

DATE: March 4, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04308

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated February 21, 2003 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). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision dated October 14, 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 Board should review Applicant's case *de novo* and reverse the Administrative Judge's decision; and (2) whether the Board should recommend that Applicant's case be considered further 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 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).

Procedural Ruling

The Administrative Judge issued a written decision dated October 14, 2003. On October 29, 2003, Applicant filed a timely notice of appeal. For reasons not apparent from the case file, the Judge issued an Amended Decision on October 29, 2003. Because the Board had jurisdiction over Applicant's appeal, the Judge had no jurisdiction or authority to take any action concerning Applicant's case on October 29, 2003. *See* ISCR Case No.98-0004 (June 19, 1998) at p. 2. Accordingly, the Administrative Judge's Amended Decision is a legal nullity, and the Board will adjudicate Applicant's appeal based on the Judge's October 14, 2003 decision. [\(1\)](#)

The Board notes that nothing in the Administrative Judge's Amended Decision adds to Applicant's rights in these proceedings, and therefore, the outcome of this appeal would be the same even if the Amended Decision were not a legal nullity.

Appeal Issues

1. Whether the Board should review Applicant's case *de novo* and reverse the Administrative Judge's decision. On appeal, Applicant does not challenge the Administrative Judge's findings or conclusions, or the Judge's legal rulings. Indeed, Applicant expressly notes that she is not raising any specific claim of factual or legal error by the Judge, but rather asks the Board to review her case "with a fresh mind" and reverse the Judge's unfavorable security clearance decision.

There is no presumption of error below. Furthermore, the Board does not review security clearance cases *de novo*. Absent a showing of factual or legal error below, the Board does not have a legitimate basis for reversing an Administrative Judge's decision. Unless an appealing party demonstrates error below, the Board will let a Judge's

decision stand. Applicant asks the Board for a form of appellate review and relief that is not available under the Directive.

2. Whether the Board should recommend that Applicant's case be considered further for a waiver under 10 U.S.C. §986(d). The Administrative Judge concluded Applicant's case falls under 10 U.S.C. §986, and that application of that statute precludes a favorable security clearance decision in her case. However, the Judge recommended that Applicant's case be considered further for a waiver under 10 U.S.C. §986. On appeal, Applicant specifically cites the reasoning and conclusions of the Administrative Judge in support of her request that she be granted a waiver under 10 U.S.C. §986.

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.)

Because there is no issue on appeal about 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 her 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." 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.

Conclusions

The Administrative Judge's conclusion that 10 U.S.C. §986 precluded him from making a favorable security clearance decision in Applicant's case is not at issue on appeal. Based on that conclusion, the Judge properly made an unfavorable security clearance decision.

Because Applicant's appeal does not raise any claim of factual or legal error by the Administrative Judge, the Judge's decision stands.

Under the Operating Instruction the Board cannot address the specific arguments asserted in Applicant's request that the Board recommend her case be considered for a waiver under 10 U.S.C. §986(d). The Board reaches this conclusion for the following reasons: (1) 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 (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 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Before Applicant submitted her appeal brief, she was notified in writing about the Board's decision in ISCR Case No. 98-0004 (June 19, 1998) and the legal effect that decision would have on the adjudication of her appeal. That notification was made in order to preclude Applicant from being confused as to which decision was the proper subject of her appeal.