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

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| In the matter of: | ) | |
| | ) | |
| | ) | ISCR Case No. 15-01717 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: Ryan Nerney, Esq.

07/26/2016

## Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the security concerns regarding his judgment, reliability, and trustworthiness raised by his 2012 conviction and 2013 arrest for driving under the influence (DUI).

## Statement of the Case

On November 20, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct and alcohol consumption guidelines.[1] DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant's security clearance.

[1] This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

Applicant timely answered the SOR and requested a hearing. On June 23, 2016, I issued a prehearing order to the parties regarding the exchange and submission of discovery, the filing of motions, and the disclosure of any witnesses.[2] The parties complied with the Order. At the hearing, which proceeded as scheduled on July 15, 2016, I admitted Government's Exhibits (GE) 1 through 5 and Hearing Exhibits I – II, without objection. After the hearing, Applicant submitted AE A and B. Both documents are admitted without objection. The Defense Office of Hearing and Appeals (DOHA) received the transcript (Tr.) on July 26, 2016.

## Findings of Fact

Applicant, 47, has worked for a federal contractor as an information technology professional since March 2013. He completed a security clearance application, his first, in May 2014. In response to questions about his police record, Applicant disclosed two DUI arrests in 2012 and 2013, respectively. He discussed these arrests during his July 2014 interview with a background investigator. Applicant's disclosures are the basis of the SOR allegations, which Applicant denied in his Answer.[3]

In February 2012, Applicant was arrested for driving under the influence of alcohol. Applicant and his wife consumed alcohol from approximately 10 o'clock at night to 7 o'clock in the morning. After sleeping for a couple of hours, Applicant decided to go to work. He testified that he felt groggy and hungover, but "not overly intoxicated." He felt capable of driving and working a full day. He completed 39 miles of his 40 mile commute before pulling into a parking lot around the corner from his job to rest. The police, responding to a wellness check requested by a passer-by, found Applicant sitting behind the steering wheel with the keys in the ignition. Suspecting Applicant of being intoxicated, the police performed field sobriety tests and executed a breathalyzer. Although he does not remember the result of the breathalyzer, Applicant did not dispute evidence that his blood alcohol content (BAC) measured at .20. He was arrested at 11 o'clock in the morning. In June 2012, Applicant pleaded guilty to driving or being in actual physical control with an alcohol concertation of .20 or more within two hours of driving, a class I misdemeanor. Accepting his guilty plea, the court sentenced Applicant to 60 months' unsupervised probation, substance abuse screening and treatment, an 18-month interlock device restriction, and 45 days in jail with 31 days suspended.[4]

A year after his conviction, Applicant was arrested again and charged with aggravated DUI and other traffic violations. After getting into an argument with his wife, Applicant decided to ride his motorcycle. He ended up at a bar, where he consumed alcohol for at least two hours while watching a baseball game. Feeling unimpaired, Applicant rode home. On his way, Applicant sped past a police officer, who measured Applicant's speed at 93 miles per hour. While following the Applicant, the officer

[2] This amended order changed the filing date of the pre-haring submissions from July 16, 2016 to July 6, 2016.

[3] Tr. 40; GE 1; Answer.

[4] Tr. 43-46, 68-76; GE 1, 4.

observed Applicant swerving between lanes as his speed fluctuated. Initially, the police officer activated her emergency lights and pursued Applicant in an attempt to conduct a traffic stop, but was ordered to end pursuit after reporting Applicant's rate of speed and failure to stop. The officer resumed following Applicant using siren and lights when he slowed down to enter his neighborhood. [5]

Still unaware of the officer, Applicant rode home. When the police officer approached him in his driveway, Applicant asked for his lawyer. He continued to ask for counsel over the next few hours as he was transported to jail and processed. The police, with Applicant's consent, measured Applicant's BAC with three breathalyzer tests and a blood test. The breathalyzer tests showed a BAC raging between .26 and .29. The blood test measured Applicant's BAC at .28. Applicant was not prosecuted for this offense. Finding that the police violated Applicant's right to counsel, the court dismissed the charges with prejudice.[6]

Applicant's testimony raised questions about his good-faith efforts to comply with the terms of sentence on the 2012 DUI. Applicant admitted that as part of the sentence for the 2012 conviction, he knew that he was required to install an interlock device on any car that he drove. Applicant interpreted the restriction as applying to only one of the two cars that he and his wife owned, claiming that he never drove the other car. He did not believe the order applied to his motorcycle, which he was riding at the time of his 2013 arrest. [7]

