



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



In the matter of: )  
 )  
 [Name Redacted] ) ISCR Case No. 20-01115  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Raashid S. Williams, Esq., Department Counsel  
For Applicant: Erica Bilkis, Esq.

03/17/2022

**Decision**

HOGAN, Erin, Administrative Judge:

Applicant mitigated the security concerns raised under Guideline G (alcohol consumption), and J (criminal conduct). Eligibility for access to classified information is granted.

**Statement of the Case**

On November 17, 2018, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On August 20, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines G, Alcohol

Consumption and J, Criminal Conduct. On October 28, 2020, Applicant responded to the SOR and requested a hearing.

On May 7, 2021, the case was assigned to another administrative judge. The case was transferred to me on October 26, 2021. The hearing was originally scheduled for January 11, 2022, but was delayed for health reasons. The parties agreed to a new hearing date of February 15, 2022. The hearing was held as scheduled using Microsoft Teams video teleconference.

During the hearing, Department Counsel offered six exhibits, Gov Ex 1-6 and one hearing exhibit, HE 1. Applicant offered five exhibits, AE A-E. There were no objections; and all proffered exhibits were admitted into evidence. (Transcript (Tr.) 12-13, 19) On February 23, 2022, DOHA received a transcript of the hearing.

Some details in this decision were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, he admitted all of the SOR allegations. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is a 38-year-old technical consultant working for a defense contractor. (Tr. 46; GE 1) His highest level of education is a Master's Degree. He is single but involved in a relationship. He lives with his mother. He is her caregiver. (Tr. 18, 41, 45)

### **Alcohol Consumption and Criminal Conduct**

The SOR alleges that Applicant was arrested in about December 2018 and charged with Driving Under the Influence of Alcohol. He was stopped while driving home from a holiday party. Applicant entered a Nolle Diversion Program. In April 2019, he successfully completed the terms of the diversion program to include three days of community service; completing a Traffic Alcohol Program (TAP); completing a Traffic Safety Program and attending a Victim Impact Panel. (SOR ¶ 1.a: Tr. 27; Gov 4; Gov 5; Gov 6 at 3)

In July 2012, Applicant was arrested and charged with Driving Under the Influence of Alcohol. He attended a friend's birthday party and had several drinks. He dropped off his friend, and while he was driving home, he was pulled over for speeding and having expired tags. The police officer smelled alcohol on his breath and gave Applicant a field sobriety test, which he failed. In 2013, Applicant plead guilty. He was sentenced to 30 days house arrest with the exception of driving to and from work. His license was suspended for one year. He paid a \$2,500 fine and attended alcohol awareness classes. (SOR ¶ 1.b: Tr. 26-27; Gov 1 at 34; Gov 2; Gov 3; Gov 6 at 3).

Finally, Applicant was arrested in January 2009 and charged with Driving Under the Influence of Alcohol. He was drinking at a bar with friends. He claims someone might have put something in his drink. The police pulled him over while he was driving home. He plead guilty to DUI on September 16, 2009. His driver's license was suspended for 60 days, He entered a diversion program. Once he completed the diversion program the conviction was expunged from his records. He initially left this DUI offense off his 2018 security clearance application. He thought he did not have to list the offense because it was expunged from his record. (SOR ¶1.c: Tr. 24-26; Gov 6 at 3-4)

In his Answer to the SOR, Applicant states he is very remorseful and would like to apologize to his family, employer and government clients. They all placed trust in his decision-making ability. He has complied with all of the terms and conditions of each offense in a timely manner. He has gained a better understanding on how to prevent a similar situation occurring in the future.

