

KEYWORD: Criminal Conduct

DIGEST: Convicted in 1970 for a felony, possession of dangerous drugs - marijuana, and sentenced to eight years, Applicant served 23 months and 15 days in a state corrections facility before he was paroled in 1972. Given the absence of any subsequent criminal conduct over the past 30 years and unlikelihood that his misdemeanor juvenile arrests from 1966 to 1970 would recur, those arrests can be mitigated. However, a statutory provision (10 U.S.C. Section 986), "the Smith Amendment," bars mitigation of his 1970 felony as this legislative act disqualifies anyone convicted, sentenced, and incarcerated for more than one year from receiving a security clearance. Applicant did not request a waiver. A waiver is recommended. Clearance is denied.

CASE NO: 04-03289.h1

DATE: 06/16/2006

DATE: June 16, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-03289

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esquire, Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Convicted in 1970 for a felony, possession of dangerous drugs - marijuana, and sentenced to eight years, Applicant served 23 months and 15 days in a state corrections facility before he was paroled in 1972. Given the absence of any subsequent criminal conduct over the past 30 years and unlikelihood that his misdemeanor juvenile arrests from 1966 to 1970 would recur, those arrests can be mitigated. However, a statutory provision (10 U.S.C. Section 986), "the Smith Amendment," bars mitigation of his 1970 felony as this legislative act disqualifies anyone convicted, sentenced, and incarcerated for more than one year from receiving a security clearance. Applicant did not request a waiver. A waiver is recommended. Clearance is denied.

### STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 20, 2005. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. <sup>(1)</sup> The SOR alleges specific concerns over criminal conduct (Guideline J), including an allegation that his criminal conduct disqualifies Applicant from having a security clearance because of 10 U.S.C. Section 986, unless the Secretary of Defense authorizes an exception. Applicant responded to these SOR allegations in an Answer notarized on November 28, 2005, where he admitted paragraphs 1.a, 1.b., and 1.c., with explanations, but failed to answer 1.d. and did not specifically request a waiver. He asked for an administrative decision on the record

The case was assigned to Department Counsel who on January 12, 2006, prepared a File of Relevant Material (FORM) for the Applicant's review and advised Applicant that he had 30 days to submit objections and/or information before the FORM was submitted to an administrative judge and that he had the right to be represented by counsel. A paralegal sent the FORM to Applicant on January 13, 2006, and again notified the Applicant that he had 30 days from receipt of the letter to submit objections and/or information before the FORM was submitted to an administrative judge. Applicant received the FORM on February 6, 2006, with a response due on March 8, 2006. The Applicant submitted no response. The DOHA Director assigned the case to me for a decision on the record on March 28, 2006.

## FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 53 years old, has been employed with Defense Contractor #1 in State #1 since May 1997. He completed a Security Clearance Application (SF 86) in October 2001. Applicant was married in 1970. (Item 4)

### **Criminal Conduct**

In response to SF 86 Question 21 on felony offenses and Question 24, alcohol/drug offenses, Applicant reported an August 1970 arrest in State #1 for possession of marijuana, a felony, where he was convicted after a jury trial and sentenced to eight years in the state department of corrections. He served 23 months and 15 days and was paroled in October 1972. (Items 4, 5, 6) Applicant admitted other arrests when he was a minor. In 1966 when he was 14 or 15 he was charged with theft over \$50 for stealing a mannequin from an amusement park which he returned in good condition. He also admitted three additional arrests prior to August 1970, but did not recall any details. He explained that his parents divorced when he was 14, and he did "wrongs" in his "young years." (Item 3)

## STATUTORY REQUIREMENTS

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Statutory provision (1) disqualifies a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." DoD implementing guidance interpreted this language to include convictions in either state or federal court ("person with convictions in both State and Federal courts, including UCMJ offenses). Subsequently the FY05 Defense Authorization Act, signed into law on October 28, 2004, modified the Smith Amendment to include the following changes shown in boldface:

The person has been convicted in any court of the United States of a crime **was** sentenced to imprisonment for a term exceeding one year **and was incarcerated as a result of that sentence for not less than one year.**

Waiver Authority. **In a meritorious case, an exception to the prohibition in subsection (a) may be authorized for a person described in paragraph (1) or (4) of subsection (c) if there are mitigating factors. Any such waiver maybe be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive Order or other guidance issued by the President.**

This case falls within this statutory provision and the DoD implementing guidance. However, the Smith Amendment establishes authority for the Secretary of Defense (or the Secretary of the military department concerned) to grant a waiver where meritorious cases exist. This authority may not be delegated. Neither the statute, nor DoD, nor the DOHA Director in the OI has defined "meritorious circumstances."

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed the relevant Guidelines as set forth below:

### **Guideline J - Criminal Conduct**

**A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## CONCLUSIONS

### **Criminal Conduct**

The Government established security concerns over Applicant's criminal conduct based on his August 1970 felony conviction for Possession of Dangerous Drugs-Marijuana, where he was sentenced to eight years in the department of correction and served 23 months and 15 days before he was paroled in October 1972. In addition, the government expressed security concerns over four misdemeanor arrests from 1966 to 1970, when he was a minor. The Criminal Conduct guidelines indicate that a person may be disqualified where the following conditions apply: E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include: E2.A10.1.2.1. *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*; E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*. Also, a provision of the Smith Amendment, as implemented by DoD, mandated restrictions on the granting or renewal of security clearances: provision (1) disqualifies persons with convictions in both state and federal courts with sentences imposed of more than one year. Subsequently the FY05 Defense Authorization Act, signed into law on October 28, 2004, modified the Smith Amendment to include the following changes shown in boldface:

The person has been convicted in any court of the United States of a crime **was** sentenced to imprisonment for a term exceeding one year **and was incarcerated as a result of that sentence for not less than one year**.

To Applicant's credit, since he was paroled in 1972, he has not subsequently been involved with any criminal activity in over thirty years. Consequently, the criminal actions that led to his juvenile misdemeanor arrests can be mitigated. (2)

However, his 1970 felony conviction which led to incarceration for more than one year cannot be mitigated because of the statutory provision in 10 U.S.C. Section 986 makes no exception for subsequent rehabilitation. Consequently, despite the passage of time since his conviction, this statutory provision mandates doubt over his current trustworthiness and access to classified information as he was previously convicted of a crime and sentenced and served a term exceeding one year. Whether the behavior was recent or whether he is fully rehabilitated from his criminal conduct is not material under 10 U.S.C. Section 986. Thus, while his misdemeanor juvenile arrests can be mitigated as not recent and not likely to recur, his 1970 criminal conviction and sentence which required him to serve more than one year incarcerated cannot be mitigated under this statutory provision. After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. and 1.b., but against Applicant on subparagraphs 1.c. and 1.d. under SOR Paragraph 1.

### **Request for Waiver**

Applicant did not request a waiver in his Answer to the SOR and submitted no response to the FORM. DOHA OI 64 explicitly prohibits an administrative judge from providing an explanation for a waiver recommendation. I recommend further consideration of this case for a waiver under 10 U.S.C. Section 986.

### **FORMAL FINDINGS**

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 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 a security clearance for the Applicant. I recommend further consideration of this case for a waiver under 10 U.S.C. Section 986. Clearance is denied.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

2. **E2.A10.1.3. Conditions that could mitigate security concerns include:** E2.A10.1.3. 1. The criminal behavior was not recent; E2.A10.1.3. 2. The crime was an isolated incident; E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

E2.A10.1.3. 4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3. 5. Acquittal; E2.A10.1.3. 6. There is clear evidence of successful rehabilitation.