

August 25, 1987

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J [REDACTED] A [REDACTED] S [REDACTED]

This is an appeal from a decision of the Assistant Secretary of State for Consular Affairs, Department of State dated August 1, 1986, approving the denial of appellant's application for a passport.

In a proceeding before a hearing officer of the United States Embassy at Caracas, Venezuela to establish the basis for the adverse passport action, the hearing officer found that appellant is the subject of an outstanding federal warrant for arrest for a felony and a request for extradition submitted by the government of Venezuela, and recommended to the Assistant Secretary for Consular Affairs that appellant's passport application be denied pursuant to governing regulations. Following the Assistant Secretary's approval of the hearing officer's findings and recommendation, appellant appeals. We conclude that the Department's passport action was proper under the regulations, and, accordingly, affirm the decision of the Assistant Secretary approving the Department's denial of a passport to appellant.

I

Appellant, J [REDACTED] A [REDACTED] S [REDACTED], was born on [REDACTED] in [REDACTED]. On [REDACTED], appellant, [REDACTED], was imprisoned at the time at La Planta prison in Caracas, Venezuela on local charges, submitted an application for a passport to a consular officer of the Embassy at Caracas. [REDACTED] application was held in abeyance pending an examination of [REDACTED] matter of his entitlement to a passport.

On June 20, 1985, the Embassy informed appellant that the Department denied his request for passport services because he was the subject of a request for extradition which was submitted to the government of Venezuela in January 1984. The denial action was taken under the provisions of section 51.70(a)(4) Title 22, Code of Federal Regulations. 1/ The Embassy also

1/ 22 C.F.R. 51.70(a)(4) (1985) reads:

See. 51.70 Denial of passports.

(a) A passport, except for direct return to United States, shall not be issued in any case which:

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(4) The applicant is the subject of a request for extradition or provisional arrest for extradition which has been presented to the government of a foreign country.

informed appellant of his right to a proceeding before a hearing officer. 2/ The hearing, the Embassy stated, would be limited to the issue of whether there exists a request for extradition and whether appellant is the subject of that request.

On August 16, 1985, appellant requested a hearing to review the adverse passport action as soon as possible. He said that he would be represented at the hearing by his attorney, Dr. Guillermo Villalobos Mateus.

Subsequently, the Department, on September 28, 1985, advised the Embassy that appellant's passport application "should also be denied pursuant to 22 CFR 51.70(a)(1) because he

2/ 22 C.F.R. 51.81 (1985) provides for a hearing to review an adverse passport action. It reads:

Sec. 51.81 Time Limits on hearing to review adverse action.

A person who has been the subject of an adverse action with respect to his or her right to receive or use a passport shall be entitled, upon request made within 60 days after receipt of notice of such adverse action, to require the Department or the appropriate Foreign Service post, as the case may be, to establish the basis for its action in a proceeding before a hearing officer. If no such request is made within 60 days, the adverse action will be considered final and not subject to further administrative review. If such request is made within 60 days, the adverse action shall be automatically vacated unless such proceeding is initiated by the Department or the appropriate Foreign Service post, as the case may be, within 60 days after request, or such longer period as is requested by the person adversely affected and agreed to by the hearing officer.

is subject to an outstanding Federal warrant of arrest". 3/ appears that the Department received a copy of the fed warrant of arrest after it sent its earlier instruction of 14, 1985, to the Embassy, denying appellant's pass application on the ground that he was the subject of a req for extradition.

On October 2, 1985, the Embassy, as instructed, info appellant that his passport application "has now been de under 22 CFR 51.70(a)(1) and (4)" that is, because of existence of an outstanding federal warrant of arrest and request for extradition. Enclosed were a copy of the fed warrant of arrest and a copy of the request for extradit The Embassy also acknowledged receipt of appellant's request a hearing, and gave notice that the hearing would be hel October 10, 1985, in the Consul General's office. 4/ The a letter was delivered to appellant at the prison by a cons officer. On that occasion, appellant executed an affidavit in which he requested "pursuant to 22 CFR Section 51.81 additional 60 days during which said hearing can occur." 5/ also requested that the hearing be held in his presence authorized his attorney "to receive all legal notice relate the hearing."

3/ 22 C.F.R. 51.70(a)(1) (1985) reads:

Sec. 51.70 Denial of passports.

(a) A passport, except for direct return to the U States, shall not be issued in any case in which:

(1) The applicant is the subject of outstanding Federal warrant of arrest for a fe including a warrant issued under the Fe Fugitive Felon Act (18 U.S.C. 1073);...

