

DATE: September 12, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11584

AMENDED DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Jocelyn E. Lowther, Esq.

SYNOPSIS

Applicant, a 49-year old communications systems engineer for a defense contractor, and convicted of a single drug-related felony charge in 1982, was later sentenced to five years 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 successfully completed his probation and was later pardoned of the conduct by his state's governor. He went on to complete his college education in engineering and prosper with his current defense contractor. Clearance is denied, but Applicant merits further consideration of a waiver of the *per se* security clearance bar requirements place in force by the Smith Amendment.

STATEMENT OF THE CASE

On November 15, 2002, 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 December 2002 and requested a hearing. The case was assigned to this Administrative Judge on January 22, 2003, and was initially scheduled for hearing on March 10, 2003. A hearing was convened on March 10, 2003, as scheduled, but had to be adjourned for lack of an available court reporter, and rescheduled for March 27, 2003. The rescheduled hearing was convened on March 27, 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 four witnesses (including himself) and ten exhibits. The transcript (R.T.) of the proceedings was received on April 8, 2003.

PROCEDURAL ISSUES

Following scheduling of the hearing, counsel made her appearance for Applicant and filed what she designated an answer. It will be treated as Applicant's first amended answer.

Before the close of the hearing, Applicant requested the record be kept open to enable him to supplement the record with written briefing of the legal issues raised in his answer. There being no objections from the Government, and good cause being demonstrated, Applicant was afforded 20 days to supplement the record with written briefing of the legal issues raised in his answer. Department Counsel was afforded 10 days to respond. Within the time allotted, Applicant filed an amended (second amended) answer admitting the allegations and seeking a waiver, but omitting his various legal defenses to the application of the Smith Amendment (10 U.S.C. Sec. 986) to the facts in his case. His second amended answer (coming as it does after the completion of argument in the case) is construed to be an abandonment of defenses raised by respondent in his first amended answer and not repeated in his second amended answer.

After the issuance of the decision in this case, Applicant (in July 2003) made a motion for clarification of the decision. The clarification request cited a stipulation between the parties at the hearing that Applicant's signed, sworn DSS statement sought to be admitted by the Government noted incorrectly, due to copying limitations, Applicant's smoking marijuana during his tour of duty in the Army (between 1975 and 1977). Under the court-approved stipulation the parties agreed that Applicant's DSS statement actually affirmed he did not smoke marijuana or use any other illegal drug during his military tour of duty spanning 1975 and 1977 (*see* R.T., at 10).

Inadvertently, the stipulation was omitted from the initial decision. Based on the poorly copied DSS statement (ex.2), the findings erroneously affirmed Applicant's continued smoking of marijuana during his Army enlistment. Believing he had filed an appeal with the Appeal Board, Applicant sought a stay of appellate proceedings from the Board to permit correction of the stipulation omission at the hearing level. This stay request was denied by the Appeal Board by letter of August 20, 2003 for reasons that no appeal was ever filed with the Board. Without a pending timely appeal, the Appeal Board concluded it had no jurisdiction to consider Applicant's request for relief.

Applicant filed an amended motion for clarification with me on August 29, 2003. His motion included both Applicant's admitted statement (ex. 2) and a stipulation with Department Counsel that the admitted statement showing Applicant's continued smoking of marijuana during his Army enlistment should be corrected to state that he "did not use marijuana during his Army enlistment between 1975 and 1977, consistent with his signed sworn statement of December 29, 1987 (*see* ex. 2)."

I conducted a telephonic conference with the parties on September 5, 2003. During this conference the parties reaffirmed their earlier stipulation and offered no objections or jurisdictional impediments under the Directive or otherwise to the issuance of an amended decision that incorporates the parties' stipulation and corrects the mistaken finding of Applicant's continuing to use marijuana during his Army enlistment. While the Directive is silent on any retained jurisdiction to issue amended decision to correct mistakes, both Rule 60(a) of F.R.Civ. and the inherent authorities of courts in general permit judges to amend their decisions to correct mistakes and afford relief to achieve the ends of justice. *See* F. Stumpf, *Inherent Powers of the Courts: Sword and Shield of the Judiciary*, at 44-45 (Nat. Jud. Col. 1994). These authorities are persuasive in affording me ample authority in this case to issue an amended decision that adopts and incorporates the parties' earlier stipulation.

