



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



In the matter of: )  
)  
) ISCR Case No. 16-01889  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Robert Kilmartin, Esq., Department Counsel  
For Applicant: Patrick Korody, Esq.

01/18/2018

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns pertaining to Guidelines J (criminal conduct), G (alcohol consumption), and E (personal conduct). Clearance is granted.

**Statement of the Case**

On November 9, 2015, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 12, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant. The action was taken pursuant to Executive Order 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), which became effective on September 1, 2006.

The SOR alleged security concerns under Guidelines J, G, and E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with national security to grant a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or denied.

On August 2, 2016, Applicant provided a response to the SOR. On September 15, 2016, Department Counsel was prepared to proceed. On November 8, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On November 8, 2016, DOHA issued a notice of the hearing, setting the hearing on November 16, 2016. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 4, which were received into evidence. Applicant offered Applicant Exhibits (AE) A through Q, which were received into evidence. Applicant testified and called three witnesses. I held the record open until December 30, 2016, to afford Applicant an opportunity to submit additional evidence. Applicant timely submitted AE R and S, which were received into evidence. On November 29, 2016, DOHA received the hearing transcript (Tr.).

On January 5, 2017, I e-mailed Department Counsel and Applicant's counsel advising that I intended to issue a summary decision granting Applicant's security clearance noting that Applicant had mitigated security concerns raised in the SOR. On January 6, 2017, Department Counsel notified me by e-mail that the Government objected to the issuance of a summary decision in this case.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs, as required.<sup>1</sup>

### **Findings of Fact**

Applicant admitted all of the SOR allegations, with explanations. After a thorough review of the record, I make the following findings of fact:

#### **Background Information**

Applicant is a 31-year-old ordinary seaman employed by a defense contractor since June 2015. He has an interim security clearance and seeks a permanent secret security clearance as a condition of his continued employment. (GE 1; Tr. 18-19, 75)

Applicant dropped out of high school in August 2005, and was awarded his GED in September 2005. He attended community college from August 2005 to October 2005, but did not earn a degree. (GE 1; Tr. 19-20, 57) Applicant married in December 2012, and has a four-year-old son. His wife is employed as a secretary. Applicant did not serve in the U.S. armed forces. (GE 1; Tr. 20-21)

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<sup>1</sup> The new AGs are available at [http://ogc.osd.mil/doha/5220-6\\_R20170608.pdf](http://ogc.osd.mil/doha/5220-6_R20170608.pdf).

## **Criminal Conduct/Alcohol Consumption/Personal Conduct**

Applicant's SOR alleges an extensive history of low-level criminal behavior that began in December 2002, when he was 16, and continued until December 2015, when he was 29. This behavior involved 18 separate incidents that included possessing tobacco as a minor, possession of alcohol as a minor, criminal mischief, speeding, driving under the influence, grand theft auto that was dismissed, disorderly intoxication, probation violation, and several automobile-related offenses (e.g. no registration certificate or no proof of insurance). Two of the arrests were for driving under the influence (DUI) in December 2006 and September 2008. He pled guilty to the December 2006 DUI and the September 2008 DUI was reduced to reckless driving. His last arrest in December 2015 was for disorderly intoxication. Alcohol played a role in all of these incidents except for those that were automobile-related. (See SOR ¶¶ 1.a – 1.r; SOR answer; and GE 1 – 4 and AE A - N for further details)

Applicant's counsel presented a compelling case in mitigation in the form of witness testimony and documentary evidence.

Applicant's mother (AM) – AM is a career paralegal, who has worked for the same attorney for over 31 years. She and Applicant's father divorced around 2005. Applicant's father is an attorney and a functioning alcoholic. Her former husband's family has a history of alcoholism and addiction. Applicant's older brother is a "serious drug addict in active addiction." When she left her husband, Applicant and his brother remained with their father. AM described the home environment for her sons and former husband as "out of control." (Tr. 22-26)

Applicant played football in high school and in 2004, his team went to the state finals and lost. In 2005, Applicant dropped out of high school and his life began to spiral downward. (Tr. 26-27) AM lived through all of Applicant's run-ins with the law. She never wavered in her support for him believing that he would overcome his problems with alcohol. That day finally came when she picked him up from jail following his last arrest in December 2015 for disorderly intoxication. AM described him as a "broken man that night" and after getting into her car, "he just broke down." (Tr. 27-30)

After the December 2015 arrest something was different. Applicant realized that he had put everything at risk -- his family and dream job. There was no doubt in AM's mind that her son was a changed man. Applicant has not had a drink since his December 2015 arrest. He is on a strict diet and physical fitness program. AM has never seen her son make such a dramatic lifestyle change after any of his previous run-ins with the law. Applicant's focus is on his family, work, and church. AM sees Applicant several times a week and would know if he is drinking. She noted that he has not had a drink in over a year and has taken appropriate steps to ensure that he will not re-offend. (Tr. 30-35)

