

DATE: September 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33144

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 4, 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 Henry Lazzaro issued an unfavorable security clearance decision dated April 13, 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 Department of Defense memorandum implementing 10 U.S.C. §986 exceeds the mandate of that statute; (2) whether the DOHA Operating Instruction concerning cases involving 10 U.S.C. §986 exceeds the mandate of that statute, and is contrary to the Department of Defense memorandum implementing that statute; (3) whether the Department of Defense memorandum implementing 10 U.S.C. §986 and the DOHA Operating Instruction concerning cases involving that statute are arbitrary and capricious; (4) whether the Administrative Judge failed to properly apply the process required by the Department of Defense memorandum implementing 10 U.S.C. §986; (5) whether the Administrative Judge erred by adjudicating Applicant's case under Guideline J when there was no adverse information concerning Applicant since a favorable security clearance adjudication in 1990 or 1991; (6) whether the Administrative Judge was precluded from adjudicating Applicant's case because of Sections 4-100 and 4-102 of Department of Defense Regulation 5200.2-R; (7) whether the Administrative Judge's analysis of Applicant's case under Guideline J was arbitrary, capricious, or contrary to law; and (8) whether the Board should recommend further consideration of Applicant's case for a meritorious 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 Applicant's case be considered further for a meritorious waiver.

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

On appeal, Applicant does not dispute the following findings by the Administrative Judge: (a) Applicant was arrested in August 1986 and later convicted of conspiracy to possess cocaine and possession with intent to distribute cocaine; (b) Applicant was sentenced to concurrent, three-year terms of imprisonment; (c) Applicant served more than two years confinement before being paroled to a halfway house in May 1989; (d) Applicant was released from the halfway house after approximately four months; and (e) Applicant has not been charged with any criminal offense (other than minor traffic violations) since being released from confinement in 1989. However, Applicant does raise several challenges to the application of 10 U.S.C. §986 to his case and the Administrative Judge's analysis of the case under Guideline J (Criminal Conduct).

1. Whether the Department of Defense memorandum implementing 10 U.S.C. §986 exceeds the mandate of that statute. 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)]. In this case, the Administrative Judge concluded that Applicant's 1987 conviction falls under one of those four statutory categories

(i.e., 10 U.S.C. §986(c)(1)).⁽¹⁾

To implement 10 U.S.C. §986, the Deputy Secretary of Defense issued a memorandum, dated June 7, 2001 ("Deputy Secretary of Defense memorandum"). Applicant contends the Deputy Secretary of Defense Memorandum exceeds the mandate of 10 U.S.C. §986 and, therefore, violates Applicant's rights under the statute. Applicant acknowledges that the Board has held that it does not have authority to review or pass judgment on the Deputy Secretary of Defense memorandum, but asks the Board to reconsider those prior rulings, arguing that (a) the Board has plenary authority when ruling on issues of law; and (b) "[t]o look away when the Constitution or the statutes of Congress are violated by administrative regulation is an abdication of the Appeal Board's plenary responsibility to uphold the law of the land." Applicant's arguments are not well founded.

Applicant is correct in noting that the Board has plenary authority when ruling on issues of law. However, Applicant errs by arguing about the scope of that review authority without regard to the legal framework within which the Board operates. The Board does not have jurisdiction and authority in a vacuum. The Board has jurisdiction and authority by virtue of Directive, Additional Procedural Guidance, Items E3.1.28 through E3.1.35. Those provisions plainly show that the jurisdiction and authority of the Board are limited to reviewing security clearance adjudications made under the Directive, and do not including reviewing actions by the Deputy Secretary of Defense. Although the Board has plenary authority when ruling on issues of law that fall *within its jurisdiction*, that review authority does *not* constitute an independent source of jurisdiction and does not expand the Board's jurisdiction beyond the provisions of the Directive.

