

DATE: August 2, 2002

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-02812

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 26-year old systems analyst convicted of two separate felony theft offenses arising over a two-month period spanning 1994 and 1995 (one federal and the other state), was later sentenced to three years of incarceration on the state offense, with all but 30 days suspended. She has successfully completed her probation, mitigated her ensuing SF-86 omissions of unfavorable employment terminations and marijuana involvement linked to a positive drug test, and has demonstrated increased maturity and responsibility in her most recent work performance for her defense contractor. 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 November 21, 2001, the Defense Office of Hearings and Appeals, 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 February 28, 2002, and requested a hearing. The case was assigned to this Administrative Judge on April 17, 2002, and was scheduled for hearing. A hearing was convened on June 3, 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 seven exhibits; Applicant relied on three witnesses (including herself) and one exhibit. The transcript (R.T.) of the proceedings was received on June 11, 2002.

PROCEDURAL ISSUES

Before the close of the hearing, Government was asked to supplement the record with a memorandum addressing two specific issues: How much time an Applicant is permitted to correct falsification in order to take advantage of MC 3 (prompt, good faith effort to correct a falsification) and whether an inquiry must be specific to be considered a confrontation. Within the time permitted, Department Counsel provided a legal memorandum covering the two issues. Applicant didn't respond to the Government's memorandum. Department Counsel's research produced ISCR citations upholding findings that delays of 9 months, 5 months, and even 4 months in correcting a falsification were not prompt. While Department Counsel could not cite to an Appeal Board decision addressing the question of whether a confrontation must be specific, she did find an ISCR trial level decision holding that an Applicant's admissions in response to a general inquiry into drug use could still qualify for good-faith rectification.

STATEMENT OF FACTS

Applicant is a 26-year old systems analyst for a defense contractor who seeks a security clearance with her defense contractor (Company A).

Summary of Allegations and Responses

Applicant is alleged to have a history of criminal activity that includes three-separate offenses spanning the period of 1994 and 1995. Specifically, she is alleged to have been charged for fraudulent conduct arising out of actions on three separate occasions: (1) she was charged in 1994 in State A with credit card fraud arising out of her alleged stealing of her roommate's credit card, as a result of which she was suspended from her university in about May 1994 and ordered to make restitution; (2) she was arrested and charged in November 1994 in State B for theft/embezzlement by a bank employee (of a local bank), a felony violation of 18 U.S.C. Sec. 656, arising out of her allegedly stealing four checks from a co-worker at a local supermarket and falsely writing these four checks totaling \$10,500.00, for which she pleaded guilty and was sentenced to six months imprisonment, and awarded supervised release for three years, subject to mental health counseling, participation in drug treatment, and performing 100 hours of community service work, and (3) she was arrested and charged with grand larceny (a felony) in January 1995, for allegedly stealing and carrying away property from a local retailer valued at \$200.00 or more, for which she was later found guilty (in February 1996) and sentenced to confinement for a period of three years (suspended for a term of ten years), conditioned on her serving 30 days in jail, making restitution to the retailer, submitting to DNA testing, paying court costs, performing community service, and remaining on supervised probation.

As the result of Applicant's felony conviction and sentence to more than 365 days confinement (actual service of less time notwithstanding), she 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 an authorized waiver exception in a meritorious case.

Additionally, Applicant is alleged to have falsified her Security Clearance Application (SF-86) of December 1998 by omitting her (a) prior terminations from (i) a federal reserve bank in July 1994 after refusing to sign a counseling form as a result of her failure to comply with her employer's rules, (ii) a local bank in October 1994 due to embezzlement and ensuing arrest, (iii) a local retailer in December 1994 due to theft of merchandise and ensuing criminal charges, (iv) a local supermarket in 1994 due, in part, to her theft of checks from a co-worker of the market, and (v) a vocational medical employer in November 1998 due to pattern misconduct, and (b) prior testing positive for marijuana in a drug test administered in July 1997, as court-required.

