



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



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-01130

**Appearances**

For Government: Daniel Crowley, Esquire, Department Counsel  
For Applicant: *Pro se*

September 28, 2010

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

**Statement of the Case**

On November 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and DOHA recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. 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 Adjudicative Guidelines (Ags) implemented by DoD on September 1, 2006.

Applicant responded to the SOR on December 19, 2009. The case was assigned to me on March 15, 2010, and was scheduled for hearing on April 15, 2010. A hearing was held on the scheduled date. At the hearing, the Government's case consisted of 13

exhibits (GE). Applicant relied on one witness (himself) and one exhibit (AE). All of the exhibits were received in evidence without objection. The transcript (Tr.) was received on April 23, 2010.

### **Procedural Issues and Rulings**

Before the close of the hearing, Applicant requested the record be kept open to afford him the opportunity to supplement the record with a signed version of his pre-prosecution diversion program (PPD) acceptance and duration of the program, character references, and performance evaluations. For good cause shown, Applicant was granted seven days to supplement the record. The Government was afforded two days to respond. Within the time permitted, Applicant provided a character reference from his supervisor, a signed version of his PPD acceptance and order suspending criminal proceedings, community college enrollment records, civilian employer performance evaluations, and non-commissioned officer (NCO) fitness evaluations. Applicant's submissions were admitted as Applicant's exhibits B through G.

### **Summary of Pleadings**

Under Guideline J, Applicant allegedly was arrested on five different occasions between 1996 and July 2009 on assorted charges. Besides his arrests, he allegedly accepted Article 15 non-judicial punishment (NJP) for an improper relationship with a trainee in August 2006. Under Guideline E, Applicant allegedly falsified his Electronic Questionnaire for National Security Positions (e-QIP) he completed in September 2008, when he failed to list his alcohol-related arrest in December 2006.

In his December 2009 response to the SOR, Applicant admitted several of the allegations, but denied others. He admitted his 1996 marijuana possession arrest, his driving under the influence arrest (DUI) in October 1997, his Article 15 punishment, and his July 2009 arrest for child abuse, but denied each of the remaining allegations. He denied any arrests for minor in possession or damage to private property while under the influence of alcohol. He also denied falsifying his e-QIP. He provided explanations for each of the alleged arrests and offenses in the SOR.

### **Findings of Fact**

Applicant is a 32-year-old technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

#### **Background and arrest history**

Applicant enlisted in the Army a short time after he graduated from high school in May 1996 (GE 1). He was honorably discharged in August 2008. (GE 3) He is married and has two children. (GE 2). Applicant is currently a full-time student at a local community college. (See AE D; Tr. 56) He documents excellent academic credits.

Applicant was arrested on a number of occasions between September 1996 and July 2009. Records document his arrest for marijuana in possession in 1996 (GE 4; Tr. 38-39), and his minor in possession arrest the same year. (GEs 4) Applicant claims both charges were dismissed (Tr. 43-44), but provides no written proof. Government submissions provide no documentary proof of dispositions relative to either arrest. Applicant has not “touched” or used marijuana since his 1996 arrest. (Tr. 39)

In October 1997, Applicant was arrested for DUI and traffic infractions. Records show that he was found guilty of all counts and sentenced to 12 months probation, 48 hours of jail, and community service, and was fined. (GE 4) In March 2006, Applicant accepted the award of Article 15 NJP for an improper relationship with a trainee. He was stripped in rank from sergeant to specialist, and had his pay reduced by one-half for two months. (GE 5)

Applicant was arrested in December 2006 and charged with damage to private property while under the influence of alcohol. (GE ). Applicant and his wife had engaged in a verbal argument, and she locked him out of their base quarters. (Tr. 40-41) He responded by attempting to force entry into the quarters, which resulted in a dented door and broken window. (See GE 7; Tr. 40). He had consumed a “couple of drinks that night,” but was not under the influence, and was never administered a field sobriety or blood-alcohol (BAC) test. (Tr. 40) Still, he attended a two-day alcohol education class as the result of the incident. (Tr. 41)

After the 2006 incident, Applicant went to a military police (MP) station on base and filed a written statement of what happened. (GE 7). He was never informed of any arrest or charges. When the investigating officer followed up on his report and came to his quarters, Applicant told the officer what transpired between himself and his wife. After taking a brief statement from Applicant, the officer transported him to another MP station, where he was processed and released to his unit. (GE 7) Following his release, Applicant reported the incident to his security office. Records show that his reported incident was treated by his command as an alcohol-related incident. (GE 8) Based on what was reported, Applicant’s command issued an oral reprimand to Applicant that was treated as an adverse personnel action. (GE 8; Tr. 41-42)

