



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



In the matter of: )  
 )  
 ) ISCR Case No. 14-00254  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Daniel Crowley, Esq., Department Counsel  
For Applicant: Andre A. Hakes, Esq.

06/20/2014

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, testimony, and exhibits, I conclude that Applicant has mitigated the security concerns raised under the guidelines for alcohol consumption and criminal activity. His request for a security clearance is granted.

**Statement of the Case**

On March 17, 2014, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) that cited security concerns under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). This 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; and the Adjudicative Guidelines (AG) implemented by the DOD on September 1, 2006.

In his undated Answer to the SOR, Applicant admitted the three SOR allegations, with explanations, and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on May 20, 2014. At the hearing on June 4, 2014, I admitted five Government exhibits (GE 1-5), and 16 Applicant exhibits (AE A-M). DOHA received the transcript (Tr.) on June 13, 2014.

## Findings of Fact

Applicant's admissions are incorporated as findings of fact. I make the following additional factual findings.

Applicant, 56 years old, married in 1981 and divorced in 2006. He is remarried. He has four adult children from his first marriage, and three grown stepchildren. He holds a bachelor's degree, completed in 1981. He served as an officer in the Navy, starting in 1981, and received his first security clearance that year. Numerous positions he held in the Navy involved tracking, inventorying, and safeguarding classified information; he had no security violations during his naval career. He successfully completed the ship handling and command qualification examination in 1992. He was honorably discharged in 1998. He is a systems engineer, and has worked for the same defense contractor since 1998. (GE 1; AE M, N; Tr. 26-30, 56, 65-68)

In December 2006, Applicant had been assigned to a work project for which he worked 80-hour weeks. The night the project ended, he and his coworkers celebrated with drinks. He felt drowsy while driving home, pulled over, and fell asleep. He was awakened by police, who charged him with misdemeanor Drunk in Public. On January 8, 2007, he pled guilty and paid a fine.<sup>1</sup> (GE 1, 2; Tr. 32-33)

In 2011 and 2012, Applicant worked on a series of high-pressure projects for his company. He described himself as someone who could not "say no" to the extra workload. For one contract, he worked 80-hour weeks for one month. The next project was behind schedule and demanded equally long hours. He then worked for 13 months in another location, traveling back and forth when possible to be with his family. His longest workweek during the project was 112 hours, about three months before his 2012 arrest. In the two weeks before his 2012 arrest, he was living in a tent so that he could commute to work more quickly. He worked 18-hour days, five days per week. He sometimes slept in his car. He spent one day per week with his family. (Tr. 38-40, 71-72)

On May 12, 2012, Applicant drove home after drinking alcohol. He was stopped for speeding. The two officers administered roadside sobriety tests before placing Applicant in handcuffs. Instead of willingly entering the police vehicle, Applicant fought with, kicked, and cursed the police officers before being taken to jail. He was charged with felony assault on a law enforcement officer, misdemeanor driving while

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<sup>1</sup> Applicant testified that he engaged in binge drinking on weekends between 2000 and 2012. However, the SOR does not allege his drinking history or alcohol-related events during that period. (SOR; Tr. 69-70) Unalleged conduct may only be considered for the following limited purposes defined by the Appeal Board: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive § 6.3.) ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); ISCR Case No. 08-09232 at 3 (App. Bd. Sept. 9, 2010).

intoxicated/first offense, and refusing a breath test. He does not remember most of the event, but during his court hearing, he saw a video of the arrest. He described it as “[s]urreal. It was disgusting, really, appalling.” (GE 1, 3, 5; Tr. 33-38, 62-64)

