

DATE: December 22, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-02732

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT J. TUIDER**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has a history of illegal drug involvement and alcohol abuse. Personal conduct concerns also arose due to Applicant's falsification of his security clearance application. Applicant mitigated drug involvement and alcohol consumption concerns. However, he failed to mitigate the personal conduct concern. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On October 15, 2003, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-illegal drug involvement (Guideline H), excessive alcohol consumption (Guideline G), and falsification of his security clearance application (Guideline E) of the Directive. Applicant answered the SOR in writing on November 14, 2003 and elected to have a hearing before an Administrative Judge. The case was assigned to me on January 7, 2004. On January 20, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance.

The government offered seven exhibits, which were marked as Government Exhibits (GE) 1 through 7, and admitted without objection. The Applicant offered no exhibits. DOHA received the transcript (Tr.) of the proceeding on January 29, 2004.

**FINDINGS OF FACT**

Applicant is a 31-year-old unmarried man, who was divorced from his wife in March 1995. He is a high school graduate and is currently attending college. He has earned approximately 60 hours of college credit. He is seeking access to classified information for his employment as a resonant frequencies technician for a defense contractor. He has been employed by this same defense contractor for eight years.

Applicant served in the Marine Corps from April 1992 to August 1995. In February 1995, he tested positive for

methaline dioxy methamphetamin (MDMA). At the time he tested positive, he held a secret clearance. In April 1995, Applicant plead guilty to wrongful use of MDMA at a summary court-martial. Answer to SOR. In August 1995, Applicant was discharged from the Marine Corps under other than honorable conditions for misconduct due to drug abuse. At the time of discharge, Applicant was a Lance Corporal, pay grade E-3.

Applicant received counseling for drugs and alcohol from approximately February 1995 to June 1995 through the Marine Corps as a result of testing positive for MDMA. In his Answer to the SOR, Applicant denies receiving counseling for drugs and alcohol. He did "admit to being questioned on a weekly basis from 02/95 to 06/95 to ensure that drug abuse was not a continued habit." Answer to SOR.

In a signed, sworn statement dated December 4, 2001, Applicant stated, "In the time that I was receiving counseling, I attended weekly briefing through my battalion S-4 office on drugs & alcohol (abuse). I had attended a psychological test through a doctor (civilian) that worked for mainside [on base]. The test was used to determine that I was not psychologically dependent on drugs. The Staff NCO in charge recommended that I had an alcohol problem due to being intoxicated by alcohol when I had made the decision to use MDMA." GE 2.

In an additional signed, sworn statement dated April 21, 2003, Applicant stated, "After my positive test of drugs, the Marine Corps ordered me to undergo drug counseling and final evaluation for drug and alcohol dependency. From Feb 95 through Jun 95, I underwent counseling through the S-4 office at [Battalion]. This consisted of weekly counseling sessions." GE 3.

Applicant concludes in his Answer to the SOR, "If in the previous statement that I had made, I used the term "counsel" or any derivative of the term "counsel," it was due to not realizing the perception of the definition and because I was under pressure to make a statement the day April 21, 2003 that I was confronted concerning the subject of an arrest . . . on January 2, 1993." Answer to SOR.

In 1992, Applicant started consuming alcoholic beverages at the age of 19 after joining the Marine Corps. Applicant drank approximately six beers per weekend day. From 1992 to early 1993, Applicant consumed a half-pint of hard alcohol and a six pack of beer approximately three times per week. Applicant drank to the point of intoxication and became violent, tired and anxious. GE 3.

In early 1993, Applicant abstained from alcohol because he did not have the money to purchase alcohol and wanted to stay focused on the Marine Corps schools he was attending. From June 1993 to November 1993, Applicant consumed five beers every Friday, Saturday and Wednesday night at the enlisted club. In November 1993, Applicant went overseas. While overseas, Applicant consumed a half pint to a pint of hard liquor and a six pack of beer three to four days per week. After turning 21 in May 1994, Applicant began to consume a six pack of beer every other day. GE 3.

In August 1995, Applicant "began to feel" he had a drinking problem. At that time he was drinking a six pack of beer every day. He voluntarily went to Alcoholic Anonymous meetings. Applicant's drinking varied until 2002. At the time Applicant submitted his SCA on April 21, 2003, he characterized his drinking to consist of two six packs per week, an average of two beers per day. GE 3. At the time of his hearing in January 2004, Applicant characterized his drinking to consist of two beers at a sitting and an occasional mixed drink. Tr. 35. Also, at the time of his hearing, Applicant was six feet tall and weighed 175 pounds. Tr. 25.

