



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



In the matter of:)	
)	
)	ISCR Case No. 20-01747
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2021

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. He was convicted three times of Driving While Intoxicated (DWI). Additionally, he pled no contest to violation of probation and remains on unsupervised probation. He has failed to mitigate the security concerns. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

On October 15, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a SOR to Applicant, detailing the security concerns under Guideline G, alcohol consumption, and Guideline J, criminal conduct, explaining why it was unable to find it clearly consistent with the national interest to grant or continue a security clearance eligibility for him.

The DCSA CAF took the action under 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DoD on June 8, 2017.

In an undated response to the SOR, Applicant requested a decision on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On November 23, 2020, the Government submitted a File of Relevant Material (FORM), consisting of six exhibits (Items 1 - 6). On December 1, 2020, Applicant received a copy of the FORM, which instructed him to respond within 30 days of receipt. As of February 2, 2021, no response had been received. I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant.

Evidentiary Ruling

Department Counsel submitted as Item 6 a Summary of Personal Subject Interview (PSI) conducted by the Office of Personnel Management investigators with Applicant on January 14, 2020. The summary was part of the DoD Report of Investigation (ROI) in Applicant's case. Under ¶ E3.1.20 of the Directive, a DoD personnel background report of investigation may be received in evidence and considered with an authenticating witness, provided it is otherwise admissible under the Federal Rules of Evidence. The interview summary report did not bear the authentication required for admissibility under ¶ E3.1.20.

In ISCR Case No. 16-03126 decided on January 24, 2018, the Appeal Board held that it was not error for an administrative judge to admit and consider a summary of personal subject interview (PSI) where the applicant was placed on notice of his or her opportunity to object to consideration of the summary; the applicant filed no objection to it; and there is no indication that the summary contained inaccurate information. In this case, Applicant was provided a copy of the FORM and advised of his opportunity to submit objections or material that he wanted the administrative judge to consider.

The FORM contained the following warning:

IMPORTANT NOTICE TO APPLICANT: The attached summary of your Personal Subject Interviews (PSI) (Exhibit 6) is being provided to the Administrative Judge for consideration as part of the record evidence in this case. In your response to this File of Relevant Material (FORM), you can comment on whether each PSI summary accurately reflects the information you provided to the authorized OPM investigator(s) and you may make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you can object on the ground that the report is unauthenticated by a Government witness. If no objections are raised in your response to this FORM, or if you do not respond to this FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case.

Concerning whether Applicant understood the meaning of authentication or the legal consequences of waiver, Applicant's *pro se* status does not confer any due process rights or protections beyond those afforded him if he was represented by legal counsel. He was advised in ¶ E3.1.4 of the Directive that he may request a hearing. In ¶ E3.1.15, he was advised that he is responsible for presenting evidence to rebut, explain, or mitigate facts admitted by him or proven by Department Counsel and that he has the ultimate burden of persuasion as to obtaining a favorable clearance decision. While the Directive does not specifically provide for a waiver of the authentication requirement, Applicant was placed on sufficient notice of his opportunity to object to the admissibility of the interview summary, to comment on the interview summary, and to make any corrections, deletions, or updates to the information in the report. Applicant did not object to the FORM or indicate that the PSI contained inaccurate information.

In December 2018, Applicant received a bachelor's degree from a state university. (Item 3) He can reasonably be held to have understood his obligation to object to the PSI or indicate that it contained inaccurate information. Accordingly, I accepted Item 6 in the record, subject to issues of relevance and materiality in light of the entire record.

Summary of SOR Allegations

Applicant has been arrested three times for DWI. He was found guilty once and pled guilty twice. Additionally, he pled no contest to a Violation of Probation. (Item1) From January 2019 through August 23, 2019, he was incarcerated following his most recent conviction. His first DWI occurred before he was of legal drinking age. Applicant admitted the allegations.