For her response to the SOR, Applicant admitted stealing her roommate's credit card in early 1994 and being charged with credit card fraud and being suspended from her university at the time. She admitted also to being convicted and sentenced as charged for theft/embezzlement in 1994, and for grand larceny in February 1996, for which she was sentenced to three years (suspended for a period of ten years), conditioned, in part, on her serving 30 days in jail, making restitution to the retailer, submitting to DNA testing, paying court costs, performing community service, and remaining on supervised probation. She admitted to being subject to *per se* disqualification from holding a security clearance by virtue of 10 U.S.C. Sec. 986, absent a waiver exception in a meritorious case. Applicant admitted, too, to omitting her terminations when responding to question 20 of her SF-86, and to omitting her positive drug test. But she

denied culpability in connection with her February 1996 conviction arising out of her charged theft of a retailer (insisting anew on her innocence), denied omitting any termination from a federal reserve bank (uncertain of the circumstances of her leaving), denied being questioned about her stealing checks from a co-worker of a local retailer, denied being terminated by a vocational medical employer due to a pattern of misconduct, and she denied any deliberate omission of her positive drug test from her SF-86, never equating one-time marijuana experimentation with drug use.

Applicant augmented her admissions and denials with explanations about her financial deprivation in her teenage years, her maturing process, her remorsefulness for her reckless actions, and the important trust restorative steps she has taken in her life to prove herself.

Relevant and Material Factual Findings

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

Applicant's criminal actions

Growing up in an unstable and financially deprived home, Applicant experienced financial hardships as a teenager and only child. Desperate for financial assistance to provide aid for her schooling and material needs, she stole her roommate's credit card in early 1994 while enrolled as a freshman at a State A university. With the credit card she charged over \$2,000.00 for clothes, jewelry and shoes, and was charged with credit card fraud. As a result of the charges, she was suspended from the university in about May 1994 and ordered to make restitution. She is credited with making restitution to her roommate, but never reapplied for readmission to the university.

While employed at a local retail market in November 1994, Applicant stole four checks from a co-worker of hers at the market. She then wrote four checks (the same ones she stole from the co-worker) totaling \$10,500.00, listing herself as the payee, and cashed them at the local bank where she was also employed (*see ex. 7*). Since she was a teller at the bank, cashing the checks was easier for her, than were she not a bank employee. At the end of the day, while her drawer was being checked, her supervisor found the four checks and confronted her. The supervisor, in turn, reported the incident to the FBI. Applicant quit her job at the retail market (with the co-worker still unaware the checks were taken from her) and was involuntarily terminated from her employment at the bank. After being charged with theft/embezzlement by a bank employee (a felony) in federal court, Applicant entered into a plea agreement with the Government in January 1995 that included a guilty plea to the felony charge. Upon accepting the guilty plea, the federal court later sentenced Applicant (in March 1995) to six months imprisonment, fined her \$50.00, and awarded her supervised release for three years, with conditions to include mental health counseling, participation in drug treatment, and ordered 100 hours of community service work (*see ex. 4*). By all accounts, Applicant served her six months of incarceration following her surrender in March 1995, paid her fine, and complied with the court's supervised release conditions.

Pending trial on her theft/embezzlement charges, Applicant (in January 1995), who was still working for her retail employer at the time as a cashier, was confronted by her store supervisor about aiding and abetting two female customers, who walked off with merchandise without paying for it (*see ex. 7*). She denied any role or knowledge of the missing merchandise at the time, but was charged, nonetheless, with grand larceny (a felony) in State B's Circuit Court. In February 1996, following her release from federal incarceration, she was found guilty of the grand larceny charges and sentenced to three years confinement. Her sentence was suspended for a term of ten years under the conditions she serve 30 days in jail, make restitution to the retailer, submit to DNA testing, and pay court costs in the amount of \$324.50. Applicant was permitted to serve her 30-day jail sentence on the weekends, or on a work release/education basis, provided she qualified, which she apparently did. She was placed under supervised probation until her release in April 1997 (*see ex. 5*). While Applicant continues to dispute her conviction, collateral estoppel principles preclude any reconsideration of the court's findings in this proceeding.

