

DATE: May 2, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-06807

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

#### FOR APPLICANT

Gary L. Rigney, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 23, 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 September 29, 2005, after the hearing, Administrative Judge Carol G. Ricciardello 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 issue on appeal: whether the Administrative Judge erred by concluding that Applicant's conviction and imprisonment were covered by 10 U.S. Code §986 in spite of the pardon Applicant received and whether Applicant is entitled to a recommendation for a waiver under 10 U.S. Code §986 .

The Administrative Judge made the following pertinent findings of fact: Applicant illegally used drugs from 1979 to 1988. Applicant also purchased and sold drugs. In 1988 he was arrested at the age of 23 for selling drugs to an undercover agent. Applicant was charged with three felony counts of violating the state's Uniform Controlled Substances Act. On May 21, 1990 Applicant pled guilty to and was adjudged guilty of one count of Trafficking in Cocaine, a felony. The other offenses were *nolle prosequi*. Applicant was sentenced to three years in the state penitentiary and fined \$50,000. Applicant was incarcerated from July 1990 to May 1993. Applicant was a model prisoner and took advantage of all the rehabilitative and educational programs that were offered. Applicant readily admits that the best thing that ever happened to him was being arrested. It turned his life around. Applicant is a welder by trade. He assists local high school teachers and serves on advisory committees at the school. He leads a healthy life style, has not used illegal drugs since 1988 and no longer associates with people from his past. His current associates know of his past but he has earned their trust. Applicant was granted a pardon by the state with restoration of his civil rights and political rights on April 23, 2003.

The Administrative Judge concluded that Applicant was covered by the provisions 10 USC §986 which prohibit the Department Defense from granting security clearances to certain categories of persons, including persons who were convicted in a court of the United States of a crime, were sentenced to imprisonment for a term exceeding one year and who were incarcerated as a result of that sentence for not less than one year. The Judge found that Applicant mitigated security concerns regarding his criminal conduct. She referenced an Appeal Board decision, ISCR Case No. 03-05804 at

4 (App. Bd. Sep 9, 2005), which concluded that recommendations regarding waivers of the prohibition under 10 USC §986 are not currently authorized, but she noted that were they authorized, she would have recommended Applicant for a waiver.

Applicant believes his state pardon should exempt him from the provisions of 10 USC §986. The Board addressed this issue previously in ISCR Case No. 01-00407 at 4-5 (App. Bd., Sep. 18, 2002). The Board concluded that when Congress wants a provision of Federal law to depend on or rely on state law, it does so by explicit statutory language, and therefore, state pardons are not binding on the Federal Government. Nothing in Applicant's brief dissuades us from that view. Applicant cites an example where, after the Supreme Court concluded that state pardons are not binding on the Federal Government for purposes of a given statute, Congress amended the statute to have the Federal Government apply state pardons for purposes of that statute. This example only demonstrates that Congress will give effect to state pardons for Federal purposes where it deems it to be appropriate. Congress chose not to do so under 10 USC §986.

Applicant also argues that he is entitled to a recommendation for a waiver under the provisions of 10 USC §986. The Board has reviewed this issue again recently (since the Administrative Judge's decision was issued in this case). In ISCR Case No. 01-20970 at 3 (App. Bd. Apr. 18, 2006) the Board concluded that its conclusion in ISCR Case No. 03-05804 did not need modification because:

". . . The Board does not know whether the President will choose to issue standards, and if so, what they would be or when they would take effect. The Board notes that the statutory amendments have been in place since 2004. Such putative standards and procedures, as applicable to the Department of Defense, may or may not provide a basis for an Administrative Judge recommendation. Moreover, even if there is to be a requirement or option for an Administrative Judge's role in such a process, the context for such an eventuality is speculative (for example, what additional standards must a waiver applicant meet, what special findings may a Judge have to make as a condition precedent to making a recommendation). At this time, Applicant's assertion that he is prejudiced by not having the benefit of a formal recommendation, is not persuasive."

The Board's reasoning in ISCR Case No. 01-20970 applies here as well.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board