

DATE: April 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-13566

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Applicant has appealed the December 17, 2002 decision of Administrative Judge Claude R. Heiny, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 finding Applicant falsified a security clearance questionnaire; (2) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law; and (3) 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 a 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 April 1, 2002. The SOR was based on Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). A hearing was held on September 5, 2002. The Administrative Judge issued a written decision 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 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**

Applicant's appeal brief makes arguments about some of the SOR subparagraphs for which the Administrative Judge entered favorable formal findings. No useful purpose would be served by the Board addressing such arguments because the Judge's favorable formal findings render Applicant's arguments moot. The Judge's favorable formal findings with respect to SOR subparagraphs 1.a through 1.f, 2.d, 2.e, and 3.b through 3.d are not at issue on appeal.

Applicant's appeal brief makes some factual assertions that go beyond the record evidence below. Such factual assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. During the proceedings below, Applicant had the opportunity to present evidence for consideration in his case. Applicant cannot fairly complain about the decision below based on a proffer of evidence that was not presented for the Judge's consideration. Furthermore, the Board will not conclude a Judge's decision is arbitrary, capricious, or contrary to law based on a proffer of evidence concerning matters or events that occur after the close of the record evidence. The Board will consider only those arguments made by Applicant that do not rely on a proffer of new evidence.

1. Whether the Administrative Judge erred by finding Applicant falsified a security clearance questionnaire. The Administrative Judge found that Applicant falsified a security clearance questionnaire in September 1999 by failing to list three alcohol-related incidents in response to question 24 of that questionnaire. On appeal, Applicant contends his answer to question 24 was not a falsification. Applicant's appeal arguments raise the issue of whether the Judge erred by finding Applicant falsified the security clearance questionnaire. [\(1\)](#)

During the proceedings below, Applicant denied he falsified the security clearance questionnaire. Applicant's statements about his intent and state of mind when he completed the security clearance questionnaire are relevant and material evidence that the Administrative Judge had to consider. However, Applicant's statements were not binding on the Judge. Rather, the Judge had to consider Applicant's statements in light of his assessment of the credibility of Applicant's testimony and the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0601 (September 21, 2001) at pp. 2-3 (even if an applicant denies having any intent to falsify, a Judge can find that the applicant engaged in falsification if there is a rational basis in the record evidence for such a finding). Considering the record evidence as a whole, the Board concludes the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Applicant's appeal arguments to the contrary fail to demonstrate the Judge's finding of falsification is erroneous.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant notes that the Administrative Judge entered formal findings in his favor with respect to eleven SOR subparagraphs and entered formal findings against him with respect to six SOR subparagraphs. Applicant goes on to state "This is a win." The Board construes Applicant's argument as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

There is no presumption in favor of granting a security clearance, and a favorable security clearance decision should not be made unless there is an affirmative determination that it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant. *See, e.g.*, ISCR Case No. 01-02677 (October 17, 2002) at p. 5. Nothing in Executive Order 10865 or the Directive indicates or suggests that a favorable security clearance decision must be made unless the Administrative Judge enters a majority of formal findings against an applicant. Indeed, nothing in Executive Order 10865 or the Directive precludes a Judge from making an adverse security clearance decision based on a single adverse formal finding. In this case, the Judge entered formal findings against Applicant with respect to six

SOR subparagraphs based on the Judge's findings and conclusions about the matters covered by those SOR subparagraphs. The Judge's favorable formal findings with respect to eleven SOR subparagraphs do not negate or diminish the negative security significance of the Judge's adverse formal findings with respect to six other SOR subparagraphs. Furthermore, the Judge's adverse formal findings do not reflect arbitrary or capricious action by the Judge. Finally, the Judge's adverse formal findings with respect to those six SOR subparagraphs provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility and the Judge's overall unfavorable security clearance decision.

3. Whether the Board should recommend Applicant's case be considered for a waiver under 10 U.S.C. §986. The Administrative Judge concluded that Applicant's 1989 drug-related conviction falls under the terms of 10 U.S.C. §986 and application of that statute precluded a favorable security clearance decision. The Judge also stated "I do not recommend further consideration of this case for a waiver of Title 10 U.S.C. 986." On appeal, Applicant asks for a waiver in his case because his conviction is 14 years old, his jail sentence was suspended, and he successfully completed probation. [\(2\)](#)

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.

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." The Administrative Judge's application of 10 U.S.C. §986 was not made erroneous by the fact that Applicant's sentence of four years imprisonment was suspended and he served no time in prison or jail. *See, e.g.*, ISCR Case No. 01-00407 (September 18, 2002) at p. 3 (the language of the Deputy Secretary of Defense's June 7, 2001 memorandum implementing 10 U.S.C. §986 precludes acceptance of the argument that 10 U.S.C. §986 does not apply when an applicant's sentence of imprisonment was suspended). Similarly, the fact that Applicant completed his probation successfully does not take his case outside the scope of 10 U.S.C. §986. 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.

Having addressed the issue of the applicability of 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). Because the Board concludes that the Administrative Judge's adverse security clearance decision can be affirmed based on the Judge's findings and conclusions under Guideline E and Guideline F, independent of the Judge's application of 10 U.S.C. §986 to the case, the Board need not make a recommendation as to whether this case should be considered for a waiver under 10 U.S.C. §986. *See* Operating Instruction, paragraph 3.f. *See also* ISCR Case No. 01-12452 (January 27, 2003) at p. 6.

### **Conclusions**

Applicant has failed to demonstrate the Administrative Judge committed factual or legal error. The Administrative Judge properly concluded that Applicant's 1989 conviction requires application of 10 U.S.C. §986. Because the Judge's adverse decision is being affirmed on grounds independent of the application of 10 U.S.C. §986, the Board does not make a recommendation as to whether this case should be considered for a waiver under 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Applicant also argues that he no longer has a problem with alcohol or drug abuse. The SOR did not allege that Applicant had a substance abuse problem under Guideline G (Alcohol Consumption) or Guideline H (Drug Involvement). Furthermore, the Administrative Judge's adverse decision does not rely on findings against Applicant based on past substance abuse. Applicant's reform with respect to alcohol and drugs is irrelevant to whether he falsified a security clearance questionnaire in September 1999 by failing to disclose three alcohol-related incidents, whether Applicant's 1989 conviction falls under 10 U.S.C. §986, and whether Applicant failed to satisfy the debt covered by SOR subparagraph 3.a.

2. On appeal, Applicant also contends that the SOR is incorrect to the extent that it alleges that he was charged with distribution of a dangerous drug. The Administrative Judge specifically found that Applicant was charged with possession of a cocaine and accepted Applicant's denial that he had ever been charged with distribution of a dangerous drug (Decision at p. 2). Given the Judge's finding, Applicant's argument about the accuracy of the SOR allegation is moot.