



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 09-02659  
)  
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Applicant for Security Clearance )

**Appearances**

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

February 28, 2011

**Decision**

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WHITE, David M., Administrative Judge:

Applicant was convicted of Driving Under the Influence in 1996 and 2008. He connected classified work stations to an unclassified network in violation of company policies and security regulations in 2006 and 2007. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted a security clearance application on May 1, 2007.<sup>1</sup> On October 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines M (Use of Information Technology Systems), G (Alcohol Consumption), and K (Handling Protected Information).<sup>2</sup> 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*

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<sup>1</sup>Item 4.

<sup>2</sup>Item 1.

*Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on November 2, 2009, and requested that his case be decided by an administrative judge on the written record without a hearing.<sup>3</sup> Department Counsel submitted the Government's written case on August 10, 2010. A complete copy of the File of Relevant Material (FORM)<sup>4</sup> was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on August 16, 2010, and returned it to DOHA. He provided no further response to the FORM within the 30-day period, did not request additional time to respond, and expressed no objection to my consideration of the evidence submitted by Department Counsel. I received the case assignment on October 26, 2010.

### **Findings of Fact**

Applicant is a 60-year-old employee of a defense contractor, where he has worked since 1997 as a media data technician. He has held a security clearance throughout this employment. He is divorced. He has no prior military service.<sup>5</sup> In his response to the SOR, he admitted each allegation.<sup>6</sup> Applicant's admissions, including his responses to DOHA interrogatories,<sup>7</sup> are incorporated in the following findings.

During December 1996 Applicant was arrested and charged with Driving Under the Influence of Alcohol/Drugs (DUI), and Careless Driving. He pled guilty to both charges, and on December 27, 1997, he was sentenced to 90 days in jail (all suspended); 90 days unsupervised probation; fined \$525; and ordered to pay \$703 in fees and costs, and to attend and complete DWI school.<sup>8</sup>

After his 1996 DUI, Applicant continued to drink two to three beers a day, but did not drink and drive. In October 1998, Applicant voluntarily entered a four-week inpatient alcohol rehabilitation program. He said that he was never formally diagnosed with Alcohol Abuse or Alcohol Dependence, but sought the treatment to help him stop

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<sup>3</sup>Item 2.

<sup>4</sup>The Government submitted 16 Items in support of the SOR allegations.

<sup>5</sup>Item 4.

<sup>6</sup>Item 2.

<sup>7</sup>Items 15 and 16.

<sup>8</sup>Item 5.

drinking because it was causing problems in his marriage of 28 years. Applicant did not drink alcohol again until sometime in late 2000, when he and his wife divorced. From then until his next DUI arrest, in February 2008, he would drink four to five beers a day, usually at home. He said he stopped again after that arrest, at least until September 5, 2008.<sup>9</sup>

On October 12, 2006, Applicant mistakenly connected a classified workstation to his company's unclassified network. He was fully aware of the potential serious setback to the facility if its operational data processing and 43 storage hard drives had been compromised. His reactions upon discovering his error prevented a serious security violation, but he failed to notify management of the potential compromise of classified data until the next day. This delay in reporting directly violated known standard procedures, and caused a considerable amount of time and effort to be expended in assessing the possible extent of compromise to the systems during the overnight delay. Applicant was suspended without pay for one day, and cautioned to correct his misconduct.<sup>10</sup>

On March 20, 2007, Applicant again violated standard operating procedures and company security policies by patching multiple classified workstations onto the unclassified network. As noted above, he was fully aware of the potential seriousness of such a compromise. After investigation, his company determined that the violation was due to negligence, and resulted in no loss or compromise of classified data. As a result, he was suspended without pay for one week.<sup>11</sup> In his interview on September 5, 2008, Applicant stated that he failed to report this incident until the following day because he was scared after he realized what he had done.<sup>12</sup> However, his Letter of Suspension for the incident made no mention of delayed reporting on this occasion, and his supervisor's report of the incident, dated March 21, 2007, reflects that the supervisor was informed of the incident on the day it occurred. Accordingly, I conclude that Applicant confused some details of these two incidents during his interview. The supervisor's report also indicates that Applicant's multiple attempts to log on were only thwarted by the inability of the classified workstations to locate a proper domain while patched to the unclassified network.<sup>13</sup> Both this incident and the one in October violated the National Industrial Security Program Operating Manual (NISPOM), Paragraphs 8-100 and 8-105c(1).<sup>14</sup>

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<sup>9</sup>Item 15 at 7; Item 16.

<sup>10</sup>Item 8; Item 9; Item 10.

<sup>11</sup>Item 11.

<sup>12</sup>Item 15 at 5; Item 16. I take notice that March 20 was a Tuesday, while Applicant described the event as having taken place on a Friday.

<sup>13</sup>Item 2 at 4; Item 11.

<sup>14</sup>Item 7.

