



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 10-02118

**Appearances**

For Government: David Hays, Esquire, Department Counsel  
For Applicant: Allen Edmunds, Esquire

June 30, 2011

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant failed to mitigate the security concerns regarding his alcohol consumption and criminal conduct. Eligibility for access to classified information is denied.

**Statement of the Case**

On November 4, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR on November 18, 2010, and requested a hearing. The case was assigned to another judge on January 12, 2011, and re-assigned

to me on March 28, 2011. The case was scheduled for hearing on March 29, 2011. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of five exhibits (GEs 1 through 5); Applicant relied on two witnesses (including himself) and 11 exhibits (AE A through K). The transcript (Tr.) was received on April 5, 2011.

### **Summary of Pleadings**

Under Guideline G, Applicant allegedly (a) consumed alcohol, at times to excess and to the point of intoxication, from approximately 1998 to at least July 2009; (b) was cited in October 1998 for underage drinking; (c) received alcohol treatment from about November 1998 to December 1998; (d) was arrested in February 2008 and charged with (1) negligent driving; (2) driving while under the influence (DUI), (3) driving while impaired, and (4) DUI *per se*, to which he pleaded guilty to driving while impaired and was given probation before judgment and fined; (d) was arrested in July 2009 and charged with (1) DUI, (2) DUI *per se*, (3) driving while impaired, (4) failure to drive on the right side of the roadway; (5) driving on a suspended registration, and (6) negligent driving, to which he pleaded guilty to DUI and was sentenced to 180 days in jail (all but eight days suspended), placed on probation, and (f) used alcohol excessively to the point that caused him to obtain treatment between November 2009 and June 2010.

Under Guideline J, Applicant is alleged to have been (a) arrested and charged on multiple occasions between 1998 and July 2009 and (b) charged in April 2009 with assault-second degree (placed on the Stet docket for one year), for which Applicant was ordered to pay restitution.

In his response to the SOR, Applicant admitted all of the allegations with explanations. He explained he understood the results of his actions and the bad choices he made. He stressed the changes he has made in his life and his increased maturity and responsibility. He claimed he has attended all of his supervised parole officer meetings and alcohol classes with W Facility in a timely way and has since been placed on unsupervised probation.

Applicant explained that the criminal assault incident was an "unusual circumstance," in which he was present during a physical altercation between two females (one his sister and the other his sister's friend) and accidentally shut the car door on the friend. And he claimed he agreed to pay restitution and have the case placed on the Stet docket, in the mistaken belief that there would be no charges left pending against him.

### **Findings of Fact**

Applicant is a 29-year-old electronics 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**

Applicant is unmarried and has no children. (GE 1) He enlisted in the Navy in August 2004 following his graduation from high school and served four years of active duty. (GE 1) He currently serves in the active Navy Reserve. (GE 1)

Applicant was introduced to alcohol in high school at the age of 16. See GE 2; Tr. 42. In October 1998 he was cited for drinking underage. Between 1998 and July 2009 he regularly consumed alcohol, and at times to excess and to the point of intoxication. (GE 2; Tr. 43) He increased his alcohol consumption after enlisting in the Navy. (GE 2) Between August 2004 and February 2008, he estimates to have regularly consumed a 12-pack of beer on the weekends, and occasionally during the week. (GE 2) While he did receive alcohol training at various intervals in his Navy enlistment, he continued to consume alcohol, sometimes at abusive levels. (Tr. 45-47).

Following his first DUI incident in 2008, he reduced his drinking to seven or eight beers on the weekends at home while watching sports events, and occasionally during the week. (GE 2) When he becomes intoxicated, his speech becomes slurred. Concerned about his excessive drinking, he has on three separate occasions enrolled in an alcohol-treatment facility on an outpatient basis.

## **Applicant's arrest history**

Between October 1998 and July 2009, Applicant was arrested on multiple occasions (four in all) for alcohol-related offenses, and one assault charge (in April 2009). Police and court records document Applicant's being cited in October 1998 for drinking underage with friends at a local bar. Prior to being arrested, he registered a .08 BAC on an administered Breathalyzer. (GEs 2 and 5) Arresting police called his parents who later picked him up from the police station. When he appeared in court to answer the charge, the court referred him to alcohol counseling. Applicant attended counseling sessions between November 1998 and December 1998. (GE 5) Additionally, Applicant was required to perform 40 hours of community service and attend Alcoholics Anonymous (AA) meetings. (GE 5)

