



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-00200

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel

For Applicant: *Pro Se*

March 17, 2008

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**Decision**

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MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on May 5, 2006. On September 25, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G and J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on October 28, 2007, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on January 29, 2008. DOHA issued a notice of hearing on February 7, 2008, and I convened the hearing as scheduled on March 4, 2008, in San Diego, California. The Government offered Exhibits (Ex.) 1 through 5, which were received without objection. Applicant testified on his own behalf. He submitted no exhibits. I granted Applicant's request to keep the record open until March 11, 2008, to submit an additional document. On March 11, 2008, he submitted three sets of

documents, which have been marked as Exhibits A through C, and entered into evidence without objection, and the record closed on that date. DOHA received the transcript of the hearing (Tr) on March 12, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

In his RSOR, Applicant admitted the SOR allegations 1.a., through 1.c., under Guideline G, and 2.a., under Guideline J. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 29 years old. He is unmarried and has no children. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

#### **Paragraph 1 (Guideline G - Alcohol Consumption)**

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption. The following are the allegations as they are cited in the SOR, and to which, as stated above, Applicant admitted:

1.a. On April 12, 2002, Applicant was charged with possession of an Open Container in a Restricted Area. He received a citation and he mailed in a check in the amount of \$50. Applicant testified that he was with a group of friends on a beach, drinking alcoholic beverages, which they did not realize was not allowed on that part of the beach. He was 23 years old, so he could consume alcohol legally, but not at that particular place.

1.b. On October 31, 2003, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol (DUI), (2) Driving While Having an 0.08% or Higher Blood Alcohol Content, and (3) Failure to Appear after signing a citation for court appearance. He plead No Contest to Count (2), and the imposition of his sentence was suspended for five years with summary probation granted. Applicant was ordered to complete the First Conviction Program, pay a fine of \$1,706, and attend a MADD panel. Counts (1) and (3) were dismissed. He also attended three Alcoholics Anonymous meetings, because of court orders. His probation continues until 2012.

Applicant testified that he did not initially appear at the date specified, because the attorney, whom he engaged to represent him, had not filed the papers in a timely manner and did not inform him of the proper date to appear.

Applicant testified that he consumes alcohol in moderation, no more than two days a week, and never to the point of intoxication. He also testified credibly that since the DUI, he has not driven and will never drive again after consuming alcohol.

## **Paragraph 2 (Guideline J - Criminal Conduct)**

The Government alleges that Applicant has engaged in criminal acts.

2.a. The SOR alleges that Applicant's conduct that is set forth under paragraph 1.a. and 1.b., above, constitutes criminal actions.

## **Mitigation**

Applicant submitted six character letters from individuals, who have known him in either professional or personal status or both (Exhibit A). They all were quite laudatory, describing Applicant "as a person who can be relied on to make the right decisions," "trustworthy and honest," and "dependable, reliable, hardworking, and honest."

He also submitted his two most recent Performance Reviews (Exhibit B). On both of them he was rated as "High Meets," which is the second from the highest rating, and he was described as "a great asset" to his employer.

Finally, Exhibit C is a Notice of Completion Certificate that establishes that Applicant completed the First Offender Program.

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information)

## **Analysis**

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

Applicant's alcohol consumption has resulted in one open container citation in 2002, and one DUI arrest and conviction, occurring in 2006.

The Government established that Applicant was involved in an alcohol-related incident away from work, and binge alcohol consumption to the point of impaired judgement on one occasion. Disqualifying Conditions (DC) 22. (a) and (c) apply to this case.

As stated above, Applicant admitted to currently drinking two time a week, but in moderation, and he never drives after drinking. I find that Mitigating Condition (MC) 23. (a) applies as the behavior was so infrequent, only one DUI in his life, for which he is extremely sorry, that it is unlikely to recur and does not cast doubt on the individual's current reliability and trustworthiness. Paragraph 1 is found for Applicant.

### **Guideline J - Criminal Conduct**

The Government has established that Applicant engaged in criminal conduct, as he was arrested for, and convicted of a DUI criminal offense.

In reviewing the Disqualifying Conditions under Guideline J, DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. Under Mitigation Conditions, I find that MC 32. (d) applies to this Applicant, as there is evidence of

successful rehabilitation; including but not limited to the sincere remorse of Applicant, and his good employment record. Applicant has mitigated this allegation. Paragraph 2 is found for Applicant.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2 (c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Based on all of the factors discussed above, including the character letters and employment reviews, plus Applicant's credible sincere remorse, I find that Applicant is a decent person, who will continue to control his alcohol consumption, so that in the future, he will not find himself in the position of driving after he has consumed alcohol.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul  
Administrative Judge