The last time Applicant drank alcohol was June 20, 2012, the day he saw the video. The next day he began attending Alcoholics Anonymous (AA). He has been attending regularly since, and has accumulated numerous sobriety chips. He usually attends three meetings per week, and his most recent meeting was two days before the hearing. His AA sponsor provided a letter noting that, after the first eight months, Applicant had read the literature, was working the steps enthusiastically, and checked in with the sponsor several times per week. He believes that Applicant's conduct during the arrest was out of character for him. In May 2014, he wrote that Applicant had maintained his sobriety, attends regularly, “[a]nd has help [sic] many other people with his experience, strength, and hope.” (GE 4; AE G, H; Tr. 40-42, 47, 51-52, 64-65)

Applicant began weekly professional counseling in May 2012, on his attorney's suggestion. He testified he was “[d]esperate to do anything to straighten myself out.” He provided letters from his therapist, a licensed professional counselor (LPC).<sup>2</sup> The therapist commented that Applicant's motivation began when he witnessed the video, an experience that “[c]learly shocked him to the core.” He noted that Applicant had “extreme remorse” for his behavior the day of his arrest, “[f]eels these behaviors went entirely against his sense of moral integrity. . . .” and has a “[t]remendous desire to develop the insight and behavioral change such that he never repeat these behaviors again.” (GE 1; AE F; Tr. 43, 49-51)

In November 2012, the therapist wrote that Applicant “[h]as engaged in his own personal development with great determination and vigorous effort . . . to an extent uncommonly witnessed in this office.” He explained that Applicant was attending AA, considering sponsoring others, attending church regularly, and recognizing the improvements in his health, motivation, and improved family relations. Applicant followed all therapeutic suggestions and implemented many ideas of his own to further his goals. The therapist indicated that the counseling ended successfully in June 2013. The counselor concluded, “In my professional opinion, the prognosis for [Applicant] remains excellent, especially with regards his sobriety . . . .” Applicant testified that he attended therapy longer than required by his sentence because it helped him learn how “[t]o best live, you know, without alcohol. How to take advantage of – of the things I discovered through the program.” (GE 1; AE F; Tr. 43, 49-51)

On January 25, 2013, Applicant entered into a plea agreement related to the 2012 arrest. The charge for refusing a breath test<sup>3</sup> was not prosecuted (*nolle prosequi*).

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<sup>2</sup> The counselor's letterhead indicates he is a licensed professional counselor (LPC). The documentation and testimony do not include additional information about his credentials or practice. (AE F)

<sup>3</sup> The court described the breath-test refusal as civil, rather than criminal, noting the “civil warrant is concluded by an order of *nolle prosequi*, and the civil refusal warrant will not be renewed.” (AE A)

Applicant pled guilty to the DWI. He was fined and sentenced to 90 days in jail (50 days suspended); good behavior for two years; his driving license was revoked for 12 months, and an ignition interlock was installed in his car for 6 months. Applicant also agreed to plead guilty to the charge of felony assault on a law enforcement officer, but conviction was withheld, and the plea was taken under advisement, subject to the following requirements: one year of supervised probation; during probation, attend substance abuse counseling, and mental health counseling, if recommended; abstain from alcohol; submit to random substance abuse tests; and exhibit good behavior during a two-year advisement period that expires January 25, 2015. Applicant was required to attend ten counseling sessions. Following successful completion of all requirements, the assault charge would be reduced to a lesser charge of misdemeanor assault and battery, a 12-month sentence would be suspended, with good behavior required for two additional years. The court also imposed a fine of \$350, reduced to \$250 upon successfully completing the state alcohol safety action program (ASAP). (GE 4; AE A, B; Tr. 44, 49)

Applicant's probation officer provided a letter showing that he complied with the court's orders, his random substance abuse tests during the one-year period were negative, and he successfully met the conditions of his probation, as of January 2014. He testified that he also completed 19 days of jail time, as required. His ASAP case manager informed the court in January 2014 that Applicant had met the requirements of the state ASAP program. The ASAP executive director provided a report on Applicant's successful completion of the ignition interlock requirement. It showed that, while driving the car to and from work each day for six months, he had no violations. (AE C, D, E; Tr. 44-49)

