

“SMITH AMENDMENT” UPDATE
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On October 30, 2000, Congress enacted a new law, known as the “Smith Amendment”, which prohibited the Department of Defense from granting or renewing a security clearance to anyone who had been “convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year.”² That Amendment, codified at 10 U.S.C. § 986, provided that “in a meritorious case the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the [above stated] prohibition.” It allowed no delegation of that authority and provided no standards to judge when a case was “meritorious”.

Because of the severity of the Amendment, many long-time, faithful employees of the government lost their clearances and their jobs for minor offenses occurring long ago. To address and correct at least some of those injustices, Congress amended 10 U.S.C. § 986 in October, 2004, so that a person would no longer be automatically barred from holding a security clearance unless he or she was actually imprisoned for at least one year, not just sentenced to that time.³ The 2004 amendment authorized the President to develop

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² The Smith Amendment, so named after its sponsor, Senator Bob Smith, amended the Floyd D. Spence FY-01 Defense Authorization Bill, P.L. 106-398 App., §1071, 114 Stat. 1654A-275.

³ 10 U.S.C. § 986 now reads:

(a) Prohibition.—After October 30, 2000, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered persons.—This section applies to the following persons:

(1) An officer or employee of the Department of Defense.

(2) A member of the Army, Navy, Air Force, or Marine

Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the

(continued...)

standards and procedures for the determining whether a person, who was barred from obtaining a clearance by the Smith Amendment, could be granted a waiver. This change allows people who have been sentenced to more than year, but placed on probation, or who actually have served less than a year of jail time, to not be automatically barred from holding a security clearance. The amendment does not automatically grant a clearance, because other Guidelines concerning past criminal conduct are still applicable in considering in whether a person with a criminal record is worthy of holding a security clearance.

Background

10 U.S. C. § 986 originally authorized only the Secretary of Defense or the Secretaries of the Military Departments, personally, to grant waivers in “meritorious” cases. The 2004 amendment removed that restriction and now permits the delegation of that waiver authority to persons below the level of the Secretaries. Also, the original statute provided no standards for determining what was to be considered “meritorious.” Thus, there was no

³(...continued)

Department of Defense.

(c) Persons disqualified from being granted security clearances.—A person is described in this subsection if any of the following applies to that person:

(1) 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.*

(2) The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the controlled Substances Act (21 U.S.C. 802)).

(3) The person is mentally incompetent, as determined by a mental health professional approved by the Department of Defense.

(4) The person has been discharged or dismissed from the Armed Forces under dishonorable conditions.

(d) 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 may 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.*

(New language in italics.)

uniformity in the few waivers that were granted. Each Department Secretary could and did apply his own standard, if there was one, but generally there was no discernable standard. The 2004 Amendment now prescribes that waivers are to 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.” Although new procedures have now been issued by the Administration, new standards have not.

On December 29, 2005, Steven Hadley, Assistant to the President for National Security Affairs, issued a memorandum on behalf of the President implementing new Adjudicative Guidelines, to be applied government-wide, for determining eligibility to access for Classified Information. That memorandum did not mention 10 U.S. C. § 986. Acting on the authority of Mr. Hadley’s memorandum, Stephen A. Cambone, Under Secretary of Defense for Intelligence, on August 30, 2006, issued his own memorandum regarding “Implementation of Adjudicative Guidelines in the Department of Defense.” In addition to implementing the revised Adjudicative Guidelines, Under Secretary Cambone went further and delegated the waiver authority under 10 U.S. C. § 986 to the Secretaries of the Military Departments *or their designees*, and to the Directors of the Washington Headquarters Services (for headquarters civilian employees), the Defense Intelligence Agency, the National Security Agency and the Defense Office of Hearings and Appeals (DOHA) (for civilian contractor employees) *or their designees*. Waiver authority was expressly prohibited from being further delegated to a member of a Component Personnel Security Appeal Board or a member of the DOHA Security Clearance Appeal Board. Under Secretary Cambone’s memorandum, however, still did not provide any standards for determining when a case is sufficiently “meritorious” to warrant granting a waiver, and it appears that each waiver authority is still left to apply its own standards or no standards at all.