4/ 22 C.F.R. 51.82 (1985) provides:

Sec. 51.82 Notice of hearing.

The person adversely affected shall receive not than 5 business days' notice in writing of the sche date and place of the hearing.

5/ See note 2, supra.

By letter dated October 3, 1985, the consular officer, who was the designated hearing officer, granted appellant's request for additional time and re-scheduled the hearing to December 4, 1985, at La Planta prison. The consular officer also informed appellant's attorney, Dr. Villalobos, of the re-scheduled date and place of the hearing. On November 27, 1985, the consular officer advised appellant and his attorney that the hearing would now be held on December 10, at the prison. Appellant's attorney maintained that he did not receive the consul's letter of November 27, and that he first had knowledge of the new hearing date when an Embassy employee called him on December 9, the day before the scheduled hearing.

The hearing was held at the prison on December 10, 1985. 6/ The appellant appeared in person without his attorney; who failed to appear. Appellant's parents were present. At the end of the hearing, the hearing officer granted appellant's request for a continuance in order that his attorney might be present. The hearing resumed on December 19, at which time appellant was accompanied by his legal counsel, Dr. Villalobos and Dra. Gladys Acoste Villalobos. The record was kept open until close of business January 10, 1986, for the submission of memoranda of law or of fact. Appellant submitted supplemental material on January 8 and 21, 1986.

A consular officer, who served as the hearing counsel for the Embassy, introduced in evidence the following documents: (1) a copy of the Embassy's memorandum of July 18, 1985, to the Department that transmitted appellant's passport application and a copy of the Embassy's letter to appellant of June 20, 1985, informing him of the denial of his request for passport services; (2) a copy of the above-mentioned Embassy letter of June 20, 1985; (3) a copy of the Embassy's letter of October 2, 1985, informing appellant that his request for passport services was denied on the further ground that he was the subject of an outstanding federal warrant of arrest, and informing him of the hearing to be held on October 10, 1985; (4) a copy of an

6/ The regulations require the Department or the appropriate Foreign Service post to establish the basis for its adverse passport action in a proceeding before a hearing officer. Although the regulations are silent as to the place or site of the proceeding, it is assumed that the proceeding will, as a rule, take place at the Department or the appropriate Foreign Service post, as the case may be. The regulations, however, do not expressly prohibit the proceeding being held elsewhere when exceptional and extraordinary circumstances may warrant it. See note 2, supra.

extradition request issued by the State of Florida government of Venezuela, dated August 9, 1983, appellant's surrender for crimes he was charged with in (5) the original copy of the above request for extradition supporting documents, including copies of the indictment on December 7, 1977, the State of Florida warrant pending Circuit Court Criminal Division, Eleventh Judicial District Dade County, Florida, charging him with the crimes of battery, lewd assault, and wholesale promotion of obscene material, felonies under the laws of the State of Florida; (6) affidavits and other sworn statements of witnesses, at the government officials, and various certifications; (6) a copy of the federal warrant of arrest dated February 15, 1978, issued by the United States District Court for the Southern District of Florida to answer a complaint charging him with knowingly and intentionally moving and traveling in interstate commerce to avoid prosecution for the above-mentioned crimes in violation of section 1073 of Title 22, United States Code; (7) a copy of a consular officer's letter of November 27, 1985, in which the consular officer advised appellant, his attorney, and the Embassy's hearing counsel of the December 10 hearing date; (8) a copy of an affidavit dated October 2, 1985, requesting an additional 10 days during which hearing could be held; (9) a copy of a consular officer's letter of October 3, 1985, granting appellant's request for additional time, and re-scheduling the hearing on December 4; and, (10) a copy of the consular officer's letter of October 3, 1985, to appellant's attorney informing him of the December 4 hearing.

Appellant submitted the following documents: (1) a copy of appellant's personal record of a consular visit to the Embassy on September 6, 1984; (2) a copy of the Embassy's communication to the Department dated June 5, 1985, regarding a consular visit to appellant on June 1; (3) a copy of the Embassy's communication to the Department regarding a consular visit to appellant on April 13, 1985; (4) a copy of Embassy's communication to the Department, dated September 10, 1984, regarding appellant's request for a passport; (5) a copy of the Department's communication to the Embassy, dated June 14, 1985, regarding appellant's request for a passport; (6) a copy of a letter (in Spanish) to appellant from his attorney, Dr. Villalobos, dated December 9, 1985; (7) a copy of appellant's attorney letter (in Spanish) to the hearing officer, dated December 19, 1985; (8) an English translation of the above letter of December 9, 1985.

