

DATE: June 30, 2003

In re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09197

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Marc Curry, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant, a 57-year old research mechanic for a defense contractor, and convicted of a breaking and entering felony charge in 1968, was later sentenced to six months to three years of imprisonment. 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 (which is recommended here). Applicant was later pardoned of the conduct by his state's governor and

has been a valued employee of his current employer for over 26 years. Clearance is denied. I recommend further consideration of a waiver of the *per se* security clearance bar requirements placed in force by the Smith Amendment.

**STATEMENT OF THE CASE**

On February 12, 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 February 20, 2003 and requested a hearing. The case was assigned to this Administrative Judge on January 22, 2003, and was scheduled for hearing on April 9, 2003. A hearing was convened on April 9, 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 five witnesses (including himself) and three exhibits. The transcript (R.T.) of the proceedings was received on April 18, 2003.

**PROCEDURAL ISSUES**

Before the close of the hearing, the Government asked for leave to brief the issue of whether a state pardon vitiates the effect of the Smith Amendment (10 U.S.C. Sec. 986) on an application for a security conviction where there has been a prior conviction and sentence of more than 365 days of imprisonment. There being no objection from Applicant, and good cause being shown, the Government's request to supplement the record was accepted. Government was afforded ten days to brief the effect of a state pardon on a prior conviction and sentence in excess of 365 days in a Smith Act case. Applicant, in turn, was afforded ten days to respond. Within the time permitted, neither side provided any briefing of the pardon issue.

## STATEMENT OF FACTS

Applicant is a 57-year old research mechanic for a defense contractor who seeks to retain his security clearance.

### Summary of Allegations and Responses

Under Guideline J, Applicant is alleged to have been arrested in January 1968 and charged with the offense of breaking and entering a dwelling house with the intention to commit a felony; he pleaded guilty to the charge and was sentenced to six months to three years in prison. By virtue of Applicant's conviction and sentence of more than a year, his conduct is subject to the mandatory clearance bar of the Smith Amendment (10 U.S.C. Sec. 986), save for the availability of a waiver on a showing of meritorious circumstances.

Additionally, Applicant is alleged to have been arrested on two other occasions: in March 1963 for simple larceny, to which he was found guilty, sentenced to 90 days in jail, and fined \$25.00, and in October 1965 for drunk in public and altering a driver's license, to which he was found guilty of both charges and fined \$30.00.

For his response to the SOR, Applicant admitted his misdemeanor charges and convictions, as well as his 1968 felony conviction and sentencing of six months to three years. He claimed to have turned his life around after his breaking and entering conviction, which includes over 24 years with his current employer, numerous commendations, awards and contributions to his community, and most of all, important lessons from his mistakes as a youth.

### 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.

As a young man, Applicant was twice arrested on misdemeanor offenses: first in 1963 for simple larceny, and secondly in 1965 for being drunk in public and altering his driver's license. His third offense proved to be more serious. In January 1968, he was arrested for breaking and entering a dwelling house with intent to commit a felony. After pleading guilty as charged on the advice of his attorney (hoping for probation), he was sentenced to six months to three years of imprisonment. He eventually served 18 months of his sentence and was paroled for a short period.

After he was released from incarceration, Applicant committed to getting his life in order. He obtained two jobs contemporaneously of each other: one a security position with the local major league baseball organization and the second a mechanic position with a local car dealership. He obtained employment with his current employer in 1979 as a mechanic and has been with his defense employer ever since. Applicant is highly regarded by his supervisors and colleagues at work, as well as community groups where he devotes considerable amounts of his private time (*e.g.*, as the president of his local church group) and his family. He enjoys excellent credit and a very good driving record and has never been involved in any law enforcement confrontation since his 1968 arrest.

In 1981, Applicant applied for a full pardon from the governor of his state in connection with his 1968 breaking and entering conviction and was granted a full pardon by the state's governor that year (*see ex. B; R.T.*, at 35).

Applicant's work and family pursuits since his release from prison represent significant life-style and life goal changes for him. From a young person involved in a couple of misdemeanor arrests and convictions, as well as his more serious felony breaking and entering conviction, he has emerged as a highly responsible and successful mechanic who has been employed by the same defense contractor for over 14 years with an exemplary work record. He demonstrated leadership

qualities in his community as well, where he has served as the president of his church group and actively participated in other important avocational endeavors.

## **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 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 research mechanic who as a young man became involved in two misdemeanor arrests/convictions (one for burglary and the other for drunk in public/altering a driver's license) and a more serious felony breaking and entering incident, for which he was sentenced to imprisonment of six months to three years. Paroled after 18 months of incarceration, Applicant went to work for his current employer with whom he has prospered and enjoyed the fullest trust and confidence of his supervisors and colleagues. Applicant has continued to impress his company's management staff with his technical abilities and strong work ethic. In recognition of his valuable efforts, he has consistently received outstanding reviews and citations from his employer. 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 arrests/convictions covered by sub-paragraphs 1.a and 1.b, which are mitigated under consideration of all of the facts presented. Each of these arrests and convictions involved judgment lapses associated with the disregard of public laws, which have not been repeated and are mitigated both by time and demonstrated rehabilitation. Favorable conditions warrant with respect to the allegations covered by sub-paragraphs 1.a and 1.b under Guideline J.

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

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1968 breaking and entering arrest and 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, his later pardon, and his renewed indicia of rehabilitation (reinforced by his many promotions and commendations at work and contributions to his church) demonstrates persuasive evidence of increased maturity, reliability and trust. Weighed against the imputed judgment and trust lapses reflected in his 1968 breaking and entering 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. Put another way, 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.

To be sure, consideration of Applicant's breaking and entering conviction independent of the Smith Amendment is advisory only and can support no 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. However, 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 imposed six month to three year sentence (*see* sub-paragraph 1.c), 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 time in rehabilitation, while very encouraging, still cannot free him from coverage of the Amendments's mandatory bar, save for his qualification for exception consideration. For despite his granted pardon of his 1968 breaking and entering conviction, our Appeal Board has expressly held that pardons do not vitiate the effect of the underlying conviction on a clearance application in a Smith Amendment case. ISCR Case No. 01-00407 (September 18, 2002). The reasoning of the Board is this: Applicant's receipt of a state pardon (as here) finds no exception and cannot be presumed to be excepted from Congress' preemptive coverage of actions deemed to bar a grant or retainer of a security clearance by a federal agency. What this means is because Congress has not directed the DoD to recognize or give effect to a state pardon in connection with the application of a state statute authorizing pardons, no such implicit authority can be drawn from the federal statutory scheme.

However Applicant might disagree with both our Appeal Board's treatment of pardons, or in the constitutionality of the retroactive application of the Smith Amendment's mandatory bar to applicants with sentences exceeding one year, its interpretation of the Smith Amendment's effect on pardons is controlling. So, 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 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.c and 1.d 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**

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: 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