Under her federal probation conditions, Applicant was required to submit to mental health counseling following her release from incarceration in November 1995. While in counseling, she was required to submit to random drug testing. Her produced specimens were all negative for illegal substances, except for one positive test in July 1997, which

reflected traces of marijuana (*see ex. 6*). Most of Applicant's court-order counseling sessions focused on family relationships and stress management issues, not substance abuse, and her discharge summary stressed recommended continued mental health counseling for Applicant, not substance abuse therapy for her one time detected use. Applicant received her counseling discharge in September 1997 with an overall positive assessment and prognosis.

Applicant's employment terminations

Between July 1994 and November 1998, Applicant was terminated for cause on five separate occasions, each time from a different employer: in July 1994 from a federal reserve bank for refusing to sign a counseling form, in October 1994 from a local bank due to her pending theft/embezzlement charges; in December 1994 from a retailer due in part, at least, to her employer's attributing merchandise theft to her (even if time card violations might have been contributing as well); in December 1994 from another employer (a local market, for whom she was also to make ends meet) for her discovered theft of checks from a co-worker; and from a vocational group in November 1998 as the result of a dispute with her supervisor following a cited pattern of misconduct (*see ex. 3*).

Applicant's SF-86 omissions

In executing her SF-86 in December 1998, Applicant made several material omissions. When answering question 20's inquiry into her employment record, she listed only her retailer and local market as employers who terminated her for misconduct or under unfavorable circumstances. Applicant's explanations (lack of counseling, sufficiently covered elsewhere and attributable to collateral causes unrelated to misconduct) for her omissions are insufficiently convincing to enable her to avert inferences of knowing and wilful omission.

In the same SF-86, Applicant answered no to question 27's inquiry into her prior use of illegal drugs. Applicant's explanation for her omission of her one-time experimentation with marijuana preceding her positive drug test in July 1997 is that she interpreted the question to refer to drug users (not usage), and she didn't consider her one-time use to make her a user within the question's scope.

Question 27 expressly refers to any use since age 16, or within the previous 7 years, which ever is shorter, and plainly makes no reference to a user of drugs. Her claimed one-time use was discovered only as the result of her testing positive in a random drug test and raises enough concerns about the extent of her use as to make a yes answer the only reasonable response to the question. Applicant's assigned interpretation under the circumstances represents a considerable stretch given her experience and training, and cannot be accepted, as such, as a plausible explanation of her **no** answer. Inferences of knowing and wilful omission are warranted here as well.

Four months later after executing her SF-86 (in April 1999), Applicant was interviewed by

a DSS agent. In the interview she was asked about any terminations for cause without any visible confrontation with references to any of her previous terminations for misconduct or under unfavorable circumstances. Applicant's signed, sworn statement reveals her disclosing all of her prior terminations without any visible prodding or confronting. When asked about any prior illegal drug use, she disclosed her one time use preceding her July 1997 positive drug test. Absent any visible indicia to the contrary in Applicant's DSS statement or testimony, her claims of voluntary disclosure, without any prodding or confronting by the interviewing DSS agent, are accepted.

Applicant is well thought of by a number of her colleagues who credit her with good communication and analytical skills and with a good conscientious attitude (*see ex. A*).

POLICY

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.

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status,

determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Mitigating conditions:

MC 3 The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts.

Burden of Proof

Under 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 burdened by a considerable history of thefts as a young adult. The first such theft occurred in 1994 and resulted in her suspension from her university. The second two incidents occurred within a space of two months spanning November 1994 and January 1995 and resulted in felony convictions, time in incarceration and jail, respectively, and court-imposed conditions, including supervised probation.

