

DATE: January 20, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24814

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER E. WILLMETH**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Department Counsel

#### **FOR APPLICANT**

William R. Babington, Jr., Esq.

### **SYNOPSIS**

Applicant has failed to mitigate two false answers on his security clearance application, both as Personal Conduct under Guideline E and Criminal Conduct under Guideline J. Applicant omitted his DWI and DUI convictions, as well as a drug-related arrest from his security clearance application. He contends the omission was not deliberate but was due to him reading the application to only cover the last seven years. His argument is not convincing. In addition to the fact that the application required him to disclose all of his alcohol and drug offenses, Applicant omitted the drug-related arrest that occurred within the prior seven years. His admission of drug use on the application also fails to establish that his omission of the drug-related arrest was not deliberate. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 30, 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 E (Personal Conduct) and Guideline J (Criminal 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 June 9, 2003, DOHA received Applicant's response to the SOR, including a request for a hearing. On August 26, 2003, Applicant withdrew his request for a hearing and requested a decision on the written record, in lieu of a hearing. On September 26, 2003, Applicant received the File of Relevant Material (FORM), which contains 11 documents. On October 24, 2003, Applicant submitted comments on the FORM. The case was assigned to me on November 6, 2003.

### **FINDINGS OF FACT**

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

Applicant is a 4-year-old test engineer, who is employed by a defense contractor. He is seeking a security clearance.

On November 2, 1984, Applicant was arrested and charged with Driving While Under the Influence of Alcohol(DUI). He was fined \$350.00 for the offense and ordered to attend DUI educational classes and counseling.<sup>(3)</sup>

On December 8, 1985, Applicant was arrested and charged with Driving While Intoxicated (DWI) and A Stop Sign Violation. He was fined \$350.00 and sentenced to 30 days in jail, which was suspended.<sup>(4)</sup>

On May 20, 1998, Applicant was arrested and charged with Possession of Drug Paraphernalia. He pleaded no contest and he was placed on probation for 6 months. The case was closed on September 16, 1999.<sup>(5)</sup>

On October 4, 2001, Applicant executed a security clearance application (SF 86) that was submitted on March 3, 2002. In response to question 24,<sup>(6)</sup> Applicant answered, "no,"and omitted all of his criminal offenses.<sup>(7)</sup>

In response to question 26<sup>(8)</sup> on the same SF 86, Applicant answered, "no," and omitted his drug-related offense.<sup>(9)</sup>

On July 1, 2002, Applicant provided a sworn statement to the special agent for the Defense Security Service (DSS) who conducted his background investigation. Applicant admitted his DUI and DWI convictions and his drug-related arrest.<sup>(10)</sup>

## POLICIES

Department Counsel is responsible for presenting evidence to establish controverted facts in the SOR. Directive E3.1.14. The applicant is responsible for presenting 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 also 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 E: Personal Conduct

Guideline E, Personal Conduct, concerns conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate 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 addresses 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.

Conditions that could mitigate security concerns include E2.A5.1.3.3, the individual made prompt, good-faith efforts to correct the falsification before being confronted by the facts.

#### 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 E2.A10.1.2.1, allegations or admission of criminal conduct, regardless of whether the person was formally charged (Disqualifying Condition 1).

Conditions that could mitigate security concerns include E2.A10.1.3.1, the criminal behavior was not recent (Mitigating Condition 1) and E2.A10.1.3.2, the crime was an isolated incident (Mitigating Condition 2).

### CONCLUSIONS

#### Guideline E: Personal Conduct

Applicant's failure to disclose his DUI and DWI convictions and arrest for Possession of Drug Paraphernalia in response to question 24 on his security clearance application (SOR ¶ 1.) raises Disqualifying Condition 2.

Applicant contends that his failure to list his alcohol-related convictions was not deliberate. He claims to have misread the security clearance application so as to limit responses to the last seven years. However, question 24 is unequivocal: "Have you *ever* been charged or convicted of any offense(s) related to alcohol or drugs?" (Emphasis added.) Moreover, even if question 24 is read so as to be limited to the last seven years, this is of dubious value to Applicant's contention, because he omitted his drug-related arrest that occurred within the seven year period.

Applicant addresses his failure to disclose his drug-related arrest in response to question 24 by emphasizing that he disclosed his use of marijuana in response to question 27. Applicant argues that this demonstrates that he was not attempting to conceal his drug involvement. However, Applicant's disclosure of a limited use of marijuana does not establish that he was not attempting to suppress the criminal consequences of his behavior. Moreover, Applicant does not specifically address SOR ¶ 1.b, which identifies his additional failure to report his drug-related arrest in response to question 26.

Had Applicant disclosed his drug-related arrest in response to question 24, his "no" answer to question 26 would have been appropriate. Since he failed to do so, however, Applicant was confronted with a second question requiring him to disclose the information, because it required the disclosure of any arrests or convictions within the last seven years that he had not previously provided. By having submitted a false answer to question 24, Applicant provided a second false answer when he answered, "no," to question 26. This also establishes Disqualifying Condition 2.

With regard to mitigation, the record does not support Applicant's argument that he made a prompt good faith effort to correct any falsification before being confronted with the facts. Applicant did not admit his criminal conduct until nearly nine months after submitting his security clearance application. Furthermore, he only did so when a security investigator confronted him with the results of his investigation. These facts fail to meet the criteria required by Mitigating Condition 3. With regard to Applicant's credibility, I have considered the affidavits of four affiants, who attest to his good character. However, their assessments fail to convince me that Applicant's omissions from his security clearance application were not deliberate, in light of the other evidence of record discussed above. I find against Applicant under both SOR ¶ 1.a and ¶ 1.b. of Guideline E.

#### Guideline J: Criminal Conduct

Even though he has not been charged, Applicant's deliberate omissions in response to questions 24 and 26 on his security clearance application constitute criminal violations of 18 U.S.C. 1001. This establishes Disqualifying Condition 1.

Applicant misconstrues the Guideline J allegation by arguing that his DWI convictions are not recent. It is not those

convictions or his drug-related arrest which is the basis for that allegation. That allegation is attributable to his false statements on his security clearance application. That criminal conduct is recent. It also is not an isolated incident. Even though his alcohol-related convictions and drug-related arrest are not alleged under Guideline J, they are established by the record. They demonstrate Applicant's recent falsifications are not isolated criminal conduct. The fact that other persons find Applicant reliable and trustworthy is not sufficient to mitigate his offenses evidenced by the record. Accordingly, I find against Applicant under Guideline J.

### **FORMAL FINDINGS**

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline J: 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. Item 9.
4. Item 10.
5. Item 11.
6. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"
7. Item 6 at 7.
8. "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?"
9. Item 6 at 7.
10. Item 7 at 2-3.