



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



In the matter of:	)	
	)	
XXXXXXXXXXXX, XXXXX	)	ISCR Case No. 14-02599
	)	
Applicant for Security Clearance	)	

**Appearances**

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

03/18/2016

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guidelines H (drug involvement) and J (criminal conduct), but failed to mitigate security concerns under Guideline G (alcohol consumption).

**Statement of the Case**

On January 30, 2013, Applicant submitted a Questionnaire for National Security Positions (SF-86). On March 18, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines G, H, and J. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant,

and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued.

Applicant answered the SOR on April 13, 2015. He elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated August 28, 2015, was provided to him by letter dated September 2, 2015. Applicant received the FORM on September 11, 2015. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any additional information. The case was assigned to me on November 12, 2015.

### **Findings of Fact**

Applicant admitted all the SOR allegations. After a thorough review of the record, I make the following findings of fact.

### **Background Information**

Applicant is a 34-year-old refueler employed by a defense contractor since November 2012. He seeks a security clearance. Applicant held a security clearance while he was in the U.S. Navy, discussed *infra*. (Item 2)

Applicant was awarded his high school diploma in July 2005. At the time he completed his SF-86, he had been attending a community college since March 2010. (Item 2) Applicant served in the Navy from September 2007 to October 2012, and received a general under honorable conditions discharge as a result of alcohol rehabilitation failure. At the time of his discharge, he was an engineman third class (pay grade E-4) (Items 2, 3) He married in May 2009, and has a five-year-old son.<sup>1</sup>

### **Alcohol Consumption/Drug Involvement/Criminal Conduct<sup>2</sup>**

Applicant's SOR alleges a history of two pre-service drug-related incidents, one in-service misconduct incident, and five in-service alcohol-related incidents or events.

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<sup>1</sup>Unless otherwise indicated, background information was derived from Applicant's SF-86. (Item 2)

<sup>2</sup>Applicant's alcohol, drug, and criminal conduct incidents are discussed in chronological order versus the order discussed in his SOR.

In October 1999, while still in high school, Applicant was involved in a verbal confrontation at a nightclub with his then girlfriend. His girlfriend left the nightclub and drove off in Applicant's car without his permission. Applicant chased her to a gas station and when he caught up with her, their verbal confrontation continued. The police were summoned and they searched Applicant's vehicle. They discovered a pipe containing marijuana. Applicant was charged with misdemeanor possession of a controlled substance and drug paraphernalia. The charges were dismissed "because the officers illegally searched [my] vehicle."<sup>3</sup> (SOR ¶ 2.b; SOR answer; Items 2, 3)

The SOR alleges that in September 2006, Applicant was arrested and charged with possession of marijuana and possession of controlled substance paraphernalia. He purportedly pled nolo contendere and paid \$190 in fines and fees. There are no primary source documents that substantiate this allegation in the FORM. See *fn 4, infra*. (SOR ¶ 2.a; SOR answer; Items 3, 4)<sup>4</sup>

In July 2008, Applicant was involved in an altercation with a shipmate who blocked his view while he was watching television in the ship's galley. When his shipmate continued to block his view, words were exchanged and Applicant "flicked" his shipmate's nametag and the shipmate "smacked" him. Applicant was awarded non-judicial punishment. He was found guilty of simple assault and received 30 days restriction and 30 days extra duty. (SOR ¶ 3.b; SOR answer; Items 2, 3)

In 2010, Applicant was involved in an alcohol-related verbal altercation with another crew member witnessed by a senior officer at a bar during an overseas port call. As a result of the altercation, Applicant was referred to a one-week class at Navy Substance Abuse Rehabilitation Program (NSARP). (SOR ¶ 1.e; SOR answer; Item 3)

In May 2012, after a day of overexposure to the sun and heavy drinking during an overseas port call, Applicant became severely sunburned and when he

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<sup>3</sup>The FORM does not contain any information whether Applicant received a drug waiver before entering the Navy or whether his previous drug involvement was vetted at the time he received his security clearance in the Navy.

