

DATE: August 9, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17850

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Arthur A. Marshall, Jr., Esq.

Administrative Judge Jerome H. Silber issued a decision, dated December 18, 2001 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

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 should recommend that Applicant's case 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 August 21, 2001. The SOR was based on Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR dated September 10, 2001. In that answer he exercised his option to have a hearing in his case before an Administrative Judge. The hearing was held on November 29, 2001. The Judge issued a written decision, dated December 18, 2001, in which he indicated he would have rendered a favorable security clearance decision in Applicant's case but for 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.

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 clearance 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) In May 1989 when he was 18¼ years old, Applicant was arrested for possession of a controlled dangerous substance, phencyclidine (PCP), with intent to distribute; (2) In November 1989 he was sentenced as a first-time offender to four years confinement, all but 18 months suspended, and five years' supervised probation after release from incarceration; (3) The conditions of his probation included drug counseling and drug testing; (4) After his release on parole in May 1990, Applicant attended aftercare drug counseling sessions and was tested twice weekly for drugs; (5) In September 1990 he tested positive for PCP and was given the choice of being cited for violation of probation/parole or being admitted to an inpatient drug treatment program; (6) Applicant chose to enter the program which he successfully completed around January 1991; (7) He returned to his prior outpatient program for six months, during which time he received a General Equivalency Degree; (8) He successfully completed probation in April 1995 without any further violations; (9) Applicant is married and has two children; (10) He is a caring husband and father who is involved with his children's sports and cheerleading activities and is also an active volunteer in other community affairs; (11) He is a homeowner who is a helpful and trustworthy neighbor; (12) Applicant readily acknowledges the truth of his guilt and sentence in 1989 and he knows that PCP is a very dangerous drug; (13) He learned to be a computer specialist during his probation and he has held a number of jobs relating to repair of computers and software; (14) The military customers he supports praise his technical ability, responsiveness, and trustworthiness; and (15) Applicant's character witnesses and his superiors, who all have knowledge of his drug conviction, are supportive and in the view of his superiors he is reliable and extremely honest.

The Administrative Judge concluded that Applicant's commission of a single serious crime was mitigated under Guideline J because: (a) Applicant's criminal behavior was not recent; (b) that it was an isolated incident; and (c) there is clear evidence of successful rehabilitation. The Administrative Judge entered a formal finding against Applicant with respect to Guideline J based on application of 10 U.S.C. §986. However, he stated, "The undersigned Administrative Judge recommends further consideration of this case for a waiver of 10 U.S.C. §986."

II. Applicant's Appeal Argument

Applicant explicitly cites and relies on the reasoning and conclusions of the Administrative Judge's decision and asks the Board to recommend that he be granted a waiver under 10 U.S.C. §986 for the reasons set forth in the Judge's decision.

III. 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.)

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. Because there is no dispute on appeal as to the applicability of 10 U.S.C. §986 in this case, 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 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.

There is no dispute that 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.

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 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