The 2004 Amendment has a number of ambiguities which raise further questions. Subsection (c)(1) uses the terms “imprisonment” and “incarceration” in the same sentence. Was there a difference intended, and does a sentence “to imprisonment” mean only to a prison or penitentiary, or does it include, for example, a sentence to house-arrest or to a halfway house? In addition, the 2004 Amendment provides that a person is barred from holding a security clearance if sentenced for a term “exceeding one year”, if that person was incarcerated for “not less than one year.” When is incarceration “for less than one year”- 364 days is less than a year except in a leap year? Would incarceration in a leap year differ from a nonleap year, as a release after 365 days in a leap year would be “less than a year?” Future decisions will have to resolve these questions.

For those who still fall under the Smith Amendment, as amended in 2004, it is still no more clear now than before what are the standards that will be applied to judge whether a case is sufficiently meritorious to be granted a waiver. Now, at least, there is the possibility

of a decision. Although, in the six years between 2000 and 2006, the Secretaries of the military departments decided a few cases each year, there were no contractor employee or headquarters civilian employee cases even *presented* to the Secretary of Defense for decision, let alone decided by him. Since the Secretary of Defense has now delegated that authority to the heads of the deciding organizations, and the military department Secretaries are also now authorized to delegate that authority, the possibility of a decision is now real.

The military department Personnel Security Appeal Boards have never published their decisions or standards so, as in the past, it is not possible to understand how they arrive at their security clearance decisions, let alone their waiver decisions. DOHA is the only organization which has previously published its procedures for handling cases subject to 10 U.S.C. § 986, and it has recently updated them. In response to the Cambone memorandum, on September 12, 2006, DOHA amended its Operating Instruction No. 64 which describes: "Processing Procedures for Cases Subject to 10 U.S.C. § 986." The Operating Instruction now provides that during a hearing or in a written consideration, Department Counsel, the government's representative, shall not argue whether a waiver of 10 U.S.C. § 986 is merited, but that nothing precludes the applicant from arguing that a waiver is merited. It further provides that if either an Administrative Judge or the Appeal Board issues a decision denying or revoking a clearance *solely* as a result of 10 U.S.C. § 986 (c)(1) or (c) (4), the decision, once final, shall be forwarded to the Director, DOHA for a determination of whether to exercise his or her discretion to grant a waiver in accordance with 10 U.S.C. § 986. It further provided that in determining whether to grant a waiver, the Director of DOHA, may obtain legal analysis of the case and a recommendation from the Deputy Director, DOHA, as to whether a waiver of 10 U.S.C. § 986 is merited. Finally, it provides that the Director, DOHA, may during periods of absence from the office, delegate the waiver determination authority to the Deputy Director, DOHA. Despite the clarity of procedures, DOHA Operating Instruction No. 64 still does not contain any statement of what standards will be applied in considering a case for waiver.

There are No Waiver Standards

A. The Legislative History

One view that has been expressed about the standards to be applied to Smith Amendment waivers is that Congress must have meant something more than just the mitigating conditions under Guideline J for Criminal Conduct, otherwise there would have

been no need for the Amendment.⁴ There is nothing in the legislative history known to support that view, as it is silent on the subject.

The Smith Amendment resulted from a 1999 newspaper article published in *USA Today* that was generally critical of the Defense Office of Hearings and Appeals (DOHA).⁵ The article selected thirteen out of several thousand DOHA decisions issued between 1994 and 1999 to bolster the story and then Senator Bob Smith of New Hampshire picked up on the story to start an investigation of the entire DOHA appeals process.⁶ Senator Smith apparently did not trust lawyers because, he said, “I am also told that DOHA is the only organization dictated to by attorneys, while in the others, i.e., in the military services, etc., security specialists are in charge.”

