



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



In the matter of:

ISCR Case No. 15-07150

Applicant for Security Clearance

**Appearances**

For Government: Charles C. Hale, Esq., Department Counsel  
For Applicant: *Pro se*

01/08/2018

**Decision**

DAM, Shari, Administrative Judge:

Applicant mitigated the criminal conduct and personal conduct security concerns. He failed to mitigate those raised under the alcohol consumption guideline. National security eligibility for access to classified information is denied.

**History of Case**

On May 16, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) effective within the DoD after September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.<sup>1</sup>

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<sup>1</sup> I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant submitted Answers to the SOR in writing on June 8, 2016, August 9, 2016, and October 21, 2016. (Item 2) He elected to have his case decided on the written record in lieu of a hearing. On November 7, 2016, Department Counsel submitted the Government's File of Relevant Material (FORM), containing 11 Items. Applicant received the FORM on November 21, 2016. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not provide a response to the FORM, object to the Government's evidence or submit documents. All Items are admitted into evidence. The case was assigned to me on August 14, 2017.

### **Findings of Fact**

Applicant is 48 years old and married for the second time in 2014. He and his first wife divorced in 1994. They have 26-year-old twins. He has a 19-year-old daughter from another relationship. Applicant served in the U.S. Army from 1987 to 1992, when he was honorably discharged. He held a security clearance while serving. In 2012 he earned a construction certificate at a local college. He has worked for his employer, a defense contractor, since October 2014. He previously worked for that employer between 2010 and 2012. (Item 3, Item 11)

Applicant has a history of criminal conduct, as set out in the SOR, which spans from 1988 to 2009. It includes seven incidents, five of which are related to alcohol consumption, including four charges for driving under the influence (DUI) of alcohol. Applicant admitted the allegations in SOR ¶¶ 1.b through 1.g, and provided explanations. He denied the allegation in SOR ¶ 1.a because he did not recall an arrest or charge for a failure to appear and burglary-felony in 2009. That criminal incident is documented by an FBI record and a state criminal history. Additionally, he described the incident in his 2010 security clearance application. (Item 5, Item 6, Item 11)

In his Answers, Applicant stated that some of criminal incidents occurred when he was in his early 20's and while stationed overseas. He stated that his first wife left him in 1993 and took their twins with her. He has not seen them since then. As a consequence, he became seriously depressed and consumed too much alcohol. Applicant stated that he has not consumed alcohol since 2009 and does not intend to ever consume alcohol and drive. (Item 2) However, that statement contradicts his May 2015 statement to a government investigator that he had a few beers the night before he was terminated from his job. (Item 4)

Applicant denied the allegation in SOR ¶ 2.a, which alleged that in 2014 he was terminated from a position after failing a breathalyzer test which indicated he had consumed alcohol. He asserted that he was a diabetic and as a consequence the result was essentially a false positive. He stated that as of 2016, when he filed his Answers, the matter was in arbitration. He did not submit medical information confirming his contention after receiving the FORM.

During a March 2015 interview, Applicant discussed his position regarding the results of the breathalyzer test, his diabetic condition, and termination from work. He also stated that he had a few beers the night before the breathalyzer, but had not been drinking at the time the test was administered. He said that the case was in arbitration as of that date. (Item 4)

Applicant denied the allegations in SOR ¶¶ 3.a and 3.b, which cross-alleged the allegations under criminal conduct and alcohol consumption. He explained that he has been honest and candid throughout the investigative process. (Item 2)

### **Policies**

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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 national security eligibility will be resolved in favor of the 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility seeks to enter 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 national

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

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination 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**

AG ¶ 30 sets out the security concern related 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.

AG ¶ 31 lists conditions that could raise a security concern and may be disqualifying. The following two are potentially applicable in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant was arrested and/or charged with eight criminal offenses from 1988 to 2009, which cast doubt on his judgment. The evidence, including his admissions and law enforcement records, confirm those allegations. The evidence established both disqualifying conditions.

AG ¶ 32 describes conditions that could mitigate security concerns raised under this guideline. Two 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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The last criminal incident occurred in February 2009, approximately nine years ago. The evidence establishes some mitigation under AG ¶ 32(b). In addition to the passage of time, the record indicates that Applicant has worked for the same employer for about six years, which indicates that he has maintained a good employment record. AG ¶ 32(d) provides some mitigation.

### **Guideline G: Alcohol Consumption**

AG ¶ 21 expresses the security concerns 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 ¶ 22 describes conditions that could raise a security concern under this guideline. Three of them are potentially applicable in this case:

(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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

(b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Between 1988 and 1999, Applicant was arrested and charged with four DUIs: 1988, 1991, 1994, and, 1999. He was over the legal limit for alcohol at the time of the arrests, indicating that his judgment was impaired. Later in 1988, he was also arrested for assault, battery, and disorderly conduct that occurred after he consumed alcohol. In 2014, he was administered a breathalyzer while at work. The test indicated that he had consumed alcohol prior to taking the test. The evidence raised the above three disqualifying conditions.

AG ¶ 23 provides the following conditions that could mitigate security concerns under this guideline:

- (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 judgment;
- (b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;
- (c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and
- (d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

The last alcohol-related incident occurred in 2014, which was less than two years before this SOR was issued. Given Applicant's history of alcohol abuse, that is not a sufficient period of time from which to conclude that similar incidents will not recur. Although Applicant asserted that the breathalyzer registered an inaccurate finding, he failed to produce evidence to substantiate his position. He also admitted to a government investigator that he had consumed alcohol the night before, which is inconsistent with his statement that he had abstained from alcohol consumption since 2009. AG ¶ 23(a) does not apply. Applicant acknowledged his problems with alcohol, but there is no evidence that he participated in treatment, established a pattern of modified consumption in accordance with treatment recommendations, or is participating in an alcohol rehabilitation program. The evidence does not establish mitigation under AG ¶ 23(b) or AG ¶ 23(c).

#### **Guideline E: Personal Conduct**

AG ¶ 15 explains the security concerns relating to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information.

The guideline at AG ¶ 16 contains no disqualifying condition that would support security concerns in this case that are independent of those comprehensively addressed

under Guideline J and Guideline G. The SOR merely re-alleges by reference the allegations raised under those guidelines. While any conduct involving questionable judgment or unwillingness to comply with rules and regulations can theoretically fall under Guideline E, as well as other guidelines, no value is added to the analysis of Applicant's national security eligibility by doing so in this case.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(d):

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and G in this whole-person analysis. I considered that Applicant's last criminal incident occurred in 2009, more than seven years before the SOR was issued. Based on that fact and that he has successfully worked for his employer for most of the intervening years, he mitigated the criminal conduct security concerns. However, he failed to present sufficient evidence to mitigate the alcohol concerns. There is minimal evidence from which to conclude he no longer has an alcohol problem or that it is sufficiently under control that recurring incidents are unlikely. Overall, the evidence raises doubt as to Applicant's present eligibility and suitability for a security clearance.

## **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline J:       FOR APPLICANT

Subparagraphs 1.a through 1.g:   For Applicant

Paragraph 2, Guideline G:       AGAINST APPLICANT

Subparagraphs 2.a and 2.b:       Against Applicant

Paragraph 3, Guideline E:       FOR APPLICANT (Duplicative)<sup>2</sup>

Subparagraphs 3.a and 3.b:       For Applicant (Duplicative)

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM  
Administrative Judge

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<sup>2</sup> Paragraph 3 is duplicative of Paragraphs 1 and 2. It supports no separate findings of security concern.