



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



In the matter of: )  
)  
) ISCR Case No. 13-00873  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Christopher Morin, Esq., Department Counsel  
For Applicant: Ryan D. Oxendine, Esq., and Gary McClure, Esq.

05/08/2014

**Decision**

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guidelines G (alcohol consumption) and J (criminal conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

On September 11, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G and J. DOD took that action under Executive Order (EO) 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 on September 1, 2006.

On October 1, 2013, Applicant answered the SOR and requested a hearing. Department Counsel submitted the ready-to-proceed notification on October 17, 2013. The case was originally assigned to another judge and was reassigned to me on

February 3, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 19, 2014, and the hearing was convened as scheduled on March 11, 2014. At the hearing, the Government offered exhibits (GE) 1 through 8. The prehearing guidance issued to Applicant was attached to the record as Hearing Exhibit (HE) 1 and Department Counsel's list of exhibits was attached as HE 2. Applicant testified, called three witnesses to testify on his behalf, and offered exhibit (AE) A. Applicant's Counsel objected to GE 4 because it addressed a criminal charge not alleged in the SOR. The objection was overruled. The record was held open until March 18, 2014, for Applicant to submit additional information. Applicant timely submitted AE B through J. All proffered exhibits were admitted into evidence. DOHA received the hearing transcript (Tr.) on March 28, 2014.

### **Findings of Facts**

Applicant is 51-year-old owner of an electrical contracting business that serves as a defense contractor. He has owned that business since 1992. He obtained his General Educational Development (GED) certificate in 1986 and attended a community college for a short period. He has been married for 34 years and has an adult child. He has held a security clearance since at least 2007.<sup>1</sup>

The SOR contained four Guideline G allegations. These asserted that Applicant had charges pending against him for driving while impaired (DWI), resisting a public officer, and failure to report an accident since December 2012 (SOR ¶ 1.a); that he was arrested and charged with driving under the influence (DUI) in November 2009 (SOR ¶ 1.b); that he was arrested and charged with operating a motor vehicle while intoxicated (OMVWI) in 1997 and pled guilty to that offense in 2001 (SOR ¶ 1.c); and that he was convicted of DWI in 1988 (SOR ¶ 1.d). SOR ¶ 1.a was cross-alleged as the sole Guideline J allegation (SOR ¶ 2.a). In his Answer, Applicant admitted all of the SOR allegations with explanations. His admissions are incorporated as findings of fact.<sup>2</sup>

Applicant began consuming alcohol in his junior year of high school. At that time, he would consume five to ten beers once a week in social gatherings. In 1988, he drank five to eight beers while playing golf with a friend. As he was driving home from that golf match, a police officer pulled him over for running a red light. He did not recall taking a breathalyzer or field sobriety test. He was arrested, taken to the local police station, and charged with DWI. He later pled guilty to that offense and was sentenced to 60 days in jail (suspended), fined \$100, placed on probation for two years, and had his driver's license suspended for a year. After that DWI conviction, he reduced his alcohol consumption to one to three beers or glasses of wine once a week while at home or in a restaurant. In 1989, he was charged with driving while his license was revoked, pled guilty to that offense, and was sentenced to a \$200 fine and three years of probation. He testified that he did not recall the driving-while-license-revoked incident.<sup>3</sup>

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<sup>1</sup> Tr. 17-18, 29, 31-33; GE 1, 2.

<sup>2</sup> SOR; Applicant's Answer to the SOR.

<sup>3</sup> Tr. 26-27, 33-39, 80, 82-84; GE 2, 3, 4, 5; AE C, I, J.

In 1997, Applicant was arrested and charged with OMVWI when he was working out of state. During a dinner with a client, he consumed about three to four beers over a three to four hour period while watching a sporting event. After driving back to his hotel and parking his car, a police officer approached him and asked if he had been drinking. He claimed that he passed the field sobriety test and believed that a joke he made about the police officer stumbling may have been a factor in his arrest. He was administered a blood alcohol test, but did not remember the results. About a month later, he returned to that location for a court hearing, but nothing was resolved then. No further court proceedings were scheduled. Four years later, he was undergoing a background investigation for a work project involving a prison in another state when this unresolved charge was brought to light. To facilitate him obtaining the prison work project, he decided the charge needed to be resolved. He hired an attorney who advised him if he pled guilty he would just lose his driver's license for six months in that state, but would be able to drive in other states. Based on that advice, he pled guilty to that offense in 2001. At the hearing, he indicated that he did not believe this incident was a cause for concern about his alcohol consumption "because I only had several beverages . . . . It wasn't an issue for me." One of Applicant's post-hearing submissions indicated that he denied being intoxicated during this incident.<sup>4</sup>

