



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



In the matter of: )  
)  
) ISCR Case No. 11-08352  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Richard Stevens, Esq., Department Counsel  
For Applicant: Andy P. Davis, Esq.

03/26/2013

**Decision**

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns arising under Guidelines J (Criminal Conduct) and G (Alcohol Consumption). Eligibility for access to classified information is granted.

**Statement of the Case**

On September 18, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and G. This action was taken under Executive Order (EO) 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 (AG) implemented on September 1, 2006.

On November 15, 2012, the Defense Office of Hearings and Appeals (DOHA) received Applicant's Answer to the SOR. Applicant initially requested a decision without a hearing. On December 11, 2012, Applicant requested a hearing. The case was

assigned to me on January 28, 2013. DOHA issued a notice of hearing on February 6, 2013, and the hearing was held as scheduled on February 26, 2012. At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 7. Department Counsel's list of exhibits was marked as Hearing Exhibit 1. Applicant testified, called three witnesses to testify on his behalf, and offered Applicant's Exhibit (AE) A through M. All exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 7, 2013.

### **Findings of Facts**

Applicant is a 48-year-old truck driver employed by a defense contractor. He has worked for his current employer since April 2009. He graduated from high school in 1984. He married in September 1994 and divorced in June 2007. He began living again with his ex-wife in November 2011. They have one child, a 17-year-old son. Applicant is seeking a security clearance for the first time.<sup>1</sup>

Under Guideline J, the SOR alleged six incidents in which Applicant was arrested and charged with criminal conduct. Five of those incidents were cross-alleged in a single Guideline G allegation as alcohol-related misconduct. In his Answer to the SOR, Applicant denied all of the SOR allegations. Through counsel at the hearing, he admitted all of the SOR allegations. His admissions are incorporated as findings of fact.<sup>2</sup>

In his testimony, Applicant described himself as a social drinker. Since his latest arrest, he has continued to consume alcohol, but indicated he does so infrequently. He stated that he may on occasion consume about three beers. He stated that he has never had any problems with alcohol at work. He has passed about six to eight drug and alcohol tests at work. On January 30, 2013, he was evaluated at a drug and alcohol treatment facility. The clinical director of the facility indicated that Applicant did not meet the clinical criteria for substance abuse treatment. Applicant has not received any alcohol treatment or counseling nor has he been evaluated as an alcohol abuser or as alcohol dependent.<sup>3</sup>

Applicant and his ex-wife were married for 13 years. Following their divorce, they lived apart for about four years and have been residing together for about the past year and a half. She testified that his consumption of alcohol has never been an issue in their relationship. She described his alcohol consumption as occasional. She indicated that he might consume a beer after work to relax or have two beers on a weekend, but those were not regular occurrences. She has not seen him intoxicated since they started residing together again. She indicated that he has not consumed any alcohol in about the month preceding the hearing. She generally does not consume alcohol, but may drink a glass of beer or wine on special occasions. Their son testified that he has not

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<sup>1</sup> Tr. 104, 115-116; GE 1, 2.

<sup>2</sup> Tr. 9-11.

<sup>3</sup> Tr. 47, 104-115, 125-126, 131-136; GE 2; AE A.

seen his father consume alcohol in the last month. He indicated that his father usually consumed alcohol only when friends were visiting their house or on special occasions.<sup>4</sup>

SOR ¶ 1.f. On June 29, 1998, Applicant was arrested and charged with speeding and driving under the influence (DUI). Earlier that evening, he was at a pool hall and had consumed alcohol. He indicated that, while driving home on a country road, a car approached him behind and was tailgating. He proceeded to drive faster because the car was right on his tail. About five miles up the road a police officer stopped him. The car following him also stopped and was being driven by an off-duty police officer. Applicant indicated that he was given a blood test that revealed he was not driving under the influence. He pled guilty to reckless driving for the speeding violation and was sentenced to six months of unsupervised probation, community service, and a fine.<sup>5</sup>

