



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



In the matter of:	)	
	)	
	)	ISCR Case No. 18-01706
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Erin P. Thompson, Esq., Department Counsel  
For Applicant: Ryan C. Nerney, Esq.

06/28/2019

**Decision**

BENSON, Pamela C., Administrative Judge:

Although Applicant mitigated the security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct), she failed to mitigate the security concerns under and Guideline E (Personal Conduct). National security eligibility for access to classified information is denied.

**Statement of the Case**

On November 8, 2016, Applicant completed and signed her security clearance application (SCA). On August 20, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline E. The action was taken 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) effective within the DOD on June 8, 2017.

On August 27, 2018, Applicant responded to the SOR and requested a hearing. On September 24, 2018, Department Counsel sent Applicant an amended SOR, which included a change to the original SOR ¶ 1.a, and also cross-alleged SOR ¶ 1.a under both Guideline G and Guideline J. On October 25, 2018, Applicant responded to the amended SOR and she denied SOR ¶¶ 1.a, 2.a, and 3.a.

On November 26, 2018, the case was assigned to me. On March 5, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 21, 2019. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits, Government Exhibits (GE) 1-4, and Applicant offered ten exhibits, Applicant Exhibits (AE) A-J. There were no objections, and all proffered exhibits were admitted into evidence. Applicant also testified. At the end of the hearing, without objection, I held the record open at Applicant's request so she could submit additional evidence. (Tr. 6-7) On April 1, 2019, DOHA received the hearing transcript. On May 3, 2019, Applicant's counsel timely submitted AE K and L, which I entered into evidence without objection, and the record closed that same day.

### **Findings of Fact**

Having thoroughly considered the evidence in the record, I make the following findings of fact: Applicant is 48 years old. She earned a bachelor's degree in November 2000. She was married from 1993 to 1997. She married a second time in 1999, which ended in a divorce in 2011. She has a 16-year-old daughter from her second marriage. Applicant is a consultant for a DOD contracting group. She started this job in September 2010, but left the company in September 2016 for a project manager position in Germany. Applicant and her daughter moved to Germany in September 2016. She was terminated by that U.S. defense contractor in August 2017, and Applicant and her daughter returned to the U.S. Her previous employer then rehired Applicant in October 2017. Since 2010, she has possessed a DOD security clearance. (Tr. 12-15, 33; GE 1, AE A, AE B)

The amended SOR ¶ 1.a alleges that Applicant deliberately omitted material facts during her background interview with a DOD authorized investigator on October 25, 2017. She had been asked if she had any law enforcement-related incidents while she was overseas, which Applicant denied. In fact, Applicant was charged with Driving under the Influence (DUI) in December 2016, with a blood-alcohol content of .061% (exceeding the German limit of .05%). She had been involved in a car accident and considered at fault. Applicant was also charged with child endangerment since her minor daughter was in her car.

At the hearing, Applicant admitted that she was involved in an incident in Germany in December 2016, which involved a traffic accident. She also admitted to consuming alcohol prior to the accident. She had one "very full" glass of wine while having dinner out with her daughter. At the time, she was stressed because she and

her supervisor did not get along. Applicant drank the wine quickly, she did not feel intoxicated, and they left the restaurant to run errands. She was involved in a car accident shortly after leaving the restaurant. (Tr. 15-19)

Applicant did not believe she was at fault for the car accident. She was struck by another car while she was attempting to make a turn. She reported the accident to the U.S. military police. The German police arrived and asked Applicant and the other driver to take a breathalyzer test. She tested over the German legal limit. She was charged with DUI and she was also cited for causing the car accident. The U.S. military police picked up Applicant and her daughter from the German police station. Her criminal case was transferred to the U.S. military's legal department. The U.S. Command suspended her driver's license for 90 days. Her driving privileges were also suspended for 10 months by the German government, and she was fined. She subsequently participated in an alcohol evaluation in March 2019, and the results showed she did not have any alcohol disorder or any need for alcohol treatment. (Tr. 20-28; GE 3; AE J)

Applicant was also charged with child endangerment by the German police after her DUI and accident, because her 13-year-old daughter was in the vehicle. Applicant was arrested by the German authorities and placed in handcuffs, and her daughter was taken into protective custody. Applicant and her daughter were referred to a therapist associated with the family advocacy program. Applicant was investigated for child neglect, and she met with the therapist several times. The therapist also met with Applicant's daughter. The therapist determined that Applicant met the criteria for neglect, but concluded that Applicant did not need additional parenting classes or alcohol counseling, as her risk level was determined to be low. Applicant reported her arrest to her supervisor. (Tr. 28-30, 34; GE 3, GE 4; AE K, AE L)

Applicant's employer placed her on a performance improvement plan, and in July 2017, she was placed on administrative leave. In August 2017, she was terminated by her employer due to her inability to successfully perform her job duties. Applicant and her daughter returned to the U.S., and in about October 2017, she was rehired by her former federal contractor employer. (Tr. 33; AE B)

Applicant met with an authorized DOD investigator in October 2017. The report summarizing the interview was later reviewed and adopted by Applicant as accurate, after she made a few changes to her reported travel. (GE 2) Applicant had extensive foreign travel and connections. The DOD investigator questioned her about her foreign travel, foreign connections, and asked her if she had any law enforcement related incidents during her time spent overseas. Applicant answered "no." She was specifically questioned whether she had any interactions with law enforcement, either foreign or domestic. Again, she provided a negative response. Applicant was then confronted with her December 2016 arrest for DUI, failure to stop at traffic control device, and child endangerment by the German police. The investigator asked her why she did not initially disclose this information during questioning, and she stated that since the incident occurred in Germany, she did not believe anyone would discover it.

She also stated that she did not want the incident to have a negative impact on her future since she believed if the incident had occurred in the U.S., she would not have been charged with DUI. (Tr. 42-46; GE 2)

At the hearing, Applicant stated that she carefully listened to the DOD agent's questions, and he had only asked her if she had any incidents with U.S. law enforcement since the completion of her SCA, which she truthfully responded, "no." Applicant testified that, at the time, she was being interviewed by a "junior investigator" while a "senior investigator" observed the interview. Applicant testified that the "senior investigator" asked her something to the effect of, "Would you like to tell us what happened in Germany?" Applicant then provided the information about her arrest in Germany. She did not initially disclose her 2016 arrest during the interview because she was embarrassed by it, and it was also out of character for her. She denied that she deliberately tried to hide the information during her background interview. (Tr. 35-41, 62-64)

Upon further questioning, Applicant denied ever telling the investigators that she did not disclose her arrest because she did not believe anyone would find out about it since it happened in Germany, or that she did not want the incident to have a negative impact on her future. Applicant made some detailed, specific corrections to the interview summary regarding her foreign travel, however, she did not list any modifications, or even note in the interrogatory these incorrect statements that were attributed to her during the background interview. (Tr. 42-49; GE 2)

Applicant provided four character letters. One of the individuals recommending her for a security clearance stated: "She (Applicant) told me that during an interview for her Top Secret clearance background investigation she misinterpreted the investigator's line of questioning regarding the incident which led to the investigators believing she was being deceptive." All four individuals stated that Applicant is trustworthy and honest. (AE C)

### **Policies**

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's national security eligibility.

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(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 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. 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. 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 as to obtaining a favorable security decision.”

A person applying for national security eligibility seeks to enter 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 as to 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 concerned.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the security concern for personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 lists one condition that could raise a security concern and may be disqualifying in this case:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant did not voluntarily disclose her December 2016 arrest in Germany during her background interview in October 2017. There is sufficient evidence to show her omission was intentional to support the application of the above disqualifying condition.

AG ¶ 17 lists conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions apply. Applicant told a co-worker, who then provided her a letter of recommendation, that she had misinterpreted the investigator's question, which in turn, caused the investigators to believe she was being deceptive. At the hearing, Applicant said she listened carefully to the investigator's question, which only asked if she had any incidents with U.S. law enforcement agencies. These inconsistencies are worrisome.

I find that Applicant's claim that she did not intend to hide this adverse information is not credible. This is especially apparent after the investigator had just questioned her about her extensive foreign travel and foreign connections, and was fully aware of her arrest in Germany. In addition, Applicant listed minor inconsistencies about her foreign travel on the interrogatory, but she failed to list several purported inaccuracies in the interview summary report: 1) She failed to note in the interrogatory that the agent had not asked her questions about interaction with law enforcement overseas; 2) she failed to note that she never stated to the investigator that she had hoped the investigation would not uncover her arrest in Germany; and 3) she failed to note that she never stated to the investigator that she failed to disclose the 2016 arrest because she was embarrassed and did not want it to have a negative impact on her future.

Applicant's failure to be upfront and candid about this serious incident in Germany was made in the context of a security investigation. Applicant's deliberate omission was recent, and did not happen under unique circumstances. Her intentional deception does cast doubt on her reliability and trustworthiness. Personal conduct security concerns are not mitigated.

**Guideline G: Alcohol Consumption**

Available information shows that Applicant was recently arrested in Germany for DUI. There is no other indication that she has, at times, consumed alcohol to excess. This information reasonably raises a security concern about alcohol consumption that is expressed at AG ¶ 21:

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.

The facts and circumstances of this case require application of the following AG ¶ 22 disqualifying condition:

(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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder.

I also have considered the following mitigating conditions available to Applicant under AG ¶ 23:

(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; 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.

I find that Applicant's arrest for DUI was an isolated incident. She participated in alcohol awareness classes, and overall, she learned a valuable lesson from this incident. A recurrence of this alcohol-related incident is unlikely. Mitigating Conditions AG ¶¶ 22(a) and (d) apply.

**Guideline J: Criminal Conduct**

The security concern 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.

I have considered all of the disqualifying conditions under AG ¶ 31, and 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 individual was formally charged, prosecuted, or convicted.

Applicant was arrested in December 2016, and charged with DUI, failure to stop at a traffic control device, and child endangerment. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

(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.

Applicant's arrest happened under such unusual circumstances that it is unlikely to recur. The arrest was over two years ago, and was an isolated occurrence that has not been repeated. For similar reasons as set forth in Guideline G, above, Mitigating Conditions AG ¶¶ 32(a) and (d) apply.

### **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 have incorporated my comments under Guidelines E, G, and J in my whole-person analysis. I have considered all the evidence, including Applicant's testimony. She was embarrassed by the adverse information she was required to disclose during her background investigation. She hoped the arrest in Germany would not be discovered during her investigation, and she did not want the arrest to have a negative impact on her future. For these reasons, she deliberately chose to withhold information about the arrest during her background interview. Her lack of candor during the interview is a security concern that calls her suitability for a clearance into question.

Overall, the record evidence leaves me with doubts as to Applicant's good judgment and reliability, as well as her national security eligibility. Because protection of the national interest is the principal focus of these adjudications, any doubts must be resolved against the Applicant and in favor of national security.

### **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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

### **Conclusion**

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

Pamela C. Benson  
Administrative Judge