DATE: September 9, 2005

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-05804

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Louis R. Moffa, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 18, 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 James A. Young issued an unfavorable security clearance decision, dated November 16, 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 erred by recommending Applicant's case not be considered for a waiver under 10 U.S.C. §986; and (2) whether Applicant is entitled to a stay of an unfavorable security clearance decision pending issuance of Presidential guidance under the 2000 amendment to 10 U.S.C. §986. 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

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").[(1)] 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 erred by recommending Applicant's case not be considered for a waiver under 10 U.S.C. §986. The Administrative Judge concluded Applicant's 1974 conviction for drug-related offenses falls under 10 U.S.C. §986, as amended by Section 1062, because Applicant served 32 months in jail. The Judge also recommended Applicant's case be considered further for a waiver under 10 U.S.C. §986.

On appeal, Applicant does not challenge the Administrative Judge's conclusion that his case falls under 10 U.S.C. §986 based on his 1974 conviction, which resulted in his incarceration for 32 months. However, Applicant contends: (a) the Judge erred by making a waiver recommendation because Section 1062 states that a waiver decision "may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President"; and (b) the Judge's reliance on legal authority that was superseded by Section 1062 deprived Applicant of the benefit of having his case under standards and procedures promulgated under Section 1062. Department Counsel's reply brief does not take a position on whether the Judge should have adjudicated Applicant's case under 10 U.S.C. §986 as it existed prior to the enactment of Section 1062 or under that statute as amended by

Section 1062. Rather, Department Counsel's reply brief takes the position that: (i) Applicant's 1974 conviction precludes a favorable security clearance decision under 10 U.S.C. §986 as it existed prior to the enactment of Section 1062, and as it exists after Section 1062 amended it; and (ii) even if the Board were to conclude that the Judge erred by making a waver recommendation after the enactment of Section 1062, such an error would be harmless because Applicant received the benefit of a favorable waiver recommendation from the Judge based on the application of legal authority that pre-dated the enactment of Section 1062.

Security clearance decisions must be based on current law and current DoD policy.[(2)] 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. Therefore, the Board concludes that Section 1062 is applicable to all pending security clearance cases that fall within its scope. Because Applicant's case was pending at the time that Section 1062 was enacted, the Judge should have adjudicated Applicant's case under the provisions of Section 1062.

The Board finds persuasive Applicant's contention that the Administrative Judge had no authority to make a waiver recommendation. According to Section 1062, any waiver decision "may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." Without such standards and procedures, the Judge had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. §986.

2. Whether Applicant is entitled to a stay of an unfavorable security clearance decision pending issuance of Presidential guidance under the 2000 amendment to 10 U.S.C. §986. Applicant contends the Administrative Judge's error entitles him to a stay of the Judge's unfavorable security clearance decision pending issuance of standards and procedures to implement Section 1062.[(3)] Applicant is not entitled to such relief.

Under the Directive, the Board is authorized to review an Administrative Judge's decision for factual or legal error, but it does not have authority to grant a stay of an Administrative Judge's decision. Nothing in 10 U.S.C. §986, as amended by Section 1062, grants any such authority to the Board. Furthermore, Applicant's request for a stay is premised on speculation about what rights or privileges he might have under whatever standards and procedures are promulgated (at some future date) to implement Section1062. Applicant is not entitled to receive relief predicated on speculation about how he might be affected by standards and procedures that have not yet been promulgated.[(4)]

Conclusion

Applicant has demonstrated legal error by the Administrative Judge, but has not demonstrated that such legal error entitles him to a stay of the Judge's decision. Therefore, the Judge's unfavorable security clearance decision stands.

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).

2. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3.

3. Applicant's appeal brief also asks for a new hearing, but does not articulate any argument or reason in support of his claim for such relief. Absent a showing that Applicant was denied a reasonable opportunity to prepare for the hearing, or was denied a reasonable opportunity to present evidence on his own behalf, Applicant is not entitled to a new hearing. *See, e.g.*, ISCR Case No. 02-30603 (February 25, 2004) at p. 3. Applicant has not made any such showing in this case.

4. *See, e.g.*, ISCR Case No. 02-33144 (September 7, 2004) at p. 6.