In February 2008, Applicant was arrested and charged with (1) negligent driving, (2) driving, or attempting to drive, a vehicle while under the influence, (3) driving while impaired by alcohol, and (4) driving, or attempting to drive, while under the influence *per se*. He had attended a going away party for a coworker and consumed about 10 beers with a coworker before he departed the bar. (GE 2; Tr. 60-62) Heading home, he struck another vehicle while trying to pass another vehicle. Losing control of his vehicle on impact, he hit a telephone pole and fell unconscious. Before being transported to a hospital for treatment, he registered a .22 BAC in a Breathalyzer test. (Tr. 64) After registering a .19 BAC at the hospital, he was released to his unit. (GE 2; Tr. 66-67)

Applicant pleaded guilty to the 2008 DUI charge. The court placed him on probation before entering judgment and ordered him to pay a fine. (GEs 2 and 3) He

accepted alcohol counseling from W facility in 2008 and attended a 12-hour alcohol education course (one hour a week) that ran for 12 weeks. He did not receive a diagnosis from the W facility that conducted the classes. His classes consisted of lectures, videos, and group discussions. (GE 2) Applicant was discharged from the program after being credited by the course instructors with successfully completing the 12-hour course. (GE 2)

Believing he did not have an alcohol problem, Applicant continued to consume alcohol following his discharge from W facility in 2008. (GE 2; Tr. 73) The following year (in July 2009), Applicant was arrested and charged with (a) driving a vehicle while under the influence (DUI); (b) driving a vehicle while under the influence *per se*; (c) driving a vehicle while impaired by alcohol; (d) failure to drive a vehicle on the right side of the roadway when required; (e) driving a vehicle on a highway with a suspended registration; and (f) negligent driving a vehicle in a careless and imprudent manner endangering property, life, and person.

Applicant had been drinking with friends in a local bar prior to his July 2009 incident and consumed between nine and ten beers and Yeager bombs (which combines a shot of liquor and a Red Bull) before he vacated the bar in the late evening. (GE 2). While driving home, he was stopped by state police for crossing the center line.(Tr. 70-71) The trooper administered a sobriety test at the scene that Applicant failed to pass. (GE 2) The officer then administered a preliminary breath test. On this test, Applicant registered a .20% BAC and was arrested and transported to a local police station, where he was administered a second breath test. On this administered Breathalyzer test, he registered a .20 % BAC.

When he appeared in September 2009 for his first court appearance on his 2009 DUI charge, Applicant pleaded guilty to DUI and was sentenced to 180 days in jail (172 days suspended), placed on two years of supervised probation, and ordered to pay a \$157 fine. (GEs 2 and 3) While the court did not order alcohol counseling, Applicant referred himself back to W facility in November 2009 at the reported urging of his probation officer. (GEs 2 and 4; Tr. 73). His probation conditions included abstinence for the duration of his supervised probation and submission to weekly urine testing. (GE 2) Additionally, alcohol restrictions were ordered for his driver's license for the duration of his probation. The remaining charges were *nolle prossed*.

By all accounts, Applicant has complied with his probation conditions. He assures he has not consumed alcohol since his July 2009 DUI arrest and is currently on unsupervised probation. (Tr. 34, 37, 53-54). His discharge summary from W facility documents his inclusive dates of counseling services (between November 2009 and June 2010) In his discharge, he is credited with receiving group alcohol and behavioral counseling by a clinician, and with completing 25 group and one individual session, four urine screens (all negative), and negative Breathalyzer tests. (GE 4; Tr. 33-34) Based on continued program compliance, Applicant was assigned a good prognosis, conditioned on his complying with recommendations and completing treatment. (GE 4) His discharge summary includes no alcohol diagnosis, however, or any assessment or

explanations of his past problems and current risks (if any). And he has not attended any additional alcohol counseling sessions since his last W facility discharge in June 2010. (Tr. 92)

Without a more thorough documented assessment, opportunities to fairly evaluate any recurrent risks of Applicant's abusing alcohol is considerably weakened. His acceptance of alcohol counseling and his commitment to avoiding alcohol abuse in the future at the risk of having his clearance revoked represent positive steps in his favor, but do not provide any indicia of his affinity for alcohol or how he might react after his probation is completed or during a stressful situation.

Besides his alcohol-related arrests, Applicant was also involved in a non-alcohol related incident. In April 2009, Applicant became embroiled in a verbal argument between two passengers in his vehicle: his sister and her girlfriend. In his attempts to intercede and calm the participants, he accidentally closed the car door on his sister's friend. (GE 2; AE K; Tr. 39-40, 83-86).

