

DATE: January 27, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-12452

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

James L. Bradford III, Esq.

Administrative Judge Barry M. Sax issued a decision, dated July 3, 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 giving undue weight to two arrests for which the charges were dismissed later; (2) whether the Administrative Judge erred by applying Personal Conduct Disqualifying Condition 5; (3) whether the Administrative Judge erred by concluding an adverse security clearance decision is warranted under Guidelines E and J, independent of the application of 10 U.S.C. §986; and (4) whether the Board should recommend 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 decision, and does not make any recommendation as to whether this case should 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 February 14, 2002. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

A hearing was held on June 11, 2002. The Administrative Judge issued a written decision, dated July 3, 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 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 also 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 the same record. 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

1. Whether the Administrative Judge erred by giving undue weight to two arrests for which the charges were dismissed later. The Administrative Judge found that Applicant was arrested on four occasions (in 1983, 1989, 1993, and 1999) and that Applicant was convicted after the arrests in 1983 and 1993. Even though the Judge found the charges against Applicant were dismissed on two occasions (in 1989 and in 1999), the Judge concluded the facts and circumstances underlying those arrests reflected adversely on Applicant's judgment under Guideline E. Applicant contends the Judge erred in giving any weight to those arrests because: (a) they did not result in convictions; (b) there is no credible record evidence that Applicant engaged in criminal conduct on those occasions; (c) the record evidence does not support the Judge's conclusion that Applicant's conduct on those occasions demonstrated poor judgment; (d) Applicant's exercise of his right to a jury trial in connection with the 1999 arrest is not a disqualifying condition; and (e) the Judge erred by finding that the 1999 charge was dismissed because the arresting officer did not appear in court. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge committed harmful error.

The fact that an applicant has been arrested, standing alone, does not prove that the applicant engaged in criminal conduct. However, the absence of a criminal conviction is not dispositive. Even if criminal charges have been dropped or dismissed, Department Counsel can present evidence to prove an applicant has engaged in the conduct that was the basis of the criminal charges. *See, e.g.*, ISCR Case No. 99-0119 (September 13, 1999) at p. 2. Dismissal of criminal charges does not preclude an Administrative Judge from considering whether there is record evidence that an applicant has engaged in the conduct that formed the basis of those charges. Furthermore, the absence of a criminal conviction does not preclude a Judge from considering whether an applicant's conduct demonstrates poor judgment under Guideline E. Considering the record as a whole, the Judge did not act in an arbitrary or capricious manner by taking into account the evidence pertaining to Applicant's conduct on the occasions that resulted in his arrests in 1989 and 1999. Furthermore, the Judge's conclusion that Applicant's conduct on those two occasions reflects adversely on his judgment for purposes of Guideline E is not arbitrary, capricious, or contrary to law.

The Board does not read the Administrative Judge's decision as holding against Applicant the fact that he exercised his right to a jury trial in connection with the 1999 arrest. The Board rejects Applicant's contention to the contrary.

The Administrative Judge did not err by finding that the 1999 charge was dismissed because the arresting police officer failed to appear to testify at the scheduled trial. Applicant is correct that page 70 of the hearing transcript, cited by the Judge in support of this finding, does not support the finding. However, the Judge's finding reflects a reasonable interpretation of the record evidence, including Applicant Exhibit C. The Judge's erroneous reference to page 70 of the hearing transcript is harmless error. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

2. Whether the Administrative Judge erred by applying Personal Conduct Disqualifying Condition 5. The Administrative Judge concluded Applicant's conduct warranted application of Personal Conduct Disqualifying Condition 5. [\(1\)](#)

Applicant contends the Judge erred by applying Personal Conduct Disqualifying Condition 5 because: (a) the arrests in 1989 and 1999 are not relevant to an analysis of Personal Conduct Disqualifying Condition 5; (b) only the 1983 and

1993 incidents (which resulted in convictions) are relevant; and (c) Applicant's 1983 conviction for burglary is mitigated by his youth at the time, and the positive evidence of his personal and professional life since the 1983 conviction.

As discussed earlier in this decision, it was not arbitrary or capricious for the Administrative Judge to consider the evidence concerning the facts and circumstances surrounding Applicant's 1989 and 1999 arrests. Since the Judge could consider Applicant's conduct on those occasions, the Judge could consider Applicant's conduct on those occasions for purposes of deciding whether to apply Personal Conduct Disqualifying Condition 5. Considering the record as a whole, it was not arbitrary or capricious for the Judge to apply Personal Conduct Disqualifying Condition 5 in this case.