Applicant's associate pastor (AP) – AP is an associate pastor and minister of community outreach responsible for overseeing a ministry of substance abuse. He has

been working in that faith-based ministry for over 27 years. His ministry currently administers to over 750 individuals a week and over the course of his career he has helped “thousands” with substance abuse problems. (Tr. 35-38)

AP has been working with Applicant for over a year and met him when he started attending his church. Applicant regularly attends substance abuse meetings on Wednesday nights and Sunday mornings on a voluntary basis. His meetings are faith-based support groups similar to Narcotics or Alcoholics Anonymous. Applicant is an active participant at the meetings and seeks to better his life. AP has discussed Applicant’s alcohol issues with him on many occasions and believes that he is fully committed to recovery. AP recognizes his credibility is on the line and is confident that Applicant “has his head on straight and moving in the right direction and doing very well.” (Tr. 38-41) AP has no knowledge of Applicant being formally diagnosed as an alcoholic. AP is unable to guarantee anyone’s success, but there are few individuals as focused on their recovery as Applicant. (Tr. 42-45)

Applicant’s project manager (PM) – PM is Applicant’s supervisor and is a retired U.S. Navy master chief quartermaster with 30 years of naval service. He held a security clearance in the Navy and is very familiar with security clearance requirements. PM is responsible for managing all the dive boats for the Navy, Marine Corps, Air Force, Army, Coast Guard, Civil Service, and foreign dive training by the Navy. PM is responsible for overseeing the operations of two large dive boats and 15 smaller combat rescue and dive boats that he referred to as “small boats. (Tr. 45-49)

Applicant is an ordinary seaman on board one of PM’s large dive boats and serves as a fill-in relief Craftmaster on those vessels. PM talks to Applicant two to three times a day and sees him once or twice a week. Applicant has the same responsibility as a commanding officer as a fill-in relief Craftmaster and as such is responsible for the safety of 60 divers in training, 10 to 15 dive supervisors and dive trainers, and a crew of 5. In short, Applicant is in charge of everything to do with their lives, getting in and out of port safely, and is responsible for the safety of the vessel and crew. (Tr. 49-50)

Applicant is a unique employee in that he is the only Craftmaster employed by PM’s company who acquired his Captain’s license at his own expense and on his own time. Applicant is a top performer and is highly regarded by company and senior Navy personnel. PM is familiar with Applicant’s previous arrests, adding that Applicant allowed alcohol to take control of his actions and ruin his life. However, based on the turnaround that Applicant has made and his years of experience in a leadership capacity, PM has absolutely no concerns about Applicant’s ability to maintain his security clearance. As far as PM is concerned, Applicant is a “must-have employee” adding that he would trust Applicant with his life and one of his ships. (Tr. 50-57)

Applicant’s testimony (AT) – Football was a big part of Applicant’s life from the time he was six years old. His dream was to play Division I football in college; however, that changed after his high school team lost the state finals in 2004. Things were not going well at home and his parents separated in 2005. His older brother was having

substance abuse problems. The combination of these events were factors that led to Applicant dropping out of high school in 2005. (Tr. 58-59)

After Applicant dropped out of high school, his alcohol consumption increased. Although he did not drink every day, when he did drink, he drank to excess and made poor choices. Applicant does not dispute the arrests listed in his SOR and apart from the civil traffic citations, those arrests all involved alcohol. Applicant discussed his arrests and acknowledged that he mistakenly thought he knew his limits with alcohol. (Tr. 59-64)

Applicant recognizes that he has a problem with alcohol and cannot drink. Despite the adverse consequences that drinking caused him, he always thought he had learned his lesson and could control himself. After his last arrest in December 2015 for disorderly intoxication, he was completely broken and never felt so horrible in his life. He disappointed his wife and thought how disappointed his son would be knowing his father was in jail. Simply put, he had had enough. (Tr. 64-67)

Applicant has not had a drink since his last arrest in December 2015. Since that December 2015 arrest, Applicant voluntarily attends AP's faith-based meetings on Wednesday evenings and Sunday mornings. He takes pride in his personal appearance and maintains a healthy lifestyle through improved diet and exercise. Applicant never misses church. His wife is supportive of his sobriety. His daily routine consists of getting up early, going to work, picking up his son at his father's house after work, and going home to spend time with his family. (Tr. 68-72) In contrast to his weekends before his December 2015 arrest, his weekends are family-centric that involve hiking, spending time on his boat, and watching football. Applicant and his wife strive to be good role models for their son. (Tr. 72-73)

Applicant avoids environments where there is drinking and has a new group of friends from church. His goals are to honor God in everything he does, and he wants to be hard working, a good husband, and a good father. Applicant enjoys his work and the contribution he is making and takes satisfaction in having completed his Captain's license on his own time and at his own expense. His criminal history makes him feel awful. Applicant recognizes the turmoil and grief his conduct has caused his mother and stepfather. Applicant understands that he cannot drink and that alcohol can no longer be a part of his life. (Tr. 73-80)

Applicant understands that having a security clearance is a privilege. Each morning Applicant prays and asks God to give him strength, and before he goes to bed, he thanks God for giving him another day of sobriety. In addition to his faith-based meetings that he attends, he periodically attends Alcoholic Anonymous meetings. Applicant reiterated that is ashamed of his past behavior and very much wants to put it behind him. (Tr. 80-93)

Applicant no longer associates with his former drinking friends. He is overwhelmed by the support he receives from his supervisors and colleagues at work.

