

DATE: September 9, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-29715

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Joseph L. Johnson, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 25, 2004, 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 Robert Robinson Gales issued an unfavorable security clearance decision, dated November 30, 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's application of the 2004 amendment to 10 U.S.C. §986 in this case was an impermissible *ex post facto* act; and (2) whether the Board should remand the case to the Judge to reconsider Applicant's case and apply pertinent Criminal Conduct mitigating conditions. 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<sup>(1)</sup>

Applicant's case involved the adjudication of his security eligibility in light of 10 U.S.C. §986. After the hearing was held in Applicant's case, but before 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").<sup>(2)</sup> The Board has been informed that a moratorium on the processing of cases involving 10 U.S.C. §986 has been lifted.

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).

1. Whether the Administrative Judge's application of the 2004 amendment to 10 U.S.C. §986 in this case was an impermissible *ex post facto* act. Applicant challenges the Administrative Judge's application of the 2004 amendment to 10 U.S.C. §986 ("Section 1062") in this case based on the following chain of arguments:

(a) Section 1062 can be interpreted as meaning either: (i) an applicant convicted of a crime and incarcerated for more than one year in jail is expressly precluded from being granted a security clearance, or (ii) any applicant convicted of a felony but serving less than one year in jail is not subject to Guideline J (Criminal Conduct) at all;

(b) Section 1062 should be interpreted as having the meaning set forth in (a)(ii) because the amended version 10 U.S.C. §986 does not apply unless an applicant is convicted, sentenced to at least one year of imprisonment AND is actually incarcerated for not less than one year;

(c) Nothing in 10 U.S.C. 986 before or after the enactment of Section 1062 specifically precludes the application of the

Criminal Conduct mitigating conditions;

(d) the Administrative Judge erred by concluding the Criminal Conduct mitigating conditions do not apply in Applicant's case merely because he served more than one year in jail;

(e) because Section 1062 was enacted after Applicant's hearing and before the Judge issued his decision, application of Section 1062 in this case would be "a prohibited *ex post facto* application"; and

(f) the decision below indicates the Judge had concluded Applicant had presented sufficient evidence of mitigating conditions to warrant a favorable security clearance decision but for Section 1062, and Applicant should not be denied a favorable decision based on an *ex post facto* application of Section 1062.

For the reasons that follow, the Board concludes Applicant's claim of error is not persuasive.

First, Guideline J (Criminal Conduct) existed before 10 U.S.C. §986 was enacted. Nothing in 10 U.S.C. §986 -- before or after enactment of Section 1062 -- indicates or suggests Congress intended to provide a "safe harbor" from Guideline J in cases that do not fall under that statute.

Second, Section 1062 reduced the coverage of 10 U.S.C. §986 in cases involving a criminal conviction by limiting its coverage to criminal convictions that result in incarceration of not less than one year. However, nothing in Section 1062 changed the effect that 10 U.S.C. §986 had on applicability of the Criminal Conduct mitigating conditions in DOHA proceedings. Prior to the enactment of Section 1062, an applicant with a criminal conviction that fell under 10 U.S.C. §986 could not receive a favorable decision from an Administrative Judge or the Board based on application of the Criminal Conduct mitigating conditions.<sup>(3)</sup> Enactment of Section 1062 does not change that result in any way.

Third, the *Ex Post Facto* clause of the U.S. Constitution does not preclude the application of 10 U.S.C. 986 in DOHA proceedings.<sup>(4)</sup>

Fourth, apart from inapplicability of the *Ex Post Facto* clause of the U.S. Constitution to DOHA proceedings, security clearance decisions must be based on current law and current DoD policy.<sup>(5)</sup> 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 *Landsgraf* decision applies to security clearance adjudications made by DOHA. Therefore, the Board concludes that Section 1062 is applicable to all pending security clearance cases that fall within its scope.

For all these reasons, taken together, the Board concludes Applicant has failed to demonstrate the Administrative Judge erred by deciding that application of 10 U.S.C. §986 precluded a favorable security clearance decision in his case.

2. Whether the Board should remand the case to the Judge to reconsider Applicant's case and apply pertinent Criminal Conduct mitigating conditions. Applicant asks the Board to reverse the Administrative Judge's unfavorable decision. For the reasons stated earlier in this decision, Applicant is not entitled to such relief. In the alternative, Applicant asks the Board to remand the case to the Judge, with instructions to reconsider his case in light of the Criminal Conduct mitigating conditions. As discussed earlier in this decision, even if the Judge were to conclude that application of the Criminal Conduct mitigating conditions would be sufficient to warrant a favorable security clearance decision, the Judge could not issue a favorable security clearance decision because of the applicability of 10 U.S.C. §986 to Applicant's case. Therefore, a remand would be unwarranted.

### **Conclusion**

The Board affirms the Administrative Judge's unfavorable security clearance decision because Applicant has failed to demonstrate error below.

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. Department Counsel did not submit a reply brief in this case.
2. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Division A, Section 1062, 118 Statutes at Large 1811, 2056 (2004).
3. *See, e.g.*, ISCR Case No. 01-17917 (May 8, 2003) at pp. 4-5. *See also* ISCR Case No. 02-06303 (August 7, 2003) at p. 3 (application of the general factors of Directive, Section 6.3 do not take a case outside the scope of 10 U.S.C. §986).
4. *See* ISCR Case No. 03-09412 (October 26, 2004) at pp. 3-4 (quoting passage from earlier Board decision that discusses federal case law).
5. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3.