



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



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| In the matter of: |) | |
| |) | |
| REDACTED |) | ADP Case No. 15-06292 |
| |) | |
| Applicant for Public Trust Position |) | |

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

02/06/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate concerns raised by her past exercise of foreign citizenship and connections to and contacts in Nigeria. Eligibility for a public trust position is granted.

Statement of the Case

On March 11, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) recommending the denial of her application to occupy a public trust position. The SOR alleges foreign influence and foreign preference concerns. The action by the DOD CAF was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).¹ Applicant, through her former counsel, answered the SOR and requested a hearing to establish her eligibility for a position of trust.

¹ Pursuant to a Memorandum from the Office of the Deputy Under Secretary of Defense for Counterintelligence and Security, dated November 19, 2004 (Memorandum), the Defense Office of

On September 20, 2016, a date mutually agreed to by the parties, a hearing was held.² Applicant testified at the hearing, and Government Exhibits 1 – 4 and Applicant's Exhibits A – L were admitted into the administrative record without objection. The transcript (Tr.) was received on September 28, 2016.

On December 29, 2016, after reviewing the transcript and the record evidence, I advised the parties that the matter appeared appropriate for summary disposition in Applicant's favor. Department Counsel objected and requested a full decision.³

Findings of Fact

Applicant, who is 29 years old, is a postdoctoral fellow conducting research on traumatic brain injury (TBI), post-traumatic stress disorder (PTSD), and other health problems facing current and former U.S. military members. She is a contract employee of a U.S. Government medical facility. She submitted an application for a position of trust in February 2015, in connection with her employment, which requires that she have access to sensitive information, primarily clinical data.

Applicant has received training on handling sensitive and classified information. A recent supervisor and coworker, who are clearance holders and have had frequent professional contact with Applicant for the past two years, both described Applicant as conscientious about the sensitive information entrusted to her care and testified that she handles such information appropriately.⁴ Applicant's supervisor testified that Applicant is "devoted to improving the outcome trajectories for wounded, ill, and injured military service members."⁵ Her supervisor also submitted a sworn declaration, stating:

I have personally found the Applicant to be an upstanding person – ethical, courteous, highly efficient, and collegial. She mentors others, reports to me promptly, and is highly productive. She exceeds all expectations . . . Her judgment is balanced, fair, and transparent; her behavior is honest and consistent. She is reliable, and treats others with respect and dignity. She regularly finds ways to support others, those above and below her in the organization . . . and has frequently reduced program expenses and made processes more efficient without having been asked. In other words, [she] is a patriot and a scholar – an American

Hearings and Appeals (DOHA) is directed to utilize the provisions of the Directive, to include Enclosure 2, the adjudicative guidelines, to resolve contractor cases forwarded to it for a trustworthiness determination.

² Prehearing correspondence, the notice of hearing, and case management order were marked and attached to the record as Appellate Exhibits (App. Exh.) I – III.

³ App. Exh. IV. Post-hearing, I amended the SOR to fix a minor typographical error to correctly reflect the SOR allegations under paragraph 2, as SOR 2.a – 2.j.

⁴ Tr. 17-22, 30-33; Exhibit 1; Exhibit B.

⁵ Tr. 29.

who upholds our country's central tenets of freedom, individualism, pragmatism, volunteerism, mobility, patriotism, and progress. She embodies the American dream.⁶

Applicant's received high ratings on a recent performance appraisal, including receiving the top mark for setting the example for others to emulate.⁷

In addition to her full-time work, Applicant has co-authored publications in peer-reviewed scientific journals and presented her studies at scientific conferences, where "her work was recognized as a significant and timely contribution."⁸ She is currently pursuing a second graduate degree from a prestigious U.S. university. Applicant volunteers her time and expertise to several charitable organizations, including a project to help first responders suffering from PTSD.⁹

Applicant was born in the United States, but at an early age her parents moved the family to Nigeria. Applicant's father is originally from Nigeria.¹⁰ Applicant and her family "always lived back and forth" between the United States and Nigeria. She spent many of her summers between 2003 and 2007 in the United States.¹¹ She "was raised in [Nigeria] attending a combination of American and private Christian international schools. She was, however, always very self-aware of her American identity. . . . She learned about American ideals in school and grew to understand that the second-class status of women in Nigeria was a professional and social barrier by which she could not abide. [Applicant] learned to speak perfectly un-accented English with the knowledge that her future lies within the United States."¹²

When she was about sixteen years old, Applicant's parents obtained for her a Nigerian passport because it was a requirement to leave Nigeria. She spent her summer break in the United States. When she last visited Nigeria in 2011 for the Christmas holidays, Applicant renewed the Nigerian passport to leave the country. She only used the Nigerian passport once in 2011 to leave Nigeria and return to the United States. She surrendered the Nigerian passport to her facility security officer (FSO) and it was destroyed nearly a year ago. She has no intention to renew it.¹³

⁶ Exhibit B at 1-2.