Applicant claimed that interlock devices were not available for motorcycles in 2012. He then explained that he believed he had permission to ride the motorcycle without the interlock device because his reinstated license showed a motorcycle endorsement. On cross examination, Applicant admitted that that he decided not to have the device installed on his motorcycle because he interpreted the order as applying to only automobiles, which he did not believe included motorcycles. On the contrary, the record shows Applicant fully understood the extent of the interlock restriction. According to the June 2012 plea agreement he signed, Applicant agreed to install an interlock device "on any motor vehicle that he operated in exchange for the suspension of 31 days of his jail sentence." Even during his drunken exchange with the police officer during his 2013 arrest, Applicant demonstrated his understanding of the interlock restriction. Without prompting, Applicant informed the officer of the interlock restriction. When the officer asked Applicant if he should be riding the motorcycle, he responded, "I shouldn't be, but I was hoping you would let me slide."[8]

During his direct examination, Applicant offered a sanitized version of the events surrounding his 2012 and 2013 arrests, omitting material facts. Toward the end of the

[5] Tr. 47, 49.

[6] Tr. 51-54.

[7] Tr. 76.

[8] Tr. 47-49, 77-78, 102; GE 2.

hearing, on cross examination, Applicant admitted that he was driving a company-issued vehicle during the 2012 DUI arrest. Applicant testified that he reported the incident to his manger and surrendered the company car without any disciplinary action being taken against him. According to Applicant's security clearance application, he left that job the month after his arrest. On the application, he gave his reason for leaving as being "unhappy with [his] work situation after not receiving a deserved promotion." At hearing, Applicant citied "poor management" and "intercompany issues" because management "decided to overlook some employees for promotion and to the save the jobs of some employees that they should not have." Applicant was unemployed for the next five months. He claims he was taking some time off between jobs.[9]

When testifying about the 2013 arrest, Applicant failed to mention during his testimony that after leaving the bar, he went to a grocery store and purchased more alcohol that he intended to drink at home. On cross examination, Applicant said that he walked to the store from the bar, contradicting the statement he gave during his July 2014 interview that he rode his motorcycle to the store before riding home. Applicant claims not to remember anything about his interaction with the police officer that approached him in his driveway beyond his repeatedly ignored request for counsel. According to the police report, Applicant told the police office that he was coming from the grocery store where he intended to buy milk, but left the store without buying anything. Applicant repeatedly denied having consumed any alcohol. Eventually, he admitted having two small beers. While talking to the police officer, Applicant removed his jacket, dislodging a bottle of vodka, which fell to the ground. Applicant denied that the unopened bottle belonged to him. Applicant repeatedly asked the officer to let him go with a warning that he was being "bad boy." He even offered to be the officer's best friend if she let him go.[10]

In addition to his own, Applicant offered the testimony of two character witnesses: his facility security officer (FSO) and his department manager. Both provided favorable assessments of Applicant's security worthiness based on their professional relationships with him. Neither witness was aware, until under cross examination, that Applicant was on unsupervised probation until July 2017. Applicant claims to have disclosed his probation status on his job application with his current employer. However, that document is not in the record. Applicant did not disclose his probation status on his security clearance application when he listed the details of his 2012 conviction. Both character witnesses testified that neither Applicant's probation status nor his failure to disclose it to them before the hearing changed their favorable assessment of his security worthiness.[11]

Applicant does not believe that he has a problem with alcohol, but claims that he has abstained from it since his 2013 arrest. He believes drinking alcohol is not compatible with his lifestyle. With his Answer to the SOR, Applicant submitted a signed

[9] Tr. 111-114.

[10] Tr. 82-93; GE 2, GE 5.

[11] Tr. 14-38, 55-56, 105-109; GE 1.

statement of intent not to abuse alcohol in the future with automatic revocation of his clearance for any future violations. Before the hearing, Applicant asked his primary care physician to evaluate him for alcohol abuse. Applicant did not show the physician copies of the SOR or police reports from his arrests. He only talked to the doctor about his alcohol consumption. It is unclear if the doctor performed any tests. In a one sentence note scrawled his prescription pad, the physician indicated, "[Applicant] does not demonstrate alcohol abuse sign or symptoms."[12]

## 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 are used in evaluating an Applicant's eligibility for access to classified information.

