



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



In the matter of: )  
)  
) ISCR Case No. 21-01551  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Dan O'Reilley, Esquire, Department Counsel  
For Applicant: *Pro se*

04/21/2022

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding alcohol consumption and criminal conduct. Eligibility for a security clearance is granted.

**Statement of the Case**

On September 23, 2020, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories, and also asked him to verify the accuracy of an investigator's summary of an interview. He responded to those interrogatories and verified the interview summary on August 3, 2021. On September 15, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guidelines G (Alcohol Consumption) and J (Criminal Conduct), and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a signed statement, dated September 27, 2021, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by DOHA on January 27, 2022, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on February 7, 2022. His response was due on March 9, 2022. Applicant chose not to respond to the FORM, for as of March 25, 2022, no response had been received. The case was assigned to me on April 12, 2022.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted, with brief comments, all of the factual allegations pertaining to alcohol consumption (SOR ¶¶ 1.a. through 1.e.). He failed to address the one allegation pertaining to criminal conduct (SOR ¶ 2.a.), and his silence in that regard is considered as a denial. Applicant's admissions and comments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a 53-year-old employee of a defense contractor. He has been serving as heavy equipment operator lead with his current employer since August 2015. He previously held identical positions with other companies since May 2008. His educational background was not reported. He enlisted in the U.S. Army in April 1987 and served on active duty until May 1996, when he was honorably discharged. He was granted a secret clearance in October 2012. He was married in 1998. He has one daughter, born in 2001.

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

When Applicant completed his SF 86, he reported in Section 24 – Use of Alcohol, that in the last seven years, his use of alcohol had never had a negative impact on his work performance, his professional or personal relationships, his finances, or resulted in intervention by law enforcement or public safety personnel. He also denied ever seeking or receiving counseling or treatment related to his use of alcohol. (Item 3 at 30-31) He did, however, report in Section 22 – Police Record, two alcohol-related incidents that resulted in law enforcement intervention and court resolutions. (Item 3 at 27-29) The two reported incidents, which are further discussed below, occurred in March 2014 and December 2019.

Applicant first started consuming alcohol at some point after entering the military. He characterized consuming alcohol as the social norm to hang out with friends who were

drinking and partying. While he was unable to quantify his alcohol consumption during that period, he acknowledged that it was “probably a lot,” and it frequently led to intoxication. Things changed after his discharge in 1996, essentially due to a new social environment, lifestyle change, and his own maturity. He generally consumed a beer on weeknights after work and about four or five beers on the weekend, generally while watching football or socializing with friends. After his 2019 alcohol-related incident, Applicant and his wife discussed his alcohol consumption – a discussion that he characterized as a “wake up call” – and he decided to make better decisions and choices, focusing on scaling back on his drinking. Since those discussions, he reduced his alcohol from the four or five beers while watching football or socializing, to one or two beers. His reduced alcohol intake has had positive results: he is happier and more talkative. (Item 4 at 3-4)

Applicant’s relationship with alcohol has resulted in at least five separate alcohol-related incidents involving police and court authorities. Those incidents, admitted by Applicant in his Answer to the SOR, some of which were described in official court or police documents, as well as by Applicant during his interview with an investigator from the U.S. Office of Personnel Management (OPM) on December 9, 2020, are as follows:

SOR ¶ 1.a.: On December 15, 2019, after consuming an unspecified number of beers and mixed liquor over a couple of hours while watching football at a friend’s house, Applicant drove himself towards his home, thinking he could do so safely. He was stopped by a police officer who saw him traveling north bound in a south bound lane. Applicant described the incident as “crossing the center lane.” The officer detected the “faint odor of an alcoholic beverage” coming from Applicant. After failing the field sobriety tests, Applicant was arrested and charged with driving under the influence (DUI); open container; and rules for driving on laned roadway. His wife paid approximately \$1,500 in bail to have him released from jail. Applicant stated that although the court did not require that he do so, he voluntarily attended DUI school and submitted proof of successful completion of the DUI school. (Item 2; Item 3; Item 5)

On February 14, 2020, after the arresting officer failed to appear at an administrative hearing without good cause, the Administrative Law Judge ruled that the Respondent (the State) had defaulted and was unable to meet its evidentiary burden. Accordingly, the Respondent’s decision to suspend Applicant’s driver’s license, permit or privilege to operate a motor vehicle or commercial motor vehicle in the state was rescinded. The Respondent was reversed, and the case was dismissed. (Order of Dismissal, attached to Item 2) A final decision with respect to the original charges – DUI; open container; and rules for driving on laned roadway – was not reported.

