



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



In the matter of:)	
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-----)	
a/k/a -----)	ISCR Case No. 07-09728
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: John R. Campbell, Esquire

March 11, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on October 31, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline G for alcohol consumption and Guideline J for criminal conduct. Both guidelines are based primarily on Applicant’s three arrests for driving under the influence (DUI) of alcohol.

In addition, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then

¹ Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant replied to the SOR on November 16, 2007, and requested a hearing. The hearing took place as scheduled on January 30, 2008, and the transcript (Tr.) was received on February 7, 2008.

The record was left open until February 29, 2008, to allow Applicant an opportunity to submit an additional documentary exhibit. It was timely submitted and department counsel had no objections to it. It is admitted as Exhibit C—physician's one-page letter.

On March 4, 2008, I held a post-hearing conference call with counsel.³ Based on review of the record evidence, I indicated that the police report for the 2006 DUI arrest would be helpful in reaching my decision. Lacking authority to order production of the document, I invited counsel to submit a complete copy of the police report should they chose to do so. Neither counsel accepted the invitation.⁴ For the reasons discussed below, this case is decided for Applicant.

Findings of Fact

Under Guideline G, the SOR alleges Applicant was arrested, charged, and convicted of two DUI offenses in 1987 and 1990; it alleges he was arrested and charged with DUI in February 2006 and that case was pending; and it alleges he uses alcohol on a weekly basis. Under Guideline J, the SOR allegation cross-references to the three DUI incidents alleged under Guideline G. In his Answer, Applicant admits the factual allegations under both guidelines and he gave explanations for the individual incidents and for his situation in general. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 38-year-old employee of a defense contractor. He is a 1995 college graduate with a bachelor of science in electrical engineering. He has worked in the defense industry since 1995 when he started his first job as a software analyst. In 1999, he accepted a position as a systems/software engineer with another company. He worked for that company for about 18 months. In October 2000, he accepted a position with his current employer working as a senior software engineer. His day-to-day

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

³ See E-mail to Counsel, dated March 4, 2008, in the correspondence folder of the case file.

⁴ See E-Mail to Counsel, dated March 10, 2008, in the correspondence folder of the case file.

work involves software for a missile-defense program. His annual salary is about \$70,000. The record is silent concerning Applicant's job performance as well as his knowledge, skills, and abilities to perform his work as a senior software engineer. He has held a security clearance, at the secret and top-secret levels, since about 1996. He is seeking to retain a security clearance at the secret level.

To retain a security clearance, Applicant completed a security-clearance application in January 2006. In response to the relevant question about alcohol- or drug-related offenses, Applicant disclosed the 1987 and 1990 DUI offenses (Exhibit 1). He had previously reported these two offenses when he was initially granted a security clearance in 1996.

His first DUI arrest was in 1987, when he was 17 years old. The police stopped him for speeding and discovered he had been drinking (Tr. 43). He was arrested and charged with DUI. Applicant believes he was treated as a juvenile offender. In a brief explanation in his security-clearance application, he stated he paid a fine, lost his driver's license, went to DUI class, and served probation.

His second DUI arrest was in 1990, when he was 20 years old. He was involved in an auto accident and the police discovered he had been drinking (Tr. 43). He was arrested and charged with DUI. He received youthful offender status for this offense. In a brief explanation in his security-clearance application, he stated he paid a fine, lost his driver's license, went to DUI class, and served probation.

His third DUI arrest was in 2006, when he was 36 years old. He was scheduled to be married in July 2006, and he and a friend had met to catch up on old times (Tr. 35). He left the establishment and was pulled over by police. He was arrested and charged with DUI.

The case was handled in municipal court. But Applicant was never tried, and the DUI charge against him was *nolle prossed* on the city attorney's motion (Exhibit A). The court records indicate a number of continuances, that the city ran out of continuances, and that the arresting officer was unavailable. In October 2007, the court granted the city's *nolle prosequi* motion and assessed court costs of \$237 against Applicant. Applicant has a valid driver's license, without restrictions, issued by his state of residence (Tr. 49–50).