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." 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Criminal Conduct

Criminal activity calls into question a person's ability or willingness to comply with law, rules, and regulations, as well as a doubts about a person's judgment, reliability,

[12] 55-56, 59-62, 94, 95-98; AE B.

and trustworthiness.[13] Applicant pleaded guilty to DUI in June 2012 and was charged with, but not convicted for DUI again in June 2013. Applicant's criminal conduct is disqualifying.[14] He is on unsupervised probation for the 2012 conviction until July 2017, which is also disqualifying.[15] Applicant failed to submit enough information to mitigate the criminal conduct concern. These the incidents continue to cast doubt on Applicant's security worthiness.

In addition to breaking the law, Applicant disregarded the terms of his 2012 plea agreement. In exchange for reduced jail time, Applicant agreed to install an interlock device on "any motor vehicle he operated." He was left to his own recognizance to install the devices as required. He chose to comply minimally by installing the device on only one of the two cars to which he had access and to violate the order completely by riding his motorcycle. His conduct shows that he may be similarly dismissive of rules and regulations attendant to the handling and safeguarding of classified information.

Applicant's testimony at hearing revealed an inability to provide full, frank, and candid statements to the government about his actions. Self-reporting is the hallmark of the security clearance process and is key to the fiduciary relationship between the government and a clearance holder. The government must be able, with a high degree of confidence, believe that a clearance holder will self-report a potential security violation even in the face of adverse consequences. Based on his behavior at hearing, I conclude Applicant is unlikely to do so.

The record contains some favorable information. Applicant's last alcohol-related criminal conduct occurred almost four years ago. In an effort to show evidence of rehabilitation and reform, Applicant claims that he has abstained from alcohol since his 2013 arrest and provided evidence to suggest that he does not have an ongoing alcohol problem. However, these facts do not mitigate the criminal conduct concerns.

**Alcohol Consumption**

Applicant's two DUIs are also disqualifying under the alcohol consumption guideline. An applicant's history of excessive alcohol consumption becomes a security concern when it serves as direct evidence of questionable judgment and a failure to control impulses.[16] The 2012 incident is disqualifying as an alcohol-related incident at work.[17] But for his arrest, which occurred one mile from his office, Applicant intended to report to work intoxicated. The 2013 DUI arrest, is disqualifying as an alcohol-related

[13] AG ¶ 30.

[14] AG 31(a), (c).

[15] AG 31(d).

[16] AG ¶ 21.

[17] AG 22(b).

incident away from work.[18] His DUI arrests are also evidence of habitual or binge consumption of alcohol to the point of impaired judgment.[19]

The nature of the two DUIs shows serious flaws in Applicant's judgment. On two occasions, Applicant binged on alcohol to intoxication. In 2012, he chose to operate a vehicle and attempted to report to work with a BAC more than twice the legal limit. He did so again in 2013, speeding on a motorcycle with a BAC more than three times the legal limit. In each instance, his conduct showed a reckless disregard for the law, his safety, and that of others who happened to share the road with him. Applicant offers as mitigating evidence his four years of abstinence from alcohol, an opinion from his primary care physician that Applicant does not exhibit the signs or symptoms of alcohol abuse, and a statement of intent not to abuse alcohol in the future agreeing to an automatic revocation of his security clearance for any future violations. These facts carry little weight toward mitigating the concerns raised by Applicant's history of alcohol consumption.

Given Applicant's lack of credibility, I am unable to accept his claims of abstinence as truthful. The opinion of his doctor does little to bolster Applicant's claims because the doctor did not provide the basis for his opinion. Applicant's statement of intent carries no weight. Applicant past behavior indicates that he will treat the restrictions on his personal behavior in the same manner he handled the interlock device restriction of his 2012 plea agreement. For these reasons and those explained in the discussion of the criminal conduct section above, none of the alcohol consumption mitigating conditions apply.

**Whole-Person Concept**

Based on the record, doubts remain about Applicant's judgment and trustworthiness. I have also considered the whole-person factors at AG ¶ 2. The purpose of the security clearance adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk."[20] Although Applicant's alcohol-related criminal conduct happened several years ago, he failed to mitigate the concerns about his judgment, reliability, and trustworthiness raised by these incidents. Overall he has shown a pattern of dishonesty and an inability to follow rules and regulations that make him an unacceptable security risk.

[18] AG ¶ 22 (a).

[19] AG ¶ 22 (c).

[20] AG ¶ 2(a).

## 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:

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| Paragraph 1, Criminal Conduct: | AGAINST APPLICANT |
| Subparagraphs 1.a – 1.b: | Against Applicant |
| Paragraph 2, Alcohol Consumption: | 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. Clearance is denied.

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Nichole L. Noel
Administrative Judge