

DATE: September 29, 2006

In Re:

SSN:-----

Applicant for Security Clearance

ISCR Case No. 04-11041

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 11, 2005, 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 April 18, 2006, after the hearing, Administrative Judge James A. Young denied Applicant's request for a security clearance. ⁽¹⁾ 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 making a recommendation that Applicant's case should not be considered for waiver under the provisions of 10 U.S.C. § 986(d). The Board concludes the Applicant's claim has merit.

In this case, the Administrative Judge found that the security concerns raised by Applicant's criminal conduct had been mitigated, but that Applicant could not be granted a security clearance because of 10 U.S.C. § 986. In his decision, the Administrative Judge noted that in ISCR Case No. 03-05804 at 4 (App. Bd. Sept. 9, 2005) the Appeal Board had concluded that Administrative Judges "had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986." The Judge then expressed his disagreement with the Board's decision in that case, but went on to state that he was "not at liberty to disregard the Board's decision even though he disagreed with it." Finally, the Judge concluded his decision by stating that he believed it was appropriate for him to note what his recommendation would be if he had authority to make one: "Recognizing my recommendation is not binding on the waiver authority, I would not recommend further consideration of this case for waiver of 10 U.S.C. § 986." Decision at 5.

Applicant argues that the Board should revise the Administrative Judge's decision and remove his recommendation against waiver, because the Judge lacked the legal authority to make such a recommendation. Applicant also requests that the Board add a reference in the decision to the fact that Applicant had been granted a security clearance by the Department subsequent to the incidents set forth in the SOR. In support of that argument, Applicant contends that inclusion of the Judge's erroneous recommendation against waiver could damage his non-DoD employment situation because it prejudices Applicant's efforts to obtain a security clearance from agencies not bound by the prohibitions of 10 U.S. C. § 986. The Board does not have the authority to grant the relief Applicant seeks.

(1) An Administrative Judge is not required to discuss each an every piece of record evidence. *See* 02-29608 at 4 (App. Bd. Dec. 17, 2003). Therefore, the Judge was not required, as a matter of law, to reference the fact that Applicant had been granted a security clearance by the Department subsequent to the incidents set forth in the SOR.

(2) It is clear from the language in the decision that the Administrative Judge acknowledged that he lacked authority to make such a

recommendation, and expressed in conditional terms what his recommendation would be if he had such authority. The language in the Judge's decision did not, indeed, could not, constitute an official recommendation against waiver. It constituted an extraneous expression of the Judge's personal opinion, based upon his acknowledged disagreement with a Department of Defense policy. The Judge's personal opinion in that regard has no legal force and effect on either of the parties to the case, and is not binding on the Department of Defense or any other agency or instrumentality of the United States government.

The Board has previously noted that although Administrative Judges have broad discretion in how to write security clearance decisions, that discretion is subject to the legal constraints of the Directive and basic concepts of due process. *See, e.g.*, ISCR Case No. 01-21030 at 4 (App. Bd. Jan. 13, 2004). The Board does not have authority to supervise the Administrative Judges or to regulate their professional conduct. *See, e.g.*, ISCR Case No. 02-04455 at (App. Bd. Mar. 7, 2006). Nor does the Board have authority to alter Administrative Judges' decisions for the purpose of removing extraneous language. To the extent that an unauthorized action by a Judge might adversely impact a non-DoD employment relationship, there is no remedy before this Board. The removal of the language about which the Applicant complains would not change the outcome of the case. Therefore, the error identified by the Applicant is harmless. ⁽²⁾

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, 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

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.a, and 1.b. Those favorable findings are not at issue on appeal.
2. After the Administrative Judge's decision was issued, the Defense Department began to implement new rules for adjudicating security clearance cases. Under these new rules, the Director, DOHA or his designee has the authority to grant waivers in meritorious cases. *See* Memorandum of the Under Secretary of Defense, dated August 30, 2006: "Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Dec. 29, 2005)." There is no provision for waiver recommendations by Administrative Judges or others. *See* DOHA Operating Instruction 64, as revised, Sept. 12, 2006 (" . . . the Administrative Judge shall not opine whether a waiver of 10 U.S.C. 986 is merited, nor recommend whether to consider the case for a waiver of 10 U.S.C. 986").