

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant with history of alcohol-related arrests/convictions spanning 1965 and 1983 mitigates all of his arrests but his Smith Amendment covered negligent homicide conviction of 1973, which resulted in a sentence of no less than one year nor more than two years. Applicant also fails to mitigate his SF-86 and DSS statement omissions (save for his 1973 negligent homicide arrest/conviction) of his alcohol-related arrests/convictions. Clearance is denied.

CASENO: 02-08971.h1

DATE: 10/22/2002

DATE: October 22, 2002

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-08071

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn A. Trowbridge, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant, a 46-year old self employed defense contractor and Vietnam war veteran, convicted of a single state felony negligent homicide arrest and conviction in State A in 1996, was later sentenced to no less than one year or more than two years of incarceration in State A's prison on the state offense, with all but 30 days suspended. Applicant's conduct is perforce 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 (not recommended here). While Applicant has successfully completed his probation and mitigated his larceny and other alcohol-related offenses, he has not mitigated the trust concerns raised by his SF-86 and DSS interview omissions sufficient to merit considered restoration of the accountability and trust required to hold a security clearance. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 24, 2002, 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 May 29, 2002, and requested a hearing. The case was assigned to this Administrative Judge on August 1, 2002, and was scheduled for hearing. A hearing was convened on September 13, 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 ten exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) of the proceedings was received on September 20, 2002.

### **STATEMENT OF FACTS**

Applicant is a 46-year old self-employed defense contractor who seeks a security clearance.

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

Applicant is alleged to have a history of criminal activity that includes numerous separate offenses spanning 1965 and 1983. Specifically, Applicant is alleged to have (a) been arrested in State A in July 1965 and charged with contributing to the delinquency of a minor, for which he was fined \$55.00, (b) received non-judicial punishment (NJP) in November 1969 under Article 15 of the Uniform Code of Military Justice (UCMJ) for larceny and conspiracy, for which he was sentenced to a one grade reduction (suspended) and forfeiture of \$50.00, (c) been arrested in July 1973 in State A and charged with negligent homicide (a felony) under Sec. 750-324 of State A's compiled laws and Sec. 28.556 of State A's Stats. Ann., and sentenced to not less than one year to not exceeding two years in State A's prison, a sentence covered by the Smith Amendment (10 U.S.C. Sec. 986), (d) been arrested in March 1981 in State A for DuI, to which he pleaded guilty to a lesser charge of impaired driving, and was fined \$156.00 and ordered to attend alcohol traffic school, (e) been arrested in April 1982 in State B for driving under the influence (DuI) and fleeing to elude police and (f) been arrested in February 1983 in State B for DuI, unlawful blood alcohol while driving and contempt of court for failure to pay fines.

Additionally, Applicant is alleged to have (i) falsified his security clearance application (SF-86) of May 2000 by omitting all of his alcohol-related arrests/convictions, save for his 1973 negligent homicide arrest/conviction and (ii) concealing all of his arrest history, save for his 1973 negligent homicide arrest/conviction, in his ensuing signed, sworn DSS statement of April 2001.

For his response to the SOR, Applicant admitted each and every allegation, while attributing memory lapse to his omitting his prior arrests.

### **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, a Vietnam war veteran, was arrested and convicted for negligent homicide in State A in 1973, and sentenced to no less than one year, nor more than two years. He served a total of nine (9) months before being released and placed on one year's supervised probation. Applicant's conviction arose out of his passing a motorcycle at a high rate of speed

while under the influence of alcohol. He struck the motorcycle proceeding in the opposite direction, killing both occupants (*see ex. 4; R.T., at 44-45*). At the sentencing hearing, he expressed remorse for his actions, which the sentencing court characterized as careless driving on a revoked license hearing (*see ex. 9*)

Besides his negligent homicide conviction, Applicant was arrested and convicted of multiple offenses involving contributing to the delinquency of a minor (an incident he doesn't doubt occurred but doesn't remember any of the details), larceny in the Army arising out of confiscating Army vehicles while on patrol (*see R.T., at 38, 42-43*), and DuIs between 1965 and 1983; four in all.

Since his last DuI offense, Applicant has remarried and stabilized his life. With the caring support of his current spouse, who "has put him back together twice" after falls from other jobs (*see R.T., at 39, 62*), he no longer abuses alcohol and drinks only occasionally (*see R.T., at 63*). His spouse characterizes Applicant as very hard working and dependable.

When asked to complete an SF-86 in May 2000, Applicant acknowledged his 1973 negligent homicide conviction, but omitted all of his remaining alcohol-related arrests/convictions: all covered by question 24. He attributes memory lapse to his omission of his 1965 contributing to delinquency offense, but could offer no explanations as to why he omitted his other alcohol-related offenses. He makes no claim of misreading question 24, or to have been mis-advised by any responsible authority. With so many DuI offenses, it is implausible that he could forget all of these arrests/convictions when he answered question 24. Fear of jeopardizing his security clearance provides the most tenable explanation of Applicant's omission. Inferences of knowing and wilful concealment cannot be avoided.

