



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



In the matter of: )  
)  
) ISCR Case No. 11-09546  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

04/10/2013

**Decision**

DUFFY, James F., Administrative Judge:

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

**Statement of the Case**

On November 9, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G and J. 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 December 6, 2012, Applicant answered the SOR. The case was assigned to me on February 11, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 15, 2013, and the hearing was held as scheduled on

March 19, 2013. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5. Department Counsel's list of exhibits was marked as Hearing Exhibit (HE) 1. Applicant testified and offered Applicant Exhibit (AE) A through J. The record was held open until March 26, 2013, for Applicant to submit additional information. Applicant timely submitted an email with an attachment. His post-hearing documents were marked as AE K and L. Department Counsel's letter forwarding the post-hearing documents was marked as HE 2. All exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 26, 2013.

### **Findings of Facts**

Applicant is a 32-year-old communications security custodian who works for a defense contractor. He has worked for his current employer since June 2004. He graduated from high school in 1999 and attended college for about one semester in 2001. He has never been married. He is the custodial parent of a seven-year-old son. Applicant has held a security clearance for about three years without any security violations.<sup>1</sup>

The SOR contains two Guideline G allegations. The first allegation (SOR ¶ 1.a) asserted that Applicant was charged with Driving Under the Influence (DUI) in September 2004. During this incident, he had a blood alcohol content (BAC) of 0.14%. In April 2005, he was found guilty of BAC over .08%, a misdemeanor, and was fined \$500. The second allegation (SOR ¶ 1.b) asserted he was charged in December 2009 with (1) Aggravated DUI – Child Under 16 in Vehicle and (2) Endangering the Welfare of a Child. During this second incident, his BAC was .18%. In November 2010, he pled guilty and was sentenced to jail for 16 days, probation for 5 years, a driver's license revocation for 18 months, and a fine of \$1,520. Although the SOR indicated both of Applicant's alcohol-related driving offenses were DUIs, the evidence revealed they were Driving While Intoxicated (DWI) offenses. The two Guideline G allegations were cross-alleged in a single Guideline J allegation (SOR ¶ 2.a). In his Answer to the SOR, Applicant admitted all of the allegations. His admissions are incorporated as findings of fact.<sup>2</sup>

Applicant began drinking alcohol when he was 18 years old. From 2001 to 2004, he consumed alcohol every other weekend and became intoxicated about once a month. From 2004 to 2006, he consumed alcohol and became intoxicated about once a month. From 2006 to 2009, he rarely consumed alcohol. After his son was born in 2006, he indicated that he would consume alcohol only on major holidays, such as the 4<sup>th</sup> of July, Labor Day, or Christmas. At that time, he estimated that he consumed alcohol about six times a year. When he drank, he usually consumed about three to four glasses of whiskey or mixed drinks. He said that he used alcohol as a stress reliever.<sup>3</sup>

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<sup>1</sup> Tr. 6-7, 33-37; GE 1, 2, 3.

<sup>2</sup> SOR; Applicant's Answer to the SOR; AE A. The SOR incorrectly listed the second paragraph (Guideline J) as Paragraph 3. I made a correction to the SOR changing that paragraph to Paragraph 2.

<sup>3</sup> Tr. 37-38, 43-47, 69; GE 3.

SOR ¶ 1.a. Applicant's alcohol-related driving offense in 2004 occurred while he was working for his current employer, but before he held a security clearance. At that time, he was about 23 years old. This offense occurred following his attendance at a barbecue over the Labor Day weekend. At the barbecue, he consumed about three four-ounce glasses of straight whiskey over a couple of hours. He departed the party by himself at about 3:00 a.m. He was stopped by the police at a drunk-driving roadblock. He did not believe he was intoxicated at that time and made no attempt to evade the roadblock. He was given a field sobriety test and a breathalyzer test. The breathalyzer test revealed his BAC was 1.4%. He was charged with (1) Operating Motor Vehicle with Blood Alcohol Content of .08% – 1<sup>st</sup> Offense and (2) DWI – 1<sup>st</sup> Offense. He pled not guilty to those offenses and was found guilty of DWI – 1<sup>st</sup> Offense. He was sentenced to a \$500 fine. His driver's license was suspended until he completed a drinking-and-driving program. On his own accord, he underwent an alcohol evaluation. During that evaluation, he was not given any recommendation to cease or modify his alcohol consumption. At that point, he did not believe he had an alcohol problem.<sup>4</sup>

SOR ¶ 1.b. Applicant indicated that he was going through a rough time when his second DWI occurred in December 2009. At that time, he had custody of his son, who was then three years old, and his son's mother was threatening to obtain custody of him. This DWI occurred on Christmas Eve. He was released from work early that day and went to a bar with coworkers from about 11:00 a.m. to about 2 p.m. After leaving the bar, he picked up his son from daycare. While driving with his son in the car, he hit a curb that caused the wheel to buckle. No one was injured in the accident. His son was riding in a child's car seat, and the car's airbags did not deploy. He called OnStar for a tow truck and OnStar notified the police of the accident. A police officer gave Applicant a breathalyzer test. His BAC was .18%. He was arrested and charged with (1) Aggravated DWI – Child Under 16 in Vehicle and (2) Endangering the Welfare of a Child. As soon as he returned to work following that incident, he notified his facility security officer (FSO) of his arrest. Pursuant to a plea agreement, he pled guilty to Aggravated DWI, a felony. As part of his sentence, he served eight weekends in jail and attended a drinking-and-driving program. He has completed over two years of his five-year probation sentence. When he reports to the probation officer once a month, he is administered an alcohol breath test. He is scheduled to remain on supervised probation until November 2015.<sup>5</sup>

Based on the advice of his lawyer after his Aggravated DWI in 2009, Applicant enrolled himself in a chemical dependence program in February 2010. During that program, a licensed alcohol and substance abuse counselor diagnosed him with alcohol abuse, but she specifically ruled out alcohol dependence. He was given alcohol tests during eight sessions and each of those tests had negative results. He successfully completed that program in April 2010. His treatment plan included a recommendation that he remain abstinent. The counselor evaluated his home environment as "stable."

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<sup>4</sup> Tr. 27, 37-42, 44; GE 1, 2, 3, 4; AE A.

<sup>5</sup> Tr. 27-28, 37, 47-73; GE 1, 3, 5; AE A, B, C.

He received a discharge prognosis of “good.” He did not attend Alcoholics Anonymous (AA) meetings as part of this treatment.<sup>6</sup>

Following Applicant’s Aggravated DWI in 2009, Child Protective Service (CPS) conducted an investigation into his suitability for maintaining custody of his son. CPS concluded that he could continue to maintain custody of his son.<sup>7</sup>

In January 2011, Applicant sought the assistance of a mental health professional because he was having difficulty in managing stress. He testified that he did not seek that assistance because he was craving alcohol or thought that he would relapse, but did so due to the stress of being a single parent. As part of that treatment, he participated in multiple substance inventory screens, urinalysis tests, and a comprehensive evaluation. All of his urinalysis tests were negative. A chemical dependency therapist diagnosed him with: 303.90 Alcohol Dependence in Sustained Full Remission. He participated in eight individual counseling sessions that addressed relapse prevention; building connections with sober, supportive members of the community; and coping skills for dealing with stress and anxiety. He continues to call the therapist whenever he feels the need to do so.<sup>8</sup>

Applicant last consumed alcohol on December 24, 2009, the date of his second DWI. He has no cravings for alcohol. He has no intention to use alcohol in the future. He considers alcohol to be poison to him. His brother resides with him and his son. He does not allow his brother to have alcohol in his apartment. He testified that he no longer attends parties or family gatherings where alcohol is served. He helps coach his son’s little league team. While alcohol is served at those games, he indicated that it is not an issue. He noted that, after his son was born, he stopped playing sports and gained weight. At that point, he weighed about 190 pounds. He has begun playing sports and exercising again. He now weighs 155 pounds. He described his relationship with his son’s mother as “really good at this point.” She lives in another state and pays child support. Their son visits her for about a month each summer. Although he is eligible to obtain a conditional driver’s license, he has not yet done so. In order to obtain such a license, he would need to have an interlock device installed on his vehicle. He stated that he is in the process of obtaining such a driver’s license.<sup>9</sup>

At the hearing, Applicant was candid about his wrongdoing. I found him to be a credible witness. He indicated that his DWI offenses showed a lack of judgment. He acknowledged that his Aggravated DWI in 2009 was a serious offense. During his

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<sup>6</sup> Tr. 29-33, 56-62; GE 1, 3; AE A, D.

<sup>7</sup> Tr. 32-33, 70-72.

