



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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-----, ----- ) ISCR Case No. 07-18623  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Pro Se*

November 20, 2008

**Decision**

WHITE, David M., Administrative Judge:

Applicant was convicted of driving under the influence (DUI) in June 2000. In October 2006, he was arrested and charged with DUI, and with his subsequent refusal to take a breath test. He pled guilty to the latter charge, and the DUI charge was dismissed. He remains on probation for this offense, and continues to drink. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Security Clearance Application (SF 86), on December 4, 2006. On April 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G, and 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 May 5, 2008. He answered the SOR in writing (Answer) on May 23, and June 23, 2008, and requested a hearing before an Administrative Judge. DOHA received the latter response on June 26, 2008. Department Counsel was prepared to proceed on July 22, 2008, and the case was assigned to me on July 24, 2008. DOHA issued a notice of hearing on October 1, 2008, and I convened the hearing as scheduled on October 29, 2008. The Government offered exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified on his own behalf, and submitted exhibits (AE) A through C, which were admitted without objection. I granted Applicant's request to leave the record open until November 12, 2008 to permit submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on November 6, 2008. On that same date, Applicant submitted five additional documents via Department Counsel, and requested additional time to obtain a signed letter from his immediate supervisor. This request was granted, and he submitted the letter via Department Counsel on November 13, 2008. These additional documents were marked AE D, admitted without objection, and the record was closed.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the factual allegations set forth in SOR ¶¶ 1.a, 1.b, and (by reference) 2.a. He denied that the allegations reflected reduced judgment, reliability or trustworthiness on his part. Applicant's admissions, including those contained in his response to DOHA Interrogatories (GE 6), are incorporated in the following findings.

Applicant is a 51-year-old employee of a defense contractor. He retired from the Air Force in April 2000, after 20 years and 3 months of enlisted service. He is rated 50% disabled for injuries suffered in a bombing incident while serving overseas, and is active in the VFW. He held a security clearance for more than 28 years.

On May 21, 2000, Applicant was riding with his former wife in their car. She was driving because he had been drinking that evening. They had an argument during which he accused her of infidelity. She stopped the car in the middle of a major intersection, got out and walked away. To avoid blocking the intersection, Applicant slid over into the driver's seat and drove the car through the intersection and into a bank parking lot. A policeman who saw this take place approached and asked Applicant if he had been drinking. Applicant admitted that he had, and was then arrested for DUI. He failed a breathalyzer test at the police station. In April 2007, he told an investigator he could not recall his blood alcohol content (BAC), but he was "just over the limit." (Tr. at 43-47; GE 3 at 1; GE 6 at 5.) Court records indicate that he tested with a BAC of .161, however. He was sentenced, after pleading "no contest," to pay a fine and costs, to serve 3 days in jail with an additional 42 days suspended, to complete an alcohol safety program and serve 2 years probation. (GE 1 at 5.) He completed all sentence requirements satisfactorily.

On October 21, 2006, Applicant was driving home after 10 p.m. from a VFW post where his friend was the bartender. Applicant said he consumed two beers between about 7 and 8:30 p.m., then stopped drinking. A policeman stopped him because he did not have his lights on. The officer noticed a faint smell of alcohol and asked Applicant to perform a field sobriety test. He told the officer he could not do so because of the injuries to his leg. He was arrested and taken to the police station, where he refused to take the breathalyzer test because he could not contact his attorney. He remained in custody until October 23, 2006, when he posted \$1,000 cash bail. He was charged with both DUI and refusing to submit to a chemical test. On January 10, 2007, pursuant to a pretrial agreement, he pled guilty to the test refusal charge and the prosecutor dismissed the DUI charge. He was sentenced to pay a \$7,000 fine with \$3,000 suspended, 180 days in jail with 150 days suspended, a year's suspension of his driver's license, 80 hours of community service and 5 years probation. He was also ordered to attend the alcohol safety program again. He completed that course, but still owes \$3,000 of the fine and will remain on probation until January 2012. (Tr. at 40-42, 73; GE 5; GE 6 at 3-4.)

Although not listed on the SOR as a potentially disqualifying allegation, Applicant was also arrested and convicted for a DUI in 1988 while serving in the Air Force. He and a group of friends went out drinking and he thought he was better off than his friends, so he drove home. He stated that he learned not to drink and drive from that incident. (Tr. at 81-84.) However, he continues to drink alcohol. (Tr. at 95.)