<sup>4</sup>This SOR allegation conflicts with Applicant's March 1, 2013 Office of Personnel Management Personal Subject Interview (OPM PSI) and follow-up May 10, 2013 OPM PSI. In his May 2013 OPM PSI, Applicant asserted that he was not charged with possession of marijuana or a controlled substance in 2006. He stated he was charged with a similar offense in 1999, which was his only drug-related charge. He corroborated this version in his DOHA interrogatories. There is no FBI "rap sheet" in the FORM to substantiate this SOR allegation, but there is a rap sheet that substantiates the 1999 arrest. (Items 3, 4)

returned to his ship, he was in severe pain. The ship's corpsman suspected that he may have been drugged. An investigation ensued, but Applicant does not know the outcome of the investigation. As a result of the incident, Applicant received documented counseling regarding his alcohol consumption. (SOR ¶ 1.a; SOR answer; Item 3)

In June 2012, after a day of drinking during an overseas port call, Applicant was involved in a physical altercation while re-boarding his ship. He was awarded non-judicial punishment. He was found guilty of drunk and disorderly conduct and simple assault. He was reduced from pay grade E-5 to E-4, given 45 days restriction, 45 days extra duty, and ordered to attend NSARP. Applicant completed all of the program requirements. (SOR ¶ 1.b; SOR answer; Item 3)

In September 2012, Applicant was arrested and charged off-base with driving under the influence of alcohol (DUI). He had gone to a Japanese restaurant to pick up take-out dinner and while waiting consumed two Long Island ice tea drinks. Applicant was unable to start his car when he left the restaurant and was approached by a police officer and questioned. The officer concluded that Applicant had been drinking and ordered him to participate in a field sobriety test. When Applicant refused, he was arrested for DUI. In October 2012, he was convicted of DUI and sentenced to 12 months confinement, which was suspended, unsupervised probation for two years, a \$500 fine, and his driver's license was suspended for 12 months. He was also ordered to participate in a ten-week alcohol safety action program once a week from November 2012 to February 2013. (SOR ¶ 1.c; SOR answer; Item 3)

In October 2012, Applicant was discharged from the Navy with a general under honorable conditions discharge as a result of alcohol rehabilitation failure. (SOR ¶ 1.d; SOR answer; Item 3)

During Applicant's March 2013 OPM PSI, Applicant stated since separating from the Navy, he has consumed a half of a bottle of wine or three beers at home on weekends. His future intent is to maintain or decrease his alcohol consumption because alcohol makes him tired. He claimed that he does not drink to the point of intoxication and does not believe that he has a problem with alcohol. Applicant acknowledged that his alcohol consumption has had a negative impact on his military career, but claims it does not affect his personal life. (SOR ¶ 1.f; SOR answer; Item 3)

### **Character Evidence**

Although Applicant did not submit any reference letters, his OPM PSI states that he went on three deployments in 2008, 2010, and 2012. According to

his DD-214, he was awarded the Navy and Marine Corps Achievement Medal, the Navy Good Conduct Medal, the National Defense Service Medal, the Global War on Terrorism Expeditionary Medal, the Global War on Terrorism Service Medal, and two Sea Service Deployment Ribbons. (Items 2, 3)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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 adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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 (4<sup>th</sup> 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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**

### **Alcohol Consumption**

AG ¶ 21 articulates the security concern relating 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.

AG ¶ 22 provides three alcohol consumption disqualifying conditions that could raise a security concern and may be disqualifying, AG ¶ 22(a) “alcohol-related incidents away from work, such as driving while under the influence . . .”; 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”; and AG ¶ 22(f) “relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.”

The Government established AG ¶¶ 22(a), 22(c), and 22(f) as a result of Applicant’s September 2012 DUI, his repeated alcohol-related incidents while in the Navy requiring command involvement, and his general under honorable conditions discharge in October 2012 as a result of alcohol rehabilitation failure.

Four alcohol consumption mitigating conditions under AG ¶ 23 are potentially applicable:

(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.

Considering the totality of the circumstances in this case, I find none of the mitigating conditions fully apply. Applicant has a history of documented alcohol-related incidents that began in 2010 during an overseas port call. Alcohol played a significant role in the demise of Applicant's Navy career in 2012. His command counseled him following overseas port call drinking episodes, he was reduced from pay grade E-5 to E-4 at non-judicial punishment in June 2012 as a result of alcohol-related misconduct, he was convicted of an off-base DUI in October 2012, and he was discharged from the Navy as an alcohol rehabilitation failure in October 2012.

In addition to whatever informal counseling and non-judicial punishment Applicant received, the Navy required him to attend NSARP in 2010 and 2012. After he was discharged from the Navy, he was required to attend a ten-week alcohol safety action program by the local authorities as a result of his September 2012 off-base DUI. However, despite the adverse effects alcohol has had on Applicant, he continues to believe that he does not have a problem with alcohol.

## Drug Involvement

AG ¶ 24 articulates the security concern pertaining to drug involvement:

[u]se 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.