<sup>8</sup> Tr. 29, 61-70; GE 3; AE E; Applicant’s Answer to the SOR. According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM–IV-TR), the specifier “sustained full remission” is used if none of the criteria for dependence or abuse has been met at any time during the previous 12 months or longer. See DSM-IV-TR at 196.

<sup>9</sup> Tr. 31-33, 56-81; GE 3; AE A, J.

testimony, he stated a couple of times that he was not making any excuses for his misconduct. Except for his two DWI arrests, he has not been arrested for, or charged with, any other offenses.<sup>10</sup>

In his post-hearing submission, Applicant provided a letter from his probation officer that was dated March 21, 2013. In the letter, the probation officer stated,

[Applicant] was sentenced to [. . .] five year(s) Probation on 11/30/10 following a conviction of Aggravated Driving While Intoxicated with Child Passenger as a class E Felony on 10/6/10 (original arrest 12/24/09) in [county and state].

[Applicant] reports as directed to Probation and has been completely cooperative with the conditions of the Court without incident. He has satisfied all special conditions of his Probation sentence including: paying a fine/surcharge in full, he successfully completed an alcohol treatment outpatient program on 8/9/11, he served eight work weekends [in jail], attended all weekends in the Day Reporting Center DWI sentencing program and he did attend a Victim Impact Panel. Furthermore, the Court granted him permission to reapply for a [State] Post Revocation Conditional License due to his compliance. Within the year he may also be eligible for an early termination of his Probation sentence.

A condition of all persons on Probation supervision is that they obtain and/or maintain gainful employment.<sup>11</sup>

Since Applicant's Aggravated DWI in 2009, he has been promoted three times at work. In January 2013, he was promoted from alternate communications security custodian to being the primary custodian. In his last performance evaluation, he received an overall rating as "high contributor."<sup>12</sup>

Applicant's immediate manager at work, who served in the military for 24 years, submitted a letter for him stating in part:

I am pleased with [Applicant's] excellent work ethic, attendance and level-headed approach as he carries out his duties and responsibilities. As a single father with all of its added burdens, he displayed an outstanding ability to keep these sometimes opposing parts of his life, responsibly in balance.

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<sup>10</sup> Tr. 27, 37, 71.

<sup>11</sup> AE L.

<sup>12</sup> Tr. 34; AE F, G.

[Applicant] and I have discussed his past issues and in my opinion, the young man with that past, in no way bears any resemblance to the [individual] I know. [Applicant] is now a mature, responsible father, and hard-working Supervisor and COMSEC Custodian.<sup>13</sup>

Applicant's FSO submitted a letter for him stating in part:

[Applicant] has distinguished himself as a trusted employee with high integrity and a strong personal commitment that has gained him recognition as a high performer and valued employee. He has made a special effort to take personal responsibility and keep his supervisor and FSO informed and ensure that he did not negatively impact or miss work as we worked through his personal matters.

As a former military officer and a security professional who has spent my entire adult life supporting our nations sensitive and classified information I place the highest priority in protecting those assets. Without reservation I am confident that [Applicant] takes his job and associated responsibilities of possessing a security clearance as serious and I strongly support him retaining his clearance.<sup>14</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.

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<sup>13</sup> AE I.

<sup>14</sup> AE H.

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 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 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.

In this case, three alcohol consumption disqualifying conditions under AG ¶ 22 are 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;

(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; and

(e) evaluation of alcohol abuse or dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant committed DWI offenses in 2004 and 2009. After 2006, he drank alcohol rarely, but when he drank he consumed significant quantities of whiskey. Licensed social workers at recognized alcohol treatment programs have diagnosed him with alcohol abuse and alcohol dependence in sustained full remission. Substantial evidence was presented at the hearing to establish each of the above listed disqualifying conditions.

AG ¶ 23 sets forth four alcohol consumption mitigation conditions. These are:

(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;

(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 Alcoholic Anonymous or similar organizations and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant's first DWI occurred over eight years ago. His second DWI occurred over three years ago. At the hearing, he acknowledged that he made mistakes, expressed remorse, and accepted responsibility for his misconduct. He specifically stated that he was providing "no excuses" for his wrongdoing.

Applicant's pattern of alcohol consumption was somewhat unusual. Since 2006, he rarely drank alcohol. When he did so, however, he would drink significant quantities of straight whiskey. This pattern tends to indicate that he did not have a strong craving to consume alcohol, but once he did start consuming it he either did so irresponsibly or could not control himself.

