

DATE: November 25, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02487

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Arrested in November 1989 for two charges which were dismissed, Applicant was charged and convicted in April 1990 with three counts of receiving stolen property and sentenced to serve consecutively one year apiece on the first two counts and six months on a third count, suspended upon good behavior and completion of three years probation. While clear evidence of successful rehabilitation and the absence of any subsequent criminal conduct over the past 14 years might otherwise mitigate security concerns over his actions, 10 U.S.C. Section 986 ("the Smith Amendment") disqualifies anyone convicted and sentenced to imprisonment for more than one year. Clearance is denied. Applicant requested a waiver based on his rehabilitation and the length of time since his conviction. A waiver is recommended.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 29, 2002. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. (1) The SOR alleges specific concerns over criminal conduct (Guideline J), including an allegation that his criminal conduct disqualifies Applicant from having a security clearance because of 10 U.S.C. Section 986, unless the Secretary of Defense authorizes an exception. Applicant responded to these SOR allegations in an Answer notarized on November 26, 2002, where he admitted paragraphs 1 and 1.a., but denied 1.b. and requested a waiver. He asked for an administrative decision on the record

The case was assigned to Department Counsel who on May 12, 2003, prepared a File of Relevant Material (FORM) for the Applicant's review and advised Applicant that he had 30 days to submit objections and/or information before the FORM was submitted to an administrative judge and that he had the right to be represented by counsel. A Personnel Security Specialist (PSS) sent the FORM to Applicant on May 13, 2003, and again notified the Applicant that he had 30 days from receipt of the letter to submit objections and/or information before the FORM was submitted to an administrative judge. Applicant received the FORM on May 28, 2003, with a response due on June 27, 2003. The

Applicant submitted his response on June 26, 2003 and attached nine items. (Exhibit A) Subsequently, on July 2, 2003, Exhibit A was forwarded to Department Counsel who indicated he had no objection to Exhibit A, but submitted a Reply to Applicant's Response to the FORM. The DOHA Director assigned the case to me for a decision on the record on September 2, 2003.

### **FINDINGS OF FACT**

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 31 years old, has been employed with Defense Contractor #1 in State #1 since May 2001. He completed a Security Clearance Application (SF 86) in October 2001. He served on active duty in the U.S. military from 1994-1998. He was honorably discharged in March 2002. Applicant attended college in State #2 from 1996 to 1997 and in State #1 from 1998 to 1999. Applicant is currently taking classes from a university in State #3. He became a naturalized U.S. citizen in August 2001. Applicant was married in 1994 and has a child born in June 1999.

### **Criminal Conduct**

In response to SF 86 Question 21 Applicant reported a November 1989 arrest in State #1 for receiving stolen property and having received three years probation. The State #1 Final Order of April 1990 documents his conviction for felonies of two counts of Receiving Stolen Property. He was ordered to serve one year in the penitentiary on each count to run consecutively. In mitigation of punishment and compatible with the public interest, the Court suspended one (1) year on each count of the sentence conditioned upon the Defendant's good behavior and that he be placed on three years of active probation and complete an alcohol treatment program and pay \$750 in restitution. On another misdemeanor count the Court ordered Applicant to serve six months in jail to run consecutively<sup>(2)</sup> with the other charge; the judge similarly suspended that sentence and placed him on three years of active probation. A charge for possession of burglary tools was nolle prosequi. The Federal Bureau of Investigations (FBI) reports documented this State #1 charge in November 1989 for Burglary and Grand Larceny, which were later dismissed, and two counts of receiving stolen property for which he received a one year sentence for each count which was suspended, and was given three years active probation, consecutive for each counts.

In his Answer Applicant admits these convictions from when he was a "difficult teenager," but stated that the arrests occurred when he was only 18 years old and a senior in high school. Applicant stated that since that time he has never been involved or committed any other criminal acts. He joined the military when he was 23 and received two meritorious promotions and several awards, including two achievement medals and one commendation medal. He has not requested a pardon.

### **Reference**

Applicant's previous military supervisor wrote a letter of reference for him in October 1997 which stated he was impressed with Applicant's "scope and breadth of talent." This officer stated that in his 13 years in the military he know of "no single individual who contributed so much" as Applicant. In his assignments Applicant developed many new systems and initiatives. This officer concluded that Applicant had his "100% confidence. He is an eager, brilliantly skilled, and tremendously dedicated young man." He argued that Applicant was perhaps "the finest young man" he had ever served with both in peace and combat.

