



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 12-06024
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: *Pro se*

03/14/2013

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), G (Alcohol Consumption), and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on May 11, 2010. On October 2, 2012, the Defense of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines J, G, and E. DOD acted 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 adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on October 11, 2012; answered it on October 30, 2012; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 18, 2013, and the case was assigned to me on

January 23, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 28, 2013, scheduling it for February 26, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until March 8, 2013, to enable Applicant to submit additional documentary evidence. He timely submitted AX D, which was admitted without objection. DOHA received the transcript (Tr.) on March 7, 2013.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.d-1.g, 3.b, and 3.c. He denied SOR ¶¶ 1.c, 2.a, and 3.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old sheet metal worker employed by a defense contractor at a naval shipyard. He graduated from high school in June 1980, and he began working at a naval shipyard shortly after graduation. He received a security clearance in July 1981. He quit his job at the shipyard in 1999 during a labor strike, and he worked in the private sector until he began his current job in April 2005. (Tr. 31, 40.)

Applicant married in August 2008. He and his wife lived together for about ten years before they married. His wife was diagnosed with terminal cancer at some time before he submitted his SCA in May 2010. She died in January 2011. (Tr. 33-34.) He has no children.

In April 1981, Applicant was charged with driving under the influence (DUI) and convicted of a reduced charge of reckless driving. He was fined \$50, his driver's license was suspended for ten days, and he was required to complete an alcohol safety action program (ASAP). (GX 2.)

In February 1984, Applicant was charged with simple assault and two counts of destroying property. The court records do not reflect the disposition of these charges. (GX 2; GX 3.) He testified that the charges were based on a false accusation by a police officer after he was stopped for DUI. According to Applicant, the police officer threw him against a brick wall while he was handcuffed and then accused him of assault and damaging his \$300 watch. He testified that the judge dismissed the charges as unfounded. (Tr. 58-60.)

In August 2000, Applicant was charged with driving while impaired (DWI) and driving without a license. He pleaded guilty and was sentenced to 30 days in jail. He was placed on unsupervised probation for 12 months and ordered to abstain from alcohol while on probation. He testified that this arrest occurred when he and his wife were returning from dinner at a restaurant. His wife was driving but became ill. She attempted to pull the car off the road but was unable. Applicant tried to move the car off the road and was stopped by a police officer while he was behind the wheel. (Tr. 36.)

In November 2002, Applicant was charged with DWI and driving while his license was suspended. He pleaded guilty and was sentenced to 20 days in jail. He was placed on supervised probation for 18 months and required to attend ASAP classes. He also was ordered not to operate a motor vehicle until an interlock device was installed on his vehicle and his driver's license was reinstated.<sup>1</sup> (Tr. 36-37.) In his answer to the SOR, Applicant admitted that he continued to drive after his conviction because he could not afford to buy an interlock device and he needed to drive to work.

After the November 2002 arrest, Applicant realized that he had an alcohol problem, and he began attending Alcoholics Anonymous (AA) meetings and sought out a sponsor. He participated in AA for about eight years. (Tr. 38-39.)

Applicant testified that he continued to drink at infrequent social occasions after his November 2002 arrest, and he began to drink more after his wife was diagnosed with cancer. He stopped drinking in bars, but he began drinking more heavily at home. (Tr. 61-63.)

In October 2011, Applicant was charged with DWI and driving without a license. When he was arrested, his blood-alcohol content was about .14%. In June 2012, he pleaded guilty and was sentenced to 60 days in jail (suspended) and unsupervised probation for 12 months. (GX 5.) He reported his arrest to his security manager. (GX 4.)

In December 2011, Applicant was charged with DWI, making an illegal U-turn, and driving on a suspended or revoked license. In April 2012, he pleaded not guilty but was convicted. He was sentenced to 60 days in jail, with 55 days suspended, and placed on supervised probation for 12 months. The driver's license violation was dismissed. (GX 6.) He testified that before the October 2011 and December 2011 arrests, he had consumed a 12-pack of beer during a two-hour period before driving. (Tr. 48-49.) In his answer to the SOR, he admitted that he did not report his December 2011 arrest to his security officer because he was embarrassed and afraid that he would lose his job.

