



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



In the matter of:	)	
	)	
	)	ISCR Case No. 22-01588
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
For Applicant: *Pro se*

11/29/2023

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on August 29, 2021. On January 4, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G, J, and E. The CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on January 31, 2023, and requested a hearing before an administrative judge. Department Counsel amended the SOR on April 4, 2023, by

adding SOR ¶ 1.b under Guideline G. Department Counsel was ready to proceed on April 4, 2023, and the case was assigned to me on September 9, 2023. On September 22, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on October 16, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until October 31, 2023, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on October 31, 2023.

### **Findings of Fact**

In Applicant's answers to the SOR and the amended SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is 46 years old. He served on active duty in the U.S. Navy from March 1996 to April 2019 when he was involuntarily retired with a general discharge under honorable conditions. He was a senior chief petty officer (pay grade E-8) when he retired. He held a security clearance during his military service.

Applicant was unemployed from April to August 2019. He worked for federal contractors from August 2019 to July 2023. The record does not reflect the circumstances of his termination from employment in July 2023. At the time of the hearing, he had been offered a job by another defense contractor, contingent on favorable adjudication of his application to continue his security clearance. (Tr. 18)

Applicant married in April 2000 and has two daughters, ages 22 and 18. He and his wife have lived separately since December 2021, but they are not legally separated. (Tr. 14-15) He attended college from July to September 2008 but did not receive a degree. (GX 1 at 10-11; Tr. 15-16)

SOR ¶ 1.a alleges that Applicant has consumed alcohol, at times in excess and to the point of intoxication, from about May 2017 to at least January 2022. Applicant admitted this allegation in his answer to the SOR. At the hearing, he testified that he was drinking every night during this period and that he was "getting close" to drinking every night to the point of intoxication. (Tr. 25).

SOR ¶ 1.b alleges that Applicant was under the influence of alcohol at the time of an incident that led to nonjudicial punishment for sexual assault in February 2018, an incident leading to a charge of assault and battery on a family member in August 2020, and an incident leading to a charge of assault and battery on a family member in October 2021. These allegations are established by Applicant's admissions in his answer to the SOR.

SOR ¶ 2.a alleges that Applicant was arrested for abusive sexual contact in October 2017 and that the arrest occurred in the United States. Although Applicant admitted this allegation in his answer to the SOR, I doubt that he fully understood what he was admitting, because when he was asked at the hearing to describe what happened, he described the sexual assault alleged in SOR ¶ 2.b, which occurred in May 2017, while he was assigned overseas. (Tr. 19) The FBI arrest record reflects an arrest that occurred in the United States in October 2017, but it does not list the offense that was the basis for the arrest. (GX 3) There is no documentary evidence in the record reflecting the basis for this arrest. I conclude that the part of SOR ¶ 2.a that alleges an arrest is established, but the part alleging that the arrest was for abusive sexual contact is not established by his admissions in his answer to the SOR or any evidence in the record.

SOR ¶ 2.b alleges that Applicant received nonjudicial punishment in February 2018 for sexual assault in violation of Article 120, Uniform Code of Military Justice. The assault occurred in May 2017. Applicant and group of fellow sailors were at a party, and Applicant was intoxicated. He came up from behind a female sailor, hugged her, touched her breast, and asked her if she would go to bed with him. Applicant appeared before his commanding officer, was found guilty of a sexual assault, and received nonjudicial punishment of a forfeiture of \$2,618 of his pay. In March 2018, he was referred to an administrative separation board, which determined that he should be retained in the Navy.

Shortly after Applicant was punished, he was transferred to another command. In March 2019, he was notified that he was required to retire. He retired in April 2019 and received a general discharge under honorable conditions. (AX A) The Certificate of Release or Discharge from Active Duty (DD Form 214) recites that the reason for separation was “sufficient service for retirement.” (AX A) The DD Form 214 reflects that during his military service, he received the Good Conduct Medal (six awards), Outstanding Military Volunteer Medal, the Navy and Marine Corps Achievement Medal (three awards), the Navy and Marine Corps Commendation Medal, two letters of appreciation and commendation, and various service medals and qualification badges and ribbons.

Applicant testified that his marital problems began after his retirement. While on active duty, he was deployed frequently, and it was not until he was at home for a while that he realized that his wife and a neighbor were drinking heavily and using drugs during the day. He believed that they had been drinking and using drugs for a couple years before his retirement. (Tr. 40)

Applicant attributed all the domestic violence incidents to his heavy drinking, followed by arguments with his wife. He testified that the incident alleged in SOR ¶ 2.c occurred in August 2020, when he was working nights and came home at about 11:30 pm. He testified that his wife and her friend had been “getting wasted all day.” He started drinking and began arguing with his wife. His wife claimed that he pushed her, and he claimed that he pushed her away when she was screaming “in his face.” His wife called the police, and they told him, “they got to take somebody,” and he was arrested. (Tr. 26-27)

The domestic incident in October 2021, alleged in SOR ¶ 1.d, was another instance of heavy drinking, arguing, and fighting. Applicant's wife accused him of throwing a beer can at her. Applicant's daughter called the police, and they arrested Applicant for assault and battery on a family member. (Tr. 29) At a court hearing a couple of months later, adjudication was deferred, conditioned on good behavior for two years. (Tr. 30)

Applicant testified that he stopped drinking heavily after he and his wife separated. He testified that he now limits himself to a couple beers while watching football and no longer drinks hard liquor. He has not received any formal counseling or treatment for his alcohol consumption. He is not involved with Alcoholics Anonymous (AA) or any similar organization. (Tr. 33-34, 42)

### **Policies**

"[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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 (4th 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## **Analysis**

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

The security concern under this guideline is set 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 evidence establishes the following 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.

The following mitigating conditions are potentially applicable:

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 judgment; and

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.

The first prong of AG ¶ 23(a) (“so much time has passed”) focuses on whether the conduct was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). Applicant admitted that he consumed alcohol in excess until “at least January 2022.” After considering Applicant’s long history of excessive alcohol consumption, his continued consumption of alcohol, his failure to seek counseling or treatment, and his unsettled relationship with his wife, whom he blames for his excessive drinking, I conclude that the evidence falls short of showing reform or rehabilitation or that his conduct is unlikely to recur.

AG ¶ 23(b) is not established. Although Applicant has acknowledged his maladaptive alcohol use, he provided no evidence of counseling, treatment, or other supportive measures such as participation in AA. For these reasons and the reasons in the above discussion of AG ¶ 23(a), I am not convinced that he has demonstrated an established pattern of modified consumption.

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

The concern under this guideline 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 following disqualifying conditions are established by the evidence:

AG ¶ 31(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

AG ¶ 31(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.

The following mitigating conditions are potentially relevant:

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 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.

AG ¶ 32(a) is not established, for the reasons set out in the above discussion of AG ¶ 23(a).

AG ¶ 32(d) is not fully established. The record does not reflect any criminal activity after Applicant's last arrest in October 2021, and he apparently complied with the terms of his two-year probation. However, he submitted no evidence of a good post-Navy employment record, job training, higher education, or constructive community involvement.

### **Guideline E, Personal Conduct**

The security concern under this guideline is set out in AG ¶ 15: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . ."

The following disqualifying conditions are relevant:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶ 16(c) is applicable to Applicant's drunken altercations with his wife in August 2020 and October 2021. It is not applicable to Applicant's sexual assault on a female sailor in February 2018, which was a serious offense sufficient for an adverse determination.

AG ¶ 16(e) is established by Applicant's sexual assault on a female sailor in February 2018 and domestic violence in August 2020 and October 2021.

The following mitigating conditions are potentially applicable:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

AG ¶ 17(c) is not fully established. Applicant's domestic incidents were arguably minor, but his sexual misconduct with a female sailor was not minor. His behavior was not infrequent and did not happen under unique circumstances.

AG ¶ 17(d) is not fully established. Applicant has acknowledged his behavior and he is living apart from his wife, but he has not obtained counseling or taken other measures to deal with his excessive alcohol consumption.

### **Whole-Person Concept**

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines G, J, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under those guidelines and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his alcohol consumption, criminal conduct, and personal conduct.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge