



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 12-04086  
)  
Applicant for Security Clearance )

Appearances

For Government: Richard Stevens, Esq. Department Counsel  
For Applicant: *Pro Se*

05/06/2014

**Decision**

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied. Applicant failed to mitigate security concerns for alcohol consumption and criminal conduct.

**Statement of the Case**

Applicant was granted eligibility for access to classified information based on an e-QIP version of a security clearance application (SCA) submitted on August 15, 2007. (Item 6) Applicant’s employer filed Joint Personnel Adjudication System (JPAS) entries concerning Applicant on November 8, 2011, and April 18, 2014, based on two driving under the influence incidents (DUI). (Item 5) An investigation was conducted by the Office of Personnel Management (OPM), consisting of a personal subject interview with Applicant and an affidavit provided by Applicant. (Item 7) After reviewing the results of the background investigation and Appellant’s answers to the interrogatories, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated November 7, 2013, detailing security concerns for alcohol consumption (Guideline G) and criminal conduct (Guideline J). (Item 1) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel*

*Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the DOD on September 1, 2006.

Applicant received the SOR on November 14, 2013 (Item 3), and responded on December 4, 2013. He admitted the two allegations of DUI with explanation, but denied the criminal conduct allegation with explanation. He provided information on the final disposition of the two DUI offenses. He denied the criminal conduct allegations by admitting the incidents but stating that they do not jeopardize his responsibilities for national security. Applicant elected to have the matter decided on the written record. (Item 4) Department Counsel submitted the Government's written case on March 13, 2014. Applicant received a complete file of relevant material (FORM) on March 25, 2014, and was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant provided additional information in response to the FORM on April 22, 2014. The case was assigned to me on April 29, 2014.

### **Findings of Fact**

After a thorough review of the pleadings, I make the following essential findings of fact.

Applicant is a 53-year-old high school graduate with some credit for college working as an electrical engineer staff member for a defense contractor since October 2005. He married in October 1991 and divorced in January 1998. He married again in September 1999 and divorced in 2013. He recently remarried for the third time. (Item 1, e-QIP)

The SOR alleges that Applicant was charged with Driving under the Influence (DUI) in July 2011. He received a pre-trial diversion which he completed on December 18, 2012. (SOR 1.a) He was charged with a second DUI in March 2013. In July 2013, he completed a substance abuse driving education course. (SOR 1.b) Applicant admitted both of these offenses. (Item 4) These two DUI charges were also cross alleged as a criminal conduct security concern. (SOR 2.a)

Applicant self-reported the two DUI offenses to his employer who reported them in the JPAS. The JPAS entries for the July 2011 DUI (Item 5) states that Applicant passed the field sobriety test but the arresting office believed he was intoxicated. In his response to questions from a security investigator, Applicant stated he had been drinking alone at a bar since 3 PM. He was stopped for speeding later that evening. (Item 7 at 18) The arrest record show that Applicant was stopped for speeding and the police officer smelled alcohol. Applicant admitted drinking three beers earlier that evening. The arresting officer states that Applicant failed the field sobriety test. Applicant's blood alcohol level on two tests was .205 and .204, over twice the legal limit. (Item 8 at 1-6) The arresting officer failed to appear in court on three occasions, so Applicant was fighting the charge in court. Applicant completed the pre-trial diversion program and the charge was nolle prosequi and dismissed. (Item 4 at 1; Item 7 at 5-7) He completed substance abuse counseling and treatment in December 2012. (Item 7 at

8-13) He stated that this was an isolated incident and that he had no intent to be involved with criminal charges in the future or again drive under the influence. (Item 7 at 18)

The JPAS entry reports the March 2013 DUI. In his response to the SOR, Applicant faults the arresting officer for his conduct and the report he filed. Applicant notes that the police officer failed to consider Applicant's problem hip from arthritis in evaluating the field sobriety test. (Item 4) The arrest record reveals that Applicant told the police officer he had three alcoholic beverages over a five-hour period that evening. In response to questions from the police officer, Applicant did not tell the officer of any medical issues that could affect a field sobriety test. His blood alcohol level was .175 and .174 on two tests. (Item 9 at 4-6) The state legal limit of blood alcohol is .08 to establish DUI, with .15 for aggravated DUI. (Item 10) Applicant was placed on probation for six months, which he completed on April 20, 2014.

Applicant resolved his community service requirement by 25 hours of community service and buying out the remaining 50 hours at \$10 per hour on December 6, 2013. He completed a court-ordered Counseling and Victim Awareness course on February 5, 2014. Applicant paid all fees and costs by February 7, 2014. (Item 4; Response to FORM, dated April 22, 2014)

In his response to the FORM, Applicant notes that all requirements of probation, fines, community service, counseling, and victim's awareness programs have been met. He acknowledges that there is no excuse for his drinking to excess and driving. He further stated that he completed 26 sessions of substance abuse counseling, attendance at required Alcoholics Anonymous (AA) meetings, as well as courses from the state safety council and Mothers against Drunk Driving (MADD). He acknowledges that the first DUI incident was not a wake-up call but the second DUI one was the wake-up call. He did not drink while attending the substance abuse courses. He remarried and his new wife drinks little alcohol and has instilled that same criteria on him. He is no longer depressed since his life has changed. (Response to FORM, dated April 22, 2014)

### **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 and mitigating conditions, which must be considered 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 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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion to obtain a favorable security 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 of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Alcohol Consumption**

Excessive alcohol consumption is a security concern because it 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)

Applicant was charged with DUI in July 2011 and March 2013. These two DUI incidents were established both by Applicant’s admissions and by police reports, and is sufficient to raise Alcohol Consumption Disqualifying Conditions AG ¶ 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).

I considered Alcohol Consumption Mitigating Conditions AG ¶ 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); and AG ¶ 23(b) (the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of action taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)).

While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of an alcohol issue, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

Applicant had two alcohol-related incidents in a 20 month-period. In November 2012, he completed an alcohol awareness program after the July 2011 DUI. Within four months of completing this program, he had a second DUI in March 2013. While he reported both incidents to his employer, who reported them through the security clearance system, it does not appear that Applicant provided his employer with the full and complete history of the incidents. For example, there is no mention in the JPAS report of the blood alcohol level for each incident. There is mention of a complaint about the police officer's failure to appear in court for the first incident. In his response to the SOR, Applicant complains about his treatment by the police officer but does not discuss the blood alcohol results. The blood alcohol levels are important because they are significantly higher than the legal limits, and they are inconsistent with his claims to the police officer that he only consumed three beers or drinks.

The two incidents happened within 20 months, the last only over a year ago, making the incidents current and frequent. There were no unusual circumstances leading to excess alcohol consumption since Applicant admits to drinking at bars alone before driving. There is nothing presented by Applicant to show that these incidents could not happen again, except Applicant's statement that he would not drink and drive in the future. His statement is not sufficient to establish that he will not drink and drive in the future.

Applicant's initial failure to discuss the blood alcohol levels is an indication that he has not acknowledged his issues with alcohol. He did complete all of the court-ordered alcohol classes and counseling. In his response to the FORM, he notes that he has had a wake-up call concerning alcohol consumption and his life circumstances have been changed. However, Applicant drank and drove within four months of completing an alcohol awareness program for his first offense. He only completed the sentence for the second DUI in the last few months. While he states he is making strides to overcome his alcohol issues, it has only been a few months since he completed his last alcohol counseling and treatment. The timing of his actions is so recent that he has not established a pattern of abstinence and has not shown sufficient timely evidence of actions taken to overcome his alcohol consumption problems. He states that he intends to control his alcohol-consumption impulses, but a significant period of time has not passed without evidence of an alcohol-related problem to show that there are changes in Applicant's circumstances so that he is reformed and rehabilitated, and will not continue to consume alcohol to excess. I find that Applicant has not mitigated the security concerns for alcohol consumption, and that he still presents a security concern based on his alcohol consumption.

## **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 (AG ¶ 30). Applicant was charged twice with DUI. The first charge was nolle prosequi after he completed a diversion program. He was convicted and sentenced on the second offense. This information raises Criminal Conduct Disqualifying Conditions AG ¶ 31(a) (a single serious crime or multiple lesser offenses), and AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). Applicant's criminal actions raise questions about Applicant's judgment, reliability, trustworthiness, and his ability and willingness to comply with laws, rules, and regulations.

I considered all of the mitigating conditions under criminal conduct, especially Mitigating Conditions 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 AG ¶ 32(d) (there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement).

As noted above for alcohol consumption, sufficient time has not passed since the criminal behavior happened and Applicant completed his sentence to establish that his drinking and driving is unlikely to recur. Applicant admits he knowingly and freely drank alcohol to excess and then drove. The admitted criminal actions did not happen under any unusual circumstances. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment.

## **Whole-Person Analysis**

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and the relevant circumstances. An 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 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 the facts and circumstances surrounding this case. I considered that Applicant has worked for a defense contractor for almost nine years and successfully eligible for access to classified information for over seven years. Applicant was charged with two alcohol-related offenses in 20 months, the most recent incident was only a year ago. His second alcohol-related offense happened only four months after completing an alcohol awareness program. He completed alcohol counseling and treatment on the second offense only a few months ago, so Applicant has not presented adequate information to establish that sufficient time has passed from his last incident to show he has been rehabilitated and ceased his excess consumption of alcohol. Applicant's history shows that he is not reliable and trustworthy and lacks the ability to protect classified information. The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate alcohol consumption and criminal conduct security concerns.

### **Formal Findings**

Formal findings for or against Applicant 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:	AGAINST APPLICANT
Subparagraphs 1.a – 1b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.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.

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THOMAS M. CREAN  
Administrative Judge