

DATE: February 21, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10999

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant (a 41-year old welder/brazier of a defense contractor) was convicted of a single cocaine distribution offense in 1987 (a felony) and later sentenced to eight years of incarceration, with all but three suspended. He has successfully completed his probation, and has demonstrated reliable and trustworthy work performance for his 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 5, 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 December 3, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 18, 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 four exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) of the proceedings was received on January 24, 2002.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant requested leave to supplement the record with character references. There

being no objection from Department Counsel, and for good cause shown, Applicant's request was granted. Applicant was afforded seven (7) days to supplement the record; the Government was granted and additional two (2) days to respond. With the time permitted, Applicant supplemented the record with six character references for inclusion in the record. Department Counsel offered no objections, and Applicant's submissions are identified and accepted as Applicant's exhibit A.

STATEMENT OF THE FACTS

Applicant is a 41-year old welder/brazier for a defense contractor who seeks a security clearance at the level of secret (*see* R.T., at 42).

Summary of Allegations and Responses

Applicant is alleged to have been arrested and charged in November 1986 with distribution of cocaine (a felony), found guilty of the listed charge, fined \$3,000.00, and sentenced to 3 years of imprisonment.

As the result of Applicant's alleged felony conviction and sentence to more than 365 days confinement, 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 authorized exception in a meritorious case by the Secretary of Defense ("SecDef").

For his response to the SOR, Applicant admitted being convicted as charged for distribution of cocaine (a felony) and pleading guilty to the offense on a plea bargain. In elaborating on his punishment, he admitted to being fined \$3,000.00 and sentenced to 8 years of incarceration, of which 5 was suspended and 3 were ordered. 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.

In 1985, Applicant was visited by two police informants who were looking for marijuana. Unaware the visitors were police informants, Applicant gave them marijuana belonging to his roommate. Approximately a week later, police returned to his residence with a search warrant. From police search of his residence, they found twenty ounces of marijuana in his constructive possession. Finding the marijuana, they took Applicant into custody and returned to the local police station where he was charged with marijuana possession with the intent to distribute. Initially, the charge was court-dismissed. But three weeks later, Applicant was re-charged with the offense and this time plea bargained with prosecutors for a pleaded charge of constructive possession of marijuana. For this pleaded offense, he was sentenced to ninety days in jail and an imposed fine of \$500.00.

Applicant was arrested again in 1986 on a drug-related charge: this time in connection with a putative "sting" operation, which produced a charge of cocaine distribution. The police informant who confronted Applicant asked for some crack cocaine and accompanied Applicant to the source. From the source, he purchased the crack cocaine, in the presence of the informant (*see* R.T., at 34-35). The cocaine was then passed from the source through Applicant to the informant. Applicant, in turn, was arrested and taken into custody. After pleading to distribution of cocaine and being sentenced to eight years of incarceration (five years suspended), Applicant was sentenced to three years of imprisonment and three years of probation thereafter; he was also fined 3,000.00 (*see* ex. 4). He paid the fine and served 210 days of his sentence before being released early for good behavior (*see* R.T., at 39-40). Applicant has since successfully completed his three years of probation, learned from his drug-related experiences, and has since avoided any involvement with illegal substances (*see* ex. 4; R.T., at 39-40).

Since being charged with his cocaine distribution offense, Applicant has had no further involvement with illegal substances and no confrontation with law enforcement authorities. He is highly regarded by his colleagues and supervisors as an employee who can be trusted and has received commendations from Navy ship commands he supports for his work.

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):

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):

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.

CONCLUSION

Applicant comes to these proceedings with considerable praiseworthy work experience with his defense contractor over the past several years. For his efforts and contributions to the defense industry, Applicant is to be roundly commended. However, Applicant also brings a history of drug-related convictions, two in all between 1985 and 1986: a misdemeanor marijuana possession conviction in 1985 and a felony cocaine distribution conviction in 1987. On his cocaine distribution conviction, he was sentenced to eight years of incarceration, with five suspended and three to serve. Besides his sentence, he was fined \$3,000.00.

Applicant's cocaine distribution charge followed his being implicated by police informants in a sting operation. His conviction was the result of a plea bargain, which he may not collaterally attack in these proceedings by any claims of entrapment (*see ex. 4*). Benefitting from a suspended sentence of all but three years of incarceration, Applicant served 210 days before being paroled for good behavior in 1987. Credited with successfully completing his supervised probation, he has avoided any further involvement with illegal substances of any kind and shows excellent progress in the rehabilitative track he has pursued since his conviction over fifteen years ago. By all accounts, he is doing well in his work and overall restoration efforts.

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1987 conviction could be considered non-recent, even if not an isolated occurrence (given his previous marijuana possession conviction in 1985) when it happened, or the result of any visible pressure or coercion during the sting operation that actively enveloped Applicant. Fifteen plus years and completed probation without any repeat involvement in illegal substances or confrontations with law enforcement provide good indicia of gained maturity and understanding of the seriousness of his drug-trafficking conviction and enable Applicant to invoke the mitigation benefits of supplemental condition MC b (non-recency) of the Adjudication Guidelines for criminal conduct.

To his credit, Applicant has compiled a praiseworthy work record with his defense contractor over the past several years. For his efforts and contributions to the defense industry, Applicant is to be roundly commended. Satisfaction of his supervised probation conditions, sustained aversion of any drug-related involvement since 1986 and overall work accomplishments certainly reflect favorably on his rehabilitation efforts and represent a strong recoupment of trust required to hold a security clearance. With over fifteen years of seasoning, and successful probation to his credit, he absolves himself of most concerns about the durability of his rehabilitation under the supplemented Adjudication Guidelines and E2.2 considerations.

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 restorative efforts are 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 mitigating conditions b(non-recency) and g (meritorious circumstances warranting exception consideration) covered by the corresponding supplemental mitigating conditions. Because of the high priority placed by Congress on security risks associated with felony-type sentencing (*viz.*, imprisonment over 365 days), waiver consideration of cases covered by provisions 1 an 4 of 10 U.S.C. Sec. 986 is necessarily reserved only for cases that involve meritorious circumstances. For the reasons cited above, this is not such a clear case of meritorious circumstances to warrant consideration of a waiver. Unfavorable conclusions are warranted with respect to the allegations covered by sub-paragraphs 1.a through 1.d on the strength of 10 U.S.C. Sec. 986. No consideration of exception relief afforded by the Amendment is recommended.

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

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