



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-02416
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

06/30/2016

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**Decision**

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HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny him eligibility for access to classified information. He has two convictions for driving under the influence (DUI) and one conviction for being drunk in public. Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the facts proven by the written record concerning his history of excessive alcohol consumption. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on May 19, 2015, the DoD issued a Statement of Reasons (SOR) detailing security concerns. On June 8, 2015, Applicant answered the SOR and elected to have the matter decided without a

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<sup>1</sup> 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 September 1, 2006.

hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM), dated July 31, 2015. The FORM contained four attachments (Items). On December 2, 2015, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. He did not reply within the 30-day period from receipt of the FORM. The case was assigned to me on April 22, 2016.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the arrests in the SOR, but indicated his most recent arrest occurred on August 9, 2013.<sup>2</sup> He indicated he had attended DUI education classes, had enrolled in court-ordered counseling and had completed 60 weekday and 12 Saturday sessions, and obtained his restricted driver's license. He admitted using cocaine in 2005. He denied volunteering for substance abuse treatment or counseling. He indicated he only enrolled in treatment classes at the urging of his father. He denied falsifying his March 2013 Electronic Questionnaires for Investigations Processing (e-QIP) for failing to report voluntary counseling or his August 2013 arrest. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant is 34 years old and is not married. (Item 2) He works for a defense contractor, for which he is seeking to obtain a security clearance. (Item 3) Applicant has not provided documentation as to duty performance, character reference, mitigation or extenuation concerning the concerning the DUI offenses and illegal drug use listed in the SOR. He did not provide documentation in his reply to the SOR or the FORM.

On July 18, 2013, Applicant had a personal subject interview (PSI) during which his cocaine and alcohol use was discussed. (Item 3) In 2005, following a rough break up with a girlfriend following a six year relationship, Applicant stated he used cocaine every other day for four or five months. (Item 3) He asserts he does not intend to use illegal drugs in the future. (Item 3) He did not list his 2005 cocaine use on his e-QIP because it was beyond the seven-year scope of the illegal drug use questions. (Item 3)

Following Applicant's February 2007 DUI arrest, his father advised him to volunteer to take an alcohol and substance abuse class, hoping for leniency when the matter went to court. (Item 3) Applicant was court ordered to attend an Alcohol Safety Action Program (ASAP). He also attended a group therapy and counseling sessions twice a week for two months, before successfully completing the state ASAP. (Item 3) From July 2007 through October 2007, he attended two hours of therapy three times a week for six weeks. (Item 3) Applicant provided no information or circumstances as to what lead to his 2007 arrest. He did state that following his arrest, he continued to drink beer in approximately the same amounts, but only on weekends, refraining from drinking during the week. (Item 3)

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<sup>2</sup> The SOR incorrectly lists the arrest as August 9, 2011, however in Applicant's SOR response he says the arrest occurred in 2013.

In August 2013, Applicant was arrested for DUI. (Item 4) He provided no facts or circumstances as to what lead up to his arrest. In February 2014, Applicant was sentenced for the August 2013 DUI to six month in jail, of which five months and 20 days was suspended. (Item 4) He paid \$737.36 in fines and court fees. His driver's license was suspended for three years and he was ordered to enroll in the state ASAP. (Item 4) In September 2014, he completed the required DUI education classes. The other classes were completed in July 2014. He regained his driver's license, which remains restricted until November 2016.

On Applicant's March 2013 e-QIP, he listed his 2007 DUI arrest and his 2008 drunk in public arrest. (Item 2) The August 2013 DUI arrest was not listed because it had not yet occurred, which is the same reason it was not discussed during his PSI. He answered "no" to the question which asked if he has ever voluntarily sought counseling or treatment as a result of his use of alcohol. (Item 2) He asserts he never "voluntarily" sought counseling or treatment, but did so in 2007 only at the urging of his father. His father asked him to seek counseling and treatment in hopes of leniency in court. He did not explain why he answered "no" to the question which asked if he had ever been ordered, advised, or asked to seeking counseling or treatment as a result of his use of alcohol.

### **Law and 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 must be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of 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 applicant or proven by Department Counsel. . . .” The applicant 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 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **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.”

Applicant was arrested and convicted in 2008 for being drunk in public. He was arrested and convicted of DUI in 2007 and 2014.<sup>3</sup> 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,” and 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,” apply.

AG ¶ 23 provides conditions that could mitigate alcohol consumption security concerns:

- (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;

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<sup>3</sup> Applicant was arrested for DUI in August 2013 and convicted in February 2014. (Item 4)

(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.

