DATE: September 18, 2002

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-00407

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Kenneth C. Smith, Jr., Esq.

Administrative Judge Barry M. Sax issued a decision, dated May 1, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 following issues: (1) whether the Administrative Judge erred by denying Applicant a security clearance based on 10 U.S.C. §986; and (2) whether the Board should recommend that Applicant's case be considered for a waiver under 10 U.S.C. §986 if the Board concludes Applicant's case falls under that statute. The Board affirms the Administrative Judge's adverse security clearance decision, and does not 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 September 24, 2001. The SOR was based on Guideline J (Criminal Conduct). A hearing was held on March 12, 2002. The Administrative Judge issued a written decision, dated May 1, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is before the Board on Applicant's appeal from the Administrative Judge's adverse decision.

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

On appeal, Applicant submitted two letters that were not part of the record before the Administrative Judge. One of the documents is a letter of reference that constitutes new evidence, which the Board cannot consider. *See*, Directive, Additional Procedural Guidance, Item E3.1.29. The other document is a letter from Applicant that asks the Board to consider certain evidence that he believes "has been completely ignored and overlooked." Because Applicant's letter essentially sets forth a kind of argument, it is not new evidence precluded from consideration on appeal. Accordingly, Applicant's letter can be considered to the extent it presents an argument for the Board to consider.

1. Whether the Administrative Judge erred by denying Applicant a security clearance based on 10 U.S.C. §986. Under 10 U.S.C. §986, the Department of Defense (DoD) 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)]. The statutory category that is at issue in this case is 10 U.S.C. §986(c)(1), which provides that: "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." The Administrative Judge concluded that Applicant's 1972 and 1989 convictions fall under that statutory category.

Applicant contends the Administrative Judge erred by basing his adverse security clearance decision on 10 U.S.C. §986 because: (a) the statutory prohibition is permissive, not mandatory, in nature; (b) the statutory prohibition applies only to convictions in federal courts and does not apply to convictions in state courts; (c) the statutory prohibition does not apply to cases where an individual received a suspended sentence; (d) Applicant's 1989 conviction no longer stands; (e) if there is any ambiguity concerning the application of 10 U.S.C. §986 to Applicant's case, such ambiguity must be resolved in Applicant's favor; and (f) the June 7, 2001 memorandum by the Deputy Secretary of Defense that implements 10 U.S.C. §986 is not controlling and is not binding on the Defense Office of Hearings and Appeals.

Applicant's first, second, third, and sixth arguments can be discussed and resolved together. The Deputy Secretary of Defense issued a June 7, 2001 memorandum implementing the provisions of 10 U.S.C. §986. Our reading of the June 7, 2001 memorandum persuades us that the Deputy Secretary of Defense has indicated it is the position of DoD that:

(a) 10 U.S.C. §986 precludes DoD personnel from granting or continuing a security clearance for a person covered by that the statute;

(b) 10 U.S.C.§986(c)(1) applies to convictions in either state courts or federal courts; and

(c) 10 U.S.C. §986(c)(1) applies if there has been an imposition of a sentence of imprisonment regardless of what time, if any, the convicted person actually serves.

The Board does not have the jurisdiction or authority to review or pass judgment on the Deputy Secretary of Defense's interpretation of 10 U.S.C. §986 or his guidance concerning implementation of that statute. *See* ISCR Case No. 01-05323 (July 25, 2002) at p. 3 (explaining limits of Board's authority). Accordingly, the Board rejects Applicant's sixth argument, and concludes it lacks the jurisdiction or authority to address the merits of Applicant's first, second and third arguments beyond concluding that application of the June 7, 2001 memorandum precludes acceptance of those arguments.

Applicant's argument that his 1989 conviction no longer stands raises an issue not addressed by the June 7, 2001 memorandum. Specifically, Applicant argues the Administrative Judge erred by applying 10 U.S.C. §986 to his 1989

conviction because: (a) he received a state pardon in September 1994 and was restored to his rights in the state where he was convicted; and (b) in March 2002, Applicant was acquitted of the 1989 matter and the prosecution dismissed. Applicant's arguments fail to demonstrate the Judge erred by applying 10 U.S.C. §986.

Applicant's 1994 state pardon does not affect the applicability of 10 U.S.C. §986 to the adjudication of his security clearance case. Under the Supremacy Clause of the U.S. Constitution,[(1)] federal law has primacy over state law. Congress is not bound by state law in determining what effect to give to a state pardon under federal law.[(2)] Accordingly, whatever effect Applicant's 1994 state pardon may have under state law, Congress is not compelled to recognize or accept that state pardon for purposes of federal statutes. Nothing in 10 U.S.C. §986 indicates what effect a state pardon should have on its application. But, the silence of 10 U.S.C. §986 does not mean that Applicant's argument about the effect of his 1994 state pardon can be accepted. There are two reasons why the silence of 10 U.S.C. §986 about state pardons precludes a conclusion that such pardons nullify or affect the prohibition set forth under 10 U.S.C. §986(c)(1). First, because the federal government is not bound to follow state law unless there is express Congressional direction to the contrary,[(3)] the silence of 10 U.S.C. §986 means Congress has not directed the DoD to recognize or give effect to a state pardon in connection with application of that statute to security clearance adjudications. Second, 10 U.S.C. §986 itself expressly provides for only one way to avoid the terms of 10 U.S.C. §986(c)(1): a meritorious waiver made pursuant to 10 U.S.C. §986(d). When Congress provides for any exception to the application of a statute, the courts will not infer the existence of other exceptions, but rather will assume Congress considered the matter of exceptions and decided to limit the statute to the exceptions listed therein.[(4)] Accordingly, the express listing of 10 U.S.C. §986(d) as the only exception to the application of 10 U.S.C. §986(c)(1) means Congress did not intend to allow other exceptions to the application of 10 U.S.C. §986(c)(1). For these reasons, the Board concludes Applicant's 1994 state pardon does not render the Administrative Judge's application of 10 U.S.C. §986 arbitrary, capricious, or contrary to law.

In the absence of a plain indication to the contrary, it is to be assumed that Congress does not intend to make the application of a federal statute dependent on state law.[(5)] When Congress wants a provision of federal law to depend or rely on state law, it does so by explicit statutory language.[(6)] Unless Congress has specifically indicated that state law controls, what constitutes a "conviction" for purposes of a federal statute is a question of federal law.[(7)] Accordingly, unless Congress has specifically indicated that state law controls, what constitutes "sentenced to imprisonment for a term exceeding one year" for purposes of 10 U.S.C. §986(c)(1) is a question of federal law, not state law. Since nothing in the statute indicates Congress intended the DoD to be bound by state law concerning what constitutes a conviction, Applicant's reliance on details of state law is misplaced.

When Congress has not indicated that state law should apply in determining whether a person is a convicted felon under a federal statute, the federal courts consider the practical reality of whether a person has been convicted, not the particular labels that may be used to describe the person's status.[(8)] Furthermore, Congress may attach federal disabilities on a person based on an expunged state conviction regardless of the effect the expungement has under state law.[(9)]

In this case, there is no dispute that Applicant was convicted in 1989 and sentenced to imprisonment for a term exceeding one year. For purposes of 10 U.S.C. §986, the existence of Applicant's 1989 conviction is not negated or nullified by state action in March 2002 which sets aside that conviction, dismisses the prosecution, and declares that dismissal of the prosecution has the same effect under state law as an acquittal.

Applicant's fifth argument also is not persuasive. Applicant cites no legal authority for his claim that any ambiguity concerning the application of 10 U.S.C. §986 must be resolved in his favor. Furthermore, acceptance of Applicant's fifth argument would have the practical effect of allowing doubts to be resolved in favor of an applicant instead of in favor of the national security. The Supreme Court has made clear that, in the area of security clearance decisions, the federal government is entitled to resolve doubts in favor of the national security.[(10)] And, in any event, Applicant has failed to show any ambiguity concerning the application of 10 U.S.C. §986 to his case. In view of the foregoing, the Board rejects Applicant's fifth argument.

For all the foregoing reasons, the Board concludes Applicant's case is covered by 10 U.S.C. §986, and the Administrative Judge did not err by applying that statute in this case.

