



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



In the matter of:	)	
	)	
	)	ISCR Case No. 18-00857
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tara R. Karoian, Esq., Department Counsel  
For Applicant: Allison R. Weber, Esq.

02/08/2019

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline J, criminal conduct, Guideline G, alcohol consumption and Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On April 6, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered (A1) the SOR on May 23, 2018, and requested a hearing. On August 20, 2018, an amended SOR was sent to Applicant adding allegations under

Guidelines G and E. Applicant answered the amended SOR on September 13, 2018 (A2). The case was assigned to me on September 18, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 18, 2018, and the hearing was held as scheduled on November 28, 2018. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection, except for GE 3, which objection was overruled. The Government's Exhibit list was marked as hearing exhibit (HE) I. Applicant testified and presented the testimony of four witnesses. He provided five character letters, which were attached to his original answer (A1— attachments). DOHA received the hearing transcript (Tr.) on December 7, 2018.

### **Findings of Fact**

In A1, Applicant admitted SOR ¶ 1.b, with explanations, and denied SOR ¶ 1.a. In A2, Applicant admitted SOR ¶ 2.a, with explanations, and denied SOR ¶ 3.a. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 30 years old. He has never married and has no children. He has worked for a defense contractor since January 2016. Before his current position he was incarcerated in a state penitentiary for 28 months for felony aggravated assault. Upon his release from prison, he was placed on probation, which he successfully completed in February 2016. He has a high school diploma.<sup>1</sup>

The SOR alleged Applicant discharged a firearm into an unoccupied vehicle in May 2012, which resulted in a citation for criminal damage (SOR ¶ 1.a). It also alleged that in August 2012, Applicant shot an associate in the face, pushed his body out of his truck, and fled the scene. He was charged with attempted first degree murder and aggravated assault. He pleaded guilty to aggravated assault and was sentenced to three and one-half years imprisonment (SOR ¶ 1.b). The amended SOR alleged that Applicant was under the influence of alcohol when he committed the acts alleged in SOR ¶¶ 1.a and 1.b (SOR ¶ 2.a). Also in the amended SOR, all the above acts were cross-alleged as personal conduct under Guideline E (SOR ¶ 3.a).

On approximately May 10 and into May 11, 2012, Applicant and a friend (F) (who he described as his best friend at that time) were drinking alcohol at a friend's house. Upon leaving the residence, rather than driving home, Applicant chose to sleep in his truck parked outside. The police were called when a neighbor's car alarm went off. The police investigated noting that a car window was broken close to where Applicant's truck was parked. Applicant was sleeping in his vehicle when the police approached him. He was questioned about whether he damaged the car window. Applicant appeared intoxicated to the officer. Applicant said he did not know if he broke the window, but that it was possible that he broke it. Applicant had a loaded pistol in his truck at the time of the incident. Evidence discovered at the scene included a shell casing next to the damaged car. Applicant was issued a citation for criminal damage to property. The case

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<sup>1</sup> Tr. 85, 95, 98; GE 1.

was disposed of through a civil compromise where Applicant paid the victims of his criminal damage and his criminal case was dismissed. His father paid the civil compromise fee on behalf of Applicant. Applicant admitted that alcohol played a part in this incident.<sup>2</sup>

In August 2012, Applicant and F engaged in an evening of drinking at various locations. Applicant claims F also used Xanax as well. Applicant claimed he drank at least seven alcoholic beverages and F drank more than that. After leaving a restaurant, Applicant and F drove away in Applicant's truck. Applicant had two handguns in his truck, one in the center compartment, and one in the driver's side compartment. Sometime late in the evening, Applicant and F began arguing. It reached the point that Applicant claimed that F reached into the center compartment and grabbed the gun. Applicant reacted by pulling the gun on the driver's side and shooting F in the face, opening the passenger door, pushing F out, and driving away. He admitted using alcohol that night, but testified that he was in control of his senses when he shot F. Later, he was arrested by the police and charged with attempted first degree murder and two counts of aggravated assault. After consulting with his attorney, he decided to forego pursuing self-defense with a not guilty plea at trial. Instead, Applicant pleaded guilty to aggravated assault in May 2013, and was sentenced to three and one-half years in the state penitentiary. Upon completion of his sentence, he was placed on probation, which he successfully completed in February 2016. F survived the shooting, but has had multiple surgeries since the shooting. Applicant does not recall apologizing to F or his family at his sentencing hearing. He has not spoken to F since the incident. Applicant had no misconduct incidents while incarcerated and has had no law enforcement involvement since his release.<sup>3</sup>

