



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



In the matter of: )  
)  
) ISCR Case No. 08-07725  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: John B. Glendon, Esq., Department Counsel  
For Applicant: *Pro Se*

July 22, 2009

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, Criminal Conduct and Guideline G, Alcohol Consumption. Applicant’s eligibility for a security clearance is denied.

On March 25, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and G. 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.

In an undated answer Applicant requested a hearing before an administrative judge. The case was assigned to me on May 27, 2009. DOHA issued a Notice of Hearing on June 1, 2009. I convened the hearing as scheduled on June 24, 2009. The

Government offered Exhibits (GE) 1 through 9. Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through D, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 6, 2009.

### **Findings of Fact**

Applicant admitted all of the allegations in the SOR. His admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 32 years old. He has worked for a federal contractor since January 2008. Prior to 2008 he was on active duty in the military for ten years before being discharged with a General Discharge under Honorable Conditions due to alcohol rehabilitation failure. He is married and has two children ages, 16 and 9 years old.<sup>1</sup>

In August 2002, Applicant was arrested and charged with assault and battery of a family member. He stated his wife assaulted him and he pushed her and she sustained a bruise. He was in the military at the time and was ordered to attend the Family Advocacy Program. He received counseling and completed the program. He was convicted of a misdemeanor, sentenced to two years of probation and 30 days confinement which was suspended.<sup>2</sup>

On February 28, 2004, Applicant was arrested for driving under the influence of alcohol (DUI). He was speeding at the time he was stopped by the police. He had been at a party. He took a breathalyzer test and recorded a Blood Alcohol Content (BAC) of .19%. He pled guilty to the offense. He was sentenced to one year in jail and all but one day was suspended. He also paid a \$1,000 fine and his driver's license was restricted.<sup>3</sup>

After this DUI, Applicant attended an alcohol awareness program and completed a 30-day residential alcohol treatment program through the military. The program consisted of assignment to an addictions group for participation in a structured program comprised of group counseling (40 hours), education and therapeutic workshops (40 hours), physical training, relapse prevention workshop (20 hours), and attendance at 12-step meetings. He was diagnosed with "alcohol abuse rule out dependency."<sup>4</sup> He found it educational, but admitted he was not serious about it.<sup>5</sup>

Applicant was arrested on about November 25, 2006, and charged with DUI. He admitted he had been drinking alcohol at a friend's house. He was sentenced to six

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<sup>1</sup> Tr. 43, 55-56; GE 3.

<sup>2</sup> Tr. 56-58.

<sup>3</sup> Tr. 39-41, 58-60.

<sup>4</sup> AE C.

<sup>5</sup> Tr. 41-43.

months in jail; five months and 10 days were suspended. He served 20 days in jail. His driver's license was suspended for three years. He was also ordered to attend an alcohol awareness program, which he did. He paid a \$500 fine.<sup>6</sup>

Applicant also went to nonjudicial punishment in September 2007, under the Uniform Code of Military Justice, for the DUI offense of November 25, 2006, and because he was in an unauthorized leave status for two days. He did not tell his command that he had been arrested for DUI, his second offense. He was also charged with failing to follow orders to not drink and drive and with making a false official statement related to the DUI. Applicant admitted that when he was in jail he did not want his military command to know of his DUI arrest. He stated that he told his command that he had not been arrested for DUI. He admitted he tried to hide the charges from his command. It was not until he had to go to court on the DUI charge in August 2007, approximately nine months later, that the command became aware of the actual pending charges. Applicant attended a 40-hour military alcohol rehabilitation relapse program from October 1, 2007 to October 5, 2007. After the nonjudicial punishment hearing, Applicant was administratively discharged from the military in November 2007.<sup>7</sup>

On March 2, 2008, Applicant signed his security clearance application. On September 16, 2008, Applicant provided sworn responses to Interrogatories. He stated in his Interrogatories regarding his prior two DUI convictions the following: "I have truly learned from these mistakes." He also indicated that he continued to consume alcohol.<sup>8</sup>

On September 29, 2008, Applicant was arrested and charged with DUI, 3<sup>rd</sup> offense within 5 years, a felony; driving with a revoked license; driving without license, a felony; 3<sup>rd</sup> DWI: refusal of blood or breath test, 3<sup>rd</sup> offense; and accident: driver did not report, property damage greater than \$250. Adjudication of this case is still pending. Applicant admitted he was arrested and charged, but denies he committed the offenses. He stated a friend came to his house and because Applicant had a restricted license, the friend drove Applicant's car to a bar and Applicant was a passenger. Applicant admitted he drank alcohol at the bar, but stated his friend was not drinking alcohol. When they left the bar the friend who was driving had an accident on the way home and hit a pole. He stated his friend jumped out of the vehicle and ran away. Applicant panicked because of his prior convictions and left the accident scene and walked home. He was arrested later at his home. He refused to provide a blood sample. He cannot find his friend to corroborate his story. His friend's phone is disconnected. He stated he met his friend playing basketball at the YMCA. He does not know his friend's last name. He knew him only for a couple of months. He has tried to find his friend but has been

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<sup>6</sup> Tr. 60-62.

