

KEYWORD: Guideline J

DIGEST: The question of whether a work-release program counts as incarceration is mixed question of fact and law. The Board cannot assume that the many such programs functioning concurrently in the United States necessarily impose the same restrictions on convicts. Given the limited record the Board cannot conclude that Department Counsel met their burden of proving controverted facts. Favorable decision affirmed.

CASENO: 04-00354.a1

DATE: 03/26/2007

DATE: March 26, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-00354
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Arvin Reingold, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 4, 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 June 8, 2006, after the hearing, Chief Administrative Judge Robert Robinson Gales granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's decision was arbitrary, capricious and contrary to law for failing to hold that Applicant was barred by the Smith Amendment (10 U.S.C. § 986) from hold a security clearance.

The Chief Administrative Judge did not find that Applicant was barred by the Smith Amendment from holding a security clearance because Applicant spent less than a year in jail and a state penitentiary. Applicant spent additional time in a work-release program which the Judge did not count as incarceration for purposes of Smith Act. Department Counsel challenges the Chief Judge's decision on that basis. The Board notes that the Chief Administrative Judge highlighted the question at the hearing and left the record open for additional material on the question. Nonetheless, there are only two exhibits in the record (a security clearance application and a statement of subject prepared by Applicant) both of which were received at the hearing. Under the Directive, Department Counsel has the burden of proving controverted facts in DOHA proceedings. The question of whether work-release should be considered incarceration for purposes of the Smith Act is a mixed question of fact and law. The Board cannot assume that the many such programs functioning concurrently in the Unites States necessarily impose the same restrictions on convicts. Given the limited record evidence in this record, the Board cannot conclude that Department Counsel met their burden regarding the pertinent controverted facts. Thus, the Administrative Judge did not err in granting Applicant a clearance.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin _____
Jean E. Smallin
Administrative Judge
Member, Appeal Board