Findings of Fact

After considering the FORM, exhibits to the FORM, and Applicant's admissions to the SOR (Item 2), I make the following findings of fact.

Applicant is 25 years old and single. He has worked for a defense contractor as a junior imagery analyst since November 2019. (Item 3) He seeks to obtain a security clearance. He has not served in the military. In December 2018, he obtained a bachelor degree.

On January 18, 2016, Applicant was at a fraternity house party celebrating his 20th birthday. (Item 6) He remembers having one drink at 10 p.m. and had no memory of what happened the rest of the evening. He was arrested at 4 a.m. and woke up in jail. (Item 6) He had been found in his car, which was parked on top of a tree stump. (Item 5) Applicant was arrested and charged with "Driving While Intoxicated (DWI), 1st Offense." He spent one night in jail following his arrest. (Item 6) On March 16, 2016, he was found guilty, and ordered to pay a fine of \$800, sentenced to 90 days in jail (all suspended), and placed on one year of supervised probation. He was also ordered to attend an Alcohol Safety Action Program (ASAP), which he completed on March 3, 2017. (Item 5) What, if any, knowledge or insight he gained from this ten weeks of alcohol education classes is not included in the record. He admits being immature at the time of his first arrest. Following his court

appearance, he stated he did not make any changes to his alcohol consumption. (Item 6) Applicant described his drinking at the time of his first DWI was drinking on weekends and was drinking to get drunk, but not to the point of blacking out. (Item 6)

On March 16, 2016, the day Applicant was to appear in court on his first DWI, he was arrested for improper driving for driving 110 miles per hour in a 75 miles per hour zone. His excuse was that he knew he would lose his driving privileges for one year so he thought he would have one last driving spree before appearing in court. (Item 5, 6) He paid a \$500 fine. (Item 6)

Applicant retained his driving privileges in July 2017. On September 9, 2017, he went to a bar and drank with friends. He then went to a friend's house and continued drinking. He then decided to joyride around town before being arrested at 3 a.m. (Item 6) He was jailed for the night and bailed out the next day. He admits being immature at the time and motivated at the time to show off for his friends. (Item 6) Again, following his court appearance for his second DWI, he stated he did not make any changes to his alcohol consumption. (Item 6)

On September 9, 2017, Applicant was arrested and charged with "DWI: 2nd Offense Within 5 Years" with a blood-alcohol content (BAC) of .15% to .20%. Prior to his second DWI arrest, he knowingly drove while intoxicated, believing at the time that he was invincible. He pled guilty, and was fined \$1,000, sentenced to 12 months in jail (10 months, 20 days suspended), and placed on probation for two years. He spent 40 days in jail. His driver's license was suspended for three years. (Item 6) He had an interlock device installed on his vehicle. (Item 5) He was again ordered to attend an ASAP, which he completed in February or March 2018. (Item 5) What, if any, knowledge or insight he received from this four weeks of alcohol education classes is not included in the record. He stated he did not make any changes to his alcohol consumption after his second offense. (Item 6)

Applicant described his drinking at the time of his 2nd DWI as drinking four days a week and drinking to get drunk. He acknowledges blacking out a few times, but asserts this was unintentional. (Item 6)

On December 28, 2018, Applicant was arrested and charged with "DWI: 3rd Offense Within 5 Years (felony)" and "Driving After Revoked License." He pled guilty on or about August 23, 2019, and was sentenced to two years in jail (1 year, 5 months suspended), and to one year supervised probation and two years of unsupervised probation. He was in jail for seven months. His driver's license was indefinitely suspended, and he was ordered to attend another ASAP for four weeks. For driving after forfeiture of license, he was sentenced to six months in jail (suspended). (Item 5) The two sentences were to be served concurrently. (Item 6)

At the time of Applicant's third DWI, he had just graduated from a university, and it was his first night back in town. He went drinking with friends at a bar before going to a friend's home to continue drinking. He and his friend then went to a fast-food restaurant. Prior to going through the driving-thru, Applicant and his friend changed seats because

of a run-in his friend had early in the day at the same establishment. Applicant knew his license was suspended, but he decided to drive anyway. He was arrested, and his breathalyzer test registered a .09% BAC.