### **STATUTORY REQUIREMENTS**

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Statutory provision (1) disqualifies a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." DoD implementing guidance interpreted this language to include convictions in either state or federal court ("person with convictions in both State and Federal courts, including UCMJ offenses) and encompasses the sentence imposed

regardless of the time actually served ("with sentences imposed of more than one year, regardless of the amount of time actually served.") This case falls within this statutory provision and the DoD implementing guidance. However, the Smith Amendment establishes authority for the Secretary of Defense (or the Secretary of the military department concerned) to grant a waiver where meritorious cases exist. This authority may not be delegated. Neither the statute, nor DoD, nor the DOHA Director in the OI has defined "meritorious circumstances."

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed the relevant Guidelines as set forth below :

### **Guideline J - Criminal Conduct**

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

**Conditions that could raise a security concern and may be disqualifying include:**

- a. Allegations or admissions of criminal conduct
- b. A single serious crime or multiple lesser offenses.
- c. Conviction in a Federal or a State court. . .of a crime and sentenced to imprisonment for a term exceeding one year.

**Conditions that could mitigate security concerns include:**

- a. The criminal behavior was not recent
- d. . . .the factors leading to the violation are not likely to recur;
- f. There is clear evidence of successful rehabilitation

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## **CONCLUSIONS**

### **Criminal Conduct**

The Government maintains security concerns over Applicant's criminal conduct based on his April 1990 convictions on three counts of Receiving Stolen Property and sentences of one year each for the felony counts and six months for the misdemeanor count to run consecutively where the judge suspended the sentence and imposed three years of active probation for each count. The Criminal Conduct guidelines indicate that a person may be disqualified where the following conditions apply: a. Allegations or admissions of criminal conduct, b. A single serious crime or multiple lesser offenses, c. Conviction in a Federal or a State court. . .of a crime and sentenced to imprisonment for a term exceeding one year. Also, a provision of the Smith Amendment, as implemented by DoD, mandates restrictions on the granting or renewal of security clearances: provision (1) disqualifies persons with convictions in both state and federal

courts with sentences imposed of more than one year, regardless of time actually served.

To his credit, since 1989 there is no evidence that Applicant has subsequently been involved with any criminal activity in 14 years. Consequently, the criminal actions that led to his 1990 conviction and probation may now be mitigated under condition (a) as the behavior was not recent, (d) . . . the factors leading to the violation are not likely to recur as he has outgrown his immature conduct as a teenager; and (f) there is clear evidence of successful rehabilitation. However, as implemented by DoD, the statutory provision in 10 U.S.C. Section 986 makes no exception for subsequent rehabilitation. Consequently, despite the passage of time since conviction, this statutory provisions mandates doubt over his current trustworthiness and access to classified information as he was previously convicted of a crime and sentenced for a term exceeding one year. Whether the behavior was recent or whether he is fully rehabilitated from his criminal conduct is not material under 10 U.S.C. Section 986. Thus, his 1989 criminal conduct cannot be mitigated<sup>(3)</sup> under this statutory provision. After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a., but against Applicant on subparagraph 1.b. under SOR Paragraph 1.

### **Request for Waiver**

Applicant in his Answer to the SOR requested a waiver based on the length of time since his 1990 conviction, a period of 14 years. He is now reliable and trustworthy, had distinguished military service, and has the endorsement of his military superior as brilliantly skilled and tremendously dedicated young man.

DOHA OI 64 explicitly prohibits an administrative judge from providing an explanation for a waiver recommendation. I recommend further consideration of this case for a waiver under 10 U.S.C. 986.

### **FORMAL FINDINGS**

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 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 a security clearance for the Applicant. I recommend further consideration of this case for a waiver under 10 U.S.C. Section 986.

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Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Since the judge ordered these sentences to be served consecutively, Department Counsel correctly argues these sentences should be added together to "effectively total two and one-half years of imprisonment." The Department Counsel correctly argues that the Smith Amendment applies to the sentence imposed by a state court, regardless of the period of imprisonment actually served.
3. **Conditions that could mitigate security concerns include:** a. The criminal behavior was not recent; b. The crime

was an isolated incident; c. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; e. Acquittal; f. There is clear evidence of successful rehabilitation; g. Potentially disqualifying conditions. . . .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.