

DATE: June 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23853

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Evidence of 49-year-old Applicant's alcohol rehabilitation is not sufficient to mitigate seven alcohol related criminal offenses, which he committed over a 16 year period. He also has failed to mitigate disqualifying conditions involving personal conduct and financial considerations. Clearance is denied.

STATEMENT OF THE CASE

On September 17, 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 October 21, 2002, DOHA received Applicant's undated response to the SOR, in which he requested a hearing. This case was assigned to another administrative judge on November 21, 2002, but was reassigned to the undersigned Administrative Judge on November 26, 2002. A notice of hearing was issued on December 16, 2002, and the hearing was held on January 15, 2003. During the hearing, ten Government exhibits, ten Applicant exhibits, and the testimony of the three Applicant witnesses, including the Applicant, were received. The transcript (Tr.) was received on January 23, 2003.

FINDINGS OF FACT

Applicant admitted all of the allegations in the SOR except for SOR ¶ 1.h, 2.a, and 3.a through 3.d. Those admissions are incorporated herein as findings of fact.

Having thoroughly considered the evidence in the record, I make the following additional findings of fact:

Applicant is a 49-year-old aircraft mechanic who has been employed by a federal contractor with the United States

Army (Army) since 1998. His supervisor extols his "outstanding" service.⁽¹⁾ Applicant is commended by an Army regiment maintenance officer for his "impeccable work ethic," as well as his "unmatched" technical expertise.⁽²⁾ An Army battalion production control officer, who has known Applicant for 17 years, attests to Applicant's exemplary service in his current position, as well his service in the Army.⁽³⁾

Applicant retired from the Army with an honorable discharge in 1992, after more than 20 years of enlisted service.⁽⁴⁾ He served in both the Vietnam and Gulf wars and his Army decorations include the Bronze Star Medal, Air Medal (fourth oak leaf cluster), and Army Commendation Medal.

Although his duty performance has been exemplary in both the military and in civilian life,

Applicant has a history of criminal misdemeanor offenses. All but one of these offenses, a 1974, drug theft, occurred while Applicant was under the influence of alcohol.

Applicant was convicted of stealing 12 bottles of phenobarbital tablets from the Army Medical Company, while serving in the Army in October 1974.⁽⁵⁾ His punishment included a reduction in grade.

During his military service in Europe in April 1984, Applicant was reprimanded for assaulting his first wife by pushing her to the ground, causing her to sustain a laceration requiring four stitches.⁽⁶⁾ He was ordered to attend alcohol counseling and domestic counseling.

In August 1992, Applicant was arrested and charged for Driving Under the Influence (DUI) in his home state.⁽⁷⁾ He had consumed at least four beers at a friend's house before the incident and was stopped by city police for speeding.⁽⁸⁾ Applicant was subsequently convicted of Reckless Driving for that incident, in September 1992. He was sentenced to six months in a penal farm, which was suspended; had his driver's license suspended for six months; was ordered into probation for 11 months and 29 days; and was ordered to complete an alcohol rehabilitation program.

As a result of a domestic dispute, Applicant was arrested by authorities for public drunkenness in February 1993.⁽⁹⁾ Rather than appear in court, he paid a \$145.00 fine.

Applicant was arrested in August 1998 in another state, in which he was working, and subsequently convicted of DUI in January 1999.⁽¹⁰⁾ He was stopped by a sheriff's deputy because his vehicle was weaving. Applicant had consumed nearly four beers from a six pack. His driver's license was suspended for one year, he had to pay a fine and costs of \$280.00, and he was ordered to attend a driver's education program.

Shortly thereafter, in October 1998, Applicant was again arrested and subsequently convicted of DUI in yet a third state, through which he was driving to visit his wife.⁽¹¹⁾ By the time he was stopped by state police, who had been tipped off by a toll booth operator, Applicant had consumed four beers from a six pack. Applicant's sentence included a fine of \$307.00 and the revocation of his driver's license for six months.

Applicant was arrested and convicted of domestic assault in December 1997, for an incident involving both his wife and his adult stepdaughter.⁽¹²⁾ The court fined him \$807.60 and ordered him into supervised probation for 11 months and 29 days. The terms of the probation required Applicant to attend domestic violence classes, as well as alcohol counseling. Applicant paid the fine in \$81.00 increments.⁽¹³⁾

In November 2000, Applicant was again arrested for domestic assault after he punched his wife.⁽¹⁴⁾ He was subsequently convicted of that offense in February 2001. Applicant's sentence from the court included 11 months and 29 days in a penal farm, which was suspended, a fine of \$316.00, and an order to attend alcohol counseling and anger management counseling.

