

DATE: April 21, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-04343

## **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 March 3, 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), Guideline G (Alcohol Consumption), and Guideline F (Financial Considerations). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision dated December 29, 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's findings and conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law; (2) whether the Administrative Judge erred by concluding Applicant's past criminal conduct had not been mitigated under Guideline J (Criminal Conduct); and (3) whether the Board should recommend Applicant's case for further consideration for a waiver under 10 U.S.C. §986(d). For the reasons that follow, the Board affirms the Administrative Judge's decision, and makes no recommendation as to whether this case should 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

1. Whether the Administrative Judge's findings and conclusions under Guideline F (Financial Considerations) are arbitrary, capricious, or contrary to law erred by concluding Applicant's history of financial difficulties had not been mitigated. The Administrative Judge made findings of fact about Applicant's history of financial difficulties. The Judge entered formal findings in favor of Applicant with respect to the debts covered by SOR paragraphs 3.a, 3.b, and 3.i, <sup>(1)</sup> but concluded Applicant's remaining debts were unresolved and not mitigated because Applicant had done little to address his past due indebtedness despite having a positive monthly cash flow in excess of \$1,500.

On appeal, Applicant (a) claims that the debts covered by SOR paragraphs 3.g and 3.j have been paid; (b) asserts that he has sought credit counseling to deal with his still unresolved debts; and (c) states "I still have difficulty dealing with any issues which were a result of the loss of my fiancé" and "Financially my focus has been towards my son and immediate family."

(a) It is not clear from Applicant's appeal brief whether he is challenging the Administrative Judge's findings that he still owes the debts covered by SOR paragraphs 3.h and 3.j, or whether he is making a factual assertion on appeal that those two debts have since been paid. Any factual assertions about changes in Applicant's financial situation since the close of the record below would constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Making allowances for Applicant's *pro se* status, the Board will construe Applicant's appeal statements about those two debts as a challenge to the Judge's findings that they are still unresolved debts. Given the record evidence in this case, the Administrative Judge had a rational basis for finding that the debts covered by SOR paragraphs 3.h and 3.j are still unresolved.

(b/c) Applicant does not challenge the Administrative Judge's findings that he still has not resolved the debts covered by SOR paragraphs 3.c, 3.d, 3.e, 3.f, 3.g, and 3.k. Indeed, except for Applicant's argument concerning the debts covered by SOR paragraphs 3.h and 3.j, Applicant concedes he still has unresolved debts. The Board construes Applicant's appeal statements about his financial situation as raising the issue of whether the Judge erred by concluding Applicant had not mitigated his history of financial difficulties.

Applicant's statement about seeking credit counseling does not have a factual basis in the record below. Since Applicant's statement about credit counseling seeks to supplement the record evidence on appeal, it constitutes new evidence. As discussed earlier in this decision, the Board cannot consider new evidence on appeal. Applicant had the opportunity to submit evidence in response to the File of Relevant Material (FORM) -- to refute, rebut, explain, extenuate or mitigate the evidence submitted against him. Applicant submitted a response to the FORM which did not provide any information about his financial situation. Applicant cannot fairly challenge the Judge's findings and conclusions about his history of financial difficulties by offering new evidence on appeal.

Applicant's remaining appeal statements are arguments that do not rely on new evidence. Given the record evidence of Applicant's overall history of financial difficulties, and given the fact that there is no dispute that Applicant still has unresolved delinquent debts, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant had not satisfied his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. <sup>(2)</sup> Given Applicant's history of financial difficulties, the Judge had a rational basis for his adverse conclusions under Guideline F (Financial Considerations).

2. Whether the Administrative Judge erred by concluding Applicant's past criminal conduct had not been mitigated under Guideline J (Criminal Conduct). Applicant does not challenge the Administrative Judge's findings of fact about his past criminal conduct. However, Applicant acknowledges the seriousness of that conduct, states he has taken steps to prevent any recurrence, and notes he has not committed any criminal act since his 1996 felony conviction. The Board construes Applicant's statements as raising the issue of whether the Judge erred by concluding Applicant's past criminal conduct had not been mitigated under Guideline J.

The Administrative Judge concluded that Applicant's 1996 conviction falls under 10 U.S.C. §986 and precluded a favorable security clearance decision. <sup>(3)</sup> Because Applicant's conviction resulted in a sentence of imprisonment exceeding one year, the Judge properly concluded 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."

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, 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.)

Under the June 7, 2001 memorandum by the Deputy Secretary of Defense and the Operating Instruction, the Administrative Judge lacks authority or discretion to make a favorable security clearance decision in a case that falls under 10 U.S.C. §986. Because the Judge properly concluded Applicant's case falls under that statute, the Judge was precluded from finding Applicant's criminal conduct was successfully mitigated under Guideline J and making a favorable security clearance decision.

3. Whether the Board should recommend Applicant's case for further consideration for a waiver under 10 U.S.C. §986(d). Applicant's brief also makes statements that the Board construes as asking that his case be further considered for a waiver under 10 U.S.C. §986(d).

In this case, the Administrative Judge did not base his adverse security clearance decision solely on 10 U.S.C. §986. Rather, the Judge based his adverse security clearance decision on the applicability of 10 U.S.C. §986 to Applicant's 1996 conviction and his adverse findings and conclusions under Guideline F (Financial Considerations). Because the Board is not affirming the Judge's adverse decision based solely on the applicability of 10 U.S.C. §986 to Applicant's 1996 conviction, under paragraph 3.f of the Operating Instruction the Board is not authorized to make any recommendation as to whether Applicant's case should be considered for a waiver under 10 U.S.C. §986(d). *See, e.g.*, ISCR Case No. 02-00500 (January 16, 2004) at p. 6.

### **Conclusions**

Because Applicant has failed to demonstrate error below, the Board affirms the Administrative Judge's security clearance decision. Furthermore, the Board does not make any recommendation (favorable or unfavorable) concerning a waiver under 10 U.S.C. §986(d).

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable formal findings about SOR paragraphs 3.a, 3.b, and 3.i are not at issue on appeal.

2. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

3. 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)].