SOR ¶ 1.e. On March 17, 2001, Applicant was arrested and charged with public intoxication and possession of drug paraphernalia. On this occasion, Applicant and two female acquaintances stopped at a VFW, where he consumed alcoholic beverages. After they left the VFW, they were pulled over by the police. The female driver was charged with DUI. During this incident, the police found a pack of rolling paper and possibly a pipe or clip under a car seat. The driver, who owned the vehicle, did not take responsibility for the drug paraphernalia. All three of them were charged with possession of drug paraphernalia. Applicant was offered and elected to participate in a pretrial diversion program. As part of that program, he pled guilty (exact charge(s) unknown) and was sentenced to 30 days in jail suspended, 50 hours of community service, and a \$50 fine.<sup>6</sup>

SOR ¶ 1.d. From about 2000 to 2006, Applicant worked at a beer distributorship. On April 6, 2002, he attended a beer company's convention with his cousin. At the convention, Applicant consumed alcohol, but his cousin did not drink. Applicant admitted that he became intoxicated at the convention. Upon leaving the convention, his cousin later drove him to a restaurant. While at the restaurant, Applicant got into an argument with a woman who also had been drinking. His cousin agreed to drive the woman home in her car and planned to have the woman's mother drive him back to the restaurant so that he could reunite with Applicant. While Applicant was waiting for his cousin at the restaurant, the police arrived and arrested him for public intoxication. He pled guilty to that charge and was sentenced to community service and a fine.<sup>7</sup>

SOR ¶ 1.c. On March 17, 2009, Applicant and a woman were talking to each other between cars in the parking lot of a tractor supply company. She was the ex-girlfriend of Police Officer X. While they were talking, the woman saw Police Officer X

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<sup>4</sup> Tr. 51-79, 133; AE A.

<sup>5</sup> Tr. 64-66, 80-83, 119-122; Applicant's Answer to the SOR; GE 2, 6.

<sup>6</sup> Tr. 65-66, 72, 83-88, 117-119; Applicant's Answer to the SOR; GE 2, 6, 7.

<sup>7</sup> Tr. 68-70, 87-92, 104-106; Applicant's Answer to the SOR; GE 2, 4.

driving in his patrol car and decided to depart the parking lot. Applicant also departed and proceeded to drive to a grocery store. Police Officer X approached Applicant while he was walking in the parking lot of the grocery store. Police Officer X told him that he did not want Applicant talking to his ex-girlfriend. Police Officer X also ordered him to get into his vehicle. Applicant initially objected, but returned to his vehicle. A state trooper arrived at the scene and checked to see whether the body of Applicant's vehicle was too high off the ground. The state trooper determined the height of his vehicle complied with legal requirements and departed the area. Police Officer X then ordered Applicant to get out of his vehicle. Police Officer X arrested him for disorderly conduct and failure to obey a law enforcement officer. Applicant testified that he had not consumed any alcohol on that occasion. The police officer's ex-girlfriend went with Applicant to his arraignment. Police Officer X did not appear at Applicant's arraignment and the charges were dismissed.<sup>8</sup>

SOR ¶ 1.b. On December 31, 2010, Applicant and a male friend went to a bar to celebrate New Year's Eve. After a few drinks, they decided to go to another bar. His friend was driving. The police pulled them over for speeding. Applicant indicated that he may have consumed about six or seven beers that night. After being pulled over, Police Officer X (same officer discussed above) arrived on the scene and ordered Applicant out of the car. Applicant argued with him because he did not want to get arrested. He was arrested and charged with disorderly conduct. In February 2011, the charge was dismissed without prejudice.<sup>9</sup>

SOR ¶ 1.a. At about 3:30 p.m. on February 5, 2011, Applicant went to the local VFW for a meeting. While there, he consumed one or two beers and met two friends. A friend asked Applicant to drive him to another bar about four miles away, because Applicant had little or nothing to drink. Applicant agreed and another friend decided to go along for the ride. Applicant intended to drive his friend to the bar and then return to the VFW. As the three of them were departing the VFW at about 7:00 p.m., a woman across the street saw them get into Applicant's vehicle. She mistakenly thought one of his friends was her boyfriend. She was upset that her boyfriend was leaving with them. She called the police and made a false report that Applicant's vehicle was driving in an erratic manner. The police stopped Applicant in the parking lot of the other bar and accused him of pulling out in front of another car and almost causing an accident. Applicant denied doing so. He indicated that he saw only one vehicle on the road on that occasion and it was traveling in the opposite direction. The police officer asked if he had been drinking, and he told the officer that he had one or two drinks. One of Applicant's friends had an open container of beer in the back seat of his vehicle and, in attempting to hide it, spilled beer. The police officer smelled beer in the vehicle. The officer and Applicant's friend got into an argument. Applicant was asked to take a field sobriety test. At the time, it was raining and the wind was blowing. Applicant claimed he had difficulty completing the field sobriety test in the gravel parking lot under those weather conditions. The police officer concluded Applicant failed the field sobriety test.

