

DATE: July 7, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-20201

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (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), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). Administrative Judge Claude R. Heiny issued an unfavorable security clearance decision dated March 26, 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 erred by concluding 10 U.S.C. §986 is applicable to Applicant's case; (2) whether the Administrative Judge erred by concluding Applicant's history of criminal conduct had not been mitigated under Criminal Conduct Mitigating Condition 6; and (3) whether the Board should recommend that Applicant's case be considered further for a 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 that Applicant's case be considered further for a waiver under 10 U.S.C. §986(d).

#### **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<sup>(1)</sup>**

1. Whether the Administrative Judge erred by concluding 10 U.S.C. §986 is applicable to Applicant's case. Applicant does not dispute the Administrative Judge's finding that in 1991 Applicant pleaded guilty to criminal charges (two counts of robbery in the second degree and one count of criminal possession of stolen property), and was sentenced to a minimum of one-and-a-half years and a maximum of four years in jail. Applicant does challenge the Judge's conclusion that his conviction and sentence of imprisonment required application of 10 U.S.C. §986.<sup>(2)</sup> Applicant asserts that he completed his security clearance application one month before the effective date of 10 U.S.C. §986, and argues that if his investigation had been conducted more quickly he could have been granted a security clearance before 10 U.S.C. §986 went into effect. For the reasons that follow, Applicant's claim of error lacks merit.

Apart from the fact that Applicant has no legal right to have his security clearance case adjudicated within one month of completing his security clearance application, Applicant would not be entitled to avoid the application of 10 U.S.C. §986 even if he had been granted a security clearance before that statute went into effect. There is no right to a security clearance,<sup>(3)</sup> and a decision to grant or continue a security clearance does not give rise to any right or vested interest in keeping it.<sup>(4)</sup> Furthermore, a decision to grant or continue a security clearance made before the effective date of 10 U.S.C. §986 does not preclude application of that statute.<sup>(5)</sup> Therefore, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to apply 10 U.S.C. §986 to Applicant's case.

2. Whether the Administrative Judge erred by concluding Applicant's history of criminal conduct had not been mitigated under Criminal Conduct Mitigating Condition 6. The Administrative Judge concluded that there was not sufficient

record evidence to warrant application of Criminal Conduct Mitigating Condition 6.<sup>(6)</sup> In challenging the Judge's conclusion, Applicant makes various factual assertions that seek to supplement the record evidence. Such factual assertions constitute new evidence, which the Board cannot consider.<sup>(7)</sup> What remains of Applicant's challenge to the Judge's conclusion about Criminal Conduct Mitigating Condition 6 fails to identify any error by the Judge.

3. Whether the Board should recommend that Applicant's case be considered further for a waiver under 10 U.S.C. §986(d). Making allowances for Applicant's *pro se* status, the Board construes Applicant's argument that he should receive a favorable security clearance decision despite his past conviction as raising the issue of whether the Board should recommend that his case be considered further for a waiver under 10 U.S.C. §986(d).

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.)

Having concluded that 10 U.S.C. §986 is applicable to Applicant's case, 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).

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.

Under the Operating Instruction the Board cannot address the specific arguments asserted in support of 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.

### **Conclusions**

The Board affirms the Administrative Judge's conclusion 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR paragraphs under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Those favorable formal findings are not at issue on appeal.

2. 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) covers the following situation: "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."

3. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988).
4. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at p. 7.
5. *See, e.g.*, ISCR Case No. 01-19823 (December 3, 2003) at pp. 5-6.
6. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
7. Directive, Additional Procedural Guidance, Item E3.1.29.