

DATE: May 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01793

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Gary L. Stapp, Esq.

Applicant has appealed the December 18, 2002 decision of Administrative Judge Barry M. Sax, 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 finding that the provisions of 10 U.S.C. §986 applied to Applicant's case; and (2) whether the Administrative Judge erred by finding that Applicant had not shown an acknowledgment of his responsibility for his criminal actions because he failed to voluntarily pay a fine resulting from a DWI conviction.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated May 24, 2002. The SOR was based on Guideline J (Criminal Conduct). A hearing was conducted on October 24, 2002. The Judge issued a written decision on December 18, 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 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 finding that the provisions of 10 U.S.C. § 986 applied to Applicant's case. Under 10 U.S.C. §986, the Department of Defense (DoD) 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)]. The statutory category that is at issue in this case is 10 U.S.C. §986(c)(1), which provides that: "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." The undisputed record evidence in this case establishes that Applicant was convicted in 1988 of two state felony counts and was subsequently sentenced to a term of incarceration in excess of one year. The Administrative Judge concluded that these convictions fall under 10 U.S.C. §986(c)(1).

Applicant contends the Administrative Judge erred by basing his adverse security clearance decision on 10 U.S.C. §986 because Applicant's 1988 convictions no longer exist. Applicant specifically argues that his convictions were set aside and were expunged from his record. Although Applicant's factual representations are supported by record evidence, his argument fails to demonstrate the Judge erred by applying 10 U.S.C. §986.

The fact that the state set aside Applicant's convictions in 1992 does not affect the applicability of 10 U.S.C. §986 to the adjudication of his security clearance case. In connection with 10 U.S.C. §986, the Board has held: (a) what constitutes a conviction under that statute turns on federal law, not state law; and (b) expungement of a state conviction does not render that statute inapplicable. ISCR Case No. 01-00407 (September 18, 2002) at pp. 4-5 (relying on federal case law). Accordingly, for purposes of 10 U.S.C. §986, the existence of Applicant's 1988 convictions is not negated or nullified by state action in 1992 which sets aside those convictions. Applicant has failed to demonstrate error on the part of the Administrative Judge.

2. Whether the Administrative Judge erred by finding that Applicant had not shown an acknowledgment of responsibility for his criminal actions because he failed to voluntarily pay a fine resulting from a DWI conviction. In addition to his findings and conclusions regarding 10 U.S.C. §986, the Administrative Judge made separate findings and conclusions about Applicant's overall criminal conduct (which included criminal activity other than that which led to the 1988 felony convictions) under the Guideline J (Criminal Conduct). The Judge made a finding, supported by the record evidence, that Applicant failed to pay a fine and costs resulting from a DWI conviction and the state Attorney General subsequently garnished funds that were being held for Applicant in a state account. On appeal, Applicant argues that he attempted to pay his fine and the fact that the state ultimately had to collect the fine amount from the state fund is of no consequence when assessing Applicant's remorse and acceptance of responsibility for his actions. Applicant fails to demonstrate error on the part of the Administrative Judge.

Applicant's argument is largely based on assertions that go beyond the record evidence in this case. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, when analyzing the case under Guideline J, the Administrative Judge based his negative conclusions about Applicant's history of criminal activity on the overall record and not just on Applicant's failure to pay the DWI fine. Finally, the Judge's conclusions concerning Applicant's failure to pay the fine are reasonable in light of the record evidence in this case. The Applicant's ability to argue for a different interpretation of the record evidence does not demonstrate error on the part of the Administrative Judge.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board