

DATE: July 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21118

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 51-year-old machinist employed by a defense contractor, has failed to mitigate disqualifying conditions under four Guidelines. His criminal conduct includes: a 1999 conviction for Malicious Wounding, his sentence for which is subject to 10 U.S.C. § 986; a 1976 charge for Possession of Marijuana; and two Driving Under the Influence of Alcohol convictions in 1990 and 2000. In addition to further instances of drug involvement and alcohol consumption, Applicant failed to mitigate false or incomplete answers to five questions on a 1998 security clearance application. Clearance is denied.

STATEMENT OF THE CASE

On August 16, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to any classified information and recommends that his case be submitted to an Administrative Judge. On November 14, 2002, Applicant executed a response to the SOR and requested a hearing. This case was assigned to me on December 16, 2002. A notice of hearing was issued on January 7, 2003, and the hearing was held on January 29, 2003. During the hearing, eight Government (Govt) exhibits and the testimony of two Applicant witnesses, including Applicant, were received. The transcript (Tr.) was received on February 6, 2003.

PROCEDURAL ISSUE

Initially, I was receptive to a request by Government Counsel and Applicant to permit him additional time to obtain character references and clarify an entry by his probation officer on her log sheet for Applicant. Upon further consideration before the completion of the hearing, I concluded that Applicant had received sufficient notice and had

adequate opportunity to obtain character references. Since the log sheet was a Government exhibit that had been served on Applicant prior to the hearing, I also concluded that both parties had the opportunity to clarify the matter prior to the hearing. Therefore, I concluded that I had no basis to grant additional time and I denied the request.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, including Applicant's admissions to the allegations in the SOR ¶ 1-3, I make the following findings of fact:

Applicant is a 51-year-old machinist, who has been employed by the same defense contractor since 1975, and is seeking a security clearance. He was granted a security clearance by the Department of Defense in December 1975⁽¹⁾ and has held a security clearance for nearly all of his current employment.⁽²⁾

On June 29, 1998, Applicant was arrested and charged with Felonious Assault.⁽³⁾ Although he denies that he stabbed the victim with a knife, Applicant also acknowledged that he was identified as the assailant by the victim as well as other witnesses in the bar where the offense was committed.⁽⁴⁾ Applicant was convicted of Malicious Wounding, a felony. On September 9, 1999, he was sentenced to five years imprisonment, but the sentence was suspended and he was placed on supervised probation for five years.⁽⁵⁾

Applicant began using marijuana in 1975 or 1976 and continued using it in the 1990s, smoking it at least once a month. He purchased the marijuana approximately 40-50% of the time.⁽⁶⁾

Applicant was arrested for Possession of Marijuana, a misdemeanor, on September 1, 1976. He was caught smoking it in his car on a lunch break from work. Applicant was placed on probation for one year and the charge was subsequently dismissed.⁽⁷⁾

In January 1997, Applicant tested positive for marijuana during drug screening conducted by the defense contractor for whom he works.⁽⁸⁾ He was required to complete a 30 day outpatient substance abuse program.⁽⁹⁾

While on probation resulting from his felony conviction, Applicant tested positive for marijuana during drug screening in February 2000. He admitted using it at his cousin's house the month before.⁽¹⁰⁾

Applicant's use of alcohol began at age 20 in 1972. Following his divorce in 1990, his consumption of alcohol reached 12 beers per day.⁽¹¹⁾ Applicant continues to consume alcohol on a limited basis.⁽¹²⁾

Applicant was charged with driving under the influence of alcohol, a misdemeanor, in August 1990. He was stopped for speeding while returning from a fishing trip. Applicant was found guilty, fined, and had his license suspended for six months.⁽¹³⁾

Applicant was again charged with DUI in April 2000. Once again, he was stopped for speeding after having consumed three beers. Applicant was found guilty and required to attend a 20 week alcohol safety action program.

On November 19, 1998, Applicant executed a security clearance application.⁽¹⁴⁾ In response to question 21 ("Have you ever been charged with or convicted of any felony offense?"), he answered, "no," deliberately omitting his 1998 arrest for malicious wounding. He also answered, "no," in response to question 23 ("Are there currently any charges pending against you for any criminal offense?"), deliberately failing to disclose the same offense.

Applicant's response to question 24 ("Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?") was not complete because he deliberately omitted his 1976 charge for possession of marijuana. The same is true of his response to question 27 ("Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana....") because he deliberately failed to report his marijuana use from 1991-1996.

Finally, Applicant answered, "no," to question 28 ("Have you ever illegally used a controlled substance...while possessing a security clearance...?"), deliberately failing to disclose that he had used marijuana while possessing a security clearance.

Applicant is a very dependable employee.⁽¹⁵⁾ He is engaged to a woman, whom he met two and a half years ago, and spends his time with her, having stopped going to bars with friends.⁽¹⁶⁾

POLICIES

Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted. Directive E3.1.14. 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 as to obtaining a favorable clearance decision. 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. [\(17\)](#)

Guideline H: Drug Involvement

The concern is improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

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

Any drug abuse, which is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction (Disqualifying Condition a);

Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution (Disqualifying Condition b).

Conditions that could mitigate security concerns include:

A demonstrated intent not to abuse any drugs in the future (Mitigating Condition c).

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 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 under Guideline E that could mitigate security concerns are applicable in this case.

CONCLUSIONS

Guideline J: Criminal Conduct

Applicant's felony conviction in 1999 for malicious wounding alone establishes both Disqualifying Condition b and Disqualifying Condition c under Guideline J of the Directive. His additional offenses, including a charge for marijuana

possession and two DUI convictions, also prevent him from establishing that the felony is an isolated incident (Mitigating Condition b). The possession charge is aggravated by the fact he smoked marijuana during his lunch break from his job with a defense contractor.

Applicant has attempted to demonstrate his rehabilitation (Mitigating Condition f). He claims,

"since me and my fiancée met, my life is 180 degree turnaround" (sic).⁽¹⁸⁾ His supervisor, who has known Applicant for over 20 years but who has been a supervisor for only two years, corroborates the fact that his behavior has improved since his fiancée entered his life.

Applicant's evidence of rehabilitation is somewhat limited, both in the scope of the evidence itself, as well as the length of time it covers. On the other hand, the record reveals that Applicant's four offenses occurred over a 24 year period, beginning when Applicant was as young as 24 years of age, with the most serious occurring when he was 48 years old. Moreover, it reveals that prior efforts at rehabilitation proved unsuccessful. As a result of testing positive for marijuana in 1997, Applicant underwent a 30 day substance abuse program. Despite that, he tested positive for marijuana again, three years later. Moreover, he did so at a time when he was on probation as a result of his felony conviction. A repeat pattern is also present with regard to his DUI convictions, the first in 1990 and the latest in 2000, again at a time when he was on probation as a result of his felony conviction. Since Applicant has demonstrated a pattern of recidivism, a three year period does not appear to be a sufficient time frame for concluding that there is clear evidence of his rehabilitation.

I also have a concern that he gives the credit to his fiancée for his life turning around. Applicant has already testified that his greatest abuse of alcohol occurred at the time of his divorce. This indicates that any rehabilitation might be at risk if any problem develops in his relationship with his fiancée.

The burden is on Applicant to present *clear* evidence of his rehabilitation in order to establish Mitigating Condition g. Any doubt as to whether granting Applicant access to classified information is clearly consistent with national security must be resolved in favor of national security. Evaluated in light of these standards, the evidence is not sufficient to establish rehabilitation under Mitigating Condition f. Even if it were, 10 U.S.C. § 986 prohibits the mitigation of Applicant's felony conviction unless he is granted a waiver by the Secretary of Defense (Mitigating Condition g). Because I find against Applicant on grounds other than 10 U.S.C. § 986, a recommendation pertaining to waiver is not appropriate.

Guideline H: Drug Involvement

With regard to all of the SOR allegations under Guideline H, there is evidence of Applicant's use or possession of marijuana, which is listed in the Controlled Substances Act of 1970, 21 U.S.C. § 802. Therefore, this establishes Disqualifying Condition a or Disqualifying Condition b with respect to each of the allegations. The record also establishes that Applicant's drug involvement is both recent and not isolated.

Applicant asserts, "since 2000, I haven't smoked any marijuana."⁽¹⁹⁾ He's also testified that he will not use it in the future. Applicant also testified that he has stopped hanging out with the wrong people.⁽²⁰⁾ Although there is no evidence of record that he has smoked marijuana since February 2000, there is a lack of evidence to corroborate his contentions. Moreover, Applicant's testimony is impaired as a result of his conflicting testimony, as well as his falsifications, discussed below. In order to mitigate his drug involvement, Applicant must establish a demonstrated intent not to abuse any drugs in the future (Mitigating Condition c). The record simply does not contain sufficient evidence to sustain such a conclusion.

Guideline G: Alcohol Consumption

Applicant's two convictions for DUI establish Disqualifying Condition 1. These offenses occurred over a 10-year period, with the most recent only three years ago, and there is no evidence that he was diagnosed for alcohol abuse or alcohol dependence and has completed a rehabilitation program.

Since the Government has established a disqualifying condition, the burden is on Applicant to at mitigate that condition. Applicant admits that he still consumes alcohol but contends that he will not drink to excess and will not drive if he drinks. Although this is some evidence of positive changes in behavior supportive of sobriety (Mitigating Condition 3), it is not sufficiently convincing to meet the standards required by the Directive. In addition, there is the issue of the weight to afford Applicant's testimony, as discussed below.

Guideline E: Personal Conduct

The record establishes five instances in which Applicant failed to disclose the information required by a security clearance application. This establishes Disqualifying Condition 2.

Applicant denies all of the allegations under Guideline E. With regard to questions 21 (SOR ¶ 4.a) and 23 (SOR ¶ 4.b) on the security form, Applicant maintained that he did not report his felony offense because he had not yet been convicted. (21) This indicates that his responses to the questions were deliberate. However, question 21 requires the disclosure of being charged with as well as being convicted of a felony offense and question 23 requires the disclosure of any pending charges. Even though Applicant was not convicted of the malicious wounding offense until nearly a year after he executed the security clearance application, he had been charged with felonious assault several months before he signed it. Applicant has failed to mitigate or adequately explain his response to questions 21 and 23.

With regard to failing to disclose being charged for Possession of Marijuana in 1976 (SOR ¶ 4.c) and failing to provide a complete seven year history of his marijuana use (SOR ¶ 4.d), Applicant merely said, "I don't know." (22) This response is not sufficient to mitigate or explain his failure to include it.

Applicant also provided no explanation for failing to disclose his marijuana use in response to question 28 (SOR ¶ 4.e). In addition to having admitting his drug use between 1976 and 2000, Applicant claimed, "I've had my [security] clearance for a good 28 of that 29 [years]." (23)

It does appear that Applicant completed the security clearance application by providing answers to a woman, who orally asked him the questions and typed his responses. (24) Admittedly, this may have contributed to inadequate responses on his part. However, those responses were provided in the written application that Applicant executed. When signing, he completed a certification which should have caused him to carefully review his answers. (25)

Applicant did appear confused at times, in understanding and responding to questions. His testimony was contradictory at times, such as stating that he had obtained an early release from probation, as of a date he could not remember, on one hand, and yet testifying as if his probation would not end until 2004, as scheduled, on another. (26) With regard to the personal conduct issues, Applicant denied that he was lying, stating, "I didn't understand what it was or I just forgot to put stuff down." (27) However, there is not a sufficient basis in the record to mitigate the evidence against him under Guideline E as a result of his confusion.

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: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline H: 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

Paragraph 3. Guideline G: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Paragraph 4. Guideline E: AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

Subparagraph 4.b: Against Applicant

Subparagraph 4.c: Against Applicant

Subparagraph 4.d: Against Applicant

Subparagraph 4.e: Against Applicant

DECISION

In light of the evidence of record 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. Govt Ex 1b at 7.

2. Tr 14.

3. Govt Ex 4.

4. Govt Ex 2 at 2; Tr 52-55.

5. Govt Ex 5.

6. Govt Ex 2 at 3.

7. Govt Ex 4; Govt Ex 2 at 2.

8. Govt Ex 6.

9. Govt Ex 7.

10. Govt Ex 8.

11. Govt Ex 2 at 2-3.

12. Tr 65, 67.

13. Govt Ex 2 at 1.

14. Govt Ex 1b.

15. Tr 82.

16. Tr. 67-68, 83.

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

18. Tr 67-68.

19. Tr 65.

20. Tr 13, 68.

21. Tr 41-43; Govt ex 2 at 2.

22. Tr 46.

23. Tr 14.

24. *Id.*

25. "My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code)."

26. Tr 73, 66.

27. Tr 70.