DATE: June 5, 2003

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-11810

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the March 3, 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 participation of Chief Department Counsel in his hearing violated Applicant's rights under Executive Order 10865 or the Directive; (2) whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law; and (3) whether the Board should recommend this case be further considered for a waiver under 10 U.S.C. §986. For the reasons that follow, the Board affirms the Administrative Judge's adverse security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 8, 2002. The SOR was based on Guideline J (Criminal Conduct). A hearing was held on February 19, 2003. The Administrative Judge issued a decision, dated March 3, 2003, in which the Judge 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

Applicant's appeal brief contains several factual assertions that go beyond the record evidence below and seek to introduce new evidence for the Board to consider in Applicant's case. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the Board will address only those appeal arguments Applicant makes that do not rely on new evidence.

1. Whether the participation of Chief Department Counsel in the hearing violated Applicant's rights under Executive Order 10865 or the Directive. Chief Department Counsel was present at Applicant's hearing and sat with the Department Counsel representing the government. Chief Department Counsel's presence was noted on the record by the Administrative Judge. On appeal, Applicant argues: (a) prior to the hearing date, he was not informed that Chief Department Counsel would be at the hearing; (b) just before the hearing, Department Counsel asked him if it would be okay for Chief Department Counsel to sit in on the hearing, and he had no reason to object at that time; (c) he was "perplexed and frankly shaken" when he noticed Chief Department Counsel whispering advice to Department Counsel throughout the hearing; and (d) Chief Department Counsel's participation at the hearing was an "unauthorized 'double-teaming' [that] prevented me from adequately stating my case and may in itself be cause for a re-hearing." The Board construes Applicant's arguments as raising the issue of whether the participation of Chief Department Counsel in the hearing violated Applicant's rights under Executive Order 10865 or the Directive. *See* Directive, Additional Procedural Guidance, Item E3.1.32.2 (Board shall consider whether "[t]he Administrative Judge adhered to the procedures required by Executive Order 10865 and this Directive").

Nothing in Executive Order 10865 addresses the participation of Department Counsel at an applicant's hearing. Accordingly, the presence and participation of Chief Department Counsel at Applicant's hearing did not violate any provision of Executive Order 10865.

Nothing in the Directive (a) limits or restricts the number of attorneys that may appear and represent a party at a hearing, or (b) requires a party to seek or obtain permission from the other party as to the number or identity of the attorneys who will appear and participate at a hearing. Furthermore, there is no general principle of law that gives a party the right to object to the participation of more than one attorney for the other party at a hearing. Finally, nothing in the record of the proceedings below indicates or suggests that the participation of Chief Department Counsel at Applicant's hearing violated Applicant's right to a fair hearing. The participation of Chief Department Counsel did not preclude or otherwise interfere with Applicant's ability to present his case for the Judge's consideration. Applicant's dissatisfaction with the participation of Chief Department Counsel at his hearing is not a basis for finding legal error below.

In the absence of any factual or legal error that violated Applicant's rights under Executive Order 10865 or the Directive, Applicant is not entitled to a new hearing. *See, e.g.*, ISCR Case No. 00-0429 (July 9, 2001) at p. 3. Since the participation of Chief Department Counsel at the hearing did not violate Applicant's rights, the Board does not find persuasive Applicant's suggestion that a rehearing of his case is warranted.

2. Whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law.[(1)] The Administrative Judge made the following findings of fact:

Applicant was convicted in 1992 for conspiracy to possess cocaine with intent to distribute. Applicant was sentenced to 121 months imprisonment. Applicant served 94 months, with time off for good behavior. Applicant began five years

supervised probation when he was released from prison in September 2000. Applicant has complied with the terms of his probation since his release from prison.

The Judge concluded the following:

Applicant's criminal conduct, which led to his 1992 conviction, was serious in nature. Applicant's criminal conduct was not mitigated due to youth or immaturity because he was 27 years old at the time of the offense. Although Applicant has not repeated his criminal conduct, he has been out of prison only for two-and-a-half years and remains on probation until September 2005. Applicant's criminal conduct was comparatively recent in terms of his being back in the community. Applicant's criminal conduct was not isolated in nature because it involved a course of conduct that occurred more than one year before his arrest. Although there is some evidence of successful rehabilitation, it is insufficient to overcome the adverse security inferences of his past misconduct.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his past criminal conduct. However, Applicant does argue: (a) the Administrative Judge should have applied Criminal Conduct Mitigating Conditions 1, 2, and 6 in his favor; and (b) the Judge should have concluded that Applicant presented enough evidence of reform and rehabilitation to warrant a favorable security clearance decision. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3 (Board shall consider whether "[t]he Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law").

