

DATE: May 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17609

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Ronald C. Sykstus, Esq.

The Defense Office of Hearings and Appeal (DOHA) issued to Applicant a Statement of Reasons (SOR) dated June 20, 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) and Guideline F (Financial Considerations). A hearing was held on December 4, 2003 and subsequently Administrative Judge Claude R. Heiny issued an unfavorable decision, dated February 5, 2004. Applicant appealed.

The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive) dated January 2, 1992, as amended.

Applicant's appeal raises the following issues: (1) whether Applicant has been denied a security clearance based on illegal discrimination, and (2) whether the Administrative Judge's adverse decision was arbitrary, capricious or contrary to law. For the reasons that follow the Board affirms the Administrative Judge's 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. 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 Applicant has been denied a security clearance based on illegal discrimination. On appeal, Applicant argues that his adverse security clearance adjudication is the result of discrimination based on age and handicap. There is no record evidence which supports Applicant's claim of discrimination. Indeed, Applicant submitted new evidence on appeal to support his claim that he has a physical condition which might constitute a handicap. The Board is not permitted to consider new evidence on appeal (*see* Directive, Additional Procedural Guidance, Item E3.1.29).

Apart from the Directive's prohibition against new evidence, Applicant's claim of illegal discrimination is legally flawed. There is a well-established legal presumption that government officials carry out their duties properly and in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See, e.g. National Archives and Records Administration v. Favish*, 541 U.S. --, slip op. at 16 (March 30, 2004). Applicant's claim of illegal discrimination ignores that presumption and seeks to shift the burden to DOHA to prove, to his satisfaction, that he is not a victim of illegal discrimination. Such burden shifting is not legally available to Applicant.

2. Whether the Administrative Judge's adverse decision was arbitrary, capricious or contrary to law. Applicant argues (1) he had a security clearance granted and continued after his 1973 conviction and sentence of three years imprisonment, and his 1982 bankruptcy discharge and 1994 bankruptcy dismissal; (2) it is disingenuous for the government to make an issue now of Applicant's 1973 conviction; (3) Applicant was never instructed to apply for a waiver under 10 U.S.C. §986; (4) Applicant requests that he be allowed to have an interim clearance and be permitted to apply for a waiver under 10 U.S.C. §986; and (5) Applicant is now in a position to take care of his debts. Taken together the Board construes Applicant's arguments as asserting that the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant's first and second arguments suggest that Applicant has some right to a clearance because some issues raised in the SOR predate his having a clearance. Applicant's claim is groundless for three reasons: (a) there is no right to a security clearance; (b) the government is not precluded from raising an issue that has been previously favorably adjudicated; and (c) Applicant's 1973 conviction is relevant in part because of a change in the law. The Board, citing federal cases, has frequently noted that there is no right to a security clearance, nor is there a presumption in favor of continuing or granting a security clearance (*see, e.g.*, ISCR Case No. 02-00318, February 25, 2004 at p. 8). The Board has also noted, again citing federal cases, that the government cannot be precluded from protecting classified information under the doctrine of equitable estoppel (*see, e.g.*, ISCR Case No. 02-00305, February 12, 2003 at p. 3). Moreover, the government has the right to reconsider the security significance of past conduct in light of more recent conduct having negative security significance (*see, e.g.*, DISCR Case No. 91-0775, August 25, 1992 at p. 3). There is nothing "disingenuous" about the government implementing recent federal legislation. Applicant's arguments do not acknowledge a Federal law which was part of the Defense Department authorization for fiscal year 2001. That law, 10 U.S.C. §986, prohibits the Department of Defense from granting or renewing security clearances for four classes of individuals. Applicant is a member of one of those classes, namely, persons convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. Applicant's past security clearance status does not preclude application of 10 U.S.C. §986 to his case (*see* ISCR Case No. 01-19823, December 3, 2003 at pp. 4-6).

Applicant's third and fourth arguments lack merit. Applicant was notified in the SOR of the statutory bar imposed by 10 U.S.C. §986. He was also notified of the Secretary of Defense's authority to grant waivers in meritorious cases. Applicant was further notified of his opportunity to submit additional information which would support consideration of a waiver. At the hearing, the Administrative Judge notified the Applicant of the applicability of 10 U.S.C. §986 and noted that the Director, DOHA would make a decision about whether to send the case forward to the Secretary of Defense with a waiver recommendation (*see* Hearing Transcript at p. 12). Applicant was fully advised of his opportunity to provide information which could be used in consideration of a waiver recommendation. Furthermore, the Board has no authority to grant interim clearances pending consideration of a waiver.

Applicant never explicitly asks the Board to recommend his case for consideration for a waiver under 10 U.S.C. §986. However, his brief might reasonably be interpreted as seeking such a recommendation. For the reasons that follow the Board declines to make any recommendation concerning a waiver.

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 Applicant has not challenged the Administrative Judge's conclusion about the applicability of 10 U.S.C. §986 to his 1993 conviction, all that remains for the Board to do is consider Applicant's contention that his case merits a waiver under 10 U.S.C. §986(d).

The Administrative Judge specifically noted that he was not basing his adverse security clearance decision solely on the applicability of 10 U.S.C. §986. Given the language of paragraph 3.e of the Operating Instruction, the Judge properly declined to make any recommendation as to whether Applicant's case should be considered for a waiver under 10 U.S.C. §986(d). Because the Judge's adverse security clearance decision can be affirmed for reasons not solely based on the applicability of 10 U.S.C. §986, under paragraph 3.f. of the Operating Instruction, the Board does not make a recommendation as to whether Applicant's case should be considered for a waiver under 10 U.S.C. §986(d) (*see, e.g.*, ISCR Case No. 01-12452, January 27, 2003 at p. 6).

Applicant's fifth argument fails to demonstrate that the Administrative Judge erred or was arbitrary and capricious in his weighing of the evidence of Applicant's financial history and current indebtedness. Applicant's argument is not persuasive because it is based on new evidence. Applicant cannot fairly challenge the Judge's findings and conclusions based on the proffer of new evidence.

Conclusion

Applicant has failed to demonstrate error in the case below. Therefore the Administrative Judge's February 5, 2004 decision is affirmed.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board