



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

-----, -----

SSN: -----

Applicant for Security Clearance

)  
)  
)  
)  
)  
)  
)

ISCR Case No. 08-09750

**Appearances**

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

November 23, 2009

**Decision**

WHITE, David M., Administrative Judge:

Applicant was arrested for Driving Under the Influence (DUI) in 1979, 2004, and 2007. He completed two outpatient treatment programs, but relapsed after the first and consumed alcohol during the second. He is on probation until August 2010. 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 May 14, 2008. On April 29, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct). 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 7, 2009. He answered the SOR in writing on May 26, 2009 (AR), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 12, 2009, and the case was assigned to me on June 23, 2009. DOHA issued a Notice of Hearing on July 24, 2009, and I convened the hearing as scheduled on August 25, 2009. The Government offered exhibits (GE) 1 through 5, which were admitted without objection. Applicant offered exhibits (AE) A through K, which were also admitted without objection, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on September 1, 2009.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted some of the factual allegations concerning his alcohol consumption, and denied the criminal and personal conduct allegations. His admissions are incorporated into the following findings. Applicant is a 56-year-old technician employed by a defense contractor. He has worked for his present employer since 1981, shortly after he honorably completed a four-year enlistment in the Navy. He has held a security clearance since 1997. He is married, with five adult stepchildren. (GE 2 at 6, 11, 13, 16-19, 24, 31; AE F; AE G; Tr. at 8-10.)

In 1979, while serving in the Navy, Applicant was arrested and charged with DUI. He refused the Breathalyzer test and, after a contested trial, was convicted of DUI, placed on probation, and fined \$300. (AR; GE 1 at 2; Tr. at 54.)

On July 10, 2004, Applicant and his wife attended a private party at which he consumed multiple beers. His wife drove them home after the party, then he decided to go out and have some more beer at a local restaurant. As he departed the restaurant parking lot, he hit a curb and another parked vehicle, then left the scene. He was arrested and tested at .11 blood alcohol content (BAC). He was charged with DUI and Hit and Run of an Unattended Vehicle. He paid a \$500 fine, and his sentencing was otherwise deferred for five years on condition that he have no alcohol or drug violations, participate in a recovery program, and attend Alcoholics Anonymous (AA) meetings. (GE 3 at 2; GE 4 Interview (PSI) at 1-2; Tr. at 53, 62-63.)

On August 23, 2004, Applicant was evaluated at a court-approved chemical dependency treatment center, and was determined to be alcohol dependent by the clinical director. From September 11, 2004, to December 17, 2006, he successfully completed an outpatient treatment program at the center, and was discharged with a "good" prognosis. He also attended several AA meetings per week from July 2004 to approximately July 2007. From January to December 2004, Applicant completed his associate's degree. From August 2005 to September 2006, he took more online classes and earned a bachelor's degree in business administration. (AR; GE 4 PSI at 2-3; GE 5 at 21-40; AE A; Tr. at 66-70.)

Applicant resumed drinking alcohol in July 2007, mostly consuming a couple bottles of wine on weekends. On September 9, 2007, he had consumed about a bottle

of wine when his grandson called in tears, and asked Applicant to come and get him. He was unfamiliar with the location of his stepdaughter's home, and while he was trying to read the written directions his wife gave him, he ran off the road into a ditch and hit a fence. He was able to back out of the ditch and leave the scene, but was subsequently arrested by police while cruising slowly trying to locate a street. He consented to a Breathalyzer test at the police station, resulting in BAC readings of .082 and .084. Applicant was then charged with DUI and Hit and Run of Unattended Property. Due to police errors, the BAC results were suppressed and Applicant pled guilty to, and was convicted of, the lesser offense of First Degree Negligent Driving and the Hit and Run. On August 12, 2008, the county court sentenced him to serve 90 days in jail (with 89 days suspended), to pay a fine of \$866, to pay restitution for damages he caused to the fence, to complete an alcohol assessment, and to serve two years of probation (expiring on August 12, 2010), and ordered to consume no alcohol or other mood altering drug not prescribed by a doctor among other conditions of probation. These offenses also violated the conditions of his deferred sentencing agreement for his 2004 DUI and Hit and Run convictions. Accordingly, on August 5, 2008, the municipal court imposed a sentence of 365 days in jail (with 364 days suspended), a \$5,000 fine (with \$4,650 suspended), \$791 in costs, and 12 months of probation for the 2004 offenses. That probation was completed on August 5, 2009. (GE 3 at 2; GE 4 PSI at 3-4; GE 5 at 4-6; Tr. at 50-54, 71-72.)

Applicant completed his court-ordered alcohol assessment on September 13, 2007, at a different recovery center. He was found to be alcohol dependent in relapse. He entered an outpatient relapse treatment program at the facility on October 15, 2007, and successfully completed it on August 12, 2008. In connection with this treatment program, he signed an agreement with the recovery center on October 24, 2007, to remain abstinent from alcohol and all other mood-altering substances. (AR; GE 5 at 7-20; Tr. at 50, 54-55.)

Applicant consumed alcohol on two occasions after he entered the treatment program in 2007. In November 2007, his uncle passed away. He returned to his family home in another state for the funeral, and consumed some wine during the dinner and wake. During June 2008, he also returned to his family home for a nephew's wedding. He drank four to six beers during the reception. (AR; AE B; GE 4 PSI at 4; GE 5 at 3; Tr. at 39-40, 54, 72-73, 75.)

