

DATE: April 18, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20970

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 14, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 20, 2005, after the hearing, Administrative Judge Philip S. Howe denied Applicant's request for a security clearance.⁽¹⁾ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge erred by not making an official recommendation on whether Applicant's case should be considered for waiver under the provisions of 10 U.S.C. § 986(d).

The Administrative Judge made the following findings of fact that are relevant to the issue:

Applicant is 59 years old, married, and with his wife drives a tractor trailer hauling classified material. He has driven a truck for 18 years. From the ages of 15 to 32, Applicant had a series of 11 arrests, seven convictions, and various incarcerations. These are specified in SOR paragraphs 1.a through 1.k, the last of which occurred in 1977. Significantly, for purposes of this appeal, on October 15, 1962, Applicant was arrested for felony auto larceny. He was found guilty and sentenced to four years in jail. He served all that time in a state penitentiary, minus good time credit. Applicant was also convicted of another offense in which he was sentenced, and incarcerated, for more than one year.

Applicant got into the trucking business from 1978 to 1983, when he had an accident. From then until 1988 he had his own business laying carpet in businesses and homes. Then he returned to being a truck driver, and at one time owned five tractor trailer trucks. Now he has one, and has a successful business driving classified and secure loads with his wife.

Applicant is a competent truck driver, and a successful small business person. He is well thought of by business associates, friends and family. Applicant has driven special loads of White House vehicles and materials for presidential visits around the nation, and is well thought of by the White House Communications Office that coordinates these visits, as being a dependable and honest trucker. Applicant first received a security clearance in 1988.

The Administrative Judge concluded that Guideline J Disqualifying Conditions 1⁽²⁾ and 2⁽³⁾ applied, but that Guideline J Mitigating Conditions 1⁽⁴⁾ and 6⁽⁵⁾ outweighed the security significance of Applicant's disqualifying conduct. Applicant's last criminal offense occurred 28 years prior to the hearing, and Applicant rehabilitated himself. Nevertheless, the Judge also

concluded that the disqualifications in 10 U.S.C. § 986, also known as the "Smith Amendment," prohibited the continuation of a security clearance for Applicant. Under Section 986(a) and (c)(1), as amended in 2004,⁽⁶⁾ the Department of Defense is prohibited from granting or continuing a security clearance to an applicant who was convicted in a U.S. court of a crime, sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year.

Applicant does not dispute that 10 U.S.C. § 986(c)(1) applies to him. (*See* Applicant's Appeal Brief at 2). However, he contends that it was error for the Administrative Judge not to make an official waiver recommendation under 10 U.S.C. § 986(d). Section 986(d) was also amended by Public Law 108-375. In a meritorious case where there are mitigating factors, it continued to provide for an exception to the prohibition in subsection (a) for a person described in Section 986(c)(1), but the authority of the Secretary of Defense or a Secretary of a military department to do so was replaced with the following language: "Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." Neither party is aware of the issuance of any standards or procedures by the President. Department Counsel's brief instructs us: "To date, no further implementation by the Department of Defense has taken place." In interpreting the application of the amended Section 986(d), the Board has concluded previously that in the absence of standards and procedures, there is no legal authority for an Administrative Judge to make any recommendation, favorable or unfavorable, concerning waiver under Section 986(d). *See* ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005). The Administrative Judge disagrees with the Appeal Board's conclusion on ISCR Case No. 03-05804, and he opined that there is a difference between a recommendation to waive and the authority to make a decision to waive. However, the Judge recognized that he was "not at liberty to disregard the Appeal Board's decision." Applicant agrees with the Judge's reasoning, and amplifies it in this appeal by suggesting that even if a clearance cannot be issued at this time, the denial of the benefit of a favorable⁽⁷⁾ formal recommendation prejudices Applicant in that it "creates the likelihood that Applicant would be required to readjudicate his case at a future date." Applicant also suggests that ¶ 3.e of DOHA's Operating Instruction No. 64, which requires the Administrative Judge to recommend or not recommend a case for further consideration for waiver, is still effective.

Having considered the arguments, the Board is not persuaded that its conclusion in ISCR Case No. 03-05804 is in need of modification. The Board does not know whether the President will choose to issue standards, and if so, what they would be or when they would take effect. The Board notes that the statutory amendments have been in place since 2004. Such putative standards and procedures, as applicable to the Department of Defense, may or may not provide a basis for an Administrative Judge recommendation. Moreover, even if there is to be a requirement or option for an Administrative Judge's role in such a process, the context for such an eventuality is speculative (for example, what additional standards must a waiver applicant meet, what special findings may a Judge have to make as a condition precedent to making a recommendation). At this time, Applicant's assertion that he is prejudiced by not having the benefit of a formal recommendation, is not persuasive.

Order

Accordingly, we conclude that Applicant has not demonstrated harmful error. Therefore, the decision of the Administrative Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in Applicant's favor with respect to SOR paragraphs 1.a through 1.k. Those favorable findings are not at issue on appeal.
2. "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged" (Directive ¶ E2.A10.1.2.1).
3. "A single serious crime or multiple lesser offenses" (Directive ¶ E2.A10.1.2.2).
4. "The criminal behavior was not recent" (Directive ¶ E2.A10.1.3.1).
5. "There is clear evidence of successful rehabilitation" (Directive E2.A10.1.3.6).
6. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, §1062, 118 Stat. 1811, 2056 (2004).
7. The Administrative Judge stated that "I would have recommended further consideration of this case for a waiver . . ." *See* Decision at 6.