On February 9, 2008, Applicant consumed some beer while eating dinner at a local lounge. He did not think that he was intoxicated. He was driving his daughter's car, and did not realize that the lights did not turn on automatically. When he turned onto a dark street, he realized his lights were off, and turned them on. A police officer was following him, and pulled him over. He failed a field sobriety test and on-scene breath-alcohol analysis, after which he was arrested. Applicant reported that he tested at .07 (below the legal limit) during a post-arrest breath test, but was still charged with DUI and Operating a Vehicle without Required Head Lamps. After his defense counsel was permitted to inspect all the evidence, Applicant chose to plead No Contest to the DUI charge pursuant to an agreement under which the head lamp offense would be dismissed and he would be sentenced as if it were a first DUI offense. On July 9, 2008, he was convicted of the DUI. He was subsequently given a deferred sentence subject to service of one year of probation and 24 hours of community service, installation of an ignition interlock, payment of \$245 in court costs, and completion of mandatory alcohol screening.<sup>15</sup>

Applicant provided no evidence concerning the quality of his professional performance, or the level of responsibility his duties entail. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), 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. Likewise, I have avoided drawing inferences

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<sup>15</sup>Item 14; Item 15 at 5-6; Item 16.

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: “[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 M, Use of Information Technology Systems**

AG ¶ 39 expresses the security concern pertaining to use of information technology systems:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The three DCs supported by the SOR allegations and asserted by Department Counsel are:

(e) unauthorized use of a government or other information technology system;

(f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations; and

(g) negligence or lax security habits in handling information technology that persist despite counseling by management.

Applicant connected classified workstations to the unclassified network in violation of security procedures and his company's standard procedures on two occasions during the seven months preceding submission of his present security clearance application. This negligence continued despite his being formally counseled and suspended for a day without pay after the first incident. Security concerns under the foregoing DCs are established, shifting the burden to Applicant to prove mitigation.

AG ¶ 41 provides conditions that could mitigate security concerns:

(a) so much time has elapsed since the 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 misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available; and

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

Applicant's misuse of his company's computer systems was both recent and repeated. He offered no evidence of unusual circumstances that caused his carelessness and violation of procedures. His conduct had the potential for major system compromise and interruption of operations, and was not done in furtherance of any organizational efficiency or effectiveness. Both incidents were apparently negligent, rather than intentional, but he failed to promptly report the first incident. The second incident involved multiple attempts by Applicant to improperly connect the systems that were only foiled by a technical detail. Accordingly, Applicant did not establish substantial mitigation under any of these provisions.

### **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 two DCs 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; and

(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.

However, only the first of these two DCs will be considered here because the SOR did not allege facts, or otherwise provide notice of the potential application of the latter provision. Applicant's two arrests and convictions for DUI, in 1996 and 2008, support security concerns under AG ¶ 22(a). Accordingly, the burden is shifted to Applicant to mitigate the resulting 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 was involved in two alcohol-related driving offenses, twelve years apart. The most recent incident was about three years ago, but nine months after submission of the clearance application under present adjudication. Neither of these incidents was shown to have occurred under unusual circumstances. His choice to resume alcohol consumption in 2000, after completing a voluntary treatment program,

and his failure to submit any evidence concerning his drinking since September 2008, preclude a finding that such incidents are unlikely to recur. Accordingly, AG ¶ 23(a) does not provide mitigation.

Applicant neither asserted, nor offered any evidence to establish mitigation under AG ¶¶ 23(b) or (c). Applicant apparently completed inpatient alcohol treatment in 1998, but resumed drinking within two years, and failed to submit documentation of participation in counseling or treatment since then. He provided no current favorable prognosis by a duly qualified medical professional or social worker, or evidence of his consumption pattern since September 2008, as would be required to find mitigation under AG ¶ 23(d).

### **Guideline K, Handling Protected Information**

AG ¶ 33 expresses the security concern pertaining to handling protected information:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying. Department Counsel asserted the applicability of four DCs:

(b) collecting or storing classified or other protected information at home or in any other unauthorized location;

(c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, "palm" or pocket device or other adjunct equipment;

(g) any failure to comply with rules for the protection of classified or other sensitive information; and

(h) negligence or lax security habits that persist despite counseling by management.

The record is devoid of any evidence to support application of either AG ¶¶ 34(b) or (c), and Department Counsel failed to identify any. However, Applicant did fail to comply with rules prohibiting the connection of classified workstations to the unclassified network on two occasions, and failed to promptly report the first such violation as required by security procedures. His persistent negligence is established by the second incident of a similar nature within six months of the first incident for which he was



counseled and suspended without pay. Both incidents violated the NISPOM, as alleged in the SOR. These facts raise security concerns under AG ¶¶ 34(g) and (h).

AG ¶ 35 provides conditions that could mitigate security concerns:

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

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities; and

(c) the security violations were due to improper or inadequate training.

Both security violations occurred within the seven months preceding his present clearance application, and were too similar to support a conclusion that they are unlikely to recur. He failed to respond to counseling by engaging in a second violation shortly after being suspended for the first incident. Applicant made no assertion of improper or inadequate training, and knew the wrongfulness and potential severity of his conduct as soon as it occurred. He failed to establish mitigation under any of these provisions.

### **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. 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 pertinent facts and circumstances surrounding this case. Applicant is a mature, accountable adult who voluntarily chose to engage in the conduct of concern. This

conduct has spanned the past fourteen years. He committed two alcohol-related driving offenses in 1996 and 2008, and resumed drinking shortly after his 1998 alcohol treatment program. Without providing further explanation of the reasons behind his security problems, he admittedly committed two similar security violations within the seven months preceding this clearance request. The likelihood of continuation or recurrence of irresponsible conduct and the ongoing potential for exploitation or duress have not been refuted. He did not demonstrate rehabilitation or other permanent behavioral changes.

Overall, the record evidence leaves me with substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his alcohol consumption and information-system-based security violations.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline M:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline K:	AGAINST APPLICANT
Subparagraph 3.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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE  
Administrative Judge