

DATE: August 19, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23923

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Reid W. Kennedy, Esq.

Administrative Judge Michael H. Leonard issued a decision, dated March 27, 2003, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

The Board has jurisdiction 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's conclusion that Applicant's 1972 conviction for Armed Robbery is not mitigated is arbitrary, capricious, or contrary to law; and (2) Whether Applicant is eligible for a waiver under 10 U.S.C. §986. For the reasons that follow, the Board affirms the Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 8, 2002. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Applicant requested a hearing which was held on November 12, 2002. Subsequently, the Administrative Judge issued an adverse decision, although he made findings favorable to Applicant under Guideline E and one subparagraph of Guideline J. Applicant appealed. The favorable findings are not at issue on appeal. [\(1\)](#)

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's conclusion that Applicant's 1972 conviction for Armed Robbery is not mitigated is arbitrary, capricious, or contrary to law. Applicant argues on appeal that the Administrative Judge ought to have found Applicant's 1972 conviction for Armed Robbery mitigated. His argument is predicated on two assertions: Applicant was a young black man in a southern state when he was arrested for three misdemeanors subsequent to the felony conviction and Applicant has received a state pardon for the conviction. The Board finds Applicant's argument unpersuasive.

There is no record evidence regarding Applicant's race and the racial conditions in his state at the time of the misdemeanor arrests. Applicant's claim of error is not persuasive.

Applicant's pardon was considered and discussed by the Administrative Judge. Absent an express federal statute to the contrary, a state pardon is not binding on the Federal government. In assessing the applicability of mitigating conditions to Applicant's case, the Administrative Judge had to consider Applicant's other legal entanglements since his armed robbery conviction. The Board concludes that, given the record evidence, the Administrative Judge had an adequate basis for concluding that Applicant's conviction was not mitigated.

2. Whether Applicant is eligible for a waiver under 10 U.S.C. §986. For the reasons that follow, the Board affirms the Judge's decision. The Administrative Judge made findings of fact about Applicant's history of criminal conduct and concluded that Applicant's 1972 felony conviction falls under 10 U.S.C. §986. (2) The Judge concluded that application of 10 U.S.C. §986 required an unfavorable security clearance decision in Applicant's case and recommended Applicant's case not be considered for a waiver under 10 U.S.C. §986. On appeal, Applicant does not challenge the Judge's findings of fact about his history of criminal conduct. Nor does Applicant challenge the Judge's conclusion that Applicant's 1972 conviction falls under 10 U.S.C. §986. However, Applicant asks that a waiver be granted in his case. The Board construes Applicant's brief as raising the issue of whether the Board should recommend his case be considered for a waiver under 10 U.S.C. §986.

Applicant asks that he be granted a waiver under 10 U.S.C. §986 for the following reasons: (1) His criminal conduct occurred three decades ago; and (2) He is now successfully rehabilitated as evidenced by his corroboration of his current good character, education, professional career, and stable family life. The Board construes Applicant's discussion of those mitigating conditions as laying out additional reasons in support of his request for a waiver under 10 U.S.C. §986.

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.)

Because Applicant does not dispute the applicability of 10 U.S.C. §986 to his case, all that remains for the Board to do is consider his 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 under 10 U.S.C. § 986(d) should be considered.

Conclusions

Applicant has failed to demonstrate any factual or legal error by in the Administrative Judge's decision. Therefore, the Board affirms the Judge's adverse security clearance decision.

Applicant does not challenge the Administrative Judge's conclusion that the 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 the Department of Defense is prohibited from granting Applicant a security clearance under the provisions of 10 U.S.C. §986.

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 two reasons: (1) because the Board is not authorized to review the Judge's recommendation that Applicant's case not be considered for a waiver, the Board is precluded from discussing the merits of the Judge's recommendation; and (2) 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: 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

Separate opinion of Chairman Emilio Jaksetic, concurring:

With one exception, I concur with the majority opinion.

I differ with my colleagues because I conclude Applicant's appeal identifies a nonfrivolous problem with the Administrative Judge's decision. Specifically, the Judge's decision is a bit confusing and appears to be inconsistent with respect to the Judge's discussion of whether Applicant had demonstrated reform and rehabilitation of his criminal conduct under Guideline J. I am not convinced that the Judge's discussion on this aspect of the case is sufficient to warrant the majority's conclusion that the Judge "had an adequate basis for concluding that Applicant's conviction was not mitigated." However, even if I were to conclude that the Judge's discussion on this point was sufficiently flawed to be unsustainable, the final result would be the same. Even if the Judge had concluded that Applicant's conduct was mitigated under Guideline J, application of 10 U.S.C. §986 to Applicant's felony robbery conviction would preclude a favorable security clearance decision. Accordingly, reversal would not be warranted and no useful purpose would be served by remanding the case for issuance of a new decision that clarified the Judge's discussion about reform and rehabilitation.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Although Applicant's appeal brief does address some of the favorable findings, the Board concludes that no useful purpose is served by addressing findings not appealed by the "losing" party on those findings.

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)]. Applicant's 1972 felony conviction falls under §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."