

DATE: January 22, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19057

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 41-year old soft ware engineer for a defense contractor, and convicted of multiple drug-related felony charges in 1988, was later sentenced to consecutive sentences, each exceeding 365 days of incarceration. 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 (which is recommended here). Applicant successfully completed her probation. She went on to complete her college education in mathematics and prosper with her current defense contractor. She is credited with numerous citations and letters of appreciation from not only her manager, supervisors and colleagues, but from community volunteer organizations as well. Besides her work and community volunteer efforts, she has devoted her many talented energies to raising a family. Applicant mitigates the trust concerns raised by her conviction sufficiently to merit further consideration of a waiver of the *per se* security clearance bar requirements placed in force by the Smith amendment.

STATEMENT OF THE CASE

On June 4, 2002, the Defense Office of Hearings and Appeals, pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), 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 June 19, 2002, and requested a hearing. The case was assigned to this Administrative Judge on September 5, 2002, and was scheduled for hearing. A hearing was convened on October 23, 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 eight witnesses (including herself) and eight exhibits. The transcript (R.T.) of the proceedings was received on

October 31, 2002.

STATEMENT OF FACTS

Applicant is a 41-year old software engineer for a defense contractor who seeks retention of her security clearance, which she has held since October 1997.

Summary of Allegations and Responses

Under Guideline J, Applicant is alleged to have been arrested and convicted in May 1988 of (Cont I) cultivating marijuana, (count II) maintaining a dwelling house for the keeping of controlled and dangerous substances and (Count V) unlawful possession of drug paraphernalia: She was sentenced to five years imprisonment and a \$5,000.00 fine on Count I, two years imprisonment and a \$2,000.00 fine on Count II, and one year imprisonment and a \$1,000.00 fine on Count V. Based on the alleged sentence imposed, Applicant's conviction and sentences are covered by the Smith Amendment (10 U.S.C. Sec. 986).

For her response to the SOR, Applicant admitted the covered allegations. In explanation, she claimed her 1988 conviction and life surrounding the circumstances leading to her arrest and conviction represent the distant past. Educated and trained as a software engineer, she claimed to have turned her life around with demonstrated commitment to her family, professional and community pursuits.

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.

Between 1973 and 1980, Applicant used marijuana infrequently, about twice yearly. Beginning in 1980, she increased her use of marijuana to daily usage and maintained this frequency pattern to October 1988. Besides marijuana, Applicant also used other drugs prior to 1988: Crank (which she inhaled in powder form, two to three times monthly from about 1982 to 1986), cocaine annually (between 1980 and 1988, when provided to her), LSD (between 1982 and 1984, until she had a bad experience with the drug that required medical treatment), and white crosses (two to three times weekly for a couple of months spanning 1980 and 1981). Between 1980 and 1988, Applicant provided for herself by performing off and on as an erotic dancer (*see* R.T., at 61).

Applicant was able to abstain from Crank for about two years before resuming her use with a boyfriend she became romantically involved with. With her boyfriend, she used Crank two to three times a month over a two-month stretch between January and May 1988.

After moving in with her boyfriend in January 1988, she continued to use illegal drugs in his presence. While admitting to being aware of his selling marijuana during their live-in arrangement, she steadfastly denies becoming involved in any of his drug distribution or cultivation activities. She insists, too, to being unaware her boyfriend had been cultivating marijuana, or had placed any marijuana in the closet of their residence at any time during the Spring of 1988. She further denies any knowledge of her boyfriend selling any marijuana to an informant.

Applicant was not present at their residence when her boyfriend was arrested and charged with marijuana-related activities in May 1988. She had encountered disagreements with the same boyfriend and had taken to spending nights away with friends in the expectation of breaking away from him (*see* R.T., at 62-63). When she returned home to find their residence torn apart, she was met by a friend of her boyfriend's and told of the police raiding of their apartment looking for Applicant. Several days later, she was arrested by local police on felony warrants. When the police searched her car, they found traces of marijuana from smoked cigarettes and arrested her on marijuana possession charges, as well as on the outstanding felony warrants stemming from the previous police raid of her joint residence.

Once charged with drug-related felony charges, Applicant was prepared to accept a plea bargain. Questioned by a relative as to why she would plea bargain if she were innocent, she elected to take her case to trial. At trial, she declined to testify on the recommendation of her attorney (reportedly concerned of the implications of her smoking marijuana),

was unable to prove her innocence and was convicted on all three counts. Because of controlling collateral estoppel principles, no inferences of Applicant innocence in fact are permitted with respect to the charges on which she was tried and convicted in October 1988.

On the felony-related drug charges Applicant was convicted of in October 1988, she was sentenced as alleged in the SOR. Applicant's sentences were ordered to run consecutively (*see ex. 4*). She served two years in the state's correctional institution before being paroled in December 1990. Applicant was released from parole in April 1991 (*see R.T., at 50*).

