

DATE: January 24, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16871

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

SYNOPSIS

Applicant, a 61-year old owner of a defense contractor, was convicted of a felony offense in 1986 for which he was sentenced to 366 days of incarceration for the offense of federal income tax evasion (failing to file his federal income tax returns for tax years 1980 and 1981). 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. Based on his credited restoration of solid judgment, reliability and trustworthiness over the past thirteen years (to include satisfaction of all of his determined tax obligations) since his release from incarceration in 1988, Applicant's conduct, while covered by the Smith Amendment's provision 1 bar, merits further consideration of a waiver. Clearance is denied.

STATEMENT OF THE CASE

On August 16, 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 September 12, 2001 and requested a hearing. The case was assigned to this Administrative Judge on November 9, 2001, and was scheduled for hearing. A hearing was convened on December 12, 2001, 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 five exhibits; Applicant relied on three witnesses (including himself) and eight exhibits. The transcript (R.T.) of the proceedings was received on December 20, 2001.

PROCEDURAL ISSUES

Before the scheduled hearing, Applicant requested a thirty-day (30) continuance of the hearing to afford counsel additional time to prepare for the hearing. On Applicant's request, a telephonic conference was convened between counsel for the parties. In the conference, Department Counsel interposed an objection to Applicant's request, citing the considerable length of time the case has been pending (including a period when the case was treated as a FORM case). Applicant urged additional time to ascertain what DoD needed for a waiver of the *per se* denial requirements imposed by 10 U.S.C. Sec. 986 ("the Smith Amendment") for cases where the applicant was convicted and sentenced to more than 365 days of incarceration. Hearing arguments from both parties, Applicant's motion was denied, without prejudice to move later to hold the record open for more time to obtain additional guidance from DoD and material to support a waiver recommendation under the Smith Amendment.

Applicant requested, again before the close of the hearing, to leave the record open to afford him the opportunity to supplement the record with an affidavit covering one of Applicant's character witnesses and a transcript of the proceedings covering his tax evasion trial in 1986. There being no objections, and good cause being shown, Applicant was afforded an additional three days to supplement the record with an affidavit covering the character witness and an additional thirty days in which to obtain a copy of the transcript covering his 1986 tax evasion trial. Within the time permitted, Applicant supplemented the record with an affidavit from witness A, which is accepted as Applicant's exhibit I. However, Applicant did not provide any transcript or other documentation of his covered tax evasion trial within the time allotted.

STATEMENT OF FACTS

Applicant is a 61-year old president of a defense contractor who seeks to retain his security clearance which he has held in connection with his current company since May 1999 (*see ex. C; R.T., at 36*).

Summary of Allegations and Responses

Applicant is alleged to have been charged in March 1986 in State A with two counts of income tax evasion, a violation of 26 U.S.C. Sec. 7201, for the tax years of 1980 and 1981, later found guilty of the charges and sentenced to serve one year and one day of incarceration in a federal correctional facility, placed on three years of probation, and ordered to pay a fine of \$10,000.00.

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

For his response to the SOR, Applicant admitted being convicted as charged for income tax evasion, sentenced to one year and one day of federal incarceration, placed on three years of probation, and ordered to pay a fine of \$10,000.00. He admitted his security clearance is subject to denial pursuant to 10 U.S.C. Sec. 986, absent a waiver exception in a meritorious case.

Relevant and Material Factual Findings

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

Following his discharge from the Navy in February 1961, Applicant went to work as a nuclear power inspector for a local nuclear power employer in his home state of State A. After experiencing some financial tightening in 1980, Applicant failed to file his federal tax return with the IRS. He based his filing omission on a Constitutional claim: others in his state had asserted in their defense of failing to file their federal income tax returns (*see R.T., at 19-20*). He assures he was not a tax protestor, but merely a tax payer who was too strapped in his finances at the time to take care of his federal taxes, and seized on Constitutional defenses he learned from acquaintances at the time. When he didn't pick up the IRS's demand letter for filing of tax returns for the tax years 1980 and 1981 at work, Government charged him with

tax evasion for the same two years. More specifically, Applicant was charged with failing to file tax returns for the tax years of 1980 and 1981 and by doing so evading assessed tax obligations of \$2,975.24 for tax year 1980 and \$9,737.59 for tax year 1981 (*see ex. 4*).

Although the court apparently exhibited some sympathy for Applicant after he pleaded guilty to two felony charges of non-filing (*i.e.*, for tax years 1980 and 1981), ultimately it accepted his guilty plea and convicted him of two felony counts of tax evasion, in violation of 26 U.S.C. Sec. 7201. In turn, the Court sentenced Applicant to one year and one day of incarceration in a federal correctional facility, placed him on three years of probation, and ordered him to pay a fine of \$10,000.00. Applicant served eight months of time in prison in a low security facility. While serving his time, he thought a great deal about what his filing omissions had cost him. Realizing he had broken the law, he committed himself resolutely to rectifying his mistakes when he emerged from prison: taking care of his tax obligations with the IRS and finding new employment.

While still in incarceration, Applicant followed up on his commitments to resolve his tax liabilities: He worked out a payment arrangement with the Service for \$200.00 a month payments (R.T., at 24) while he was still in prison (*see R.T.*, at 38). Even without work after his release, he continued to make his agreed \$200.00 monthly payments. But he didn't stay in his old community in State A: Rather, he relocated first to State B where he worked for a local power company for several years, met his current spouse, and remarried in 1993. Upon meeting his current spouse (in 1988), he became very interested in the teachings of the Catholic Church and converted to Catholicism in 1996. His conversion has continued to have a profound influence on his personal values and relationships, as well as on his grasp of duty and responsibility to his profession and community.

Since becoming a converted Catholic, Applicant regularly tithes 25 to 30 per cent of his income to the Church. A former vice president with the company he was employed with for over seven years, Applicant has owned and operated his own company since July 1998, in conjunction with his other partners. He has been faithful in his meeting his agreed monthly payments with the IRS (periodically adjusted by the Service) and in 1995 worked out a settlement arrangement for liquidating his federal tax obligations within 90 days (*see ex. A*). Agreeing on a liquidated payment of \$43,000.00 to cover all past due tax obligations owed, Applicant fully met his settlement commitment to the IRS and was credited with a release of federal tax lien in July 1995. He has continued to meet his federal tax filing and payment obligations in a timely way (*see R.T.*, at 37).

Applicant has continued to be a major benefactor to not only Catholic Charitable groups, but to higher education foundations and other charitable groups as well (*see ex. B*; R.T., at 32-33). He is highly regarded by colleagues and associates of his with whom he has worked in various non-profit organizations (*see exs. D, E and H*), as well as fellow parishioners and his priest of his local parish, all of whom vouch for him as a person of great integrity and character who can always be trusted to keep his word and commitments (*see exs. F, G and I*).

Since his release from incarceration in 1986, Applicant fully satisfied all of his imposed probation conditions for his three years of court-ordered probation (*see R.T.*, at 40) and has experienced no federal, state or local convictions of any kind (*see R.T.*, at 39-40).

CONTROLLING 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.

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.**

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 an exemplary record of performance and trust in his professional, interpersonal and charitable relationships since he relocated in his current State B some thirteen years ago (in 1988). He also comes burdened by a felony conviction in 1986 arising out of federal charges of tax evasion derivative of his failure to file federal tax returns in 1980 and 1981, little more than three years old.

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1986 tax evasion conviction could be considered isolated, dated, the result of mistakes of judgment and financial pressures at the time, and sufficient to warrant the full benefit of revised Adjudicative Guidelines MC a (criminal behavior not recent), MC b (the crime was an isolated incident) and MC f (there is clear evidence of rehabilitation).

Applicant's satisfaction of his probation conditions and overall transformation into a highly reliable and trustworthy person in all of his professional and personal affairs do reflect significant and persuasive rehabilitation on his part and demonstrable evidence of his regaining the judgment, reliability and trust required to continue holding a security clearance. With over fifteen years now of seasoning, he should be considered a rehabilitation success story who is entitled to the full benefit of both the mitigation guidelines of Guideline J and E2.2 considerations, without any consideration of the Smith Amendment.

But as the result of Applicant's federal 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 Applicant actually served less than a year in a minimum security federal incarceration facility, and he has since completed all the probation conditions. 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. Otherwise worthy 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, still cannot free him from coverage of the Amendments's mandatory bar, save for his 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 further consideration of a waiver in this case. Affording considerable credit to the extraordinary turn around Applicant has demonstrated in his personal and professional behavior and exhibited responsibilities, enabling him 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 warranted. So, while unfavorable conclusions are called for with respect to the allegations covered by sub-paragraphs 1.a and 1.b by virtue of the *per se* requirements of the Smith Amendment, waiver consideration is recommended herein.

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 recommend further consideration of this case for a waiver of 10 U.S.C. Sec. 986.

Roger C. Wesley

Administrative Judge