



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 07-10959
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel F. Crowley, Esquire, Department Counsel  
For Applicant: Pro Se

March 28, 2008

**Decision**

HENRY, Mary E., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on January 5, 2007. On November 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on December 3, 2007. He answered the SOR in writing on December 18, 2007, and requested a hearing before an administrative judge. DOHA received the request, and Department Counsel was prepared to proceed on January 23, 2008. I received the case assignment on January 28, 2008. DOHA issued a notice of hearing on February 12, 2008 and an amended notice of hearing on March 4, 2008. I convened the hearing on March 5, 2008, the

scheduled date, but at an earlier time. The government withdrew allegation 1.g. The government offered three exhibits (GE) 1 through 3, which were received without objection. Applicant and four witnesses testified on his behalf. DOHA received the transcript of the hearing (Tr.) on March 14, 2008. I held the record open for two weeks to submit additional matters. On March 11, 2008, Applicant submitted one exhibit (AE 1), without objection. The record closed on March 19, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, dated December 18, 2007, Applicant admitted all the factual allegations in the SOR, with explanation, including a change in some dates.

Applicant, who is 31 years old, works for a Department of Defense contractor as a draftsman. He started working for the contractor five years ago. He completed his security clearance application on January 5, 2007.<sup>1</sup>

Applicant dropped out of high school in the 9<sup>th</sup> grade. He obtained employment in the construction industry as an installer. Later, he worked as an autobody technician.<sup>2</sup>

Applicant began drinking at age 15 sporadically. He liked to party and to drink alcohol. By age 18, he drank alcohol daily. He generally consumed beer, on average 6-10 beers a day. Occasionally, he drank liquor. He never missed work as a result of his alcohol consumption, but he arrived late to work occasionally. He also used marijuana.<sup>3</sup>

In 1995, the police observed him driving and noticed an air freshener on his rear view mirror. The police stopped him and searched his car. The police found marijuana joints in the ashtray and arrested him for possession of marijuana. He appeared in court. The court fined him, directed he attend substance abuse classes and placed him on probation for one year. He complied with the terms of his sentence.<sup>4</sup>

Approximately two years later, in November 1997, after a day of drinking with friends at his house, he decided to leave his house. He drove down the road near his house, lost control of his car and hit a tree. A friend took him home. He left the car at the accident scene. The police arrived at his house a short time later, escorted him back to his car, and arrested him for driving under the influence of alcohol (DUI). The court based his sentence on first offender status. The court fined him \$1,000, suspended his

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<sup>1</sup>GE 1 (Security Clearance Application, dated January 5, 2007) at 1, 8-9; Tr. 18-20, 40.

<sup>2</sup>GE 1, *supra* note 1, at 9-16; Tr. 19.

<sup>3</sup>GE 3 (Answers to Interrogatories, dated September 10, 2007) at 8, 16; Tr. 22-24.

<sup>4</sup>GE 2 (United States Department of Justice, Federal Bureau of Investigation, criminal record report) at 2; GE 3, *supra* note 3, at 5; Tr. 24-25.

drivers license for one year and directed he attend substance abuses classes. He paid the fine and attended the classes. He, however, continued to drive, even though his license had been suspended.<sup>5</sup>

In 1998 or 1999, but not in 2001, the police arrested him a second time for DUI.<sup>6</sup> With his friends, he had been driving his car in mud, in an activity called rooting. On his way home, his car transmission broke. He fell asleep in the car with the engine running so that he had heat in the car. The police woke him and charged him with DUI. The court sentenced him to 90 days in jail, suspending 88 days; fined him \$1,000; directed he attend additional substance abuse programs; and suspended his drivers license for three years. Again, he complied with the terms of his sentence, except he continued to drive his car on a suspended license.<sup>7</sup>

In April 2000, he and friends spent the afternoon drinking alcohol. He left his friend's house and drove into the drive through lane of a McDonald's. He passed out in the drive through lane. Since he was on private property, the police could not charge him with DUI. The police arrested him for public drunkenness, took him to jail, and impounded his car. The court fined him \$50.<sup>8</sup>

