DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke a security clearance to work in the defense industry. A 52-year-old engineer, Applicant has taken sufficient action to address and overcome the security concerns stemming from two alcohol-related incidents resulting in misdemeanor criminal convictions in 1986 and 2012. Accordingly, this case is decided for Applicant.

Statement of the Case

In August 2012, Applicant self-reported to security officials that he was arrested and charged for driving under the influence (DUI) of alcohol in May 2012.[1] Thereafter, on June 6, 2013, Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format).[2] After reviewing the application and information

[1] Exhibit 5.

[2] Exhibit 4 (for ease of reading, it will be referred to as a security clearance application or simply an application).

gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility (DOD CAF),[3] on September 24, 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 access to classified information.[4] The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline G for alcohol consumption and Guideline J for criminal conduct. Applicant answered the SOR on October 21, 2014. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.[5]

On December 24, 2014, Department Counsel submitted all relevant and material information that could be adduced at a hearing.[6] This so-called file of relevant material (FORM) was mailed to Applicant, who received it January 12, 2015. Applicant replied to the FORM by submitting a two-page memorandum, which is admitted without objections as Exhibit A. The case was assigned to me March 11, 2015.

Rulings on Evidence

Exhibit 6 is an undated set of interrogatories the DOD CAF issued to Applicant, likely sometime before issuance of the SOR. The interrogatories sought information from Applicant about financial matters, alcohol consumption, criminal conduct, and asked him to review and verify the accuracy of a summary of an interview in June 2013. The summary is contained in a report of investigation (ROI) from the background investigation of Applicant.

An ROI may be received and considered as evidence when it is authenticated by a witness.[7] It appears Applicant did so by answering the interrogatories, but the exhibit is missing important information. Omitted from Exhibit 6 is the signature page, which would presumably be labeled page 9, the last page of the interrogatories. Omission of the signature page is a serious flaw, because without it, there is no proof that Applicant

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[3] The DOD CAF, Fort Meade, Maryland, 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.

[4] 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.

[5] Directive, Enclosure 3, ¶ E3.1.7.

[6] The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

[7] Directive, Enclosure 3, ¶ E3.1.20; *see* ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing caselaw that a properly authenticated report of investigation is admissible).

actually signed-off on his answers to the interrogatories. Accordingly, Exhibit 6 is not admitted, and it will not be considered for any purpose.

In his answer to the SOR, Applicant attached a letter from a counselor with the outpatient program he is attending. It is my practice to detach such matters from the answer and admit it as an evidentiary exhibit. Accordingly, the letter is admitted as Exhibit B.

Findings of Fact

Applicant is a 52-year-old employee who is seeking to retain a security clearance. His educational background includes a master's degree. He has worked for federal contractors in the defense industry since at least 1999, and he has worked for his current employer since 2005 as a propulsion staff engineer.[8]

The undisputed evidence shows Applicant has two alcohol-related incidents resulting in misdemeanor criminal convictions in 1986 and 2012. In addition to his self-report of the 2012 incident, mentioned above, he disclosed both incidents in his June 2013 security clearance application.[9]

Applicant admits consuming alcohol over the course of his adulthood, but he denies drinking to the point of intoxication was a common occurrence.[10] There is no evidence that he has received a diagnosis of alcohol dependence or alcohol abuse. In 2003, he described himself as a social as opposed to a habitual drinker who had two cocktails or glasses of wine twice a week, usually on the weekend while having dinner.[11] In his 2015 response to the FORM, he described his history of alcohol consumption as moderate.[12]

Applicant pleaded no contest to a DUI offense stemming from his arrest in November 1986. He was driving home after an evening out with his then girlfriend after drinking four or five cocktails over a three-hour period.[13] He was stopped by the highway patrol for driving aggressively. The state court sentenced him to pay a $700 fine, to attend an alcohol-education class, and his driver's license was restricted to driving to and from work for three to six months.

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[8] Exhibit 4.

[9] Exhibit 4.

[10] Answer to SOR.

[11] Exhibit 7.

[12] Exhibit A.

[13] Exhibit 7.

Applicant was charged with two counts of DUI stemming from his arrest in May 2012, and he pleaded guilty to a single offense for having a blood-alcohol content above 0.08%.[14] The other DUI offense was dismissed. In August 2012, the state court sentenced him to serve five days in jail, to attend DUI school for nine months, and to serve probation for three years, although he served the jail time by performing community service.[15] He described the probation as unsupervised, because he is not required to report to a probation officer or other court official.[16] There is no evidence that Applicant has violated the terms of his probation, which will conclude in August 2015.

In July 2014, which was a few months before issuance of the SOR, Applicant decided to stop drinking and abstain from alcohol, and he self-enrolled in an outpatient alcohol-treatment program.[17] He attends the program regularly, and he also attends meetings of Alcoholics Anonymous (AA). He is making progress in the program as verified in a letter from his counselor:

> [Applicant] has been attending and participating in groups on a regular basis since July 17th and has made much progress while in treatment. [Applicant] not only acknowledges that he has a substance abuse issue but has taken action to maintain sobriety. [He] seeks extra support at outside support groups as well as coming to outpatient treatment. He meets with myself, his substance abuse counselor, once a week and completes his assignments on time and thoroughly. In my professional opinion, [he] shows great promise in continuing his recovery and is a great example to the other clients at the program.[18]

In his answer to the SOR, Applicant stated that he accepts full responsibility for the two alcohol-related incidents, and he is taking action, via the outpatient program, to address his drinking and eliminate any further incidents of DUI or other alcohol-related incidents.

Law and Policies

It is well-established law that no one has a right to a security clearance.[19] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent

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[14] Exhibit 8.

[15] Answer to SOR.

[16] Exhibit A.

[17] Answer to SOR; Exhibit B.

[18] Exhibit B.

[19] *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 (10th Cir. 2002) (no right to a security clearance).

standard indicates that security clearance determinations should err, if they must, on the side of denials."[20] 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[21] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[22]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[23] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[24] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[25] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[26] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[27] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[28]

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

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[20] 484 U.S. at 531.

[21] Directive, ¶ 3.2.

[22] Directive, ¶ 3.2.

[23] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[24] Directive, Enclosure 3, ¶ E3.1.14.

[25] Directive, Enclosure 3, ¶ E3.1.15.

[26] Directive, Enclosure 3, ¶ E3.1.15.

[27] *Egan*, 484 U.S. at 531.

[28] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

person a security clearance is not a determination of an applicant's loyalty.[29] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The alcohol consumption and criminal conduct concerns are discussed together because they are factually interrelated. Under Guideline G for alcohol consumption,[30] 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. Under Guideline J for criminal conduct,[31] 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.

Based on the evidence, I have considered the following Guideline G and Guideline J disqualifying conditions:

> AG ¶ 22(a) alcohol-related incidents away from work, such as driving while under the influence, . . . ;
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> 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;
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> AG ¶ 31(a) a single serious crime or multiple lesser offenses;
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> AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
>
> AG ¶ 31(d) individual is currently on parole or probation.

Likewise, both guidelines contain conditions that may mitigate security concerns. Based on the evidence, I have considered the following Guideline G and Guideline J mitigating conditions:

> AG ¶ 23(b) the [person] acknowledges [their] alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this

[29] Executive Order 10865, § 7.

[30] AG ¶¶ 21, 22, and 23 (setting forth the security concern and the disqualifying and mitigating conditions).

[31] AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

AG ¶ 23(c) the [person] is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

AG ¶ 32(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community service.

Applicant was a problem drinker. This is rather obvious in light of the two alcohol-related incidents resulting in misdemeanor criminal convictions in 1986 and 2012. Those two incidents are persuasive evidence that Applicant occasionally abused alcohol and then exercised very poor judgment by deciding to drive a car after drinking. The two incidents occurred more than 25 years apart and do not necessarily indicate a pattern (although three or more such incidents certainly would). Nonetheless, the two incidents are serious and of concern, because they demonstrate that Applicant failed to learn his lesson after the 1986 DUI offense. And he is on probation for another six months due to the 2012 DUI offense.

In mitigation, I am persuaded that Applicant has taken sufficient action to address and overcome the security concerns stemming from two alcohol-related incidents resulting in criminal convictions. The primary or most persuasive evidence in support of that conclusion is that he initiated action in July 2014 to address his drinking by enrolling in an outpatient program, and he has since been alcohol-free. According to his counselor at the program, he is making satisfactory progress, he is a good example for others in the program, and he shows great promise. Although he is currently on unsupervised probation, he has served about 80% of the probation without incident, and he is on course to complete the remainder within the next six months. His continued participation in the outpatient program provides assurance that he will remain alcohol-free and not violate his probation.

In addition to the mitigating conditions, I also gave Applicant credit for (1) self-reporting the 2012 DUI to security officials; (2) being truthful and complete during the security clearance process; (3) seeking assistance via the outpatient program and following their guidance; and (4) demonstrating positive changes in behavior by abstaining from alcohol since July 2014.[32] By doing those things, Applicant did what is expected of a person who is currently eligible for access to classified information.

Applicant's history of alcohol-related incidents resulting in criminal convictions does not justify current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-

[32] AG ¶ 2(e)(1)–(6).

person concept.[33] I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa.* Accordingly, I conclude he met 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:

Paragraph 1, Guideline G:	For Applicant
Subparagraphs 1.a–1.c:	For Applicant
Paragraph 2, Guideline J:	For Applicant
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

[33] AG ¶ 2(a)(1)–(9).