Applicant's reference to the obligation of Board members to adhere to the U.S. Constitution and other federal law adds nothing substantive to his argument. As federal officials, we have taken an oath of office that requires us to uphold and defend the U.S. Constitution and faithfully discharge our duties.⁽²⁾

However, the oath of office does not confer jurisdiction on us beyond that conferred by the Directive. Followed to its logical conclusion, Applicant's argument would provide a rationale for the Board to assert jurisdiction to review the constitutionality of federal statutes, adjudicate an applicant's rights under various provisions of the U.S. Code, or decide the lawfulness of Presidential directives and decisions by the Secretary of Defense (and other DoD officials) whenever an appealing party raised a claim that implicates those matters. We will not accept an argument that would result in such an untenable situation. As federal officials, we adhere to the oath of office not only by carrying out duties under our jurisdiction in a lawful manner, but also by recognizing the limits of our authority and not acting outside those limits.⁽³⁾

In short, the Board has no authority to adjudicate Applicant's claim that the Deputy Secretary of Defense memorandum exceeds the mandate of 10 U.S.C. §986.

2. Whether the DOHA Operating Instruction concerning cases involving 10 U.S.C. §986 exceeds the mandate of that statute, and is contrary to the Department of Defense memorandum implementing that statute. To implement the Deputy Secretary of Defense memorandum, the Director, DOHA issued an Operating Instruction, dated July 10, 2001. Applicant contends the Operating Instruction exceeds the mandate of 10 U.S.C. §986 and is contrary to the Deputy Secretary of Defense memorandum implementing that statute.

As discussed earlier in this decision, the Board's jurisdiction is limited by the provisions of the Directive. Nothing in the Directive authorizes the Board to review the actions of the Director, DOHA. And, for the same reasons discussed earlier in this decision, neither the Board's review authority nor the oath of office taken by its members provides jurisdiction to review the actions of the Director, DOHA. Accordingly, the Board has no authority to adjudicate Applicant's claim that the DOHA Operating Instruction exceeds the mandate of 10 U.S.C. §986 and is contrary to the Deputy Secretary of Defense memorandum implementing that statute.⁽⁴⁾

3. Whether the Department of Defense memorandum implementing 10 U.S.C. §986 and the DOHA Operating Instruction concerning cases involving that statute are arbitrary and capricious. Applicant contends the Deputy Secretary of Defense memorandum implementing 10 U.S.C. §986 and the DOHA Operating Instruction concerning cases involving that statute are arbitrary and capricious because neither one sets standards for judging whether to recommend a waiver under that statute.

For the reasons stated in addressing Applicant's first issue, the Board will not presume to review and pass judgment on the legal sufficiency of the Deputy Secretary of Defense memorandum implementing 10 U.S.C. §986. And, for the reasons stated in addressing Applicant's second issue, the Board will not presume to review and pass judgment on the legal sufficiency of the DOHA Operating Instruction concerning cases involving 10 U.S.C. §986.⁽⁵⁾

4. Whether the Administrative Judge failed to properly apply the process required by the Department of Defense memorandum implementing 10 U.S.C. §986. Applicant contends, in the alternative, that even if the Department of Defense memorandum implementing 10 U.S.C. §986 is legally permissible, the Administrative Judge failed to properly apply the process required by that memorandum. Specifically, Applicant argues: (a) the Judge erred by failing to decide whether he should have received a favorable security clearance decision "without consideration of the statute"; and (b) without such a determination by the Judge, Applicant will be prejudiced in the future "if and when [10 U.S.C. §986] is repealed."

Applicant's first argument is not frivolous, but it is not persuasive. In reviewing an Administrative Judge's decision, the Board considers the decision in its entirety and does not limit itself to reading individual sentences or passages in isolation. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 6 n.4. Reading the decision below in its entirety, the Board does not agree with Applicant's interpretation of the Judge's decision. Reading the Judge's decision in its entirety, the Board construes it as holding that, but for the application of 10 U.S.C. §986, Applicant's past criminal conduct was mitigated under Guideline J.

Applicant's second argument lacks merit. It is untenable for Applicant to make a claim of prejudice based on an assumption that a federal statute will be repealed in the future. Applicant is entitled to have his case adjudicated under existing law, not on speculation as to how the law may be different in the future. Moreover, even if there were any rational basis to conclude that the law would change in a particular way in the foreseeable future, Applicant's legal rights today are not determined or measured against any future change in the law. A claim of prejudice to a person's rights must be predicated on the evaluation of the facts and circumstances of their situation in light of existing law, not speculation about whether or how possible changes in the law might have retroactive applicability to their current situation.