None of the mitigating conditions apply. AG ¶ 23(a) does not apply because the behavior was not infrequent and it did not occur under unusual circumstances. He provided no information as to the circumstances leading up to his three arrests so it cannot be determined that his arrests occurred under unusual circumstances. His last arrest was in August 2013. Sufficient time has not passed to provide assurance that this adverse alcohol-related conduct will not recur. He has received DUI educational classes, but he received similar classes following his 2007 DUI arrest. The earlier classes did not prevent the recurrence of another DUI.

AG ¶ 23(b) does not apply because there is no acknowledgement of alcoholism or issues of alcohol abuse. Additionally, there is no evidence of actions to overcome the problem and there is no period of abstinence shown. The only evidence of any change in his drinking habits is that following his 2007 arrest, he limited his drinking to beer only on the weekend.

AG ¶ 23(c) does not apply. Although he completed the court-ordered state program, he has a history of a prior treatment and relapse. AG ¶ 23(d) does not apply because Applicant never successfully completed aftercare or demonstrated a clear and established pattern of modified consumption or abstinence. In 2014, he completed the court-ordered DUI education classes. Applicant's completion of group therapy and counseling after his 2007 DUI did not preclude a recurrence of drunk driving. While he has completed the ASAP required by the court for this August 2013 DUI, he has yet to establish a record of sustained responsible consumption from which I could reasonably conclude that his alcohol abuse will not reoccur. Additionally, it is important to note that Applicant did not volunteer for treatment. He did so only at the urging of his father in hopes of leniency when he appeared in court for his DUI arrest.

## **Drug Involvement**

AG ¶ 24 expresses the security concern pertaining to drug involvement: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.”

For four or five months in 2005, Applicant used cocaine every other day following the breakup of a six year relationship. AG ¶ 25 describes several conditions that could raise a security concern and may be disqualifying. The following two conditions apply:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

AG ¶ 26 provides conditions that could mitigate security concerns. AG ¶ 26(a) states, “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.” Applicant's last use of cocaine occurred more than ten years ago. He asserted he intends to never use illegal drugs again.

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 record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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.”<sup>4</sup>

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<sup>4</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The drug allegation was mitigated. Because of Applicant's abstention from illegal drug usage for more than ten years and his stated desire never to use illegal drugs again, there is reasonable certitude that he will continue to abstain from drug use. His illegal drug use ending more than ten years ago does not cast doubt on his current reliability, trustworthiness, or good judgment. Because he will not use illegal drugs in the future, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored. AG ¶ 26(a) applies.

## **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 provides conditions that could raise a security concern and may be disqualifying in regard to falsification of Applicant's security clearance. The following condition applies:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The SOR raised the issue as to whether Applicant falsified his March 2013 e-QIP by intentionally failing to disclose derogatory information about his alcohol treatment and arrests. He did not list the August 2013 DUI arrest because it had yet to occur. He did not list he had "voluntarily" sought treatment for his use of alcohol because he had not voluntarily sought treatment following his 2007 DUI arrest, but did so at the urgings of his father. His answer to the question was not a falsification. Applicant did not falsify either question listed in the SOR.

Section 24 of the e-QIP includes an inquiry concerning whether he had ever been ordered, advised, or asked to seek counseling or treatment as a result of his alcohol use. Having been advised by his father to attend an alcohol education program in 2007, Applicant seemingly should have responded "yes" to that question. However,

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The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

the SOR does not allege that Applicant falsified that inquiry, and he did not explain his negative response.

### **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 the facts and circumstances surrounding this case. In requesting a decision without a hearing, Applicant chose to rely on the written record. However, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances and facts that would mitigate the alcohol consumption security concerns. Applicant has not presented sufficient information to rebut, explain, extenuate, or mitigate the facts proven by the written record. By failing to provide such information, and simply acknowledging the SOR allegations, he failed to mitigate the security concerns. He provided no information as to the circumstances surrounding his three alcohol-related offenses.

The two allegations of falsification set forth in the SOR were not established. The drug allegation was mitigate4d. However, his problematic alcohol history creates doubt about his current reliability, trustworthiness, good judgment, and ability to protect classified information. His second and most recent DUI arrest occurred less than two years before the issuance of the SOR. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a security clearance at some time in the future. The awarding of a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both



disqualifying and mitigating, to the evidence presented. However, a clearance at this time is not warranted.

Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **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, Alcohol Consumption:	AGAINST APPLICANT
Subparagraphs 1.a –1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Drug Involvement:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Personal Conduct:	FOR APPLICANT
Subparagraphs 3.a and 3.b:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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CLAUDE R. HEINY II  
Administrative Judge