Applicant successfully completed an inpatient alcohol rehabilitation program between August and October 2001.⁽¹⁵⁾ He

⁽¹⁶⁾

was diagnosed as being alcohol dependent and received a prognosis of "fair." Following completion of the inpatient program, Applicant attended 16 outpatient sessions over a five week period.⁽¹⁷⁾ Applicant attended Alcoholics Anonymous (AA) meetings for several weeks after completing the rehabilitation program.⁽¹⁸⁾

Applicant provided a security clearance application in April 1999.⁽¹⁹⁾ His response to question 24⁽²⁰⁾ listed his DUI convictions resulting from arrests in 1998, but he deliberately failed to disclose his conviction involving alcohol in 1992.⁽²¹⁾ In response to question 30⁽²²⁾, Applicant deliberately failed to disclose the alcohol counseling that he received for the his 1992 offense, as well as the fact that he was required to attend AA meetings as a result of his 1997 conviction.⁽²³⁾ His response to question 40⁽²⁴⁾ includes a date in December 1997, identifies a county court in his home state, and refers to "assult (sic) fines."⁽²⁵⁾

In March 2001, a special agent of the Defense Security Service (DSS) confronted Applicant with the omissions from his security clearance application. Applicant executed a statement, which includes admissions by Applicant pertinent to allegations in the SOR, as well as his false assertion that the Army never referred him for any type of counseling for his use of alcohol.⁽²⁶⁾

Applicant has not resolved a medical clinic claim against him for \$4669.00 that was incurred in 1994.⁽²⁷⁾ He is also indebted to a financing company for the remaining \$6139.00 balance on a loan that was incurred in 1998⁽²⁸⁾. Applicant paid off the fines imposed for his 1997 domestic abuse offense in monthly installments.⁽²⁹⁾

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.

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:

Allegations or admission of criminal conduct, regardless of whether the person was formally charged (Disqualifying Condition 1);

A single serious crime or multiple lesser offenses (Disqualifying Condition 2).

Conditions that could mitigate security concerns include:

There is clear evidence of successful rehabilitation (Mitigating Condition 6).

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);

Following diagnosis of alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program (Mitigating Condition 4).

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);

Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination (Disqualifying Condition 3);

A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency (Disqualifying Condition 5).

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

Guideline F: Financial Considerations

The concern under Guideline F 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:

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

Conditions that could mitigate security concerns include:

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

CONCLUSIONS

Guidelines J: Criminal Conduct

The Government has shown that Applicant has been convicted of six misdemeanors and has twice been the subject of Army disciplinary action over a period of 29 years. This establishes both Disqualifying Condition 1 and Disqualifying Condition 2.

The evidence further establishes that Applicant was under the influence of alcohol when he committed all but one of these offenses. In this regard, Applicant has attempted to mitigate these offenses through evidence that he has been rehabilitated. He has established that he has successfully completed an inpatient alcohol rehabilitation program.

Applicant testified that he has totally abstained from alcohol since he entered that program in August 2001.⁽³⁰⁾ He also testified as to how this has greatly improved his relationship with his wife.⁽³¹⁾ Applicant presented the testimony of a corroborating witness in order to establish that he has quit drinking alcohol.⁽³²⁾ Whereas the evidence of record includes a number of instances in which Applicant denied he was an alcoholic or had a drinking problem, he now admits that he is an alcoholic.⁽³³⁾

Since Applicant has attempted to demonstrate successful rehabilitation, Mitigating Condition 6 is appropriate for consideration. Certainly, Applicant has presented evidence of successful rehabilitation. However, Mitigating Condition 6 requires *clear evidence* of successful rehabilitation. Although Applicant successfully completed an alcohol rehabilitation program, the prognosis for his recovery was only, "fair." Even though there is evidence that he attended AA meetings following the completion of the rehabilitation program, it does not appear from his testimony that Applicant continues to attend AA meetings on a regular basis. With a history of alcohol related offenses over a 16 year period, Applicant, by his own admission, has only abstained from alcohol for a period of a year and a half. Moreover, the testimony of his corroborating witness is somewhat limited, verifying that Applicant no longer goes out drinking after work. Given his history of offenses, I was impressed with the progress Applicant has demonstrated on the road to rehabilitation. If he is able to demonstrate further progress down that path, Applicant may be able to successfully mitigate his criminal offenses at a future date. Based on the standard of *clear evidence* required by Mitigating Condition 6, however, the evidence of record is not sufficient to mitigate the alcohol related offenses in SOR ¶ 1.

The remaining offense under SOR ¶ 1 is Applicant's theft of phenobarbital tablets from the Army in 1974 (SOR ¶ 1.d). Since this offense has not been shown to have been alcohol related, was committed 29 years ago, and Applicant has not been shown to have committed a similar offense on any other occasion, this offense is mitigated in accordance with Mitigating Condition 1 and Mitigating Condition 2 under Guideline J.

Guideline G: Alcohol Consumption

In SOR ¶ 2, the Government has reasserted six of Applicant's criminal misdemeanor offenses addressed in SOR ¶ 1. This evidence establishes Disqualifying Condition 1, since three of the offenses involve an arrest or conviction for DUI and two of the offenses are domestic abuse that is alcohol related, as is the remaining offense, which is for public drunkenness.

Here again, Applicant has attempted to mitigate these offenses by demonstrating that he has been rehabilitated. Based on the extent of Applicant's alcohol related offenses, including an offense as recent as November 2000, and the fact Applicant has been diagnosed as alcohol dependent, Mitigating Condition 4 is appropriate for consideration. With regard to Mitigating Condition 4, the evidence establishes that Applicant has successfully completed an inpatient rehabilitation program, as well as 16 additional outpatient sessions over a five week period. There is also evidence that he has abstained from alcohol for more than 12 months. However, Mitigating Condition 4 also requires that an applicant frequently participate in AA meetings and that an applicant receive a favorable prognosis by a person with the requisite

credentials. As previously stated, it does not appear from his testimony that Applicant continues to attend AA meetings on a frequent or regular basis. Although a medical director would appear to be a credentialed medical professional, Applicant's prognosis, "fair," does not conform with the required standard of "favorable." Therefore, Applicant has not met the requirements for mitigating his alcohol related offenses pursuant to Mitigating Condition 4, nor has he met the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive E3.1.15.

Guideline E: Personal Conduct

The Government reasserts Applicant's criminal misdemeanor offenses addressed in SOR ¶ 1 and 2. This establishes Disqualifying Condition 5. Once again and for the reasons discussed above, Applicant's attempt to demonstrate establish his alcohol rehabilitation is not sufficient to mitigate these offenses.

The evidence of record demonstrates that Applicant did not disclose all of his alcohol related offenses, when he submitted a security clearance application on April 29, 1999. This establishes Disqualifying Condition 2 with regard to SOR ¶ 3.b. When confronted with the omissions, Applicant told the DSS special agent he had forgotten the 1993 offense. This is plausible in light of the fact that Applicant was merely issued a ticket for the offense, which he paid instead of appearing in court. With regard to the 1992 conviction, however, Applicant's statement establishes that he recalled the conviction but elected not to list it. Applicant said that he "omitted it because it was outside the seven years and the initial charge was down graded (sic) to Reckless Driving." (34) Apparently, Applicant confused question 24 with question 30 because question 24 is not limited to a seven year period. Moreover, even if question 24 was limited to a seven year period, Applicant committed the 1992 offense within seven years of completing the security clearance application. Although Applicant was convicted of Reckless Driving, he was still charged with DUI and question 24 covers both being "charged or convicted of any offense(s) related to alcohol or drugs." Clearly, Applicant's own statement indicates that his omission was deliberate and he has failed to provide evidence to establish any of the mitigating conditions under Guideline E or to otherwise mitigate the non-disclosure.

When he submitted a security clearance application on April 29, 1999, Applicant did not disclose that he had received alcohol-related treatment or counseling. This establishes Disqualifying Condition 2 with regard to SOR ¶ 3.c. Applicant admitted to the DSS special agent that he had to attend an alcohol abuse program as a result of the 1992 DUI offense. With regard to his 1997 offense, Applicant admitted in his response to the SOR that his probation officer required him to attend AA meetings. He tried to maintain in his testimony that this did not constitute treatment or counseling. Applicant's own statements indicate that his omissions were deliberate and he has failed to establish any of the mitigating conditions under Guideline E or to otherwise mitigate the non disclosure.

The Government concedes that Applicant has mitigated its concern with respect to SOR ¶ 3.d. That subparagraph had alleged Applicant's falsification on question 40 of the security clearance application, pertaining to civil court actions. (35) However, it is not necessary for Applicant to mitigate his response to that question. On its face, Applicant's answer to question 40 fails to establish that he did not report the referenced judgment. Applicant may not have answered the question like a lawyer but his answer is sufficient to demonstrate that he was referring to the judgment in question.

In his response with regard to SOR ¶ 3.e, Applicant admitted that his statement to the DSS special agent was not true. His excuse is that he had forgotten the incident. This excuse is insufficient to mitigate the allegation and he has not otherwise mitigated this false statement.

Guideline F: Financial Considerations

The evidence of Applicant's bad debts for a medical bill of \$4669.00 and to a financing company for \$6139.00 establishes Disqualifying Condition 3 on the part of Applicant.

Applicant acknowledges both of these bad debts. He testified that the medical bill resulted from his wife's foot surgery in 1994. Applicant asserted that his medical insurance through CHAMPUS (now TRICARE) covered the most of the claim but it did not get paid because of "a mixup in the paper work." (36) He related efforts by he and his wife to resolve the matter and contended that the doctor merely needs to resubmit the claim and TRICARE will pay it. (37) However, Applicant was confronted with the fact the medical provider continued to pursue a claim against him, when interviewed

by the DSS special agent in March 2001. It would appear that a good faith effort to resolve this matter should have been successful by now, especially if, as Applicant claims, all that is required is the re-submission of the bill.

Applicant testified that the bad debt to the finance company resulted from a loan that he co-signed for his son to purchase a truck. He stated that his son totaled the truck and defaulted on the loan because he did not have insurance on the truck. (38) Applicant claimed to have made several offers to the creditor to make payments of \$500.00 per month but his offer was refused, with the creditor insisting upon full payment. (39) Without corroborating evidence, however, I am reluctant to conclude that a creditor or collection agent would reject \$500.00 per month payments, even on a bad debt.

If verified, Applicant's testimony with respect to his efforts to resolve these debts could support the application of Mitigating Condition 6. However, Applicant has provided no corroborating evidence for any of his assertions. Failure of an applicant to present documentation in support of claims about financial matters is a factor to be considered in evaluating such claims. ISCR Case No. 99-0012 (App. Bd. Dec. 1, 1999). Due to the lack of any corroborating evidence, I am not able to find that Applicant has mitigated either of these bad debts.

As Department Counsel recognized, the evidence is unclear as to whether Applicant's home state obtained a judgment against him for nonpayment of the fines imposed for his domestic abuse offense in 1997. (40) Applicant testified that he paid it off in monthly \$81.00 payments. Government Counsel accepted Applicant's testimony. (41) Moreover, there is some corroboration for Applicant's testimony in the court records submitted by Government. They reveal \$81.00 credits for each of the two fines imposed for his 1997 offense. (42) Therefore, I conclude that Applicant has mitigated this debt, in accordance with Mitigating Condition 6, by having paid it off.

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

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Paragraph 2. Guideline G: FOR APPLICANT

Subparagraph 2.a: For Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: For Applicant

Subparagraph 3.e: Against Applicant

Paragraph 4. Guideline F: AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

Subparagraph 4.b: Against Applicant

Subparagraph 4.c: 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. Applicant Exhibits C and D.
2. Applicant Exhibit A.
3. Applicant Exhibit B.
4. Applicant Exhibit G.
5. Applicant's response to the SOR; Government Exhibit 6.
6. Government Exhibit 5.
7. Government Exhibit 9.
8. Government 2 at 2.
9. Government Exhibit 8.
10. Government Exhibit 7.
11. Government Exhibit 2 at 3.
12. Government Exhibit 4.
13. Government Exhibit 4 at 6-7; Tr. 58-59, 66.
14. Government Exhibit 3.
15. Applicant Exhibits F, I and J.
16. Applicant Exhibit I.
17. Tr. 54.

18. Tr. 55.

19. Government Exhibit 1.

20. Question 24: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"

21. Government Exhibit 2 at 1.

22. Question 30: "In the last 7 years has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?"

23. Government Exhibit 2 at 6; Tr. 51.

24. Question 40: "In the last 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?"

25. Government Exhibit 1 at 11.

26. Government Exhibit 2.

27. Government Exhibit 10 at 4.

28. Government Exhibit 10 at 7.

29. Government Exhibit 4 at 6-8; Tr. 58-59, 65-66.

30. Tr. 53.

31. Tr. 61.

32. Tr. 28.

33. Tr. 17.

34. Government Exhibit 2 at 1.

35. Tr. 65-66.

36. Tr. 30.

37. *Id.*

38. *Id.*

39. Tr. 30-31.

40. Tr. 65-66.

41. Tr. 66.

42. Government exhibit 4 at 6-7.