Applicant submitted character reference letters from three colleagues and supervisors. These letters attest to his outstanding character and integrity, and his superior performance at work. (AE A: AE B; AE D at 3-4, 8-9.) On June 6, 2007, he was evaluated by the VA and found not to meet the criteria for a diagnosis of alcohol abuse or dependence. (AE C.) He completed Alcohol and Drug Information School, a 12-hour course, on February 1-3, 2008. (AE D at 11.) His military awards and decorations include the Purple Heart, the Air Force Commendation Medal with two devices, the Air Force Achievement Medal with one device, the Air Force Good Conduct Medal with four devices, and numerous service and unit awards. (AE D at 12.) He holds a leadership in his VFW Post, and has worked to supply telephone calling cards to deployed troops.

### **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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

## **Analysis**

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

AG ¶ 21 expresses the security concern pertaining to alcohol consumption: “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.” AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The disqualifying condition asserted by the Government in this case is: “(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.”

Applicant was arrested twice for DUI since leaving active duty in 2000. The first time he engaged in an argument with his former wife while she was driving him home, and provoked her to the point that she stopped the car in a busy intersection and walked away. He then chose to drive the car, and was arrested and convicted. His October 2006 DUI arrest resulted from his driving at night with his lights off after an evening at the VFW Post bar. He refused to participate in chemical testing for alcohol levels, despite claiming he had only consumed two beers some two hours before his arrest. He was held in jail until he posted a \$1,000 cash bond more than a day later. He received a relatively severe sentence, although not convicted of DUI as a result of his plea agreement. The Government has established substantial evidence raising security concerns under this guideline, shifting the burden of proof to Applicant to mitigate those concerns.

AG ¶ 23 provides conditions that could mitigate 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;

(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 most recent DUI arrest was only two years ago, and is one of three such arrests since 1988. The conduct of concern is recent and, with three such incidents in 20 years, can not be considered infrequent. Applicant's uncorroborated version of his DUI arrests would suggest unusual circumstances, but his admitted response to each set of circumstances reflected bad judgment that continues to cast doubt on his current trustworthiness. He provoked his wife to leave the car in his intoxicated state, then drove the car himself. He refused chemical testing that would have confirmed his lack of intoxication had that been the case. Applicant established no

mitigation under AG ¶ 23(a). He neither asserted nor provided evidence to support mitigation under AG ¶¶ 23 (b), (c), or (d).

### **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. Disqualifying conditions asserted by the Government were: "(a) a single serious crime or multiple lesser offenses;" "(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;" and "(d) individual is currently on parole or probation."

Applicant was arrested and convicted for DUI in 2000, with a BAC of .161. He was again arrested for DUI in 2006, but refused alcohol-level testing and was convicted of that offense in lieu of the DUI charge. He gave no rational explanation for refusing the chemical test of his blood alcohol level that would be consistent with innocence of the DUI. He will remain on probation until January 2012 for this offense, with a suspended 5 month jail sentence and additional \$3,000 fine pending his continued good behavior. The Government has presented substantial evidence raising security concerns under these disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. Applicant failed to establish mitigation under AG ¶ 32 (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." It is just two years since his most recent DUI arrest, driving home from an evening spent at the VFW post bar - an activity he continues to be involved with. He refused chemical testing to determine his BAC on that occasion. That casts doubt on his good judgment if he was sober, and casts doubt on his trustworthiness if he was not.

The only other potentially applicable mitigating condition in this case is AG ¶ 32 (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." Two years have passed since his last DUI arrest, but he has been on probation with substantial suspended punishment hanging over his head during this period. His employment record has been good, but on balance that is not yet sufficient to mitigate security concerns arising from a 20-year history of multiple DUI incidents leading to arrests and convictions.

## 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 established by the record evidence. 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. Applicant's conduct of potential concern involved two post-service DUI arrests, leading to convictions and substantial sentences including probation that will continue until 2012. He was evaluated and not diagnosed with alcohol abuse or dependence, but each of these incidents demonstrated poor judgment and disregard for his obligations under pertinent laws and regulations.

Applicant claimed that his admitted 1988 DUI offense taught him not to repeat such criminal conduct, but his 2000 and 2006 incidents belie his assertion that he learned to be more responsible. None of this conduct was involuntary or otherwise coerced. He continues to drink under conditions similar to those that led to these incidents, and his minimization of responsibility for his conduct precludes any judgment that continuation or recurrence is unlikely.

Applicant's good reputation among work colleagues is commendable, and if he can avoid future crimes and alcohol-related incidents that performance will support future consideration for security clearance eligibility. To date, however, he has not met his burden of mitigating security concerns raised by his behavior and judgment as alleged in the SOR.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his alcohol consumption and 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 G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

## Conclusion

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

DAVID M. WHITE  
Administrative Judge