

DATE: January 30, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-25896

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Deputy Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was involved in two separate special courts martial proceedings in 1967 on AWOL charges, for which he was sentenced to confinement of 6-month sentences in each case. He refutes allegations that he was sentenced to 13 months confinement and mitigates, accordingly, his conduct by showing no recurrent criminal conduct and a meritorious professional, family and community record that reflects solid judgment, reliability and trustworthiness. Clearance is granted.

**STATEMENT OF THE CASE**

On March 20, 2003, 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 April 18, 2003 and requested a hearing. The case was assigned to this Administrative Judge on August 18, 2003, and was scheduled for hearing on November 4, 2003. A hearing was convened on November 4, 2003, 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 two exhibits; Applicant relied on two witnesses (including himself) and four exhibits. The transcript (R.T.) of the proceedings was received on November 14, 2003.

**SUMMARY OF PLEADINGS**

Under Guideline J, Applicant is alleged to have a history of criminal activity during his military service. Specifically, he is alleged to have been (a) arrested in January 1967 for AWOL (released to military authorities), (b) arrested in February 1967 for Army desertion (released to military authorities), (c) arrested in ay 1967 for AWOL, for which he was

sentenced to confinement for 6 months and a 1/3 reduction in pay, and (d) arrested in June 1967 for AWOL, for which he was sentenced to 13 months confinement. By virtue of his being convicted and sentenced to over a year of confinement, his conduct is covered by the Smith Amendment's (10 U.S.C. Sec. 986) *per se* disqualification requirements, subject to consideration of a waiver in a meritorious case.

For his answer to the SOR, Applicant admitted his AWOL arrests but denied his arrest for Army desertion. He also denied application of the Smith Amendment to the alleged facts of his June 1967 arrest and sentence. He claimed to be a disabled, decorated Vietnam veteran, who was released from confinement in December 1967 (never having been sentenced to 13 months confinement), honorably discharged from active duty in February 1969, and honorably discharged from the inactive reserves in March 1972. Applicant claimed to have been a member of the American Legion for over 10 years and one who has donated his time and gifts to his disabled Veterans Hospital.

### **FINDINGS OF FACT**

Applicant is a 55-year-old self-employed truck driver who seeks a security clearance. 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 has been married to his current spouse (W) since 1971 and has three children by W (ex. 1; R.T., at 50). Since his honorable Army discharge from active duty in February 1969 he has had no adverse encounters with law enforcement.

While in the Army, Applicant was first arrested in January 1967 for AWOL by a local police department after he had failed to timely return to his basic training unit in another state. On this first arrest, he was cited at a local installation, given a plane ticket and permitted to return to his basic training unit (R.T., at 30, 38). Once back with his unit, he was told he would be court martialed (by special court martial) for being AWOL for 14 days. Told that he would likely get 6 months of confinement and 2/3 reduction in pay, he went AWOL for a second time. Three days later (in February 1967) he was arrested by a local police officer for desertion (R.T., at 30-31). Once returned to another Army unit (not his basic training unit), he was charged with AWOL and court martialed by special court martial in May 1967 (R.T., at 35). At the conclusion of his first special court martial, he was given 6 months and a 2/3 reduction in pay.

After serving about three months of his first courts martial sentence, Applicant was released and credited with suspension of the remaining 3 months of his sentence (R.T., at 35-37). Young and immature, Applicant went AWOL again and was picked up in May 1967 after about 14 days of AWOL. Once returned to his unit, he was charged with AWOL and court martialed for a second time. In this second courts martial, he was sentenced to an additional 6 months of confinement and given a 2/3 reduction in pay (R.T., at 31, 36-40).

In July 1967, following his second sentence of 6 months confinement and reduction in pay, Applicant was incarcerated for the second time. Applicant commenced serving his imposed 6-month sentence in July 1967 and served the full 6 months before he was released in December 1967. and returned to active duty (R.T., at 32)

Applicant assures he was never sentenced to 13 months of confinement in 1967 and has been unable to obtain his military records to document his assurances (R.T., at 32, 48). He attributes the erroneous mistaken reference to a 13-month sentence in the FBI information report (ex. 2) to a mistaken combining of his two 6-month sentences. The only proof offered by the Government to support its allegation of Applicant's being sentenced separately to 13 months of confinement in 1967 is the FBI's information report. This report lists the June 1967 AWOL charge and reports a 13-month sentence, without reference to any source documents. Government acknowledges, too, its difficulty in obtaining Applicant's military investigation records (R.T., at 47). Both Applicant and the Government agree that the maximum amount of confinement that can be allowed in a special courts martial is 6 months.

Based on the testimony of Applicant and a review of the only documentary evidence provided, Applicant's claims that he received two confinement sentences of 6 months each, and not a 13-month confinement sentence in connection with his second courts martial, is accepted.

After his release from confinement in December 1967, Applicant served with distinction in Vietnam where he was

disabled and was awarded the bronze star medal for heroism (ex. D). Since his honorable Army discharge from active duty in February 1969 (ex. C), he has had no adverse encounters with law enforcement.

Applicant's spouse (W) describes him as a very responsible and trustworthy person who contributes considerable time and resources to disabled veterans in their community, as well as the American Legion. Applicant and W have taken in a number of foster children in their home in the past (between 1984 and 1988), many of them sexually and physically abused, and provide an excellent growth environment for them to progress. Applicant is a decorated disabled Vietnam war veteran. Applicant is highly regarded by his friends, business customers and trucking company he is leased to (ex. A).

## **POLICIES**

Adjudicative Guidelines of the Directive (Change 4) list guidelines to be considered by judges in the decision making process covering DOHA cases. Judges are required to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Criminal Conduct**

*The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

#### **Disqualifying Conditions:**

DC 1. Allegations or admission of criminal conduct.

DC 2. A single serious crime or multiple lesser offenses.

#### **Mitigating Conditions:**

MC 1. The criminal behavior was not recent.

MC 6. There is clear evidence of successful rehabilitation.

### **Burden of Proof**

By virtue 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 material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that 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 that 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 a meritorious professional record and no criminal history since his series of AWOL incidents over 36 years ago. Because the last of his AWOL courts martial was reported in a FBI information report to have resulted in 13 months of confinement, issues arose as to whether his conduct was covered by the mandatory clearance denial provisions of the Smith Amendment (10 U.S.C. Sec. 986). As it turns out, the FBI report mistakenly combined Applicant's separate 6-month confinement sentences from his first and second AWOL courts martial in 1967 into one reported separate confinement of 13 months. By virtue of drawn inferences that the FBI's report was mistaken and Applicant's claims of two separate 6-month confinement sentences were accepted, the Smith Amendment has no applicability to this case.

Because Applicant's special courts martial proceedings encompass criminal conduct, two of the disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct have some applicability: DC 1 (allegations of criminal conduct) and DC 3 (single serious crime or multiple lesser offenses).

Considering the very considerable elapsed time since Applicant has committed any form of criminal conduct (over 36 years) and his excellent record of responsible employment and dedicated family and community efforts, Applicant is able to show successful rehabilitation. Both MC 1 (conduct not recent) and C 6 (successful rehabilitation) are applicable. Applicant's AWOL incidents covered by Guideline J are fully mitigated.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the 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): FOR APPLICANT**

Sub-para. 3.a: FOR APPLICANT

Sub-para. 3.b: FOR APPLICANT

Sub-para. 3.c: FOR APPLICANT

Sub-para. 3.d: FOR APPLICANT

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge