

DATE: August 9, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-21060

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

James S. Maxwell, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated May 23, 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 Joan Caton Anthony issued an unfavorable security clearance decision dated April 19, 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 issue has been raised on appeal: whether the Administrative Judge erred by concluding Applicant's case falls under 10 U.S.C. §986 despite the fact that Applicant was sentenced to three one-year sentences, to run consecutively, instead of being sentenced to a single term of imprisonment exceeding one year. 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 Issue**

Whether the Administrative Judge erred by concluding Applicant's case falls under 10 U.S.C. §986 despite the fact that Applicant was sentenced to three one-year sentences, to run consecutively, instead of being sentenced to a single term of imprisonment exceeding one year. On appeal, there is no challenge to the Administrative Judge's findings that: (a) Applicant had sexual relations with his 15-year-old stepdaughter over a three-year period, beginning in 1979; (b) Applicant had sexual contact with his younger stepdaughter on one occasion during that period; (c) Applicant was indicted on one felony count of statutory rape and three counts of sodomy, all the counts arising from his sexual conduct with his stepdaughters; (d) Applicant pleaded guilty to a misdemeanor charge of contributing to the delinquency of a minor and was sentenced to 90 days of confinement; (e) Applicant was convicted later of one misdemeanor count of indecent exposure and two counts of misdemeanor sexual battery; (f) Applicant was sentenced to 12 months imprisonment on each of the counts, the sentences to run consecutively; (g) the court suspended execution of imprisonment and placed Applicant on supervised probation for four years; and (h) Applicant successfully completed probation and has not been charged with any other crime or off-duty misconduct since then.

The Administrative Judge concluded Applicant's case falls under 10 U.S.C. §986, which provides that 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)]. The Judge concluded that Applicant's case falls under 10 U.S.C. §986(c)(1), which reads: "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." On appeal, Applicant challenges the Judge's conclusion that his case falls under 10 U.S.C. §986. In support of that challenge, Applicant argues the following:

(1) 10 U.S.C. §986(c)(1) refers to "a crime" and "a term," both of which are singular in nature, not plural, and therefore 10 U.S.C. §986(c)(1) does not apply to Applicant because the state court imposed on him three, consecutive, 12-month sentences for three separate crimes, not a single term of imprisonment exceeding one year;

- (2) courts have a variety of reasons for imposing consecutive sentences, rather than concurrent sentences, some of which do not imply anything about the seriousness of the crimes involved or about the defendant;
- (3) in enacting 10 U.S.C. §986, Congress was concerned about convicted felons being granted security clearances, and that concern does not extend to persons convicted only of misdemeanors;
- (4) 10 U.S.C. §986(c)(1) should be interpreted and construed in light of the definition of "felony offense" set forth under 18 U.S.C. §3559, 18 U.S.C. §3581, and §4A1.2 of the U.S. Sentencing Commission Guidelines Manual;
- (5) the two decisions by DOHA Hearing Office Administrative Judges relied on by Department Counsel in support of its argument that 10 U.S.C. §986 applies to Applicant's case are not legally binding precedent and should not be considered persuasive authority;
- (6) the decision in *United States v. Brown*, 333 U.S. 18 (1948), relied on by Department Counsel in support of its argument that 10 U.S.C. §986 applies to Applicant's case, is distinguishable and does not support the Administrative Judge's conclusion about the applicability of 10 U.S.C. §986; and
- (7) a decision of the Colorado Supreme Court, relied on by Department Counsel in support of its argument that 10 U.S.C. §986 applies to Applicant's case, is distinguishable and does not support the Administrative Judge's conclusion about the applicability of 10 U.S.C. §986.

Although Applicant's appeal raises a serious, novel legal issue, Department Counsel elected to not file a reply brief.

As a preliminary matter, Applicant correctly notes that his appeal raises a question of law that the Board has not previously addressed. Because this appeal involves a question of law, the Board's scope of review is plenary and *de novo*.

Applicant's last three arguments can be disposed of quickly. The Administrative Judge in this case correctly noted that the two decisions by Hearing Office Judges cited by Department Counsel during the proceedings below were not legally binding on her. Furthermore, the Board does not rely on them to reach its decision in this case.<sup>(1)</sup> Moreover, the Board concludes the decisions in *United States v. Brown*, 333 U.S. 18 (1948) (involving the imposition of a sentence under the Federal Escape Act) and *Spoto v. Colorado State Department of Corrections*, 883 P.2d 11 (Colo. 1994) (involving parole eligibility under Colorado law) are distinguishable and not particularly helpful in deciding this appeal. The Board will now turn to Applicant's remaining arguments.

Applicant correctly notes that "a crime" and "a term" are singular, not plural, in nature. However, that observation does not have the significance Applicant places on it because statutory construction is not based on interpreting or construing single words or brief phrases in the abstract. According to the Supreme Court:

"Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (citations omitted)

Moreover, in 1 U.S.C. §1, Congress has provided some guidance for construing federal statutes that is pertinent to the construction and interpretation of 10 U.S.C. §986. The following language from 1 U.S.C. §1 is pertinent to this appeal:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise -

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular; . . . ."

Nothing in 10 U.S.C. §986 indicates or suggests that Congress intended its application to turn on whether there was a single crime or multiple crimes covered by a given conviction, or whether there was a single term or multiple terms of imprisonment imposed in connection with a given conviction.<sup>(2)</sup> In this case, Applicant's consecutive sentences of imprisonment were imposed in connection with a given conviction, and the practical effect of the imposition of consecutive sentences resulted in Applicant being sentenced to a term of imprisonment exceeding one year.

The reasons why courts decide to sentence a defendant to concurrent or consecutive terms of imprisonment are irrelevant. Nothing in 10 U.S.C. §986 indicates or suggests that the reasons why a court imposes a particular sentence are relevant to its application.

Applicant correctly notes that (a) there is very little legislative history concerning the enactment of 10 U.S.C. §986,<sup>(3)</sup> and (b) Congress enacted 10 U.S.C. §986 after publication of a newspaper article entitled "How Felons Gain Access to the Nation's Secrets." However, the paucity of legislative history does not warrant relying on a newspaper article to discern Congressional intent, especially when the article was published before any legislation was introduced or enacted.

Applicant's reliance on the statutory definition of a federal felony is misplaced. Congress did not enact 10 U.S.C. §986 with any language referring to a statutory definition of "felony." Nor did Congress use the words "felon" or "felony" in 10 U.S.C. §986. If Congress had wanted to distinguish between felony convictions and misdemeanor convictions, then Congress easily could have done so by wording 10 U.S.C. §986 differently. The application of 10 U.S.C. §986 does not turn on whether an applicant's conviction is labeled or characterized as a "misdemeanor" or a "felony."

For all the foregoing reasons, taken cumulatively, the Board concludes the Administrative Judge did not err by deciding Applicant's case falls under 10 U.S.C. §986. Accordingly, Applicant's conviction falls within the scope of 10 U.S.C. §986. Because the Judge correctly held that 10 U.S.C. §986 applies to Applicant's case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that application of that statute precluded a favorable security clearance decision.

### **Conclusion**

Applicant has failed to demonstrate the Administrative Judge erred by applying 10 U.S.C. §986 to his case. Therefore, the Board affirms the Judge's unfavorable 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Decisions by a Hearing Office Administrative Judge are not legally binding precedent on another Hearing Office Judge or the Board. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Judges).
2. Applicant also argues that construing 10 U.S.C. §986 to cover his situation would allow the Department of Defense to invoke that statute to deny or revoke a security clearance if the aggregate of each and every sentence in an applicant's life exceeds one year. Applicant's case does not present that situation, and the Board's interpretation of 10 U.S.C. §986 does not open the door for that situation.
3. Nothing in the legislative history of 10 U.S.C. §986 sheds any light on the issue raised by this appeal.