While traveling out of state in November 2009, Applicant and his brother took a customer to dinner and a dance club. Applicant consumed about two beers at dinner and about two beers at the dance club. As he was driving back to his hotel, a police officer pulled him over for speeding. Upon questioning, he informed the police officer that he had been drinking alcohol. He was administered a field sobriety test and arrested for DUI. In the OPM interview, he reportedly stated that he passed the field sobriety test and could not recall the reason the police officer arrested him. At the hearing, he stated that the police officer informed him that he failed the field sobriety test and indicated he might have refused the blood alcohol test. He also testified that he thought he was safe to drive on that occasion. After his arrest, he was placed in a holding cell overnight and was released the next day. He hired an attorney to represent him. The DUI charge was eventually dismissed. He thought the charge was dismissed because the police officer had acted unlawfully. In a post-hearing submission, Applicant's Counsel indicated the reason for dismissal of the charge could not be determined because the court record had been expunged.<sup>5</sup>

In December 2012, Applicant attended a holiday luncheon with local businessmen at a restaurant. He was there from approximately 1:30 p.m. to approximately 6:30 p.m. and consumed beer and shots of liquor. He could not recall the amount of alcohol consumed but stated he does not normally drink shots. He acknowledged he drank to excess on that occasion and was intoxicated. He did not recall leaving the luncheon and next remembers someone tapping on the window of his car as it was in a small ditch or on the curb on the left side of the road. He testified that he had driven less than a mile from the event when he had hit a tree stump. No one was

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<sup>4</sup> Tr. 23-26, 39-46, 50, 80; GE 2, 5; AE C. The quoted language may be found at Tr. 45.

<sup>5</sup> Tr. 22-23, 46-53, 80-81; GE 2, 5, 6; AE C, H.

injured in the accident, but his vehicle incurred about \$1,000 of damage. He was arrested for DWI, resisting a public officer, and failure to report an accident. At the hearing, he indicated that he thought his blood alcohol level was .17 percent, but was not sure. On October 1, 2013, Applicant was convicted of DWI and sentenced to 120 days of imprisonment (suspended); 12 months of unsupervised probation; a fine, court costs, and restitution totaling \$1,340; and 48 hours of community service. His driver's license was also suspended for a year. A court record indicated that the state was unable to prove beyond a reasonable doubt that Applicant's alcohol concentration was .15 percent or greater. The resisting public officer and failure to report accident charges were dismissed. Applicant has completed his community service and his unsupervised probation will end in October 2014.<sup>6</sup>

While the 2012 DWI charge was pending, Applicant was ordered to complete an alcohol assessment. During that assessment, a certified substance abuse counselor at an accredited alcohol treatment facility issued a diagnosis of alcohol abuse. In his testimony, Applicant indicated he was not aware that he was diagnosed as an alcohol abuser. As a result of that assessment, he attended 20 hours of substance abuse outpatient treatment. He completed that treatment in March 2013. In a post-hearing submission, the substance abuse counselor stated:

When [Applicant] presented for the DWI assessment, we were using the DSM-IV manual. A person meets the criteria for abuse if one of the indicators is met. In his case it was "using substances in which it is physically hazardous", (*i.e.*, driving an automobile). Otherwise no other criteria for this diagnosis were met. A specifier can be added, "sustained full remission." We are now using the DSM-V and the diagnosis for substance disorders have changed. He would now fall under: Alcohol Use Disorder, Mild, Sustained Remission. It is my opinion that [Applicant] does not abuse alcohol. In the course of his treatment, he was attentive, punctual, engaged in the discussions and voiced his desire to live a healthy lifestyle focused on quality time with his family and work.<sup>7</sup>

Applicant testified that he abstained from alcohol consumption for about six months following his December 2012 arrest. He now consumes alcohol once or twice a week while socializing with friends or business associates. He indicated that he has never been diagnosed as alcohol dependent and has never been told to abstain from consuming alcohol. At the hearing, he noted that he was now eligible to obtain a restricted driver's license. Since his December 2012 arrest, he has not driven a vehicle after consuming alcohol. He testified that, except for the December 2012 incident, he has never consumed alcohol excessively. He indicated his December 2012 DWI was an isolated incident.<sup>8</sup>

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<sup>6</sup> Tr. 19-22, 53-75, 77-84; GE 2, 7; AE A, C, E, F, G. The court record (AE E) indicated Applicant was convicted of "Impaired Driving."

<sup>7</sup> AE D.

<sup>8</sup> Tr. 18-22, 28, 50, 53-76, 86-89; Applicant's Answer to the SOR; GE 2, 7, 8; AE D.

Applicant stated that he was very remorseful for his actions and such conduct would not happen again. Following his December 2012 arrest, he claimed he changed everything in his life. He said the arrest was devastating and almost caused the breakup of his marriage. Since his arrest, he has focused on his family, especially his granddaughter. He stated that he was active in community activities and is a member of the board of directors of a number of charitable organizations and foundations. He coaches softball and tennis, and is involved one of his granddaughter's activities.<sup>9</sup>

A friend testified that he has known Applicant since 1999. They socialize and play golf together. For a period, this friend lived in Applicant's neighborhood. The December 2012 holiday luncheon is the only time that this friend has seen Applicant drink to excess. The friend indicated that Applicant is devoted to his granddaughter and spends a large amount of his time with her. He also stated that Applicant is extremely reliable, and he would trust Applicant with his money, business, or life. He described Applicant's judgment as top notch.<sup>10</sup>

A second friend testified that he has known Applicant since 2000. They socialize and play tennis together. For a period, this friend lived in Applicant's neighborhood. This friend indicated that he has seen Applicant drink to the point of intoxication, but said that did not occur often. He also indicated that Applicant gave up drinking for about six or seven months following his December 2012 arrest. He described Applicant as a person of integrity who can be trusted.<sup>11</sup>

A third friend testified that he has known Applicant since 1988. They have vacationed together. They came to know each other as neighbors. This friend has not observed Applicant drink to excess or exercise poor judgment. He described instances in which Applicant assisted individuals, including him, while they were unemployed.<sup>12</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 that are to be 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's

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<sup>9</sup> Tr. 18-19, 21-22, 27-28, 30-33.

<sup>10</sup> Tr. 92-98.

<sup>11</sup> Tr. 98-105.

<sup>12</sup> Tr. 106-120.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to 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 adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

AG ¶ 21 expresses the security concern pertaining to 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. Two are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving 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; and

(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.

Applicant has been arrested on four occasions for alcohol-related driving offenses. He has been convicted of three of those offenses. Following his latest arrest, he received an evaluation of alcohol abuse from a certified substance abuse counselor. AG ¶¶ 22(a) and 22(e) apply.

Three alcohol consumption mitigation conditions under AG ¶ 23 are potentially applicable:

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

(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); and

(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.

After his 2012 DWI arrest, Applicant underwent an alcohol assessment. He was diagnosed with alcohol abuse based on that DWI incident. The substance abuse counselor later stated that the specifier of "sustained, full remission" could be added to his diagnosis. She further indicated that she did not believe Applicant abuses alcohol. She stated that he actively participated in his 20 hours of outpatient treatment and voiced a desire to live a healthy lifestyle forced on his family. Applicant testified that he abstained from alcohol for about six months following his 2012 arrest, but now consumes alcohol periodically in moderation. AG ¶¶ 23(b) and 23(d) partially apply.

Despite such mitigation, I cannot find that Applicant's alcohol-related problems are behind him. His alcohol-related arrests occurred when he was 26, 35, 47, and 50

years old. These arrests should not be considered in a piecemeal manner, but instead be viewed as a whole. In doing so, it is apparent these were not isolated or infrequent instances, but irresponsible behavior of a recurring nature that spanned many years. In his testimony, Applicant downplayed the significance of the first three arrests, which raises questions about whether he has reformed and rehabilitated himself. The most serious incident occurred in December 2012, less than a year and a half ago. On that occasion, he drank so much that he did not remember driving from the event or having an accident. He was convicted of that latest DWI offense in October 2013, less than eight months ago. His driver's license remains either suspended or restricted, and he remains on unsupervised probation until October 2014. At this point, it is still too early to conclude that he has reformed and rehabilitated himself and that his alcohol-related problems are unlikely to recur. In short, his alcohol-related arrests continue to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 23(a) does not apply.

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

AG ¶ 30 sets out the security concern relating to criminal conduct:

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.

Several conditions that could raise security concerns under AG ¶ 31 are potentially applicable:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

Applicant was arrested for DWI in December 2012 and was convicted of that offense in October 2013. He remains on unsupervised probation as a result of that conviction. The evidence is sufficient to establish the above disqualifying conditions.

Two criminal conduct 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, remorse or



restitution, job training or higher education, good employment record, or constructive community involvement.

For the reasons discussed under Guideline G, Applicant has not established that his criminal conduct is unlikely to recur. AG ¶¶ 32(a) and 32(d) do not 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(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.

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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G and J 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 successful businessman who is active in the local community. His friends and neighbors hold him a high esteem. Nevertheless, he has had three convictions for alcohol-related driving offenses. The most recent conviction occurred less than eight months ago. For the reasons stated above, it is still too early to conclude that Applicant's irresponsible behavior is unlikely to recur.

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 has failed to mitigate the alcohol consumption and criminal conduct security concerns.

### **Formal Findings**

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

Paragraph 1, Guideline G:                   AGAINST APPLICANT  
    Subparagraphs 1.a – 1.d:               Against Applicant

Paragraph 2, Guideline J:                 AGAINST APPLICANT  
    Subparagraph 2.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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James F. Duffy  
Administrative Judge