Finding both jurisdiction to issue an amended decision and good cause to adopt the parties stipulation, I issue an amended decision that incorporates the parties' hearing stipulation.

STATEMENT OF FACTS

Applicant is a 49-year old communications systems engineer for a defense contractor who seeks to retain the security clearance he has held since 1988.

Summary of Allegations and Responses

Under Guideline J, Applicant is alleged to have been arrested in January 1980 and charged with the offenses of

trafficking in cocaine and conspiracy to traffic in cocaine; he pleaded *nolo*

contendre to conspiracy to traffic in cocaine and was sentenced to 5 years imprisonment (the trafficking in cocaine charge was *nolle prossed*). 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.

For his first amended answer to the SOR, Applicant admitted his 1980 charges and conviction. But he denied application of the Smith Amendment to his conduct for various reasons: his grant of a full pardon; lack of timely review of his actions, unconstitutionality of 10 U.S.C. Sec. 986, and the non-retroactivity affect of the statute. Applicant also claimed his entitlement to a waiver.

In Applicant's second amended answer, he admitted the allegations set forth in the SOR and requested consideration of a waiver based on his demonstrated good character and integrity and receipt of a full pardon from his state's governor.

Relevant and Material Factual Findings

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

Applicant became involved with marijuana (in cigarette form) with high-school friends in 1971 (ex. 2). In the beginning, he smoked the substance about once or twice a month. By 1973, he had increased his marijuana use to daily use. During his Army enlistment (between 1975 and 1977) he did not use marijuana or any other illegal substances of any kind. He returned to using marijuana only briefly following his military discharge before discontinuing his use of the substance altogether in 1979. To meet his personal needs, he sometimes purchased marijuana. Over time, he estimates to have used marijuana over 500 times (*see ex. 2*).

Beginning in 1978, Applicant also tried cocaine, oft-purchasing enough of the drug to satisfy his personal needs. However, he did not limit his cocaine involvement to just his personal needs. Between 1979 and 1980, he sold cocaine on 50 to 100 occasions to friends and acquaintances. During this period, he also introduced some of his friends to cocaine suppliers. When they made their purchases, Applicant, in turn, would be rewarded by the same suppliers with cocaine supplies for his own personal use (ex. 2).

In January 1980, Applicant was arrested and charged with trafficking in cocaine and conspiracy to traffic in cocaine during the previous month (*i.e.*, in December 1979). His arrest resulted from his introducing a female friend (who was interested in buying a kilo of cocaine) to a cocaine dealer. This friend and dealer thereupon agreed to a cash deal that required this friend to pay \$50,000.00 for a kilo of cocaine having a street value of between \$50,000.00 and \$60,000.00 (*see R.T.*, at 107-08). The friend turned out to be a local police informant who arrested Applicant. Applicant was subsequently charged with the offenses of trafficking in cocaine and conspiracy to traffic in cocaine (felonies). A considerable period ensued following his charges before his case was brought to trial: almost 2½ years. While waiting for trial, Applicant, deeply remorseful and embarrassed over his actions, obtained a job and entered college at a local university (*see exs. D and H; R.T.*, at 110-12). His first trial (in June 1982) ended in a mistrial (*see R.T.*, at 111). At the prosecution's request, the court scheduled a second trial later in June 1982. When Applicant appeared for his new trial in June 1982, he pleaded *nolo contendere* to a single felony count of conspiracy to traffic in cocaine and was convicted of the same: the trafficking in cocaine charge was dismissed. Applicant, in turn, was sentenced to a term of imprisonment of 5 years.

Before his June 1982 trial and anticipated sentencing hearing, Applicant's family, friends and work colleagues provided supporting letters to the court in Applicant's behalf, praising him for his overall honesty and good work ethic and asking the court for leniency. These endorsements were presumably considered and taken into account in the court's ensuing sentencing of Applicant (*see R.T.*, at 75-76). Applicant served six months of his five-year sentence and was paroled for two years with the State's Department of Corrections under the Department's early release program (*see ex. J*). Applicant satisfactorily met all of his parole conditions and was discharged from his parole in 1983.

Once released from prison, Applicant returned to college, where he consistently earned excellent grades. For his

academic efforts, he earned a bachelors of science degree with high honors in 1989.

Applicant's work-related credits with his current employer include outstanding performance evaluations and numerous promotions in recognition of his outstanding work (*see* exs. B, and C). He has been cited many times by high ranking military commanders for his outstanding contributions to projects he has been tasked to support and awarded certificates of achievement in recognition of his exemplary efforts (*see* exs. G and H). He has not only been responsible for analyzing existing communications infrastructures and identifying ways to meet requirements with existing structures, but he has had a direct involvement in the designing of circuits (*see* R.T., at 100-01). His four submitted suggestions to improving the effectiveness of the hardware used by his team were accepted and credited to him (*see* ex. I). Applicant is highly regarded by his CEO, area manager, direct supervisor, colleagues, friends, and high ranking military officials his unit he is assigned to support (*see* exs. G and H; R.T., at 31-32, 49-58, 67-69). He is known by his colleagues to be highly reliable and trustworthy and a valued team member who can be counted on to complete his team's most difficult missions.

Applicant is consistently recognized, too, for his many contributions outside of his work place. Married in 1984, he has two children by his spouse and expends considerable time supporting his children's outside curricular activities (*see* R.T., at 92-98). He and his wife work hard at living within their means and report stable finances (*see* ex. E; R.T., at 98-99).

In 1995, Applicant applied for a full pardon from the governor of his state in connection with his conspiracy conviction of June 1982 (*see* ex. A; R.T., at 91, 112-13). His pardon request was approved by his state's governor in March 1996 (*see* ex. A; R.T., at 91).

Applicant's educational, professional and family pursuits since his release from prison represent significant life-style and life goal changes for him. From a person involved in the use of drugs as a teenager and young adult, he has emerged as a highly responsible and successful professional who devotes his considerable energies to advancing his employer's defense-related missions, undertaking important roles in supporting his children's outside sporting activities, and

raising his family. Applicant may be fairly characterized as a fully rehabilitated and exemplary role model in his work, community and home.

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. 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 the Smith Amendment.

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.

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 communications systems engineer who as a young man became involved with illegal drugs and was later convicted of conspiracy to traffic in cocaine, for which he was sentenced to imprisonment of five years. Paroled after six months of incarceration, Applicant completed college with honors and was fully pardoned of his 1982 conviction in 1996. Highly recommended by ranking military officers who interfaced with Applicant on other AF contracts, Applicant came to work for his current defense contractor in 1990. He has continued to impress his company's management staff with his technical abilities and professional knowhow. In

recognition of his valuable efforts, he has consistently received outstanding reviews and citations from his employer and has distinguished himself with his company's military customer on numerous occasions. He has continued to prosper with excellent finances and exhibited successful parenting of his two children. Applicant is by all credible accounts fully rehabilitated.

Independent consideration of Smith Amendment related-conduct

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1982 drug trafficking arrest and conviction on a conspiracy to traffic in cocaine charge could be considered dated and the result of drug-related mistakes of judgment at the time, and sufficient to warrant the benefit of revised Adjudicative Guidelines MC a (criminal behavior not recent), MC b (conduct isolated), 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 CEO, manager, supervisor, coworkers, high ranking military personnel, and friends) demonstrates persuasive evidence of increased maturity, reliability and trust. Weighed against the imputed judgment and trust lapses reflected in his drug-related 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.

Application of Smith Amendment

But as the result of Applicant's state felony conviction and imposed five year sentence (*see* sub-paragraph 1.a), 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 1982 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. *See* 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 365 days, he has abandoned any challenges to the statute's application to his case facts. 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. Taking full account of the gravity of Applicant's covered 1979 offense, his exemplary accomplishments since his 1982 parole, and the confidence he has inspired by everyone who knows and works with him, his restorative efforts to date are considered sufficient to enable him to claim the mitigation benefits of several of the mitigating conditions of Guideline J: MC a (conduct not recent), MC b (isolated misconduct), MC f (clear evidence of rehabilitation) and MC g (meritorious circumstances warrant

waiver by the Secretary of Defense), 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 warranted. 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.

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: 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