

DATE: August 21, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18069

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck issued a decision, dated May 8, 2002, in which he 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 following issue: whether the Board should recommend that his case be considered for a waiver under 10 U.S.C. §986. The Board affirms the Administrative Judge's adverse 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 October 25, 2001. The SOR was based on Guideline J (Criminal Conduct) and Guideline B (Foreign Influence).

A File of Relevant Material (FORM) was prepared and a copy of the FORM was provided to Applicant. After Applicant submitted a response to the FORM, the case was assigned to an Administrative Judge for determination.

The Administrative Judge issued a written decision, dated May 8, 2002, 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 security clearance 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 Issue

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline B. Those favorable formal findings are not at issue on appeal.

The Administrative Judge made findings of fact about Applicant's October 1986 conviction for criminal sexual misconduct with his 14-year-old stepdaughter. The Judge concluded that Applicant had demonstrated mitigation of his criminal sexual misconduct under Guideline J, but decided that application of 10 U.S.C. §986 precluded a favorable security clearance decision. The Judge recommended that Applicant's case be considered for a waiver under 10 U.S.C. §986.

On appeal, Applicant submitted an appeal brief in which he states "I hereby request consideration of this case for waiver of 10 USC 986." Department Counsel did not submit a reply brief. Resolution of Applicant's appeal issue requires a discussion of 10 U.S.C. §986 and its implementation by the Department of Defense.

10 U.S.C. §986 and Its Implementation

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. If there is no dispute on appeal as to the applicability of 10 U.S.C. §986, all that would remain for the Board to do is consider an applicant's request that it recommend further consideration of the applicant's 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.

Analyzing Applicant's case under 10 U.S.C. §986

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." 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.

As discussed earlier, the Board does not have the authority to review the Administrative Judge's recommendation that Applicant's case be considered for a waiver under 10 U.S.C. §986(d), and it 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 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

The Administrative Judge correctly concluded that application of 10 U.S.C. §986 precluded him from making a favorable security clearance decision in Applicant's case. Accordingly, the Board affirms the Judge's adverse security clearance decision. The Board does not recommend consideration of this case 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