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<sup>8</sup> Tr. 92-96, 135; Applicant's Answer to the SOR; GE 2, 5.

<sup>9</sup> Tr. 96-99, 125-126, 135; Applicant's Answer to the SOR; GE 2.

Applicant was asked to take a blood alcohol test. Being upset, he refused the test. He was arrested and charged with DUI and an implied consent law violation. When asked at the hearing why he refused the blood alcohol test, Applicant stated, "Because I was right." Applicant's Counsel also represented Applicant in the criminal proceeding. Before the court proceeding, his counsel believed that Applicant would beat the DUI charge, but would still lose his driver's license for the implied consent law violation. His counsel arranged a plea agreement in which Applicant would plead guilty to reckless driving, but would be allowed to retain his driver's license. In a court document, the judge noted that the implied consent violation was dismissed due to potential lack of probable cause for the traffic stop. Applicant pled guilty to the reduced charge of reckless driving and was sentenced to six months in jail/alternative six months supervised probation, eight hours of community service, and a fine. His probation ended in September 2011.<sup>10</sup>

At the hearing, Applicant testified in an open and forthcoming manner. I found him to be a credible witness. He admitted that he has made mistakes and accepted responsibility for his wrongdoing.

Applicant's former boss testified that Applicant worked for him from 2006 to 2008. He stated that Applicant was a very reliable employee. He never had any concern about Applicant's alcohol consumption. He indicated that Applicant was a trustworthy individual and that he would trust him with his property.<sup>11</sup>

Applicant presented a number of character reference letters. They describe Applicant as a pleasant and decent person who does not have an alcohol problem. One letter was from a local circuit judge, who stated in part:

I would preface my analysis of [Applicant's] situation by stating that dealing with drugs and alcohol addiction has been a passion project for me. Several years ago I lost my youngest son in a tragic accident who had battled with drugs and alcohol for many years. Following his death, I noticed a void in this community for the treatment of alcohol and drug addiction, and established the Drug Court program in our judicial district. As part of my work as executive officer of the Drug Court I deal on almost a daily basis with the symptoms, denials, struggles and battles of addiction. In my many years knowing [Applicant] I have never observed any behavior that gave me concern. I would add that being a social drinker myself, on many occasions I have seen [Applicant] select iced tea when everyone else present was consuming what was not the best for us.

I have looked at the arrest reports in question and discussed this matter at length with [Applicant]. I encouraged him to get an A&D assessment to allow a professional to evaluate him, which he did. I was gratified to hear that they did not feel he had a problem, as I shared that opinion. I noticed

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<sup>10</sup> Tr. 99-104, 106-107, 122-125, 128-131, 133-135; Applicant's Answer to the SOR; GE 2, 3, 6.

<sup>11</sup> Tr. 38-51.

2 incidents occurred on New Year's Eve, one was on a birthday, and the other occurred following a [beer company's] function that allowed consumption. These are all common situations where a causal drinker may succumb to a momentary lapse of judgment, not indicators of addiction or other chronic problems.

I apologize that I was not able to be present for the hearing. However, I want to staunchly vouch for the character, honesty, and trustworthiness of [Applicant]. Having known [Applicant] both personally and professionally, I would have no hesitation recommending him as a honest and trustworthy individual, who in no way poses any security threat to our government.<sup>12</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions that 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it

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<sup>12</sup> The quotation is from AE B. The other character reference letters are AE C through L.

grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption**

Because the Guideline J and G allegations are intertwined in this case, they are discussed together here. The security concerns arising under those guidelines are similar and involve questions of reliability, judgment, and trustworthiness.