⁷ Exhibit B at 6-7.

⁸ Exhibit K.

⁹ Exhibits D, G; Answer, Counsel's Affidavit at 2.

¹⁰ Tr. 47-48.

¹¹ Tr. 42-48; Exhibits 1, 2.

¹² Answer, Counsel's Affidavit at 1-2.

¹³ Tr. 33-35, 42, 50-51; Answer, Counsel's Affidavit at 2-3; Exhibit E. Applicant's decision to obtain and use a Nigerian passport is alleged as a foreign preference security concern at SOR 1.a.

In 2006, while going to college in Nigeria, Applicant accepted a four-week, internship program with a Nigerian government agency. During the internship, she rotated through three or four labs “observing basic research experiments on food plants and grains.” This unpaid internship was a requirement to complete her college degree.¹⁴

In 2008, after graduating from college, Applicant worked for six months in a low-wage position for a Nigerian government agency responsible for compliance with consumer safety requirements. With the assistance of the U.S. Embassy in Nigeria, Applicant applied to and was accepted by a prestigious U.S. college for graduate school. She started her graduate studies in the United States in 2009, and has lived in the United States ever since. She has not maintained contact with anyone she met through the internship or the short-lived job. She closed a bank account that she once held in Nigeria. She considers the United States her home.¹⁵

Applicant attended graduate school in the United States from 2009 to 2014. Her specific degree program was in experimental and molecular medicine. She received grades denoting “superior quality” work, and received numerous awards for her academic achievements and volunteer efforts on and off campus. While pursuing her doctorate, Applicant also worked full-time as a graduate assistant during the school year and part-time with U.S. firms during the summers. She earned her doctorate in June 2014, and shortly thereafter was hired as a federal contractor by her current employer.¹⁶

Applicant’s thesis advisor, who is also a dean at the school and had daily interaction with Applicant from 2010 through 2014, writes:

[T]here are few individuals in whom I would trust more completely than [Applicant.] She evinces an amazing balance of confidence without arrogance; critical compassion; amazing personal tact and the ability to state her opinions with great conviction and purpose, but without offense. For such a young person, I am constantly amazed that her level of diplomacy in these areas far exceeds nearly all but a handful of my (similarly middle-aged!) colleagues . . . I would have no reservations to put her in charge of any new venture and have full confidence that she would make it work both at the level of understanding the mechanics and component parts of the program and in successfully navigating the human and social world in which such plans need to be actualized. She is not in any way oblivious to pressure or stress, but she manages both with an equanimity and grace that is rare and to be envied.

* * *

¹⁴ Tr. 41, 48-50; Answer, Counsel’s Affidavit at 6.

¹⁵ Tr. 40-43, 48-51; Exhibit F. The unpaid internship and six-month job are alleged at SOR 2.i and 2.k, while the closed Nigerian bank account with a nominal balance of \$300 is alleged at SOR 2.h.

¹⁶ Exhibits 1, 2; Exhibits A, B, G, H.

I give her my strongest and unqualified recommendation. She hits all marks and goes well beyond for honesty, leadership, academic achievement, commitment to community, and dedication to any task for which she has been charged. “Difference makers” has become a popular phrase these days. I firmly believe that [Applicant] will stand at the head of this line.¹⁷

Before receiving her doctorate, Applicant contemplated attending a school in England to attain a second graduate degree. She has citizenship in the United Kingdom through her mother. She obtained a U.K. passport in 2013. She ultimately decided to attend school in the United States and accepted the job offer from her current employer. She did not use the U.K. passport and surrendered it to her FSO. It was destroyed nearly a year ago. She does not intend to obtain a U.K. passport in the future.¹⁸

Applicant’s only remaining close contact in Nigeria is her mother, who is a dual citizen of Nigeria and the U.K. Her mother owns her own small business in Nigeria, and is only vaguely familiar with what Applicant does for a living in the United States. Applicant is encouraging her mother to permanently relocate to the United States.

