

DATE: October 28, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16155

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Robert J. Tuider, Department Counsel

FOR APPLICANT

Otis K. Forbes, Esq.

SYNOPSIS

Applicant has failed to sufficiently mitigate his criminal conduct that includes nine convictions for various offenses between 1992 and 1998, one of which included a sentence subject to 10 U.S.C. § 986. In addition, he has failed to establish adequate mitigation of his alcohol abuse, provided a false answer on his security clearance application, and has not mitigated his delinquent indebtedness, which includes four unpaid bad debts totaling \$9,226.00. Clearance is denied.

STATEMENT OF THE CASE

On October 18, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On November 21, 2003, DOHA received a response to the SOR from Applicant, in which he requested a hearing. The case was assigned to me on January 23, 2003. A notice of hearing was issued on February 4, 2003, and the hearing was scheduled on February 26, 2003. Applicant appeared on that date and requested a postponement of the hearing in order for him to obtain counsel. Department Counsel did not object and I granted a postponement of the hearing. A notice of hearing was again issued on March 28, 2003, and the hearing was held on April 18, 2003. During the hearing, four Government exhibits, nine Applicant exhibits, and the testimony of five Applicant witnesses, including Applicant, were received. The transcript (Tr) was received on April 25, 2003.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, including Applicant's admissions to SOR ¶ 1 and 2, except for

SOR ¶ 1.m, and his admissions to SOR ¶ 3.b, h, i, and k, I make the following findings of fact:

Applicant is a 32-year-old designer employed by a defense contractor and is seeking a security clearance. He is a responsible employee who is respected by his supervisor and co-workers.

In December 1990, Applicant received an entry level separation from the Air Force following a fight with another airman. The fight occurred in a bar after applicant had consumed alcohol. From the time of that fight through his arrest on charges including public drunkenness on August 8, 1998, Applicant consumed alcohol to excess and to the point of intoxication at various times. [\(3\)](#)

Applicant was arrested and charged with Robbery, a felony, on October 12, 1991. He was subsequently tried and found not guilty. [\(4\)](#)

Applicant was arrested and charged with Simple Assault and Defiant Trespass on January 18, 1992. [\(5\)](#) He pleaded guilty to the lesser charge of Harassment and was sentenced to 90 days in jail, which was suspended, and fined \$100.00. [\(6\)](#)

On April 18, 1992, Applicant was arrested and charged with Attempted Theft, a felony, Criminal Mischief, Public Drunkenness, and Possession of Instruments of a Crime. On August 20, 1992, he pleaded guilty to all of the charges except public drunkenness. Applicant was sentenced to three years probation and was ordered to pay costs and restitution totaling \$1,632.22. [\(7\)](#)

On May 21, 1992, Applicant was arrested and charged with Theft of Moveable Property, a felony, and Unauthorized Use of a Vehicle. He was also charged with Receiving Stolen Property and Criminal Conspiracy to Receive Stolen Property. On November 6, 1992, Applicant pleaded guilty to unauthorized use of a Vehicle. He was ordered to pay \$810.00 restitution to the victim, fined \$823.05, and placed on probation for two years. [\(8\)](#) On December 1, 1993, Applicant's probation was revoked after he failed to pay the fine and costs in full. He was ordered to not less than one year less one day nor more than two years less two days in jail. [\(9\)](#)

On January 6, 1994, Applicant was charged with Simple Assault and Disorderly Conduct as a result of a domestic dispute with his girl friend. [\(10\)](#) Although the Simple Assault charge was dismissed, he pleaded guilty to the Disorderly Conduct charge, was fined \$150.00, and ordered to attend 14 sessions at a domestic abuse counseling center. [\(11\)](#)

In February 1994, Applicant incurred a \$407.00 debt to a clothing store that he has never paid. [\(12\)](#)

In July 1994, Applicant opened a credit card account with a bank and incurred a debt of \$1,482.00 that he has never paid and that the bank has charged off as a bad debt. In October 1997, he also incurred another debt to the same bank in the amount of \$2,323.00 that has never been satisfied. [\(13\)](#)

In December 1994, Applicant opened a credit card account with a bank and incurred a debt of \$5,014.00 that he has never paid and that the bank has charged off as a bad debt. [\(14\)](#)

On August 5, 1995, Applicant was arrested after another domestic dispute with his girl friend. He was charged with Simple Assault, Disorderly Conduct, and Criminal Mischief. All of the charges were nolle prossed. [\(15\)](#)

On February 1, 1996, Applicant was arrested and charged with two counts of Driving Under the Influence of Alcohol (DUI). His blood alcohol content was .115 percent. Applicant was placed in an accelerated rehabilitation program, fined \$465.50, ordered to abstain from alcohol for one year, and had his driver's license suspended for 30 days. [\(16\)](#)