Applicant admitted that he used alcohol before both the May and August 2012 incidents. He did not receive any alcohol treatment or counseling while incarcerated. He continues to drink alcohol. The last time he was intoxicated was at a friend's wedding about a year ago. He consumed about five drinks in five hours. He has not sought alcohol treatment or counseling since leaving prison.<sup>4</sup>

Applicant presented the testimony of three officers from his company (the vice president of finance, the chief operating officer, and the chief executive officer) at hearing. They also provided statements. All described the process of hiring Applicant for their IT position. They were aware of his legal issues when they hired him. Applicant's father formerly worked for the same company and suggested him for the position. The officers knew there was risk involved should they hire Applicant. They decided to do so anyway. They universally believe the company has been rewarded many times over by hiring Applicant. He has earned more and more responsibility by performing in an

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<sup>2</sup> Tr. 58-59; GE 3, 5.

<sup>3</sup> Tr. 62, 65-66, 70, 82-85, 89-90, 95, 98-99; GE 2, 4-5.

<sup>4</sup> Tr. 74, 98-99.

outstanding manner. All the officers trust Applicant implicitly and all recommend the granting of his clearance.<sup>5</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a careful weighing 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 national security eligibility will be resolved in favor of the 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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

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<sup>5</sup> Tr. 20-23, 25, 34-37, 39-40, 44-52; A1--attachments.

concerned.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was convicted of aggravated assault by shooting his friend in the face. He also was involved in criminal damage to private property, which was resolved through a civil payment to the victim. I find that the stated disqualifying condition applies.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Both of the criminal acts committed by Applicant involved his use and abuse of alcohol. Despite what has happened in the past, he continues to use alcohol. Although several years have passed since his criminal action, it cannot reasonably be determined that such behavior might not happen in the future since he still consumes alcohol, which obviously impaired his reliability, trustworthiness, and good judgment in the past. While

Applicant is credited with some mitigation under AG ¶ 32(a), it is insufficient to overcome the disqualifying condition. Applicant should be commended for the strides he has made toward rehabilitation. However, his callousness in shooting his friend, pushing him out of his truck, and leaving him for dead is not overcome by his successful IT career since leaving prison. AG ¶ 32(d) does not fully apply.

### **Guideline G, Alcohol Consumption**

AG ¶ 21 expresses the security concern for alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Both of Applicant's criminal acts involved his abuse of alcohol and support the application of the above disqualifying conditions.

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has established a pattern of modified consumption or abstinence in accordance with treatment recommendations; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant was sent to prison for over three years for shooting his best friend in the face. His use of alcohol contributed to his actions then. It was also a factor when he engaged in criminal damage to private property for which his father paid the victim. Despite these life-changing events due, in part, to his alcohol abuse, he continues to use alcohol. He admitted that he drank to intoxication within the last year. He received no alcohol counselling in prison and has sought none since then. Given these facts, none of the above mitigating circumstances apply.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the personal conduct security concern:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

Between the language expressed in the general security concern in AG ¶15 and the specific concern expressed in AG ¶16(c),<sup>6</sup> Applicant's two criminal incidents in May and August 2012 raise questions about his reliability, trustworthiness, and judgment.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

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<sup>6</sup> The record evidence is sufficient for adverse determinations under both the criminal conduct and alcohol consumption guidelines, nevertheless, as a whole, Applicant's actions put into issue his judgment, trustworthiness and overall personal conduct.

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Appellant's criminal act of shooting his friend in the face and leaving him for dead was not a minor incident. It casts doubt on his reliability, trustworthiness, and judgment. AG ¶17(c) does not apply. Applicant completed his prison sentence and follow-up probation without any issues. He has since achieved gainful employment and by all accounts is thriving in his job. However, because he still uses alcohol, it is too early to determine whether similar behavior is unlikely. Applicant receives some credit under AG ¶ 17(d).

### **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(d):

(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 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. I considered Applicant's completion of probation, his letters of recommendation, the testimony of the officers of his company, and his father's testimony. However, I also considered that he was convicted of aggravated assault when he shot his friend in the face and that alcohol was involved with both criminal incidents. Applicant failed to provide sufficient evidence to mitigate the criminal conduct, alcohol consumption, and personal conduct security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guidelines J, G and E.

### **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 J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Robert E. Coacher  
Administrative Judge