Applicant's most recent DUI offense in December 2018, occurred shortly after he submitted his security clearance application. He attempted to contact his Facility Security Officer (FSO) the next day after his arrest. His FSO did not answer the phone so he sent an e-mail. (Tr. 30; Gov 4)

As part of his nolle diversion program for the December 2018 offense, Applicant successfully completed a state-certified Alcohol and Drug Treatment Program on February 5, 2019. Dr. R., Clinical Counselor for the program, indicates that Applicant successfully completed 26 sessions of the program. Dr. R. states: "[Applicant] was an attentive and active participant and contributed with good thoughts in group sessions. It appears that he had gained knowledge on the consequences of alcohol and illicit drugs in his life." (Note: The case file provides no evidence Applicant used illicit drugs nor is it alleged in the SOR.) (Tr. 28; AE B-1)

Applicant was required to attend a Mothers Against Drunk Driving (MADD) Victim Impact Panel. He testified that the panelists spoke about how alcohol-related incidents negatively affected their lives. He could relate because his father was killed when he was younger. The panel changed his perspective and made him understand how drinking and driving can negatively impact others. (Tr. 28-30; AE B-2) Applicant completed 24 hours of community service. (Tr. 28-30; AE B-3)

Applicant completed the requirements of his diversion program in 2019. (AE C) He was not diagnosed with an alcohol or substance abuse disorder. He was not advised to stop drinking alcohol. He occasionally drinks once or twice a week. He meets friends to watch sports or attend work-related network events. He testified that he has worked to change his behavior. He monitors his alcohol consumption and makes sure that he does not drink and drive. He arranges to take an Uber or Lyft when he plans on drinking. (Tr. 30-32)

Since October 2021, Applicant has met with a therapist every two to three weeks to seek help with setting better boundaries and self-care, and seeking healthier ways to relieve stress. His therapist's credentials include PhD, LICSW, and LCSW-C. The

therapist provided a letter on Applicant's behalf stating that since October 2021, Applicant has made significant progress on "managing stress, regulating emotions, and effectively communicating thoughts and feelings. [Applicant] fully engages in the therapeutic process and consistently demonstrates commitment to his mental and emotional well-being." (Tr. 32-33; AE E)

Applicant has begun to exercise more and has learned to meditate. He does not struggle with controlling his alcohol intake. He has not had an alcohol-related incident since his December 2018 arrest. (Tr. 33)

### **Character Evidence**

Mr. K.W., a friend and co-worker of Applicant, testified on his behalf. He has known Applicant for four years. He describes Applicant as a mentor who encouraged him to apply for a job at his current place of employment. He is aware of Applicant's three DUIs. Applicant told him about the 2018 DUI the morning after it happened. He testified Applicant was very remorseful and knew he made a mistake. He observed Applicant being proactive in preventing future alcohol-related incidents. Applicant tells all of his friends of the importance of not drinking and driving. K.W. socializes with Applicant. When Applicant drinks he usually only has one to two drinks, mainly beer. He believes Applicant drinks responsibly. He states that it is unlikely Applicant will drink and drive in the future. Applicant has grown over the years. Applicant has a stellar reputation at work. Applicant is his mother's caregiver. Applicant and his friends now focus on healthier activities, such as biking. They are starting a bike club. (Tr. 13-19)

Mr. C.D. is vice president of a school that provides alternative education paths for customers receiving government assistance. He has known Applicant for over 13 years both professionally and personally. In 2019, Applicant began teaching a course pro bono. Applicant prepared the lessons, provided one-on-one feedback, and successfully guided an 85% pass rate for his students. After each program, the students provide feedback on the instructors. Applicant receives extremely high marks. He communicates comfortably with his students. He shares some of the barriers he faced and the students look to him as an example of what they can become if they focus on their goals. Mr. C.D. trusts Applicant and feels lucky that Applicant is willing to teach without receiving pay. He notes Applicant faced his barriers and miscalculation of judgment directly. Applicant took responsibility and shares a wealth of knowledge with the students and anyone else who needs assistance. (AE B – 5; RSP003)

Applicant provided employer feedback of his duty performance from 2019 to 2021. Applicant has an excellent reputation at work and is highly regarded by his supervisors and customers. (AE D)

### **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.

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. Thus, nothing in this decision should be construed to suggest that it is based, 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, Secretary of Defense, and DNI 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 (4th Cir. 1994). “The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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 [or her] 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

### Alcohol Consumption

AG ¶ 21 states the Government's concern about 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 lists conditions that could raise a security concern and may be disqualifying in this case including:

(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.