Applicant’s father, brother, and two sisters are U.S. citizens or permanent U.S. residents, living in the United States. Her father has owned property in the United States for nearly 30 years, and runs his own business in the United States. Her siblings all work or are going to school in the United States.

Applicant has two half-siblings, but is not close to either of them because they are much younger than she and are the offspring of adulterous relationships entered into by her father. None of Applicant’s family works for or are associated with the Nigerian government, or its military, security, or intelligence services.¹⁹

Beyond her mother, Applicant does not maintain frequent contact with anyone living in Nigeria. She used to have infrequent contact with a former high school friend, but they had a falling out and have had no contact in over 18 months. She also maintained infrequent contact with a college classmate. This individual moved to the United States last year for graduate school. Applicant’s closest friends are the people she met in graduate school and through her current work. Several of these individuals submitted reference letters attesting to her upstanding character.²⁰

¹⁷ Exhibit I.

¹⁸ Tr. 33-35; Exhibit E; Answer, Counsel’s Affidavit at 3-4.

¹⁹ Tr. 35-40; Exhibit 2. Applicant’s family, including her half-siblings, are listed as foreign influence concerns at SOR 2.a – 2.f.

²⁰ Tr. 39-40, 53; Answer, Counsel’s Affidavit at 2, 5; Exhibits B, K, L. SOR 2.g alleges that Applicant has close and continuing contact with Nigerian citizens.

Applicant has no property or assets in Nigeria. Her annual salary is about \$90,000. After paying expenses and setting aside money for charity, Applicant has a monthly net remainder of nearly \$800. She contributes to her employee-sponsored 401(k) account and, as of April 2016, her U.S. investments and savings totaled about \$15,000. She is currently saving to purchase a home in the United States. She fully and freely disclosed her foreign connections, including past employment in Nigeria, on her application for a public trust position and then discussed these matters in detail with a background investigator. She has expressed a willingness to renounce her foreign citizenships in connection with her application for a position of trust.²¹

Federal Republic of Nigeria (Nigeria)

Administrative notice may be taken of uncontroverted facts regarding a foreign country set forth in reliable and relevant U.S. Government reports. Additionally, the official position of relevant federal agencies or the statements of key U.S. Government officials may be appropriate for administrative notice. Generally, the party requesting administrative notice must provide the source document, either the full document or relevant portion, to allow an administrative judge to assess the reliability, accuracy, and relevancy of any matter requested for administrative notice.²² After reviewing Department Counsel's request for administrative notice, the following pertinent facts regarding Nigeria are noted:

Nigeria is a federal republic and gained its independence from Britain in 1960. Since gaining its independence, Nigeria has faced many challenges, including terrorist activity, sectarian conflicts, entrenched corruption, and widespread mistrust of the government. Nigerian security forces, particularly the police, have been accused of serious human rights abuses.

Boko Haram, a U.S.-designated Foreign Terrorist Organization, has grown increasingly active and deadly in its attacks against state and civilian targets, primarily northern Nigerian states. In 2014, the group's abduction of almost 300 schoolgirls drew international attention. The United States has established a strategic dialogue with Nigeria to address issues of mutual concern.

In general, the security situation in Nigeria remains fluid and unpredictable. The U.S. State Department warns U.S. citizens to avoid travel to a number of Nigerian states because of the risk of kidnapping, robberies, and other armed attacks.

²¹ Tr. 42-43; Answer, Counsel's Affidavit at 2, 5; Exhibits 1, 2; Exhibit C.

²² See ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007). See also Directive, Enclosure 3, ¶ E3.1.19 (the Federal Rules of Evidence (F.R.E.) shall serve as a guide in DOHA proceedings and technical evidentiary rules may be relaxed to permit the development of a full and complete record); F.R.E. 201; F.R.E. 1006.

Policies

Positions designated as ADP I and ADP II are classified as sensitive positions. The standard that must be met for assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security.²³

When evaluating an applicant's eligibility for a position of trust to support a DOD contract, an administrative judge must apply the provisions of the Directive, to include the adjudicative guidelines (AG or guidelines).²⁴ In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

In addition to the guidelines, the Directive sets forth procedures that must be followed in trustworthiness adjudications. The Government must present evidence to establish controverted facts alleged in the SOR. While an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. An applicant has the ultimate burden of persuasion to establish their eligibility for a public trust position.²⁵ In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve any doubt in favor of national security.