2. Whether the Board should recommend that Applicant's case be considered for a waiver under 10 U.S.C. §986. Applicant argues the Board should recommend that his case be considered for a waiver under 10 U.S.C. §986 if it concludes that statute applies. Department Counsel contends the Judge's decision would have been adverse under Guideline J "whether or not 10 U.S.C. §986 was in place." If Department Counsel's contention were correct, there would be no need for the Board to consider whether to recommend that Applicant's case be considered for a waiver under 10 U.S.C. §986(d).

Department Counsel's contention is unpersuasive for two reasons. First, if the Administrative Judge had intended to render an adverse decision under Guideline J without applying 10 U.S.C. §986, then it would not make any sense for the Judge to address whether to recommend a waiver under that statute. Second, the following language appears in the decision below: "I conclude that this is a case where my decision to deny or revoke is 'solely a result of 10 USC. §986.'" Department Counsel does not articulate any reason why the Board should ignore that language. Accordingly, the Board concludes the issue of a waiver under 10 U.S.C. §986 is raised by this appeal and must be addressed.

Under 10 U.S.C. §986, the DoD 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 the 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, the 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. For the reasons stated earlier in this decision, Applicant's case is covered by 10 U.S.C. §986.

Having concluded that this case is covered by 10 U.S.C. §986, all that remains for the Board to do is consider Applicant's request that it recommend further consideration of his 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

Under the terms of the DoD memorandum implementing 10 U.S.C. §986, 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(d). 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 not be considered for a waiver under 10 U.S.C. §986(d); 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. U.S. Constitution, Article VI, Clause 2.

2. *See Yacavone v. Bolger*, 645 F.2d 1028, 1035 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 844 (1981); *Diaz v. Chasen*, 642 F.2d 764, 765 (5th Cir. 1981); *United States v. Larranaga*, 614 F.2d 239, 241-242 (10th Cir. 1980); *United States v. Sutton*, 521 F.2d 1385, 1389 (7th Cir. 1975).

3. *See, e.g.*, cases exempting federal facilities from state regulation, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988); *Hancock v. Train*, 426 U.S. 167, 178-179 (1976); *Environmental Protection Agency v. California*, 426 U.S. 200, 211 (1976).

4. *See, e.g., United States v. Johnson*, 529 U.S. 53, 58 (2000); *St. Charles Investment Co. v. Commissioner of Internal Revenue*, 232 F.3d 773, 776 (10th Cir. 2000); *Klinger v. Department of Corrections*, 107 F.3d 609, 614 n.5 (8th Cir. 1997); *Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994).

5. *N.L.R.B. v. Natural Gas Utility Dist.*, 402 U.S. 600, 603 (1971); *United States v. Campbell*, 167 F.2d 94, 97 (2d Cir. 1999).

6. *See, e.g., United States v. Brebner*, 951 F.2d 1017, 1021 (9th Cir. 1991)(discussing effect of amendment to federal firearms statute that changed definition of "conviction" to refer to state law in connection with state criminal convictions); *United States v. Campbell*, 167 F.2d 94, 97 (2d Cir. 1999); *United States v. Balascsak*, 873 F.2d 673, 677 (3d Cir. 1989)(en banc)(same).

7. *United States v. Campbell*, 167 F.2d 94, 97 (2d Cir. 1999)(citing *Dickerson v. New Banner Institute, Inc*, 460 U.S. 103 (1983)). When Congress wants a provision of federal law to depend or rely on state law, it does so by explicit statutory language. *See, e.g., United States v. Brebner*, 951 F.2d 1017, 1021 (9th Cir. 1991)(discussing effect of amendment to federal firearms statute that changed definition of "conviction" to refer to state law in connection with state criminal convictions); *United States v. Campbell*, 167 F.2d 94, 97 (2d Cir. 1999); *United States v. Balascsak*, 873 F.2d 673, 677 (3d Cir. 1989)(en banc)(same)

8. *See, e.g., Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983)(person is a convicted felon under federal firearms statute even though his state conviction was expunged); *United States v. Lehman*, 613 F.2d 130, 135 (5th Cir. 1980)(person is a convicted felon under federal firearms statute even though there was no final conviction under state law because execution of 8-year sentence was suspended and person was placed on 8-years probation).

9. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 114-115 (1983).

10. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).