

DATE: August 27, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-07051

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Juan Rivera, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant, a 31-year old drafter for a defense contractor, was convicted of a breaking into a motor vehicle felony charge in 1990, and later sentenced to one to five years of imprisonment (suspended). 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 waiver (which is recommended here). Applicant is highly regarded by his spouse, friends, neighbors, management and work associates as a person who is hardworking, reliable and trustworthy. Clearance is denied. I recommend further consideration of this case for a waiver of the *per se* security clearance bar mandated by the Smith Amendment.

**STATEMENT OF THE CASE**

On February 6, 2003, the Defense Office of Hearings and Appeals, 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 March 14, 2003, and requested a hearing. The case was assigned to this Administrative Judge on April 14, 2003, and was scheduled for hearing. A hearing was convened on May 8, 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 three exhibits; Applicant relied on three witnesses (including himself) and five exhibits. The transcript (R.T.) of the proceedings was received on May 16, 2003.

**PROCEDURAL ISSUES**

Following the hearing, Applicant faxed post-hearing submissions for consideration: a letter from the girlfriend (Ms. G)

he was convicted of assaulting in 1994, a personal statement from the Applicant covering his past judgement lapses and corrective steps he has taken to change his life around, and a letter from his supervisor supplementing his trial testimony. Department Counsel does not object to either Ms. G's letter or Applicant's own statement, and they are admitted as exhibits F and G, respectively. Department Counsel does object to the admission of the statement from Applicant's supervisor, for reasons of the letter's being both cumulative and outside of the proceedings. Taking into account both the cumulative effect of the supervisor's letter and the absence of any Applicant reservation to supplement the record, Department Counsel's objection must be sustained.

### STATEMENT OF FACTS

Applicant is a 31-year old drafter for a defense contractor who seeks a security clearance.

#### **Summary of Allegations and Responses**

Applicant is alleged to have been twice arrested in his home state: once in March 1994 for assault and battery, for which he was found guilty and fined \$254.25, and previously in April 1990 on two counts of petit larceny, two counts of breaking and entering a car, and unlawful entry into enclosed places, for which he was found guilty of one count of petit larceny (misdemeanor) and one count of breaking into a motor vehicle (Class F felony) and sentenced to serve one to five years in prison (suspended to one year of probation and house arrest). By virtue of his 1990 felony conviction and sentence in excess of one year, Applicant's conduct is alleged to be covered by 10 U.S.C. Sec. 986, which disqualifies him from holding a security clearance, subject to a waiver approved by the Secretary of Defense in a meritorious case.

For his response to the SOR, Applicant admitted each of the allegations, with accompanying explanations. He claimed his 1994 assault and battery arrest resulted from his trying to fend off his girlfriend who had become emotional after he told her he wanted to end their relationship. He claimed the court would not listen to either his story or his supporting ex-girlfriend and chose to rely on police-produced physical evidence of redness around her wrists. Addressing his earlier 1990 petit larceny misdemeanor and breaking and entering felony arrest/conviction, he claimed his initial sentence was suspended in favor of just one year of house arrest and probation (which he completed in February 1992), plus restitution for the damages he caused and the items stolen. Except for the covered arrests/convictions in the SOR, Applicant claims he has had no other arrests and has since matured and stabilized with his supportive family.

#### **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.

Applicant's first of two arrests occurred in April 1990 when he was 18 years of age. In the first incident, he was arrested by the local sheriff on two counts of petit larceny (a misdemeanor), two counts of breaking and entering a motor vehicle (a felony), and unlawful entry into enclosed places (a felony). Applicant had accompanied a friend to an impoundment lot where his friend's car had been impounded. While his friend took care of his business, Applicant broke into two vehicles and took beer from one and speakers and a radio from the other (*see* R.T., at 40-41). He was spotted by a lot employee, who began shooting at him. Applicant was flushed out of the lot and the police were called. On their arrival at the scene, the police arrested Applicant.

At his trial in February 1991, Applicant pleaded guilty to one count of petit larceny (a misdemeanor) and one count of breaking into a motor vehicle (a felony). He was sentenced by the magistrate to serve a term of one to five years in prison. The magistrate then suspended his sentence under the state's youthful offender's act and placed him on one year of probation and house arrest (*see* ex. 2; R.T., at 35). The remaining charges were dismissed. Applicant began his probation period in February 1991 and completed it in February 1992 (*see* ex. 2; R.T., at 35, 41).

Applicant was also arrested in March 1994. In this arrest he was charged with assault and battery on a female: his girlfriend, who he had been dating for about six months. He had gone to the girl's home that evening to end their relationship. She became very emotional and physical with him over his announced intentions. In his effort to fend her off, he bruised her wrist. Their struggle apparently roused neighbors who called the police to investigate the situation. By the time the police arrived, he had left his girlfriend's home and drove away. He was later stopped and arrested.

At his trial, his girlfriend (Ms. G) testified in his behalf and denied an assault had occurred. However, because she (a) had initially told the police Applicant had assaulted her and (b) bore physical red marks on her wrists to corroborate her claims, the court chose to treat her denials as recanted characterizations of her initial assault claims and found Applicant guilty of the assault charges and fined him \$254.25. Ms. G repeated her previous court claims of Applicant's innocence at the hearing (*see ex. F*). Without more to corroborate Ms. G's recanted claims, however, Applicant's evidence of his innocence lacks the probative weight necessary to overcome the force of his conviction. His explanations do reveal considerable extenuating circumstances, which the court would seem to have taken into account as well with its limiting punishment to a fine.

Since his last arrest in 1994, Applicant has had no further arrests or confrontations with law enforcement authorities. He has since married and shown considerable maturing and remorse for his previous judgment lapses (*see ex. G*). Applicant is highly regarded by his friends and neighbors, as well as his senior managers and associates at work. He is considered by all of his references to be hardworking, reliable and trustworthy (*see ex. D*). Both his supervisor and his wife who testified on his behalf characterize him as particularly responsible and trustworthy in his work and with his children and family (*see R.T., at 52-57*).

### **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 Secretary of Defense as to whether the case merits a waiver. 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 have been developed. These revised Guidelines 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 guidelines 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 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 material bearing on the applicant's eligibility to obtain or maintain a security clearance. The required showing of materiality, 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 meritorious employee of a defense contractor who as a young man was involved in a misdemeanor assault arrest/conviction and a more serious felony breaking into a vehicle conviction, for which he was sentenced to serve a term of one to five years in prison. Placed on one year's probation as a condition of a suspended sentence pursuant to the state's youthful offender's act, Applicant completed his probation in February 1992 and has had no further problems with law enforcement authorities. Applicant is highly regarded by his friends and neighbors, as well as his senior managers and associates at work, as a person who can be relied on and trusted. Not only does Applicant express deep remorse for his prior judgment lapses, but he demonstrates he has learned from his mistakes. Applicant is by all credible accounts fully rehabilitated and an exemplary role model in his work, community and home.

#### **Applicant's non-Smith-related arrests**

Applicant is entitled to favorable conclusions with respect to the misdemeanor arrest/conviction covered by subparagraph 1.a, which are mitigated under consideration of all of the facts presented. The 1994 arrest/conviction attributed to Applicant involves a minor altercation with his girlfriend at the time, which both Applicant and Ms. G denied at trial. The magistrate's levied small fine reflects credit to the extenuating circumstances presented by Applicant at his trial; even though, it was not enough to avert a conviction. Applicant never resumed his relationship with Ms. G, and he has avoided any similar conduct since his 1994 arrest/conviction. The conduct is, accordingly, mitigated both by time and demonstrated rehabilitation. Favorable conditions warrant with respect to the allegations covered by subparagraph 1.a under Guideline J.

#### **Independent consideration of Smith Amendment related-conduct**

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1990 petit larceny (misdemeanor) and breaking into a motor vehicle (felony) conviction could be considered dated and the result of

youthful immaturity, and sufficient to warrant the benefit of revised Adjudicative Guidelines MC a (criminal behavior not recent) and MC f (there is clear evidence of rehabilitation) as well as overall favorable consideration taking into account the E.2.2 factors.

Applicant's satisfaction of his probation conditions and his evidence of his rehabilitation (based on the recommendations he has received from his spouse, friends, neighbors, supervisor, senior managers and associates at work) demonstrate persuasive evidence of increased maturity, reliability and trust. Weighed against the imputed judgment and trust lapses reflected in his 1990 breaking into a motor vehicle felony conviction, his prior mistakes should be considered sufficiently mitigated to entitle him to the renewed level of trusted judgment and reliability necessary to afford him continued access to classified information. Except for the Smith Amendment, Applicant's impressive post-release rehabilitation efforts would be enough to enable safe predictive judgments about his overall judgment, reliability and trustworthiness requisite for holding a security clearance entitling him to continued access to classified information.

However, consideration of Applicant's breaking into a motor vehicle conviction independent of the Smith Amendment is advisory only and cannot support a favorable or unfavorable formal finding without regard to application of the Smith Amendment and its waiver exception. By and large courts at all levels lack jurisdiction to render advisory opinions absent statutory, regulatory or guiding policy authority. *Cf. Valley Baptist Medical Center v. Gonzales*, 33 S.W. 3d 821, 822 (Tex. Sup. Ct. 2000). Only by virtue of the revised Adjudicative Guidelines implementing the Smith Amendment is authority extended to DOHA judges to make advisory assessments independent of the Smith Amendment's applicability. This advisory assessment grant of authority does not extend to the crafting of formal findings. As a result, any formal finding that follows from this advisory assessment must necessarily be conditioned on the adoption or not of a waiver of the Smith Amendment's mandatory clearance bar, which only the Secretary of Defense can grant in contractor cases (as here).

### **Application of Smith Amendment**

As the result of Applicant's state felony conviction and one to five year prison term (suspended) (*see* sub-paragraph 1.b), his actions fall within the coverage 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 completed probation and time in rehabilitation, while very encouraging, still cannot free him from coverage of the Amendments's mandatory bar, save for his qualification for waiver consideration.

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 in accordance with MC g of the revised guidelines. Unfavorable conclusions are called for with respect to the allegations covered by sub-paragraphs 1.b and 1.c by virtue of the *per se* requirements of the Smith Amendment, subject to consideration of a meritorious waiver..

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**

Based on the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, I make the following FORMAL FINDINGS:

**GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT**

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: 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