Following her parole from incarceration in December 1990, Applicant enrolled in an accredited local university. She earned a B.S. degree in mathematics, with a minor in computer science in 1997. Her academic record was excellent and earned her an entry position shortly after graduation as a computer analyst with her current employer. With this employer Applicant has shown excellent professional development and recently was promoted to her current position of software engineer, where she has continued to excel.

Applicant's work-related credits with her current employer include outstanding performance evaluations and numerous promotions in recognition of her outstanding work (*see exs. C, D and E; R.T., at 36-43, 66-84*). In addition to her regular duties, she has completed training courses in information and operations security, and is regularly relied on by her employer for her security expertise (*see ex. H*).

Applicant is highly regarded by her division manager, supervisors and co-workers for her engineering software skills, which she has put to productive use in developing software changes to accommodate updated system changes (*see ex. H*). She is known by her colleagues to be highly reliable and trustworthy and a valued team member who consistently mentors junior team members.

Applicant is consistently recognized, too, for her many contributions outside of her work place. Married in 1995, she assumed parental responsibilities for not only her own daughter (born to her in March 1991), but for her husband's children by another marriage (*see R.T., at 43*). She has received numerous letters of appreciation for her volunteer services in behalf of United Way and other support groups associated with her employer (*see ex. G*).

Applicant's educational, professional and family pursuits since her release from prison represent significant life-style and life goal changes for her. From a person accustomed to using drugs, she has emerged as a highly responsible and successful professional who devotes her considerable energies to completing her employer's defense-related missions, undertaking community volunteer efforts, and raising her family. Applicant may be fairly characterized as a fully rehabilitated and exemplary role model in her work, community and home.

True, Applicant is noted for having continued to use marijuana occasionally between 1991 and 1994 at social functions, and pleading guilty to a DuI offense in 1994. She has remained drug free and alcohol-abuse free since 1994, however, and remains fully rehabilitated from any past problems with illegal and abusive substances. Her June 1997 SF-86 omission of her occasional use of marijuana (between 1991 and 1994) stemmed from her attributed belief her usage was negligible and over with. While her SF-86 omission cannot be fairly characterized as a simple misreading of the form, she made a prompt, good faith correction when afforded a opportunity in an ensuing DSS interview two months later. Neither her prior substance abuse problems nor her SF-86 omission was enough to prevent her obtaining her security clearance in 1997 (*see R.T., at 59*). Neither judgment lapses are enough to tarnish the impressive turn around she has shown by her educational accomplishments, job achievements, community efforts, and parenting success since her 1990 parole from incarceration.

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

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 is a highly regarded software engineer who as a young woman became involved with illegal drugs and was later convicted after a full trial, along with her boyfriend, of joint cultivation, maintenance of a dwelling house for the keeping of controlled substances, and possession of drug paraphernalia, for which she was multiple-sentenced to consecutive prison terms exceeding 365 days. Paroled after service of two years in incarceration, Applicant completed college with honors, joined her current defense contractor where she has continued to prosper, married, and is a successful parent, both of her own child and her step children. Applicant is by all credible accounts fully rehabilitated.

Independent consideration of Smith Amendment related-conduct

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to her 1988 drug-related arrest and conviction could be considered dated and the result of drug-related mistakes of judgment at the time, and sufficient to warrant the benefit of revised Adjudicative Guidelines MC a (criminal behavior not recent), MC b (conduct isolated) and MC f (there is clear evidence of rehabilitation).

Applicant's satisfaction of her probation conditions and renewed indicia of rehabilitation (reinforced by the support she draws from her manager, supervisors, coworkers, United Way representatives and friends) demonstrates persuasive evidence of increased maturity, reliability and trust. Weighed against the imputed judgment and trust lapses reflected in her drug-related conviction, her prior mistakes should be considered sufficiently mitigated to entitle her to the renewed level of trusted judgment and reliability necessary to afford her continued access to classified information. Put another way, without consideration of the Smith Amendment, Applicant's impressive post-release rehabilitation efforts would be enough to enable safe predictive judgments about her overall judgment, reliability and trustworthiness requisite for holding a security clearance.

Application of Smith Amendment

But as the result of Applicant's state felony conviction and multiple consecutive sentences in excess of 365 days (sub-paragraph 1.a), her actions fall within the coverage of the plain mandatory provisions of the Smith Amendment's provision 1. 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 very encouraging, still cannot free her from coverage of the Amendments'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 warrants further consideration of a waiver in this case. Taking full account of the gravity of Applicant's covered 1988 offenses, her exemplary accomplishments since her 1990 parole, and the confidence she has inspired by everyone who knows and works with her, her restorative efforts to date are considered sufficient to enable her to claim the mitigation benefits of several of the mitigating conditions of Guideline J: MC a (conduct not recent), MC b (isolated misconduct), MC f (clear evidence of rehabilitation) and MC g (meritorious circumstances warrant waiver by SecDef), 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. 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.

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

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