

DATE: April 22, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0547

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck issued a decision, dated December 18, 2001, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue of whether the Appeal Board should recommend that Applicant's case be considered for a waiver under 10 U.S.C. §986.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated July 26, 2001. The SOR was based on Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he indicated he wanted an administrative determination made in his case. A File of Relevant Material (FORM) was prepared. A copy of the FORM was sent to Applicant, and he was provided the opportunity to respond to the FORM and submit additional information for consideration in his case. No response to the FORM was received from Applicant.

The case was assigned to the Administrative Judge for determination. The Judge issued a written decision, dated December 18, 2001, in which he indicated he would have rendered a favorable security clearance decision in Applicant's case but for the provisions of 10 U.S.C. §986. The Judge also recommended that Applicant's case be considered for a waiver of 10 U.S.C. §986.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal

error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Appeal Issues

This appeal presents the Board with legal issues concerning the adjudication of industrial security clearance cases covered by 10 U.S.C. §986. Applicant submitted an appeal brief. Department Counsel did not submit a reply brief.

I. Administrative Judge's Decision

The Administrative Judge found: (1) around May 1990, Applicant began to fondle the breasts of his 13-year-old daughter; (2) Applicant's sexual abuse of his minor daughter was interrupted in August 1990, when he was deployed overseas; (3) Applicant resumed sexually abusing his minor daughter when he returned home in March 1991; (4) Applicant had oral sex and sexual intercourse with his minor daughter (then 14-years-old) in October 1991; (5) Applicant was initially charged with rape, sodomy, and indecent liberties with a minor; (6) in April 1992, Applicant pleaded guilty to aggravated sexual battery (a felony) and two counts of non-aggravated sexual battery; (7) in August 1992, Applicant was sentenced to 15 years imprisonment for aggravated sexual battery, confinement was suspended, and he was placed on supervised probation, and required to participate in counseling for sex offenders; (8) Applicant was sentenced to 58 days in jail for the non-aggravated sexual battery, and he was released for good behavior after serving 29 days; (9) in mid-1995, pursuant to a recommendation by Applicant's probation officer, his supervised probation was changed to unsupervised probation; (10) Applicant is required to register quarterly with state authorities as a convicted sex offender, and he has complied with that requirement; (11) from November 1991 to December 1993, Applicant received regular treatment from a psychologist certified to treat sexual offenders; and (12) the psychologist released Applicant from treatment in December 1993 as "a treatment success."

The Administrative Judge concluded Applicant's sexual abuse of his minor daughter is mitigated under Guideline D because: (a) Applicant's sexual misconduct occurred more than 10 years ago; (b) Applicant successfully completed his treatment program with the psychologist; (c) there is no evidence that Applicant committed similar acts of sexual misconduct or engaged in other criminal misconduct; (d) there is persuasive evidence that Applicant has been rehabilitated; and (e) it is unlikely that there will be a recurrence of the sexual misconduct that occurred in the past.

The Administrative Judge concluded Applicant's criminal conduct was mitigated under Guideline J because: (i) Applicant's criminal conduct occurred almost 10 years ago; and (ii) Applicant demonstrated he has been rehabilitated.

The Administrative Judge entered a formal finding against Applicant with respect to Guideline J (apparently based on application of 10 U.S.C. §986), but stated "I recommend further consideration of this case for a waiver of 10 U.S.C. §986."

II. Applicant's appeal

Applicant does not challenge the Administrative Judge's findings of fact or his favorable conclusions under Guideline D, ⁽¹⁾ or the Judge's findings of fact under Guideline J. However, Applicant refers to the Judge's recommendation that his case warrants further consideration for a waiver under 10 U.S.C. §986, and asks that a waiver be granted in his case. ⁽²⁾

III. Scope of Board's authority under 10 U.S.C. §986

Under 10 U.S.C. §986, the Department of Defense may not grant or renew a security clearance for a defense contractor official or employee that falls under any of four statutory categories (10 U.S.C. §986(c)(1) through (c)(4)). Pursuant to 10 U.S.C. §986(d), the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the statutory prohibition against granting or renewing a security clearance for cases covered by 10 U.S.C. §986(c)(1) or 10 U.S.C. §986(c)(4). In a June 7, 2001 memorandum implementing the provisions of 10 U.S.C. §986, the Deputy Secretary of Defense indicated: "The decision as to whether a particular case involves a meritorious case that would justify pursuing a request for waiver shall be the province of the DoD Component concerned (i.e. all Components authorized to grant, deny or revoke access to classified information) beginning with the Director of the Component Central Adjudication Facility (CAF), the Component appellate authority or other appropriate senior Component official." For purposes of the June 7, 2001 memorandum, Director, DOHA is the Director of the Component Central Adjudication Facility for industrial security clearance cases. To implement the June 7, 2001 memorandum, the Director, DOHA issued an operating instruction (dated July 10, 2001) which indicates the following:

"Administrative Judges are responsible for initial resolution as to whether or not 10 U.S.C. 986 applies to the facts of the case." (Operating Instruction, paragraph 2.e.)

