KEYWORD: Guideline C

DIGEST: Applicant's paid foreign military service supports the Judge's ultimate adverse decision. The Department's basic policy that an individual's religious affiliation plays no part in the security clearance process was not violated. Adverse decision affirmed

CASENO: 10-02902.a1

DATE: 05/16/2011

DATE: May 16, 2011

In Re:	)	
------	)	ISCR Case No. 10-02902
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

<u>APPEARANCES</u>

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Barry M. Sax, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 6, 2010, 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 February 3, 2011, after the hearing, Administrative Judge Darlene D. Lokey Anderson 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 the Judge failed to consider all of the record evidence and whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is an engineer for a Defense contractor. He is seeking a security clearance in connection with his employment.

Applicant was born in the U. S. to Jewish parents. He attended Jewish religious schools from elementary through mid-high school. In the early 2000s he moved to Israel, where he attended a religious college. He transferred from that school to a college of technology. Subsequently he enlisted in the Israeli Defense Force (IDF). He served on active duty with the IDF from late 2005 to early 2007, a period of 14 months. In doing so, he carried a weapon and was taught to kill if his post was attacked. His duties included guarding the West Bank. He also was present in a combat zone.[1] Upon completing his term of service, Applicant returned to the U.S. He enrolled in college in order to study engineering. He never acquired Israeli citizenship or retained a passport.

Applicant enjoys an excellent reputation for his intelligence, trustworthiness, integrity, job performance, and ability to protect classified information.

Israel is a parliamentary democracy that has a close relationship with the U.S. The U.S. is concerned about Israeli sales of military equipment to China and inadequate protection of U.S. intellectual property. There have been espionage cases in the U.S. involving Israeli citizens.

Applicant challenges the Judge's adverse finding under Guideline C, Foreign Preference, with regard to SOR allegation 1.b. which reads "You resided and attended school in Israel between about 2003 to about 2007." The Judge's adverse conclusion regarding this allegation is not sustainable on this record. An applicant's attendance in a foreign school and residency abroad to attend a foreign school are not indicia of Foreign Preference. Residence in a foreign country to meet citizenship requirements and accepting educational benefits from a foreign country are cited in the Guideline. Neither of those conditions apply on this record. (There is evidence that Applicant had a scholarship, but there is not evidence that the source of the scholarship was a foreign country). Additionally, it was error for the Judge to make an adverse formal finding on a SOR allegation without discussing the security significance of the facts alleged in the allegation.

Applicant also challenges the Judge's adverse finding under allegation 1.c., arguing that his decision to join the IDF did not demonstrate a foreign preference. He argues that the Judge reached

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[1]This presence was only for a matter of days. Tr. at 130-131.

conclusions concerning Applicant's ties to Israel that are not supported by the record, and that the Judge failed to consider favorable evidence, notably his evidence of good character and trustworthiness. On this latter point, a Judge is presumed to have considered all of the evidence in the record. In this case, the Judge made numerous favorable findings regarding Applicant's character evidence. Applicant's brief does not rebut the presumption that she considered this evidence, along with all the other evidence in the record, in arriving at her ultimate decision. *See, e.g.*, ISCR Case No. 10-00898 at 2 (App. Bd. Mar. 25, 2011).

Concerning Applicant's ties to and/or manifestations of preference for Israel, Applicant argues variously that there is no evidence to support the Judge's statements that: (1) Applicant moved to Israel to study and immerse himself in Judaism and Jewish culture; (2) Although Applicant stated that after going to Israel, he found he did not like it there, his conduct shows differently; (3) Applicant's conduct shows he has deep and abiding ties to Israel; and (4) Although Applicant has lived in the United States most of his life, his contacts and connections with Israel are strong.

After a review of the record evidence the Board concludes that the Judge's finding that Applicant went to Israel to study and immerse himself in Judaism and Jewish culture is reasonably supported by the record evidence. In terms of the Judge's statements that Applicant generally has continuing deep and abiding ties to Israel and has an ongoing commitment to Israeli culture and the Israeli military, her conclusions overstate the matter to a degree. In fact, there is some record evidence indicating that Applicant's experiences in Israel left him somewhat disenchanted with the country and its culture, and there is no record evidence of significant contacts with citizens of Israel or the country itself since Applicant returned to the United States in 2007. Nevertheless, the Judge's ultimate conclusion that Applicant's military service in Israel created an unmitigated security concern is sustainable.

From a security standpoint, voluntarily serving in the military of a foreign country is a serious matter. 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. 08-05869 at 5 (App. Bd. Jul. 24, 2009); ISCR Case No. 00-0317 at 4 (App. Bd. Mar. 29, 2002). Accordingly, a willingness to bear arms for a foreign country raises security concerns about an applicant seeking to be granted access to U.S. classified information. *Id.* In this case, the Judge found herself in the position of having to weigh this strong objective evidence of a foreign preference against the other evidence of record, including Applicant's statements that his actions and motivations were not all that significant from a security standpoint. The Board is unable to conclude as a matter of law that the Judge's weighing of the evidence and her resolution of the ultimate issue in the case were erroneous.

Applicant's brief suggests the Judge's adverse decision (and Department Counsel's arguments) relied on Applicant's religious affiliation. We do not read the Judge's Decision as a whole as doing that, although there are clauses which might lend themselves to such a reading. The record evidence of Applicant's paid foreign military service supports the Judge's ultimate adverse conclusion. However, in light of the issue raised by Applicant, it is worth repeating the established

policy of the Department of Defense that "an individual's religious affiliation plays no part in the security clearance process." *See, e.g.,* Hearing Before the Committee on Government Relations, July 13, 2006, Statement of Mr. Robert Andrews, Deputy Under Secretary of Defense for Counterintelligence and Security at pages 18-19 of the Committee print and pages 4-5 of the statement. We conclude that this basic policy was not violated by the Judge's decision in this case.

Applicant has cited to Hearing Office cases in support of his appeal. We give due consideration to these cases. However, Hearing Office decisions are not binding on the Appeal Board or upon other Hearing Office Judges. *See, e.g.*, ISCR Case No. 08-09236 at 4 (App. Bd. Jan. 14, 2010). The record supports a conclusion 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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

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