AG ¶ 25 provides one drug involvement disqualifying condition that could raise a security concern and may be disqualifying, AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture purchase, sale, or distribution; or possession of drug paraphernalia."<sup>5</sup> The Government established AG ¶ 22(c) as a result of Applicant's October 1999 drug-related arrest. For reasons discussed, *supra*, there is insufficient corroborating evidence to establish Applicant's purported 2006 drug-related arrest.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

(a) 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;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

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<sup>5</sup>AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.



(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's 1999 drug-related arrest occurred when he was 18 years old, while he was in high school, and was pre-service. The charges against him were dismissed. As noted, I find the 2006 drug-related arrest to be unsubstantiated. With the 2006 arrest unsubstantiated, that leaves a one-time 1999 arrest – an arrest that occurred 17 years ago and the charges were dismissed. Apart from Applicant's 1999 drug-related arrest, there is no evidence that Applicant had any further involvement with drugs. Full application of AG ¶¶ 25(a) and 26(b) (3) is warranted.

### **Criminal Conduct**

AG ¶ 30 articulates 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.

Alcohol consumption concerns under SOR ¶¶ 1.a and 1.b as well as drug involvement concerns under SOR ¶¶ 2.a and 2.b were cross-alleged under this concern.

AG ¶ 31 provides two criminal conduct disqualifying conditions that could raise a security concern and may be disqualifying, AG ¶ 31(a) "a single serious crime or multiple lesser offenses"; and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

The Government established AG ¶¶ 31(a) and 31(c) as a result of Applicant's June 2012 non-judicial punishment for being drunk and disorderly and simple assault. (SOR ¶ 1.b) However, the evidence contained in the FORM

regarding Applicant's May 2012 alcohol consumption during an overseas port visit does not substantiate criminal conduct as envisioned by the Directive. (SOR ¶ 1.a)

The evidence that supports Applicant's eight-year-old July 2008 non-judicial punishment describes an incident between two shipmates that began by one shipmate blocking the view of another shipmate trying to watch television and resulting in a minor altercation. (SOR ¶ 3.b) This incident led to Applicant being found guilty of simple assault at non-judicial punishment.<sup>6</sup>

As noted *supra*, I found the September 2006 drug-related charge to be unsubstantiated based on lack of FORM evidence. The October 1999 drug-related pre-service arrest resulted in charges being dismissed and occurred when Applicant was 18 years old, in high school, and some 17 years ago. (SOR ¶¶ 2.a and 2)

AG ¶ 32 provides conditions for potentially applicable criminal conduct mitigating conditions:

(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; 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.

The comments discussed in the alcohol consumption and drug involvement analysis section above are applicable. For reasons discussed *supra*, AG ¶¶ 32(a) and 32(d) are fully applicable.

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<sup>6</sup>Non-judicial punishment, authorized under Article 15, Uniform Code of Military Justice (UCMJ), designed to dispose of minor offenses, is administrative in nature, and does not result in a federal conviction. See Article 15, UCMJ, Commanding Officer's Non-judicial Punishment; and Section 0109, Advice to Accused Prior to Initiation of Article 15, UCMJ, Proceedings, Navy Manual of the Judge Advocate General, JAGINST 5800.7F.

## **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 the 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.

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. AG ¶ 2(c). My comments in the Analysis section are incorporated in the whole-person discussion.

A security clearance adjudication is aimed at evaluating an applicant's judgment, reliability, and trustworthiness. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his five years of military service and his three years of employment as a defense contractor. Applicant provided no evidence corroborating rehabilitation. If other favorable evidence exists, Applicant did not provide it.

The gravamen of this case centers on Applicant's alcohol-related issues. It is clear from the record that alcohol was involved in the majority of problems Applicant experienced in the Navy leading to the early termination of his enlistment. This occurred after considerable command counseling, two referrals to NSARP, and an alcohol-related non-judicial punishment. After all of these events, Applicant was arrested for an off-base DUI. In spite of this history, Applicant does not believe he has a problem with alcohol and continues to drink. Applicant is a relative newlywed and the father of a young child. He appears to be a talented individual with considerable potential, who had at one time held the rank of engineman second class. He has yet to come to terms with the adverse impact alcohol has had on him.

Lastly, in requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the security concerns. By failing to provide such information, security concerns remain.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible 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, Guideline G: Subparagraphs 1.a – 1.f:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline H: Subparagraph 2.a – 2.b:	FOR APPLICANT For Applicant
Paragraph 3, Guideline J: Subparagraphs 3.a – 3.c:	FOR APPLICANT For Applicant

### **Conclusion**

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

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ROBERT J. TUIDER  
Administrative Judge