



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



In the matter of: )  
 )  
----- ) ISCR Case No. 07-04460  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Eric H. Borgstrom, Esq. Department Counsel  
For Applicant: *Pro se*

April 30, 2008

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his security clearance application on May 16, 2006. On November 16, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline G (Alcohol Consumption). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on November 19, 2007; answered it on December 7, 2007; and requested a hearing before an administrative judge. DOHA received the request on December 11, 2007. Department Counsel was prepared to proceed on December 27, 2007, and the case was assigned to me on January 2, 2008. DOHA issued a notice of hearing on January 18, 2008, scheduling the hearing for February 11, 2008.

Applicant retained individual counsel on January 25, 2008. His counsel filed motions for a continuance and change of venue on January 28, 2008; and I granted the motions by order on January 31, 2008 (Hearing Exhibits (HX) I and II). DOHA issued a second notice of hearing on February 1, 2008, scheduling the hearing for March 10, 2008. On March 4, 2008, Applicant's counsel withdrew from representation (HX III).

I convened the hearing as scheduled on March 10, 2008. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified on his own behalf. I granted his request to keep the record open until March 28, 2008, to enable him to submit additional evidence. He did not submit any additional evidence. DOHA received the transcript of the hearing (Tr.) on March 18, 2008. The record closed on March 28, 2008. Eligibility for access to classified information is denied.

### **Evidentiary Ruling**

Department Counsel offered GX 3, DOHA interrogatories that included a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and he waived it (Tr. 47). Accordingly, I admitted GX 3.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations, but he disputed the starting date of his excessive consumption of alcohol alleged in SOR ¶ 1.a. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 32-year-old assistant research engineer for a defense contractor. He has worked for his current employer since January 2000. He holds a bachelor's degree in computer science and is enrolled in a master's degree program. He received a clearance in June 2000.

Applicant began drinking alcohol after his 21<sup>st</sup> birthday in 1996. At first he consumed about one beer once a week. He recalled three occasions between 1998 and 1999 when he became mildly intoxicated (Tr. 30-31). Around August 2002, he began drinking 4-5 beers at a time and as much as 15-20 shots of hard liquor over the course of an evening (GX 3 at 5-6).

In August 2003, Applicant drank to the point of intoxication at a party and passed out on the front lawn of the residence where the party occurred. He was discovered by the police, taken to a hospital, and eventually charged with public intoxication. He pleaded guilty and paid a fine of about \$300 (GX 3 at 4; GX 4).

At a New Year's Eve party on January 1, 2004, Applicant became intoxicated, attempted to walk home, and passed out on a sidewalk. He was found by a policeman, taken to a hospital, and charged with public intoxication. He pleaded guilty and paid a fine of about \$300 (GX 3 at 4; GX 5).

On March 17, 2006, Applicant visited about three bars with friends, celebrating St. Patrick's Day. He became heavily intoxicated, attempted to walk home, mistakenly entered someone else's residence instead of his own, and passed out. An occupant of the residence summoned the police, who charged him with criminal trespass and criminal mischief. He was convicted of the criminal mischief charge and fined about \$600.

After the St. Patrick's Day incident, Applicant stopped drinking hard liquor and limited himself to three beers in an evening (GX 3 at 6). However, on his birthday in June 2007, he consumed six drinks and considered himself too impaired to drive (Tr. 34).

Applicant testified he has not consumed any alcohol since November 2007 (Tr. 29, 41, 45). He decided to stop consuming alcohol after receiving the SOR and reading Guideline G (Tr. 56). He has never received any counseling or treatment for his alcohol use (Tr. 37). He has not participated in Alcoholics Anonymous or similar organizations (Tr. 46). He has never been evaluated by a medical professional. He testified he believes he can stop drinking on his own, without a support structure (Tr. 64).

### **Policies**

"[N]o 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 applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). 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 over-arching adjudicative goal is a fair, impartial and common sense 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 protect or 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.

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, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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**

The security concern relating to Guideline G is set out in AG ¶ 21 as follows: “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 SOR ¶ 1.a alleges Applicant consumed alcohol, “at times to excess and to the point of intoxication,” from about 1996 to at least March 2007. Based on the evidence of record, I conclude Applicant’s excessive consumption of alcohol commenced in 1998 as he asserted, and not in 1996 as alleged in SOR ¶ 1.a. The SOR also alleges arrests and convictions for public intoxication in August 2003 and January 2004 (¶¶ 1.b and 1.c), charges of alcohol-related criminal trespass and criminal mischief in March 2006, and a conviction of criminal mischief (¶ 1.d).

A disqualifying condition may arise from “alcohol-related incidents away from work, such as driving while under the influence . . . , disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.” AG ¶ 22(a). Applicant’s three alcohol-related convictions raise this potentially disqualifying condition.

A disqualifying condition also may arise from “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 ¶ 22(c). “Binge drinking” is “the consumption of five or more drinks in a row on at least one occasion.” U.S. Dept. of Health & Human Services, Substance Abuse and Mental Health Services Administration, *The National Household Survey on Drug Abuse: Binge Drinking Among Underage Persons*, Apr. 11, 2002, available at <http://www.oas.samhsa.gov>. Applicant’s description of his drinking habits raises AG ¶ 22(c).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 22(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns arising from alcohol consumption may be mitigated if “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” AG ¶ 23(a). The first prong (“so much time has passed”) is not established; because Applicant’s last alcohol-related conviction was only two years ago, and he did not stop drinking until November 2007, after he received the SOR. The second prong (“so infrequent”) is not established in light of his multiple convictions and regular pattern of heavy drinking until his last conviction. The third prong (“unusual circumstances”) is not established because his excessive drinking occurred under normal social conditions, with no external pressures. Finally, the record is insufficient to establish that his conduct is “unlikely to recur.” He has not sought or received any counseling or treatment, and has no support structure for his continued sobriety. I conclude AG ¶ 23(a) is not established.

Security concerns under this guideline also may be mitigated if “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).” AG ¶ 23(b). Applicant has acknowledged his alcohol abuse, but has not sought treatment, counseling, or a support group. His period of abstinence, only about four months at the time of the hearing, was triggered by the pressure of keeping his clearance, and it is too short to constitute a “pattern” of abstinence. I conclude AG ¶ 23(b) is not established.

## **Whole Person Concept**

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature, well-educated, obviously intelligent adult. He was candid and sincere at the hearing. However, his drinking to the point of unconsciousness while holding a security clearance raises doubts about his judgment and reliability. His receipt of the SOR may have triggered a lifestyle change, but it is too soon to tell. His lack of treatment, counseling, or a support structure militates against continued sobriety.

After weighing the disqualifying and mitigating conditions under Guideline G, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on alcohol consumption. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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LeRoy F. Foreman  
Administrative Judge