

DATE: August 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06303

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the June 2, 2003 decision of Administrative Judge John G. Metz, Jr., 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's decision is erroneous because the Judge failed to apply pertinent provisions of the Directive; and (2) whether the Board should recommend this case be considered further for a waiver under 10 U.S.C. §986. For the reasons that follow, the Board affirms the Administrative Judge's adverse decision and does not recommend this case be considered further 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 January 16, 2003. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). A hearing was held on April 30, 2003. The Administrative Judge issued a written decision, dated June 2, 2003, 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⁾

1. Whether the Administrative Judge's adverse decision is erroneous because the Judge failed to apply pertinent provisions of the Directive. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of criminal conduct. However, Applicant argues that the Administrative Judge's adverse decision should not be affirmed because: (a) his criminal conduct is mitigated under the general factors of Directive, Section 6.3; and (b) he does not pose an imminent threat to the national security under Directive, Section 6.4. For the reasons that follow, the Board concludes Applicant's arguments lack merit.

(a) Applicant argues that the Administrative Judge's adverse decision should not be affirmed because his criminal conduct in 1995 is mitigated under the following factors under Directive, Section 6.3:

Section 6.3.2 ("Frequency and recency of the conduct");

Section 6.3.3 ("Age of the applicant");

Section 6.3.5 ("Absence or presence of rehabilitation"); and

Section 6.3.6 ("Probability that the circumstances or conduct will continue or recur in the future").

Applicant's argument is not persuasive. The Administrative Judge specifically indicated that, but for the application of 10 U.S.C. §986, he would conclude that Applicant's conduct was mitigated under Guideline J. The Judge had no authority or discretion to make a favorable security clearance decision because Applicant's 1995 convictions fall under the scope of 10 U.S.C. §986. Application of the general factors cited by Applicant would not take this case outside the scope of 10 U.S.C. §986.

(b) Applicant's reliance on Directive, Section 6.4 is misplaced. Section 6.4 deals with suspension of security clearance decisions *before* a security clearance decision is made.⁽²⁾ It does not cover security clearance decisions made by an Administrative Judge.

In the section of Applicant's brief that relies on Directive, Section 6.4, Applicant also argues that there is no risk that he could be pressured or coerced because his past criminal conduct is known by his employer and the federal government. Vulnerability to coercion or blackmail poses a security risk. However, even in the absence of that particular kind of security risk, an applicant's conduct and circumstances can raise security concerns based on other kinds of threats or risks. Accordingly, Applicant's argument fails to demonstrate error by the Administrative Judge.

2. Whether the Board should recommend this case be considered further for a waiver under 10 U.S.C. §986. Applicant asks that his case be considered further for a waiver under 10 U.S.C. §986. This raises the issue of whether the Board should recommend Applicant's case be considered further for such a waiver.

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). Applicant's 1995 conviction is covered by 10 U.S.C. §986(c)(1).

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.)

Since there is no dispute on appeal as to the applicability of 10 U.S.C. §986 in this case, 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). 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 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 Board affirms the Judge's conclusion that 10 U.S.C. §986 precluded him from making a favorable security clearance decision in Applicant's case.

Under the Operating Instruction the Board: (1) does not have the authority to review the Administrative Judge's recommendation that Applicant's case be considered further for a waiver under 10 U.S.C. §986(d); and (2) 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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found that Applicant did not falsify a security clearance application in March 2001 and entered formal findings in favor of Applicant with respect to Guideline E. The Judge's findings and conclusions under Guideline E are not at issue on appeal.

2. Section 6.4 reads in pertinent part: "Whenever there is a reasonable basis for concluding that an applicant's continued access to classified information poses an imminent threat to the national interest, any security clearance held by the applicant may be suspended by the ASD(C3I), with the concurrence of the GC, DoD, *pending a final clearance decision.*" (Emphasis added)