



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 19-01495
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Patricia Lynch-Epps, Esquire, Department Counsel  
 Moira Modzelewski, Esquire, Department Counsel  
 For Applicant: Alan V. Edmunds, Esquire

06/08/2020

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

**Statement of the Case**

On June 21, 2019, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). The action was taken under Executive Order 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 or after June 8, 2017. On August 15, 2019, Applicant timely submitted a response to the allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

On October 28, 2019, I was assigned the case. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 14, 2019, setting the hearing for December 10, 2019. The hearing was convened as scheduled.

The Government offered 12 documents, accepted without objection as exhibits (Exs.) 1-12. Without objection, the Government moved to strike “the words breather and

breathalyzer refusal from [SOR allegation 1.c]. . . . [to] read, in June 2014 you were convicted of DUI and sentenced to 30 days in jail.” It also moved to “substitute DUI, second offense, to the words reckless driving” in the second sentence of allegation 1.d., which was also granted without objection. (Transcript at 10-12) Applicant offered testimony and 24 documents, accepted without objection as Exs. A-X. Additional materials, marked as Exs. Y-Z, were accepted from Applicant on December 12, 2019.

A transcript (Tr.) of the proceeding was received on December 26, 2019. Upon receipt of the transcript, the record was closed. Based on the exhibits, testimony, and record as a whole, I find Applicant failed to mitigate the personal conduct security concerns raised.

### **Findings of Fact**

Applicant is a 36-year-old cybersecurity engineer who has been in his present position for nearly two years. He is considered an excellent employee and has maintained a security clearance without adverse incident since 2006. He appreciates the responsibilities of one maintaining a security clearance. (Tr. 26) Applicant has earned a master’s degree in information systems.

Married, Applicant is the father of a toddler and is expecting a second child. He is the main wage-earner with an income of about \$120,000 a year. His wife, who also maintains a security clearance, works at home as a business analyst generating approximately \$100,000 a year in salary.

The couple own their home, in which no alcohol is present. Applicant has been abstinent since March 2018, consuming his last alcoholic beverages at a party for his child. (Tr. 22). This led to his most recent alcohol-related incident, discussed below. Prior to that, he had not had alcohol for over three years. (Tr. 25, 62) He has never been diagnosed as an alcoholic or alcohol-dependent. (Tr. 27) He has had extensive counseling and does not believe he has a problem with, or need for, alcohol. (Tr. 27)

Applicant’s alcohol-related issues and legal issues date back to at least 2010. One night in about September 2010, Applicant was spotted by a police officer swerving his car. (Tr. 46) At the time he was heading back to his hotel after attending an event where he had consumed alcohol. (Tr. 43) He passed the field sobriety test and he had a .06 or a .07 result on a breathalyzer reading, under the legal threshold of .08 for intoxication. (Tr. 28-29; 41) However. Applicant was arrested and charged with driving under the influence (DUI). Being handcuffed and driven to the station was “devastating and it shook [him].” (Tr. 46-47) His lawyer appeared in court and the matter was dropped. He no longer has much faith in field sobriety tests or breathalyzers. (Tr. 29)

In January 2012, Applicant was arraigned for DUI (first offense). Applicant had been stopped for a broken headlight after drinking at an earlier social event. (Tr. 49) He does not remember how much time had passed between his imbibing and his being pulled over, nor does he recall how much alcohol he had consumed. (Tr. 49-50) He

does not remember the result of a urine test and does not recall whether a breathalyzer was administered at the time of arrest. (Tr. 30, 52) His attorney negotiated a plea agreement. (Tr. 53) In February 2012, a deferred sentencing agreement was filed and Applicant was enrolled in a diversion program. (Ex. 6) Ultimately, the charges were dismissed as part of the plea agreement after successful conclusion of the diversion program (*nolle* diversion) in February 2013. (Ex. 6; Tr. 53)

In about April 2014, Applicant had been out with friends and had a “couple” of alcoholic beverages. (Tr. 57) On the way home, his vehicle was rear-ended by another car. The other driver appeared to be injured and he called the police. After officers arrived, he was asked to submit to a breathalyzer and a field sobriety test, both of which he refused because he “wasn’t confident to perform the test . . . [he] did not think [he] was under the influence.” (Tr. 31) He did so because in the past, he had been told to refuse such tests unless a lawyer was present. (Tr. 34) He was arrested and handcuffed, leaving him to feel “awful, not good.” (Tr. 59)

In June 2014, Applicant was charged with DUI. He admitted to the DUI charge and was convicted of that crime. (Tr. 56) He entered a diversion program, which he successfully completed. A counselor gave him a good prognosis. (Tr. 59) He was advised not to drink and drive in the future. After three alcohol-related incidents, Applicant began to feel he was “running out of luck” and, given his job, marriage, and baby, he realized he had too much to lose if his pattern continued. (Tr. 63) He understood “bad things happen when I consume alcohol.” (Tr. 63) At some point after the 2014 incident, he decided to permanently quit using alcohol. (Tr. 61) He maintained that commitment for “over three years.” (Tr. 62)

Despite his decision to give up alcohol, Applicant again imbibed in March 2018. After drinking alcohol at a party for his child at home, Applicant and some friends went to a bar. (Tr. 65) While driving himself home around 3:30 a.m., he was detained at a traffic stop by police. (Ex. 12; see *also* Tr. 70, indicating the stop was at about 1:00 a.m.) His attorney argued that reckless driving was a more appropriate charge. (Tr. 34, 71; Ex. 12). Applicant attended several alcohol counseling sessions and courses. He was ultimately convicted of reckless driving and breathalyzer refusal, and his driver’s license was suspended for three years. It remains suspended.

As a consequence of the 2018 incident, Applicant was asked to resign from his employer for violation of a new drug and alcohol policy. (Tr. 55) Applicant and management discussed the issue. Applicant knew that even the reckless driving conviction could lead to his termination. (Tr. 76) It was ultimately agreed that Applicant could simply resign from his position and keep his record “clean.” (Tr. 40)

Today, Applicant maintains that he has never driven a vehicle under the influence of alcohol nor ever blown an alcohol level above the legal limit for intoxication and DUI. (Tr. 30) He has signed a letter of intent not to return to drinking. (Tr. 35-36, 38; Ex. E) He believes he is no longer at risk for driving after drinking because he does not

drink. (Tr. 36) After being assessed by a counselor, he was not found to be in need of treatment. (Ex. F) It was noted that he was on a “positive trajectory.” (Tr. 38)

## **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. They 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 the AG, 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 in making a decision.

The protection of the national security is the paramount consideration. The AG 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.

Under the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. In addition, 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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

## **Analysis**

### **Guideline J – Criminal Conduct**

The concern raised by 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.

Applicant's four arrests within eight years each occurred after he imbibed alcohol. Although the matter was dropped for the earliest incident when he was in his 20s, the remainder were arranged for alternative disposition so he was not subject to a DUI conviction. He was, however, found guilty of refusing to submit to a breathalyzer. These facts potentially give rise to the following disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(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.

Here, Applicant's multiple charges have been through the court system. He is committed to abstinence and, by extension, never driving after drinking again. He has been abstinent for at least two years. Until his termination, he was considered an excellent employee. The incident in 2018 resulted in conviction and the suspension of his driver's license. That suspension is still pending. The security concerns raised under this guideline have been mitigated, in part, by the following factor:

AG ¶ 31(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.

## **Guideline G - Alcohol Consumption**

The Alcohol Consumption guideline is set out in 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.

Applicant has been stopped while driving after imbibing alcohol and cited for alcohol-related charges on four occasions between 2010 and 2018. In the end, his attorney arranged for a dismissal of the 2010 charges; Applicant was alternatively offered entrance into a diversion program 2012; another diversion program was completed in response to the 2014 charges; and charges raised in 2018 for DUI were

lowered in favor of charges for reckless driving while he was found guilty of refusing to take a breathalyzer. These incidents of concern are sufficient to raise disqualifying condition:

AG ¶ 22(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.

Applicant's driver's license remains under suspension for the 2018 incident. His most recent attempt at sobriety began that same year, after a previous attempt at sobriety that lasted about three years. Consequently, it is premature to conclude he has established a clear and established pattern of abstinence or is unlikely to again lapse in his alcohol use despite his commitment to remain abstinent. At best, the facts presented raise the following mitigating condition in part:

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

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

The concern under this guideline is set out in AG ¶ 15:

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. . . .

The following disqualifying condition is applicable to the concerns raised by Applicant's four traffic stops and legal violations involving alcohol in the past decade, as well his loss of employment as a result of his 2018 incident:

AG ¶ 16(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.

The following mitigating conditions are potentially applicable:

AG ¶ 17(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

AG ¶ 17(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.

Applicant was granted a security clearance in 2006. It must be assumed he understood the gravity of being invested with this credential. In 2010, 2012, 2014, and 2018, he drove after consuming alcohol, was stopped by police officers, and was charged with, at least, DUI on each occasion. After each occasion, he was aware that his actions were dubious, at best. He found them “devastating,” they “shook him,” and made him feel “awful,” yet he continued with this practice. After the 2014 arrest, he felt he was “running out of luck.” He declared himself committed to sobriety that year. His luck did run out in 2018, when he was arrested and his pattern resumed. In March 2018, he again decided to commit himself to sobriety, but his conduct still led to his departure from his employer. He took appropriate counseling and training, and is now waiting for his period of driver’s license suspension to be completed. He is clearly remorseful about his past poor judgment and signed a letter of intent to remain sober.

As noted, Applicant’s last drink was in 2018. The Directive does not define “recent,” and there is no “bright-line” definition of what constitutes “recent” conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006).

Applicant’s latest use of alcohol occurred about two years ago. His prior commitment to sobriety lasted three to four years before relapse. Meanwhile, his driver’s license remains suspended. After considering the record as a whole, specifically, the circumstances surrounding Applicant’s past incidents of driving after drinking and his 2018 lapse in sobriety, I cannot conclude Applicant’s track record for drinking, then driving, and for failing to adhere to his commitment to sobriety demonstrate that another incident is unlikely to recur. More time is also needed to demonstrate his ability to control the temptations that lead have lead him to imbibe, then drive, and rebuild a track record for sound judgment and reliability. Consequently, I find that none of the available mitigating conditions (AG ¶ 17(a)-(g)) 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 relevant 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 the three applicable guidelines in my whole-person analysis. I also considered Applicant's testimony, background, age, and maturation.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance vis-à-vis his ability to comport his personal conduct. In choosing to commit himself to sobriety as a safeguard against future driving after drinking, or even the appearance of poor judgment that combination of activities represents, he now holds himself to a high standard. This is commendable. However, his last commitment to sobriety lasted only about three or four years before he lapsed. To date, his present commitment has only lasted about two years, and his driver's license remains suspended. As a result of his behavior, he lost his job. It is not unreasonable for Applicant's current demonstration of sobriety, sound judgment, and comportment with the law to last at least as long as his last period of sobriety or the duration of his license suspension. I thus believe more time is needed to demonstrate his present reliability and good judgment. Consequently, I conclude security concerns are not mitigated.

### **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:	For Applicant
Subparagraphs 1.c-1.d:	Against Applicant



Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	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 a security clearance. Eligibility for access to classified information is denied.

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Arthur E. Marshall, Jr.  
Administrative Judge