One year later, on April 8, 2001, after an evening of drinking with friends, Applicant drove home. He has little recall about the subsequent events, but testified based on the information given him and in the police report. An off-duty police officer observed him driving erratically and called in a report. Another police officer stopped him, determined that he was intoxicated and arrested him. He spend the night in jail. The police charged him with a third DUI, a felony, and as a habitual offender, also a felony.<sup>9</sup> The police also charged him marijuana possession. Applicant has not had an alcoholic beverage since this date.<sup>10</sup>

Applicant appeared in court on August 29, 2001. Pursuant to a plea agreement, he pled guilty to both felony charges, which carried a mandatory jail time of five years

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<sup>5</sup>GE 2, *supra* note 4, at 2; GE 3, *supra* note 3, at 5, 17; Tr. 26-27.

<sup>6</sup>The record contains conflicting evidence about the date of Applicant's second DUI arrest. His statement to the investigator contains a reference to a DUI arrest in April 2001 and another arrest in July 2001. The factual scenario in the statement for both arrests is identical as is the charges and sentence. This factual summary is clearly in error. The criminal records report also contains inaccurate information. Given that Applicant admits to three DUI arrests, I find his testimony about the dates of these arrest credible.

<sup>7</sup>GE 2, *supra* note 4, at 2; GE 3, *supra* note 3, at 5; Tr. 29-30.

<sup>8</sup>GE 3, *supra* note 3, at 5; Tr. 29.

<sup>9</sup>GE 2, *supra* note 4, at 2; GE 3, *supra* note 3, at 5, 16-17; Tr. 30-31.

<sup>10</sup>Applicant denies being arrested for marijuana possession in June 2001 because such an arrest would have been his third felony arrest. Under the state's statutes, a third felony arrest would have resulted in a sentence to life in prison. Tr. 34.

each. The court sentenced him to 10 years in jail, suspending all but 18 months. The court also suspended his drivers license for five years and placed him on three years probation.<sup>11</sup>

Applicant began his prison sentence on August 29, 2001. He stopped smoking marijuana on this date. In jail, he reevaluated his life style. He enrolled in classes to prepare him for passing his General Education (GED) examination and attended alcoholics anonymous classes (AA). With sobriety, he realized how much a negative effect alcohol had on his life. For him, staying out of trouble from his alcohol use was easier than returning to jail. He decided that he preferred to move forward in his life. He no longer drinks and goes to parties, activities which he found easy to stop. He states that he is an alcoholic and that he does not intend to drink alcohol in the future. The earlier alcohol programs did not work for him because he did not believe he had a problem and did not want to be helped.<sup>12</sup>

Applicant served 15 ½ months on his sentence. He was released on good behavior. Initially, after his release, he returned to work in the construction industry and continued to attend substance abuse programs. He also ran a substance abuse program at a local church for three years.<sup>13</sup>

Shortly after his release from jail, his uncle told him, that if he obtained his GED and a certification for computer drafting, he would recommend Applicant to the company where he worked. By March 2003, Applicant had completed both. Applicant's uncle testified to this same information, adding that he specifically requested the company not to tell anyone that Applicant was his nephew until Applicant proved himself. To his uncle's knowledge, Applicant has not consumed any alcohol since leaving jail.<sup>14</sup>

Since starting his present job, Applicant has moved forward in his position. He now supervises four individuals. His department has nominated him five times for quality associate of the year. Applicant's supervisor also testified. He described Applicant as a very good employee, who is dependable, reliable and trustworthy.<sup>15</sup>

Applicant's parents, who are divorced, also testified. His mother admitted that he learned to drink and party from her. As a result of his incarceration, she and his step-father stopped drinking alcohol entirely. Before he went to prison, Applicant had no purpose in his life. He used his time in prison positively. He learned to forgive himself

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<sup>11</sup>GE 3, *supra* note 3, at 16-17; Tr. 31, 36.

<sup>12</sup>Tr. 24, 32-33, 36-37.

<sup>13</sup>*Id.* at 21-22, 32.

<sup>14</sup>*Id.* at 21-22, 32, 37-39.