Applicant is very fortunate to have the continuing support of his mother, who “always does the right thing” and is disappointed for having failed her so many times. (Tr. 99-101) Post-hearing, Applicant submitted a signed statement dated December 30, 2016, advising that he has not had a drink since his December 2015 arrest, and documentation of his regular attendance at faith-based meetings. (AE R - S)

### **Character Evidence**

Applicant submitted his Craftmaster designation letter and a copy of his current Coast Guard license. His supervisor submitted a reference letter lauding his performance and trustworthiness and recommended him for a security clearance. Applicant’s recent performance evaluations document sustained superior performance and note his contribution to the national defense. (AE O)

In addition to his supervisor’s reference letter, Applicant submitted ten character reference letters that vouched for his trustworthiness and good character. These individuals include his mother’s attorney-employer, family friends, co-workers, pastor, and a member of law enforcement. They are familiar with Applicant’s alcohol-related arrests, know him well as a member of the community, and have no reservations in supporting him for a security clearance. Lastly, Applicant submitted photographs of his family that show family involvement that only a photograph could. (AE P)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Criminal Conduct**

Under Guideline J (criminal conduct), the Government’s concern is that 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.

The Government established its case under Guideline J through Applicant’s admissions and evidence presented. A review of the evidence supports application of three criminal conduct disqualifying conditions, AG ¶ 30(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;” AG ¶ 30(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;” and AG ¶ 30(d) “violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.”

Considering the totality of the circumstances in this case, I find application of two criminal conduct mitigating conditions is appropriate:

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 credible 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.

Applicant presented credible evidence of actions taken to overcome his 13-year history of low-level criminal activity. A review of the evidence demonstrates that the source of Applicant’s criminal activity stems primarily from his misuse of alcohol. Unfortunately, it took Applicant 13 years and numerous arrests before he came to the realization that alcohol was taking him down a destructive path with adverse consequences for not only for him, but also for his family. Further mitigating rationale is discussed under alcohol consumption below.

### **Alcohol Consumption**

Under Guideline G (alcohol consumption), the Government’s concern is that 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 ¶ 21.

The Government established its case under Guideline G through Applicant’s admissions and evidence presented. A review of the evidence supports application of two 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 the frequency of the individual’s alcohol use or whether the individual has been diagnosed with alcohol use disorder;” and AG ¶ 22(c) “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.”

Considering the totality of the circumstances in this case, I find application of three alcohol consumption mitigating conditions is appropriate:

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;

AG ¶ 23(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; and

AG ¶ 23(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.

Applicant presented credible evidence of actions taken to overcome his alcohol-related arrests. Given Applicant's 13-year history of extensive alcohol-related criminal conduct, it appeared unlikely that he could mitigate this history. However, Applicant's counsel did a superb job of presenting a methodical and compelling case of mitigation. He did this through Applicant's credible testimony corroborated by persuasive witness testimony and documentary evidence. Applicant has completed one year of sobriety accompanied by lifestyle changes. He no longer associates with his drinking colleagues and focuses on his work, family, and faith. Applicant's sobriety has earned him the respect and support of his family, friends, and his employer.

Applicant is an excellent employee, who is reliable, dependable, professional, and a respected member of the community. At his hearing, Applicant acknowledged the problems the misuse of alcohol has caused him, demonstrated remorse, and a steadfast commitment to continue lifestyle changes consistent with leading an alcohol-free life.

## **Personal Conduct**

The conduct under criminal conduct was cross-alleged under personal conduct without any additional facts or allegations. Given the fact that the SOR allegations were fully discussed and dealt with under criminal conduct as well as alcohol consumption, it is unnecessary to discuss further under personal conduct

## **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 the 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) 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. The discussion in the Analysis section under Guidelines J, G and E is incorporated in this whole-person section. However further comments are warranted.

I was particularly impressed with Applicant's demeanor during his hearing and the apparent effect this process has had on him. Applicant has been willing to do whatever is necessary to recover from his alcohol-related arrests. The process has been costly for him, not only financially, but also personally and professionally. Applicant is dedicated to the defense industry and his talents and skillset are in demand. His witnesses and reference letters provide insight into his recovery and the importance of maintaining sobriety. Applicant demonstrated the correct attitude and commitment to maintaining sobriety.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors" and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

### **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 J: Subparagraphs 1.a – 1.f:	FOR APPLICANT For Applicant
Paragraph 1, Guideline G: Subparagraphs 2.a:	FOR APPLICANT For Applicant
Paragraph 2, Guideline E: Subparagraph 3.a:	FOR Applicant For Applicant

## **Conclusion**

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

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ROBERT TUIDER  
Administrative Judge