Applicant testified that he has made lifestyle changes over the past two years to have a more balanced life. He changed his work schedule to reduce his hours at the off-site location to three days per week. He does not work more than 40 hours per week, unless specifically required. He spends more time with family, and doing physical activities around the home. At social events where alcohol is served, he explains to friends and coworkers that, "I don't drink anymore, I can't handle it, but I can be with you guys." They have been accepting and supportive of his sobriety. Applicant also volunteers to be the designated driver. (Tr. 51-54, 59-61, 72-73)

Applicant submitted his Navy fitness reports for 1982 through 1997. He received several recommendations of early promotion, and scores of either 4 (above standards) or 5 (greatly exceeds standards) in most categories. His facility security officer (FSO) described him as a "[d]edicated, hard-working employee with no history of security incidents or infractions during his 14½ years of service." He was selected Engineer of the Quarter in 2002, and Support Engineer of the Year in 2009. Applicant's therapist recommended him for a security clearance based on his opinion that Applicant is trustworthy and reliable. (GE 4; AE A, F, O, P; Tr. 58)

Several coworkers and friends provided character references. A senior program manager and former Navy commanding officer, who has known Applicant 16 years, noted that he performed his work in a way that “far exceeded any expectation and [was] a credit to the company.” He also stated that he and other acquaintances had noted that Applicant does not drink alcohol at social events. Another coworker who has known Applicant for 16 years, considers him to be in the top ten percent of the company’s employees. He noted that Applicant's dedication has resulted in his team receiving bonuses for putting in extra time and work and completing projects ahead of schedule. He has socialized with Applicant since June 2012 and has not seen Applicant consume alcohol. (AE I, J)

Another project manager who provided a reference opined that Applicant's commitment to Navy personnel is “beyond reproach.” He has been with Applicant at social occasions and noted that Applicant did not drink alcohol. He believes that Applicant “[h]as truly embraced his sobriety. . . “ and possesses the “[h]igh character and responsibility” required to hold a security clearance. (AE K; Tr. 52-53)

### **Policies**

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and policy in the AG.<sup>4</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines G and J.

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest<sup>5</sup> for an applicant to either receive or continue to have access to classified information. The Government must produce admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government’s case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.<sup>6</sup> A person who has access to classified information enters a fiduciary relationship with the

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<sup>4</sup> Directive. 6.3.

<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>6</sup> See *Egan*, 484 U.S. at 528, 531.

Government based on trust. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as her or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.<sup>7</sup>

## **Analysis**

### **Guideline G (Alcohol Consumption)**

AG ¶ 21 expresses the following security concern about alcohol consumption:

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

AG ¶ 22 includes the following potentially applicable disqualifying conditions:

(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;

(b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(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;

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

(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;

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and

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<sup>7</sup> See *Egan*; AG ¶ 2(b).

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant was arrested on a charge of Drunk in Public in 2006, and DWI in 2012. While intoxicated, he fought with police during his 2012 arrest, resulting in a charge of felony assault on a law enforcement officer. He has not been diagnosed as alcohol dependent or an alcohol abuser. AG ¶ 22(a) applies.

AG ¶ 23 lists the following mitigating factors:

(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;

(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);

(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,

(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.

Applicant's two alcohol-related arrests in the past eight years are infrequent. His significantly changed circumstances since his arrest in 2012—his two years attending AA, his year of mental health counseling, and most significantly, his two years of sobriety—reflect well on his current reliability, trustworthiness, and judgment. AG ¶ 23(a) applies.

Applicant was repelled by the video showing his assault on a police officer while intoxicated in 2012. It was a life-changing event that made him realize the need for significant, immediate changes in his life. He has not had alcohol since that day. The next day, he began attending AA regularly, as confirmed by his probation officer and his sponsor. He also began therapy with a licensed professional counselor who documented Applicant's significant remorse, desire for change, and commitment to

sobriety. He began AA and therapy on his own initiative. He has demonstrated commitment by his pattern of abstinence over the past two years. He successfully completed counseling in June 2013. In line with the Appeal Board's holding that substance abuse professionals should not be defined narrowly,<sup>8</sup> I find that Applicant's licensed professional counselor qualifies under AG ¶ 23(d). He determined that, after completing one year of counseling, Applicant has an "excellent" prognosis. AG ¶¶ 23(b) and (d) apply.

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

AG ¶ 30 expresses the security concern pertaining 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and,
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

Applicant was arrested and pled guilty to a charge of Drunk in Public in 2006. In 2012, he was arrested and, subject to a plea agreement, he pled guilty to DWI and felony assault on a law enforcement officer. AG ¶¶ 31(a) and (c) apply. Applicant has

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<sup>8</sup> The Appeal Board has held that Administrative Judges should not construe definitions of qualified substance abuse professionals narrowly. In ISCR 07-00558.a1, it noted that AG ¶¶ 22(d) and (e) "[c]ontemplate a broad range of providers who, by education and by position, are qualified to diagnose and treat alcohol dependence and other substance abuse disorders. By its own terms, AG ¶ 22(d) lists the . . . types of care providers by way of example only. . . . In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security." ISCR Case No. 07-00558 at 5 (App. Bd. Apr. 7, 2008).



successfully completed his probation, and therefore, AG ¶ 31(d) does not strictly apply. However, he does remain under an advisement period, and his felony charge will not be reduced to a misdemeanor until he completes the advisement period in January 2015.

AG ¶ 32 provides the following conditions that could mitigate security concerns under Guideline J:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense;

(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; and,

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

AG ¶ 32(a) discusses essentially the same mitigation as AG ¶ 23(a) under Guideline G, and applies for the reasons enumerated there. The arrests occurred two to eight years ago, and Applicant has changed his life in ways that reflect favorably on his trustworthiness, making a recurrence unlikely. AG ¶¶ 32(b), (c), and (e) are not relevant.

Applicant has demonstrated rehabilitation in numerous ways. The record contains no evidence of alcohol-related convictions since 2012. He has successfully completed his probation, which required random sobriety monitoring. He completed all the requirements of his sentence, except for the advisement period, which expires in six months. He has been involved in AA since just after his arrest. He has successfully completed therapy, and his counselor noted his remorse, and his commitment to a changed lifestyle. He has reduced the stresses that contributed to his excessive alcohol use. He received an excellent prognosis. He has been sober for two years. His life, references, and conduct show rehabilitation. AG ¶ 32(d) applies.

## Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the totality of an applicant's conduct and all the 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 change; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I also considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's stressful, high-pressure job was a significant factor in his abuse of alcohol. He led an unbalanced lifestyle, pushing himself to unreasonable lengths to meet project goals, and using alcohol excessively. Applicant candidly admits his excessive alcohol use, which led to the arrest and confrontation with law enforcement. Although several months of the advisement period remain, Applicant has completed all other court requirements, and has changed his life.

He has rehabilitated his lifestyle to a more reasonable combination of home and work—he spends less time commuting to the off-site work location and more time with his family. He works no more than 40 hours, unless specifically required to do so. He has been sober for two years, and continues to attend AA meetings at least weekly. He is not only supported in his sober lifestyle by his own commitment, but by his sponsor, and his friends and coworkers. His military fitness reports show a history of commendable service during his Navy career. His employment awards show his employer lauds his work performance. His FSO recommends him based on his reliability for more than 14 years. In the Navy, and as a civilian, he has held security clearances for 30 years without a violation. Applicant's sobriety demonstrates maturity and character, and his past conduct is unlikely to recur.

A fair and commonsense assessment of the available information shows Applicant has satisfied the doubts raised about his suitability for a security clearance.

### **Formal Findings**

Paragraph 1, Guideline G	FOR APPLICANT
Subparagraphs 1.a – 1.b	For Applicant
Paragraph 2, Guideline J	FOR APPLICANT
Subparagraph 2.a	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

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RITA C. O'BRIEN  
Administrative Judge