

DATE: September 24, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06337

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Bruce A. Kent, Esq.

Administrative Judge Claude R. Heiny issued a decision, dated April 16, 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 applying 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. For the reasons that follow, the Board affirms the Administrative Judge's adverse decision, and does not recommend consideration of this case 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 27, 2001. The SOR was based on Guideline J (Criminal Conduct). A hearing was held on February 19, 2002. The Administrative Judge issued a decision, dated April 16, 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 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

The Administrative Judge found the following: (a) Applicant was convicted in early 1995 of a crime that occurred between September 1988 and December 1989; (b) Applicant was fined \$255 and sentenced to two years in jail, with the jail sentence suspended and Applicant given three years probation; (c) Applicant completed all the terms and conditions of his sentence; (d) in March 1996, Applicant's motion for reconsideration of sentence was granted and entry of judgment was stayed; and (e) Applicant's probation was terminated early. The Judge concluded 10 U.S.C. § 986 precluded a favorable security clearance decision because Applicant had been convicted a crime and sentenced to imprisonment for a term exceeding one year. The Judge recommended Applicant's case be considered for a waiver of 10 U.S.C. § 986.

1. Whether the Administrative Judge erred by applying 10 U.S.C. § 986. Applicant contends the Administrative Judge erred by applying 10 U.S.C. § 986 because: (a) although he was sentenced to two years imprisonment, the sentence of imprisonment was suspended, and therefore, his case does not fall under the provisions of 10 U.S.C. § 986; and (b) the March 1996 court action that resulted in staying the entry of judgment means that, under state law, Applicant's 1995 conviction "is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of crime." For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge erred.

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 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 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 concludes it lacks the jurisdiction or authority to address the merits of Applicant's suspended sentence argument beyond concluding that application of the June 7, 2001 memorandum precludes acceptance of that argument.

Applicant's argument that his 1995 conviction no longer stands under applicable state law raises an issue not addressed by the June 7, 2001 memorandum. Applicant's argument on this point fails to demonstrate the Judge erred by applying 10 U.S.C. § 986.

Under the Supremacy Clause of Article VI of the U.S. Constitution, federal law has primacy over state 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.⁽¹⁾ 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.⁽²⁾ Indeed, when Congress wants a provision of federal law to depend or rely on state law, it does so by explicit statutory language.⁽³⁾ Accordingly, because nothing in 10 U.S.C. § 986 indicates that Congress intended the DoD to be bound by state law concerning what is a conviction, Applicant's reliance on state law is misplaced.

When Congress has not indicated that state law should apply in determining whether a person has been convicted for

purposes of applying 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.⁽⁴⁾ 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.⁽⁵⁾

In this case, there is no dispute that Applicant was convicted in 1995 and sentenced to imprisonment for a term exceeding one year. For purposes of 10 U.S.C. § 986, the existence of Applicant's 1995 conviction and sentence to imprisonment for a term exceeding one year is not negated or nullified by the state court action in March 1996 which set aside the 1995 conviction. Although a state legislature is free to enact legislation to relieve a convicted person of disqualifications or disabilities arising under state law, because of the Supremacy Clause of the U.S. Constitution a state legislature has no authority to enact legislation to relieve a convicted person of disqualifications or disabilities arising under federal law.

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 also argues that the Board should recommend that his case be considered for a waiver under 10 U.S.C. § 986 if it concludes that statute applies.

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.)

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 Administrative 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.

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. *N.L.R.B. v. Natural Gas Utility Distr.*, 402 U.S. 600, 603 (1971); *United States v. Campbell*, 167 F.2d 94, 97 (2d Cir. 1999).
2. *United States v. Campbell*, 167 F.2d 94, 97 (2d Cir. 1999)(citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983)).
3. *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).
4. *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).
5. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 114-115 (1983).