In his testimony for this case, Applicant initially said he did not remember how many beers he had before he was arrested in February 2006; he later estimated drinking six to eight beers over a six-hour period (Tr. 61–63). The police required Applicant to take field sobriety tests, but he was not told the results (Tr. 60). Likewise, the police required Applicant to take a breathalyser test, but he does not remember the results (Tr. 61). He was told that he was above the legal limit (Tr. 61).

Applicant married in July 2006 as planned, and it is his first marriage. He is the father of a 14-year-old son from a previous relationship, and the son lives with his

mother. He has paid child support over the years for his son and his payments are current. Also, he has a 17-year-old stepson living in his household. Applicant's wife works as a first-grade school teacher.

Applicant's wife describes herself as an occasional drinker who may have a glass of wine with dinner or with guests (Tr. 72). Her first marriage ended after about five months due to her first husband's drinking. She is sensitive to the issue and would not tolerate it in a spouse (Tr. 70). She describes Applicant's use of alcohol as having one or two beers every now and then (Tr. 70). She keeps little alcohol (a few beers or a bottle of wine or both) in the house (Tr. 76). Also, she indicated that neither will drink alcohol when they go out to eat (Tr. 71).

Applicant is a beer drinker. Before his February 2006 arrest, Applicant estimates the frequency of his beer drinking as weekly, usually on the weekends, and he would drink no more than three or four beers (Tr. 54–56). After his February 2006 arrest, he has gone several weeks without drinking any alcohol, or he may have a beer a couple of days in a row (Tr. 56). In 2008, he has had "a beer every now and then" (Tr. 63).

None of his DUI arrests resulted in a court-ordered alcohol evaluation (Tr. 56). Likewise, a court has never ordered him to attend Alcoholics Anonymous or a similar organization, and he has not attended on his own (Tr. 57). He has never been diagnosed or evaluated as suffering from either alcohol abuse or alcohol dependence, nor has he received treatment for the same (Tr. 31).

Applicant saw a physician in 2008 concerning his use of alcohol. In light of this proceeding, he was concerned if he had an alcohol problem and decided to get a medical opinion (Tr. 32). Applicant underwent an examination and testing (Exhibit B). According to his physician, Applicant's "blood alcohol level was within normal limits and his test showed no chronic liver disease secondary to alcohol liver disease" (Exhibit C). His physician did not mention any diagnosis, but recommended, per his usual practice, that Applicant use alcohol in moderation if at all. Applicant is more than willing to follow his doctor's recommendation (Tr. 41–42).

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.⁵ As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁶ A favorable decision establishes eligibility of an

⁵ *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) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

⁶ *Egan*, 484 U.S. at 531.

applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁷ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁸ 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.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁹ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁰ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹¹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹² In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹³ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁴

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. 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.¹⁵ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

⁷ Directive, ¶ 3.2.

⁸ Directive, ¶ 3.2.

⁹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁰ Directive, Enclosure 3, ¶ E3.1.14.

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ *Egan*, 484 U.S. at 531.

¹⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁵ Executive Order 10865, § 7.

Analysis

Under Guideline G for alcohol consumption,¹⁶ the security concern is that “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.”¹⁷

The guideline contains several conditions that could raise a security concern and may be disqualifying. In general, a security concern is raised by Applicant's pattern of drinking-and-driving. In particular, the two pertinent DC are alcohol-related incidents away from work and binge consumption of alcohol. Each DC is discussed below.

First, DC 1¹⁸ applies against Applicant due to the three arrests for DUI, which resulted in convictions in the first two cases. The three arrests for DUI are alcohol-related incidents away from work within the meaning of the guideline. Second, DC 3¹⁹ applies against Applicant because of his binge-drinking episode that resulted in his DUI arrest in 2006. Drinking six to eight beers over a six-hour period was excessive, and then getting behind the wheel of the car indicates impaired judgment. Taken together, these facts and circumstances raise questions about Applicant's judgment, reliability, and trustworthiness.

The guideline also contains four conditions that could mitigate security concerns. The most pertinent is MC 1, which provides as follows:

[S]o 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.²⁰

MC 1 applies in Applicant's favor because approximately two years have passed since the last alcohol-related incident. And the three alcohol-related incidents no longer cast doubt on his current reliability, trustworthiness, or good judgment because he is no longer engaging in similar behavior. Since his last arrest, Applicant has married, become a stepfather, and, most important, he has established a pattern of responsible

¹⁶ Revised Guidelines at 15–16 (setting forth the alcohol consumption disqualifying and mitigating conditions).

¹⁷ Revised Guidelines at 15.

¹⁸ DC 1 is “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.”

¹⁹ DC 3 is “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.

²⁰ Revised Guidelines at 15.

and moderate use of alcohol. The pattern is established by his own testimony, which is supported by his wife's testimony and the doctor's letter indicating no chronic liver disease secondary to alcohol liver disease. The record evidence shows Applicant has not been diagnosed or evaluated as an alcohol abuser or alcohol dependent, and he has not been an irresponsible, problem drinker for the last two years.

Under Guideline J for criminal conduct,²¹ the concern is that "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."²²

In general, a security concern is raised by Applicant's pattern of drinking-and-driving. In particular, both DC 1²³ and DC 3²⁴ apply against Applicant as evidenced by his arrests, charges, and convictions for DUI. Although the 2006 DUI case did not result in a conviction, there is substantial evidence, which is sufficient for this proceeding, to conclude that he committed the offense. In any event, the record evidence is that he was arrested and charged with DUI in 2006, and that is enough to trigger application of DC 3. The totality of the disqualifying information calls into question Applicant's judgment as well as his ability or willingness to comply with laws, rules, and regulations.

Turning to the mitigating conditions of Guideline J, MC 1 provides as follows:

[S]o 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.²⁵

This mitigating condition is similar to MC 1 of Guideline G, which is discussed above. And it applies in Applicant's favor under essentially the same rationale. These circumstances amount to a positive change in his behavior.

This case has also been considered under the whole-person concept, as the record evidence raises both disqualifying and mitigating conditions. The most troubling aspect of this case is Applicant's 2006 DUI arrest, as the security significance of the 1987 and 1990 incidents is reduced, in part, due to his youth and immaturity at the time. That is not the case for the 2006 DUI arrest. He used grossly poor judgment in deciding

²¹ Revised Guidelines at 21–22 (setting forth the criminal conduct disqualifying and mitigating conditions).

²² Revised Guidelines at 21.

²³ DC 1 is "a single serious crime or multiple lesser offenses."

²⁴ DC 3 is "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

²⁵ Revised Guidelines at 21.

to drive after drinking several beers and becoming intoxicated. But it appears this incident of poor judgment was a lapse in an otherwise long period of responsible behavior during his employment in the defense industry. Since his last arrest, he married and gained a stepchild, and he consulted with a physician concerning his use of alcohol. He has established a pattern of responsible and moderate use of alcohol for the last two years. He has his wife's support in this regard, and she is an occasional and moderate drinker of alcohol. In other words, codependency does not appear to be a concern. Taken together, these circumstances indicate that Applicant is on the right path. Likewise, they also suggest that he now has better self-awareness of his alcohol use making it unlikely that he will engage in further drinking-and-driving or binge drinking.

Based on the record evidence as a whole, both favorable and unfavorable, I conclude that Applicant is suitable for continued access to classified information, a privilege he has held since about 1996. Applicant met his burden to present sufficient evidence of reform and rehabilitation to mitigate the security concerns under both guidelines. And Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

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

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

Conclusion

In light of all of the circumstances, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge