

DATE: February 5, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-04949

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge John R. Erck issued a decision, dated October 23, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 Applicant was denied the right to present witnesses on his behalf; and (2) whether the Board should recommend consideration of Applicant's case for a waiver under 10 U.S.C. §986. For the reasons that follow, the Board affirms the Administrative Judge's decision, and does not recommend that Applicant's case be considered for a waiver under 10 U.S.C. §986.

**Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 11, 2002. The SOR was based on Guideline J (Criminal Conduct). A hearing was held on August 13, 2002. The Administrative Judge issued a written decision, dated October 23, 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.

Applicant submitted a timely notice of appeal. The November 4, 2002 letter acknowledging receipt of Applicant's notice of appeal informed him that an appeal brief had to be submitted by no later than December 9, 2002, and that the Chairman could enter a default if he failed to submit a timely appeal brief. Although Applicant failed to submit an appeal brief, the Chairman did not enter a default. The Chairman treated Applicant's notice of appeal as an appeal brief because it contained statements that could be construed as appeal arguments. On December 19, 2002, Department Counsel submitted a notice indicating that it did not intend to submit a reply brief. On the same day, the Chairman sent a letter to the parties indicating the Board would issue a written decision after considering the appeal issues.

On December 31, 2002, the Board received from Applicant a letter, dated December 27, 2002. On the same day, the Chairman sent a letter to Applicant, informing him that his December 27, 2002 letter would not be accepted as an appeal

brief because it was submitted long after the deadline for submitting an appeal brief.

Apart from the lateness of Applicant's December 27, 2002 letter, it contains various assertions that constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.<sup>(1)</sup> Furthermore, Applicant's December 27, 2002 letter also asks the Board to contact a named individual to discuss Applicant's case. The Board cannot and will not contact individuals to discuss a case on appeal.

### 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 Issue

1. Whether Applicant was denied the right to present witnesses on his behalf. On appeal, Applicant states "I have several individuals whom I have worked for or with over the last 15 years that are willing to testify on my behalf." Making allowances for Applicant's *pro se* status, the Board construes that statement as raising the issue of whether Applicant was denied the right to present witnesses on his behalf. For the reasons that follow, the Board concludes Applicant fails to demonstrate he was denied the right to present witnesses on his behalf.

A review of the case file shows the following:

- (a) Applicant was provided with a copy of the Directive with the SOR. The Directive placed Applicant on notice of his obligation to present witnesses or other evidence on his behalf. *See* Directive, Additional Procedural Guidance, Item E3.1.15.
- (b) Before the hearing, Applicant was provided with a document entitled "Prehearing Guidance for DOHA hearings." Paragraph 2 of that document placed Applicant on notice that "Each party is expected to be prepared to present at the hearing whatever evidence (testimonial or documentary, or both) that party intends to offer."
- (c) At the hearing, the Administrative Judge informed Applicant that: (i) he had "the responsibility to represent your own case and protect your own rights and interests in this proceeding" (Hearing Transcript at p. 8); and (ii) the Judge's decision would be "based upon [the SOR, Applicant's answer to the SOR] and any other evidence presented during this hearing. So, if either party wishes me to consider other evidence, it is your respective responsibility to offer that evidence" (Hearing Transcript at p. 11).
- (d) When Applicant was asked if he would be presenting any witnesses on his behalf, he said "No, I do not, sir" (Hearing Transcript at pp. 8-9).
- (e) After Applicant presented his testimony and was cross-examined by Department Counsel and questioned by the Administrative Judge, the Judge asked him if he had any further evidence to present. Applicant answered "No, Your

Honor" (Hearing Transcript at p. 51).

Considering the record as a whole, it is clear that Applicant was on notice of his obligation to prepare for the hearing and to present evidence on his behalf, and his right to have witnesses testify on his behalf. Applicant failed to take advantage of his opportunity to present witnesses on his behalf at the hearing. Having failed to do so, Applicant waived his right to present witnesses to testify on his behalf in these proceedings. Accordingly, Applicant was not denied the right to present witnesses.

2. Whether the Board should recommend consideration of Applicant's case for a waiver under 10 U.S.C. §986. On appeal, Applicant asks the Board to consider that the Administrative Judge recommended his case be considered for a waiver under 10 U.S.C. §986. The Board construes that request as raising the issue of whether the Board should recommend consideration of Applicant's case for a waiver under 10 U.S.C. §986.

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)]. 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 paragraph 2.f. of the Operating Instruction, the Board is responsible for resolving any appeal as to the applicability of 10 U.S.C. §986. In this case, Applicant does not challenge the Administrative Judge's conclusion that 10 U.S.C. §986 applies to Applicant's 1982 conviction for conspiracy to distribute cocaine. All that remains for the Board to do is consider Applicant's request that it recommend further consideration of his case for a waiver under 10 U.S.C. §986(d). However, the Operating Instruction does not authorize the Board to review a 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.

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.

### **Conclusions**

Under the terms of the Department of Defense memorandum implementing 10 U.S.C. §986, 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." Accordingly, the Board affirms the Administrative Judge's conclusion that 10 U.S.C. §986 precluded him from making a favorable security clearance decision in Applicant's case.

Applicant was not denied the right to present witnesses on his behalf. Applicant's appeal offer to present witnesses on his behalf fails to demonstrate the Administrative Judge erred in his conduct of the hearing. Because Applicant has failed to demonstrate error below, the Judge's adverse security clearance decision is affirmed.

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: 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

1. Applicant's December 27, 2002 letter offers information that Applicant could have presented at the August 13, 2002

hearing. Applicant waived his right to have such information considered in his case when he failed to present it in a timely manner for consideration by the Administrative Judge during the proceedings below.