

DATE: February 19, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-00574

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

David Michael Goode, Esq.

SYNOPSIS

Applicant (a 35-year old engineering associate of a defense contractor) was convicted of three separate felony offenses in 1997 and later sentenced to separate sentences totaling twenty years in the aggregate (suspended) for the offenses of attempted possession of marihuana with the intent to distribute, transportation of marijuana and conspiracy to possess marijuana (all felonies). While he has completed the supervised phase of his probation, he remains subject to unsupervised probation for the balance of his suspended sentence. Applicant's conduct is covered by the Smith Amendment (10 U.S.C. Sec. 986), which bars persons sentenced to more than one year of incarceration, regardless of time actually served, from ever holding a security clearance, absent a meritorious basis for an exception (not recommended here). Clearance is denied.

STATEMENT OF THE CASE

On September 28, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on November 27, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 13, 2001 and was scheduled for hearing. A hearing was convened on January 15, 2002, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of three exhibits; Applicant relied on one witness (himself) and eight exhibits. The transcript (R.T.) of the proceedings was received on January 24, 2002.

STATEMENT OF THE FACTS

Applicant is a 35-year old engineering associate for a defense contractor who seeks a security clearance at the level of secret.

Summary of Allegations and Responses

Applicant is alleged to (a) have been arrested and charged in February 1997 with attempted possession of marijuana with the intent to distribute (a felony), transportation of marijuana (a felony) and conspiracy to possess marijuana (a felony), (b) have been found guilty of all the listed charges, fined, sentenced to 5 years of imprisonment on the first charge, 10 years on the second and 5 years on the third, and suffered the suspension of his driving privileges for six months, and (c) have had his sentence reduced to 8 months incarceration (remainder suspended), conditioned upon good behavior, supervised probation until released by the probation officer, and payment of costs in the approximate amount of \$2,544.00.

As the result of Applicant's alleged felony conviction and sentence to more than 365 days confinement (suspended sentence notwithstanding), he is alleged to be *per se* disqualified from having a security clearance granted or renewed by the Department of Defense (DoD), pursuant to 10 U.S.C. Sec. 986, subject to any determination of an authorized exception in a meritorious case by the SecDef.

For his response to the SOR, Applicant admitted being convicted as charged for the covered offenses under subparagraphs 1.a through 1.c of the SOR and being sentenced to more than one year of incarceration (suspended, except for 8 months), in addition to being taxed court costs. He admitted his security clearance is subject to denial pursuant to 10 U.S.C. Sec. 986, absent an exception in a meritorious case.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Appellant are incorporated by reference and adopted as relevant and material findings. Additional findings follow.

Following his honorable discharge from the Marine Corps in 1992 (ex. B), Applicant worked for a parcel service and enrolled at a local university. Beginning in 1996, he experienced a rough period of unemployment. Unable to find meaningful work, he renewed his associations with old friends that he had lost contact with. In February 1997, Applicant was introduced to someone who asked him where he could get some marijuana (*see ex. 3*). After he told this individual he knew of a supply source of marijuana, the individual asked Applicant for five to ten pounds of the substance. Applicant obliged and arranged the transaction with the marijuana supplier (Mr. X) he knew from past neighborhood associations. That same day Applicant arranged with this supplier for delivery of ten pounds of marijuana. Applicant's understanding with the supplier was that when the marijuana was exchanged with the buyer for the agreed price, Applicant would, in turn, pay the supplier (ex. 3).

On the day of the arranged marijuana exchange, Applicant learned that a certain girlfriend of Mr. X was going to be involved in the transaction. This prompted him to begin feeling very uncomfortable with going through with the transaction, which he knew to be illegal. Even though, he needed the money (being unemployed at the time), he called the girlfriend to express his reluctance with going ahead with the deal, and thereafter tried talking his supplier into calling off the deal, but to no avail. While Ms. X may have misunderstood his instructions about avoiding strangers coming to the house while he was out getting something to eat, Applicant is not at all convincing that he had communicated any firm instructions to repudiate their marijuana deal with the supplier. So, when the supplier arrived with the package of marijuana, she accepted delivery. She, in turn, permitted investigating police (who followed the supplier) to search the house for any probative evidence of supplied marijuana (*see ex. 3*). When Applicant returned to the house, he was both questioned and searched. This left Applicant with the distinct impression that he had been set up by his suppliers with some type of sting operation.

After a brief exchange of questions and answers at the scene of the marijuana transaction, Applicant was escorted to the local police station for further questioning and charging with attempted possession of marijuana with the intent to distribute, transportation of marijuana, and conspiracy to possess marijuana, all felonies. After pleading not guilty to the

charges, Applicant was convicted on all of the charged offenses and fined, sentenced to more than one year on each of the convictions (20 years in all), with all but eight months suspended for good behavior, placed on supervised probation until released by the probation officer, and had his driver's license suspended for six months. Applicant served his eight months of incarceration on a work release program that permitted him to work during the day and return to jail at night.

Upon his being released from incarceration, Applicant enrolled in a local community college and completed a number of courses there before returning to his previous university where he has since earned a bachelors degree, and is currently working on an advanced degree. He is currently separated from his current spouse, who he married in 1998 following his divorce from his first spouse in 1994 (*see ex. 1; R.T., at 36*). He has three children, and one from his first marriage, for whom he was behind in his child support payments at the time of his 1997 arrest (*see R.T., at 36-37*). By all evidentiary accounts he is current in his child support payments.

While Applicant was released from his supervised probation in June 2000, he remains on unsupervised probation. His probation includes no reporting requirements, but demonstrated good behavior conditions for the duration of his overall 20-year term imposed by the court (*see R.T., at 40-43*). He has been involved in no other drug-related incidents or confrontations with law enforcement authorities since his release.

Applicant remains very ashamed of his drug-related conduct and has tried to do his best to restore his life to the way it was before the marijuana incident. He continues to work in a responsible engineering position with his research foundation while he pursues his graduate studies (*see ex. A*). He hopes one day to reconcile with his current spouse. Besides his primary engineering position with his defense contractor, he has worked for a brief period as a masonry assistant to supplement his income and for a research organization affiliated with his university

Applicant receives high praise from his supervisors for his engineering work and has excellent performance evaluations to his credit. His supervisor and colleagues characterize him as an exceptional engineer and recommend him for admission to his university's graduate engineering management program where he is currently enrolled (taking graduate courses towards a degree in engineering management (*see R.T., at 17-18*)).

STATUTORY REQUIREMENTS

Because this case involves supplemental DoD criteria for implementing the governing provisions of 10 U.S.C. Sec. 986 ("the Smith Amendment"), additional revised provisions must be considered when appraising conduct covered by provision 1 (criminal convictions in both state and federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served) and provision 4 (persons who have been discharged from the Armed Forces under dishonorable conditions). The Amendment does establish waiver authority for determined meritorious cases and places waiver authority in the Sec Def or the Secretary of the Military Department concerned. This waiver authority may not be delegated.

POLICIES

In addition to adjudicating Smith Amendment cases in accordance with current Executive Order and DoD Directive/Regulatory guidance, including applicable due process procedures, the criteria provide for consideration of issues covered by provisions 1 and 4 of the Act without consideration of the statute, this for the purpose of developing as complete a record as possible to aid the responsible authority for making a recommendation to the Sec Def as to whether the case merits a waiver. The DoD regulations include revised Adjudicative Guidelines designed to implement the provisions of the Smith Amendment and supplement existing Adjudicative Guidelines and pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision of security clearance eligibility. E2.2 considerations comprise the following: the nature, extent and seriousness of the conduct, the circumstances surrounding the conduct, the frequency and recency of the conduct, the individual's age and maturity at the time of the conduct, the voluntariness of participation, the presence or absence of rehabilitation, the motivation for the conduct, the potential for pressure, coercion, or duress, and the likelihood of continuation or recurrence.

DoD's revised regulations are, in turn, reinforced by DOHA Operating Instruction 64, which all judges are required to follow in their implementation of Smith Amendment-covered cases.

Viewing the issues raised and evidence as a whole, the following adjudication policy guidelines are pertinent herein:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

Disqualifying Conditions:

DC a Allegations or admission of criminal conduct.

DC b A single serious crime or multiple lesser offenses.

DC c Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

Mitigating Conditions:

MC a The criminal behavior was not recent.

MC b The crime was an isolated incident.

MC c The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life.

MC f There is clear evidence of successful rehabilitation.

MC g Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant comes to these proceedings with a solid military career and honorable discharge from the Marine Corps in

1992. Besides working at civilian jobs to take care of himself and his family following his Marine Corps discharge, he pursued a college engineering curriculum to prepare himself for advanced professional opportunities. For this commitment, Applicant is to be roundly commended. However, he also succumbed in February 1997 to involvement in a marijuana distribution scheme to generate money at a time when he was unemployed and in need of funds to take care of his family and finance his education. Unable to pull out of the drug-sale transaction he initiated after having second thoughts about completing the deal, he was confronted by investigating police at the scene, and charged with major drug-related conduct. The charges (attempted possession of marijuana with intent to distribute, transportation of marijuana, and conspiracy to possess marijuana), upon which he was convicted, were felonies and carried major fines and time in incarceration totaling 20 years. Benefitting from a suspended sentence of all but eight months of incarceration, Applicant has completed the supervised phase of his probation and now faces the balance of his imposed twenty-year suspended sentence in unsupervised probation under conditions of good behavior. So far, he has avoided any further incidents or infractions that could jeopardize his probation and shows excellent progress in the professional track he has pursued with his defense contractor, while committing himself to post-graduate education in engineering management. By all accounts, he is doing well in his restoration efforts.

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1997 conviction could be considered isolated and the result of some extenuating financial pressure, but insufficient at best to warrant the benefit of revised Adjudicative Guideline MC c (person pressured or coerced into committing the act), given his age, intelligence and military experience. Nor can his underlying conduct and related conviction be considered non-recent: Four years and continued probation (though currently unsupervised) are still relatively recent for purposes of applying the pertinent mitigation condition of MC b.

Applicant's satisfaction of his supervised probation conditions and overall professional and educational accomplishments and pursuits do reflect considerable rehabilitation on his part and a strong start towards regaining the trust required to hold a security clearance. However, with just over four years of seasoning and less than a month removed from supervised probation, he is still open to some concerns about the durability of his rehabilitation under the supplemented Adjudication Guidelines and E2.2 considerations, even without any consideration of the Smith Amendment.

But as the result of his state felony conviction, he was sentenced to a period of incarceration exceeding a year, which brings his actions within the coverage of the mandatory provisions of the Smith Amendment's provision 1. This much is true, even though the sentence was suspended by the court, and he has since completed the supervised phase of his court-ordered probation. With its passage of the Smith Amendment, Congress manifest a statutory purpose for raising the level of critical scrutiny of persons with histories of serious criminal actions and corresponding sentencing time. Marginal cases become less amenable to reconciliation of perceived security risks than under pre-Smith Amendment assessments. By available adjudicative guidelines implementing the Smith Amendment, Applicant's time in rehabilitation, while praiseworthy certainly, is still insufficient to meet the mitigation threshold envisioned by 10 U.S. C. Sec. 986 to qualify for exception consideration. On the strength of the Smith Amendment's mandatory lifetime disqualification of applicants whose conduct (like Applicant's) is found to be covered by the Smith Amendment's outlined provisions, risk absolving mitigation is not available to Applicant by virtue of MC g of the revised guidelines (no mitigation of potentially disqualifying conditions, except by demonstration of sufficiently meritorious circumstances to justify the granting of a waiver by the Sec Def).

Independent consideration of the mitigating guidelines developed for assessing a provision 1 situation falling under the Smith Amendment does not warrant the availing of any of the mitigating conditions covered by the corresponding revised mitigating conditions and does not warrant at this time the recommendation of an exception to the mandatory exclusion provisions of the Smith Amendment for Applicant. Unfavorable conclusions are warranted with respect to the allegations covered by sub-paragraphs 1.a through 1.d.

In reaching my decision, I have considered the evidence as a whole, including each of the factors set forth in the Procedures section (paragraph 6) of the Directive, as well as E.2.2 of the Adjudicative Process of Enclosure 2 of the same Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. I do not recommend further consideration of this case for a waiver of 10 U.S.C. Sec. 986.

Roger C. Wesley

Administrative Judge