



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



In the matter of:	)	
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	)	ISCR Case No. 14-01322
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: *Pro se*

09/11/2014

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him a security clearance to work in the defense industry. A 33-year-old test-vehicle operator, Applicant has a history of four alcohol-related incidents resulting in his arrest during 2005–2011. He did not present sufficient evidence to explain and mitigate the criminal conduct and alcohol consumption security concerns. Accordingly, this case is decided against Applicant.

**Statement of the Case**

On May 7, 2014, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant or continue access to classified information.<sup>1</sup> The SOR is

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<sup>1</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,

similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline J for criminal conduct and Guideline G for alcohol consumption.

The case was assigned to me July 30, 2014, to conduct a hearing requested by Applicant. The hearing was held August 25, 2014. At the hearing, Department Counsel presented Exhibits 1–6, which were admitted. Likewise, Applicant presented Exhibits A–B, which were admitted. Applicant testified, but called no other witnesses. The transcript (Tr.) was received September 4, 2014.

The record was kept open to allow Applicant an opportunity to present complete, legible copies of Exhibits A and B. Those matters were timely submitted and are made part of the record.

### **Findings of Fact**

Applicant is a 33-year-old employee of a federal contractor who is seeking a security clearance for the first time.<sup>2</sup> A native of Mexico, he immigrated to the United States with his family at the age of three or four. He completed high school in 1999, and then attended technical school where he earned an associate's degree. He also attended community college during 2003–2004, but did not earn a degree. He became a naturalized U.S. citizen in 2011. He has never married and has no children.

He is employed as a test-vehicle operator, a job that requires him to operate military vehicles that are under evaluation.<sup>3</sup> He has held this job since July 2013. He has a good record of employment with his employer as shown by two letters of recommendation.<sup>4</sup>

The SOR alleges and there is substantial evidence to show that Applicant has a history of four alcohol-related incidents resulting in arrest during 2005–2011.<sup>5</sup> In his answer to the SOR, Applicant admitted the four incidents and provided an explanation for each. In addition, he disclosed the four incidents when he completed his security

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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>2</sup> Exhibit 1.

<sup>3</sup> Applicant was suspended from his job on or about August 8, 2014, due to withdrawal of his interim clearance pending the resolution of this case and his employer continues to sponsor him for a clearance. Tr. 60–62.

<sup>4</sup> Exhibits A and B.

<sup>5</sup> Exhibits 2–6.

clearance application and during his background investigation.<sup>6</sup> The four incidents are discussed below.

Applicant was arrested in 2005 for resisting or interfering with the police.<sup>7</sup> Applicant explained that the incident took place when he and his brother were drinking at a local bar. His brother got into a fight and was arrested for aggravated assault after hitting a person in the forehead with a glass bottle. Applicant was arrested when he approached his brother and interfered with the arrest. Applicant explained that the charge against him was dismissed after he paid a small fine, performed community service, and took an ethics class.

Applicant was arrested in 2006 for two counts of driving under the influence of alcohol.<sup>8</sup> Applicant explained that the arrest occurred after a night of drinking in Mexico when he and his friend were driving back home. The friend passed out and Applicant realized he was not in condition to drive, so he parked the car in a residential area, took the keys out of the ignition, and fell asleep in the car. He was arrested a couple of hours later when discovered by the police. Subsequently, the charges were dismissed.

Applicant was arrested in 2009 for driving under the influence of alcohol and failure to have mandatory insurance.<sup>9</sup> Applicant explained that the arrest occurred when he was driving after having two beers with dinner with a friend at a local restaurant. His blood-alcohol content or concentration (BAC) was measured at 0.071 and 0.069, which was below the statutory limit of 0.10, but he failed field sobriety tests and smelled of alcohol according to the police report.<sup>10</sup> The case was resolved under a plea agreement in April 2009, when the two charges were dismissed and Applicant pleaded guilty to the added charge of reckless driving and paid a fine of \$1,390 and a \$20 fee.

Applicant was arrested in 2011 for the felony offense of aggravated assault.<sup>11</sup> Applicant explained that the arrest occurred when he and his cousin were waiting for a taxi outside a club where they had been drinking. They were approached by another man in an aggressive and threatening manner. His cousin punched the man, knocking him to the ground, and Applicant then kicked the man in the head. Applicant explained that he kicked the man due to fear and adrenaline. Subsequently, the charge was dismissed.

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<sup>6</sup> Exhibits 1 and 2.

<sup>7</sup> Exhibit 4.

<sup>8</sup> Exhibit 3.

<sup>9</sup> Exhibit 5.

<sup>10</sup> Exhibit 5.

<sup>11</sup> Exhibit 6.

Applicant denied any other arrests. He described his current drinking habits as follows: (1) his alcohol consumption is limited to weekends; (2) he no longer frequents bars but instead drinks alcohol (beer) at a friend's house or his home or with dinner at a restaurant; (3) he believes he was last intoxicated a few months ago after having four or five beers at a friend's house where he spent the night; and (4) he denied ever being diagnosed as an alcohol abuser or alcohol dependent.<sup>12</sup> In addition, he denies ever being court-ordered to undergo an alcohol evaluation or attend an alcohol awareness class or attend a meeting of Alcoholics Anonymous.<sup>13</sup> He has a commercial driver's license from his state of residence.<sup>14</sup> He intends to use a designated driver when he drinks alcohol while dining at a restaurant or another public venue.<sup>15</sup>

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>16</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>17</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.

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>18</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>19</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>20</sup> The Government has the burden of presenting

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<sup>12</sup> Tr. 49–57.

<sup>13</sup> Tr. 63–64.

<sup>14</sup> Tr. 66–69.

<sup>15</sup> Tr. 71.

<sup>16</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>17</sup> 484 U.S. at 531.

<sup>18</sup> Directive, ¶ 3.2.

<sup>19</sup> Directive, ¶ 3.2.

<sup>20</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.<sup>21</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>22</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>23</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>24</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>25</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>26</sup> 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 gravamen of the SOR is whether Applicant's history of four alcohol-related incidents resulting in arrest during 2005–2011 should disqualify him from eligibility for a security clearance. The two security guidelines will be discussed together because they are factually interrelated.

There is substantial evidence to demonstrate the applicability of the following disqualifying conditions under Guideline J for criminal conduct<sup>27</sup> and Guideline G for alcohol consumption:<sup>28</sup>

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

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<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>22</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>23</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>24</sup> *Egan*, 484 U.S. at 531.

<sup>25</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>26</sup> Executive Order 10865, § 7.

<sup>27</sup> AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>28</sup> AG ¶¶ 21, 22, and 23 (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;

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 individual is diagnosed as an alcohol abuser or alcohol dependent; and

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.

In mitigation, I have considered the following mitigating conditions under Guideline J for criminal conduct and Guideline G for alcohol consumption:

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;

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 involvement; and

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 good judgment.

The available evidence raises a concern about Applicant's reliability, trustworthiness, and good judgment. In short, Applicant was involved in two bar fights and was twice arrested for drinking-and-driving. It should be obvious but it is nonetheless stated here that an applicant who has four alcohol-related incidents resulting in arrest over a period of seven years is not a good candidate for access to classified information.

Applicant's evidence in mitigation consists of (1) the passage of time since 2011 without recurrence of similar incidents, (2) his self-reported moderation of alcohol consumption, and (3) a good record of employment since July 2013 with his current employer. Although the evidence is favorable, it is not particularly persuasive or strong, and I assess the evidence as lukewarm. Stated differently, I have doubts that his history of alcohol-related incidents resulting in arrest is safely in the past and will not recur. Those doubts result from the frequency and recency of his conduct, his admitted continued use of alcohol on what he stated was a moderated level, and the absence of

stronger evidence in reform and rehabilitation. Although the responsible use of alcohol is socially acceptable and not a concern in these cases, it is too soon to tell here if Applicant will be a responsible user of alcohol in the future as he has clearly demonstrated otherwise in the past. For these reasons, Applicant's history of alcohol-related incidents resulting in arrest cannot be mitigated and it remains a legitimate concern.

Applicant's history of criminal conduct and alcohol consumption raise doubt about his reliability, trustworthiness, and good judgment. Following *Egan* and the clearly-consistent standard, I resolve that doubt in favor of protecting national security. 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>29</sup> In doing so, I considered Applicant's good employment record. Nonetheless, the favorable matters are not enough to justify a conclusion that he met his ultimate burden of persuasion to obtain a favorable clearance decision.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a–1.d:	Against Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of the record as a whole, 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.

Michael H. Leonard  
Administrative Judge

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<sup>29</sup> AG ¶ 2(a)(1)–(9).