

DATE: October 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09412

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Ronald C. Sykstus, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 23, 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) and Guideline D (Sexual Behavior). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated July 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 basing his unfavorable decision on 10 U.S.C. §986 because that statute "constitutes an unconstitutional ex post facto law"; and (2) if the Board concludes that 10 U.S.C. §986 is not an unconstitutional law, whether the Board should recommend that Applicant's case be considered further for a waiver under 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

On appeal, Applicant does not challenge the Administrative Judge's findings that: (a) he was convicted of four counts of indecent behavior with two juveniles (one age 7, the other age 9) in 1985; (b) he was sentenced to serve from two years to two-and-a-half years in jail on each of those counts; and (c) he served more than one year in jail as a result of his conviction.

Attached to Applicant's appeal brief are multiple documents that seek to supplement the record evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the proceedings below persuades the Board that Applicant had a reasonable opportunity to present evidence for consideration in his case.

1. Whether the Administrative Judge erred by basing his unfavorable decision on 10 U.S.C. §986 because that statute "constitutes an unconstitutional ex post facto law". Applicant contends the Administrative Judge should not have based his unfavorable security clearance decision on application of 10 U.S.C. §986 because: (a) he was granted a security clearance in 1992; (b) no new derogatory information was developed in connection with the renewal of Applicant's security clearance; and (c) application of 10 U.S.C. §986 to Applicant would be an *ex post facto* punishment in violation of Article I, Section 9, Clause 3 and Article I, Section 10, Clause 1 of the U.S. Constitution.

On its face, Article I, Section 10, Clause 1 of the U.S. Constitution applies to the States, not the federal government. Therefore, Applicant cannot reasonably rely on that provision. Article I, Section 9, Clause 3 of the U.S. Constitution does apply to laws enacted by Congress. However, Applicant's citation of that provision does not persuade the Board that the Administrative Judge erred by applying 10 U.S.C. §986. The Board has stated the following about the applicability of the *Ex Post Facto* Clause to these proceedings:

"The *Ex Post Facto* Clause is applicable only to criminal or penal legislation. *Landsgraf v. USI Film Products*, 511 U.S. 244, 266 n.19 (1994). The *Ex Post Facto* Clause does not apply to civil or regulatory law. *United States v. O'Neal*, 180 F.3d 115, 122 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 433 (1999). Nor does the *Ex Post Facto* Clause apply to legislation imposing civil disabilities. *Karpi v. Commissioner of Internal Revenue*, 909 F.2d 784, 787 (4th Cir. 1990). Moreover, the *Ex Post Facto* Clause applies only to the legislative branch, not the other branches of the federal government. *Prater v. U.S. Parole Commission*, 802 F.2d 948, 951-52 (7th Cir. 1986). Accordingly, the *Ex Post Facto* Clause does not apply to Executive Branch civil decisions. For example, the *Ex Post Facto* Clause does not apply to deportation proceedings, which are purely civil actions to determine eligibility to remain in the United States, not to punish. *Scheidemann v. Immigration and Naturalization Service*, 83 F.3d 1517, 1520 n.4 (3d Cir. 1996); *Hamama v. Immigration and Naturalization Service*, 78 F.3d 233, 237 (6th Cir. 1996). The *Ex Post Facto* Clause does not apply to an OPM regulation that renders certain people ineligible for certain federal jobs because it is civil, not criminal, in nature. *Dehainaut v. Pena*, 32 F.3d 1066, 1073 (7th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). *See also Korte v. Office of Personnel Management*, 797 F.2d 967, 972 (Fed. Cir. 1986). And, the mere denial of a noncontractual government benefit without a showing of penal intent does not violate the *Ex Post Facto* Clause. *Peeler v. Heckler*, 781 F.2d 649, 651 (8th Cir. 1986).

"Security clearance adjudications are civil, not criminal, proceedings by Executive Branch officials and employees. Furthermore, security clearance decisions involve the grant or denial of a noncontractual government privilege. *See Department of Navy v. Egan*, 484 U.S. 518, 528 (1988)('It should be obvious that no one has a "right" to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official.'). Accordingly, the *Ex Post Facto* Clause has no application in these proceedings. Applicant's reliance on the *Ex Post Facto* Clause to challenge application of the ASDC3I memo lacks merit." ISCR Case No. 99-0424 (February 8, 2001) at p. 7.

Although ISCR Case No. 99-0424 did not involve a challenge to the application of 10 U.S.C. §986, the Board cited that decision in a later appeal to reject a claim that the *Ex Post Facto* Clause precluded the application of 10 U.S.C. §986. *See ISCR Case No. 03-00112* (August 10, 2004) at p. 6 n. 3. Applicant's appeal brief cites no legal authority and makes no cogent argument that persuades the Board to change its position concerning the inapplicability of the *Ex Post Facto* Clause to these proceedings.

2. If the Board concludes that 10 U.S.C. §986 is not an unconstitutional law, whether the Board should recommend that Applicant's case be considered further for a waiver under 10 U.S.C. §986. Applicant argues, in the alternative, that if the Board concludes that application of 10 U.S.C. §986 to his case does not violate the *Ex Post Facto* Clause of the U.S. Constitution, then the Board should recommend his case be considered further for a waiver under 10 U.S.C. §986(d).

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)]. Pursuant to 10 U.S.C. §986(d), the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the statutory prohibition against granting or renewing a security clearance for cases covered by 10 U.S.C. §986(c)(1) or 10 U.S.C. §986(c)(4).

In a June 7, 2001 memorandum implementing the provisions of 10 U.S.C. §986, the Deputy Secretary of Defense stated: "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 the June 7, 2001 memorandum, the Director, DOHA is the Director of the Component Central Adjudication Facility for industrial security clearance cases.

To implement the June 7, 2001 memorandum, the Director, DOHA issued an operating instruction (dated July 10, 2001) which indicates 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.

Under the Operating Instruction the Board cannot address the specific arguments asserted in Applicant's request that the Board recommend his case be considered for a waiver under 10 U.S.C. §986(d). The Board reaches this conclusion for the following reasons: (1) the Board does not have the authority to review the Administrative Judge's recommendation that Applicant's case be considered for a waiver under 10 U.S.C. §986(d); and (2) the Board is precluded from giving an explanation for its own recommendation concerning waiver.

Conclusions

The Board affirms the Administrative Judge's conclusion that 10 U.S.C. §986 precluded him from making a favorable security clearance decision in Applicant's case.

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.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board