

DATE: September 24, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-07102

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Robert J. Tuider, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has failed to mitigate alcohol-related incidents away from work, including three convictions for Driving While Intoxicated (DWI), two for Driving Under the Influence (DUI), and an alcohol-related assault on a military policeman. The offenses span a 22 year period. Applicant committed the latest DWI offenses within a year of submitting his pending security clearance application. Following his latest conviction, Applicant participated in a substance abuse program from which he received a favorable prognosis from the administrator. However, the value of the administrator's opinion is undermined by the fact that clinic records reflected that Applicant only had one prior DWI when he participated in their program. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 15, 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 26, 2002, Applicant executed a response to the SOR and requested a hearing. This case was assigned to me on January 21, 2003. A notice of hearing was issued on February 4, 2003, and the hearing was held on February 25, 2003. During the hearing, 11 Government (Govt) exhibits, 11 Applicant (Ap) exhibits, and the testimony of two Applicant witnesses, including Applicant, were received. The transcript (Tr.) was received on March 6, 2003.

### **FINDINGS OF FACT**

Having thoroughly considered the evidence in the record, including Applicant's admissions, I make the following findings of fact:

Applicant is a 47-year-old armament mechanic, who is employed by a defense contractor and is seeking a security clearance.

Applicant retired from the United States Army with the rank of Sergeant First Class (E-7) in 1997, after completing more than 20 years of enlisted service.<sup>(1)</sup> Although he received an Honorable Discharge, as well as a number of awards and decorations, including the Meritorious Service Medal and Army Commendation Medal,<sup>(2)</sup> Applicant committed criminal offenses on seven occasions during the course of his military service.

On August 6, 1977, Applicant was arrested for Assault upon a Military Policeman and Drunk and Disorderly Conduct. He struck the Military Policeman in the face with his forearm after he was apprehended for Drunk and Disorderly Conduct. Applicant received punishment under Article 15.<sup>(3)</sup>

On March 4, 1978, Military Police arrested Applicant for Destruction of Government Property and Communicating a Threat. He engaged in a fight with another Army member, threw a pool ball through a window, and threatened another Army member who tried to intervene. Applicant received punishment under Article 15 for Disorderly Conduct. His punishment included a reduction in grade to Private, E-2, a forfeiture of \$73.00, which was suspended, extra duty for 14 days, and a restriction for 14 days.<sup>(4)</sup>

On July 26, 1980, Applicant was arrested by civilian police and charged with Driving Under the Influence (DUI). On September 16, 1980, he plead guilty to and was convicted of Careless and Reckless Driving After Drinking. Applicant was sentenced to 60 days confinement, which was suspended, and fined \$100.00 plus court costs.<sup>(5)</sup>

The following month, Applicant was again arrested by civilian police for DUI. He registered .11% on a Breathalyzer that police conducted on that date, August 28, 1980. On September 9, 1980, Applicant pleaded guilty and was found guilty of DUI. He was sentenced to 90 days confinement, which was suspended for one year, and fined \$150.00 plus court costs.<sup>(6)</sup>

On February 15, 1985, Applicant was arrested for Driving While Impaired (DWI). He subsequently pleaded guilty and was convicted of the offense.<sup>(7)</sup>

On June 24, 1988, Military Police arrested Applicant for Assault Consummated by Battery and Damage to Government Property. He engaged in a fight with a non-commissioned officer in the grade of E-7, whom he struck in the face with his fist. Applicant received both oral and written reprimands.<sup>(8)</sup>

On September 26, 1992, Applicant was arrested by civilian police and charged with DWI and a Stoplight Violation, which resulted in an accident. On March 24, 1993, he was convicted of both offenses. Applicant received a sentence of 30 days confinement; which was suspended, and a fine of \$150.00, plus court costs of \$70.00. He was also ordered to pay \$100.00 in restitution, directed and to serve 72 hours of community service, had his driver's license suspended; and was required to participate in a substance abuse program at a mental health center.<sup>(9)</sup> At the mental health center, a physician's diagnosis of Applicant was "Alcohol Abuse."<sup>(10)</sup>

Two years after retiring from the Army, Applicant was stopped by civilian law enforcement authorities for speeding on October 29, 1999. He failed a Breathalyzer that was administered because the arresting officer smelled alcohol on his breath. Applicant consumed approximately nine beers at a bar, where he met an old Army buddy.<sup>(11)</sup> After being charged for DWI, Applicant pleaded guilty and was convicted of DWI on March 14, 2000. His sentence included an order to receive substance abuse counseling.<sup>(12)</sup>

As an outpatient, Applicant successfully completed a clinic's 40 hour substance abuse program that the court ordered as a result of his DWI conviction on arch 14, 2000. It was the opinion of the administrator at the clinic that he "has learned from his mistakes and is unlikely to make them again."<sup>(13)</sup> However, Applicant's records from the clinic reflect that Applicant only had one prior DWI conviction.<sup>(14)</sup> Applicant did not participate in any follow-up program after  
<sup>(15)</sup>

completing the counseling at the clinic.

On May 17, 2000, Applicant completed a security clearance application. He answered, "yes," to question 23d, "have you ever been charged or convicted of any offense(s) related to alcohol or drugs?" However, Applicant only listed his latest DWI conviction in March 2000 and he deliberately omitted any of his six prior alcohol related offenses. [\(16\)](#)

On January 23, 2002, Applicant provided a sworn statement to a special agent of the Defense Security Service (DSS). [\(17\)](#) He provided the circumstances surrounding his three DWI offenses but failed to provide any information concerning his other alcohol related offenses.

Applicant continues to consume alcohol. [\(18\)](#)

## 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:

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

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

Conditions that could mitigate security concerns include:

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

### Guideline E - Personal Conduct

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).

Conditions that could mitigate security concerns include:

The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily (Mitigating Condition 2);

#### 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);

Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence (Disqualifying Condition 3).

Conditions that could mitigate security concerns include:

The alcohol related incidents do not indicate a pattern (Mitigating Condition 1);

The problem occurred a number of years ago and there is no indication of a recent problem (Mitigating Condition 2);

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

Following diagnosis of alcohol abuse or 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).

### CONCLUSIONS

#### Guideline J

SOR ¶ 1.e alleges that Applicant was arrested on or about September 16, 1980 for DUI. In fact, he was convicted on that date for the offense he committed on July 26, 1980, which is alleged in SOR ¶ 1.c. Therefore, I find in favor of Applicant with regard to SOR ¶ 1.e. The same is true with regard to SOR ¶ 1.i. Whereas it alleges that Applicant committed DWI on March 24, 1993, that is actually the date he was convicted for the offense he committed on September 26, 1992, which is alleged in SOR ¶ 1.h. Again, I find in favor of Applicant with respect to SOR ¶ 1.i.

As set forth in SOR ¶ 1.f, SOR ¶ 1.h. and SOR ¶ 1.j, Applicant's criminal conduct includes three DWI offenses. It also includes two DUI offenses, as set forth in SOR ¶ 1.c and SOR ¶ 1.d. Finally, it includes two offenses involving assault and battery, as set forth in SOR ¶ 1.b and SOR ¶ 1.g, and another for disorderly conduct, as set forth in SOR ¶ 1.a. <sup>(19)</sup> This criminal conduct establishes both Disqualifying Condition a and Disqualifying Condition b.

Although most of Applicant's offenses occurred more than 10 years ago, his conduct is not mitigated as not recent pursuant to Mitigating Condition a, because he committed the latest offense within the year before he submitted his pending security clearance application. Neither are Mitigating Conditions b through e applicable to his case.

Essentially, Applicant presents evidence to support Mitigating Condition f. Although he has resumed drinking, he contends that he now limits his drinking: "I might sip one, you know, but at this stage, believe me, there ain't no six or seven, even two, especially driving." (20) His testimony may be some evidence of successful rehabilitation but it does not amount to *clear* evidence of the same, as required by Guideline J. Lacking corroboration, his testimony does not enable him to meet his burden pursuant to Section E3.1.15 of the directive. Moreover, Applicant's admission of having resumed the consumption of even one alcohol drink raises doubt as to whether he can maintain such constraint, given his prior conduct. In accordance with Section E2.2.2 of the Directive, such doubt must be resolved against Applicant. Consequently, I find against Applicant with respect to all subparagraphs under paragraph 1 of the SOR, except for SOR ¶ 1.e. and SOR ¶ 1.i.

#### Guideline E

Contrary to the allegation in SOR ¶ 2.a, Applicant actually answered, "yes," not, "no," to question 23 on the security clearance application. Specifically, question 23d is the one that asks the question referred to in SOR ¶ 2.a: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant listed his DWI conviction in March 2000. Although he listed his latest conviction, he failed to enumerate his two prior DWI convictions or his two DUI convictions. This omission is sufficient to establish Disqualifying Condition 2.

Applicant gave his explanation for this omission to a special agent for the DSS: "I assume that I did not notice that the alcohol offense question on the form pertained to my entire lifetime. I suppose I was under the impression that I only had to provide information for the past seven years." (21) Although this may have been the case, Applicant's explanation is not sufficient to mitigate the disqualifying condition established by his failure to provide anything even approaching a complete response. His omission may be an isolated incident, but it occurred on his pending application and he did not provide complete information before he was confronted by the DSS special agent. Therefore, Applicant cannot avail himself of Mitigating Condition 2. It also fails to satisfy any of the other mitigating conditions under Guideline E. I find against Applicant with regard to SOR ¶ 2.a.

#### Guideline G

SOR ¶ 3.b merely relates the fact that Applicant told a DSS special agent he expected to resume drinking alcohol when his probation was completed. This is not evidence of a disqualifying condition. As the DOHA Appeal Board has recognized: 'a person *may* be engaging in alcohol abuse because the specific facts and circumstances of his drinking indicates actual abuse. But, it does not follow that *any* time the person drinks alcohol, regardless of quantity, he is drinking to excess within the meaning of Criterion M [predecessor to Criterion G.] (emphasis in original).' ISCR Case No. 96-0869 (App. Bd., Sep. 11, 1997) at 2, citing DISCR Case No. 90-1054 (App. Bd., Feb. 25, 1993) at 4. SOR ¶ 3.b merely reflects an expression of Applicant's intent with regard to a future act as opposed to actual conduct that has occurred. In accordance with the DOHA Appeal Board's holding, moreover, there is no basis for concluding that any time Applicant drinks alcohol, it is evidence of excessive consumption. Therefore, I find in favor of Applicant with regard to SOR ¶ 3.b.

However, Applicant's alcohol-related incidents away from work, include three DWI offenses, as set forth in, SOR ¶ 1.h. and SOR ¶ 1.j. They also include two DUI offenses, as specified in SOR ¶ 1.c and SOR ¶ 1.d. Finally, Applicant's alcohol related offenses include being drunk and disorderly and committing an assault upon a military policeman, as set forth in SOR ¶ 1.b. (22) These incidents establish Disqualifying Condition 1. When Applicant participated in a substance abuse program following his DWI conviction in 1993, a physician's diagnosis of Applicant was "Alcohol Abuse." This establishes Disqualifying Conditions 3.

With regard to mitigating these disqualifying conditions, Applicant cannot avail himself of Mitigating Condition 1 because there clearly is a pattern to his excessive alcohol consumption. This pattern consists of five instances of driving while intoxicated, including his most recent offense. Applicant also cannot avail himself of Mitigating Condition 2

because the most recent of his offense occurred within the year before he submitted his pending security clearance application. Given the pattern of his alcohol abuse, the recency of his latest offense, and his admission that he does not abstain from the use of alcohol, Applicant faces a difficult task to meet his burden, in accordance with the Directive, and demonstrate that it is the interest of national security to grant him a security clearance.

It appears that Applicant attempts to demonstrate positive changes in behavior supportive of sobriety (Mitigating Condition 3). He testified that he limits himself to one drink but provides no corroboration for his testimony. Although an official from his employer testified that Applicant's duty performance has never been affected by alcohol consumption, that appears to have been the case throughout his history of alcohol abuse. It does not address, let alone corroborate how Applicant conducts himself during his time away from work, which is when most, if not all, of his alcohol related offenses have occurred.

Applicant also testified about his experience in the substance abuse program he participated in following his most recent DWI conviction. Although Applicant may have benefitted from the program, this was the second time he participated in such a program. Despite having undergone the previous program in 1993, he committed another DWI offense in 1999.

The administrator for Applicant's latest substance abuse program provided a prognosis that "[he] has learned from his mistakes and is unlikely to make them again." First of all, this opinion is not a basis for establishing Mitigating Condition 4. There is no evidence as to the credentials of the administrator, Applicant has not participated in any follow-up program, and he continues to consume alcohol. There is also a serious issue as to what weight that opinion should be afforded in light of the facts upon which it was based. The clinic's records reflected that Applicant only had one prior DWI conviction. <sup>(23)</sup> It would appear that knowledge that Applicant actually had two prior DWI offenses and two DUI offenses would have adversely impacted the assessment of his likelihood to repeat the offense. At the very least, it raises doubt as to the value to afford the opinion that must be resolved against Applicant in accordance with Section E2.2.2 of the Directive.

Clearly, the record is not sufficient to establish Mitigating Condition 3, since it does not adequately demonstrate that he has accomplished positive changes in his behavior supportive of sobriety. In addition, the evidence is not otherwise sufficient to mitigate the Government's case. Therefore, I find against Applicant with regard to SOR ¶ 3.a.

### **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: Against Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: For Applicant

Subparagraph 1.j: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3. Guideline G: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: For 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. Ap Ex K.
2. Ap Ex G.
3. Govt Ex 6.
4. Govt Ex 7.
5. Govt Ex 8; Ap Ex A.
6. Govt Ex 9; Ap Ex B.
7. Govt Ex 3 at 3.
8. Govt Ex 10.
9. Govt Ex 11; Ap Ex C.
10. Govt Ex 5.
11. Govt Ex 3 at 1.
12. Govt Ex 3 at 1-2; Govt Ex 4 at 2; Ap Ex C.
13. Govt Ex 4 at 1.
14. Govt Ex 4 at 2.
15. Tr 58.
16. Govt Ex 1 at 7.
17. Govt Ex 3.
18. Tr 56.

19. Applicant denied SOR ¶ 1.a, claiming he was only 16 at the time of the alleged offense. SOR ¶ 1.a misstates the date of Applicant's offense. The underlying evidence, Govt Ex 7, establishes that the offense occurred on March 4, 1978, not March 4, 1973, as alleged in the SOR. Although Brown may be a common name, the evidence identifies Applicant by both his Social Security Number, as well as his date of birth, and establishes that he committed the offense.

20. Tr 56.

21. Govt Ex 3 at 4.

22. As previously explained, SOR ¶ 1.e and SOR ¶ 1.i do not specify additional offenses but address convictions for offenses already covered in the SOR.

23. Govt Ex 4 at 2.