<sup>15</sup>AE A (Recommendations from employer);Tr. 48-49, 54-55.

and became a responsible young man. His mother can trust him with anything now.<sup>16</sup> His father also describes him as a changed man, who did more partying than he should as a young man. Applicant finally realized that he was in the wrong place, a place he did not want to be. Applicant does not use alcohol or drugs.<sup>17</sup>

Applicant married six months ago and purchased a house last summer. His wife does not drink alcohol. He has new friends.<sup>18</sup> Since his arrest in April 2001, the police have not arrested him for any misconduct. He has had one parking ticket. The state returned his drivers license in January 2005. He now has a good driving record.<sup>19</sup>

## Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

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<sup>16</sup>Tr. 43-46.

<sup>17</sup>Tr. 58-60.

<sup>18</sup>Tr. 18, 33-34

<sup>19</sup>*Id.* at 21,

Applicant has the ultimate burden of persuasion as to obtaining 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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**

### **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.”

Under AG ¶ 31, the following disqualifying condition could raise a security concern in this case:

(a) a single serious crime or multiple lesser offenses.<sup>20</sup>

Between 1995 and 2001, the police arrested Applicant three times for DUI, once for public drunkenness, and twice for marijuana possession. Following his third DUI arrest, the police also charged him as a habitual offender, a felony. He served 15 ½ months in prison after his third DUI conviction, a felony, and three years on probation. During this six year period of time, Applicant had numerous arrests and criminal convictions related to his alcohol consumption and marijuana use. This disqualifying condition applies in this case.

AG ¶ 32 provides conditions that could mitigate security concerns:

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<sup>20</sup>At the hearing, the government withdrew allegation 1.g. because of the recent repeal of 10 U.S.C. 986. In light of the government's withdrawal, I need not discuss disqualifying condition AG ¶ 31(f).

(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.

Since his last DUI Arrest in April 2001, Applicant has not consumed any alcohol. A few months later, he stopped smoking marijuana. As a result of these decisions, he has not been arrested by the police for any criminal conduct, especially conduct resulting from his alcohol consumption, in nearly seven years. Because he no longer drinks and recognizes the negative impact of alcohol should he drink again, there is little likelihood that this conduct will reoccur. AG ¶ 32(a) applies.

While in prison, Applicant took classes to prepare for taking his GED examination and attend AA meetings. Since his release from prison, he obtained his GED and a certificate for computer skills. He has worked at the same job for five years, comes to work every day, works long hours, and is highly respected by his supervisors and co-workers. He is dependable and reliable employee. He also started a substance abuse program at a local church which he ran for two years. He has successfully rehabilitated his behavior and attitude towards alcohol, which ended his criminal conduct. AG ¶ 32(d) applies. None of the other mitigating conditions are applicable in this case.

### **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 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) 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. When he first started consuming alcohol, Applicant was a 15-year-old teenager. (See AG ¶ 2(a)(4).) He liked to party and drink, which lead to a serious drinking problem by age 18. He continued with his daily, excessive drinking until age 25, despite knowing the problems his drinking was causing him. (See AG ¶¶ 2(a)1)-(3), (5)).

Applicant quit drinking following his third DUI arrest. Until this time, he denied to himself that he had an alcohol problem. With this arrest, he finally realized that his drinking behavior was having a detrimental effect on his life. He made a clear decision in April 2001 to change his attitude and behavior towards alcohol. He stopped drinking immediately and continues not to drink. He acknowledges that he is an alcoholic and knows the negative impact future alcohol consumption will have on his life. He served his prison sentence without incident. During his incarceration, he took advantage of educational opportunities and attend AA meetings, where he gained a much clearer understanding of alcohol and its effect on his life. Since leaving prison, he has completed his GED and attained computer skills. He has held the same work position for five years and plans to continue working in this job. He recently married and purchased a home. He likes his present life and has no desire to return to his previous life style. Given his seven-year abstinence from alcohol and nearly seven-year abstinence from using marijuana, and the knowledge of others in his life about his past conduct, the potential for coercion, exploitation, pressure or duress for his past conduct is unlikely. (See AG & 2(a)(6)-(9). Applicant misused alcohol as a teenage and young adult. His incarceration caused him to seriously reevaluate his lifestyle and look at his future. He decided to change the direction of his life and successfully did.

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct.



## 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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Withdrawn

## Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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MARY E. HENRY  
Administrative Judge