

DATE: February 23, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-22081

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

**APPEARANCES**

**FOR GOVERNMENT**

Catherine Engstrom, Department Counsel

**FOR APPLICANT**

Maurice E. Moylan, Esq.

**SYNOPSIS**

Applicant has mitigated two criminal arrests, the latest of which occurred over seven years ago, by providing clear evidence of successful rehabilitation. However, he has not mitigated his failure to report his criminal record on his recent security clearance application. Despite the presentation of favorable character evidence, Applicant's explanation of the omission is not convincing. His actions are not consistent with the high level of trust and confidence the federal government must be able to repose in persons granted a security clearance. Clearance is denied.

**STATEMENT OF THE CASE**

On July 17, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> 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 August 8, 2003, Applicant executed a response to the SOR and requested a hearing. The case was assigned to me on November 7, 2003. A notice of hearing was issued on November 20, 2003 and the hearing was held on December 16, 2003. During the hearing, six Government exhibits (Govt Ex), and the testimony of three Applicant witnesses, including Applicant, were received. The transcript (Tr) was received on December 29, 2003.

**PROCEDURAL ISSUE**

At the conclusion of the evidentiary portion of the hearing, Department Counsel moved to amend SOR ¶ 2.a so as to delete the reference to SOR ¶ 1.a. Because the arrest of Applicant referred to in SOR ¶ 1.a occurred more than seven years prior to his submission of his security clearance application, he was not required to report it in response to question 26. Therefore, I granted the motion to so amend SOR ¶ 2.a.

## FINDINGS OF FACT

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

Applicant is a 30-year-old software test manager employed by a defense contractor. He is seeking a security clearance.

On July 11, 1993, Applicant was arrested and charged with Armed Robbery, Assault and Battery with a Dangerous Weapon, Larceny over \$250.00, all felonies, and Breaking and Entering with Intent to Commit a Misdemeanor, a misdemeanor. The charges were subsequently dismissed and Applicant was assessed and paid court fees totaling \$225.00. The charges resulted from Applicant and two friends attempting to take car stereo equipment that they claimed the victim had stolen from one of Applicant's friends. Applicant called the victim, expressed an interest in purchasing the equipment, and arranged a meeting with him at a park. Applicant and his friends carried plastic pistols. His friends hid in the woods until the victim displayed the equipment. A fight ensued in which the victim was punched and kicked. Applicant and his friends were arrested by police following a complaint by the victim (SOR ¶ 1.a).

On June 15, 1996, Applicant was arrested and charged with being a Disorderly Person and Malicious Destruction of Property of \$250.00 or less, both misdemeanors. The charges were subsequently dismissed and Applicant was assessed a fee or fine that he paid on June 4, 2002. The charges occurred during a major league baseball game that Applicant and a companion attended. They were drinking beer and rooting for the visiting team. Applicant refused an attendant's request to stop using profanity and refused a subsequent request to leave the seating area. He had to be subdued and handcuffed. This scuffle resulted in damage to the arresting officer's sunglasses.

Applicant completed technical training in the information technology field in August 1997 and has been employed in that field ever since. He and his wife were married in October 2001. They are purchasing a home. Applicant spends a great deal of time playing baseball, basketball, hockey, softball, and gardening with his wife.

On November 30, 2001, Applicant executed a security clearance application (SF 86). In response to question 26, <sup>(3)</sup> Applicant answered, "no," and omitted his aforementioned arrest in 1996 (SOR ¶ 2.a).

## 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 2).

Conditions that could mitigate security concerns include Mitigating Condition 1, the criminal behavior was not recent, and Mitigating Condition 6, there is clear evidence of successful rehabilitation.

#### 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

The incidents in 1993 (SOR ¶ 1.a) and 1996 (SOR ¶ 1.b) resulting in Applicant's arrest raise Disqualifying Condition 2. Even though the charges in both cases were subsequently dismissed, the evidence in the record is sufficient to establish Applicant's commission of criminal offenses in each case.

As Applicant acknowledges, the most serious of the criminal incidents in 1993 reflects his immaturity at the time. This instance of taking the law into his own hands also demonstrates poor judgment on his part. The same is true of the ballpark incident in 1996, when Applicant's refusal to comply with an attendant's request to refrain from offensive behavior lead to his arrest. Although there is no indication that Applicant has an alcohol problem, his use of alcohol at the time of the 1996 incident may have contributed to his actions.

The more serious incident occurred over 10 years ago and the latest more than 7 years ago. Applicant was only 19 at the time of the first incident and was still in technical school when the second occurred. For more than seven years, he has been engaged in full-time employment in the information technology career field. Applicant has been married for over two years. His non-working time is largely devoted to playing sports and gardening with his wife. In light of the foregoing and all the evidence of record, I find there is clear evidence of successful rehabilitation of Applicant. Based on Mitigating Condition 1 and Mitigating Condition 6, I find in favor of Applicant with respect to (SOR ¶ 1.a) and (SOR ¶ 1.b).

#### Guideline E

Applicant's omission from his security clearance application (SF 86) of his criminal arrest in 1996 (SOR ¶ 2.a) raises Disqualifying Condition 2.

In assessing the allegation under Guideline E, I carefully considered the positive testimony of a fellow worker of Applicant, who not only spoke highly of Applicant's work performance but of his honesty and reliability as well. I also considered the testimony of Applicant's supportive wife, whose trust he has.

Unlike his criminal arrests, Applicant's failure to disclose his second arrest on his SF 86 was a recent event. Applicant denies that his omission was deliberate. He states that he "misread question 26" and "focused" on the word, "convicted." Applicant testified that after he was confronted by the omissions, he had to read question 26 several times before "to realize that I actually had done something wrong." His testimony is not convincing. Question 26 is not complicated. It asks, "in the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) [not listed in the

referenced questions]." Applicant has not explained how or why he read the question so as to focus on "convicted," to the exclusion of "arrested for" or "charged with." It would seem that Applicant would be more likely to focus on what applied to him, namely, being "arrested for" and "charged with" criminal offenses. Applicant even claimed to have gone back over the SF 86 when he realized that he had not revealed his arrests. This seems to undermine his alleged focus on "convicted," to the exclusion of "arrested for" and "charged with."

Applicant contended that he wasn't trying to hide anything because he knew the Government would check his background and uncover it. His argument is not persuasive in light of the fact that he makes it after the fact, with full knowledge that the Government was able to uncover arrests that he had failed to report. Even after being confronted with the SOR, Applicant was less than candid. In his response to the SOR, he said that the Armed Robbery charge resulted from his friends having plastic guns. Applicant later admitted in his testimony that he too carried a plastic gun during that incident.

Applicant acknowledged that he was concerned that his reading of the SF 86 did not require him to report his arrests on the SF 86. However, he admitted that he made no attempt to raise his concern and "just figured that they would find it and talk to me." Applicant's actions are not consistent with the high level of trust and confidence the federal government must be able to repose in persons granted a security clearance. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

In light of the above, 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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For 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.

*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. "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?"