In January 1993, Applicant was arrested for felony aggravated assault at a private club. GE 3, GE 4. At the time of this arrest, Applicant was a 19-year-old Marine, but the drinking age was 21. Tr. 25-26. Applicant had consumed approximately 12 mixed drinks and became involved in a "verbal and pushing confrontation" and pulled a knife. Applicant was detained by club personnel, arrested and booked by the police, and taken to jail. He was released the following day. The charges were dismissed and no further disciplinary action was taken. GE 3.

Applicant completed a security clearance application (SCA) on August 29, 2001. Question 21 asked if Applicant had ever been charged with or convicted of any felony offense, regardless of whether the record has been sealed or otherwise stricken from the record. Applicant answered no. Applicant admitted this allegation and stated, "Although I falsified, I had no intention to do so. It was my misunderstanding of the information required." Answer to SOR. In contrast, Applicant stated in his signed, sworn statement, "I did not list this arrest on my security questionnaire because I

did not consider this a valid arrest as the charges against me were dismissed. Even though I read the question to list all criminal charges against me, even if the charges were dismissed or dropped." GE 3.

In response to Question 28, which asked if Applicant, while in a sensitive position, ever illegally used a controlled substance while holding a security clearance. Applicant answered "no." Applicant admitted this allegation, but asserts he put the government on notice of his drug abuse when he answered Questions 25 and 27. In response to Question 25 relating to his police record - military court, Applicant listed "UA, TESTED POS ON DRUG SCREEN, 25 DAYS IN BRIG." In response to Question 27 relating to use of illegal drugs and drug activity, Applicant listed, "1995/02/05 METHALINE DIOXY ETHAMPHETAMIN ONCE." GE 1. Applicant further stated in his Answer, "I have no intention of contradicting myself on the SF-86 application. I did so by overlooking "while possessing a security clearance" in question 28 of the SF-86 application."

Question 30 asked Applicant if the use of alcohol in the last seven years resulted in any alcohol-related treatment or counseling. Applicant answered "no." Applicant denied receiving counseling "for the fact that I was evaluated to determine if counseling/treatment was required in which resulted as not required and two meetings at alcoholics anonymous is not considered as counseling for alcohol." Answer to SOR.

### POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure (2) of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

### CONCLUSIONS

#### **Guideline H - Drug Involvement**

In the SOR, DOHA alleged Applicant used MDMA in approximately February 1995, while holding a security clearance in the Marine Corps (¶ 1.a.), that he was discharged from the Marine Corps in August 1995 under other than honorable conditions for misconduct due to drug abuse (¶ 1.b.), and that he received counseling for drugs and alcohol from

approximately February 1995 to June 1995 through the Marine Corps due to using MDMA (¶ 1.c.). All three of these allegations stemmed from Applicant's single use of MDMA in February 1995.

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. Directive ¶ E2.A8.1.1.1.

The government established by substantial evidence and Applicant's admissions the allegations contained in SOR ¶ 1.a. and ¶ 1.b. Applicant denied the allegation contained in SOR ¶ 1.c. In his Response to the SOR, Applicant denies he received counseling and admits to being questioned on a weekly basis in his battalion S-4 office. He previously indicated he received counseling in two signed, sworn statements in December 2001 and in April 2003. In those statements, as reflected above in the Findings of Fact, the process he underwent included testing to determine psychological dependence on drugs, and weekly briefings through his battalion S-4 office. At the time, he submitted his signed, sworn statements, he viewed the process he underwent in the Marine Corps as "counseling." His subsequent reevaluation of what occurred in his Response to the SOR does not transform what occurred in the past to something different in the present. His explanation that his use of the term counsel "was due to not realizing the perception of the definition" and because he was "under pressure to make a statement" in April 2003 is not persuasive. In December 2001, he previously used the same terminology and sufficiently described the process to persuade a reasonable person that he received counseling.

This entire drug involvement concern stemmed from Applicant's single use of MDMA approximately 10 years ago. There is no evidence that Applicant has since been involved with drugs. In short, Applicant's single use of MDMA, while not condoned, appears to be long behind him.

DC 1 is applicable: Any drug abuse. E2.A8.1.2.1. The following MCs are applicable: MC 1: The drug involvement was not recent. E2.A8.1.3.1.; MC 2: The drug involvement was an isolated or *aberrational* event. E2.A8.1.3.2. MC 3: A demonstrated intent not to abuse any drugs in the future. E2.A8.1.3.3. I conclude Guideline H for Applicant.

### **Guideline G - Alcohol Consumption**

In the SOR, DOHA alleged Applicant received counseling for drugs and alcohol as referenced in ¶ 1.c. (¶ 2.a.), that Applicant attended Alcoholics Anonymous due to his belief that he might have a drinking problem (¶ 2.b.), that Applicant consumed alcohol to the point of intoxication through at least 2001 (¶ 2.c.), that Applicant continues to consume approximately two six-packs of beer each week (¶ 2.d.), and that Applicant was arrested in January 1993 for felony aggravated assault while "extremely intoxicated" (¶ 2.e.).

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. E2.A7.1.1.

The Government established by substantial evidence and Applicant's admissions to ¶ 2.b., ¶ 2.c., ¶ 2.d, and ¶ 2.e. Applicant denied the allegation in ¶ 2.a. For the reasons discussed under Guideline H, I consider the process Applicant underwent in the Marine Corps to have been counseling and do not believe his subsequent explanation redefining the process in his Answer to the SOR.

After joining the Marine Corps, Applicant experimented with alcohol often to excess. To his credit, he recognized that he may have had a drinking problem and attended Alcoholics Anonymous meetings to ascertain whether or not he had a drinking problem. Applicant's drinking evolved from excess when he was young to his present moderate consumption. Applicant has not admitted, and there is no other record evidence to suggest he still drinks to the point of intoxication. Just because Applicant has had problems with alcohol in the past does not mean that he has to abstain from consuming alcohol.

The following DCs are applicable: DC 1: 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. E2.A7.1.2.1; DC 5: Habitual or binge consumption of alcohol to the point of impaired judgment. E2.A7.1.2.5. The following MCs are applicable: MC 1: The alcohol related incidents do not indicate a pattern. E2.A7.1.3.1. MC 2: The problem occurred a number of

years ago and there is no indication of a recent problem. E2.A7.1.3.2. MC 3: Positive changes in behavior supportive of sobriety. E2.A7.1.3.3. I conclude for Applicant on Guideline H.

### **Guideline E- Personal Conduct**

In the SOR, DOHA alleged Applicant falsified his SCA three times. First, by failing to list felony offenses, whether charged or convicted, (¶ 3.a.), when in fact he had been arrested in January 1993 for aggravated assault. Second, for denying he had used illegal drugs while possessing a security clearance (¶ 3.b), when in fact he had tested positive in February 1995 for MDMA while in the Marine Corps holding a secret clearance. Third, for denying in the last seven years his use of alcohol resulted in any alcohol-related treatment or counseling, (¶ 3.c.), when in fact he had received counseling while in the Marine Corps from February 1995 to June 1995.

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. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence and Applicant's admissions to ¶ 3.a., and ¶ 3.b. Applicant denied the allegation in ¶ 3.c. For the reasons discussed under Guideline H, I consider the process Applicant underwent in the Marine Corps to have been counseling and do not give credence to his subsequent explanation redefining the process in his Answer to the SOR.

In response to SOR ¶ 3.a, Applicant stated he "had no intention to do so" as it pertained to omitting his felony arrest for aggravated assault. Given Applicant's educational level and apparent attention to detail, it is difficult to comprehend that he could have overlooked this arrest. Applicant indicated when he was arrested, he was taken into custody, processed, and spent the night in jail. Certainly, this experience should have made an impact on Applicant to jog his memory at the time he completed his SCA.

In response to SOR ¶ 3.b, Applicant stated his failure to list use MDMA use while holding a security clearance was unintentional. To support his argument, he suggests the Government had constructive notice of his drug involvement when he answered Questions 25 and 27. It is clear from Applicant's SCA that the information sought by Question 28 was provided in response to Questions 25 and 27. Furthermore, Applicant indicated he held a secret clearance in response to Question 31. Applicant's unintentional explanation has merit. While Applicant could reasonably have been expected to be more diligent in responding to this question, his judgment lapses are not enough to impute knowing and wilful falsification under Guideline E.

In response to SOR to ¶ 3.c., Applicant denies falsifying his answer to Question 30, in which he denied receiving alcohol-related treatment for use of alcoholic beverages in the last seven years. As stated above, he did not view the process he underwent while in the Marine Corps to be counseling. For the reasons discussed above, I do not find this explanation credible.

The following DC is applicable. DC 2: 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. E2.A5.1.2.2. There are no MCs applicable. I conclude Guideline E against Applicant on this concern, however, I conclude for him on ¶ 3.b.

In conclusion, I find that Applicant has overcome his past conduct as it pertains to drug involvement and alcohol consumption. However, his recent behavior as it pertains to his credibility when completing his SCA has not convinced me he is sufficiently trustworthy to be granted a security clearance.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H.: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline G: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Paragraph 3. Guideline E. AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: Against Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

**Robert J. Tuidor**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.