

DATE: May 8, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17917

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the February 28, 2003 decision of Administrative Judge Richard A. Cefola, 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 not concluding Applicant's 1976 conviction for drug offenses was sufficiently mitigated to warrant a favorable security clearance decision; and (2) 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 adverse decision, and does not recommend this 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 April 17, 2002. The SOR was based on Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he indicated he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who did not submit a response to the FORM.

The case was then assigned to the Administrative Judge for determination. The Judge issued a written decision, dated February 28, 2003, 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

1. Whether the Administrative Judge erred by not concluding Applicant's 1976 conviction for drug offenses was sufficiently mitigated to warrant a favorable security clearance decision. The Administrative Judge found: (a) Applicant was convicted in 1976 of two felonies, transportation of marijuana and possession of marijuana for sale; (b) as a result of Applicant's conviction, he was sentenced to four to five years in prison; and (c) Applicant's sentence of imprisonment was suspended. The Judge concluded that Applicant's conviction falls within the scope of 10 U.S.C. §986, and that application of that statute precluded a favorable security clearance decision.⁽¹⁾

On appeal, Applicant does not challenge the Administrative Judge's findings about his 1976 conviction or the Judge's conclusion that his 1976 conviction falls within the scope of 10 U.S.C. §986. However, Applicant does make several arguments⁽²⁾ that the Board construes as raising the issue of whether the Judge erred by not concluding Applicant's 1976 conviction was sufficiently mitigated to warrant a favorable security clearance decision. Specifically, Applicant's arguments raise the question of whether the Judge should have applied Criminal Conduct Mitigating Conditions 1⁽³⁾ and 2.⁽⁴⁾ For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate harmful error by the Judge.

In order to implement 10 U.S.C. §986, the Deputy Secretary of Defense issued a June 7, 2001 memorandum ("Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001"), with attachments.⁽⁵⁾ And to implement the June 7, 2001 memorandum, the Director, Defense Office of Hearings and Appeals issued an operating instruction, dated July 10, 2001 ("Operating Instruction").

According to the first attachment to the June 7, 2001 memorandum, "all cases potentially covered by [10 U.S.C. §986] shall be fully investigated and adjudicated in accordance with current Executive Order and DoD Directive and Regulatory guidance, including applicable due process procedures."⁽⁶⁾ Therefore, adjudication of a case under 10 U.S.C. §986 does not relieve an Administrative Judge from applying pertinent provisions of the Directive in a manner that is consistent with requirements of 10 U.S.C. §986 as implemented by the June 7, 2001 memorandum and its attachments.

The Board understands the first attachment to the June 7, 2001 memorandum as requiring an Administrative Judge to adjudicate cases covered by 10 U.S.C. §986 as the Judge would have done prior to enactment of that statute⁽⁷⁾ with additional steps being added to the adjudication. Neither 10 U.S.C. §986 nor the June 7, 2001 memorandum (or its attachments) relieves a Judge from the requirement to issue a written decision "setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR . . ." Directive, Additional Procedural Guidance, Item E3.1.25. *See also* Directive, Section 6.3 (indicating that each security clearance decision must be based upon consideration of all relevant and material information and pertinent provisions of the Adjudicative Guidelines). In fulfilling that requirement, the Judge must apply pertinent provisions of the Adjudicative Guidelines as revised by the attachments to the June 7, 2001 memorandum.⁽⁸⁾ Furthermore, the Judge must decide whether or not to make a

recommendation for a waiver under 10 U.S.C. §986, pursuant to the provisions of the Operating Instruction.

Applicant's arguments on appeal (that do not rely on new evidence) raise the question of whether the Administrative Judge should have applied Criminal Conduct Mitigating Conditions 1 ⁽⁹⁾ and 2. ⁽¹⁰⁾ Regardless of the Judge's conclusion about the applicability of 10 U.S.C. §986, the Judge had the obligation to apply pertinent Criminal Conduct mitigating conditions. Given the record evidence in this case, the Judge erred by not explaining why he concluded no Criminal Conduct mitigating conditions were applicable to Applicant's case. However, because Applicant's 1976 conviction falls under 10 U.S.C. §986, the Judge could not have made a favorable security clearance decision based on application of Criminal Conduct Mitigating Conditions 1 and 2. ⁽¹¹⁾ Accordingly, the Judge's error does not warrant remand or reversal under the particular facts and circumstances of this case.

2. Whether the Board should recommend Applicant's case be further considered for a waiver under 10 U.S.C. §986.

Making allowances for Applicant's *pro se* status, the Board construes Applicant's appeal arguments as raising the issue of whether the Board should recommend his case be considered further for a waiver under 10 U.S.C. §986.

To implement the Deputy Secretary of Defense's 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.)

Since the applicability of 10 U.S.C. §986 to Applicant's case is not at issue on appeal, all that remains for the Board to do is consider whether it should recommend further consideration of this 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 only 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.

Recognizing the limits of its authority under the Operating Instruction, the Board has reviewed the record 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.

Conclusions

Applicant has failed to demonstrate harmful error by the Administrative Judge with respect to his application of the Criminal Conduct mitigating conditions. The Board affirms the Judge's conclusion that Applicant's 1976 conviction falls within the scope of 10 U.S.C. §986 and precluded him from making a favorable security clearance decision in Applicant's case. The Board does not recommend this case be considered further 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: 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)]. 10 U.S.C. §986(c)(1) states "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."
2. Applicant's appeal brief relies, in part, on factual assertions that go beyond the record evidence below. Such factual assertions constitute a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
3. "The criminal conduct was not recent."
4. "The crime was an isolated incident."
5. The first attachment is entitled "Criteria for Implementing the Provisions of 10 U.S.C. 986 in All DoD Determinations for Access to Classified Information." The second, third and fourth attachments are identified by the June 7, 2001 memorandum as "revised copies of the adjudication guidelines" (Guidelines H, I, and J).
6. In these proceedings, the pertinent legal authorities are Executive Order 10865 and the Directive.

7. The first attachment to the June 7, 2001 memorandum states "If the result of the current process, without consideration of the statute, would be to grant or renew the security clearance of someone covered by provisions [10 U.S.C. §986(c)(1) and 10 U.S.C. §986(c)(4)], the authority responsible for making that decision may recommend to the Secretary of Defense or the Secretary of the Military Department concerned, that the case merits a waiver." Paragraph 3.e of the Operating Instruction states "If an Administrative Judge issues a decision denying or revoking a security 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.'"

8. In this case, the Administrative Judge's finding that Applicant's 1997 conviction falls under 10 U.S.C. §986 required the Judge to apply the following Criminal Conduct disqualifying condition: "Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year." By the terms of the third attachment to the June 7, 2001 memorandum, that Criminal Conduct disqualifying condition "may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver."

9. "The criminal conduct was not recent."

10. "The crime was an isolated incident."

11. *See* footnote 8 of this decision.