On April 15, 1996, Applicant was again arrested and charged with DUI. His blood alcohol content was .20 percent. Applicant pleaded guilty was sentenced to not less than two days nor more than 12 months of confinement, fined \$1,326.00, had his driver's license suspended, was ordered to undergo evaluation, and was required to attend an alcohol

safe driving school. [\(17\)](#)

On January 3, 1997, Applicant was arrested and charged with driving while his license was suspended or revoked and for having forged plates on his vehicle. The latter charged was nolle prossed, but he pleaded guilty to the first charge and his driving privileges were revoked. [\(18\)](#)

In another dispute with his girl friend that occurred at a campground, Applicant was arrested on August 8, 1998 and charged with Simple Assault, Public Drunkenness, and Disorderly Conduct. He pleaded guilty to Disorderly Conduct and Public Drunkenness. Applicant was fined \$575.00 and placed on probation for one year for each count, to run consecutively.

In March 1999, a collection agency had obtained Applicant's bad debt to an apartment lessor in the amount of \$406.00. [\(19\)](#) After a judgment was obtained against him, Applicant satisfied the debt on January 28, 2000. [\(20\)](#)

Applicant was remanded to a county court on April 29, 1999, for failure to pay child support to his girlfriend. [\(21\)](#) On August 2, 1999, his wages were garnished for \$225.00 per month in order to satisfy his \$1,834.00 obligation.

On July 27, 1999, Applicant executed a security clearance application (SF 86). In response to question 21, [\(22\)](#) he answered, "no," and failed to list his three felony arrests and two felony convictions, as set forth above. [\(23\)](#) In response to question 24, [\(24\)](#) Applicant answered, "yes," and listed his two DUI offenses, but failed to list his arrest for Public Drunkenness in April 1992. [\(25\)](#) In response to question 26, [\(26\)](#) Applicant answered, "yes," and listed his two offenses in 1995, 1997, and 1998 but failed to list his offense in 1994. [\(27\)](#) In response to question 34, [\(28\)](#) Applicant answered, "no," and failed to list the garnishment of his wages in 1999 to pay child support. [\(29\)](#) In response to question 38 [\(30\)](#) and question 39, [\(31\)](#) Applicant answered, "no," and failed to list any delinquent debts. [\(32\)](#)

On February 3, 2000, Applicant provided a personal financial statement to the Defense Investigative Service (DIS) that showed he had a monthly net remainder of \$679.50. [\(33\)](#)

On December 24, 2002, Applicant married a woman, who is employed as a secretary with same defense contractor for whom he is employed.

POLICIES

The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion to demonstrate that it is clearly consistent with the national interest to grant or continue a security clearance. Directive E3.1.15.

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment should include the following factors: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of national security. Directive E2.2.2.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline J: Criminal Conduct

The concern under Guideline J is a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

A single serious crime or multiple lesser offenses (Disqualifying Condition b);

Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year (Disqualifying Condition c).

Conditions that could mitigate security concerns include:

There is clear evidence of successful rehabilitation (Mitigating Condition f);

Potentially disqualifying condition c, 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 (Mitigating Condition g).

Disqualifying Condition c implements a requirement of 10 U.S.C. § 986, which prohibits the Department of Defense from granting or renewing a security clearance for 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." As implemented by Mitigating Condition g, the statute further permits the Secretary of Defense or the Secretary of the military department concerned to authorize an exception to a person covered by the prohibition "in a meritorious case." DOHA Operating Instruction No. 64, *Processing Procedures for Cases Subject to 10 U.S.C. § 986*, provides further guidance. [\(34\)](#)

Guideline G: Alcohol Consumption

The concern under Guideline G is that excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Conditions that could raise a security concern and may be disqualifying include:

Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use (Disqualifying Condition 1);

Conditions that could mitigate security concerns include:

Positive changes in behavior supportive of sobriety (Mitigating Condition 3);

Guideline F: Financial Considerations

The concern is that an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise a security concern and may be disqualifying include:

A history of not meeting financial obligations (Disqualifying Condition 1);

Inability or unwillingness to satisfy debts (Disqualifying Condition 3).

Conditions that could mitigate security concerns include:

The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) (Mitigating Condition 3);

The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts (Mitigating Condition 6).

Guideline E: Personal Conduct

The concern under Guideline E is conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment, qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities (Disqualifying Condition 2).

None of the conditions that could mitigate security concerns are applicable in this case.

CONCLUSIONS

Guideline J: Criminal Conduct

The Government concedes that Applicant was acquitted of the robbery charge referred to in SOR ¶ 1.a. There is no evidence in the record to establish that Applicant committed the offense despite the verdict. Therefore, I find in favor of Applicant with respect to SOR ¶ 1.a.

Applicant was arrested and convicted of nine criminal offenses between 1992 and 1998 (SOR ¶ 1.b through SOR ¶ 1.j). This establishes Disqualifying Condition b. In addition, Applicant was remanded to a county court for failure to pay child support (SOR ¶ 1.k) and deliberately omitted pertinent information from his security clearance application (SOR ¶ 1.l). Applicant attributed his earlier behavior to people he no longer associates with but the record does not contain sufficient evidence to establish Mitigating Condition c. Although Applicant has offered some evidence that he is rehabilitated, he has not met the standard for mitigating under Mitigating Condition f, "clear evidence of successful rehabilitation." Moreover, Applicant admitted in his response to SOR ¶ .d that he was convicted of an offense and sentenced to more than one year imprisonment. Therefore, as stated in SOR ¶1.m, Applicant is precluded by statute from obtaining a security clearance without a waiver by the Secretary of Defense (Mitigating Condition g). Consequently, I find against Applicant with regard to SOR ¶ 1.b through SOR ¶ 1.j. Because I find against Applicant on grounds other than 10 U.S.C. § 986, a recommendation pertaining to waiver is not appropriate.

Guideline G: Alcohol Consumption

Applicant's two DUI convictions (SOR ¶ 2.d and SOR ¶ 2.e), his arrests on charges including public drunkenness (SOR ¶ 2.c and SOR ¶ 2.f), his entry level separation from the Air Force as a result of a fight following his consumption of alcohol (SOR ¶ 2.b) and his excessive use of alcohol during that time period SOR ¶ 2.a) establish Disqualifying Condition 1.

Applicant admits that he still consumes alcohol but contends that he limits himself to a drink or two while socializing. This is some evidence of positive changes in behavior supportive of sobriety but it is not sufficient to establish Mitigating Condition 3 with out further corroboration. Although Applicant's wife, supervisor, and two co-workers testified on his behalf, none of them specifically addressed his current consumption of alcohol. In accordance with the Directive, any doubt about Applicant's current use of alcohol must be resolved against him. Therefore, I find against Applicant with regard to SOR ¶ 2.

Guideline F: Financial Considerations

In response to SOR ¶ 3.a, Applicant denies that his wages were garnished to pay the costs and restitution he was ordered to pay in December 1993. The Government has provided no evidence that such a garnishment was imposed. Therefore, I find in favor of Applicant as to SOR ¶ 3.a.

With regard to SOR ¶ 3.b, the only evidence in the record of the debt to the hospital is Applicant's admission in response to the SOR. However, he also stated that he paid the debt in full. This is corroborated by the credit report he provided, dated October 7, 2002 (Ap Ex F), which does not list the debt. Consequently, I conclude that Applicant has mitigated the debt pursuant to Mitigating Condition 6 and find in his favor with regard to SOR ¶ 3.b.

Applicant denies two additional debts to the same hospital, as well as a debt to a provider of emergency medical services (SOR ¶ 3.c, SOR ¶ 3.d, and SOR ¶ 3.e, respectively). The Government has failed to provide evidence of any of these debts. Therefore, I find in favor of Applicant with respect to each of these subparagraphs in the SOR.

However, SOR ¶ 3.f through SOR ¶ 3.l enumerate establish both Applicant's history of not meeting financial obligations (Disqualifying Condition 1), as well as his demonstrated inability or unwillingness to satisfy debts (Disqualifying Condition 3). Moreover, some of these debts have not been paid and even those that he has paid have not been satisfied in a manner that reflects a good-faith effort on Applicant's part as required by Mitigating Condition 6.

Applicant may have paid the child support but he did not do so until he became delinquent in the amount of \$1,834.00. Although Applicant contends the garnishment of his wages to satisfy the debt was automatic under the state's law, he provided no corroboration. Although Applicant may have eventually satisfied the \$406.00 debt to an apartment lessor, he did not do so until after it had been turned over for collection and a judgment was obtained against him. Applicant acknowledges he has never paid his \$5,014.00 debt to a bank. The same is true of another \$407.00 debt to another creditor. Applicant also admits two bad debts of \$2,323.00 and \$1,482.00 owed to the same bank. Although he claims that one is "unjust," he has not offered convincing evidence of this assertion.

Now that he is married and has a house and car payments, Applicant may not have as much income available to pay his debts as was reflected in his February 2000 financial statement. However, his income level appears sufficient to have enabled him to have done more to have addressed his delinquent debts. Applicant testified that he will satisfy his outstanding obligations now that he is aware of them. However, he was advised of them by the DIS in February 2000. Applicant still has not implemented a plan or even offered a specific one for doing so. Therefore, I find against Applicant with regard to SOR ¶ 3.f through SOR ¶ 3.l.

Guideline E: Personal Conduct

Applicant failure to list any of his three felony arrests and two felony convictions in response to question 21 on the SF 86 is sufficient to establish Disqualifying Condition 2. In his response to the SOR, Applicant contended that he misunderstood or did not remember the actual offenses. If he did not understand the question or had doubt about whether his offenses were applicable, he should have inquired. As for not remembering actual offenses, his other responses on the SF 86 undermine this argument since they reveal he was able to recall his misdemeanor offenses with specificity. Therefore I find against Applicant with regard to SOR ¶ 4.a.

I reach a different result with regard to SOR ¶ 4.b. In response to question 24, Applicant listed his two DUI convictions in 1996. The SOR cites his failure to include his 1992 arrest for public drunkenness as well. However, that arrest was also on other charges, including a felony. Moreover, he was convicted of the other offenses and not public drunkenness. It is reasonable to conclude that he forgot the details of the arrest, as he stated. Therefore, I find in Applicant's favor with regard to SOR ¶ 4.b.

The same is the case with regard to SOR ¶ 4.c. Although Applicant listed his convictions in 1995, 1997, and 1998, the SOR cites his failure to include his 1994 arrest for simple assault and disorderly conduct. Under these circumstances in which Applicant provided so much more recent derogatory information, the omission does not appear to be deliberate. Therefore, I find in favor of Applicant with regard to SOR ¶ 4.c.

The Government fails to meet its burden with regard to Applicant's negative response to question 34 (SOR ¶ 4.d). Applicant denies that his wages were garnished to pay the costs and restitution he was ordered to pay in December 1993. The Government has provided no evidence that the garnishment alleged in SOR ¶ 3.a was imposed. Not only has the Government failed to provide evidence of a garnishment with regard to SOR ¶ 3.g, but the subparagraph does not even allege there was one. Consequently, I find in favor of Applicant with regard to SOR ¶ 4.d.

Finally, the Government's case fails with regard to applicant's negative response to questions 38 and 39 on the SF 86, as alleged in SOR ¶ 4.e. The Government has failed to provide evidence of any of the referenced debts. Therefore, I find in favor of Applicant as to SOR ¶ 4.e.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Subparagraph 2.f: Against Applicant

Paragraph 3. Guideline F: AGAINST APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: For Applicant

Subparagraph 3.c: For Applicant

Subparagraph 3.d: For Applicant

Subparagraph 3.e: For Applicant

Subparagraph 3.f: Against Applicant

Subparagraph 3.g: Against Applicant

Subparagraph 3.h: Against Applicant

Subparagraph 3.i: Against Applicant

Subparagraph 3.j: Against Applicant

Subparagraph 3.k: Against Applicant

Subparagraph 3.l: Against Applicant

Paragraph 4. Guideline E: AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

Subparagraph 4.b: For Applicant

Subparagraph 4.c: For Applicant

Subparagraph 4.d: For Applicant

Subparagraph 4.e: For Applicant

DECISION

In light of all the evidence in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant

Signed

Roger E. Willmeth

Administrative Judge

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.
3. Govt Ex 2 at 3.
4. Govt Ex 3 at 4; Govt Ex 2 at 1-2.

5. Govt Ex 3 at 4.
6. Govt Ex 2 at 2.
7. Govt Ex 3 at 4.
8. Govt ex 3 at 5.
9. Applicant admitted these facts in his response to the SOR. In an earlier statement to the DIS special agent, he claimed that the court made a mistake and he only spent two days in jail before it was resolved (Govt Ex 2 at 2). However, Applicant never renewed this argument or, more importantly, provided evidence of it at the hearing.
10. Govt Ex 3 at 5; Govt Ex 2 at 2.
11. Although an FBI report on Applicant indicates that both charges were nolle prossed, he admitted in his response to the SOR that he was convicted of the Disorderly Conduct charge.
12. Govt Ex 4 at 5; Govt Ex 2 at 4.
13. Govt Ex 4 at 6; Govt Ex 2 at 4.
14. Govt Ex 4 at 5; Govt ex 2 at 4.
15. Govt Ex 3 at 6; Govt Ex 2 at 2.
16. *Id.*
17. Govt Ex 3 at 7; Govt Ex 2 at 2.
18. Govt Ex 3 at 7; Govt Ex 2 at 3.
19. Govt Ex 4 at 4.
20. Ap Ex I.
21. Govt Ex 2 at 4.
22. "Have you ever been charged with or convicted of any felony offense?"
23. Govt Ex 1 at 6.
24. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"
25. Govt Ex 1 at 7.
26. "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?"
27. Govt Ex 1 at 7-8.
28. "In the last 7 years, have you had your wages garnished for any reason?"
29. Govt Ex 1 at 9.
30. "In the last 7 years, have you been over 180 days delinquent on any debt(s)?"

31. "Are you currently over 90 days delinquent on any debt(s)?"

32. Govt Ex 1 at 9.

33. Govt Ex 2 at 5.

34. Neither 10 U.S.C. § 986 nor DOHA OI No. 64 defines "a meritorious case."