3. Whether the Administrative Judge erred by concluding an adverse security clearance decision is warranted under Guidelines E and J, independent of the application of 10 U.S.C. §986. The Administrative Judge specifically concluded that "Applicant's ineligibility to hold a security clearance is not based solely on the applicability of 10 U.S.C. 986, but is based on the totality of the evidence against him, as discussed above." Applicant contends the Judge erred in reaching that conclusion. In support of this contention, Applicant argues: (a) his 1983 burglary conviction and his 1993 conviction for driving under the influence are the only two acts of criminal conduct demonstrated by the record evidence; (b) his 1993 conviction for driving under the influence, standing alone, should not be a disqualifying condition under Guideline J; and (c) the only rational basis for the Judge to render an adverse security clearance decision would be to apply 10 U.S.C. §986 to his 1983 burglary conviction. Applicant's arguments fail to demonstrate the Judge's challenged conclusion is arbitrary, capricious, or contrary to law.

Applicant's first argument fails to demonstrate the Administrative Judge erred. As discussed earlier in this decision, the Judge did not act in an arbitrary or capricious manner by considering under Guideline E the facts and circumstances of Applicant's conduct at the time of the incidents that resulted in the 1989 and 1999 arrests. Even if the Judge concluded that the 1989 and 1999 incidents did not involve criminal conduct by Applicant, the Judge was not precluded from considering Applicant's conduct on those occasions, in light of the record evidence as a whole, under Guideline E.

Applicant's second argument also is not persuasive. Under the whole person concept (Directive, Section 6.3; Enclosure 2, Items E2.2.1 and E2.2.3), it would be arbitrary and capricious for the Administrative Judge to consider Applicant's 1993 driving under the influence conviction in isolation from his other conduct. Furthermore, even if the 1993 conviction, standing alone, was not sufficient to warrant an adverse security clearance decision, the Judge had to consider whether the totality of the 1983, 1989, 1993 and 1999 incidents raised questions about Applicant's security eligibility. *See* Directive, Enclosure 2, Item E2.2.4 ("Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior."). *See also* ISCR Case No. 00-0365 (May 16, 2001) at p. 4 ("Security clearance adjudications must be based on an evaluation of the whole person, not a piecemeal analysis of an applicant's past conduct and present circumstances. Conduct or circumstances that, if considered in isolation, might not warrant an adverse security clearance decision still can be evidence of poor judgment, unreliability, or untrustworthiness that supports an overall adverse security clearance decision in light of the totality of the record evidence.").

Applicant's third argument also fails to demonstrate the Administrative Judge erred. That argument is premised on Applicant first and second arguments. As discussed in the preceding paragraphs, those two arguments are not persuasive. Whether viewed individually or collectively, Applicant's three arguments do not persuade the Board that the only rational basis for the Judge to render an adverse security clearance decision was to apply 10 U.S.C. §986 to Applicant's 1983 burglary conviction. Even if 10 U.S.C. §986 had not been enacted, the Judge's findings and conclusions under Guidelines E and J provide a sufficient basis for the Judge's adverse conclusions about Applicant's security eligibility.

4. Whether the Board should recommend Applicant's case be considered for a waiver under 10 U.S.C. §986. Applicant asks the Board to give him the following relief: (a) reverse the Administrative Judge's decision "insofar as it concludes that [Applicant] is disqualified from a security clearance under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) for reasons other than the requirements of 10 U.S.C. §986"; (b) render a Board decision that concludes the only basis for an adverse security clearance decision in Applicant's case would be the application of 10 U.S.C. §986; and (c) recommend Applicant for a waiver under 10 U.S.C. §986.

For the reasons discussed earlier in this decision, the Board concludes Applicant is not entitled to (a) or (b). Resolution of the last item of relief requested by Applicant warrants a discussion of the adjudication of cases 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, 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. In this case, Applicant does not dispute that his 1983 conviction falls under 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).

Under paragraph 3.f. of the Operating Instruction, the Board must make a recommendation for or against a waiver under 10 U.S.C. §986 "[i]f the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986." Since the Board concludes that is not arbitrary or capricious for the Administrative Judge to base his adverse decision on Guidelines E and J in addition to his application of 10 U.S.C. §986, there is no need for the Board to make

any recommendation about whether Applicant's case should be considered for a waiver under 10 U.S.C. §986(d).

Conclusion

Applicant has failed to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Furthermore, under the terms of the Operating Instruction for adjudicating cases under 10 U.S.C. §986, there is no need for the Board to make any recommendation about whether Applicant's case should be considered for a waiver under 10 U.S.C. §986(d).

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. "A pattern of dishonesty or rule violations."