When the girlfriend filed assault charges against both Applicant and his sister, Applicant engaged an attorney to represent him in court. Accepting the advice of his attorney, Applicant agreed to pay restitution and have the case placed on the Stet docket, in the mistaken belief that there would be no charges left pending against him. (AE K; Tr. 40) Unbeknownst to Applicant at the time, the charges have remained on the Stet docket. (AE K). Considering all of the circumstances known to Applicant at the time of the accident and from his attorney counseling, his version of the events of the case are accepted as a credible accounting of what transpired.

### **Endorsements**

Applicant is well regarded by his coworkers and friends who extol his professional and technical contributions and laud his honesty and dependability. See AEs A through E. His coworkers who have known him and worked with him characterize him as a trustworthy team member who consistently provides exemplary quality of service to his internal and external customers. (AEs A-E; Tr. 27)

Applicant's performance evaluations for 2007 through 2009 describe his overall performance as meeting or exceeding requirements. (AEs G through I) In his most recent evaluation, his supervisor credited him understanding and adhering to the company's ethics principles in his conducting of company business. Cited principles included accountability, honesty, integrity, openness, and respect. (AE G) Applicant is also credited with timeliness, good communication skills, application of job knowledge, and quality work. (AE 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." These guidelines 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 ¶ 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:

### **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.

### **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.

## **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. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

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 conscientious and dependable electronics technician for his defense contractor who presents with a considerable history of assorted arrests and convictions (mostly alcohol-related) over an 11-year period. Principal security issues raised in this case center on Applicant's history of alcohol-related offenses, and the recency of his last alcohol-related conviction without the benefit of a diagnosis and completion of the court's probation conditions.

### **Criminal arrest issues**

Applicant's arrests and convictions involve alcohol-related offenses, as well as an isolated assault charge, over an 11-year period. Three of the arrest/convictions involve alcohol (three between 1998 and 2009). Taken together, they reveal some continuing pattern of reckless behavior throughout Applicant's early 20s and into his late 20s with his latest assault charge and alcohol-related offense in 2009.

Applicable disqualifying conditions under the criminal conduct guideline include DC ¶ 31(a), “a single serious crime or multiple lesser offenses,” and DC ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecute or convicted.”

Since July 2009, Applicant has not been involved in any arrest incidents and shows added growth and maturity in his professional and personal relationships. And, his still recorded assault charge involved mistaken Applicant intentions and misunderstandings and do not warrant any conclusions of criminal conduct. Still, Applicant’s arrest history reflects considerable poor judgment and a lack of proper respect for state driving laws. His arrests involve a series of recurrent offenses covering underage drinking to abusive levels and DUIs between 1998 and July 2009. While there have been considerable breaks in his confrontations with law enforcement officers, his back-to-back DUI convictions in 2008 and 2009 reflect a lack of demonstrated respect and adherence to state driving laws and avoidance of abusive drinking.

Applicant is entitled to partial application of MC ¶ 32(a), “so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” However, with his recurrent record of arrests and convictions covering more than ten years, less than 20 months of elapsed time from the date of his hearing since his last DUI in July 2009, the absence of an alcohol diagnosis on which to evaluate the seriousness of Applicant’s arrest risks, and Applicant’s still active probation status (not scheduled to end before July 2011), it is still too soon to make safe predictive assessments about his ability to maintain careful adherence to state drinking laws.

Based on his lack of any established rehabilitation program tailored to meet his specific recovery needs, and the absence of a good, reliable track record for avoiding alcohol-related incidents (less than 20 months since his last DUI offense), Applicant may take only limited advantage of MC ¶ 32(d) of the criminal conduct guideline, “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.”

Both from a consideration of the applicable guidelines, and from a whole-person perspective, it is still too soon to make safe assessments that Applicant possesses the strength of commitment and resolve to meet all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance. Based on his lack of any active steps to identify his current state as an abusive drinker, and his still active probation status (albeit without supervision at this time), he fails to persuasively demonstrate he no longer presents any recurrent risk of judgment lapses associated with his prior arrests and convictions. Taking into account all of the facts and circumstances developed in the record, unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 2.b. Favorable conclusions warrant with respect to subparagraph 2.a.



