (App. Bd. Oct. 16, 2002) (There is a rational connection between an applicant's family ties in a country whose interests are adverse to the United States and the risk that the applicant might fail to protect and safeguard classified information.) *See also* ISCR Case No. 05-03250 at 4-5 (App. Bd. Apr. 6, 2007); ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (In Foreign Influence cases, the nature of the foreign government involved, the intelligence gathering history of that government, and the presence of terrorist activity are important considerations that provide context for the other record evidence and must be brought to bear on the Judge's ultimate conclusions in the case.) Accordingly, the Judge properly concluded that Applicant's circumstances raised concerns under Guidelines C and B, which placed upon Applicant the burden of persuasion as to mitigation. *See* Directive ¶ E3.1.15.

Judge's Treatment of the Mitigating Conditions

Applicant contends that the Judge erred in his application of the pertinent mitigating conditions. In his argument concerning Guideline C, Applicant discusses record evidence which appears to raise the applicability of FPMC 11(e).⁷ He cites to testimony in which Applicant discussed the circumstances surrounding his decision to turn his two foreign passports over to his FSO. Applicant testified that he was called by a DOHA Department Counsel (not the one who actually represented the Government in this case), who advised Applicant to give the passports to the FSO. Tr. at 58. In his brief, Applicant contends that he "followed [Department Counsel's] instructions exactly—he gave the passports to his FSO to hold—a fact which is now being held against him. The Judge criticized the Applicant at the hearing for failing to destroy the passports." Applicant Brief at 6.

There is no other evidence in the record regarding this alleged advice, either in rebuttal or explanation. Moreover, Department Counsel did not provide a reply brief. As it stands, therefore, the record contains uncontradicted testimony that, in turning his passports over to his FSO, Applicant was relying upon advice from a DOHA official. Under the circumstances, we conclude that the Judge erred in not extending favorable application to FPMC 11(e), insofar as Applicant, in

⁶In circumstances where a passport has been surrendered to a security official, Directive, Enclosure 2 ¶ 11(e), a mitigating condition, may also apply, as in this case. *See* our discussion under Judge's Treatment of the Mitigating Conditions below.

⁷Directive, Enclosure 2 ¶ 11(e): "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated[.]"

apparent good faith, surrendered his passport to his employer's security authority. On the other hand, we find no error in the Judge's treatment of the mitigating conditions under Guideline B.

Other Issues

We note Applicant's argument, toward the beginning of his brief, in which he quotes the interview summary prepared by the security clearance investigator. The quoted language states, among other things, that Applicant has no preference for any foreign country over the U.S. and that he has received no benefits by virtue of his status as a citizen of a foreign country or by virtue of his foreign relatives. To the extent that Applicant's brief assumes that the quotations reflect the judgement of the investigator, the brief is in error. The quoted language merely summarizes what Applicant told the investigator, not the investigator's personal conclusions about Applicant's security issues. We conclude that the Judge's whole person analysis complies with the requirements of Directive, Enclosure 2 ¶ 2, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 08-02464 at 3 (App. Bd. Jul. 16, 2009); ISCR Case No. 05-03948 at 3-4 (App. Bd. May 21, 2007).

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *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)). The Judge's adverse decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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