AG ¶¶ 22(a) and 22(c) apply. Between 2009 and 2018, Applicant had three DUI arrests. AG ¶ 22(a) applies because of Applicant's alcohol-related incidents away from work. AG ¶ 22(c) applies because the evidence supports that Applicant consumed alcohol to the point of impaired judgement before each of his alcohol-related arrests.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

AG ¶ 23 details conditions that could mitigate security concerns including:

(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.

I have carefully considered history of alcohol-related DUIs. I considered that Applicant reduced his alcohol consumption after his 2018 DWI. He successfully completed the court-ordered Alcohol and Drug Treatment Program. He did not receive a diagnosis or recommendation to cease his alcohol consumption. Dr. R., the Clinical Counselor, noted Applicant was an attentive and active participant in the program. Applicant also learned from attending the MADD Victim Impact Panel. He currently drinks alcohol at a responsible level and limits his alcohol consumption to two drinks when he drinks. He insures that he does not drink and drive by taking Lyft or Uber on occasions when he is drinking. He has had no subsequent alcohol-related incidents involving the police and courts after December 2018. Enough time has elapsed without alcohol-related problems to enable a reasonable predictive judgment that his maladaptive use of alcohol is safely in the past. AG ¶ 23(a) applies. Applicant acknowledged his issues with alcohol and has taken steps to reduce his consumption and avoid drinking and driving. In October 2021, Applicant started and continues to see a therapist every two to three weeks to assist him with setting better boundaries, improving self-care, and finding better ways to relieve stress. AG ¶ 23(b) applies. Applicant's past history of alcohol consumption does not cast doubt on his current reliability, trustworthiness, or judgment. Alcohol consumption security concerns are mitigated.

### **Criminal Conduct**

AG ¶ 30 describes the security concern about 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 two conditions that could raise a security concern and may be disqualifying 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 committed DUI offenses in 2009, 2012 and 2018. These misdemeanor-level offenses are serious in that they entailed a risk of death, bodily injury, and property damage to Applicant and other drivers. AG ¶¶ 31(a) and 31(b) are established.

AG ¶ 32 describes four conditions that could mitigate security concerns including:

(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 demonstrated he is actively taking steps to prevent another alcohol-related driving offense. While he drinks on occasion, he limits himself to one to two drinks. He takes an Uber or Lyft on occasions when he does drink. He actively participated during the alcohol class he was required to take after his 2018 DUI. He has not been involved in an alcohol-related offense since December 2018. He is rated favorably by his employer and his customers. AG ¶ 32(a) and AG ¶ 32(d) apply. Applicant mitigated the Criminal Conduct concern.

### **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.

Applicant is a 38-year-old technical consultant working for a defense contractor. His work colleagues think highly of him. Applicant teaches a pro bono class to adults from under-privileged backgrounds in his spare time. He is a full-time caregiver to his mother. His friends are supportive. He immediately disclosed his 2018 DUI to his FSO and has been fully cooperative throughout his background investigation. He completed all of the terms for each of his DUI offenses. His clinical counselor indicated he was an active participant in his alcohol counseling program. He reduced his alcohol use and takes steps to avoid drinking and driving by using Uber or Lyft on occasions when he intends to drink alcohol. I am further impressed by Applicant's decision to see a therapist on a regular basis to assist him with setting boundaries and seeking healthier ways to deal with stress. Applicant is aware of the consequences should he become involved in an alcohol-related incident in the future.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant 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, Guideline G:	FOR APPLICANT
Subparagraphs 1.a through 1.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

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

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Erin C. Hogan  
Administrative Judge