<sup>7</sup> Tr. 49, 60-71.

<sup>8</sup> Tr. 45-46; GE 4 pages 2 and 3.

unsuccessful. Applicant did not provide any other witnesses to corroborate any part of his story.<sup>9</sup>

A licensed clinical social worker met with Applicant on October 23, 2008, and provided the following:

I see no indication of alcohol dependence. The medical diagnosis on his chart at this time is alcohol abuse 305.00, not alcohol dependence 303.90.

Prior to meeting with me, [Applicant] participated in two inpatient substance abuse treatment programs. It appears he completed each of these programs completely and successfully. I have reviewed [Applicant's] history and documents and feel that there is no indication of alcohol dependency at this time.<sup>10</sup>

Applicant admits he has a history of alcohol abuse. He stated that "alcohol is bad for me." He admitted he cannot drink alcohol because it affects his judgment and his life. He stated alcohol destroyed his military career. He knows he has a track record of alcohol abuse and he is working on it and doing his best. After his last DUI arrest he stated he has abstained from alcohol consumption. He enrolled in an alcohol recovery program and attended sessions on June 11, 2009 and June 18, 2009.<sup>11</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

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<sup>9</sup> Tr. 24-30, 50-54.

<sup>10</sup> Tr. 46-49; GE 5.

<sup>11</sup> Tr. 29-39, 48-49, 72-75; AE A and B.

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 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**

### **Criminal Conduct**

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered the following:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was convicted of DUI twice. His charges of felony DUI, leaving the scene of an accident, failure to report an accident and property damage, and driving without a license are pending adjudication. He was also found guilty at nonjudicial punishment for providing false statements to his command about his DUI arrest. There is sufficient evidence to raise both disqualifying conditions.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 23 and especially considered the following:

- (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;
- (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.

Applicant has two convictions for DUI since 2004. Days before he was arrested a third time for DUI, he stated in his Interrogatories that he had learned his lesson. Applicant continues to use poor judgment when using alcohol. His latest felony charges are still pending. Although Applicant disputes he was the driver of the car at the last incident, he failed to provide any corroborating evidence. It appears that Applicant continues to make the same poor choices that cost him his military career. Not until very recently has he altered his alcohol consumption, and this did not occur until after his 3<sup>rd</sup> DUI arrest. I find, under the circumstances, that none of the above mitigating conditions apply.

### **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.

I have considered all of the disqualifying conditions under AG ¶ 22 including:

- (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;

(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;

(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

Applicant has three DUI arrests, two resulting in convictions, and he is pending adjudication on a third DUI arrest, a felony. He continued to consume alcohol after his first two convictions. He was diagnosed by a licensed clinical social worker as an alcohol abuser. He completed alcohol counseling and inpatient treatment, but continued to use poor judgment when consuming alcohol when he was arrested for his third DUI and leaving the scene of an accident. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions under AG ¶ 23 and especially considered:

(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); 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 had three alcohol-related incidents since 2004. He attended alcohol awareness and education and also completed inpatient alcohol counseling. Days before his third DUI arrest, he stated he had learned his lesson from his mistakes. He continued to consume alcohol after the first two DUI convictions. At his hearing he stated that he stopped drinking after his last arrest. He only recently acknowledged he

uses poor judgment when he consumes alcohol. He has an extended history of alcohol having a negative impact on his life, including being discharged from the military because of alcohol rehabilitation failure. Applicant lied to his command about his DUI arrest. He states that he was not driving when he was arrested for the third DUI, but did not have evidence to corroborate any part of his story. I cannot find at this juncture that Applicant has overcome his problem with alcohol. He has attended only two alcohol counseling sessions in the past couple of weeks. He failed to take heed of his previous counseling sessions and it is too early to determine if this time will be different. Applicant has had three warnings about the negative impact alcohol has on his judgment before his last arrest. He was arrested and went to jail twice for DUI. He was discharged from the Navy due to his alcohol issues. Although he claims he now understands his alcohol issues, it is too early to determine if his commitment can be sustained. I find none of the mitigating conditions apply.

### **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) 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 common sense 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 served in the military until his career was cut short due to incidents involving alcohol. He has been afforded alcohol awareness and education courses. He continued to make poor decisions when using alcohol. He has felony DUI charges pending. Applicant has abstained from drinking alcohol since his last arrest and is attending counseling. He has repeatedly been given opportunities to make the right decision regarding his conduct when consuming alcohol and has failed. Applicant does not yet have a sufficient track record to conclude that alcohol is no longer a factor in his choices and decisions. He has failed to meet his burden of persuasion. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.



For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from 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 J:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d-2.f:	Against Applicant

### **Conclusion**

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

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Carol G. Ricciardello  
Administrative Judge