After his second DWI, Applicant successfully completed an outpatient alcohol treatment program. Following that treatment, he was received a prognosis of "good." He has not attended AA meetings. In 2011, he consulted with a mental health profession to deal with stress. He indicated that he would continue to consult with that mental health



professional if he felt the need to do so. Since his last DWI, he has avoided parties or events in which alcohol is consumed. He has begun exercising again, lost weight, and has focused on raising his son. He has developed a healthy lifestyle to avoid alcohol consumption.

Applicant last consumed alcohol on December 24, 2009. He now considers alcohol as poison to him. He does not intend to consume alcohol in the future. He has resolved his alcohol problem. His alcohol-related misconduct is unlikely to recur. AG ¶¶ 23(b) and 23(c) apply; while 23(a) and 23(d) partially apply.

### **Guideline J, Criminal Conduct**

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.

In this case, three criminal conduct disqualifying conditions under AG ¶ 31 are potentially applicable:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

Applicant committed DWI offenses in 2004 and 2009. His second DWI was a felony offense. He is still on probation for that second DWI. His probation is scheduled to end in November 2015. AG ¶¶ 31(a), 31(c), and 31(d) apply.

Two criminal conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (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.

Applicant's criminal conduct is limited to two alcohol-related offenses. He has no other arrests, charges, or convictions. The analysis under Guideline G, above, applies

equally here. In mitigating the alcohol consumption security concerns, he has also shown that his criminal conduct is unlikely to recur.

Applicant remains on probation. He is still being supervised by his probation officer and is not yet eligible for an unrestricted driver's license. Nothing in the Directive indicates that Applicant's current probationary status is a *per se* bar to a favorable clearance decision. In this regard, the Appeal Board has clearly stated:

The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of the case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole."<sup>15</sup>

Nonetheless, because Applicant's probation status triggers a specific disqualifying condition, it merits significant consideration. See DISCR Case No. 90-115 at 3 (Oct. 6, 1992) ("In evaluating Applicant's behavior since the 1988 criminal charges, the Judge, as trier of fact, may properly note Applicant can be expected to exhibit good behavior while on probation.") Likewise, probation is an indicator that an offender may not yet be reformed or rehabilitated. Similarly, by placing an offender on probation, a state has demonstrated that it has doubts about an offender's reliability or trustworthiness. If a state has such doubts, one may ask why the federal government should trust such an individual with classified material. While those are all valid factors to consider when evaluating a case in which an applicant is on probation, the final decision to grant or deny a security clearance must still be an exercise of sound discretion in light of the whole record.

Applicant is approaching the halfway point of his probation. He has met all of his probation requirements. He has received a favorable letter from his probation officer who indicated that he may be eligible for early termination of his probation within the year. The key concern in this case is Applicant's alcohol consumption. The record evidence shows that Applicant has changed his behavior. Specifically, he made lifestyle changes to avoid consuming alcohol in the future. He made those changes because he knew it was the right thing to do and not because he was being supervised while on probation. He has reformed and rehabilitated himself and has mitigated the security concerns arising from his current probation. In light of the record evidence as a whole, I find that AG ¶¶ 32(a) and 32(d) apply.

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<sup>15</sup> ISCR 09-01652 at 3-4 (App. Bd. Aug. 8, 2011) and ISCR Case No. 05-03635 at 3 (App. Bd. Dec 20, 2006). See also ISCR Case No. 99-0018 at 3 (App. Bd. Dec. 6, 1999) ("Applicant still was on probation. That evidence is not solely dispositive. See, e.g., ISCR Case No 98-0247 (January 20, 1999) at page 3 note 5 (there is no *per se* bar to a favorable security clearance because applicant is still on probation). However, the Administrative Judge could not simply ignore Applicant's probationary status. See, e.g., ISCR Case No. 96-0710 (June 20, 1997) at p. 3. Applicant's probationary status has obvious relevance to any analysis of whether Applicant's efforts at rehabilitation warrant applicant of Criminal Conduct Mitigating Condition 5."). This case was issued under a previous version of the adjudicative guidelines. Those guidelines did not contain an explicit disqualifying condition addressing probation.

## 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 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 single parent. Although he committed an offense that endangered his son, he is by all other accounts a responsible and dedicated father. He is a valued and trusted employee. At the hearing, he was candid, sincere, remorseful, and credible. He has accepted responsibility for his misconduct and changed his lifestyle so that he will not commit further alcohol-related offenses. He has reformed and rehabilitated himself. 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 G:	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline J:	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