

DATE: May 24, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-02181

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

#### **FOR APPLICANT**

Joseph L. Johnson, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 26, 2003, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 28, 2005, after the hearing, Administrative Judge Philip S. Howe denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge erred in his application of 10 U.S.C. § 986(d); whether the Administrative Judge erred by not making an official recommendation as to whether Applicant's case should be considered for waiver under the provisions of 10 U.S.C. § 986(d).

The Administrative Judge made the following findings of fact that are relevant to the issue: Applicant is a 56 years old, married, long-distance truck driver who transports government and military cargo. She has one daughter, three grandchildren, and two great-grandchildren. Applicant has held a security clearance for 14 years with no violations of security requirements and procedures. She is a successful business person, with excellent character and work performance references.

Applicant was arrested in 1977 for burglary of a residence. She pleaded guilty to the charge on September 17, 1977, and was sentenced to five years in the state penitentiary. She served 10 months, plus three months awaiting trial in the county jail. Applicant has not been in any trouble with the law since the aforesaid event. She was arrested because she was a friend of the two co-defendants who committed the burglary and went along with them in the car. Applicant did not enter the house from which items were stolen, but was in the car when those items were put there and from which the items were later sold to other persons. Her co-defendants did not receive jail sentences.

After release from prison, Applicant was on parole for five years. She worked various jobs, worked towards a general education degree (GED), attended Alcoholics Anonymous for six months, and has abstained from using drugs or alcohol for many years. Applicant has received a pardon from the Governor of the state.

The Administrative Judge concluded that Guideline J Disqualifying Conditions 1-(1) and 2-(2) applied, but that Guideline

J Mitigating Conditions 1, ~~(3)~~ 2-~~(4)~~ and 6-~~(5)~~ outweighed the security significance of Applicant's disqualifying conduct. Nevertheless, the Judge also concluded that the disqualifications in 10 U.S.C. § 986 prohibited the continuation of a security clearance for Applicant. Under that provision, as amended in 2004, ~~(6)~~ the Department of Defense is prohibited from granting or continuing a security clearance to an applicant who was convicted in a U.S. court of a crime, sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year.

Applicant argues that the Administrative Judge's unfavorable clearance decision should be reversed because she did not actually serve more than one year in prison for the offense after the date on which she was sentenced and because the favorable application of the Guideline J mitigating conditions was sufficient to overcome the provisions of 10 U.S.C. § 986. The Board does not find Applicant's arguments persuasive.

Applicant's own evidence indicates that, although she was sentenced on September 13, 1977, and subsequently served 10 months from that date before being paroled, the sentence ran from June 30, 1977, giving her credit for the three months she had been incarcerated while awaiting trial. Applicant's Exhibit A ([State] Department of Corrections Social and Criminal History). Thus, the Administrative Judge correctly concluded that Applicant had actually served a sentence of not less than one year for the offense--a circumstance which brought Applicant's case within the prohibitions of 10 U.S.C. § 986. The Judge also correctly concluded that the favorable application of the Guideline J mitigating conditions does not overcome the prohibitions of 10 U.S.C. § 986. *See, e.g.*, ISCR Case No. 03-00112 at 7-8 (App. Bd. Aug. 10, 2004).

Alternatively, Applicant argues that the Administrative Judge should have made a formal recommendation for waiver of the application of 10 U.S.C. § 986 to Applicant. The Judge stated he "would have recommended further consideration of the case for a waiver of 10 U.S.C. § 986," but he was not at liberty to disregard the Appeal Board's holding that Administrative Judge's have no authority at the present time to make any recommendation, favorable or unfavorable, concerning waiver under section 986(d). Based on our recent discussion of this issue in ISCR Case No. 01-20970 at 3 (App. Bd. Apr. 18, 2006), the Board concludes that the Judge does not have authority at this time to make a formal recommendation of waiver. Accordingly, the Board concludes that Applicant has not demonstrated error.

#### **Order**

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: ChristineM. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive ¶ E2.A10.1.2.1 ("Allegations or admissions of criminal conduct, regardless of whether the person was formally charged").
2. Directive ¶ E2.A10.1.2.2 ("A single serious crime or multiple lesser offenses").
3. Directive ¶ E2.A10.1.3.1 ("The criminal behavior was not recent").

4. Directive ¶ E2.A10.1.3.2 ("The crime was an isolated incident").

5. Directive ¶ E2.A10.1.3.6 ("There is clear evidence of successful rehabilitation").

6. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, § 1062, 118 Stat. 1811, 2056 (2004).