5. Whether the Administrative Judge erred by adjudicating Applicant's case under Guideline J when there was no adverse information concerning Applicant since a favorable security clearance adjudication in 1990 or 1991. Applicant contends that the Administrative Judge should not have adjudicated his case under Guideline J because there is no adverse information concerning Applicant since he received a favorable security clearance adjudication in 1990 or 1991.⁽⁶⁾ Applicant argues that the Judge's unfavorable decision: (a) "defies the law, logic and experience"; (b) is contrary to the concept of repose that underlies the legal doctrines of *res judicata*, judicial estoppel, collateral estoppel, and equitable estoppel;⁽⁷⁾ (c) is inconsistent with a recent federal district court decision in an Army security clearance case having similar facts; and (d) improperly fails to apply DoD policy and standards applicable to Guideline J cases. For the reasons that follow, the Board concludes Applicant's arguments lack merit.

The doctrine of judicial estoppel⁽⁸⁾ and the doctrine of equitable estoppel⁽⁹⁾ are not applicable to Applicant's situation and provide no legal support for his appeal arguments. Moreover, the legal doctrines of *res judicata* and collateral estoppel do not preclude the application of a new federal statute.⁽¹⁰⁾ Applicant cites no legal authority to support his premise that legal doctrines developed by courts to regulate issue preclusion in the context of adjudications can be invoked to negate the force and effect of a federal statute enacted by Congress. An individual's right to expect repose in adjudications does not confer any right to, or reasonable expectation in, being exempted from the application of a new federal statute.

The federal district court decision cited by Applicant is distinguishable on its facts from Applicant's case. Moreover, to the extent that the federal court decision cited by Applicant is based on the federal district court's exercise of judicial authority under Article III of the U.S. Constitution, the Board cannot and will not presume to exercise such authority in these proceedings.

Applicant acknowledges that 10 U.S.C. §986 is an intervening change in law, but then appears to argue that the

Administrative Judge should have adjudicated his case under DoD policy and standards that predated the enactment of that statute (Brief at p. 41). Applicant's argument is not persuasive for two reasons. First, Applicant cites no legal authority for the proposition that he has any vested right or reasonable expectation in the continued application of DoD policy and standards without regard to an intervening change in federal law.⁽¹¹⁾ Second, the Deputy Secretary of Defense memorandum implementing 10 U.S.C. §986 constitutes an explicit modification of the DoD policy and standards applicable in cases covered by that statute.

6. Whether the Administrative Judge was precluded from adjudicating Applicant's case because of Sections 4-100 and 4-102 of Department of Defense Regulation 5200.2-R. Applicant also contends the Administrative Judge was barred, as a matter of law, from adjudicating his case because of Sections 4-100 and 4-102 of Department of Defense Regulation 5200.2-R. Applicant argues that under those two provisions of Department of Defense Regulation 5200.2-R the only question the Judge should have considered was whether, based on the previously adjudicated facts, whether to recommend further consideration of Applicant's case for a waiver under 10 U.S.C. §986(d). Department Counsel argues that those two provisions do not apply to Applicant's situation.

During the proceedings below, Applicant did not raise the issue of whether his case is covered by Sections 4-100 and 4-102 of Department of Defense Regulation 5200.2-R. Furthermore, Department Counsel's reply brief identifies other provisions of Department of Defense Regulation 5200.2-R that could be pertinent to a determination of whether Applicant's case is covered by Sections 4-100 and 4-102, but the applicability *vel non* of those provisions turns on factual determinations for which no record evidence was presented. Since Applicant did not raise the issue until appeal, Applicant cannot fairly complain that the Administrative Judge did not consider it. Moreover, Applicant cannot fairly invoke Sections 4-100 and 4-102 in isolation from other pertinent provisions of Department of Defense Regulation 5200.2-R and without developing or trying to develop a factual record (during the proceedings below) that would allow a reasoned decision by the Judge as to whether Applicant's case is covered by Sections 4-100 and 4-102. Furthermore, Applicant's argument ignores the fact that Sections 4-100 and 4-102 appear in a portion of DoD Regulation 5200.2-R entitled "Reciprocal Acceptance of Prior Investigations and Personnel Security Determinations." Applicant has not identified any record evidence that indicates or suggests his situation raises a colorable claim of reciprocity. *Compare* ISCR Case No. 99-0454 (October 17, 2000) at pp. 3-4 (discussing concept of "reciprocity" under NISPOM).

Applicant's argument about Section 4-100 and Section 4-102 also is inconsistent with his argument (Brief at pp. 38-39) that the Administrative Judge prejudiced him by failing to decide this case without consideration of 10 U.S.C. §986. Applicant cannot have it both ways. Applicant cannot fairly claim both (a) the Judge erred by not deciding his case under Guideline J without consideration of 10 U.S.C. §986; and (b) the Judge erred by deciding his case under Guideline J. Moreover, Applicant took the position during the proceedings below that the Judge should analyze his case under Guideline J and conclude he satisfied the mitigating conditions under that Guideline. *See* Hearing Transcript at pp. 22, 157-159; Applicant's Hearing Memorandum at pp. 6-7. Having asked the Judge to analyze his case under Guideline J and apply the mitigating conditions under that Guideline, it is not reasonable for Applicant to claim now that the Judge erred by adjudicating his case under Guideline J.

7. Whether the Administrative Judge's analysis of Applicant's case under Guideline J was arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's analysis of his case under Guideline J is arbitrary, capricious, or contrary to law because: (a) the Judge failed to consider the earlier favorable adjudication of Applicant's security clearance; (b) the Judge's decision is contrary to the provisions of Executive Order 12968, the Directive, and other applicable federal law; (c) the Judge should have concluded Applicant's past criminal conduct was mitigated under Guideline J; (d) the Judge's decision does not reflect application of the "whole person" concept as required by the Directive; and (e) the Judge's decision does not reflect a common sense determination as required by the Directive. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

(a) A favorable security clearance adjudication in 1990 or 1991 does not give Applicant any right to have the Administrative Judge adjudicate his case without regard to an intervening change in federal law (*i.e.*, 10 U.S.C. §986).

(b) There is no presumption of error below and the appealing party must raise claims of error with specificity. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why claims of error must be raised with

specificity). Applicant's conclusory claim that the Administrative Judge's decision is contrary to the provisions of Executive Order 12968, the Directive, and other applicable federal law is too general and vague to discern what claim of error Applicant is raising. The Board will not speculate or guess at what provisions of law Applicant believes the Judge did not comply with. To the extent Applicant's brief makes other, more specific claims of error, they have been addressed elsewhere in this decision.

(c) As discussed earlier in this decision, the Board construes the Administrative Judge's decision as holding that, but for the application of 10 U.S.C. §986, Applicant's past criminal conduct was mitigated under Guideline J. Accordingly, the Board fails to discern any basis for Applicant's claim that the Judge erred by not concluding Applicant's past criminal conduct was mitigated under Guideline J.

(d)/(e) The Board does not find persuasive Applicant's arguments concerning the Directive's requirements that an Administrative Judge must evaluate an applicant's security eligibility in terms of the "whole person" concept and render an overall common sense determination. A reading of the decision below persuades the Board that the Administrative Judge discussed the overall facts and circumstances of Applicant's conduct and circumstances in terms of the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.

8. Whether the Board should recommend further consideration of Applicant's case for a meritorious waiver under 10 U.S.C. §986(d). Applicant asks the Board to reverse the Administrative Judge's decision and recommend that his case be considered further for a waiver under 10 U.S.C. §986.

Given the applicability of 10 U.S.C. §986 to Applicant's case, the Board cannot reverse the Administrative Judge's unfavorable decision. A reversal would be in violation of 10 U.S.C. §986 and would usurp the authority of the Secretary of Defense under that statute.

