



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



In the matter of:	)	
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	)	ISCR Case No. 12-06840
Applicant for Security Clearance	)	

**Appearances**

For Government: Ray T. Blank Jr., Esq., Department Counsel  
For Applicant: *Pro se*

10/20/2015

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke a security clearance to work in the defense industry. He was involved in an alcohol-related incident away from work in 2011, when he became heavily intoxicated after arguing with his wife, who then left the family home. The incident escalated when he locked his wife out of the house, and he pointed a firearm at his son. The incident was resolved when Applicant surrendered to the police, who had deployed a SWAT team to the family home. Subsequently, he pleaded guilty to two counts of disorderly conduct involving domestic violence and was placed on a term of probation, which ended in April 2015. Although Applicant has established a good case in reform and rehabilitation, the security concerns stemming from a serious alcohol-related incident of criminal conduct are simply too much to overlook, mitigate, or explain away. Accordingly, this case is decided against Applicant.

## Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (Standard Form 86) on December 1, 2011.<sup>1</sup> After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD), on September 11, 2014, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.<sup>2</sup> The SOR is similar to a complaint.<sup>3</sup> It detailed the reasons for the action under the security guidelines known as Guideline J for criminal conduct, Guideline G for alcohol consumption, and Guideline E for personal conduct. He answered the SOR on October 22, 2014, and requested a hearing.

The case was assigned to an administrative judge on January 22, 2015. The hearing was scheduled for February 11, 2015, but was postponed at Applicant's request due to medical reasons. The case was reassigned to me on May 1, 2015. The hearing was held as scheduled on June 2, 2015. Department Counsel offered Exhibits 1–4, and they were admitted. Applicant offered Exhibits A–O, and they were admitted. Applicant testified, but no other witnesses were called. The hearing transcript (Tr.) was received on June 9, 2015.

## Findings of Fact

Applicant is a 43-year-old employee of a major defense contractor and industrial corporation. He is seeking to retain a security clearance previously granted to him. He has worked for his current employer since 2006, and he has a good employment record.<sup>4</sup> His employment history includes teaching school for several years as well as military service (active duty) in the U.S. Marine Corps during 1989–1995. His educational background includes master's degrees in the fields of education and business. He married in 1994, and he and his wife have two sons, ages 20 and 15.

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<sup>1</sup> Exhibit 1 (this document is commonly known as a security clearance application).

<sup>2</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>3</sup> The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

<sup>4</sup> Exhibits C, I–O.

The SOR alleged essentially two matters. The first matter is Applicant's involvement in an alcohol-related incident of criminal conduct in 2011. It was alleged under the three security guidelines at issue. The second matter is an allegation that Applicant provided false and misleading information about the 2011 alcohol-related incident during an interview conducted as part of his background investigation. It was alleged solely under Guideline E for personal conduct. In his answer to the SOR, Applicant denied the allegations. For the first matter, although he did not dispute that the incident had occurred, he explained that it was now mitigated. For the second matter, he denied providing false and misleading information during the interview, and he explained that his statements were based on his recollection of events, which was degraded because of his level of intoxication.<sup>5</sup>

The October 2011 alcohol-related incident occurred when Applicant became heavily intoxicated after arguing with his wife, who then left the family home. He stated at the hearing that he started drinking at 7:30 or 8:00 in the morning and consumed about a half-gallon of rum during the day by drinking rum-and-coke cocktails.<sup>6</sup> The incident escalated when he locked his wife out of the house, and he pointed a firearm at his youngest son. The firearm was a Smith and Wesson 9mm pistol, which had a magazine with 13 live rounds in it, but none in the chamber. The incident was resolved when Applicant eventually surrendered to the police, who had deployed a SWAT team as part of the response. The various reports of the incident show that the police took the incident quite seriously because they believed Applicant was intoxicated and barricaded in the family home with access to several firearms.<sup>7</sup> Applicant self-reported the incident to his employer's facility security officer on October 28, 2011, which was shortly after the incident occurred.<sup>8</sup>

In February 2012, Applicant pleaded guilty to two counts of disorderly conduct involving domestic violence, both Class 6 undesignated offenses, non-dangerous, non-repetitive offenses under state law.<sup>9</sup> His guilty plea was necessitated to resolve the two felony-level offenses he was originally charged with committing. The state court suspended imposition of sentence and placed Applicant on probation for a period of three years for each offense, to be served consecutively (for a period of six years in total). He was also required to complete domestic violence counseling or treatment, complete 40 hours of community service, abstain from alcohol, and forfeit the right to

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<sup>5</sup> I am not persuaded that Applicant provided false and misleading information as alleged in SOR ¶ 3.b, and this matter is resolved in Applicant's favor without further discussion.

<sup>6</sup> Tr. 67, 94–95.

<sup>7</sup> Exhibit 3.

<sup>8</sup> Exhibit 4.

<sup>9</sup> Exhibits 2, 3, and 4.

bear arms. He was discharged from probation in April 2015 (apparently ahead of schedule), and the two offenses were re-designated as misdemeanors.<sup>10</sup>

Applicant initiated counseling in October 2011, which is before the charges were resolved.<sup>11</sup> Issues addressed included emotional maturity, emotional age, empathy, and marital cohesion and enhancement. During probation, he completed a domestic violence orientation course as well as 39 hours of domestic-violence treatment.<sup>12</sup> Likewise, he completed a 18-hour course of substance-abuse therapy.<sup>13</sup> He has not participated in meetings of Alcoholics Anonymous or a similar organization.<sup>14</sup> Also during probation, he completed his master's degree in business administration in March 2014.<sup>15</sup>

In October 2011, the time of Applicant's misconduct, he typically consumed two to three strong rum-and-coke cocktails daily, perhaps consuming as much as a half-gallon of rum every two to three days.<sup>16</sup> As required by the court order, he abstained from alcohol during the period of probation. He resumed drinking once his probation ended, and his intention is to limit himself to social drinking.<sup>17</sup>

### **Law and Policies**

It is well-established law that no one has a right to a security clearance.<sup>18</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>19</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

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<sup>10</sup> Exhibits A and B.

<sup>11</sup> Exhibit F.

<sup>12</sup> Exhibits G and H.

<sup>13</sup> Exhibit I.

<sup>14</sup> Tr. 85–86.

<sup>15</sup> Exhibit D.

<sup>16</sup> Tr. 95–97.

<sup>17</sup> Tr. 86–89, 98.

<sup>18</sup> *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>19</sup> 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>20</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>21</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>22</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>23</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>24</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>25</sup>

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>26</sup> The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>27</sup>

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>28</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

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<sup>20</sup> Directive, ¶ 3.2.

<sup>21</sup> Directive, ¶ 3.2.

<sup>22</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>23</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>24</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>25</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>26</sup> *Egan*, 484 U.S. at 531.

<sup>27</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>28</sup> Executive Order 10865, § 7.

## Discussion

The criminal conduct, alcohol consumption, and personal conduct concerns are discussed together because they are factually interrelated. Under Guideline J for criminal conduct,<sup>29</sup> the concern is that criminal activity creates doubt about a person's judgment, reliability, and trustworthiness, and calls into question a person's ability or willingness to follow laws, rules, and regulations. Under Guideline G for alcohol consumption,<sup>30</sup> the concern is that excessive alcohol consumption often leads to the exercise of questionable judgment or failure to control impulses, and it can raise questions about a person's reliability and trustworthiness. And under Guideline E for personal conduct, the concern is, in relevant part, that conduct involving questionable judgment can raise questions about a person's reliability, trustworthiness, and ability to protect classified information.<sup>31</sup>

Applicant has a history of excessive drinking based on his admission that, before the October 2011 incident, he typically consumed two to three strong rum-and-coke cocktails daily, perhaps consuming as much as a half-gallon of rum every two to three days. His pattern of heavy drinking led to an episode of binge drinking, which was the basis for the October 2011 alcohol-related incident involving criminal conduct. Those circumstances raise concerns under the following disqualifying conditions:

AG ¶ 15(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any 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 person may not properly safeguard protected information;

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 whether the [person] is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 22(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

AG ¶ 31(a) a single serious crime or multiple lesser offenses;

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<sup>29</sup> AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>30</sup> AG ¶¶ 21, 22, and 23 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>31</sup> AG ¶ 15, 16, and 17 (setting forth the security concern and the disqualifying and mitigating conditions).

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In addition to disqualifying conditions, each of the three guidelines has conditions that may mitigate security concerns. Based on the evidence, 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 [person's] reliability, trustworthiness, or good judgment;

AG ¶ 17(d) the [person] has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthiness, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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 and does not cast doubt on the [person's] current reliability, trustworthiness, or good judgment;

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 [person's] current reliability, trustworthiness, or good judgment; and

AG ¶ 32(d) there is evidence of successful rehabilitation; including but not limited to the passage of time with recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant stands convicted of two misdemeanor offenses of domestic violence stemming from the 2011 alcohol-related incident. This is a serious matter as shown by (1) the extensive police deployment to resolve the situation at Applicant's home, which included Applicant brandishing a firearm, (2) the original charges of felony-level offenses, and (3) the six-year period of probation imposed by the court, which was terminated after three years. When the record closed in this case (June 2015), he had been discharged from probation for about two months. In addition, I have concerns and doubts whether Applicant's history of marital strife and heavy drinking is safely in the past and will not recur. On that point, it is telling that Applicant resumed drinking alcohol upon his discharge from probation. Although he reports that he is consuming alcohol at a moderate and responsible level, the fact that he is currently drinking means he is only a step or two away from another episode of binge drinking, which obviously is a high-

risk situation for Applicant. Taken together, those circumstances militate against a favorable decision.

I have considered all the mitigating conditions mentioned above, and none, individually or in combination, is sufficient to mitigate the security concerns raised by the October 2011 incident. I also considered that Applicant voluntarily self-reported the information. The circumstances surrounding the October 2011 incident establish that the nature, extent, and seriousness of Applicant's misconduct are simply too much to overlook, mitigate, or explain away. Indeed, the October 2011 incident had the potential for tragedy. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>32</sup> I am convinced that Applicant accepts responsibility for his actions, but I am not convinced that the risk of recurrence of another alcohol-related incident involving criminal conduct is acceptably low. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility is denied.

Michael H. Leonard  
Administrative Judge

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<sup>32</sup> AG ¶ 2(a)(1)-(9).