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

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 14-05201 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Caroline Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

05/29/2015

## Decision

HARVEY, Mark, Administrative Judge:

In May 2009, and October 2011, Applicant was arrested and charged with driving while under the influence of alcohol (DUI). He was on probation when arrested for the October 2011 DUI. He continues to consume alcohol to intoxication. Alcohol consumption concerns are not mitigated. Eligibility for access to classified information is denied.

## Statement of the Case

On February 25, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (GE 1) On November 12, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline G (alcohol consumption). (HE 2) The SOR detailed reasons why DOD could not make the affirmative finding under the Directive that it is clearly consistent with national security to grant or continue

a security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On December 17, 2014, Applicant responded to the SOR. (HE 3) On March 9, 2015, Department Counsel was prepared to proceed. On March 19, 2015, DOHA assigned the case to me. On April 13, 2015, DOHA issued a notice of the hearing, setting the hearing for May 14, 2015. (HE 1) The hearing was held as scheduled. Department Counsel offered four exhibits into evidence, and Applicant offered five exhibits into evidence. (Tr. 14-19; GE 1-4; AE A-E) There were no objections, and I admitted all proffered exhibits into evidence. (Tr. 15, 17, 19; GE 1-4; AE A-E) On May 22, 2015, I received the transcript of the hearing.

## Findings of Fact[1]

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a and 1.b. Applicant also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 30-year-old employee of a defense contractor, who has provided security services for his employer since May 2009. (Tr. 6, 38; GE 1) In 2003, Applicant graduated from high school, and in 2013, he received a certificate of completion in administrative justice. (Tr. 7, 22; AE D) He has never served in the military. (Tr. 7) He has never been married, and he does not have any children. (Tr. 7) There is no evidence of security violations, use of illegal drugs, or criminal offenses aside from his DUIs.

### Alcohol Consumption

In May 2009, at about 6:00 pm, the police arrested Applicant for DUI. (Tr. 25-26) His blood alcohol content (BAC) was .29 percent. (Tr. 26) He was scheduled to work at 10 pm (four hours after he was arrested). (Tr. 26-27) Applicant said he was "not sure" whether he would have still been under the influence of alcohol when he reported to work as a security guard. (Tr. 26, 28) At the time of his arrest, he did not feel like he was still under the influence of alcohol. (Tr. 28) Applicant was enrolled in the first offender program. (Tr. 28) He paid his attorney $2,000 and his fine was $1,800. The first offender program cost about $1,500 to $2,000. (Tr. 29) He was on unsupervised probation for three years. (Tr. 29-30) His probation did not prohibit alcohol consumption; however, it entailed zero tolerance for DUI. (Tr. 30) He was required to watch videos about the impact of DUI. (Tr. 33)

In October 2011, while still on probation from his previous DUI, Applicant was driving in stop-and-go traffic, and he rear ended another vehicle. (Tr. 31) Applicant's BAC was .10 percent, which exceeded the DUI threshold of .08 percent. (Tr. 32) He

[1]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

received a fine, was required to pay restitution, and was placed on probation for three more years. (Tr. 33; GE 4) His probation ended in February 2015. (Tr. 33) He received small group in-person instruction on the impact of DUI. (Tr. 34) He was not told he was an abuser of alcohol. (Tr. 35) It was suggested that he reduce his alcohol consumption. (Tr. 35) Probation did not include prohibition of alcohol consumption. (Tr. 35)

Applicant has never attended Alcoholics Anonymous or alcohol counseling or treatment. (Tr. 35) He became intoxicated after consuming 64 ounces of beer the week before his hearing. (Tr. 35-36) He drinks about this amount of beer once or twice a week. (Tr. 36-37) His second DUI did not affect the amount of his alcohol consumption; however, it did cause him to ensure he did not drive after consuming alcohol. (Tr. 39)

Applicant has not driven after consuming alcohol since his arrest in 2011. (Tr. 37) Applicant has not had any traffic infractions since his 2011 DUI. (Tr. 23; GE 4) He did not believe his alcohol consumption affected his personal relationships or work. (Tr. 38, 41)

**Character evidence**

Applicant is highly organized in his establishment of schedules for his subordinates, who work in the security area. (Tr. 16; AE A)

Applicant assisted in the apprehension and detention of an intoxicated fake screener at an airport, who was directing women into a private booth for pat downs. (Tr. 20-21; AE B) They held the fake screener until the local police arrived to arrest him. (AE B)

Applicant has been certified as a high school level coach for three years. (Tr. 21) He mentors 50-60 children. (Tr. 22)

## 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." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's 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.

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, these guidelines are applied 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, 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 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 "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. *See also* Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about applicant's allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

## Analysis

### Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "[e]xcessive 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."

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

> (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;
>
> (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> (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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> (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
>
> (e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;
>
> (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and
>
> (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(b), 22(d) through 22(g) do not apply. Applicant did not have any alcohol-related incidents at work, did not violate any court orders, and did not have a relapse after a diagnosis of alcohol abuse or dependence. He did not suffer a relapse after being diagnosed as suffering from alcohol abuse or dependence.

Applicant engaged in binge-alcohol consumption to the extent of impaired judgment.[2] His excessive alcohol consumption resulted in arrests, convictions, and various penalties imposed by the courts for DUIs in May 2009, and October 2011. AG ¶ 22(a) and 22(c) apply.

[2]Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. *See* U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) are potentially applicable:

> (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;
>
> (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);
>
> (c) the individual 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
>
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. Applicant has not attended an alcohol rehabilitation or counseling program. He is not currently attending alcohol counseling, treatment, or AA meetings. He continues to consume alcohol to intoxication. He has not established a pattern of responsible alcohol use. He has not provided "a favorable

prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program."

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. *See* ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) the Appeal Board reversed the administrative judge's grant of a clearance and noted, "That Applicant continued to drink even after his second alcohol related arrest vitiates the Judge's application of MC 3."

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge's grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and capricious. *See also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (involving case with most recent alcohol-related incident three years before hearing, and reversing administrative judge's grant of a clearance).

After careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I have doubts about Applicant's continued alcohol consumption to intoxication and lack of alcohol-related counseling and treatment. His BAC in 2009 of .29 percent is more than three times the legal limit of .08 percent. His .29 percent BAC was four hours before he was scheduled to report for his security-related employment. His 2011 DUI was during his probation from his 2009 DUI. Alcohol consumption concerns are not mitigated.

**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 AG ¶ 2(a):

> (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 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. I have incorporated my comments under Guideline G in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is some evidence supporting continuation of Applicant's access to classified information. Applicant is 30-year-old employee of a defense contractor, who has provided security services for his employer since May 2009. In 2003, Applicant graduated from high school, and in 2013, he received a certificate of completion in administrative justice. There is no evidence of security violations, use of illegal drugs, or criminal offenses aside from his DUIs. Applicant is highly organized in his establishment of schedules for his subordinates, who work in the security area. He assisted in the apprehension and detention of an intoxicated fake screener at an airport, who was directing women into a private booth for pat downs. He has been certified as a high school level coach for three years, and he mentors 50-60 children.

The evidence supporting denial of Applicant's clearance is more substantial than the evidence supporting approval of his security clearance. Applicant has two serious offenses—his two convictions for DUI in 2009 and 2011. DUI is a serious criminal offense in which he endangered himself and others. Excessive alcohol consumption followed by driving a motor vehicle shows a lack of judgment, rehabilitation, and impulse control. There is no medical diagnosis, evaluation, or prognosis of his alcohol consumption; he continues to consume alcohol to intoxication; and he is not attending any ongoing alcohol-related counseling or treatment. "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." (AG ¶ 21) Alcohol consumption concerns are not mitigated.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Alcohol consumption security concerns are not mitigated.

## 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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1.a and 1.b: | Against Applicant |

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark Harvey
Administrative Judge