

DATE: June 12, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21072

PPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

William S. Aramony, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 10, 2004, 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 November 23, 2005, after the hearing, Administrative Judge Michael H. Leonard 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 he should be permitted to supplement the record at this time, whether he is entitled to a recommendation for a waiver under 10 U.S.C. §986, and whether Department Counsel supports granting Applicant such a waiver.

The Administrative Judge found that, in January 1991, Applicant pleaded guilty to two counts of first-degree vehicular homicide and two counts of serious injury by vehicle. Applicant was sentenced to 15 years of confinement and 15 years of probation. Applicant was released in June 1993, after serving 29 months of confinement. Effective January 1996, Applicant was granted parole, which was due to end on January 14, 2006. The Judge concluded that Applicant successfully mitigated his criminal conduct, except that Applicant's criminal history bars the Department of Defense from granting a security clearance to Applicant under 10 U.S.C. §986. The Judge recognized that the current state of the law does not authorize him to recommend Applicant for a waiver, however, he noted that were such a recommendation authorized he would have recommended Applicant for a waiver.

Concerning Applicant's first appeal issue, the Board does not have authority to receive or consider new evidence on appeal. *See* Directive ¶E3.1.29.

Applicant's second issue has been addressed by the Board in three recent cases: ISCR Case No. 01-20970 (App. Bd, Apr. 18, 2006), ISCR Case No. 04-06807 (App. Bd., May 2, 2006), and ISCR Case No. 03-02181 (App. Bd., May 24, 2006). Having considered the party's arguments in this case, the Board is not persuaded that its interpretation of the law as spelled out in those three cases and earlier in ISCR Case No. 03-05804 (App. Bd., Sep. 9, 2005) should be changed. As the Board has explained in those cases, the Board does not know if the President will choose to issue standards and procedures to authorize waivers in accordance with the 2004 amendments to 10 U.S.C. §986. Absent such standards and

procedures there is no authority to issue waivers. Similarly, there is no basis to speculate as to what role, if any, Administrative Judges might have under such putative standards and procedures, nor what substantive requirements might be spelled out in such standards and procedures. Applicant asserts that he is denied due process and a hearing because of the lack of authority for recommended waivers. Applicant had a hearing on October 12, 2005. Applicant was represented by counsel and called two witnesses (including himself) on his behalf. As noted earlier, the Judge issued a decision in which he concluded that Applicant had mitigated his criminal conduct, apart from the 10 U.S.C. §986 prohibition. Applicant's assertions are unpersuasive.

Applicant's third issue is immaterial. Under the current legal framework, Department Counsel does not have authority to recommend a waiver.

Thus, the Administrative Judge did not err in denying Applicant a clearance.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), 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