

DATE: October 31, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11922

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 38-year-old maintenance technician for a defense contractor, was convicted of several offenses over a five-year period spanning 1986 and 1991. His grand theft auto and 1991 drug-related arrest never resulted in prosecution, and his lone drug-related conviction occurred in 1989 and is dated. All of these individual offenses are mitigated by the passage of time and showing of rehabilitation. However, Applicant's burglary 2nd degree felony conviction of 1987 resulted in a sentence of five-years (all but two suspended) and 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 (not recommended here). While Applicant has since been pardoned by his state's governor of the burglary conviction, his mitigation is not of sufficient strength by the proofs provided to warrant a waiver recommendation under the very narrow exception afforded by the Smith Amendment. Clearance is denied, and I recommend no further consideration of a waiver of 10 U.S.C. Sec. 986.

STATEMENT OF THE CASE

On April 22, 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 April 22, 2003, and requested a hearing. The case was assigned to me on July 10, 2003, and scheduled for hearing on September 22, 2003. A hearing was convened on September 22, 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 eight exhibits; Applicant relied on two witnesses (including himself) and two exhibits. The transcript (R.T.) of the proceedings was received on September 30, 2003.

STATEMENT OF FACTS

Applicant is a 38-year-old maintenance technician for a defense contractor who seeks to obtain a security clearance.

Summary of Allegations and Responses

Under Guideline J, Applicant is alleged to have been (a) arrested in February 1986 and charged with grand theft auto (charge subsequently rejected by district attorney), (b) arrested in January 1987 and charged with burglary, 2nd degree (a felony), to which he pleaded guilty and was sentenced to 5 years with the state's department of corrections (with 2 years to serve and the balance suspended upon conditions, in part, by good behavior and payment of court fees and costs for his court appointed attorney, to be paid within 6 months after his release from incarceration), and was later pardoned by the state's governor in July 1999, (c) charged in July 1989 with possession of controlled substance (marijuana), to which he pleaded guilty and was awarded probation, and (d) arrested in March 1991 on an outstanding warrant in another state for conspiracy to deliver cocaine (a class II felony), for which he was held in jail for 91 days and released upon failure of the charging state to provide additional information. By virtue of Applicant's 1987 burglary 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 each of the allegations. But he claimed the incidents occurred more than 12 years ago, and he (a) received a pardon for the 1987 felony burglary incident, (b) became a Christian in May 1990, changed his desires and eliminated his weaknesses, and (c) is willing to submit to drug tests. Based on these claims, Applicant does not believe he should be disqualified from holding a security clearance.

Relevant and Material Factual Findings

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

In February 1986 (while residing in his current state), Applicant borrowed a friend's car for a few days to move from the place he was living to a new place out of state. The father, who had not been informed in advance, became upset and filed a stolen car report. While stopped for repairs in another state, Applicant and his friend were arrested (*see ex. R.T.*, at 38-39). The state's district attorney declined to prosecute the charge. Applicant was using illegal drugs at the time and admits to poor judgment in not seeking the father's permission before taking the car out of state.

Applicant was arrested and charged with burglary 2nd degree in January 1987 after he and a friend broke into a neighbor's house and stole a VCR, television stereo and other household goods. After they took everything they could, another friend turned them to the police. And a couple of days later they were arrested and charged with burglary 2nd degree (a felony). At his court appearance he pleaded guilty and was sentenced to five years in prison (reduced to two years and the balance suspended, subject to the conditions set forth in the SOR).

Applicant served less than six months in prison before being released in July 1987 for good behavior and credited volunteer efforts. In July 1999, he was pardoned for the incident by the state's governor. Unable to avoid the same people he previously associated with after his release from prison, he asked for and was granted permission by the court to move to another state (*see ex. 3*). While in this other state, Applicant returned to illegal substance use. In July 1989, he was arrested for possession of a controlled substance (marijuana) while in the company of local friends (*see R.T.*, at 44). He pleaded guilty to the charge and was granted probation.

After returning to his current state, Applicant was stopped and arrested in March 1991 on an outstanding warrant from another state for conspiracy to deliver cocaine (a class II felony). Because he could not post the \$10,000.00 bond imposed, he was jailed for 91 days. When the other state holding the outstanding warrant could not provide any additional documentation probative of the conspiracy charge supporting the arrest warrant, Applicant was released from jail, and never prosecuted for the offense. However, Applicant admits to trafficking in cocaine during the period charged in the arrest (*see R.T.*, at 46). He now acknowledges he erred when he assured the interviewing DSS agent in February 2002 that he had no reason to return to that state to answer charges there since he had done nothing wrong (*see ex. 3*;

R.T., at 50). Inferences warrant, accordingly, that Applicant sold and delivered cocaine during the period in issue.

Since returning to his current state in 1991, Applicant has avoided illegal substances and endeavors to be a faithful practitioner of his church ministry (*see* R.T., at 37). He married in 1992 and has three children. He is credited by his FSO and supervisors with being a dedicated and capable employee who consistently exceeds expectations in his performance ratings (*compare* exs. A and B).

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.

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 well regarded maintenance technician who was convicted of burglary 2nd degree in 1987 and sentenced to five years imprisonment, with all but two years suspended, subject to conditions. Paroled after less than six months of incarceration, Applicant returned to drugs and was involved in two drug-related arrests in 1989 and 1991, respectively: the first resulting in conviction and the second not prosecuted by the district attorney in another state. He gave up drugs, though, following his 1991 arrest and was later pardoned by his state's governor of his burglary conviction. Applicant is by all credible accounts fully rehabilitated.

Non-Smith amendment conduct

Evaluated independently of his Smith-covered burglary 2nd degree conviction and sentence, Applicant's admitted 1986 grand theft auto charge and his drug-related charges related to drug possession and trafficking in 1989 and 1991 ((each covered by Disqualifying Conditions (DC) of the Adjudicative Guidelines for criminal conduct: DC a (allegations or admissions of criminal conduct) and DC b (a single serious or multiple lesser offenses)) are sufficiently aged to warrant credit for mitigation under the Adjudicative Guidelines for criminal conduct: specifically, MC a (criminal behavior not recent), MC b (conduct isolated), and C f (there is clear evidence of rehabilitation). So, it is as to these allegations covered by subparagraphs 1.a, 1.c and 1.d, favorable conclusions warrant.

Independent consideration of Smith Amendment related-conduct

By reliance on otherwise applicable mitigating conditions, Applicant's underlying actions leading to his 1987 burglary 2d degree conviction, would also be sufficiently aged and isolated to bear diminished trustworthiness implications when assessing his security eligibility. Without Smith, Applicant would be entitled to appropriate 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, ensuing pardon on his 1987 burglary conviction, and renewed indicia of rehabilitation (reinforced by the support he received from his FSO and supervisors for his being a dedicated and capable employee who consistently exceeds expectations in his performance ratings) demonstrate persuasive evidence of increased maturity, reliability and trust. Weighed against the imputed judgment and trust lapses reflected in his drug-related conviction and other criminal offenses over a five-year period spanning 1986 and 1991, his prior mistakes would 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 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.b), his actions fall within the coverage of the Smith Amendment's provision 1 (1.c of the SOR). 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. 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 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 1987 burglary 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: 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.

Whether 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, 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. Application of the Smith Amendment to Applicant's 1987 felony burglary conviction mandates denial of a security clearance to Applicant without regard to mitigating circumstances, subject only to the provisions in the Amendment that permit recommendation of further consideration of a waiver in a meritorious case.

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

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: AGAINST APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: 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