

DATE: November 3, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08099

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 53-year old deputy program manager for a defense contractor, was convicted of a single drug-related felony charge in 1973, and later sentenced to four years imprisonment (suspended in favor of probation). 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. Applicant completed his probation and went on to complete his college education and have a successful employment career. Clearance is denied, but I recommend further consideration of this case for a waiver of 10 U.S.C. Sec. 986.

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 in May 2003 (undated) and requested a hearing. The case was assigned to this Administrative Judge on July 7, 2003, and was scheduled for hearing on September 9, 2003. A hearing was convened on September 9, 2003, as scheduled, 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 one witness (himself) and four exhibits. The transcript (R.T.) of the proceedings was received on September 25, 2003.

STATEMENT OF FACTS

Applicant is a 53-year old deputy program manager engineer for a defense contractor who seeks to retain the security

clearance that he has held since 1988.

Summary of Allegations and Responses

Under Guideline J, Applicant is alleged to have been arrested in November 1973 for possession of heroin, sentenced to four years in jail (sentence suspended), and placed on probation. By virtue of the provisions of the Smith Amendment's (10 U.S.C. Sec. 986), Applicant is subject to the mandatory clearance bar of the Smith Amendment, save for the availability of a waiver by the Secretary of Defense on a showing of meritorious circumstances.

For his response to the SOR, Applicant admitted each of the allegations set forth and provided no explanations.

Relevant and Material Factual Findings

The allegations in the SOR as admitted by Applicant are incorporated herein by reference and are adopted as relevant and material findings. Additional findings follow.

While driving home from work in 1973, Applicant was stopped by police; he and his car were searched. Police found drugs in a jacket lying in the back seat of Applicant's vehicle, which his younger brother had been wearing earlier in the morning (*see ex. 3; R.T.*, at 24-26). Applicant's younger brother was not in the vehicle when Applicant was stopped. Police at the scene told Applicant they believed the drugs were his, since they were found in a jacket located in Applicant's vehicle. Following his arrest, he was taken to a local police station, where he was held for about a week before he was released on bail (*see ex. 3*).

At his arraignment following his 1973 arrest, Applicant appeared without an attorney. He pleaded guilty to the heroin possession charge (a felony) on the promise of a probation recommendation from prosecutors (*see R.T.*, at 27). His younger brother never appeared to claim the drugs found in Applicant's vehicle were his (*see R.T.*, at 34-35). Applicant was found guilty of the heroin possession charge and sentenced to four years incarceration, all of which were suspended. Applicant was placed on four years probation (*ex. 3*).

Applicant's probation conditions included his participation in a narcotics addiction program, which required him to submit to regular urinalysis testing, and any other tests for narcotics and dangerous drug offenders that the program's officials might request (*see ex. 4*). For the first six weeks of his probation, Applicant was drug tested daily. Thereafter, he was tested once a week for five weeks and once a month for the duration of his probation (*see R.T.*, at 27). All of his tests were negative. Applicant completed his probation conditions in satisfactory manner by 1978 and was discharged from any further probation conditions.

Applicant has three children from his second marriage: one in college, one in high school, and one in middle school. He also has three children from his first marriage. Since joining his current defense contractor, he has completed his educational requirements for a bachelors of arts degree at a local university (*see ex. D*). Applicant is highly regarded by his managers and co-workers as a deputy program manager who can always be trusted and relied on to give his best effort. His work is considered exceptional and critical to a weapon system he is responsible for developing for DoD (*see exs. A and B*). His company manager describes Applicant "as an outstanding employee and family man," whose "struggle to clear his name exemplifies his character" (*see ex. A*). His company's president bestows strong praise, too: "He has always given 120% for all he has to both his family and the job" (*see ex. A*). High praise for Applicant's trustworthiness and reliability is similarly extended by co-workers who provide written character references for him (*see Ex. A*).

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 is 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 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.

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 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 highly regarded deputy program manager who as a young man was arrested and charged with possession of heroin found in a coat pocket in his car. Unable to persuade his brother to come forward and claim the heroin as his own, Applicant pleaded guilty to the heroin possession charge and was sentenced to four years of incarceration. That Applicant was placed on four years probation by the sentencing court in lieu of incarceration does not alter or change the legal force of the four year sentence for purposes of applying the Smith Amendment (10 U.S.C. Sec. 986) to the facts of this case. For over ten years, Applicant has continued to impress his company's management staff with his technical abilities and dedicated effort. Applicant is by all credible accounts fully rehabilitated and an exemplary role model in his work, community and home.

Independent consideration of Smith Amendment related-conduct

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1973 heroin possession 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 C 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 personal and work accomplishments are persuasive evidence of his increased maturity, reliability and trust. His achievements begin with his strong family background (to include his raising six children, with one currently in college) and encompass both his educational pursuits with an accredited local university and his outstanding work achievements. Applicant's company contributions and the trust and reliance he has inspired among his management team and co-workers is impressive and heavily documented in the record. His work is considered by his management to be exceptional and critical to a weapon system he is responsible for developing for DoD.

Without consideration of 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. Because a pre-Smith Amendment assessment is advisory only, however, any formal finding that follows from this advisory assessment must necessarily take into account the Smith Amendment and its exception that permits a consideration of a waiver of the 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 imposed four year sentence (*see* sub-paragraph 1.c), his actions fall within the coverage of the Smith Amendment's provision 1. Cases that may otherwise be decided in favor of an applicant must, nonetheless, be decided unfavorably because of the Smith Amendment's mandatory bar where applicable. Under the adjudicative guidelines implementing the Smith Amendment, Applicant's time in rehabilitation, while very encouraging, still cannot free him from coverage of the Amendments's mandatory bar, absent a waiver. 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, 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 Secretary of Defense.

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.a and 1.b 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

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: 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