

DATE: July 21, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-10534

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Wilbur W. Bolton III, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 28, 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 Henry Lazzaro issued an unfavorable security clearance decision, dated March 31, 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 Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law; and (2) whether the Board should recommend that Applicant's case be considered further for a meritorious waiver under 10 U.S.C. §986(d). For the reasons that follow, the Board affirms the Administrative Judge's decision, and does not recommend Applicant's case be considered further for a meritorious waiver.

### **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**

The Administrative Judge found the following: (a) in February 1986, Applicant received probation before judgment in connection with a criminal charge of possession of a concealed weapon; (b) in April 1995, Applicant was convicted of carrying a handgun/weapon on his person, and was sentenced to three years in jail (suspended) and three years supervised probation; and (c) Applicant's probation was terminated after one year, seven months and 15 days. The Judge concluded that Applicant's criminal conduct was mitigated under Guideline J (Criminal Conduct), but that the applicability of 10 U.S.C. §986<sup>(1)</sup> to Applicant's April 1995 conviction precluded a favorable security clearance decision. The Judge also stated that he did not recommend further consideration of Applicant's case for a meritorious waiver under 10 U.S.C. §986(d).<sup>(2)</sup>

1. Whether the Administrative Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's unfavorable security clearance decision on the following grounds: (a) Applicant has had a security clearance for 17 years without incident; (b) under applicable state law, the disposition of the February 1986 charge means that Applicant was not convicted of a criminal offense; (c) the facts and circumstances surrounding the two incidents that led to the criminal charges brought against Applicant are extenuating or mitigating; (d) Applicant has applied for a state pardon in connection with his April 1995 conviction; (e) none of Applicant's legal entanglements are related to his credibility or trustworthiness, and Applicant submitted evidence attesting to his honesty and integrity; and (f) nothing since September 11, 2001 changes Applicant's reliability, loyalty, or qualifications for a security clearance. For the reasons that follow, the Board concludes Applicant's arguments do not demonstrate error below.

The absence of any security violations does not have the significance that Applicant places on it. The federal

government is not required to wait until an applicant has mishandled or failed to safeguard classified information before it can decide whether to deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Moreover, the presence or absence of security violations is irrelevant to whether 10 U.S.C. §986 applies.

The Administrative Judge based his unfavorable security clearance decision on the applicability of 10 U.S.C. §986 to Applicant's April 1995 conviction, not the February 1986 disposition of the criminal charge against Applicant. Accordingly, the legal status (under state law) of the February 1986 disposition of the criminal charge against Applicant is not relevant to the Judge's unfavorable security clearance decision.

Applicant's argument about the facts and circumstances surrounding the two incidents that led to the criminal charges brought against him fails to demonstrate the Administrative Judge erred. The Judge concluded that Applicant's conduct was mitigated under Guideline J, but that Applicant's April 1995 conviction precluded a favorable security clearance decision because of 10 U.S.C. §986. The Judge's conclusion about the applicability of 10 U.S.C. §986 to Applicant's case is legally correct. Given the applicability of 10 U.S.C. §986, the Judge could not render a favorable security clearance decision based on his favorable conclusions under Guideline J.

Applicant's request for a state pardon does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Even if Applicant had received a state pardon and presented evidence of such a pardon to the Judge during the proceedings below, Applicant would not be entitled to a favorable security clearance decision. A state pardon does not negate the applicability of 10 U.S.C. §986. *See* ISCR Case No. 01-00407 (September 18, 2002) at pp. 4-5 (explaining why a state pardon does not affect the applicability of 10 U.S.C. §986).

Applicant's remaining arguments do not demonstrate factual or legal error by the Administrative Judge.

2. Whether the Board should recommend that Applicant's case be considered further for a meritorious waiver under 10 U.S.C. §986(d). The Board construes Applicant's arguments in support of a favorable security clearance decision as raising the issue of whether the Board should recommend that Applicant's case be considered further for a meritorious waiver under 10 U.S.C. §986(d).

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 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 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.)

Having decided that the Administrative Judge properly concluded that 10 U.S.C. §986 applies to Applicant's case, all that remains for the Board to do is consider whether to recommend that Applicant's case be further considered for a waiver under 10 U.S.C. §986(d).

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 Administrative Judge properly concluded that 10 U.S.C. §986 precluded him from making a favorable security clearance decision in Applicant's case.

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: Jean E. Smallin

Jean E. Smallin

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)]. 10 U.S.C. §986(c)(1) provides: "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."

2. 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).