Applicant remained in jail after his arrest on December 28, 2018, until February 13, 2019. At that time, he was allowed to enroll in an alcohol-recovery retreat program until March 13, 2019, where he was diagnosed with "Alcohol Abuse." He returned to jail on March 23, 2019. He remained in jail until August 23, 2019, when he appeared in court to be sentenced for his 3rd DWI. (Item 6) What he learned from the alcohol-recovery retreat is not part of the record.

Applicant asserted he was more mature at the time of his 3rd DWI arrest than he was during his previous two DWI arrests. He said he just has to say "no" to his friends. (Item 6) He stated he had decided to leave the fraternity and move in with his father. It should be noted that his third DWI occurred after he had graduated from the university, which would normally result in an individual no longer living in a fraternity home. (Item 6)

On April 1, 2019 Applicant was charged with Violation of Probation for the sentence imposed for his September 2017 DWI. He pled no contest, and the remaining 10 months, 20 days of his sentence was imposed (9 months suspended). His driver's license was suspended until ordered by the court to be returned. (Item 5) From January 2019 until August 23, 2019, he remained in jail. (Item 6)

As of January 2020, when Applicant completed his enhanced PSI, he had yet to complete the ASAP classes. (Item 6) He stated he was waiting to take the classes to a date closer to when his driver's license will be reinstated, because once he completes the classes, he will have to check in with the program every three months until his license is reinstated and he will also have to make a payment on checking in. Although his license was indefinitely suspended, Applicant believes his license will be reinstated in 2024. (Item 6) He believes his driver's license suspension was for five years. He plans to attend the required classes closer to his reinstatement date in order to save money. (Item 6)

Applicant asserts he has stopped the "party lifestyle" and will not get behind the wheel after drinking. (Item 6) He asserts he no longer drinks to get drunk. He maintains that he now makes better choices and usually obeys all laws. (Item 6) He continues to drink alcohol.

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, 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(a), the adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

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.

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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination of 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

Guideline G: Alcohol Consumption

The security concern for alcohol consumption is articulated in AG ¶ 21:

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.

Applicant has been arrested and convicted of DWI three times. His first DWI arrest was before he had attained legal drinking age. His BAC at the time of his second arrest was .15% to .20%, evidencing a high level of intoxication and a high frequency of consumption. All three convictions resulted in him being sentenced to jail. He served one month and 10 days in jail on his second conviction and six months on his third conviction.

He continued to drink alcohol to excess even after attending court ordered ASAPs. As of the date of his PSI, he had yet to complete the state ASAP, and there is no evidence in the record that he has completed that court-ordered alcohol program. He has also experienced blackouts while drinking.

Two disqualifying conditions under AG ¶ 22 apply:

(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

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

Applicant has the burden of establishing one or more of the mitigating conditions under AG ¶ 23. Those conditions that could possibly mitigate alcohol consumption security concerns are:

(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;

(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 a counseling or treatment program, has no history of previous 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.

Applicant's multiple alcohol-related offenses raise considerable concerns for his judgment and reliability. His DWI arrests started before he reached the legal age to consume alcohol. Alcohol-awareness programs and even time in jail did not deter him from overindulging in drinking and then driving. After his first DWI, he lost his license for one year. Two months after he reacquired his license, he was again arrested for DWI. Prior to his second DWI arrest, he knowingly drove while intoxicated, believing at the time he was invincible. He now asserts he has stopped the "party lifestyle" and no longer drives

after drinking, but his current level of alcohol consumption is unknown. He asserts he now drinks more responsibly, but provided no evidence of moderating his drinking except for his self-serving statement.

None of the mitigating conditions apply. The relatively short period of time that has passed since Applicant's last alcohol-related incident and treatment, coupled with his history of prior alcohol-related incidents, treatments, and relapses precludes application of AG ¶ 23(a). This mitigating condition cannot reasonably apply to such a recent episode of serious binge drinking with blackout. His latest arrest was in December 2018. At the time of his enhanced subject interview, he was still drinking. Not enough time has passed since his last arrest to guarantee against a recurrence of abusive consumption. The behavior was not infrequent, nor did it happen under unusual circumstances.

AG ¶ 23 (b) "the individual acknowledges his or her alcoholism or issues of alcohol abuse, 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," does not apply. Applicant has been diagnosed with Alcohol Abuse and asserted, but failed to provide documentation showing that he uses alcohol responsibly.

Neither 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," nor AG ¶ 23(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," applies. He returned to drinking to excess after two court-ordered ASAPs.

Guideline J, Criminal Conduct

The security concern about criminal conduct is articulated in AG ¶ 30, "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." Applicant's underage drinking to intoxication resulting in a DWI in January 2016, his DWIs committed in September 2017 and December 2018, and his violation of probation in April 2019 raise serious criminal conduct security concerns. Although not specifically alleged in the SOR, the evidence also shows that he drove 110 mph in a 75-mph zone on the day he was to appear for sentencing for his first DWI conviction. He said he was speeding because he knew he was going to lose his driving privilege for one year once he was sent to court on the DWI. While that conduct cannot be considered for disqualifying purposes, it reflects serious immaturity and a lack of reform that weights against him under the whole-person evaluation.

In August 2019, Applicant was sentenced to one year supervised probation for his third DWI, two years unsupervised probation for driving without a license, and sentenced to two years in prison, of which he served seven months. On April 1, 2019, he was

charged with violation of probation, pled no contest, and the remaining 10 months, 20 days of his sentence was imposed (9 months was suspended).

Four disqualifying conditions under AG ¶ 31 are established, as follows:

(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;

(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.

(c) individual is currently on parole or probation; and

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant has the burden of establishing the applicability of one or more of the mitigating conditions under AG ¶ 32, which provide:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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.

Applicant remains on unsupervised probation. What he learned during his February 2019 alcohol treatment at the recovery retreat program and from his first two court-ordered ASAPs is unknown. He has not completed the court-ordered ASAP for his third DWI and does not intend to do so until closer to the time of his driver's license reinstatement. His decision not to attend ASAP at this time is that it will cost him money every three months when he has to check in after completing ASAP and prior to his license being reinstated. He asserts that he has stopped the "party lifestyle," has learned to say "no" to his friends, and now drinks responsibly. However, it is too soon to conclude

that he possesses the requisite good judgment, reliability, and trustworthiness for security clearance eligibility. The criminal conduct security concerns are not adequately mitigated.

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) 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 common sense 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. My comments under Guidelines G and J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant has a lengthy history of repeated alcohol-related incidents, completion of alcohol safety-awareness programs followed by periods of excessive alcohol consumption and driving under the influence. Abusive drinking raises concerns about whether Applicant possesses the judgment, self-control, and other characteristics essential to protecting national security information.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Further, it must once again be noted that any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.

Applicant requested a decision on the written record, so it was incumbent on him to provide the evidence that might extenuate or mitigate the poor judgment raised by his history of alcohol-related arrests and convictions. Applicant has the ultimate burden of persuasion. In requesting an administrative determination, Applicant chose to rely on the written record. By so doing, and then not responding to the Government's file of relevant

material, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the alcohol consumption and criminal conduct security concerns. By failing to provide such information, and in relying solely on the admissions he made in his SOR Response, the alcohol consumption and criminal conduct security concerns remain.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, DOD Manual 5200.02, and the AGs, to the facts and circumstances in the context of the whole person. The issue is whether his alcohol-related arrests raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(c)) Overall, 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 not mitigated the 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, Alcohol Consumption:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Paragraph 2, Criminal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge