



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



In the matter of: )  
)  
) ISCR Case No. 23-00155  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Adrienne M. Driskill, Esquire, Department Counsel  
For Applicant: *Pro se*

11/08/2023

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**Decision**

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding alcohol consumption and criminal conduct. Eligibility for a security clearance is denied.

**Statement of the Case**

On September 23, 2021, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On a unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to those interrogatories on March 13, 2023. On April 4, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) 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* (AG) (December 10, 2016), 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.

On April 10, 2023, 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 May 22, 2023, and he was afforded an opportunity after receipt of the FORM 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 June 20, 2023. His response was due on July 20, 2023. Applicant chose not to respond to the FORM, for as of September 28, 2023, when the case was assigned to me, no response had been received. The record closed on July 20, 2023.

### **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 factual allegation pertaining to criminal conduct (SOR ¶ 2.a.), and his silence in that regard is considered as a denial. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 32-year-old employee of a defense contractor. He has been serving as an aircraft mechanic with his current employer since February 2020. He was previously employed as a grocery store stocker (May 2010 – March 2012). He is a 2009 high school graduate. He enlisted in the U.S. Navy in March 2012 and remained on active duty until February 2020, when he was discharged as an E-5. He was granted a secret clearance in 2012. He has never been married. He has one child, born in 2021.

### **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. Nevertheless, he did admit that he was involved in alcohol-related incidents that required that he undergo alcohol counseling or treatment. (Item 3 at 34-35) He also reported in Section 22 – Police Record, several alcohol-related incidents that resulted in law enforcement intervention and court resolutions. (Item 3 at 28-32)

It is unclear when Applicant first started consuming alcohol, for the issue was never explored by the investigator from the U.S. Office of Personnel Management (OPM) who

interviewed him on December 14, 2021, and Applicant did not report it either in his SF 86 or during his OPM interview. The earliest evidence in the record of Applicant's relationship with alcohol took place in 2014 when he and three friends were drinking somewhere in the desert. No mention was made of the type or quantity of the drinks consumed.

Applicant's relationship with alcohol has resulted in at least two separate alcohol-related incidents involving police and court authorities. Those incidents, admitted by Applicant in his Answer to the SOR, and described in official court and police documents, as well as by Applicant in his SF 86, and during his OPM interview, are as follows:

SOR ¶¶ 1.a. and 2.a.: On or about April 15, 2017, when he was 25 years old, Applicant was arrested by the state highway patrol and charged with (1) driving while under the influence of any alcoholic beverage, and (2) driving while having a 0.08% or higher blood alcohol, both misdemeanors. He was represented by an attorney. Upon his plea of guilty to the second charge, the first charge was dismissed. He was sentenced to probation for thirty-six months; fines and fees totaling approximately \$2,377; eight days in the county jail (reduced to six days with credit for time served); and ordered to complete a 90-day in-person Driving Under the Influence (DUI) Program. Applicant satisfied the trial court judge that he had successfully complied with his sentence, and the case was closed in September 2020. (Item 2 at 1; Item 3 at 28-31; Item 6 at 8; Item 8)

SOR ¶¶ 1.c. and 2.a.: On or about April 10, 2021, Applicant was again arrested by the state highway patrol. He failed the field sobriety tests and the breathalyzer test and was charged with (1) driving while under the influence of any alcoholic beverage, and (2) driving while having a 0.08% or higher blood alcohol, both misdemeanors. He did not report the arrest until five months later when he submitted his SF 86. Upon his plea of no contest to the second charge, the first charge was dismissed. He was sentenced as a DUI 2<sup>nd</sup> offender to probation for three years (suspended); fines and fees totaling approximately \$1,883; ten days in the county jail; eight days of community service; and ordered to complete an 18-month DUI Program. (Item 2 at 2; Item 3 at 31-32; Item 4 at 3, 7; Item 5 at 3; Item 6 at 9; Item 7)

As the sentence was imposed on September 7, 2022, it appears that Applicant's period of probation has not yet expired, and there is no evidence to indicate that it had been terminated by the trial court. (Item 7 at 2) In addition, Applicant claimed to have completed his DUI Program in March 2023, but he did not submit any verifying documentation to confirm his claim. Moreover, in April 2023, he stated that his fines were "currently being paid." (Item 2 at 2) In the absence of such documentation, I am unable to determine that Applicant has satisfied the trial court that the sentence has been successfully completed, or that the case has been closed.

SOR ¶ 1.b.: Applicant received court-ordered out-patient alcohol counseling from a community services facility from about October 2017 to about February 2018. He did not submit any documentation to describe the program or counseling reports to verify his participation in the program. Nevertheless, the trial court was satisfied by the documentation that it had apparently received, and it considered the case closed. (Item 3 at 34-35; Item 8)

SOR ¶ 1.d.: Applicant purportedly received court-ordered out-patient alcohol counseling from an unidentified source from about November 2021 to about March 2023. He did not submit any documentation to identify or describe the program or counseling reports to verify his participation in the program. (Item 4 at 7) In the absence of such documentation I am unable to determine if he participated in, or successfully completed, the program.

SOR ¶ 1.e.: Although Applicant was arrested and convicted of driving while having a 0.08% or higher blood alcohol on two occasions four years apart, he never acknowledged that he was a maladaptive alcohol user although he recognized the fact that alcohol contributed to the incidents. He believed he was fine to drive after drinking. He claimed that before the DUI charges, without specifying whether it was related to one or both incidents, he ate a meal and consumed three or four beers. He claimed that alcohol affects his behavior by making him happier and more talkative. Because he now has a child he drinks and goes out less often and does not have any future intent for any further alcohol-related issues. However, despite participating in the DUI program on two occasions; successfully completing at least one court-ordered outpatient alcohol counseling program; and possibly completing a much longer outpatient counseling program, he continues to consume alcohol. In March 2023, he acknowledged that he consumed one to two unidentified alcohol drinks in an average week and stated that he had consumed alcohol as recently as a few days earlier. (Item 4 at 7)

### **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.

On two separate occasions in 2017 and 2021, after consuming alcohol and driving, Applicant was arrested by the state highway patrol and charged with (1) driving while under the influence of any alcoholic beverage, and (2) driving while having a 0.08% or higher blood alcohol, both misdemeanors. On both occasions, he was convicted of the second charge and the first charge was dismissed. 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;

(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.

None of the mitigating conditions apply. Despite two alcohol-related convictions and repeated court-ordered mandatory out-patient alcohol counseling over extended periods, Applicant continues to consume alcohol, as recently as March 2023. As noted above, he never acknowledged that he was a maladaptive alcohol user although he recognized the fact that alcohol contributed to both incidents. At the time, he believed he was fine to drive after drinking, and claimed that alcohol affects his behavior by making him happier and more talkative. Merely claiming to have become more responsible by

drinking less because he now has a child does not constitute a “clear and established pattern of modified consumption.” In addition, because Applicant failed to submit documentation to identify or describe the two programs or counseling reports to verify his participation in them, I am unable to review any program recommendations – especially as to modified consumption or abstinence – to determine if he has been fully compliant with those recommendations.

## **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;
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
- (c) individual is currently on parole or probation.

My discussion related to Applicant's Alcohol Consumption is adopted herein. Applicant was arrested by the state highway patrol and charged with (1) driving while under the influence of any alcoholic beverage, and (2) driving while having a 0.08% or higher blood alcohol, both misdemeanors. On both occasions, he was convicted of the second charge and the first charge was dismissed. Based on the actions described above, AG ¶¶ 31(a) and 31(b) have been established.

In addition, his second conviction's sentence was imposed on September 7, 2022. Although in April 2023 he claimed that he had completed his 18-month court-ordered out-patient alcohol counseling program in March 2023, he offered no documentary evidence to verify his claim. He acknowledged that his fines were currently being paid. His 3-year probation has not expired or otherwise been terminated, and as such, without verifying documentation to the contrary, it appears to be still in force until September 7, 2025. AG ¶ 31(c) has 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.

Neither condition applies. Appellant's criminal behavior occurred in April 2017 and reemerged again in April 2021 – four years apart. There is no evidence of criminal conduct since April 2021 – a period of 31 months. The passage of such time without recurrence of criminal activity; compliance with the terms of probation; constructive community service; modified alcohol consumption; and the successful completion of DUI schools, are generally considered to be positive factors. However, in this instance, it remains unclear if Applicant actually learned to modify his actions after undergoing repeated court-ordered punishment and alcohol counseling, for he continues to consume alcohol. Also, because Applicant failed to submit documentation to identify or describe the two programs or counseling reports to verify his participation in them, I am unable to review any program recommendations – especially as to modified consumption or abstinence – to determine if he has been fully compliant with those recommendations. Under these circumstances, Applicant's criminal conduct continues to cast 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 considering 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 evidence mitigating Applicant's conduct. Applicant is a 32-year-old employee of a defense contractor. He has been serving as an aircraft mechanic with his current employer since February 2020. He was previously employed as a grocery store stocker (May 2010 – March 2012). He is a 2009 high school graduate. He enlisted in the U.S. Navy in March 2012 and remained on active duty until February 2020, when he was discharged as an E-5. He was granted a secret clearance in 2012.

The disqualifying evidence under the whole-person concept is simply more substantial. On two separate occasions in April 2017 and April 2021, after consuming alcohol and driving, Applicant was arrested by the state highway patrol and charged with (1) driving while under the influence of any alcoholic beverage, and (2) driving while having a 0.08% or higher blood alcohol, both misdemeanors. On both occasions, he was convicted of the second charge and the first charge was dismissed. Despite those alcohol-related convictions and repeated court-ordered mandatory out-patient alcohol counseling over extended periods, Applicant continues to consume alcohol, as recently as March 2023.

Applicant never acknowledged that he was a maladaptive alcohol user although he recognized the fact that alcohol contributed to both incidents. At the time, he believed he was fine to drive after drinking, and claimed that alcohol affects his behavior by making him happier and more talkative. Because he failed to submit documentation to identify or describe the two programs or counseling reports to verify his participation in them, it is difficult to review any program recommendations – especially as to modified consumption or abstinence – to determine if he has been fully compliant with those recommendations. It remains unclear if he has fully complied with the terms of his second sentence or if his period of probation has been dismissed early.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate 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:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.e.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a.:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES  
Administrative Judge