

DATE: October 31, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-15692

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

**APPEARANCES**

**FOR GOVERNMENT**

Robert J. Tuider, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's conviction of two drug offenses more than 32 years ago is an isolated criminal incident in his life. It would be mitigated under Mitigating Condition a and Mitigating Condition b under Guideline J had Applicant not received a suspended sentence of confinement for two years. The sentence precludes Applicant from receiving a security clearance in accordance with 10 U.S.C. § 986. Although the Secretary of Defense may authorize a waiver of the prohibition in a meritorious case, a recommendation concerning waiver is not appropriate because Applicant has failed to mitigate his omission of the conviction from his June 2000 security clearance application. Clearance is denied.

**STATEMENT OF THE CASE**

On January 20, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) issued a Statement Reasons (SOR) to Applicant. The SOR details security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to classified information and recommends that his case be submitted to an Administrative Judge.

On February 14, 2003, Applicant executed a response to the SOR and requested a hearing. The case was assigned to me on March 17, 2003. A notice of hearing was issued on March 27, 2003 and the hearing was held on April 30, 2003. During the hearing, two Government exhibits (Govt Ex), three Applicant exhibits (Ap Ex) and the testimony of Applicant were received. The transcript (Tr) was received on May 8, 2003.

**FINDINGS OF FACT**

Having thoroughly considered the evidence in the record, including Applicant's admission to SOR ¶ 1.a, I make the following findings of fact:

Applicant is a 53-year-old security guard employed by a defense contractor. He is seeking a security clearance.

On October 2, 1968, Applicant enlisted in the United States Army for a three year term. <sup>(3)</sup>

On April 12, 1971, Applicant and his friend were arrested at the friend's residence and charged with Wrongful Possession of Marijuana and Wrongful Possession of a Stimulant, Methamphetamine. Narcotics agents seized small quantities of each of these substances at the residence. On July 6, 1971, Applicant and his friend both pled guilty and were found guilty of each charge. Each was sentenced to confinement for two years, which was suspended, and fined \$500.00. After paying their fines, they were both released. <sup>(4)</sup>

After his conviction, Applicant completed his term of enlistment with the Army. On October 23, 1971, having attained the grade of E3, he was released from active duty and received an Honorable Discharge. <sup>(5)</sup>

Following military service, Applicant moved to the state where his parents retired at the conclusion of his father's career as a commissioned officer in the United States Air Force. After working in construction for several years, Applicant became an automobile salesman for 25 years. His wife of 20 years operates the interior decorating business that they own. Applicant undertook employment as a security guard in order to obtain medical insurance. Both of his sons have served in the Army. <sup>(6)</sup>

On June 29, 2000, Applicant executed a security clearance application (SF 86). In response to question 24, <sup>(7)</sup> Applicant answered, "no," omitting his drug conviction. <sup>(8)</sup>

## 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 under Guideline J include: a single serious crime or multiple lesser offenses (Disqualifying Condition b); and 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: Mitigating Condition a, the criminal behavior was not recent;

and Mitigating Condition b, the crime was an isolated incident.

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.<sup>(9)</sup>

#### 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 under Guideline E include E2.A5.1.2.2 (Disqualifying Condition 2). Disqualifying Condition 2 covers 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.

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

### CONCLUSIONS

#### Guideline J

Applicant's conviction of possession of marijuana and possession of methamphetamine by a state court and his sentence to confinement for more than a year (SOR ¶ 1.a) establishes Disqualifying Condition c.

It is the only criminal conduct in Applicant's life. Furthermore, it occurred more than 32 years ago. In the face of other disqualifying conditions under Guideline J, his offense could therefore be mitigated under Mitigating Condition a and Mitigating Condition b. However, these conditions are not sufficient to mitigate as to Disqualifying Condition c, because of the sentence that Applicant received, even though it was suspended and never implemented. Because of that sentence following his conviction of a crime by a State court, Applicant is precluded by statute from obtaining a security clearance without a waiver by the Secretary of Defense, in accordance with Mitigating Condition g (SOR ¶ 1.b). Therefore, find against Applicant with regard to SOR ¶ 1.a and SOR ¶ 1.b.

#### Guideline E

Applicant's omission from his security clearance application (SF 86) of his drug conviction (SOR ¶ 2.a) establishes Disqualifying Condition 2, since the omission would appear to have been deliberate.

Applicant denies that his omission was deliberate. Of his conviction, he states, "the event is a long forgotten event from my time in the army, one not remembered until receipt of [the SOR]."<sup>(10)</sup> Applicant still maintains his innocence of the charges and indicated that he pled to the charges at the urging of his counsel. At the time of the raid on his friend's house, Applicant claimed that he had gone there in order to get a ride to the airport, on his way to visit his wife and new born son.

Applicant had a duty to report his conviction on his SF 86, even if he were innocent of the offenses as he maintains. Unfortunately, nothing the Applicant has offered establishes any of the mitigating conditions under Guideline E.

As I have previously concluded, the drug conviction is an isolated incident in his life that occurred over 32 years ago. Aside from the SOR, there is no evidence in the record that reflects adversely on the Applicant. I have tried to accept his explanation for the omission from his SF 86, essentially that he simply forgot the episode.

The problem with Applicant's explanation is that it is difficult to accept that a person would simply forget his only conviction of criminal charges in his life. It would seem that a person, especially an innocent one, would have the experience of being "busted" in a raid by narcotics officers indelibly etched in his memory. Moreover, even if he had forgotten the incident as he claimed, it would seem that question 24 would have sparked his recollection of the events. Even though I would like to believe Applicant's explanation, the circumstances leave me with doubt. Under section E2.2.2 of the Directive, such doubt has to be resolved in the interest of national security. Consequently, I find against Applicant with regard to SOR ¶ 2.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

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: 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. Because I find against Applicant on grounds other than 10 U.S.C. § 986, a recommendation pertaining to waiver is not appropriate.

*Signed*

**Roger E. Willmeth**

**Administrative Judge**

1. Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.
3. Ap Ex B.
4. Govt Ex 2.
5. Ap Ex B.
6. Ap Ex C; Tr 19, 23.
7. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"
8. Govt Ex 1 at 6.
9. Neither 10 U.S.C. § 986 nor DOHA OI No. 64 defines "a meritorious case."
10. Answer at 1.