"In the event of an appeal raising an issue as to the applicability of 10 U.S.C. 986, the Appeal Board is responsible for final resolution of the issue." (Operating Instruction, paragraph 2.f.)

"In the event of a final determination that 10 U.S.C. 986 applies to the facts of a case, the Director is solely responsible for the discretionary decision as to whether to recommend to the Deputy General Counsel (Legal Counsel) that 10 U.S.C. 986 should be waived by the Secretary of Defense." (Operating Instruction, paragraph 2.g.)

"If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.'" (Operating Instruction, paragraph 3.e.)

"If the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Appeal Board shall include without explanation either the statement 'The Appeal Board recommends consideration of this case for a waiver of 10 U.S.C. 986' or 'The Appeal Board does not recommend consideration of this case for a waiver of 10 U.S.C. 986.'" (Operating Instruction, paragraph 3.f.)

"In any case in which the Administrative Judge, or the Appeal Board in the event of an appeal, recommends consideration of a waiver of 10 U.S.C. 986, the Director shall within his sole discretion determine whether or not to forward the case to the Deputy General Counsel (Legal Counsel) for further consideration of a possible waiver of 10 U.S.C. 986 by the Secretary of Defense together with such rationale as may be requested by the Deputy General Counsel (Legal Counsel)." (Operating Instruction, paragraph 3.g.)

Under paragraph 2.f. of the Operating Instruction, the Board is responsible for resolving any appeal as to the applicability of 10 U.S.C. §986. If there is no dispute on appeal as to the applicability of 10 U.S.C. §986, all that remains for the Board to do is consider an applicant's request that it recommend further consideration of the applicant's case for a waiver under 10 U.S.C. §986(d). Such a request, however, places the Board in an unusual situation. The Operating Instruction does not authorize the Board to review an Administrative Judge's recommendation whether or not a waiver should be considered. Furthermore, under the Operating Instruction, the Board is not authorized to give reasons or an explanation for its decision to recommend or not recommend that a waiver be considered, but only state without explanation either: (1) "The Appeal Board recommends consideration of this case for a waiver of 10 U.S.C. 986" or (2) "The Appeal Board does not recommend consideration of this case for a waiver of 10 U.S.C. 986." Since the Board is asked to make a recommendation in its own capacity, the Board is not bound by the recommendation made by the Judge below and must review the record evidence as a whole in order to fulfill its obligation to make a meaningful decision whether to recommend or not that a waiver should be considered.

Conclusions

With one minor exception, Applicant has not asserted the Administrative Judge's decision contains factual or legal error. The minor exception noted by Applicant constitutes harmless error that does not warrant remand or reversal. Accordingly, the Board affirms the Judge's adverse security clearance decision.

There is no dispute that Applicant's case falls under 10 U.S.C. §986(c)(1): "The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." Accordingly, the Board affirms the Judge's conclusion that 10 U.S.C. §986 precluded him from making a favorable security clearance decision in Applicant's case.

Under the Operating Instruction the Board cannot address the specific arguments asserted in Applicant's request that the Board recommend his case be considered for a waiver under 10 U.S.C. §986. The Board reaches this conclusion for the following reasons: (1) the Board does not have the authority to review the Administrative Judge's recommendation that Applicant's case be considered for a waiver under 10 U.S.C. §986; and (2) the Board is precluded from giving an explanation for its own recommendation concerning waiver.

Recognizing the limits of its authority under the Operating Instruction, the Board has reviewed the record evidence as a whole and states the following: The Appeal Board does not recommend consideration of this case for a waiver of 10 U.S.C. §986.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Applicant correctly notes the Administrative Judge reached favorable conclusions under Guideline D, but indicated that a Formal Finding was being entered against Applicant under Guideline D. Reading the Judge's decision in its entirety, the Board concludes the Judge's entry of a formal finding against Applicant under Guideline D was a typographical error.

2. Applicant's appeal brief contains some factual assertions that go beyond the record evidence. Those assertions constitute new evidence, which the Board cannot consider on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.*