The Deputy Secretary of Defense memorandum implementing the provisions of 10 U.S.C. §986 states: "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 Deputy Secretary of Defense memorandum, the Director, DOHA is the Director of the Component Central Adjudication Facility for industrial security clearance cases.

To implement the Deputy Secretary of Defense memorandum, the Director, DOHA issued an operating instruction (dated July 10, 2001) which states 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.)

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.

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.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance decision. Furthermore, the Board does not recommend this case be considered further for a waiver under 10 U.S.C. §986(d).

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. 10 U.S.C. §986(c)(1) 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."

2. 5 U.S.C. §3331 states: "An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true

faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.' This section does not affect other oaths required by law."

3. Applicant's brief refers to the need to raise this issue to preserve the matter for possible judicial review. Whether Applicant needs to raise the issue before the Board in order to exhaust administrative remedies as a condition precedent to a federal lawsuit is a matter for a federal court, not the Board, to decide.

4. The Board notes the U.S. Court of Appeals for the Fourth Circuit recently affirmed a decision by the U.S. District Court for the Eastern District of Virginia which held, in part, that the DOHA Operating Instruction did not exceed the mandate of 10 U.S.C. §986. *Nickelson v. United States*, 284 F. Supp. 2d 387, 392-393 (E.D. Va. 2003), *aff'd for reasons stated by lower court*, 2004 WL 1700932 (4th Cir., July 30, 2004).

5. The Board notes the U.S. Court of Appeals for the Fourth Circuit recently affirmed a decision by the U.S. District Court for the Eastern District of Virginia which held, in part, that the DOHA Operating Instruction is not unlawful because it does not establish any criteria for the discretionary decision whether to recommend a case be forwarded for consideration of a waiver under 10 U.S.C. §986. *Nickelson v. United States*, 284 F. Supp. 2d 387, 391-392 (E.D. Va. 2003), *aff'd for reasons stated by lower court*, 2004 WL 1700932 (4th Cir., July 30, 2004).

6. The record below contains some references to Applicant receiving a security clearance in 1990 and other references indicating the year was 1991. For purposes of this appeal, it does not matter whether Applicant was granted a security clearance in 1990 or 1991.

7. Applicant's brief also refers to the constitutional prohibitions against *ex post facto* law and double jeopardy in criminal proceedings. Neither prohibition is relevant to these proceedings. Security clearance adjudications are not criminal prosecutions and, therefore, do not implicate a criminal defendant's rights under the Fifth and Sixth Amendments to the U.S. Constitution. *Chesna v. U.S. Department of Defense*, 850 F. Supp. 110, 119 (D. Conn. 1994). *See also* DISCR Case No. 94-0295 (December 30, 1994) at p. 4 (discussing federal cases). Therefore, the prohibition against double jeopardy is not applicable in these proceedings. Furthermore, a review of federal case law on the *ex post facto* doctrine shows that it is not applicable to security clearance adjudications. *See* ISCR Case No. 99-0424 (February 8, 2001) at p. 7 (discussing federal cases).

8. *See, e.g., Black's Law Dictionary* (7th edition, 1999) at p. 571 (definition of "judicial estoppel").

9. *See, e.g., Black's Law Dictionary* (7th edition, 1999) at p. 571 (definition of "equitable estoppel").

10. Indeed, the federal court decisions cited in ISCR Case No. 01-19823 (December 3, 2003) at p. 6 n.6 make clear that an intervening change in the law is a well-recognized exception to the doctrines of *res judicata* and collateral estoppel.

11. Applicant's argument is also flawed to the extent it overlooks the simple fact that DoD policy and standards pertaining to the adjudication of security clearance cases have been revised and changed since he received a favorable security clearance adjudication in 1990 or 1991 (*i.e.*, the current edition of the Directive was promulgated in January 1992 and revised as late as April 1999). Applicant's argument fails to articulate a rational basis for reconciling (a) his implicit acceptance of the lawfulness of applying to his case post-1990 or post-1991 changes in DoD policy and standards (as reflected by the current edition of the Directive), with (b) his insistence that it would be unlawful to apply 10 U.S.C. §986 to his case.