

DATE: September 9, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21013

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Clairborne S. Newlin, 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). On February 20, 2004, Department Counsel moved to amend the SOR to include four additional allegations under Guideline J. Administrative Judge James A. Young issued an unfavorable security clearance decision, dated October 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 should have recommended Applicant's case be considered for a waiver under 10 U.S.C. §986; and (2) whether the Board should remand the case to the Administrative Judge with instructions to reopen the record to receive evidence on the question of Applicant's case falls under 10 U.S.C. §986, as amended. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the Board's rulings and instructions.

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

Applicant's case involved the adjudication of his security eligibility in light of 10 U.S.C. §986. After the Administrative Judge issued his decision, an amendment to that statute became law. *See* Section 1062 of Defense Authorization Act for Fiscal Year 2005 (hereinafter "Section 1062").⁽¹⁾ The Board has been informed that a moratorium on the processing of cases involving 10 U.S.C. §986 has been lifted.

Applicant contends that the Administrative Judge should have recommended his case be considered for a waiver under 10 U.S.C. §986. In response, Department Counsel contends that: (1) Section 1062 applies to Applicant's case; (2) Applicant has not demonstrated any error with the Judge's findings and conclusions; and (3) the Board should remand the case to the Judge so the parties can present further evidence because it is not clear whether Applicant served more than one year in jail.

The Board is not aware of any guidance or directive issued by authorized Executive Branch officials regarding implementation of Section 1062. The absence of any such guidance or directive does not change the Board's responsibility to address appeal issues concerning the application of Section 1062. *See* Directive, Additional Procedural Guidance, Item E3.1.32 (Board shall address material issues raised on appeal).

Section 1062 changed: (a) the applicability of 10 U.S.C. §986 to cases involving criminal convictions; and (b) the language in 10 U.S.C. §986 pertaining to waivers. The Board concludes Department Counsel is correct in asserting that Section 1062 applies to Applicant's case. Security clearance cases should be decided in accordance with current law and current DoD policy. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3. If Congress expressly indicates that a statute is to apply retroactively, an appellate tribunal must apply that statute to cases on appeal that fall under the

statute even if the cases on appeal were decided before the statute was enacted. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995). Even if Congress does not specifically indicate that a statute is to apply retroactively, federal courts will apply the statute to pending cases that fall under the statute, with some exceptions. *See Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 263-280 (1994). None of the exceptions discussed in the *Landgraf* decision applies to security clearance adjudications. Therefore, the Board concludes that Section 1062 is applicable to all pending security clearance cases that fall within its scope.

There is no question that Applicant's convictions fell under the coverage of 10 U.S.C. §986 before Section 1062 was enacted. However, because Section 1062 reduces the coverage of that statute in cases involving criminal convictions, the question arises whether Applicant's convictions fall under that statute as amended by Section 1062. Department Counsel is correct that the record evidence is not sufficient to allow a reasoned determination as to whether Applicant's convictions fall under the amended version of 10 U.S.C. §986. Accordingly, a remand is warranted to allow the parties the opportunity to present evidence relevant to a determination of whether Applicant's convictions fall under the amended version of 10 U.S.C. §986.

Conclusion

Pursuant to Directive, Additional Procedural Guidance, Item E3.1.32.2, the Board remands the case to the Administrative Judge with instructions. The Judge should reopen the record and allow the parties to present evidence on whether any of Applicant's convictions resulted in him being "incarcerated as a result of that sentence for not less than one year." After receiving such evidence, the Judge should issue a new decision that complies with Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Separate Opinion of Administrative Judge Michael Y. Ra'anan

I agree with the majority's ultimate resolution of this case although I differ on some of the majority's language in laying out the context in which the case is decided. Also, I do not believe that this case involves retroactive application of a statute. Rather, I understand our task to involve the current application of a statute which was designed to deny access to classified information to certain categories of applicants (drug users, felons, the mentally incompetent, and the dishonorably discharged).

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Division A, Section 1062, 118

Statutes at Large 1811, 2056 (2004).