Applicant resumed his AA attendance after the December 2011 arrest. At the hearing, he testified that his last drink was on the day of this arrest. (Tr. 64.)

Applicant has paid the fines, driver's license reinstatement fee, ASAP fee, and court costs arising from his most recent arrest and conviction. Even though he was assigned outside his state of residence by his employer, he arranged to complete the ASAP in his state of temporary duty. (AX A through D.)

When Applicant submitted his SCA in May 2010, he answered "Yes" to Question 22e, asking if he had ever been charged with any offenses related to alcohol or drugs.

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<sup>1</sup> Department Counsel did not submit any documentary evidence of the convictions in 2000 and 2002. However, Applicant admitted them in his answer to the SOR and at the hearing. He disclosed an alcohol-related arrest in his SCA that corresponds to the arrest in November 2002, alleged in SOR ¶ 1.d.

He disclosed his November 2002 DWI, but he did not disclose arrests in August 2000 and April 1981. (GX 1 at 32.) He denied intentionally falsifying his SCA. He testified that he overlooked the word “ever,” and thought that the question covered the last seven or ten years. (Tr. 55.)

## **Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Guideline J, Criminal Conduct

The SOR alleges four alcohol-related arrests and convictions (SOR ¶¶ 1.a, 1.b, 1.e, and 1.g), an arrest for assault and destruction of property (SOR ¶ 1.f), and deliberate falsification of his SCA in violation of 18 U.S.C. § 1001 (SOR ¶ 1.c). 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."

Four disqualifying conditions under this guideline are relevant:

AG ¶ 31(a): a single serious crime or multiple lesser offenses;

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted;

AG ¶ 31(d): individual is currently on parole or probation; and

AG ¶ 31(e): violation of parole or probation; or failure to complete a court-mandated rehabilitation program.

Department Counsel conceded that Applicant's testimony regarding his incorrect answer to Question 22e was plausible and credible. Based on my independent evaluation of Applicant's credibility and Department Counsel's concession, I conclude that Applicant has refuted the allegation that he falsified his SCA, as alleged in SOR ¶ 1.c. However, Applicant's admissions and the documentary evidence regarding the other allegations under this guideline are sufficient to establish the disqualifying conditions in AG ¶¶ 31(a) and (c). AG ¶ 31(d) also is established because Applicant is still on probation as a result of his arrests in October 2011 and December 2011. Finally,

AG ¶ 31(e) is established because Applicant violated the terms of his probation after his November 2002 arrest by driving without an interlock device on his vehicle.

The following mitigating conditions under this guideline are potentially relevant:

AG ¶ 32(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;

AG ¶ 32(c): evidence that the person did not commit the offense; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) is not established. The first prong of this mitigating condition focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* Nine years elapsed between Applicant's November 2002 arrest and his December 2011 arrest, but he admitted that he consumed alcohol, sometimes to excess, during that period. Although Applicant has abstained from alcohol since his arrest in December 2011, I conclude that this is insufficient time to warrant a finding of rehabilitation, when considered in the context of a lifetime of alcohol abuse and the fact that he is still on probation.

The second prong of AG ¶ 32(a) (unusual circumstances) also is not fully established. While the illness and death of Applicant's wife were unusual circumstances, the conduct alleged in SOR ¶¶ 1.d-1.g preceded her terminal illness. Thus, I conclude that AG ¶ 32(a) is not established.

AG ¶ 32(c) is established for the falsification alleged in SOR ¶ 1.c. Based on Applicant's credible testimony and the absence of any evidence of a conviction, I conclude that it also is established for the assault and destruction of property alleged in SOR ¶ 1.f.

AG ¶ 32(d) is not established. Applicant was genuinely remorseful at the hearing, but insufficient time has elapsed to warrant a finding of rehabilitation. Furthermore, Applicant presented no evidence of his work performance or constructive community involvement beyond the court-ordered community service he has performed in connection with his multiple convictions.

## **Guideline G, Alcohol Consumption**

The SOR cross-alleges the conduct alleged in SOR ¶¶ 1.a, 1.b, 1.d, 1.e, and 1.g under this guideline. The concern under this 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.” The following disqualifying conditions under this guideline are potentially relevant:

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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

AG ¶ 22(e): evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and

AG ¶ 22(f): relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

Applicant's admissions, corroborated by his record of alcohol-related arrests and convictions, are sufficient to establish AG ¶¶ 22(a) and (c). However, AG ¶¶ 22(d), (e), and (f) are not established because there is no evidence that he has been diagnosed with alcohol abuse or alcohol dependence.

The following mitigating conditions are potentially relevant:

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 good judgment;

AG ¶ 23(b): the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

AG ¶ 23(c): the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

AG ¶ 23(d): the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 23(a) is not established for the reasons set out in the above discussion of AG ¶ 32(a). AG ¶ 23(b) is established, because Applicant has acknowledged that he has an alcohol problem, has resumed his AA participation, and has established a pattern of abstinence for about 15 months. However, the duration of his pattern of abstinence has not persisted for sufficient time to warrant a finding of rehabilitation.

AG ¶¶ 23(c) and (d) are not established, because Applicant is not in a counseling or treatment program, nor has he completed counseling or rehabilitation in the past. The ASAP programs that he completed were educational classes rather than counseling or rehabilitation programs, and they did not include a diagnosis or prognosis.

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

The SOR alleges that Applicant falsified his answer to Question 22e on his SCA by not disclosing all his alcohol-related charges (SOR ¶ 3.a), continued to drive in violation of the court's order that he not resume driving until an interlock device was installed on his vehicle (SOR ¶ 3.b), and failed to inform his FSO of his December 2011 arrest for DWI because he was embarrassed and afraid that he would lose his job (SOR ¶ 3.c). The concern under this guideline is set out in AG ¶ 15 as follows:

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.

The disqualifying condition relevant to Applicant's answer to Question 22e in his SCA is AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . ." When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the



record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). Applicant plausibly and credibly explained why he did not disclose all his alcohol-related arrests, and Department Counsel conceded that his explanation was credible. Thus, I conclude that AG ¶16(a) is not established.

Applicant's violation of the court order prohibiting him from driving until he installed an interlock device on his vehicle and his failure to notify his FSO of his December 2011 arrest raise the following disqualifying conditions under this guideline:

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 person may not properly safeguard protected information;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions under this guideline are potentially relevant:

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;

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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not established. Applicant's failure to notify his FSO of his most recent arrest is arguably "minor," but his repeated violation of the court order prohibiting him from driving was not minor. His failure to notify his FSO appears to have been a one-time violation, and it closely followed his October 2011 arrest, which he reported as required. However, none of his multiple rule violations occurred under unique circumstances, and they cast doubt on his reliability, trustworthiness, and good judgment.

AG ¶ 17(d) is not fully established. Applicant has acknowledged his behavior and he has resumed his AA participation. However, for the reasons set out in the above discussions of AG ¶¶ 32(a) and 22(a), insufficient time has elapsed to determine that his behavior is unlikely to recur.

AG ¶ 17(e) is established. Applicant has fully disclosed his criminal record and alcohol problems. He was candid at the hearing, and he has taken positive steps to avoid further alcohol-related problems.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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) 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.

I have incorporated my comments under Guidelines J, G, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult who has finally recognized that he must abstain from alcohol. He cares about his job. He has held a security clearance and worked for defense contractors for many years. He was candid, remorseful, and sincere at the

hearing. He is on the right track to overcome his alcohol problems, but he needs more time to demonstrate rehabilitation.

After weighing the disqualifying and mitigating conditions under Guidelines J, G, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns about his criminal conduct, alcohol consumption, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline G (Alcohol Consumption)	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraphs 3.b-3.c:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge