



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



In the matter of:	)	
	)	
-----, -----	)	
	)	ISCR Case No. 08-05070
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: Laura Anderson, Esquire

September 14, 2009

**Decision**

WHITE, David M., Administrative Judge:

Applicant was convicted of Driving Under the Influence (DUI) in 2000, 2001, 2004, and 2006. He was convicted of driving while his license was suspended in 2006 and 2007. He is on probation until 2011. Security concerns were insufficiently mitigated. 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 on September 17, 2007. On December 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct) and G (Alcohol Consumption). 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 January 6, 2009. He answered the SOR in writing on February 3, 2009, and requested an administrative determination of his case without a hearing before an administrative judge. After receiving the File of Relevant Materials provided by Department Counsel pursuant to Directive ¶ E3.1.7, Applicant obtained representation by his above-named counsel. She entered her appearance on April 6, 2009, and requested a hearing before an administrative judge on Applicant's behalf. Department Counsel was prepared to proceed on April 7, 2009, and the case was assigned to me on May 21, 2009. DOHA issued a Notice of Hearing on June 1, 2009, and I convened the hearing as scheduled on June 23, 2009. The Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant offered exhibits (AE) A and B, which were also admitted without objection, and testified on his own behalf. Three other witnesses also testified for him. I granted Applicant's request to leave the record open until July 17, 2009, to permit him to submit a written closing argument by counsel. On that date, Applicant's counsel submitted the closing argument to Department Counsel, who forwarded it without objection to its consideration. This argument was marked Hearing Exhibit (HE) II, and the record was closed. DOHA received the transcript of the hearing (Tr.) on July 6, 2009.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all of the factual allegations concerning his criminal conduct and alcohol consumption. His admissions are incorporated into the following findings. Applicant is a 35-year-old engineer employed by a defense contractor. He worked for his present employer from February 1997, shortly after graduation from college, until March 2006 when he was fired for excessive absences. After arbitration, he was reinstated in August 2007. He held a security clearance from 1997 until his termination, and submitted the present application upon his reinstatement. He has never married, and has no children. (GE 1 at 6, 10-13, 15, 20, 26; Tr. at 28-29, 67-70.)

On December 2, 2000, Applicant attended a birthday party at a friend's house. Over the course of about seven hours he drank many beers. At around 2:00 the next morning he decided to drive home. He was stopped by police, failed roadside sobriety and breath alcohol tests, and was arrested for Driving Under the Influence (DUI). He eventually pled guilty to and was convicted of DUI. He was sentenced to one day in jail, two years of probation, 40 hours of community service, and fined. He was also required to attend an alcohol awareness course, a DUI victims' panel, and his driver's license was suspended for 90 days. (GE 1 at 23; GE 2 at 2; GE 3 at 65-66, 73; Tr. at 47-51.)

During May 2001, he went to a bar with some friends at about 9:00 p.m. one evening. After consuming many beers, he left the bar at about 1:30 a.m. to drive to a friend's house. He was stopped by police, again failed roadside sobriety and blood alcohol tests, and was arrested for DUI. He was granted a deferred prosecution, under which he was required to pay a \$1,000 fine, to serve five years probation, and attend intensive outpatient alcohol treatment for two years. (GE 1 at 22-23; GE 3 at 66, 73.)

Applicant successfully underwent his court-ordered outpatient alcohol treatment from June 2001 to June 2003, but resumed occasional drinking thereafter. (GE 3 at 66, 72; Tr. at 51-54.) In September 2004, he attended another birthday party at a friend's house. He began drinking heavily at about 10:00 p.m., and continued to do so until he left at around 3:00 a.m. to find a restaurant for breakfast. He was again stopped by police while driving and, after failing sobriety and blood alcohol tests, arrested for DUI. He later pled guilty to DUI and was sentenced to 90 days in jail, which he served on work release, 120 days of electronic home monitoring, fined \$1,200, five years of probation, and a one-year suspension of his driver's license. He was also ordered to attend another DUI victims' panel and outpatient alcohol treatment. (GE 1 at 22; GE 3 at 67, 73; Tr. at 53-55.)

Applicant attended outpatient alcohol treatment from October 2004 to October 2005, when he successfully completed the program. (GE 3 at 67, 72; Tr. at 56.) He later resumed drinking on weekends with friends. On February 17, 2006, he went to a bar to drink by himself at around 10:00 p.m. after his girlfriend told him she wanted to break up. At around 12:30 a.m., after about six beers, he left to drive home. He stopped to buy gas, but the store attendant refused to sell him any because he detected Applicant's intoxication. Applicant was stopped by the police shortly after leaving the store, again failed roadside sobriety and blood alcohol tests, and was arrested for DUI. In March 2006, he pled guilty to DUI and was sentenced to 365 days in jail (with 275 days suspended), 120 days of electronic home monitoring, fined \$1,200, five years of probation, and a one-year suspension of his driver's license. He was also ordered to undergo inpatient alcohol treatment. He will remain on probation until sometime in 2011. (GE 1 at 21; GE 2; GE 3 at 68, 73; Tr. at 56-57.)

Applicant completed his jail time in late April 2006 and entered a three-week inpatient alcohol treatment program. He then entered outpatient treatment again in August 2006, as an after-care program, which he continued until February 2007. On March 1, 2007, he was discharged after successful completion of his Relapse Prevention Treatment Program. His final chemical dependency counselor testified that Applicant is alcohol-dependent, and was in full compliance with all treatment protocols and met all of his treatment goals. This counselor is a state-licensed Chemical Dependency Professional with an associate's degree, but is neither a medical professional nor a licensed clinical social worker. Applicant continues to attend Alcoholics Anonymous meetings about once a week. (GE 1 at 24-25; GE 3 at 68-69, 72; AE A; Tr. at 60, 135-166.)

During December 2006, Applicant was employed by a different company about 45 or 50 miles away from his residence. He normally rode in a van pool, but on December 5, 2006, he drove. A policeman pulled him over for some reason and learned that his license was suspended and arrested him. A month or so later, he pled guilty to driving with a suspended license, and was fined \$400. By November 2007, he had been reinstated with his current employer. Although he normally took the bus, a van pool, or his bike to work, he was late on the morning of November 2, 2007, and decided to drive. He was pulled over for speeding eight miles per hour over the limit in a school zone,

and also cited for driving with a suspended license 1<sup>st</sup> degree and driving without insurance. The court records reflect his conviction on all three of these charges on January 29, 2008. He was sentenced to 365 days in jail, with 355 days suspended for two years, and fines totaling about \$600, with the sentence to be served consecutive to some other punishments for violating probation. Applicant reported paying total fines of \$1,000 to \$1,500 and 60 to 80 days in jail, which he served through home monitoring for 120 days. (GE 2 at 2; GE 3 at 64, 69-70, 73-75; Tr. at 61-63, 72-74.)

Applicant has not consumed alcohol since February 18, 2006. He moved to new housing accommodations where he now lives alone, and no longer spends time with his former drinking buddies. He has resumed exercising and eating healthy meals. (Tr. at 31-39.) His boss since his reinstatement and a coworker who has known him for ten years both testified to his outstanding work performance. In the past year, despite not having a security clearance, he has been rewarded with a substantially above-average pay increase and an upgrade in his retention level rating. He never violated security procedures during the nine years he held his original security clearance, and he has scrupulously followed procedures for protection of both classified and unclassified but sensitive trade-restricted information since his return to employment. (AE B; Tr. at 28-30, 79-132.)

### **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 to be used 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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 "[a]ny 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. 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, "[t]he 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 “[a]ny 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 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 (DCs). The three DCs 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) the individual is currently on parole or probation.” (Tr. at 169.)

As alleged in the SOR, Applicant was arrested and convicted for four separate DUI offenses in 2000, 2001, 2004, and 2006. He was also convicted of driving with a suspended license in December 2006 and again in November 2007. He has been on probation since his early 2001 conviction for his first DUI, and will remain on probation until 2011 if he avoids committing further criminal offenses. The evidence fully supports security concerns under the DCs set forth in AG ¶¶ 31(a), (c), and (d).

AG ¶ 32 provides conditions that could mitigate security concerns (MCs). These are:

- (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.

For mitigation analysis, Applicant's SOR-listed criminal conduct and his criminal history must be evaluated as a whole, not piece by piece. His pattern of multiple DUI offenses, followed by two separate convictions for driving illegally while his license was suspended demonstrate a willingness to flaunt rules and regulations. Given the lengthy and repetitive nature of his criminal history, Applicant did not establish strong mitigation of the concerns arising therefrom. His pattern of alcohol relapses leading to subsequent DUI offenses within a few months or years after completing alcohol treatment programs, and his choices to drive illegally without a license when it suited his convenience, preclude substantial mitigation under MC 32(a). His offenses were so frequent and similar that insufficient time has passed to support a reasonable conclusion that recurrence is unlikely or his judgment has permanently improved. He made no showing that he was pressured or coerced into any of his criminal acts to support application of MC 32(b). Although he is alcohol-dependent, that fact has not changed and each of his DUI offenses was preceded by totally voluntary consumption of excessive alcohol.

Applicant admitted that he committed each SOR-listed criminal offense, and he was formally convicted of each of them, so MC 32(c) has no application. Applicant's recent excellent employment record, and his abstinence from alcohol since successful completion of his inpatient and outpatient treatment programs in 2006 and 2007, provide evidence that begins to demonstrate rehabilitation. The recency and repetitive nature of his criminal activity, however, leads to the conclusion that on balance it is still too soon to be confident that such behavior is unlikely to recur, and no longer casts doubt on his reliability, trustworthiness, and judgment. Applicant's two non-alcohol-related and intentional criminal driving violations, neither of which had reasonable justification, and the most recent of which was less than two years ago, further preclude a finding of substantial mitigation under MC 32(d).

### **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 DC supported by the SOR allegation and asserted by Department

Counsel 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’s four admitted DUI offenses clearly raise security concerns under this DC. Facts supporting other potentially applicable alcohol consumption DCs were not alleged in the SOR, so independent analysis of security concerns arising from those DCs is not appropriate.

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

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(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 alcohol-related incidents were frequent and, when viewed in the context of his multiple relapses within six months to three years, his 2006 DUI remains relatively recent. He resumed drinking after each of his first three DUI convictions, despite successful completion of two outpatient treatment programs. His resumed abstinence since his 2006 DUI is of insufficient duration to establish that such conduct is unlikely to recur or no longer casts doubt on his reliability. Applicant did not establish mitigation under AG ¶ 23(a). Applicant has acknowledged his alcoholism, and has begun to demonstrate effective action to overcome it, but he has yet to establish a pattern of abstinence sufficient to overcome concerns raised by his previous relapses.

There is no evidence that he has consumed alcohol since February 2006, and he has made a substantial start toward establishing a pattern of responsible conduct and

abstinence. However, as discussed above, insufficient time has passed to establish mitigation under AG ¶ 23(b) given the duration, pattern, and seriousness of his history of alcohol abuse. Similarly, there is insufficient evidence yet to support mitigation under either AG ¶¶ 23(c) or (d), due to his history of relapses after previous alcohol treatment programs. He is taking proper and commendable measures to create future mitigation under these provisions, but has not yet done so sufficiently to overcome the security concerns raised by his serious alcohol abuse.

### **Whole Person Concept**

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances 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 relevant facts and circumstances surrounding this case. Applicant's conduct of security concern involved multiple DUI offenses over six years, followed by two probation-violating offenses of driving while his license was suspended. All occurred while he was fully mature and accountable for his actions. None of the incidents in and of itself was particularly serious since he was fortunately arrested before hurting himself or others. Taken together, however, they form a pattern reflecting very poor judgment, flaunting of rules and regulations, and inadequate self-control. He knowingly and voluntarily participated in every incident of security concern, and failed to take necessary steps to change the circumstances under which his problems recurred until fairly recently. It has been less than two years since his most recent offense, and he remains on probation until 2011. The substantial suspended punishment facing Applicant for another criminal violation lessens the degree to which his recent good behavior can be attributed to real remorse and rehabilitation. While evidence of an excellent start toward establishing rehabilitation was presented, including his recent outstanding work performance, lifestyle changes and abstinence from alcohol, it is too soon to confidently conclude that



continuation or recurrence of his criminal conduct or alcohol problems are unlikely. He made insufficient showing of reduced potential for pressure, exploitation, or duress.

Overall, the record evidence generates substantial doubts concerning Applicant's present eligibility and suitability for a security clearance. Although his recent efforts have been commendable, he has not yet met his burden to mitigate the security concerns arising from his criminal conduct and alcohol consumption.

### **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:	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
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline G:	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