DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 10-06270
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

July 26, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline C (Foreign Preference). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on April 6, 2010. (Government Exhibit (GX) 3.) On February 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline C. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on February 16, 2011; answered it on March 3, 2010; and requested a determination on the record without a hearing. DOHA received his response on March 7, 2011. Department Counsel submitted the Government's

written case on April 20, 2011. On May 5, 2011, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on May 13, 2011, and did not respond. The case was assigned to me on July 12, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the sole allegation in the SOR, alleging his possession of an active foreign passport. His admission is incorporated in my findings of fact.

Applicant is a 58-year-old product lifecycle manager employed by a defense contractor since April 1994. He served as an aircraft technician in the United Kingdom (UK) Royal Air Force (RAF) from January 1969 to April 1993, when he retired. He retired as a chief technician, equivalent to a senior master sergeant (pay grade E-8) in the U.S. Air Force. (GX 4 at 24-25.) He currently receives retired pay of about $1,000 per month for his RAF service. His retired pay is deposited in a bank in the UK, and he has access to it through a U.S. bank affiliated with the UK bank. He has never held a security clearance.

Applicant married a citizen of the UK in May 1971. His spouse accompanied him to the United States, where she worked with Applicant's employer as a representative of the UK government. She became a U.S. citizen in 2008. (GX 4 at 29.) They have an adult son, who is a UK citizen but a permanent U.S. resident.

Applicant obtained a European Union United Kingdom (EUUK) passport in April 2003. (GX 4 at 4-20.) It will expire in April 2013. He became a U.S. citizen in September 2003 and obtained a U.S. passport in October 2003. He uses his U. S. passport for foreign travel. He has never used his EUUK passport for travel, even when he has traveled to the UK. He has retained his EUUK passport because he intends to spend a portion of each year in the UK after he retires from his current job. He has not voted in any UK elections since becoming a U.S. citizen. (GX 4 at 23.)

In response to DOHA interrogatories, Applicant stated that he is not willing to destroy, surrender, or invalidate his EUUK passport. He explained:

> "Surrendering to a [employer's] security official, destroying or invalidating the passport does not change the fact that I was born in another country. Passport can be replaced. . . . When the United States honored and entrusted me with citizenship it was not required that I destroy my British passport."

(GX 4 at 2-3.)

In his response to the SOR, Applicant stated:

> I have worked for [employer] for 17 years, both as a Green card holder and a naturalized Citizen and I am not now, nor have I ever been, a threat to the national security of the United States. If I were a threat, handing my passport to an employee in a security office would not change that and I am not comfortable entrusting such an important document to the care of someone who has no consequence of ownership.

Notwithstanding his reluctance to surrender his EUUK passport, Applicant told a security investigator in May 2010 that he would be willing to renounce his UK citizenship if requested to do so. (GX 4 at 24.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained 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 an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

The SOR alleges that Applicant possesses a current foreign passport, but it does not allege his foreign military service or his receipt of retirement benefits from the UK. The concern under Guideline C is set out in AG ¶ 9: "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." A disqualifying condition may arise from "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to:

> AG ¶ 10(a)(1): possession of a current foreign passport;
>
> AG ¶ 10(a)(2): military service or a willingness to bear arms for a foreign country; and
>
> AG ¶ 10(a)(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country.

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep. 15, 1999).

The security concern under this guideline is not limited to countries hostile to the United States "Under the facts of a given case, an applicant's preference, explicit or

implied, even for a nation with which the U.S. has enjoyed long and peaceful relations, might pose a challenge to U.S. interests." ADP Case No. 07-14939 at 4 (App. Bd. Mar. 11, 2009).

Applicant's continued possession of an active EUUK passport is sufficient to raise AG ¶ 10(a)(1), even though he has never used it for travel to the UK or any other foreign country. His military service in the RAF is sufficient to raise AG ¶ 10(a)(2), and his receipt of retirement pay from the UK is sufficient to raise AG ¶ 10(a)(3), but these disqualifying conditions were not alleged in the SOR. Thus, they may not be used as an independent basis for denying his application for a clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's military service and his receipt of retired pay from the UK for these limited purposes, and I have decided this case solely under AG ¶ 10(a)(1).

Security concerns under this guideline may be mitigated by any of the following conditions:

> AG ¶ 11(a): dual citizenship is based solely on parents' citizenship or birth in a foreign country;
>
> AG ¶ 11(b): the individual has expressed a willingness to renounce dual citizenship;
>
> AG ¶ 11(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;
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> AG ¶ 11(d): use of a foreign passport is approved by the cognizant security authority;
>
> AG ¶ 11(e): the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; or
>
> AG ¶ 11(f): the vote in a foreign election was encouraged by the United States Government.

Applicant's UK citizenship is derived from his place of birth and his parents' citizenship, but he has actively exercised it by his military service, continued possession of an active EUUK passport, and receipt of retired pay. Thus, AG ¶ 11(a) is not established because his dual citizenship is not based solely on his parents' citizenship or his place of birth.

Applicant has expressed willingness to renounce dual citizenship if requested to do so. Thus, I conclude that AG ¶ 11(b) is established.

Applicant obtained his EUUK passport and served in the RAF before becoming a U.S. citizen. However, AG ¶ 11(c) is not established because he has continued to hold an active foreign passport and receive retirement pay from the UK after becoming a U.S. citizen.

There is no evidence that Applicant has been authorized by "cognizant" authority to possess or use a foreign passport. Furthermore, the evidence establishes that he has never used his EUUK passport for foreign travel. Thus, AG ¶ 11(d) is not applicable.

Applicant has declined to destroy, surrender, or invalidate his EUUK passport. Thus, AG ¶ 11(e) is not established.

Applicant has never voted in a foreign election since becoming a U.S. citizen. Thus, AG ¶ 11(f) is not applicable.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An 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.

Under 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 have incorporated my comments under Guideline C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature adult who has worked for a defense contractor in the United States for 17 years. He and his spouse have become U.S. citizens. His reluctance to surrender his EUUK passport appears to be largely symbolic. He has never used it for travel, and his responses to DOHA interrogatories and questions from a security investigator suggest that he does not agree with the rationale for requiring surrender, destruction, or invalidation of a foreign passport. Paradoxically, he has

indicated willingness to renounce his UK citizenship, but he has not done so. Furthermore, there is nothing in the record reflecting how a renunciation of UK citizenship would affect his retirement pay, which is a significant part of his monthly income. Because this case is being decided on the record, I cannot question Applicant about the indicators of foreign preference reflected in the record, and my ability to assess his sincerity and credibility is limited. The uncertainties raised by the limited evidence in the record require that I resolve them in favor of national security.

After weighing the disqualifying and mitigating conditions under Guideline C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on foreign preference. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline C (Foreign Preference):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge