

DATE: July 27, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08979

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Phillip B. Herron, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 2, 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 Paul J. Mason issued an unfavorable security clearance decision, dated March 22, 2004.

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 decision of the Administrative Judge is arbitrary, capricious, or contrary to law because it fails to recommend one way or the other as to whether Applicant's case should be further considered for a waiver under 10 U.S.C. §986(d); and (2) whether Applicant should be granted leave to file a supplementary brief as to whether the record evidence supports the findings. For the reasons that follow, the Board affirms the Administrative Judge's decision and declines to grant Applicant leave to file a supplemental brief.

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 decision of the Administrative Judge is arbitrary, capricious, or contrary to law because it fails to recommend one way or the other as to whether Applicant's case should be further considered for a waiver under 10 U.S.C. §986(d). The SOR alleged that between 1981 and 2000, Applicant had engaged in a history or pattern of criminal activity. The Administrative Judge concluded that Applicant's 1981 conviction for breaking and entering fell under 10 U.S.C. §986 because Applicant was sentenced to five years confinement (suspended) and five years probation as a result of that conviction. ⁽¹⁾

The Judge's decision contains no recommendation, either favorable or unfavorable, as to whether Applicant's case should be considered further for a waiver under 10 U.S.C. §986(d). On appeal, Applicant does not challenge the applicability of 10 U.S.C. §986 to his 1981 conviction, but contends that the Administrative Judge erred by not making a recommendation concerning waiver. Applicant contends that the Board should remand the case to the Administrative Judge for a specific waiver recommendation.

In a June 7, 2001 memorandum implementing the provisions of 10 U.S.C. §986, the Deputy Secretary of Defense stated: "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's 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 states 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 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.)

On appeal, Applicant contends paragraph 3.e of the Operating Instruction required the Administrative Judge to make a recommendation concerning waiver under 10 U.S.C. §986(d).

A review of the record and the Administrative Judge's decision reveals the following: (1) the SOR contained six subparagraphs under Guideline J, alleging various criminal acts; (2) only one of the SOR subparagraphs invoked the provisions of 10 U.S.C. §986; (3) the Administrative Judge found against Applicant on all six subparagraphs of the SOR; (4) the Administrative Judge's decision specifically listed three disqualifying conditions under Guideline J as applicable to the case, and only one of those invoked the provisions of 10 U.S.C. §986; (5) the Administrative Judge's decision specifically listed three potentially applicable mitigating conditions under Guideline J in addition to listing the provision that covered waiver under 10 U.S.C. §986; (6) after concluding Department Counsel established criminal conduct within the scope of 10 U.S.C. §986, the Judge stated, "The circumstances of this case should first be evaluated under the conditions of the criminal conduct guideline and the whole person concept"; (7) in discussing the applicability of Criminal Conduct Mitigating Condition 6⁽²⁾

the Judge concluded that evidence in support of Mitigating Condition 6 would not be sufficient to overcome the adverse inference under the Criminal Conduct Guideline "[e]ven without the statutory prohibition of 10 U.S.C. §986 . . ."; and (8) the Judge concluded, "Considering the evidence as a whole, this case is controlled by 10 U.S.C. §986 and Applicant's clearance must be denied."

The Administrative Judge's statement that the case was "controlled" by 10 U.S.C. §986 suggests that the broader considerations of Guideline J may not have been a factor in the ultimate decision. This one statement should not be read in isolation, however. In ascertaining the meaning of a Judge's decision, the Board does not look at individual portions in isolation, but rather reviews the decision as a whole. After a review of the Judge's decision, including the matters highlighted above, the Board concludes that the Judge's ultimate conclusion was not based solely upon the application of 10 U.S.C. §986, but was based upon a general application of Guideline J as well. Therefore, according to Operating

Instruction paragraph 3.e, the Administrative Judge was not required to make a recommendation concerning waiver and his failure to do so was not error.

2. Whether Applicant should be granted leave to file a supplementary brief as to whether the record evidence supports the findings. As part of his prayer for relief, Applicant asks to be allowed to file a supplementary brief as to whether the record evidence supports the Administrative Judge's findings. The filing of appeal briefs with the Board is governed by Item E3.1.30 of the Additional Procedural Guidance section of the Directive. That provision requires the appealing party to file a brief within 45 days of the Administrative Judge's decision. It also states, "The appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error." By its own terms the governing Item does not contemplate an appeal process that involves the filing of multiple appeal briefs. Moreover, as a practical matter, it would be confusing, inefficient and unfair to the nonappealing party to allow the appealing party to submit piecemeal, seriatim briefs raising a series of appeal issues. Finally, Applicant gives no explanation why he could not raise all his appeal issues in one brief. Applicant is not entitled to the procedural relief he seeks.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision. Because the Board's affirmance of the Administrative Judge's decision is not based solely on the application of 10 U.S.C. §986, the Board does not make a recommendation one way or the other as to whether Applicant's case should be considered further for a waiver under that statute.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. 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)]. Convictions which result in a sentence of imprisonment for more than one year fall under 10 U.S.C. §986(c)(1).

2. "There is clear evidence of successful rehabilitation."