In July 2009, Applicant was arrested and charged with two counts (felonies) of intentional child abuse (no death or great bodily harm). He was recovering from back surgery, and used a belt to discipline his young daughters. (Tr. 54) The belt he struck his daughters with left marks. (Tr. 53)

Applicant agreed to deferred prosecution of the child abuse charges made against him. The agreement he was asked to sign was conditioned on his accepting court-ordered counseling and other conditions, at a cost of \$30 a month. (AE A and C; Tr. 45-46, 53-54) Applicant executed the pre-prosecution diversion (PPD) agreement with the district attorney in March 2010. (See AEs A and C) He accepted the underlying felony charges which can be used against him should he ever be terminated from the program. Under the PPD program’s terms, should applicant withdraw from the program at any

time, the district attorney may resume prosecution at any time. Violation of any terms of his PPD program is grounds for his termination. (AEs A and C)

Upon his acceptance of the terms and conditions of his PDD agreement, the court with jurisdiction over the case entered an order suspending criminal proceedings. (AE D) Included in the order was a clause permitting the reopening of criminal proceedings in the event Applicant's participation in his PPD program was terminated for cause. (AE D)

Applicant is required to meet with his diversion counselor twice a month, and last met with his counselor just before the hearing. (Tr. 54-55) Applicant currently performs community service and attends class for educational credits, as well as classes under the court-supervised PPD program. He hopes to complete his approved diversion program within next 22 weeks. (Tr. 45)

Court documents confirm that Applicant was expected to complete at least six months of counseling and community service, and up to 24 months in the diversion program. (AEs A and C; Tr. 46) Whether or not he will complete his diversion program in 22 weeks cannot be determined from the documentation produced in this hearing.

While several of the alleged charges involved drinking associated with the actions that resulted in his arrests, only one of the charges involved documented alcohol abuse: his 1997 DUI arrest for which he was found guilty. Applicant denies drinking at the apartment where he was arrested with others in 1996, and there are no probative findings in the record to challenge his claims. The balance of the evidentiary record lacks any probative evidence of Applicant's abusing alcohol since his 1997 DUI incident.

### **E-QIP omissions**

Asked to complete a security clearance application in September 2008, Applicant omitted his 2006 damage to private property (alcohol) incident. Applicant denies any intent to omit his December 2006 incident, and assures he did not know he was arrested or charged with damage to private property. (Tr. 44)

While the incident reports covering the underlying incident recite the details of Applicant's reported verbal altercation with his wife in December 2006, they do not record any arrest or indications of excessive alcohol consumption. (GEs 6 and 7) The commander's report classifies the incident as damage to private property (alcohol), and notes the issuance of an oral reprimand. However, the commander's report does not provide any information about whether Applicant was arrested and charged as the result of his reported incident.

While Applicant's apprehension and processing by military investigating officers can be treated as an arrest, there are no indications in the incident reports that Applicant was notified of an arrest, and advised of his rights. Applicant's claims that he was never told by investigating officers that he was placed under arrest and charged with a crime are plausible under the circumstances and credible. His explanations are accepted.

## **Endorsements**

Applicant is well-regarded by his employer. His direct supervisor described Applicant as a valued member of his work team. (AE B) His civilian performance evaluations and NCO military fitness reports covering his last six years of active duty (2003-2008) credit him with success in all phases of his assigned responsibilities and covered elements. (AEs F and G).

## **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

## **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. (AG ¶ 30)

## **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, 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. (AG, ¶ 15)

## **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. (AG, ¶ 21)

## **Burden of Proof**

Under the Directive, a decision to grant or continue an applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) It must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

## **Analysis**

Applicant is a respected employee of a defense contractor who has a considerable history of arrests (one alcohol-related). Concerns are raised over Applicant's criminal arrest history, and particularly his most recent child abuse charges that he admitted to as part of his court-diversion program. Initial concerns are raised, too, over his e-QIP omissions of his alcohol-related arrests and the evidence of alcohol abuse associated with at least his 1997 DUI arrest and conviction.

### **Criminal conduct and alcohol concerns**

Applicant's arrest history (some alcohol-related) raises important concerns about his risk of recurrent alcohol abuse. On the strength of the evidence presented, one disqualifying condition (DC) of the AG for alcohol consumption (AG ¶ 21) may be applied: DC ¶ 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."

