



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



In the matter of:)	
)	
)	ISCR Case No. 12-03912
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Richard L. Morris, Esq.

04/14/2014

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits in this case, I conclude that Applicant mitigated security concerns under Guideline C, Foreign Preference. His eligibility for a security clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 12, 2011. On November 19, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C, Foreign Preference. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD for SORs issued after September 1, 2006.

On December 13, 2013, Applicant answered the SOR in writing and elected to have a hearing. The case was assigned to me on January 28, 2014. I convened a hearing on March 14, 2014, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced two exhibits, which were marked Ex. 1 and Ex. 2 and entered in the record without objection. To supplement the administrative record, the Government also offered a copy of the discovery letter provided to Applicant on January 22, 2014. I marked the Government's submission as Hearing Exhibit (HE) 1 and entered it in the record without objection. The Applicant testified, called four additional witnesses, and introduced 13 exhibits, which were identified, marked, and entered without objection in the record as Applicant's Ex. A through Ex. M. DOHA received the hearing transcript (Tr.) on March 25, 2014.

Findings of Fact

The SOR contains two allegations that raise security concerns under AG ¶ 9, Foreign Preference (SOR ¶¶ 1.a. and 1.b.). In his Answer to the SOR, Applicant admitted the two allegations and provided additional information. Applicant's admissions are entered as findings of fact. (Answer to SOR.)

Applicant is 55 years old. He has been married since 2003, and he and his wife are the parents of three young children, whose ages are 6, 8 and 10 years. Applicant is a native-born United States citizen. His parents, born and raised in Germany, immigrated to the United States and became naturalized U.S. citizens in 1959, the year following Applicant's birth. (Answer to SOR; Ex. 1; Tr. 85-86.)

As a college student, Applicant enrolled in the Reserve Officer Training Corps (ROTC) and earned a bachelor's degree in accounting. He was commissioned as an officer in an active reserve unit in the U.S. military, where he served for six years. (Ex. 1; Tr. 87-88.)

In 1983, Applicant accepted a position with a federal law enforcement agency. In 1986, Applicant transferred to an individual ready reserve military unit. He received an honorable discharge in 2003. (Ex. H; Tr. 88-89.)

Applicant also served in two other federal law enforcement agencies. He was first granted a security clearance in 1990. He retired from federal civilian service in 2008. During his federal service, he received certificates of appreciation and recognition, and he carried out responsible federal law enforcement work. He seeks renewal of his security clearance now as a federal contractor. (Ex. 1; Ex. B; Ex. C; Ex. D; Ex. E; Ex. F; Tr. 100-101.)

Early in his career, in about 1989, Applicant earned a master's degree in international finance. He envisioned working for a company overseas. He learned that as the child of German-born parents, he could claim dual citizenship and acquire a German passport. He thought having a German passport would make it easier for him to obtain employment someday in Europe. Later, when his children were born, he thought it might be helpful for them someday to have German citizenship. (Tr. 99-101, 110; Ex. 2.)

Applicant acquired a German passport in 1990. He renewed the passport in 2000 and in 2010. His current German passport will expire in 2020. (Ex. 1; Ex. 2; Tr. 101, 109-111.)

In his answer to the SOR, Applicant stated that he had informed federal investigators of his dual citizenship with Germany during a polygraph examination in 2005. At his hearing Applicant reiterated this information. He stated that he could not recall whether he reported at that time that he possessed a German passport. He was not aware that possessing a foreign passport raised security concerns with his employer. He stated that he had never used his German passport for travel or for business. (Answer to SOR; Tr. 101-103, 112-113.)

Applicant's wife testified and stated that, in her opinion, Applicant was always loyal to the United States. His affinity for Germany was cultural, she observed, and related to his heritage as the only child of German immigrants. She stated that Applicant wanted to share his German heritage with their children, and in order to enrich their understanding of Germany, Applicant enrolled the children in Saturday German language classes. In the summer of 2013, Applicant and his family visited Germany together for the first time, she reported. Applicant used his U.S. passport on the trip. Applicant's wife reported that she had never seen her husband use his German passport for travel. She further observed that Applicant kept the passport in a locked box in their home and only took it out of the box to show to their children. (Tr. 64-66.)

In colloquy with Department Counsel, Applicant appeared to believe that possessing a German passport conferred dual citizenship:

Department Counsel: And how did you expect that your possession of a German passport would help your children with possible employment in Germany or anything of that nature?

Applicant: Well, let's . . . it has changed. My understanding is, at least by German law, is that it can get passed to your children, having that.

Department Counsel: Citizenship, correct?

Applicant: I guess that, Yes. I mean, a passport would mean dual citizenship. Yes.

Department Counsel: Okay. But you don't have to have a German passport to have German citizenship, correct?

Applicant: No, I don't . . . I don't know. I don't know that answer.

(Tr. 111-112.)

In his answer to the SOR, Applicant stated that he was willing to relinquish his German passport. He also stated that, in December 2013, he attempted to relinquish his passport to the security office at the federal agency where he is assigned as a contractor. However, the agency security official told Applicant that the agency had no facility to store the passport. He advised Applicant to contact the security officer at the company that employed him as a contractor. (Answer to SOR.)

Because he appeared to believe that his German passport conferred dual citizenship with Germany, Applicant was initially reluctant to surrender it. However, after consulting with his attorney, he surrendered his German passport to his facility security office approximately one week before his hearing. At his hearing, he testified that he had no intention of retrieving his German passport from the facility security officer. (Ex. A; Tr. 114-116.)

In addition to Applicant's wife, three individuals, all former law enforcement officers, testified on Applicant's behalf. One former colleague, who has also been Applicant's friend for over 20 years, testified that he respected and relied upon Applicant's judgment and integrity when they worked together. (Tr. 24-31.)

The second former colleague testified that he met Applicant in 2000 at a law enforcement conference. Later, the two men worked together in 2003-2004 and again from 2006 to 2008. At one time during their professional association, the witness was Applicant's supervisor. Since 2008, the witness and Applicant have had a personal friendship. The witness praised Applicant's "impeccable honesty," loyalty to the United States, trustworthiness, and integrity. (Tr. 32-41.)

Applicant's current supervisor also testified as a witness. He stated that he had supervised Applicant for 3½ years. He described Applicant as a team leader who is very serious, focused, mature, and responsible. He also praised Applicant's judgment. (Tr. 48-54.)

Applicant also provided 11 letters of character reference from friends, former colleagues, and the chairman and chief executive officer of the company where he is employed as a government contractor. All of the letters emphasized Applicant's outstanding character, integrity, honesty, and trustworthiness. (Ex. M.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no 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 an applicant's 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 and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider and apply the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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, the administrative judge applies these guidelines 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking to obtain 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 about 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.” Such an individual “may be prone to provide information or make decisions that are harmful to the interests of the United States.”

AG ¶ 10 describes several conditions that could raise a security concern and may be disqualifying. These disqualifying conditions are as follows:

(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; and
- (7) voting in a foreign election;

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

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant, a native-born U.S. citizen, acquired German citizenship at birth through his parents’ German citizenship. In approximately 1990, he took action to

acquire a German passport through his German citizenship, and he renewed his German passport twice, once in 2000 and once in 2010. At one time, he hoped to use his German passport at some unspecified future date to obtain employment in Germany or a European Union country. Later, when he became a father, he introduced his children to German culture and the German language to increase their future educational and employment opportunities. Applicant's acquisition of a German passport as a U.S. citizen raises a concern that he actively exercises dual citizenship with Germany. His actions raise security concerns under AG ¶¶ 10(a)(1) and 10(b).

Under AG ¶ 11(a), dual citizenship might be mitigated if "it is based solely on [an applicant's] parents' citizenship or birth in a foreign country." Under AG ¶ 11(b), an individual's dual citizenship might be mitigated if he or she "has expressed a willingness to renounce dual citizenship." Under AG ¶ 11(c), an individual's "exercise of the rights, privileges, or obligations of foreign citizenship might be mitigated if it occurred before becoming a U.S. citizen or when the individual was a minor." Under AG ¶ 11(d), an individual's use of a foreign passport might be mitigated if it were "approved by the cognizant security authority." Under AG ¶ 11(e), an individual's use of a foreign passport might be mitigated if he or she presents credible evidence that "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

Initially, Applicant's German citizenship was a passive condition: he acquired it at birth as the child of German citizens. However, when he took action, as a U.S. citizen, to obtain a German passport, he acted in a manner indicating a preference for Germany over the United States. Moreover, his decision to acquire a German passport was not approved by his cognizant security authority. His dual citizenship with Germany, as expressed in his passport choice, therefore became a security concern. Accordingly, the mitigating conditions at AG ¶¶ 11(a), 11(c), and 11(d) do not apply to the facts of this case.

However, at his hearing and in his answer to the SOR, Applicant explained that while he appreciated his German heritage, he surrendered his German passport to demonstrate his preference for his U.S. citizenship. At his hearing, Applicant asserted his mistaken understanding that possession of a German passport conveyed dual citizenship with Germany. I conclude that AG ¶ 11(b) applies in part in mitigation and AG ¶ 11(e) applies fully in mitigation to the facts of Applicant's case.

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 relevant 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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature person of 55 years. He has provided laudable service to his country as a military officer and as a federal law enforcement officer. He was credible when he testified that he believed a passport conferred dual citizenship. This misunderstanding led him to believe that if he relinquished his German passport, he would also renounce his dual citizenship, a condition he had possessed from birth as the son of German citizens who immigrated to the United States. His interest in his German heritage and the possibility, early in his career, of obtaining employment in Germany, led him to seek a German passport, which he kept for reasons of sentiment, never used, and never intended to use.

Overall, the record evidence persuades me that Applicant is mature, trustworthy, and capable of being entrusted with access to classified information. I conclude Applicant mitigated the security concerns arising under the foreign preference adjudicative guideline.

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: FOR APPLICANT

Subparagraphs 1.a. and 1.b.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Joan Caton Anthony
Administrative Judge