In the first set of DOHA interrogatories to which Applicant responded, he was asked when he had last consumed alcohol. He replied, on November 28, 2008, that his last consumption was in June 2008, at his nephew's wedding. He also said that he had not consumed any alcohol in any form since that date. (GE 4 at 4.) DOHA sent Applicant another set of interrogatories in January 2009, including a question asking whether he had consumed any alcohol since June 2008. Applicant responded "yes," and indicated that he had done so twice. The first incident he reported was the nephew's wedding in June 2008, and the second was his uncle's funeral, which he mistakenly stated took place on November 27, 2008. (GE 5 at 3.) In fact, this funeral occurred on November 27, 2007. (AE B.) Applicant continued his confusion about the

correct date during his hearing testimony, but has consistently denied any intent to deceive or conceal his alcohol consumption during the wake dinner. His self-report of this consumption is the only available evidence that it occurred. Applicant did not falsify his response to the first set of DOHA interrogatories because his nephew's wedding was more recent than his uncle's funeral. He honestly but mistakenly reported what he thought to have been subsequent alcohol use when responding to the second set of interrogatories.

Applicant lives in a nice, well-kept home. He comes from a large family, and has worked a second career in his own home construction and remodeling company over the years. (AE C; AE D; AE E; Tr. at 38-41.) Group leaders from two AA groups Applicant regularly attends wrote letters describing his active and positive participation on a regular basis. Nine coworkers and friends also wrote letters on his behalf, expressing their high opinions of his character and trustworthiness. (AE H.) Two more-senior managers, who were unable to attend the hearing and prohibited by company policy from writing letters, expressed their willingness to vouch for his character via telephone. (AE J; Tr. at 45-47.) Applicant's wife and stepson also wrote letters complimenting his good character and recent progress within AA. (AE I.) Finally, Applicant submitted a credit report documenting his financial responsibility. (AE K.)

### **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 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 (DCs). The DCs supported by the SOR allegations and asserted by Department Counsel are:

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

Applicant’s three admitted DUI offenses clearly raise security concerns under AG ¶ 22(a). Although his latest conviction reflected the lesser included offense of First Degree Negligent Driving, he admitted driving with a BAC in excess of .082, and was sufficiently impaired to have driven into a ditch and collided with a fence. He was

evaluated as alcohol dependent by the licensed chemical dependency professional social workers at both treatment clinics he attended, supporting application of AG ¶ 22(e). Finally, he admitted relapsing into regular alcohol consumption in July 2007, about eight months after completing his first alcohol rehabilitation program. This consumption continued until his latest DUI arrest in September 2007. He also consumed alcohol in November 2007 and June 2008, in violation of the agreed terms of his second outpatient alcohol rehabilitation program. Therefore, AG ¶ 22(f) also supports security concerns.

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 multiple DUI arrests preclude a finding that the behavior was infrequent, and his 2007 DUI remains relatively recent. He resumed drinking after each of his first two DUI convictions, despite successful completion of a lengthy outpatient treatment program in December 2006. His resumed abstinence since his 2007 DUI is of insufficient duration to establish that such conduct is unlikely to recur or no longer casts doubt on his reliability. Applicant could not yet 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 June 2008, 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 and the lack of evidence of a favorable prognosis by a duly qualified medical professional or qualified social worker. 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 history and pattern of alcohol abuse.

### **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. The three DCs asserted by the Government and supported by the SOR allegations are:

- (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.)

Applicant admittedly committed, and was arrested for, three separate DUI offenses in 1979, 2004, and 2007. The most recent two incidents also included hit and run on unattended property charges. He was convicted of DUI for the first two, and of a lesser included, negligent driving offense for the third incident because of police errors in gathering the evidence. His latest arrest violated the terms of his probation for the second conviction, and he remains on probation until August 2010 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 criminal conduct security concerns. 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 multiple DUI offenses 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 alcohol relapse leading to a subsequent DUI offense shortly after completing his first alcohol treatment program, and use of alcohol on two separate occasions during his second treatment program, preclude substantial mitigation under AG ¶ 32(a). His offenses were frequent and similar enough 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 AG ¶ 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 for each incident, so AG ¶ 32(c) has no application. Applicant's lengthy and excellent employment record, and his abstinence from alcohol since successful completion of his latest outpatient treatment program in August 2008, 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. These facts preclude a finding of substantial mitigation under AG ¶ 32(d).

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.



The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The potentially disqualifying condition alleged in this case is:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant denied that he deliberately or knowingly falsified relevant information about his alcohol consumption. His November 28, 2008, interrogatory response was not false. His March 2009 interrogatory response was erroneous because he confused the date of his uncle's funeral as November 2008 when it was actually in November 2007. These facts are consistent with Applicant's July 11, 2008, disclosure during his security interview, that he drank at his uncle's November 2007 funeral and his nephew's June 2008 wedding. The record does not support application of AG ¶ 16(a), nor does it raise any personal conduct security concerns other than general reliability and trustworthiness issues already addressed under Guidelines G and J.

### **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 involves multiple DUI offenses over the past thirty years, including two since July 2004. All occurred while he was 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. The latter two did involve damage to other people's property, however. Taken together, these offenses 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 just over two years since his most recent offense, and he remains on probation until August 2010. 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 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:

<b>Paragraph 1, Guideline G:</b>	<b>AGAINST APPLICANT</b>
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 J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

\*Excepting the date, "November 27, 2008," and substituting therefore the date, "November 27, 2007."

### **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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE  
Administrative Judge