

DATE: December 3, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-19823

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Edward J. McMahon, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 22, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision dated June 30, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge erred by concluding that Applicant's case had been sufficiently investigated by the Department of Defense; (2) whether Applicant was denied due process in the proceedings below; (3) whether the Administrative Judge erred by concluding that 10 U.S.C. §986 applied to Applicant's case; and (4) whether the Board should recommend that Applicant's case be further considered for a waiver under 10 U.S.C. §986(d). For the reasons that follow, the Board affirms the Administrative Judge's decision, and does not recommend that this case be considered further for a waiver under 10 U.S.C. §986(d).

### **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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an

explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3)

### **Appeal Issues<sup>(1)</sup>**

1. Whether the Administrative Judge erred by concluding that Applicant's case had been sufficiently investigated by the Department of Defense. The Administrative Judge concluded that Applicant's 1984 conviction (for which he was sentenced to two years imprisonment) falls under 10 U.S.C. §986,<sup>(2)</sup> and that application of that statute precluded a favorable security clearance decision.

On appeal, Applicant cites to the June 7, 2001 memorandum by the Deputy Secretary of Defense which implements 10 U.S.C. §986 (hereinafter "Implementing memorandum") and contends: "[t]he DoD failed to do a full investigation and develop a complete record upon which to evaluate whether a waiver is meritorious," as required by the Implementing Memorandum. Relying on that passage from the Implementing Memorandum, Applicant argues the Administrative Judge erred by concluding his case had been sufficiently investigated by the Department of Defense.

Under the Directive, an Administrative Judge has the jurisdiction and authority to adjudicate security clearance cases. *See* Directive, Additional Procedural Guidance, Items E3.1.7 through E3.1.26 and E3.1.35. Nothing in the Directive gives a Judge jurisdiction or authority to supervise security clearance investigations or pass judgment on the necessity or sufficiency of such investigations. Indeed, the Board has held that neither Hearing Office Judges nor this Board has jurisdiction or authority over security clearance investigations. *See, e.g.*, ISCR Case No. 01-03112 (March 20, 2002) at p. 3 (citing prior Board decisions). Although DOHA has the authority to "[d]irect further investigations" in connection with deciding whether to issue an SOR (Directive, Additional Procedural Guidance, Item E3.1.2.1), that authority is not vested in Hearing Office Judges or the Board; and the jurisdiction and authority of Judges to make security clearance decisions (and the jurisdiction and authority of the Board to review such decisions) do not extend to supervising,

reviewing, or controlling the exercise of authority under Item E3.1.2.1. <sup>(3)</sup> Furthermore, nothing in the Implementing Memorandum gives Hearing Office Judges or the Board the jurisdiction or authority to supervise security clearance investigations, or to review or evaluate the necessity or sufficiency of such investigations.

Since the sufficiency of the investigation in Applicant's case was not a matter within the jurisdiction or authority of the Administrative Judge, any statements or rulings by the Judge concerning that matter were *ultra vires* and a legal nullity.

2. Whether Applicant was denied due process in the proceedings below. Applicant contends he was denied due process in the proceedings below because the Administrative Judge erred by concluding that DoD had complied with the provisions of the Implementing Memorandum which require a full investigation be conducted.

As discussed in the Board's discussion and resolution of Applicant's first appeal issue, the Administrative Judge's statements or rulings concerning the sufficiency of the investigation of Applicant's case were *ultra vires* and a legal nullity. Furthermore, the Due Process Clause of the Fifth Amendment of the U.S. Constitution does not create or confer jurisdiction or authority on federal administrative tribunals. Such jurisdiction is created or conferred by federal statute, Executive Order, or federal regulation. Furthermore, the Due Process Clause does not create any right to a particular procedure or remedy. *See, e.g., New York State National Organization for Women v. Pataki*, 261 F.3d 156, 163-164 (2d Cir. 2001); *Farmer v. Lane*, 864 F.2d 473, 478 (7th Cir. 1988).

3. Whether the Administrative Judge erred by concluding that 10 U.S.C. §986 applied to Applicant's case. Applicant contends it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that 10 U.S.C. §986 applies to this case because: (a) she erroneously concluded DoD had conducted a sufficient investigation of Applicant's case; (b) without any new evidence concerning Applicant's situation, there "was no need to relitigate issues of fact and law that had been previously determined in a [DOHA hearing in 1986] and by this Board in 1987"; and (c) "[o]ther than [10 U.S.C. §986], there must be some evidentiary basis for initiating this proceeding without unjustly and unfairly depriving the Applicant of his security clearance as has occurred in this case."

(a) For the reasons given earlier in this decision, Applicant's first argument lacks merit. Furthermore, Applicant seeks relief to which he would not be entitled even if the Board were to accept (solely for purposes of deciding this appeal) his theory concerning the sufficiency of the investigation of his case. The applicability of 10 U.S.C. §986 does not turn on whether Applicant is able to adjudicate the sufficiency of the investigation in his case. Acceptance of Applicant's argument would lead to the absurd result that an applicant could avoid the application of 10 U.S.C. §986 if the applicant were able to identify some procedural irregularity or failure by DoD in executing the Implementing Memorandum. A federal statute is not nullified or rendered inapplicable merely because the federal department or agency implementing that statute fails to properly execute its internal regulations or procedures.

(b) Applicant's second argument raises the questions of (i) whether the prior favorable adjudication of his case by DOHA gives him a vested right or interest in continued retention of a security clearance, or (ii) whether application of the doctrines of *res judicata* or collateral estoppel preclude adjudication of his case under 10 U.S.C. §986.

(b)(i) There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Nor does a prior favorable security clearance decision give rise to a vested right or interest in continued retention of a security clearance. *See, e.g., ISCR Case No. 01-21528* (July 26, 2002) at p. 3. To the extent that Applicant's argument could be construed as raising the question whether DoD is equitably estopped from denying or revoking his security clearance, it is unpersuasive because the federal government is not equitably estopped from denying or revoking access to classified information. *See, e.g., ISCR Case No. 96-0461* (December 31, 1997) at p. 4 (citing prior Board decisions); *DISCR Case No. 88-1733* (February 20, 1991) at p. 3 (citing federal cases). Therefore, the prior favorable adjudication of Applicant's security eligibility by DOHA in 1986 and 1987 does not entitle Applicant to continued retention of a security clearance.

(b)(ii) Under the doctrine of *res judicata*, a legal judgment precludes the parties from seeking to relitigate any claims that were adjudicated or could have been adjudicated in the earlier proceeding. <sup>(4)</sup> Under the doctrine of collateral estoppel, a legal judgment forecloses relitigation of issues that were actually and necessarily decided in the earlier litigation. <sup>(5)</sup> There are technical differences between *res judicata* and collateral estoppel, but those differences are not significant for purposes of deciding Applicant's argument in this appeal. For purposes of this appeal, it does not matter

whether Applicant's argument is labeled as *res judicata*, collateral estoppel, or a combination of both.

The doctrines of *res judicata* and collateral estoppel preclude a subsequent litigation only if the controlling facts and relevant law remain unchanged; both doctrines are inapplicable when, between the original judgment and the subsequent litigation, there has been an intervening change in the law or a modification of significant facts creates new legal conditions. <sup>(6)</sup> In this case, the passage of 10 U.S.C. §986 constitutes an intervening change in the law. Accordingly, the prior favorable adjudication of Applicant's security eligibility by DOHA did not preclude the Administrative Judge from applying 10 U.S.C. §986 to Applicant's case.

(c) Applicant's third argument also fails to demonstrate the Administrative Judge erred. Because the passage of 10 U.S.C. §986 constitutes an intervening change in the law that justifies a new adjudication of Applicant's security eligibility, for purposes of deciding whether 10 U.S.C. §986 applies it does not matter whether there was any new evidence concerning Applicant since the prior adjudication of his security eligibility by DOHA.

4. Whether the Board should recommend that Applicant's case be further considered for a waiver under 10 U.S.C. §986(d). Applicant argues, in the alternative, that the Board should recommend his case be further considered for a waiver under 10 U.S.C. §986(d) based on: (a) the prior favorable DOHA adjudication of Applicant's security clearance case in 1986 and 1987; and (b) Administrative Judge Matchinski's recommendation that his case be further considered for a waiver under the statute.

In the Implementing Memorandum, 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 Implementing Memorandum, the Director, DOHA is the Director of the Component Central Adjudication Facility for industrial security clearance cases.

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.)

Having addressed Applicant's claims concerning the applicability of 10 U.S.C. §986, 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).

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." Finally, 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.

Because the Board is not authorized to review the Administrative Judge's recommendation concerning a waiver under 10 U.S.C. §986(d), or give reasons or an explanation for its own recommendation concerning a waiver under 10 U.S.C. §986(d), the Board declines to address the specific reasons Applicant contends should persuade the Board to make a favorable waiver recommendation.

### **Conclusions**

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 Administrative Judge's conclusion that 10 U.S.C. §986 precluded her from making a favorable security clearance decision in Applicant's case.

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.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Department Counsel did not file a reply brief in this case. Accordingly, the Board must address the issues raised by Applicant on appeal (some of which are novel) without the benefit of Department Counsel's views.

2. 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) reads as follows: "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."

3. *See also* ISCR Case No. 99-0481 (November 29, 2000) at p. 4 (neither Hearing Office Administrative Judges nor the Board has jurisdiction or authority to adjudicate the manner in which DOHA personnel decide to issue or not issue SORs, to order DOHA personnel to issue or not issue SORs, or to dismiss an SOR); ISCR Case No. 98-0619 (September 10, 1999) at p. 3 (Administrative Judge does not have authority to dismiss a case or an SOR); DOHA Case No. 94-0569 (March 30, 1995) at p. 4 (Administrative Judge has no authority to strike or dismiss SOR allegations). If Administrative Judges (and the Board) do not have authority concerning the issuance of SORs and do not have authority to strike or dismiss SOR allegations, then *a fortiori*, the Judges (and the Board) lack authority to supervise or pass judgment on interim decisions made by DOHA personnel responsible for deciding whether or when to issue SORs.

4. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 850 n.4 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001); *Monahan v. New York City Department of Corrections*, 214 F.3d 275, 284-285 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000).

5. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 850 n.4 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001); *Spradling v. City of Tulsa*, 198 F.3d 1219, 1222 (10th Cir. 2000).

6. *Monahan v. New York City Department of Corrections*, 214 F.3d 275, 290 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000); *Spradling v. City of Tulsa*, 198 F.3d 1219, 1223 (10th Cir. 2000); *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1299-1300 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313-314 (3d Cir. 1995); *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1422 (5th Cir. 1995); *Barrow v. Falck*, 11 F.3d 729, 731 (7th Cir. 1993); *Federal Labor Relations Authority v. U.S. Department of Treasury, Financial Management Service*, 884 F.2d 1446, 1456 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990).