Smith Amendment and other criminally-related conduct

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to her theft convictions could be considered dated and the result of mistakes of judgment and financial pressures at the time, and sufficient to warrant some benefit of revised Adjudicative Guidelines MC a (criminal behavior not recent) and MC f (there is clear evidence of rehabilitation).

Applicant's satisfaction of her probation conditions and promise exhibited in her transformation into a reliable and trustworthy person in her professional and personal affairs reflect significant rehabilitation on her part and demonstrable evidence of increased maturity, reliability and trust. With just a little over four years of time removed from her emergence of parole, however, additional seasoning would be required to enable her to reach the assurance levels necessary to make safe predictable judgments about her overall judgment, reliability and trustworthiness requisite for holding a security clearance, even without any consideration of the Smith Amendment.

But as the result of Applicant's state felony conviction (sub-paragraph 1.c), she was sentenced to a period of incarceration exceeding a year, which brings her actions within the coverage of the mandatory provisions of the Smith Amendment's provision 1. The Amendment applies, even though Applicant never actually served time in excess of a year in any incarceration facility as a result of her conviction. With the passage of the Smith Amendment, Congress manifested a statutory purpose for raising the level of critical scrutiny of persons with histories of serious criminal actions and corresponding sentencing time. Otherwise worthy cases become less amenable to reconciliation of perceived security risks than under pre-Smith Amendment assessments. Under the adjudicative guidelines implementing the Smith Amendment, Applicant's time in rehabilitation, while generally successful, still cannot free her from coverage of the Amendment's mandatory bar, save for her qualification 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 available to Applicant only 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 conditions developed for assessing a provision 1 situation falling under the Smith Amendment warrant no further consideration of a waiver in this case. Taking full account of the gravity of Applicant's covered offense and her involvement in other contemporaneous offenses, and her time spent in incarceration, probation and her more recent personal and professional endeavors, her restorative efforts to date are considered to be too recent and insufficient to enable her to claim the mitigation benefits of several of the mitigating conditions of Guideline J, as well as overall favorable consideration taking into account the E.2.2 factors. Recommendation for further consideration of a waiver from the *per se* bar requirements of 10 U.S.C. Sec. 986 is not warranted. Unfavorable conclusions are called for with respect to the allegations covered by sub-paragraph 1.c by virtue of the *per se* requirements of the Smith Amendment. Waiver consideration is not recommended herein. Unfavorable conclusions warrant as well with respect to the allegations covered by sub-paragraphs 1.a and 1.b.

Applicant's covered SF-86 omissions

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's respective SF-86 omissions of her employment terminations (either for cause or under unfavorable circumstances) and marijuana-related positive drug test. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

Applicant falsified her SF-86 in several material respects: omitting three of her five employers who terminated her for cause or under unfavorable circumstances, and omitting her marijuana-related positive drug test. She makes no persuasive claim of misunderstanding the questions, which were posed in a straightforward way in the questionnaire. Applicant's explanations of misunderstanding the questions are considered insufficient to avert drawn conclusions of knowing and wilful concealment of facts material to a security clearance determination. Her omissions invite application of a disqualifying conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire).

Mitigation is availing to Applicant. When generally inquired about her prior terminations and substance abuse in an ensuing DSS interview just over four months later, she took advantage of the first obvious opportunity afforded her to correct her earlier SF-86 omissions. DOHA's Appeal Board has never found the use of mitigating condition (MC) 3 (prompt, good faith disclosure) of the Adjudicative Guidelines for personal conduct to be unavailable to applicants seeking mitigation by convincing proof of a prompt, good faith correction before being confronted with the facts. In this vein, a general inquiry by the agent of conduct covered by the omissions does, not by itself constitute a confrontation.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), favorable conclusions warrant with respect to sub-paragraphs 2.a and 2.b of Guideline E.

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

GUIDELINE E (PERSONAL CONDUCT) FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR 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 recommend no further consideration of this case for a waiver of 10 U.S.C. Sec. 986.

Roger C. Wesley

Administrative Judge