SOR ¶ 1.b.: On March 30, 2014, after consuming what Applicant described as a “good bit” of beers and mixed liquor over a couple of hours while watching football at a friend’s house, Applicant drove himself towards his home, thinking he could do so safely. He was stopped by a police officer who determined that the radar had clocked Applicant at 52 miles per hour (MPH) in a 35 MPH speed zone. The officer detected the “strong odor of an unknown alcoholic beverage” coming from Applicant. After failing the field sobriety tests, Applicant was arrested and charged with DUI and speeding. His wife paid

approximately \$1,500 in bail to have him released from jail. (Item 2; Item 3; Item 6) The Prosecuting Attorney added the charge of "DUI alcohol less safe." (Item 7 at 5)

On May 10, 2014, after the arresting officer failed to appear at an administrative hearing without good cause, the Administrative Law Judge ruled that the Respondent (the State) had defaulted and was unable to meet its evidentiary burden. Accordingly, the Respondent's decision to suspend Applicant's driver's license, permit or privilege to operate a motor vehicle or commercial motor vehicle in the state was rescinded. The Respondent was reversed, and the case was dismissed. (Order of Dismissal, attached to Item 2) On June 23, 2014, upon Applicant's plea of guilty to reckless driving, the other charges were dismissed. Applicant was sentenced to 12 months of unsupervised probation; payment of \$1,315.00 in fines; and attendance and completion of DUI school. (Item 7) Applicant successfully completed the DUI school. On August 18, 2014.

SOR ¶ 1.c.: On March 23, 1996, Applicant was stopped by the police and arrested and charged with DUI; no proof of insurance; and driving too fast for conditions. On May 24, 1996, upon his plea of guilty to the DUI, he was convicted and sentenced to probation for 12 months; fined \$822.50; ordered to perform 40 hours of community service; and ordered to spend one weekend in jail. The other charges were dismissed. (Item 2; Item 8; Item 9)

SOR ¶ 1.d.: On April 8, 1995, Applicant was stopped by the police and arrested and charged with DUI. On April 28, 1995, upon his plea of guilty, he was convicted and sentenced to probation for 12 months; fined \$627.00; and ordered to perform community service. (Item 2; Item 8)

SOR ¶ 1.e.: On January 15, 1994, Applicant was stopped by the police and arrested and charged with DUI. On January 18, 1994, the charge was apparently reduced to reckless driving. Upon his plea of guilty, he was convicted and fined \$100.00 plus unspecified court costs. (Item 2; Item 8)

## **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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 and modified.)

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying

conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. The entire process is a conscientious scrutiny 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). "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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. 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).)

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

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 I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that

are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

## **Analysis**

### **Guideline G, Alcohol Consumption**

The security concern relating to the guideline for Alcohol Consumption is set out 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.

The guideline notes a condition that could raise security concerns for Alcohol Consumption in 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.

Applicant acknowledged that from January 1994 until December 2019, he was arrested at least five times, as alleged in the SOR, and charged with a variety of alcohol-related violations, with the one common charge being DUI, all of which appear to have resulted in convictions. Applicant argued that the charges were dismissed with respect to the charges in 2014 and 2019, but his assessment is incorrect. As noted by Department Counsel, the Appeal Board has held:

The disposition of an arrest or a criminal charges in a manner that is favorable to an applicant, such as dropping or dismissal of a charge, does not preclude a Judge from finding the applicant engaged in the underlying criminal conduct. . . . In cases of this nature, the key issue is an applicant's criminal or dishonest conduct, not what actions law enforcement authorities may have taken regarding that conduct.

(CAC Case No. 16-01524 at 4 (App. Bd. Apr. 19, 2018))

Applicant was convicted of the underlying charges, and because he had completed DUI school, and the arresting officer failed to appear before the Administrative Law Judge regarding the continued suspension of his driving privileges following both convictions, those driving privileges were restored, but the convictions for the alcohol-related charges were maintained. AG ¶ 25(a) has been established.

The guideline also includes examples of conditions under AG ¶ 23 that could mitigate security concerns arising from Alcohol Consumption:

(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; and

(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.

AG ¶ 23(b) applies. Applicant has candidly acknowledged that he has consumed alcohol to excess. Three of his alcohol-related incidents occurred while he was in the Army, socializing relatively heavily with alcohol. As noted above, he indicated that things changed after his discharge from the military in 1996. He claimed that the change was essentially due to a new social environment, lifestyle change, and his own maturity. For 18 years, his modified alcohol input did not result in any further alcohol-related incidents. Whereas before, he generally consumed a beer on weeknights after work and about four or five beers on the weekend, generally while watching football or socializing with friends, things changed.

After his 2019 alcohol-related incident, Applicant and his wife discussed his alcohol consumption – a discussion that he characterized as a “wakeup call – and he decided to make better decisions and choices, focusing on scaling back on his drinking. Since those discussions, he reduced his alcohol from the four or five beers while watching football or socializing, to one or two beers. His reduced alcohol intake has had positive results: he is happier and more talkative. His new reduced relationship with alcohol has resulted in zero alcohol-related incidents since December 2019 – a period of 28 months. That period, when combined with his modified consumption, provide clear evidence of positive actions to overcome his alcohol problem. An additional positive indication of changed circumstances is his candor in self-reporting the alcohol-related incidents to his employer, in his SF 86, during his OPM interview, and in his Answer to the SOR.

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out 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.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns:

(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.

My discussion related to Applicant's Alcohol Consumption is adopted herein. Applicant was arrested, charged, and convicted on five occasions for alcohol-related incidents between 1994 and 2019. Based on the actions described above, AG ¶¶ 31(a) and 31(b) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from Criminal Conduct:

(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.

Both conditions apply. Appellant's criminal behavior essentially commenced in January 1994 and continued until March 1996 – a period of about 27 months, and stopped at that point. It reemerged in March 2014 and was repeated in December 2019. There is no evidence of criminal conduct since December 2019 – a period of 28 months. After his 2019 alcohol-related incident, Applicant had a "wakeup call." The subsequent period without any other criminal conduct provides evidence of successful rehabilitation. The passage of 28 months without recurrence of criminal activity; compliance with the terms of probation; constructive community service; modified alcohol consumption; and the successful completion of DUI school, are all positive factors. Applicant's criminal conduct no longer casts doubt on his current reliability, trustworthiness, and good judgment.

### **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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some disqualifying evidence regarding Applicant's conduct. Applicant first started consuming alcohol at some point after entering the military. He characterized consuming alcohol as the social norm to hang out with friends who were drinking and partying. While he was unable to quantify his alcohol consumption during that period, he acknowledged that it was "probably a lot," and it frequently led to intoxication. He generally consumed a beer on weeknights after work and about four or five beers on the weekend, generally while watching football or socializing with friends. From January 1994 until December 2019, Applicant was arrested at least five times and charged with a variety of alcohol-related violations, with the one common charge being DUI, all of which resulted in convictions.

The mitigating evidence under the whole-person concept is simply more substantial. Applicant is a 53-year-old employee of a defense contractor. He has been serving as heavy equipment operator lead with his current employer since August 2015, and he previously held identical positions with other companies since May 2008. He enlisted in the U.S. Army in April 1987, and served on active duty until May 1996, when he was honorably discharged. He was granted a secret clearance in October 2012. Applicant candidly acknowledged that he had consumed alcohol to excess. Three of his alcohol-related incidents occurred while he was in the Army, but things changed after his discharge in 1996. For 18 years, his modified alcohol input did not result in any further alcohol-related incidents. Whereas before, he generally consumed a beer on weeknights after work and about four or five beers on the weekend, generally while watching football or socializing with friends, things changed.

After his 2019 alcohol-related incident, Applicant and his wife discussed his alcohol consumption – a discussion that he characterized as a "wakeup call" – and he decided to make better decisions and choices, focusing on scaling back on his drinking. Since those discussions, he reduced his alcohol from the four or five beers while watching football or socializing, to one or two beers. His reduced alcohol intake has had positive results: he is happier and more talkative. His new reduced relationship with alcohol has resulted in zero alcohol-related incidents since December 2019 – a period of 28 months. That period, when combined with his modified consumption, provide clear evidence of positive actions to overcome his alcohol problem. An additional positive indication of changed circumstances is his candor in self-reporting the alcohol-related incidents to his employer, in his SF 86, during his OPM interview, and in his Answer to the SOR.

Overall, the evidence no longer leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has successfully mitigated the security concerns arising from his alcohol consumption and criminal conduct. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

### **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.e.:	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 Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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ROBERT ROBINSON GALES  
Administrative Judge