Because the offense is classed as a criminal offense, it is covered by DC ¶ 31(a) of the criminal conduct guideline: "a single serious crime or multiple lesser offenses." And because Applicant is still on probation, DC ¶ 31(d), "individual is currently on parole or probation," applies as well to his situation. Applicant's DUI offense would appear to qualify as a serious crime, but without a definition section in this guideline, it is less than clear.

Despite the seriousness of his October 1997 DUI offense, Applicant does not believe he is an alcohol abuser, and claims no involvement in alcohol-related incidents after 1997. Applicant's claims have some merit. For outside of his 1997 DUI, there is scant proof of any alcohol involved with his 1996 and 2006 offenses, or in any other documented incident. Since his DUI incident he assures he has not been involved in any other alcohol-related incident, and has not abused alcohol in any way since his 1997 DUI offense. Absent firm evidence to the contrary, Applicant's assurances are accepted.

Based on the isolated nature of his alcohol-related offense, Applicant may rely on one of the mitigating conditions of the alcohol guideline: MC ¶ 22(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." MC ¶ 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," of the criminal conduct guideline also applies to Applicant's situation.

Taking into account Applicant's very limited history of alcohol abuse (defined by the two proven alcohol-related incidents, conclusions warrant that his overall alcohol history reflect sufficient evidence of sustained commitment to responsible alcohol consumption to ensure that he is not at any risk of recurrent alcohol abuse. With little

history of alcohol abuse before his DUI incident and renewed commitments to avoiding any drinking and driving in the future, he is a sound risk not to repeat any of the mistakes that contributed to his 1997 DUI offense. Considering the record as a whole, Applicant makes a convincing showing that he has the strength and stability to avert any recurrent problems with judgment lapses related to alcohol. Applicant's mitigation efforts are enough to warrant safe predictions that he is no longer at risk to judgment impairment associated with alcohol abuse. Favorable conclusions warrant with respect to the allegations covered by the alcohol guidelines of the SOR.

More difficult to reconcile with minimum requirements of security clearance eligibility are Applicant's admitted child abuse charges. While prosecution of these charges has been suspended (conditioned on his satisfactory participation in his court-approved PPD program), he admitted the underlying conduct which is covered by the two felony counts filed against him. Because he is still an active participant in the diversion program, with some months to go before he can be credited with completion and eligibility for dismissal of the charges, it is premature to discount them.

Potentially available mitigating conditions are MC ¶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," and MC ¶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." Because of the number of criminal incidents in Applicant's past, and the relative recency and seriousness of his child abuse charges, these two mitigating conditions have limited application to his situation.

Evaluating Applicant's actions under the criminal conduct guidelines, and from a whole-person perspective, there is much to commend. He documents meritorious civilian and military service and exhibits good progress with his work and schooling.

Moreover, Applicant's earlier 1996 and 1997 charges involve substance abuse and are quite old. Alcohol concerns associated with these offenses are mitigated, and the risks of any recurrent incidents involving DUI offenses are very small. Applicant's Article 15 punishment and reprimand stemming from his reported damage to property incident are also mitigated. There have been no recurrent incidents involving similar behavior and no arrests or charges arising out of his 2006 damage to property incident. Moreover, Applicant's overall military and civilian contributions warrant conclusions that the conduct associated with allegations 1.a through 1.e are mitigated.

Mitigation is not available to Applicant, however, with respect to his child abuse charges. The suspended child abuse charges are much too serious and recent to mitigate without a considerable period of seasoning to convince he has the strength and stability to avert any recurrent problems with judgment lapses related to criminal child abuse. Unfavorable conclusions warrant with respect to the allegations covered by the subparagraph 1.f of the criminal conduct guideline of the SOR.



## **Applicant's omissions**

Applicant omitted his 2006 property damage (alcohol) incident from the e-QIP he completed in September 2008. Applicant does not challenge the omission. But he does contest the claim that an arrest and charge resulted from his reported incident. The incident reports in evidence make no mention of an arrest or charge. And Applicant's acceptance of a verbal reprimand is consistent with Applicant's claims that no arrest or charge occurred.

Taking into account all of the circumstances surrounding Applicant's reported 2006 damage to property incident, conclusions warrant that the allegations are unsubstantiated. Favorable conclusions are warranted with respect to the allegations covered by Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in ¶ 2(a) of the AGs.

## **Formal Findings**

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subparas 1.a through 1.e:	For Applicant
Subpara 1.f:	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	FOR APPLICANT
Subpara. 2.a:	For Applicant
GUIDELINE G (ALCOHOL CONSIDERATIONS):	FOR APPLICANT
Subpara 3.a:	For Applicant

## **Conclusions**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

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Roger C. Wesley  
Administrative Judge