The testimony of the few government witnesses appearing at the hearing on the Proposed Amendment before the Senate Armed Services Committee shed little light. Harold J. Kwalwasser, Department of Defense, Deputy General Counsel for Legal Counsel, stated that “in cases involving recidivist criminal behavior, additional guidance may be helpful on the issue of how much time should elapse after the last report of inappropriate behavior in order to demonstrate that the conduct will not occur again.”⁷ He thought because of the uniqueness of virtually every case of this type, it was difficult to assess the issue of “consistency,” but suggested that DoD should “issue guidance on what constitutes a sufficient period of time of good behavior to permit an administrative judge to conclude that the disqualifying behavior is neither ‘recent’ nor likely to ‘recur’ as required under the mitigation factors.”⁸ The testimony of the three additional government witnesses addressed

⁴ Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. Part 154, 71 Fed. Reg. 51474, Aug. 30, 2006. (“ hereinafter cited as Adjudicative Guidelines”).

⁵ “*How Felons Gain Access to the Nations Secrets*,” *USA Today*, pp. 1A, 6A, Dec. 29, 1999.

⁶ See, Opening Statement of Senator Bob Smith before the Senate Armed Services Committee Hearing to Review Procedures and Standards for the Granting of Security Clearances at the Department of Defense, April 6, 2000.

⁷ Testimony of Harold J. Kwalwasser before the Senate Armed Services Committee, Hearing to Review Procedures and Standards for Granting Security Clearances at the Department of Defense, April 6, 2000.

⁸ *Ibid.*

only the process, but not the standards to be applied when considering the granting of security clearances.⁹

The legislative history of the 2004 amendment to 10 U.S.C. § 986 is even more sparse. Between the October 2000 enactment of 10 U.S.C. § 986 and the 2004 amendment, Congress expressed its dissatisfaction with the small number of waivers being granted under the Smith Amendment. On November 12, 2003 Congress enacted legislation directing the Secretary of Defense to file a report with Congress within sixty days, giving an assessment of the effects of 10 U.S.C. § 986 on those persons disqualified from being granted security clearances, and offering recommendations to improve the legislation or to improve the administration of the Amendment.¹⁰ Although that legislation was signed into law by the President on December 2, 2003, no report was ever filed by the Secretary of Defense.

Subsequently, the 2004 Amendment was offered by Congressman Rob Simmons of Connecticut, whose constituency includes Electric Boat Company of Groton, Connecticut, which builds nuclear submarines. Electric Boat has a large blue collar work force which was being particularly hard hit by the Smith Amendment. Negotiations between the Department of Defense and Congressman Simmons' office ultimately resulted in the 2004 Amendment to 10 U.S.C § 986 which removed from its strictures those people who have not actually served more than a year's imprisonment. It not only authorized the Secretaries of Defense and the military departments to delegate their waiver authority, but also authorized the President to issue standards and procedures for granting waivers.

The only legislative history of the 2004 Amendment to be found is in the House Committee report which states:

This section would amend section 986 of Title 10, United States Code, to allow decisions on granting meritorious waivers related to the granting of a security clearance to be delegated by the Secretary of Defense or the secretary

⁹ Testimony of Carol R. Schuster, Associate Director, National Security Preparedness Issues, National Security and International Affairs Division, United States General Accounting Office; testimony of Donald Mancuso, Deputy Inspector General, Department of Defense; and testimony of Lt. Gen. Charles J. Cunningham, Jr. USAF (Ret.), Director, Defense Security Service, all before the Senate Armed Services Committee, Hearing to Review Procedures and Standards for Granting Security Clearance at the Department of Defense, April 6, 2000.

¹⁰ Section 1051 of H.R. 1588, The National Defense Authorization Act, for Fiscal Year 2004. P.L. 108-136, Nov. 24, 2003.

of a military department to appropriate subordinates. This change is intended to improve the operation of the current program and decrease the time required to adjudicate the security clearance eligibility without creating any additional risk for the national security.¹¹

Thus, there is, nothing in the legislative history to indicate what standard Congress intended to be applied for granting waivers, or to support the view that it intended anything more or different than the mitigating conditions of Guideline J, or the general conditions of the “whole person concept.”

The problem of the lack of any standard for judging whether a waiver of 10 U.S. C. § 986 is warranted is further worsened, because there are seven different offices and agencies within the Department of Defense authorized to make that judgment.¹² That those offices could come to different conclusions on the same set of facts is not only theoretically possible, but likely, based on past experience. For example, the Washington Headquarters Services Personnel Security Appeal Board has held that a pardon of state felony conviction removes it from the Smith Amendment, while DOHA has held just the opposite, that a conviction is a conviction regardless of any subsequent state pardon and that 10 U.S.C. § 986 does bar a security clearance.¹³ Yet both of these Offices are under the jurisdiction of the same Under Secretary of Defense.

B. Recommended Waiver Standards

The Guideline J mitigating conditions are:

(a) So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and

¹¹ Report of the Committee of Armed Services of the House of Representatives on H.R. 4200, on the National Defense Authorization Act for Fiscal Year 2005, at p. 361, May 14, 2004.

¹² Waiver authority is delegated to the Directors of Washington Headquarters Services, Defense Intelligence Agency, National Security Agency, and Defense office of Hearings and Appeals for employees of contractors, and to the Secretaries of the Military Department by Under Secretary Cambone’s Memorandum of August 30, 2006.

¹³ DOHA ISCR Case No. 01-00407 (Sept. 18, 2002); DOHA ISCR Case No. 04-06807 (May 2, 2006).

does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) The person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) Evidence that the person did not commit the offense;

(d) There is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement;¹⁴

The “whole person” factors under the “adjudicative process” portion of the Guidelines are:

(1) The nature, extent, and seriousness of the conduct;

(2) The circumstances surrounding the conduct, to include knowledgeable participation;

(3) The frequency and recency of the conduct;

(4) The individual's age and maturity at the time of the conduct;

(5) The extent to which participation is voluntary;

(6) The presence or absence of rehabilitation and other permanent behavioral changes;

(7) The motivation for the conduct;

(8) The potential for pressure, coercion, exploitation, or duress; and

(9) The likelihood of continuation or recurrence.¹⁵

Under these standards, what then might be considerations for granting a waiver to someone convicted of a felony who has served more than a year in prison? The following

¹⁴ Adjudicative Guidelines.

¹⁵ Id. at 32 C.F.R. Part 154, Paragraph 2.

are suggested: (1) First and foremost, the amount of time that has passed since the conviction, and what the person has done with his or her life since release from prison; (2) The person's positive contributions to society since release from prison; (3) The person's self-efforts towards rehabilitation; (4) The value of the person's contribution to the national defense, past and in the future; and (5) Whether the offense for which the person was convicted was a heinous crime or committed under aggravated circumstances such as first degree murder or organized drug trafficking.

The exercise of waiver authority should be *inclusive* rather than an *exclusive*. Waiver should be granted to an individual who would otherwise meet the mitigating conditions under Guideline J and the whole person General Considerations unless there were particularly adverse factors, for example: (1) if the crime was heinous or premeditated; (2) if the person was of mature age when the crime was committed; (3) if the crime was the culmination of a series of earlier convictions for lesser offenses indicating a pattern of criminality; (4) if the crime showed lack of concern for the common welfare such as accepting bribes to subvert the political process or the national safety; or (5) or if the crime was of national disloyalty.

One benefit of the 2004 Amendment to 10 U.S.C. § 986 is clear however - anyone who has lost his or her clearance since October 30, 2000 because of the Smith Amendment and who was incarcerated for less than a year should apply for reconsideration of the denial or revocation of his or her clearance.

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