## Alcohol concerns

Applicant's recurrent problems with abusive drinking and alcohol-related arrests over a 15-year period raise major concerns over his risk of recurrent alcohol abuse. On the strength of the evidence presented, two disqualifying conditions (DC) of the AGs 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," and DC ¶ 22(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."

While Applicant has never been diagnosed with any known alcohol abuse or dependence, he did attend several alcohol counseling programs that stressed educational and group therapy issues, and not individually diagnosed participants. Altogether, he attended three counseling programs. Altogether, one in 1998, sponsored by W facility, and two in the 2008-2009 time-frame, which were also sponsored by W facility.

Applicant's counseling programs offered no identified diagnostic procedures or rehabilitative guidance, and cannot be properly assessed without some documentation of the program's diagnosis assessments (if any) and discrete steps to address them. While Applicant denies any alcohol problem, he admits to drinking to intoxication levels on a weekly basis over an extended period of time (*i.e.*, between 2000 and July 2009), and provides no diagnostic insights into his disposition for alcohol.

Because of the absence of any known diagnosis or reliable prognosis to evaluate Applicant's capacity to safely consume alcohol at any level, application of DC ¶ 22(d), "diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence," may not be employed in Applicant's circumstances. His court-approved counseling sessions are not supported by any records of counseling and treatment by a duly qualified medical professional. If he was diagnosed to be free of any alcohol problems (as Applicant claims) medical records should be available to verify Applicant's claims.

By contrast, were Applicant diagnosed with either alcohol abuse or dependence, some recommended abstinence or curtailing of his alcohol consumption could be reasonably expected. Depending on the diagnosis, Applicant's continued abstinence or drinking at light to abusive levels could be an important consideration in determining what weight to assign to his reformed drinking claims. See ISCR Case 02-03186 (App. Bd. Feb. 16, 2006); ISCR Case 01-20579, at 5 (App. Bd. Apr. 14, 2004). Quite possibly, Applicant could resume his consumption of alcohol when his probation is concluded in July 2009 without any risk of recurrent abuse. Without any counseling records to evaluate, though, there is no verifiable way to know whether he can safely drink at any level in the future.

Considering Applicant's recurrent arrest history (with three prior alcohol-related offenses) and the limited elapse of time since Applicant's last DUI in July 2009, limited application of MC ¶ 23(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, is available to Applicant," is available to him. Partially applicable to Applicant's circumstances are MC ¶ 23(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 (AA) 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." Too little is known about his court-approved counseling program in 2009, however, and the length of time he is likely to remain on unsupervised probation to warrant safe conclusions that he is not a recurrence risk.

Faced with similar evidence of limited rehabilitation and a seasoned track record, the Appeal Board has expressed doubts about the ability to make safe, predictive judgments about an applicant's ability to avoid abusive incidents in the future without jeopardizing the national interest. See ISCR Case No. 06-17541 (App. Bd. Jan. 14, 2008); ISCR Case No. 04-10799 (App. Bd. Nov. 9, 2007); ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007).

Taking into account both Applicant's history of alcohol abuse and incidents away from work and corresponding lack of solid probative evidence of a seasoned track record of abstinence without probation conditions, the applicable guidelines, and a whole-person assessment of his avoidance of alcohol following his latest DUI in 2009, it is too soon to draw firm conclusions about his commitment to avert recurrent alcohol abuse after he has completed his probation conditions.

Applicant's overall showing that his excessive drinking in the past was situational and that he can be trusted to drink responsibly and avert any recurrent problems with judgment lapses related to alcohol in the future is not sufficient to enable him to meet his mitigation burden. While Applicant's counseling and sustained abstinence over the past 20 months (i.e., between July 2009 and March 2011) are encouraging, a whole-person assessment does not support approval of a security clearance at this time.

Given the still relatively short time he has followed his abstinence recommendations, and his still active probation status, it is still too soon to make safe predictive judgments about Applicant's ability to withstand recurrent risks to resume drinking. More time is needed for him to persuade that he can avert alcohol-related incidents in the future. While his contributions to the Navy and civil employers are commendable, they are not enough to enable him to surmount recurrent risks of alcohol abuse at this time. Unfavorable conclusions warrant with respect to the allegations covered by the alcohol guideline of the SOR.

## 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 G ( ALCOHOL CONSUMPTION):      AGAINST APPLICANT

Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraphs 1.c and 1.f:	For Applicant
Subparagraphs 1.d and 1.e:	Against Applicant

GUIDELINE J (CRIMINAL CONDUCT):              AGAINST APPLICANT

Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against 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