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 ¶ 30 sets out the security concern relating to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Both guidelines contain several disqualifying conditions that could raise security concerns. In this case, one alcohol consumption disqualifying condition under AG ¶ 22 is potentially applicable:

(a) alcohol-related incidents away from work, such as driving 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.

Two criminal conduct disqualifying conditions under AG ¶ 31 are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Between the ages of 33 and 46, Applicant was arrested on six occasions. He consumed alcohol before five of those arrests. He was twice charged with DUI (1998 and 2011) and pled guilty to reckless driving on both occasions. In 2001, he was charged with public intoxication and possession of drug paraphernalia and entered into a pretrial diversion program for those charges. He admitted that he was drunk in public in 2002. He did not consume alcohol before his arrest for disorderly conduct and disobeying a police officer in 2009, and those charges were later dismissed. After consuming six or seven beers in 2010, he was arrested for disorderly conduct, but that charge was dismissed. At the hearing, substantial evidence was presented to establish each of the above listed disqualifying conditions.

In this case four mitigating conditions are potentially applicable. Two are alcohol consumption mitigation conditions under AG ¶ 23:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unique circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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).

The other two are criminal conduct mitigating conditions under AG ¶ 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

(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.

At the hearing, Applicant acknowledged that he has made mistakes, expressed remorse, and accepted responsibility for his misconduct. In his closing argument, Department Counsel stated:

I would feel remiss if I didn't point out that it appears as though at least two of these arrests seem to be triggered by perhaps an overaggressive police force there in a small community, and perhaps, on at least one occasion, was almost baited into committing an offense by a police officer who he had a prior encounter with.



The Government is a little concerned when a police officer charges somebody with an offense and fails to appear. The Applicant indicated that the lady who was present at the time, the officer's ex-girlfriend was there [at the arraignment] in support, and we accept his word on that.<sup>13</sup>

I agree with Department Counsel's assessment of the allegations in SOR ¶¶ 1.b and 1.c. Similarly, Applicant's arrest for DUI in February 2011 (SOR ¶ 1.a) was precipitated when a false report was made to the police that he was driving erratically. In each of these three incidents, Applicant most likely exercised poor judgment by arguing or failing to cooperate fully with the police, but he acted in that manner because he thought he was being mistreated. It is also important to note that the alleged misconduct in SOR ¶¶ 1.a–1.c arose when Applicant and his ex-wife were living apart. He is now living again with his ex-wife and son in a supportive family environment. This lifestyle change has had a positive impact on him and lessens the likelihood that he may have negative interactions with the police. In short, the incidents alleged in SOR ¶¶ 1.a–1.c occurred under unusual circumstances that are unlikely to recur.

Applicant's reckless driving conviction in 1998 (SOR ¶ 1.f), his charges that resulted in pretrial diversion in 2001 (SOR ¶ 1.e), and his public intoxication conviction in 2002 (SOR ¶ 1.d) occurred a long time ago. Those incidents do not cast doubt on his current reliability, good judgment, or trustworthiness and are of limited security significance.

At times, Applicant has consumed alcohol to the point of intoxication and has gotten himself into trouble while in that condition. For at least the past year and a half, however, he has consumed alcohol only occasionally. When he does drink, he does so in a responsible manner, only consuming a reasonable quantity. His family, friends, and a local judge indicated that he does not have an alcohol problem. He has never been diagnosed as an alcohol abuser or as alcohol dependent. He was recently evaluated at an alcohol and drug treatment and counseling center and found to not meet the clinical criteria for substance abuse treatment.

The security concerns arising from SOR allegations, whether viewed separately or in total, have been mitigated. AG ¶¶ 23(a) and 32(a) apply, and AG ¶¶ 23(b) and 32(d) partially apply.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all 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

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<sup>13</sup> Tr. 137-138.

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. I have incorporated my comments under Guidelines J and G in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a responsible parent and family man. He is a reliable employee. He has learned from his negative interactions with the police and will likely avoid similar situations in the future. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated the Alcohol Consumption and Criminal Conduct security concerns.

### **Formal Findings**

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraphs 1.a – 1.f:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

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James F. Duffy  
Administrative Judge