

DATE: August 13, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-06396

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Joe C. Ashworth, Esq.

Applicant has appealed the April 28, 2003 decision of Administrative Judge Robert Robinson Gales, 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 not recommending Applicant's case be further considered for a waiver under 10 U.S.C. §986(d); and (2) whether the Board should recommend Applicant's case be further considered for a waiver under 10 U.S.C. §986(d). For the reasons that follow, the Board affirms the Administrative Judge's adverse security clearance decision, and does not recommend this case be further 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 November 14, 2002. The SOR was based on Guideline J (Criminal Conduct). A hearing was held on March 19, 2003. The Administrative Judge issued an adverse security clearance decision, dated April 28, 2003. Applicant appealed 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 not recommending Applicant's case be further considered for a waiver under 10 U.S.C. §986(d). The Administrative Judge made findings of fact about Applicant being arrested and charged in 1985 in connection with his cultivation of marijuana plants, Applicant's conviction in May 1986 on charges arising from his cultivation of marijuana plants, and the reduction of Applicant's original sentence in August 1986. The Judge concluded Applicant was ineligible for a security clearance under 10 U.S.C. §986 because: (a) Applicant was sentenced in 1986 to a term of imprisonment in excess of one year; and (b) the suspension of the remainder of Applicant's five-year term of imprisonment after he served only three months of incarceration did not take Applicant's case outside the scope of 10 U.S.C. §986.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his cultivation of marijuana plants. Nor does Applicant challenge the Judge's conclusion that Applicant's 1986 conviction falls under 10 U.S.C. §986. Rather, Applicant contends the Judge's decision to not recommend a waiver under that statute is clearly erroneous and not supported by the record evidence. In support of that contention, Applicant argues the Judge's decision to not recommend a waiver is: (a) inconsistent with the Judge's own conclusions about Applicant's conduct and rehabilitation; (b) inconsistent with the Judge's decision in another case under 10 U.S.C. §986; and (c) not consistent with the waiver recommendations made by other Hearing Office Judges.

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)]. However, 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.)

The Operating Instruction does not authorize the Board to review an Administrative Judge's recommendation whether or not a waiver should be considered. Accordingly, the Board will not address the specific arguments Applicant makes in support of his challenge of the Judge's decision to not recommend a waiver under 10 U.S.C. §986(d). Under the Operating Instruction, the Director, DOHA -- not the Board -- has the responsibility for deciding whether a Judge's recommendation concerning a waiver under 10 U.S.C. §986(d) is well-founded or not, and whether it is persuasive or not.

2. Whether the Board should recommend Applicant's case be further considered for a waiver under 10 U.S.C. §986(d). Applicant asks the Board to reverse the Administrative Judge's recommendation that his case not be further considered for a waiver under 10 U.S.C. §986(d). As discussed earlier in this decision, the Board does not review a Judge's waiver recommendation. The Board will construe Applicant's request as raising the issue of whether the Board should recommend Applicant's case be further considered for a waiver under 10 U.S.C. §986(d).

Under the Operating Instruction, the Board is asked to make its own recommendation concerning waiver, not to review a Hearing Office Administrative Judge's recommendation about waiver. Accordingly, 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 recommend that a waiver should be considered.

(1) However, 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."

### 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.

Under the Operating Instruction the Board cannot address the specific arguments asserted in Applicant's request that the Board recommend his 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. Applicant relies, in part, on waiver recommendations made by Hearing Office Administrative Judges in other cases. Although decisions by Hearing Office Judges may be cited as persuasive authority, they are not legally binding on the Board. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 4.