During the hearing appellant made several objections to the record. He objected to the admissibility of the copy of the request for extradition (Passport Services Exhibit No. 5) and the copy of the federal warrant of arrest (Passport Services Exhibit No. 6). He contended that the documents were not certified copies and, on their face, lacked authenticity of that kind; and, that the request for extradition was

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substantiated by supporting depositions or affidavits. ^{7/} Appellant also maintained that he was not notified in writing, with not less than five business days, of the scheduled date and place of hearing, as required by 22 CFR 51.82, and that his attorney was not given adequate notice of the hearing. He further questioned the conduct of the hearing officer, the behaviour of a consular officer who, he said, refused to accept his initial passport application, and the attitude of the Department "throughout the entire process." Appellant asserted that the Department's denial of a passport, even if only valid for direct return to the United States, which would enable him to "normalize" his status in Venezuela, is a breach of his human rights.

On February 24, 1986, the Embassy's hearing officer made the following findings of fact:

1. That J [REDACTED] A. [REDACTED] applied for a passport and that the application was denied.
2. That [REDACTED] is the subject of a federal warrant of arrest issued on February 15, 1978, by the U.S. District Court for the Southern District of Florida.
3. That [REDACTED] is the subject of a request for extradition which has been submitted to the government of Venezuela.
4. That the denial of [REDACTED] application is based on the existing warrant of arrest and request for extradition.
5. That the passport application was denied pursuant to the provisions of 22 CFR 51.70 and that [REDACTED] was informed of that action "on or about July 5, 1985."
6. That [REDACTED] was informed of his right to a hearing and that he was accorded such a hearing on December 10 and 19, 1985.

^{7/} It should be noted that Passport Services Exhibit No. 5, introduced as evidence at the hearing, is the original copy of the extradition request issued by the State of Florida and is supported by the indictment, the State of Florida warrant, affidavits, sworn statements of witnesses, attorneys, government officials, and various certifications. Appellant did not object to or challenge the admissibility of this exhibit. In view of Passport Services Exhibit No. 5, appellant's objection to the admissibility of the copy of the extradition request (Passport Services Exhibit No. 4) is without substance.

7. That [REDACTED] and his attorney, Dr. Villalobos received adequate notice of the hearing under CFR 51.82.

In reporting his findings of fact to the Department, the hearing officer recommended that the denial of appellant's passport application be upheld. The Assistant Secretary for Consular Affairs, upon review of the entire record in the case, including the transcript of the hearing held at the prison, concurred with the findings and recommendations of the hearing officer and upheld the denial of appellant's passport application. The Embassy forwarded to appellant the Assistant Secretary's letter of August 1, 1986, notifying him of the adverse decision and of his right to appeal that decision to the Board of Appellate Review. ^{8/} On September 15, 1986, appellant took an appeal to this Board and submitted the case for consideration on the basis of the record.

II

In considering this appeal, the Board's review is limited to determining whether the Department's denial of a passport application is in conformity with the regulations and whether appellant was accorded the procedural due process provided by the regulations. The regulations do not require or authorize the Department or the Board to consider the validity or merit of the underlying charges of a federal warrant of arrest or a request for extradition to a foreign government.

On appeal, appellant contends that he was denied an unbiased and impartial hearing as a consequence of improper actions by the hearing officer, that the hearing officer placed undue restraints prohibiting him from calling key witnesses to give testimony on his behalf, that he and his attorney did not receive adequate notice of the date and place of the hearing and that there was no showing at the hearing that witnesses "unequivocally" prove that a federal warrant for his arrest "actually does exist and is valid."

8/ 22 C.F.R. 51.89 (1986) provides:

51.89 Decision of Assistant Secretary for Consular Affairs; notice of right to appeal.

The person adversely affected shall be promptly notified in writing of the decision of the Assistant Secretary for Consular Affairs and, if the decision is adverse to him or her, the notification shall state the reasons for the decision and inform him or her of his right to appeal the decision to the Board of Appellate Review (Part 7 of this chapter) within 60 days after receipt of notice of the adverse decision. If no appeal is made within 60 days, the decision will be considered final and not subject to further administrative review.

The alleged improper actions of the hearing officer are said to be that the hearing officer frequently went off the record, during which time he and the hearing counsel for the Embassy would discuss "prosecution strategy", and that the hearing officer failed to maintain an impartial and objective attitude throughout the hearing. While the record discloses that the hearing officer often went off the record during the course of the hearing, we do not believe that that practice constituted procedural error on the part of the hearing officer. Since the Board's scope of review under the regulations is limited solely to the record on which the Assistant Secretary's decision was based, 9/ it is not apparent in what manner appellant may have been—prejudiced as a result of the hearing officer going off the record. As to the "attitude" of the hearing officer throughout the hearing, we find no basis in the record that would support appellant's allegations of bias, harassment, and badgering.

