

DATE: December 26, 2001

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-17354

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

William S. Fields, Department Counsel

**FOR APPLICANT**

Gary Byler, Esq.

**SYNOPSIS**

Applicant, a 22-year old employee of a defense contractor, was convicted of a felony offense in 1998 for which she was sentenced to three years of incarceration (suspended) for the offense of receiving stolen property. She suspected the car was stolen but succumbed to peer pressure, after being privy to other suspected car thefts over a six-month period. 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. Clearance is denied.

**STATEMENT OF THE CASE**

On August 30, 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 October 4, 2001 and requested a hearing. The case was assigned to this Administrative Judge on October 22, 2001 and was scheduled for hearing. A hearing was convened on November 13, 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 two witnesses (including herself) and one exhibit. The transcript (R.T.) of the proceedings was received on November 21, 2001.

**STATEMENT OF THE CASE**

Applicant is a 22-year old flight-line installer for a defense contractor who seeks a security clearance at the level of

secret, having been granted an interim clearance in June 1999.

## Summary of Allegations and Responses

Applicant is alleged to have been charged in May 1998 in her home state of receiving stolen goods (a felony) and of subsequently being found guilty of that charge, sentenced to three (3) years in the penitentiary, suspended, and ordered to pay court costs in the amount of \$540.50 and restitution.

As the result of Applicant's alleged felony conviction and sentence to more than 365 days confinement (suspended sentence 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 any determination of an authorized exception in a meritorious case.

For her response to the SOR, Applicant admitted being convicted as charged for receiving stolen goods in 1998 and being sentenced to three years in the penitentiary (suspended), in addition to being taxed court costs in the amount of \$540.50, and ordered to pay restitution. She admitted her 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.

While just a high school student (her parents divorced), Applicant accompanied her mother and stepfather, who had accepted an overseas assignment with his defense employer (the same as Applicant's current employer), abroad. She was still very innocent when she arrived in the foreign country and was never exposed to any wrongdoing during her two-year stay with her mother and step-father on the latter's overseas assignment. During her two-year stay abroad (*i.e.*, between September 1995 and June 1997), she was an exemplary student and role model for the younger students at the American-operated school she attended (*see ex. 2*). When she returned home with her mother and step-father during the summer of 1997, she longed to establish new friendships and befriended several individuals with troubled histories who she would come to realize were very bad association choices (*see R.T.*, at 21).

After initially making friends with a Mr. A, Mr. A, in turn, introduced her to Mr. B. Once she got acquainted with Mr. B, she proceeded to spend the ensuing ten months co-habiting with him. Over the course of a four month span between December 1997 and March 1998, Mr. A committed several acts of larceny while driving about with Applicant and two of Mr. A's other friends, primarily Mr. C: Mr. A committed several acts of vandalism on cars they encountered. In each instance, Mr. A and an accomplice ripped off various equipment from cars they found unattended in parking lots; while Applicant and another girl stayed behind. In none of these cited incidents was Applicant or any of her friends or acquaintances cited for theft or damage.

On the day following Mr. A's last theft of car equipment (this one in March 1998), Mr. A appeared at Applicant's home with a sporty SUV and suggested she try it out. Suspicious that the car, like the others, might be stolen (since she knew he did not have any money to buy such a car), she, nonetheless, succumbed to the peer pressure exerted by Mr. A and took the car out for a short drive before returning to the apartment: Her estimates of distance vary from one mile to one block (*compare ex. 2 with R.T.*, at 22). So badly did she want to fit in with her new friends that by her own admission she "would have done almost anything to be accepted" (*see ex. 2*). Whether or not Mr. A's reason for enlisting Applicant to drive the vehicle was to neutralize her from implicating him is not entirely clear, but plausible. Factual development of the issue is too incomplete, however, to draw any inferences of Mr. A's motives for inviting Applicant to drive the stolen SUV. Applicant was able to return the SUV without being stopped by police. Later, one of the other accomplices (Mr. C), who had wrecked one of the other stolen cars and was apprehended by police, implicated Applicant and Mr. B when confronted by police investigators.

Shortly following her brief trip in the stolen car turned over to her by Mr. A, Applicant and Mr. B were confronted by investigating police and asked their names. They were then taken to the local police station for further questioning. Once she told them everything she knew, ("I kind of turned myself in"), she was charged with receiving stolen property

by reason of her driving the subject SUV (*compare* ex. 2 with R.T., at 22-23). She was not, however, charged with being an accessory to any of the other crimes Mr. A and Mr. C had been involved in.

When initially approached by investigating police, and later in their questioning of her at the police station, Applicant was cooperative in answering their questions about the series of car thefts Messrs A and C were responsible for. Apparently because of her cooperation and more limited role in the theft, she was not charged with being an accessory. But she was charged with receiving stolen property, a felony, for driving off (at Mr. A's urging) in the SUV she suspected to be stolen.

Upon being found guilty of receiving stolen property (a felony) in July 1998, Applicant was sentenced to three years imprisonment (suspended) and ordered to pay costs of \$540.00 and to make restitution for the stolen SUV. She made agreed payments totaling \$750.00 over a ten-month period (beginning in September 1998) to satisfy her restitution requirements and successfully complete her three-year probation. She is credited with satisfying both conditions in July, 2001 (*see* R.T., at 18).

Since her conviction (her only previous legal infraction), Applicant has not been involved in any other criminally-related incidents, directly or indirectly. While she didn't terminate her relationship with Mr. B immediately after her 1998 trial (hoping he could stabilize himself), she has since severed all ties with him (*see* R.T., at 17, 21-22). By contrast, immediately following her 1998 trial she cut her ties with Messrs A and C and the rest of the crowd she associated with before her 1998 conviction (*see* ex. 2; R.T., at 26-27). She knows Mr. A to be in jail at this time and believes Mr. C to be in jail as well for their role in the 1997-1998 incidents (*see* ex. 2; R.T., at 22).

In place of her old crowd of friends, she has found new ones, who are older and much more responsible. With these new friends, and the support of her family, she no longer feels the need to fit in with her old crowd.

Applicant currently lives with her mother and step-father who characterizes her as trustworthy and "a changed person" since her conviction and ensuing disassociation with "the crowd she was running around with" (R.T., at 27). Since she was granted an interim security clearance in 1999, she has had no reported instances of any security violations (R.T., at 19) and is credited with maintaining a good employment record with her current defense contractor.

### **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, who by all evidentiary accounts under this single guideline case strayed from the exemplary young model student she exhibited to be as a high school student growing up overseas with her mother and stepfather, comes to these proceedings burdened by a felony conviction little more than three years old. Innocent when she returned to the States after high school she became involved with the wrong crowd (her step-father's characterization of her attitude change following her return to the States) and succumbed to peer pressure of making use of a vehicle stolen by the leader of the group she became associated with. Her actions were at all times, though, knowing and voluntary, even if they were influenced by an overwhelming desire to fit in with her new found friends. When confronted, she fully cooperated with police: this much surely helped her in averting even more serious felony accessory charges. Doubtlessly reflecting this cooperation, her young age at the time (just 18), her crime-free history and her lack of any manifest accessory role in the theft of the subject vehicle, or any other vehicles, she was found guilty of the lesser crime of receiving stolen property by the court and given a three-year suspended sentence. Since her conviction, she shed her associations with the individuals who involved her in the theft incident and by all accounts has returned to being a reliable productive contributor to the defense effort.

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to her 1998 conviction could be considered isolated, the result of some peer pressure, and influenced by immaturity, given her youth (just 18) at the time of the conduct, but marginally sufficient at best to warrant the full benefit of revised Adjudicative Guideline MC c (person pressured or coerced into committing the act). Nor can her underlying conduct and related conviction be considered non-recent: Three years are still relatively recent for purposes of applying the pertinent mitigation condition of MC b.

Applicant's satisfaction of her probation conditions and overall transformation into a mature young productive employee and family contributor do reflect considerable rehabilitation on her part and a strong start towards regaining the trust required to hold a security clearance. With just over three years of seasoning and only six months removed from probation, however, she is still open to some concerns about the durability of her rehabilitation under the supplemented Adjudication Guidelines and E2.2 considerations, even without any consideration of the Smith Amendment.

But as the result of her state felony conviction, 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. This much is true, even though the sentence was suspended by the court, and she has since completed all of 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. 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. Unfavorable conclusions are warranted with respect to the allegations covered by subparagraphs 1.a and 1.b.

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