(a) Criminal Conduct Mitigating Condition 1.[(2)] The Board has declined to adopt any bright-line rule on what constitutes "recent" misconduct. Moreover, the Board need not adopt such a rule to decide this appeal. For the reasons that follow, the Board concludes the Administrative Judge failed to articulate a sustainable basis for not applying Criminal Conduct Mitigating Condition 1.

The Directive does not define what constitutes "recent." When faced with an undefined term or phrase in the Directive, the undefined term or phrase must be construed or interpreted in a reasonable manner. *See, e.g.*, ISCR Case No. 00-0339 (March 22, 2001) at p. 2. For purposes of Criminal Conduct Mitigating Condition 1, the recency of an applicant's criminal conduct should be measured or evaluated in relation to when the criminal conduct occurred, not in relation to when the applicant completed his or her imprisonment. Accordingly, for purposes of applying Criminal Conduct Mitigating Condition 1, the Judge erred in as much as he measured the recency of Applicant's criminal conduct in terms of Applicant's return to the community after being released from imprisonment.

Although the Board concludes the Administrative Judge erred by not applying Criminal Conduct Mitigating Condition 1 in this case, that error was harmless under the particular facts and circumstances of this case. First, the Board has noted that the mere applicability or nonapplicability of an Adjudicative Guidelines Disqualifying or Mitigating Condition is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 10. Therefore, even if the Judge had applied Criminal Conduct Mitigating Condition 1, the Judge would not have been required, as a matter of law or logic, to reach a favorable security clearance decision. Second, in making a matter of common sense determination (as required by Directive, Section 6.3), the Judge is entitled to take into consideration the overall facts and circumstances of an applicant's case and draw reasonable inferences and conclusions about an applicant's security eligibility. Under Section 6.3, it was not arbitrary or capricious for the Judge to take into account that Applicant has been out of prison for a relatively brief period of time, and consider that fact in evaluating Applicant's evidence of reform and rehabilitation. And, as will be discussed shortly, the recency of an applicant's return to the general community after release from imprisonment is a valid consideration for a Judge to weigh when deciding whether to apply Criminal Conduct itigating Condition 6.

Criminal Conduct Mitigating Condition 2.[(3)] The Administrative Judge concluded Applicant's criminal conduct was not isolated in nature because it involved conduct that occurred over a period of a year before Applicant's conviction. The Judge's conclusion reflects a reasonable interpretation of the record evidence and does not involve arbitrary or capricious reasoning. Applicant's appeal argument concerning Criminal Conduct Mitigating Condition 2 is not persuasive.

Criminal Conduct Mitigating Condition 6.[(4)] The Administrative Judge concluded that Applicant's evidence of reform and rehabilitation was insufficient to overcome the adverse implications of his past misconduct. In reaching that conclusion, the Judge noted the relatively short time Applicant has been out of jail and the fact that he remains on probation until September 2005. Considering the record as a whole, the Judge's adverse conclusion is not arbitrary, capricious, or contrary to law. Applicant's appeal argument concerning Criminal Conduct Mitigating Condition 6 is not persuasive.

(b) The Administrative Judge had the responsibility of weighing the record evidence and deciding whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. The Judge considered the favorable evidence presented by Applicant and concluded that it did not demonstrate reform and rehabilitation sufficient to warrant a favorable security clearance decision. Given the record evidence in this case, the Judge's conclusion is not arbitrary, capricious, or contrary to law. Applicant's ability to argue for an alternate weighing of the record evidence is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law.

3. Whether the Board should recommend this case be further considered for a waiver under 10 U.S.C. §986. The Administrative Judge concluded 10 U.S.C. §986 applied to Applicant's 1992 conviction for conspiracy to possess cocaine with intent to distribute. The Judge did not make any recommendation as to whether Applicant's case should be further considered for a waiver under that statute. On appeal, Applicant makes statements which the Board construes as asking the Board to recommend his case be further considered 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 dispute that his 1992 conviction falls under 10 U.S.C. §986. 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).

Under paragraph 3.f. of the Operating Instruction, the Board must make a recommendation for or against a waiver under 10 U.S.C. §986 "[i]f the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986." There is no need for the Board to make any recommendation about whether Applicant's case should be considered further for a waiver under 10 U.S.C. §986(d) because the Administrative Judge specifically stated that he was not basing his adverse decision solely on application of 10 U.S.C. §986 and Applicant has failed to demonstrate harmful error by the Judge.

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR subparagraph 1.b. That favorable formal finding is not at issue on appeal. Accordingly, the Board need not discuss the Judge's findings and conclusions about the matter covered by SOR subparagraph 1.b.

2. "The criminal conduct was not recent."

3. "The crime was an isolated incident."

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