

DATE: July 25, 2002

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-05323

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Alan Shachter, Esq.

Administrative Judge William R. Kearney issued a decision, dated April 22, 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. 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 following issues: (1) whether the Department of Defense erred by interpreting 10 U.S.C. §986 as applying to state felony convictions; and (2) whether the 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 October 18, 2001. The SOR was based on Guideline J (Criminal Conduct). Applicant submitted an answer to the SOR, in which she stated "I am hereby waiving my right to a hearing."

A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant and she was provided an opportunity to respond to the FORM and to submit additional information for consideration by the Judge. No response to the FORM or other submission was received from Applicant.

The case was assigned to an Administrative Judge for determination. The Administrative Judge issued a written decision, dated April 22, 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 Judge's adverse security clearance 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**

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

The Administrative Judge found the following: (a) Applicant was convicted of two counts of forgery in 1975; (b) Applicant was sentenced to two years in jail on each count, the sentences to run concurrently; (c) Applicant's jail sentence was suspended, and she was placed on probation for two years; (d) Applicant successfully completed probation without incident; and (e) Applicant's criminal conduct was "driven by immaturity, homelessness, and inexperience."

The Administrative Judge concluded the following: (i) Applicant's crime was a serious one, but that it was not recent, it was isolated in nature, and there is clear evidence of successful rehabilitation; (ii) "Applicant has long been rehabilitated, with regard to criminal activity, and that she presents little identifiable *present* security risk" (italics in original); (iii) Applicant's past criminal conduct does not warrant an unfavorable decision under Guideline J (Criminal Conduct); and (iv) application of 10 U.S.C. §986 precludes a favorable security clearance decision.

The Administrative Judge recommended the case for further consideration of a waiver under 10 U.S.C. §986. [\(1\)](#)

1. Whether the Department of Defense erred by interpreting 10 U.S.C. §986 as applying to state felony convictions. The Department of Defense memorandum implementing 10 U.S.C. §986 indicates that statute applies to both state and federal felony convictions. On appeal, Applicant contends the Department of Defense memorandum is legally erroneous because 10 U.S.C. §986 uses language which means the statute applies only to federal felony convictions.

The Board's jurisdiction and authority are limited to reviewing security clearance decisions made by DOHA Administrative Judges. *See* Directive, Additional Procedural Guidance, Items E3.1.28-E3.1.35 (provisions dealing with the appeal process and the Board's authority). The memorandum implementing 10 U.S.C. §986 was issued by the Deputy Secretary of Defense. 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. *Cf.* ISCR Case No. 99-0519 (February 23, 2001) at p. 5 (Board declining to review actions taken by DoD personnel that are outside the scope of the Board's jurisdiction and authority); ISCR Case No. 99-0424 (February 8, 2001) at p. 5 ("Nothing in the Directive indicates or suggests that the ASDC3I's authority is controlled, constrained by, or otherwise limited by decisions made by Hearing Office Administrative Judges or the Board."). Lacking such jurisdiction and authority, the Board declines to address the merits of Applicant's argument on this issue.

2. Whether the Board should recommend that Applicant's case be considered for a waiver under 10 U.S.C. §986. Applicant argues, in the alternative, that even if 10 U.S.C. §986 applies to her case, she should be granted a waiver under 10 U.S.C. §986(d).

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, 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. However, paragraph 2.f. of the Operating Instruction cannot enlarge the Board's jurisdiction and authority beyond the terms of the Directive. Accordingly, Board construes paragraph 2.f. as meaning the Board is responsible for resolving any appeal as to the applicability of 10 U.S.C. §986 as long as the appeal issue raised falls within the scope of the Board's jurisdiction and authority under the Directive. [\(2\)](#)

Having addressed the 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**

Under the terms of the Department of Defense 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 her 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 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. 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 either 10 U.S.C. §986(c)(1) or 10 U.S.C. §986(c)(4).

2. Accordingly, paragraph 2.f. of the Operating Instruction does not change the Board's conclusion about Applicant's first appeal issue.