We also find without merit appellant's contention that he suffered a denial of due process because of undue restraints that prohibited him from interrogating the hearing officer and the hearing counsel as witnesses. He asserted that the hearing officer "violated" the provision of giving adequate notice of the date of the hearing, and, therefore, he should not have been restrained from examining the hearing officer. He also asserted that the hearing counsel, in his capacity as a consular officer, was the only person with pertinent knowledge of appellant's passport application and its subsequent processing and denial, and, therefore, should have been allowed to give testimony and be subject to cross examination.

9/ 22 C.F.R. 7.7 (1986) reads:

See. 7.7 Passport cases.

(a) Scope of review. With respect to appeals taken from decisions of the Assistant Secretary for Consular Affairs denying, revoking, restricting, or invalidating a passport under sections 51.70 and 51.71 of this chapter, the Board's review, except as provided in paragraph (b) of this section, shall be limited to the record on which the Assistant Secretary's decision was based.

(b) Admissibility of evidence. The Board shall not receive or consider evidence of testimony not presented at the hearing held under sections 51.81-51.89 of this chapter unless it is satisfied that such evidence or testimony was not available or could not have been discovered by the exercise of reasonable diligence prior to such hearing.

Under 22 CFR 51.81, the purpose of the proceeding before a hearing officer is to establish the basis for the Department's denial of a passport to appellant. Specifically in this case the purpose is to establish whether there exists a federal warrant of arrest and the request for extradition, and whether appellant is the subject of those actions. With respect to the proceedings, the federal regulations provide that the person adversely affected may present witnesses, offer other evidence and make argument, and, shall be entitled to be informed of the evidence before the hearing officer and of the sources of such evidence, and to confront and cross-examine any adverse witness. 10/ The hearing officer and the hearing counsel serving in those capacities, would not qualify as witnesses contemplated by the regulations.

In this connection, appellant complained that he was aware of the Department's instruction to the Embassy regarding the conduct of the hearing until during the course of the hearing. In these instructions, the Department cautioned that at no time during the hearing should the appellant or his attorney be permitted to interrogate the hearing officer or hearing counsel as a witness; appellant or his attorney shall be permitted, however, to ask relevant questions concerning the conduct of the hearing. Appellant argues in effect that the internal cautionary guidelines, which are proper and correct, adversely affected the governing regulations regarding proceedings before the hearing officer. Appellant's complaint is clearly without substance, and we find unpersuasive his argument that the instructions of the Department constitute "undue restraints".

With respect to the notice of hearing, appellant noted above, contends that he and his attorney did not receive adequate notice of the place and date of the hearing. Under 22 CFR 51.82, the person adversely affected shall receive not less than five business days notice in writing of the scheduled date and place of the hearing.

10/ Sec. 51.85 Proceedings before the hearing officer.

The person adversely affected may appear and testify in his or her own behalf and may himself, or by his or her attorney, present witnesses and offer other evidence and make argument. If any witness whom the person adversely affected wishes to call is unable to appear in person, the hearing officer may, in his or her discretion, accept an affidavit by the witness or other evidence to be taken by deposition. The person adversely affected shall be entitled to be informed of all the evidence before the hearing officer and of the sources of such evidence, and shall be entitled to confront and cross-examine any adverse witness. The person shall, upon request by the hearing officer, confirm his or her oral statements in an affidavit for the record.

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As we have seen, the record shows that on August 16, 1985, appellant requested a hearing as soon as possible; that on October 2, 1985, the Embassy advised him that the hearing would take place on October 10, at the Consul General's office; that on October 2, appellant requested an additional sixty days during which the hearing could occur, and authorized his attorney to receive all legal notice related to the hearing; that on October 3, the Embassy informed both appellant and his attorney of a rescheduled hearing to be held on December 4, at La Planta prison; that on November 27, the Embassy advised appellant and his attorney that the hearing would be held on December 10. The Embassy's letter of November 27, was personally delivered to appellant in prison on the same date and was mailed to his attorney, who claimed that he had not received it. Appellant's attorney stated that he first received notice of the December 10th hearing when called by an Embassy employee on December 9.

In light of the record, it can hardly be denied that appellant actually received "not less than 5 business days' notice in writing" of the scheduled date and place of the hearing. He received in prison on November 27, the Embassy's letter of the same date, informing him of the hearing to be held on December 10, 1985. In our view, appellant, the person adversely affected, received proper notice of hearing.

Appellant argues, however, that his attorney did not receive notice of the December 10th hearing until informed by an Embassy employee on December 9, and, therefore, did not receive adequate notice as required by the regulations. His argument is based on the affidavit that he executed on October 2, 1985, in which he authorized his attorney "to receive all legal notice related to the hearing." The appellant's position appears to be that he did not receive adequate notice of the hearing because his attorney was "the only person legally authorized" to receive notice and his attorney did not receive adequate notice. We reject his contention.

We do not consider appellant's authorization to be a waiver of or limitation on 22 CFR 51.82, which requires that notice of hearing be given to the person adversely affected. The fact that appellant actually received notice of the date and place of the hearing within the time prescribed is compliance with the regulation, and precludes appellant from asserting lack of adequate notice.

It is clear from the record that appellant's attorney received timely notice of the hearing that was scheduled on December 4, 1985, and made no appearance on that date. As to the hearing to be held on December 10, appellant's attorney, as stated above, claimed that he had not received the Embassy letter of November 27, 1985, informing him of the postponement of the hearing date to December 10, and that he first became aware of the change on December 9. Notwithstanding, we do not

see that appellant was thereby prejudiced. At the commencement of the hearing on December 10, the hearing officer, because of the failure of appellant's attorney to appear, suggested continuance of the hearing until such time as appellant could be represented by his attorney. Appellant elected, however, to proceed with the hearing, but reserved the right to request continuance if he desired the advice of his attorney. At the end of the hearing appellant did request a continuance of the hearing to December 19, at which time he was accompanied by an attorney.

Finally, appellant asserts that the copy of the federal warrant of arrest charging him with unlawful flight to avoid prosecution that was submitted at the hearing (Passport Service Exhibit No.6), does not constitute proof that the charge "did in fact exist". He states that the copy of the arrest warrant is not a certified copy and bears no proof of authenticity of any kind.

Although the copy of the federal warrant of arrest is certified, it does not follow that the copy lacks authenticity. In the first place, the original copy of the extradition request and supporting documents, including copies of the December 1977 indictment and the State of Florida warrant charging appellant with specified crimes, were all in fact introduced as evidence and available for comparison. In the second place, it is plainly manifest from an examination of the State of Florida indictment and warrant, the federal Complaint, and the federal warrant of arrest that appellant is the subject and is charged with moving and traveling in interstate commerce to avoid prosecution in violation of 18 U.S.C. 1073.

Under the regulations, the Department is required to deny a passport, except for direct return to the United States, to an applicant who is the subject of an outstanding federal warrant of arrest, as is the case here. Appellant was duly informed of the denial of a passport on the ground that he was the subject of a warrant of arrest and given a copy of that warrant. He had sufficient notice of its existence. The fact that the copy of the warrant is uncertified does not render it inadmissible in the proceedings held before the hearing officer in light of 22 CFR 51.86. 11/

11/ 22 C.F.R. 51.86 (1985) reads:


Sec. 51.86 Admissibility of evidence.

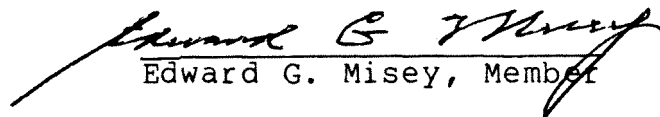
The person adversely affected and the Department may introduce such evidence as the hearing officer deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to relevance, competence and materiality of evidence presented.

It is mandatory under 22 CFR 51.70(a)(1) and (4) that a passport, except for direct return to the United States, not be issued in any case in which the applicant is the subject of an outstanding federal warrant of arrest for a felony or the subject of a request for extradition presented to the government of a foreign country. Here, appellant is the subject of a federal warrant of arrest issued by the United States District Court for the Southern District of Florida and a request for extradition to the government of Venezuela, and, under the regulations, is not entitled to a passport, except for direct return to the United States.

III

Under the regulations, the Board's action is limited to determining whether the Department's decision to deny appellant a passport was in conformity with the regulations. We find that the Department's adverse passport action was proper under 22 CFR 51.70(a)(1) and (4) in that appellant is the subject of an outstanding federal warrant of arrest for a felony and a request for extradition presented to the government of Venezuela. Accordingly, we affirm the decision of the Assistant Secretary for Consular Affairs upholding the Department's denial of a passport to appellant.


Alan G. James, Chairman


Edward G. Misey, Member


Howard Meyers, Member