Analysis

Guideline C, Foreign Preference

A foreign preference concern 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."²⁶ Applicant's adult decision to exercise her Nigerian and U.K. citizenships by obtaining a passport from each of these countries potentially raises this concern and the disqualifying condition at AG ¶ 10(a).²⁷

²³ Memorandum; Directive, § 3.2. Cf. Department of Defense Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended, ¶¶ C3.1.2.1.1.7, C3.1.2.1.2.3, C6.1.1.1.

²⁴ Directive, Enclosure 2. See also ADP Case No. 14-01655 (App. Bd. Nov. 3, 2015) ("the Guidelines apply to all adjudications under the Directive, including both security clearance and public trust cases.")

²⁵ Directive, Enclosure 3, ¶¶ E3.1.14, E3.1.15.

²⁶ AG ¶ 9.

²⁷ Exercise of any right, privilege or obligation of foreign citizenship.

Applicant mitigated the foreign preference concern. She surrendered the foreign passports to her FSO and they were destroyed nearly a year ago. Furthermore, Applicant's motivation for obtaining these foreign passports reveals that it was not an act of preference for a foreign country over the United States. Rather, Applicant obtained the Nigerian passport in 2011 to be able to leave Nigeria after visiting her mother over the Christmas holidays. This was the only time she ever used this foreign passport, and she has not returned to Nigeria in over five years. Applicant's decision to obtain a U.K. passport raises even less of a security concern, as she only applied for the passport because she was considering going to school in the U.K. This occurred before she applied for a position of trust and became aware that such action may raise a concern. She never used the U.K. passport. She has indicated an intent to renounce her now passively held foreign citizenships and the record evidence clearly reflects that, as she testified, the United States is her home.

After a thorough review of the record evidence, I find that the mitigating conditions listed at AG ¶¶ 11(a),²⁸ 11(b),²⁹ and 11(e)³⁰ apply and when considered together with the favorable whole-person factors present in this case mitigate the foreign preference concern. In short, Applicant's past exercise of foreign citizenship no longer raises a concern about her eligibility for a position of trust.

Guideline B, Foreign Influence

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest.³¹

A person is not automatically disqualified from holding a security clearance because he or she has relatives or other contacts in a foreign country. Instead, in assessing a person's vulnerability to foreign influence, an administrative judge examines the nature of the relationship(s) and the foreign country involved. A foreign country's intelligence-gathering history, human rights record, and other similarly pertinent factors are all relevant in assessing the foreign influence concern.³²

²⁸ Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

²⁹ The individual has expressed a willingness to renounce dual citizenship.

³⁰ The passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

³¹ AG ¶ 6.

³² ISCR Case No. 12-05839 at 4 (App. Bd. July 11, 2013) ("in assessing whether there is a likelihood of vulnerability to [foreign] government coercion," the judge properly considered "the nature and strength of the family ties, the nature of [the foreign] government, its relationship with the United States and its human rights record."); ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors to consider in Guideline B cases).

Applicant's connections to and contact with her father, siblings, and former classmates, as alleged in SOR 2.a – 2.g, do not raise a foreign influence concern. The nature of these relationships, as well as the fact that some of these relatives live and work in the United States, removes any potential concern that these contacts could be exploited or used by a foreign power to influence Applicant.

Applicant's other past connections to Nigeria, namely, her old bank account and employment in Nigeria, as alleged in SOR 2.h – 2.j, also do not raise a Guideline B concern. Although Applicant's short-term work for two Nigerian government agencies nearly a decade ago on its face raises heightened concerns, the underlying circumstances of this employment demonstrate that it was of limited scope, duration, and of no meaningful significance to her current eligibility for a position of trust.

Of note, Applicant did not obtain these jobs through special connections and did not form any lasting relationships through these jobs. One was a four-week, unpaid internship that she needed to complete college, while the other was a six-month, low-paying job that tied her over financially while applying for graduate school in the United States. Neither employment was even tangentially related to matters of national security, and the record is devoid of any suggestion that she received access to sensitive Nigerian government information that could potentially pose a conflict with her ability to properly handle and protect sensitive U.S. Government information.³³

After fully and thoroughly considering these past foreign connections and giving due deference to the heightened security concerns that Applicant's past foreign employment could potentially raise, I find that these past connections to Nigeria do not leave her currently vulnerable or susceptible to foreign influence.

On the other hand, Applicant's close relationship to her mother does raise a foreign influence concern and requires further examination. A person with relatives and other connections to a foreign country faces a high, but not insurmountable hurdle in mitigating concerns raised by such foreign connections. An applicant for a position of trust is not required "to sever all ties with a foreign country before he or she can be granted access to [sensitive] information."³⁴ However, what factor or combination of factors will mitigate concerns raised by an applicant with familial and other ties to a foreign country are not easily identifiable or quantifiable.³⁵

³³ *Contrast with* ISCR Case No. 14-04937 at 3 (App. Bd. Dec. 15, 2016) ("the Judge [properly] considered Applicant's prior involvement with a foreign defense establishment, including his having served in the military and/or having held a foreign security clearance. This was appropriate for him to consider. That is, there is a rational connection between service in a foreign military and access to a foreign country's national secrets (which imposes a fiduciary relationship with that country) and susceptibility to pressure or persuasion to aid that foreign country at the expense of the U.S."). *See also* ISCR Case No. 14-03112 (App. Bd. Nov 3, 2015) (foreign military service and possession of foreign clearance); ISCR Case No. 10-00824 at 4 (App. Bd. Aug. 6, 2012).

³⁴ ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

³⁵ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

Furthermore, although the relationship between the United States and Nigeria is generally recognized as friendly, foreign influence concerns are not limited to countries hostile to the United States. The Appeal Board has cautioned against the overreliance on “simplistic distinctions between ‘friendly’ nations and ‘hostile’ nations when adjudicating cases under Guideline B,” because such “ignores the historical reality that (i) relations between nations can shift, sometimes dramatically and unexpectedly; (ii) even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security; and (iii) not all cases of espionage against the United States have involved nations that were hostile to the United States.”³⁶

The nature of Applicant’s relationship to her mother, coupled with the facts administratively noticed regarding Nigeria, notably, the threat of terrorism, serious human rights issues, and the government’s inability to stem corruption, raise a heightened concern. The record evidence also raises the following foreign influence disqualifying conditions:

AG ¶ 7(a): contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and

AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information.

Once a disqualifying condition is established, the burden shifts to an applicant to present evidence demonstrating extenuation or mitigation sufficient to warrant a favorable decision. In assessing Applicant’s case, I have considered all the available mitigating conditions, including the following:

AG ¶ 8(a): the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.; and

AG ¶ 8(b): there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

³⁶ ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

Applicant disclosed her foreign connections and contacts on her application and discussed them thoroughly during the processing of her case. Her mother does not reside near any area that terrorists are known to operate, nor does she work for the Nigerian government. Her mother has dual U.K-Nigerian nationality, which presumably entitles her to leave Nigeria at any time and easily move to the U.K. However, in light of the matters accepted for administrative notice, AG ¶ 8(a) has limited applicability.

Applicant, however, did meet her heavy burden of persuasion in establishing the applicability of AG ¶ 8(b) to her circumstances. She left Nigeria in 2009, following her childhood dream to return and settle in her country of birth, the United States. She has created a life for herself in the United States, earning a doctorate, beginning a promising professional career, and forming strong, lifelong relationships with those she has come in contact with through school and work. Her well-paying job, assets, close friendships, and the multiple charities that she is involved with and committed to are all located in the United States. She also has a solid track record of properly handling and safeguarding sensitive U.S. information.

Accordingly, after carefully weighing the evidence, both favorable and unfavorable, and considering the whole-person factors set forth in AG ¶ 2(a), I find that Applicant mitigated the heightened concerns raised by her connections to and contact with her mother, a resident of Nigeria. Furthermore, Applicant clearly demonstrated that “prior to being awarded a [position of trust], [s]he actually possesses the judgment, reliability, and trustworthiness essential to a fiduciary relationship with this country.”³⁷

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:

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| Paragraph 1, Guideline C (Foreign Preference): Subparagraphs 1.a and 1.b: | FOR APPLICANT For Applicant |
| Paragraph 2, Guideline B (Foreign Influence): Subparagraphs 2.a – 2.j: | FOR APPLICANT For Applicant |

Conclusion

In light of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for access to sensitive information. Applicant’s request for a public trust position is granted.

Francisco Mendez
Administrative Judge

³⁷ ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011).