Applicant was interviewed by Agent A in April 2001. When asked about any other arrests besides his 1973 arrest/conviction for negligent homicide, he responded in the negative (*see ex. 3*).

Not until he was afforded the opportunity to respond to the SOR did he acknowledge his other arrests/convictions.

## **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.**

### **Personal Conduct**

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

#### **Disqualifying Conditions:**

DC 2 The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status,

determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

DC 3 Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

**Mitigating conditions:** None

### **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 comes to these proceedings with a history of alcohol-related offenses (five in all) and a larceny-based offense in the Army for which he received NJP. The second of his five alcohol-related arrests came in 1973 and resulted in a

felony conviction, imposed imprisonment no less than one year or more than two years, and court-imposed conditions, including supervised probation.

### **Smith Amendment and other criminally-related conduct**

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1973 negligent homicide conviction could be considered dated and the result of alcohol-related mistakes of judgment at the time, and sufficient to warrant some benefit of revised Adjudicative Guidelines C a (criminal behavior not recent) and MC f (there is clear evidence of rehabilitation).

Applicant's satisfaction of his probation conditions and renewed indicia of rehabilitation (reinforced by the support he draws from his current spouse) demonstrates evidence of increased maturity, reliability and trust. When combined with the trust lapses evinced by his concealment of his alcohol-related arrests/convictions in his SF-86, however, additional seasoning would be required to enable him to reach the assurance levels necessary to make safe predictable judgments about his overall judgment, reliability and trustworthiness requisite for holding a security clearance, even without any consideration of the Smith Amendment.

But as the result of Applicant's state felony conviction (sub-paragraph 1.c), he was sentenced to a period of incarceration no less than a year nor more than two years, which taken together manifests a sentencing initiative intended to expose Applicant to time in incarceration in excess of a year certain. This reading of Applicant's incarceration term brings his imposed sentence within the coverage of the plain mandatory provisions of the Smith Amendment's provision 1. The Amendment applies, even though Applicant never actually served time in excess of a year in any incarceration facility as a result of his conviction. 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 encouraging, still cannot free him from coverage of the Amendments's mandatory bar, save for his 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 no further consideration of a waiver in this case. Taking full account of the gravity of Applicant's covered 1973 offense, his involvement in other contemporaneous offenses, and his failure to disclose his army NJP and other alcohol-related arrest/convictions when asked expressly to do so in his May 2000 SF-86 and ensuing DSS interview, his restorative efforts to date are considered to be too recent and insufficient to enable him to claim the mitigation benefits of several of the mitigating conditions of Guideline J, 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 not warranted. Unfavorable conclusions are called for with respect to the allegations covered by sub-paragraph 1.c by virtue of the *per se* requirements of the Smith Amendment.

Applicant's recent restorative efforts are sufficient, however, to mitigate the security implications of his larceny and other alcohol-related incidents. He has not had another known arrest since his last recorded one in 1983 and has demonstrated considerable stabilization of his life in recent years with the strengthened support he receives from his current spouse. With respect to these non-Smith Amendment arrests-convictions and receipt of NJP between 1965 and 1983, Applicant successfully carries his mitigation burden. Favorable conclusions warrant, accordingly with respect to sub-paragraphs 1.a and 1.b and 1.d of Guideline J.

### **Applicant's covered SF-86 omissions**

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's respective SF-86 omissions of his numerous alcohol-related arrests (four in all spanning 1965 and 1983) and single larceny offense. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

Applicant falsified his SF-86 in several material respects: omitting four of his alcohol-related arrests/convictions. He makes no persuasive claim of misunderstanding question 24, which was posed in a straightforward way in the questionnaire. Applicant's explanations for omitting the material information in the questionnaire and his ensuing DSS statement are considered insufficient to avert drawn conclusions of knowing and wilful concealment of facts material to a security clearance determination. His omissions invite application of a disqualifying conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire) and DC 3 (deliberately providing false or misleading information to an investigator or security official).

Mitigation is not available to Applicant. Only when afforded the opportunity to answer the SOR did he admit his other arrests/convictions. DOHA's Appeal Board has never found the use of mitigating condition (MC) 3 (prompt, good faith disclosure) of the Adjudicative Guidelines for personal conduct to be available to applicants seeking mitigation absent convincing proof of a prompt, good faith correction before being confronted with the facts. In this vein, Applicant does not satisfy either of the confrontation or prompt prongs of MC 3.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paragraphs 2.a and 2.b of Guideline E. Applicant's omissions reflect no mitigating actions either that would enable him to avoid treating them as subject to the felony provisions of 18 U.S.C. Sec. 1001. Unfavorable conclusions warrant as well with respect to sub-paragraph 1.h of Guideline J.

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: FOR APPLICANT

Sub-para. 1.b FOR APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para..1.f: FOR APPLICANT

Sub-para. 1.g: FOR APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

**GUIDELINE E (PERSONAL CONDUCT) AGAINST APPLICANT**

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.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 no further consideration of this case for a waiver of 10 U.S.C. Sec. 986.

Roger C. Wesley

Administrative Judge