



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



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
|                                  | ) | ISCR Case No. 08-04951 |
| SSN:                             | ) |                        |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Paul M. DeLaney, Esquire, Department Counsel

For Applicant: *Pro Se*

November 20, 2008

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**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant submitted Electronic Questionnaires for Investigations Processing (e-QIP), dated October 22, 2007. On August 6, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Activity). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, the 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 August 11, 2008. In his August 18, 2008, response to the SOR, he admitted all allegations under both guidelines and requested the opportunity to review and respond to the documentary evidence supporting the SOR. He also requested a determination based on the written record.

In response to Applicant's answer, Department Counsel prepared a File of Relevant Material (FORM), dated September 16, 2008. Applicant received the FORM on September 22, 2008. His response, dated October 23, 2008, was accepted into the record without objection by Department Counsel on October 31, 2008.

The case was forwarded to DOHA for assignment to an Administrative Judge for a determination. The case was assigned to me on November 5, 2008. Based upon a review of the case file, pleadings, and exhibits, I find it is not clearly consistent with the national security to grant Applicant a security clearance.

### **Findings of Fact**

Applicant is a 52-year-old quality engineer employed by a Defense contractor. Applicant was married in 1979 and the couple had two children. The marriage ended in divorce in 2003. In 2005, he remarried. Applicant actively served in the U.S. Navy for nearly 30 years before being honorably discharged. At the time of his retirement, Applicant had attained the rank of Chief Warrant Officer. His military record is impressive, contains many highlights, and he was awarded with several decorations.<sup>1</sup>

Starting in 1975, at about the age of 18 or 19, Applicant began drinking alcoholic beverages. Devoted to his military career, his consumption of alcohol was infrequent and mainly limited to social settings for the first 25 years. Alcohol abuse started to impact his life after 2000 with the onset of a string of events. His wife filed for divorce in September 2002. Three months later, his mother suddenly and unexpectedly died in December 2002. It became his pattern to have 2-5 beers a night after work, 3-4 days a week. The following year, in December 2003, Applicant retired from the Navy.

After retirement, Applicant's self-control over his drinking wavered as he remained idle for a couple of years. In about January 2004, he was arrested and charged with Driving Under the Influence (DUI). He was fined and sentenced to one year of probation. In approximately July 2005, around the time he accepted a brief period of employment in a position below his abilities, he was again arrested and charged with DUI. He was fined and sentenced to one year of probation. In approximately March 2007, Applicant was arrested and charged with DUI for a third time and Applicant last consumed alcohol on March 9, 2007. Applicant was fined and sentenced to 180 days in jail, with all but 20 days suspended. He was also put on three years of probation and ordered to receive alcohol counseling at a medically certified center for substance abuse.

From June 2007 through September 2007, Applicant underwent the prescribed alcohol counseling. After his initial alcohol screening and personal examination, he was directed by the center to attend a weekly group Outpatient session at the recovery center and to attend Alcoholics Anonymous (A.A.) once a week. He also met monthly with his clinician, a Licensed Clinical Drug Counselor (LCDCIII) with a Master of

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<sup>1</sup> FORM, Item 6, Certificate of Release or Discharge; Response to the FORM, Summary at 4-5.

Science degree. Applicant attended all the Outpatient sessions and opted to attend A.A. two to three times a week, beyond the number prescribed by the center. Recognizing that he had a problem helped expedite his recovery. With his requirements completed, a history of clean random drug and alcohol tests, and his clinician's favorable determination regarding his success, he was discharged from the center in September 2007, one month earlier than anticipated. He remains alcohol-free to date.

While undergoing outpatient treatment, Applicant was also undergoing a 90-day probationary period as a full-time quality inspector for a technology company.<sup>2</sup> Due to his performance, he was ultimately one of the few temporary employees chosen to become permanent. That trial experience and his military background qualified him for selection at his current company as a quality engineer, rather than simply a quality inspector. His current job evaluation shows that his performance is solidly in the good to excellent range with regard to competencies in the areas of cooperation, versatility, attendance, and professionalism.

Applicant takes full responsibility for his DUIs and alcohol abuse, noting his embarrassment and contrition for his inability to modify his behavior earlier. He stresses that these incidents do not reflect who he is now or how he was raised. He understands that he is simply unable to consume alcohol responsibly and is resolved to refrain from its use in the future. Noting Applicant's favorable prognosis upon discharge from the center, Applicant's probation officer following his second DUI stresses that Applicant always passed his drug and alcohol screenings and otherwise complied with all aspects of his probation: "He was one of the most responsible, capable, and respectful people I have ever had on reporting probation."<sup>3</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.

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<sup>2</sup> Response to FORM at 3.

<sup>3</sup> Response to FORM, Encl. 2 (Probation Officer Letter, dated Oct. 7, 2008).

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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”<sup>4</sup> The burden of proof is something less than a preponderance of evidence.<sup>5</sup> The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant.<sup>6</sup>

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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>7</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>8</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>9</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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<sup>4</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>5</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>6</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Executive Order 10865 § 7.

Based upon consideration of the evidence, I find the following adjudicative guidelines to be the most pertinent to the evaluation of the facts in this case:

**Guideline G – Alcohol Consumption. *The Concern:* 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.**

**Guideline J – Criminal Conduct. *The Concern:* 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.**

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

## **Analysis**

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

Issues regarding one’s reliability and trustworthiness can arise from unbridled alcohol consumption because it can lead to uncontrolled impulses and questionable judgment. Applicant was arrested and charged with DUI in 2004, 2005, and 2007. Consequently, Alcohol Consumption (AC) Disqualifying Condition (DC) 1, 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*) applies. With a disqualifying condition thus established, the burden shifts to Applicant to mitigate related security concerns.

Applicant’s problem with alcohol did not manifest itself until 2004, when he received his first DUI. He failed to manage his alcohol consumption, resulting in a 2005 DUI. The problem remained unaddressed until after he received his third DUI in 2007, at which point the court ordered that he seek counseling. Therefore AC Mitigating Condition (MC) 1, AG ¶ 23(a) (*so much time has passed, or the behavior was 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*) does not apply.

Although Applicant fully acknowledges his abuse of alcohol and has provided details as to his outpatient counseling, only a little over a year has passed since he completed his alcohol counseling program. Applicant was incident free for longer periods of time between his three DUIs. Moreover, he is less than half way through the three year probation ordered in 2007. Therefore, it would be premature to say that this period of sobriety, as earnest and committed as he is to staying alcohol-free, is sufficient for significantly establishing a pattern of abstinence or responsible use.

Therefore, AC MC 2, AG ¶ 23(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)*) does not apply.

On its face, AC MC 4, AG ¶ 23(d) (*the individual has 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 plan*) merits close consideration. Despite Applicant's compliance with his center's programmatic requirements, successful completion of that program a year ago with a positive prognosis, and approximately 19 months of sobriety, a pattern of modified consumption or abstinence remains ill-defined, as discussed above. Moreover, his clinician was a licensed clinical drug counselor III. Although she possesses a master's degree, those credentials do not match the requisites set forth in this mitigating condition. Therefore, this condition does not apply. None of the other AC MCs apply.

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

With respect to Guideline J (Criminal Conduct), the Government has established its case. Applicant admits that he received three DUIs between 2004 and 2007. Such conduct and admissions are sufficient to raise security concerns, invoke Criminal Conduct Disqualifying Conditions (CC DC) 1, AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*), CC DC 3, AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted*), and CC DC 4, AG ¶ 31(d) (*individual is currently on parole or probation*) and initiate inquiry.

The crimes at issue took place between 2004 and last year, in 2007. They resulted from Applicant's repeated inability to control his use of alcohol. They also resulted after he repeatedly failed to learn from his past conviction(s) not to drink and drive. Therefore, Criminal Conduct Mitigating Condition (CC MC) 1, 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*) does not apply.

Although Applicant notes that his wife filed for divorce in the fall of 2003 and that his mother tragically died a few months later, Applicant was apparently able to complete his final year in the Navy without succumbing to apparent alcohol abuse and criminal conduct. Therefore, CC MC 2, AG ¶ 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) does not apply. Applicant admits to the three DUIs alleged, obviating application of CC MC 3, AG ¶ 32(c) (*evidence that the person did not commit the offense*).

Applicant was last cited for DUI in March 2007. While not remote in time, he has accomplished much in the intervening period. He successfully completed an alcohol counseling program and has maintained sobriety for nearly 19 months. At the same time, he returned to the workforce after a couple of years of idle retirement, proved himself as a viable full-time quality inspector in private industry, and found a position as a quality inspector. His appraisal in his current employment shows an excellent level of professionalism and attendance. Such factors raise CC MC 4, 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*) and indicate his criminal past, a by-product of his abuse of alcohol and inability to comport his behavior while under the influence, is well behind him.

### **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 public trust position 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, as well as the "whole person" factors noted above. Applicant is a mature man with a significant amount of personal, professional, and military experience. Recently divorced and idle after nearly 30 years in the Navy, he began to lose the military control and self-restraint that helped him through a successful Navy career and started to abuse alcohol. Worse, he would drive his automobile while intoxicated. He failed to seek help or manage his drinking and driving habits until the third DUI, at which point he received appropriate counseling. Once there, he recognized he had steered from his course. He now embraces sobriety and has successfully returned to the workforce. His actions lay out a blue print for mitigating alcohol abuse security concerns, but his period of sobriety has yet to endure for as long as the periods between DUIs or the substantial completion of his probation. Consequently, 19 months of sobriety and a little over a year since completing counseling does not present an established pattern of abstinence or controlled alcohol use. Therefore, alcohol consumption security concerns thus far remain.

Security concerns regarding his criminal conduct, however, are mitigated. The crimes at issue are incidental to his past alcohol abuse, specifically the driving of a

motor vehicle under the influence of alcohol. Applicant recognizes the illegality of that conduct and has expressed his commitment not to be a repeat offender. He has successfully finished an alcohol counseling program, has a good prognosis, simultaneously returned to the work force, and demonstrated his ability to rise and excel in his field. If Applicant should return to using alcohol, even socially, there is no indication that he will again break the law in relation to such use or abuse. Therefore, criminal conduct security concerns are mitigated.

Any doubt concerning personnel being considered for access to classified information must be resolved in favor of the national security.<sup>10</sup> Because Applicant's period of sobriety is so recent, his resolve remains untested. Consequently, security concerns yet remain regarding Applicant's past alcohol abuse. Clearance is revoked.

### **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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline G: | AGAINST APPLICANT |
| Subparagraph 1.a:         | Against Applicant |
| Subparagraph 1.b:         | Against Applicant |
| Subparagraph 1.c:         | Against Applicant |
| Subparagraph 1.d:         | Against Applicant |
| Subparagraph 1.e:         | Against Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT     |
| Subparagraph 2.a:         | For Applicant     |

### **Conclusion**

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

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ARTHUR E. MARSHALL, JR.  
Administrative Judge

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<sup>10</sup> AG ¶ 2(b).