

DATE: August 20, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17851

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Adam L. Birbrower, Esq.

Administrative Judge Kathryn Moen Braeman issued a decision, dated March 11, 2002, in which she 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 issue of whether the Appeal Board recommends that Applicant's case be considered for a waiver of the statutory provisions under 10 U.S.C. §986. For the reasons set forth below, the Board affirms the Administrative Judge's 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 13, 2001. The SOR was based on Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which she exercised her option to have a hearing in her case before an Administrative Judge. The hearing was held on January 18, 2002. The Judge issued a written decision, dated March 11, 2002 in which she 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

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

I. Administrative Judge's Decision

The Administrative Judge found: (1) Applicant was arrested in April 1981 for knowingly and intentionally conspiring to import substantial quantities of cocaine into the United States in violation of federal law; (2) She had accompanied her husband while he trafficked in cocaine from April 1979 to January 1981; (3) Applicant was convicted of aiding and abetting and sentenced to eighteen months confinement, all of which was suspended, and given 5 years probation; (4) In 1986 Applicant violated the terms of her probation by using marijuana once a week; (5) She was ordered to serve her original sentence of eighteen months and three years Special Parole Term; (6) She served nine months in confinement and five months in a halfway house; (7) She successfully completed her parole in September 1988 and attended a Narcotics Anonymous program which required her to get a job; (8) Applicant obtained a job with a defense contractor in May 1988 where she has continuously worked in increasingly responsible positions; (9) Since 1986 she has not used drugs and she has no future intent to use drugs; (10) She was promoted to a supervisory position in 1996; (11) A past supervisor, current supervisor, a co-worker and a friend all relate that Applicant is trustworthy, conscientious, and very knowledgeable in her field; (12) None of Applicant's character references have seen her use drugs; and (13) She was granted a Department of Defense Secret clearance in 1997.

The Administrative Judge concluded that Applicant's criminal conduct might now be mitigated because the behavior was not recent, there is no evidence that she has subsequently been involved with any criminal or drug activity, the factors leading to her criminal law violation are not likely to recur and there is clear evidence of successful rehabilitation. The Administrative Judge ultimately found against Applicant, however, on the specific SOR allegation citing her past criminal conduct under the standard provisions of Guideline J. The Administrative Judge also found against Applicant under a separate SOR allegation citing the provisions of 10 U.S.C. §986. The Judge also recommended that Applicant's case be considered for a waiver under 10 U.S.C. §986.

II. Applicant's Appeal Argument

Applicant does not challenge the Administrative Judge's conclusion that her case is covered by the provisions of 10 U.S.C. §986, which precludes the Department of Defense from granting or continuing a security clearance for persons who fall under any of four statutory categories. However,

Applicant asks that she be granted a waiver under 10 U.S.C. §986 for the following reasons: (1) Applicant's criminal activity was neither frequent nor recent as her conviction occurred over twenty years ago, and although she violated her probation in 1986, she has stayed out of trouble for more than fifteen years; (2) She is now a 47-year-old mature, reformed adult; (3) Applicant lacks criminal motivation as her past criminal activity was not willful and arguably was not voluntary as evidenced by physical and mental abuse she suffered at the hands of her husband who coerced her into criminal participation by threatening physical and mental abuse; (4) Applicant has been fully rehabilitated as evidenced by her successful completion of drug treatment and parole, her exemplary job performance in positions of increasing responsibility since 1988, and the favorable evaluation of her trustworthiness by others who have testified on her behalf; and (5) Applicant's criminal activity ended with her probation violation in 1986, has not continued and will not recur as her criminal activity was intimately involved with her marriage to her husband from whom she is now divorced and has no contact. Applicant also discusses the Guideline J mitigating conditions in her appeal brief. The Board construes

Applicant's discussion of those mitigating conditions as laying out additional reasons in support of her request for a waiver under 10 U.S.C. §986.

II. Scope of Board's authority 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, 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 her case, all that remains for the Board to do is consider her request that it recommend further consideration of her 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 and 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 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 her 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 her case be considered for a waiver under 10 U.S.C. §986. The Board reaches this conclusion for three reasons: (1) neither Applicant nor Department Counsel has challenged the Judge's findings or conclusions; (2) 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 a Judge's recommendation; and (3) 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