

DATE: July 29, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13965

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge Elizabeth M. Matchinski issued a decision, dated March 25, 2003, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

The Board has jurisdiction under Executive Order 10865 and Department of defense Directive 5220.6 (Directive) dated January 2, 1992, as amended.

Applicant's appeal presents the issue: Whether the Board should recommend Applicant's case be considered further 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 recommend Applicant's case be considered further 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 July 30, 2002. The SOR was based on Guideline J (Criminal Conduct). Applicant requested a hearing which was held on January 10, 2003. Subsequently, the Administrative Judge issued a decision in which she concluded that Applicant is not eligible for a security clearance solely on the basis of the provisions of 10 U.S.C. §986. However, the Judge recommended Applicant's case be considered further under the waiver provision of that statute. Applicant appealed.

**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**

Whether the Board should recommend Applicant's case be considered further for a waiver under 10 U.S.C. §986. The Administrative Judge made findings of fact about Applicant's history of criminal conduct and concluded that Applicant's 1979 felony conviction falls under 10 U.S.C. §986. <sup>(1)</sup> The Judge concluded that application of 10 U.S.C. §986 required an unfavorable security clearance decision in Applicant's case but recommended Applicant's case be considered for a waiver under 10 U.S.C. §986. On appeal, Applicant does not challenge the Judge's findings about his history of criminal conduct. Nor does Applicant challenge the Judge's conclusion that Applicant's 1979 conviction falls under 10 U.S.C. §986. On appeal, Applicant states the following: (1) His criminal conduct was more than twenty years ago; (2) He regrets his past criminal conduct and has done nothing since then that would reflect adversely on his reliability and trustworthiness; (3) He has held a security clearance for over twenty years; and (4) The Administrative Judge recommended his case be considered further for a waiver. The Board construes Applicant's assertions as laying out reasons in support of a request that the Board recommend this case be considered further for a waiver under 10 U.S.C. §986.

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, Director, DOHA is the Director of the Component's 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 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.)

Because Applicant does not dispute the applicability of 10 U.S.C. §986 to his case, all that remains for the Board to do is consider his 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 is authorized only to 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 under 10 U.S.C. §986(d) should be considered.

### **Conclusions**

Applicant has not asserted or demonstrated that the Administrative Judge's decision contains factual or legal error. Accordingly, the Board affirms the Judge's adverse security clearance decision.

Applicant concedes that his 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 her 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. The Board reaches this conclusion for two reasons: (1) because the Board is not authorized to review the Judge's recommendation that Applicant's case be considered for a waiver, the Board is precluded from discussing or addressing the merits of the Judge's recommendation; 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 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)]. Applicant's 1979 felony conviction falls under §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."