



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



In the matter of:	)	
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SSN: -----	)	ISCR Case No. 07-15113
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Paul M. DeLaney, Esquire, Department Counsel  
For Applicant: *Pro Se*

October 31, 2008

**Decision**

MALONE, Matthew E., Administrative Judge:

Applicant has not mitigated the security concerns raised by the government's information about his alcohol consumption. Accordingly, his request for a security clearance is denied.

On November 20, 2006, Applicant submitted a Questionnaire for Sensitive Positions (SF-86) to request a security clearance required as part of his employment with a defense contractor. (FORM, Item 5) After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request.

On May 27, 2008, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision – security concerns addressed in the Directive

<sup>1</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

under Guideline G (alcohol consumption) of the Revised Adjudicative Guidelines (AG).<sup>2</sup> More specifically, the government alleged that Applicant was arrested in September 2006, charged with and convicted of Operating a Motor Vehicle While Intoxicated (SOR ¶ 1.a); that from 1975 until at least March 2008, he regularly consumed alcohol to excess and to the point of intoxication (SOR ¶ 1.b); that he intends to continue consuming alcohol to the point of intoxication (SOR ¶ 1.c); and that he was arrested in September 1995, charged with and convicted of Operating a Motor Vehicle While Intoxicated/Operating a Motor Vehicle With a Blood Alcohol Content 0.08% - 0.15%. (SOR ¶ 1.d).

On June 22, 2008, Applicant answered the SOR, admitted the allegations in SOR ¶¶ 1.a, 1.c and 1d. He denied the SOR ¶ 1.b allegation. He also requested a decision without a hearing. On July 24, 2008, DOHA Department Counsel submitted a file of relevant materials (FORM)<sup>3</sup> in support of the government's preliminary decision. Applicant received the FORM on August 6, 2008, and was given 30 days to file a response to the FORM. He did not submit anything in response to the FORM by the September 5, 2008, deadline. The case was assigned to me on October 10, 2008.

### **Findings of Fact**

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the FORM, I make the following additional findings of fact.

Applicant is a 52-year-old engineer employed by a defense contractor and has held a security clearance since 1991. He holds a bachelor's degree and a master's degree in electrical engineering. He and his wife were married in March 1984, divorced in June 1992, and re-married in August 1994. They have two sons, ages 23 and 21. (FORM, Items 5 and 6)

Applicant considers himself to be a social drinker. He will drink beer when attending or watching a sporting event, and on such occasions has consumed as many as 10 beers. He drinks between three and six beers at one time each month and was last intoxicated in March 2008. (FORM, Item 7) Applicant has further stated he will continue to consume alcohol in this manner and with this frequency. He also acknowledges that his alcohol consumption will probably result in his being legally intoxicated at times. Applicant further avers he will not drive after drinking to the point of intoxication, which he speculates is about four beers. (FORM, Item 7)

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<sup>2</sup> Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

<sup>3</sup> See Directive, Enclosure 3, Section E3.1.7. The FORM included six documents (Items 1 - 6) proffered in support of the government's case.

Prior to the current investigation, Applicant had submitted a Security Clearance Application (SF 86) on March 7, 2000 (FORM, Item 6), to request a periodic reinvestigation. He disclosed therein that, in September 1995, he was arrested for "DUI". He was subsequently convicted and sentenced to 60 days in jail, of which all but two days (already served) were suspended. He was also placed on probation for 363 days and assessed fines and court costs. (FORM, Items 4, 5, 6 and 9) There is no information available regarding the details of his conduct, e.g., how much he had to drink or under what circumstances he was drinking and decided to drive. Further, the allegation in SOR ¶ 1.d states the charge as "Operating a Motor Vehicle While Intoxicated/Operating a Motor Vehicle with a Blood Alcohol Content 0.08% - 0.15%." However, the record before me does not contain the source of that charge as drafted. Nonetheless, it is uncontroverted that Applicant was arrested, charged, and convicted of an alcohol-related driving offense in 1995.

In September 2006, after watching a basketball game and consuming an unspecified amount of alcohol, Applicant was arrested and charged Operating a Vehicle While Intoxicated. After refusing a breath test, his blood alcohol level was determined through an involuntary blood test conducted pursuant to a search warrant. He was convicted in December 2006 and sentenced to 365 days in jail. His jail term was suspended for one year conditioned on good and lawful behavior, payment of assessed fines and court costs, completion of alcohol safety awareness classes, 180 hours of community service, participation in Mothers Against Drunk Driving (MADD) activities, and installation of an ignition interlock system on his car for one year. Applicant completed the court's requirements and was released from probation in December 2007. (FORM, Item 8)

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).<sup>4</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole person" concept, these factor are:

- (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.

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<sup>4</sup> Directive. 6.3.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline G (alcohol consumption) at AG ¶ 21.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest<sup>5</sup> for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.<sup>6</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>7</sup>

## Analysis

### Alcohol Consumption.

Under Guideline G, "[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." (AG ¶ 21) The government's information presented in the FORM is sufficient to support the allegations in SOR ¶¶ 1.a - 1.d. Applicant was arrested and convicted in 1995 and in 2006 for driving while under the influence of alcohol. In December 2007, Appellant completed probation and other requirements of his sentence from his 2006 conviction. He admits to consuming as many as 10 beers in one sitting and that he drinks between three and six beers in one sitting about once monthly. Applicant was most recently intoxicated in March 2008, three months after completing his probation and having the interlock ignition device removed from his car.

Available information requires application of the disqualifying conditions listed at AG ¶ 22(a) (*alcohol-related incidents away from work, such as driving while under the*

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<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>6</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>7</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

*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).*

By contrast, of the mitigating conditions listed under AG ¶ 23, only 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;*) potentially applies here. Applicant's most recent alcohol-related incident occurred about two years ago. It had been 11 years since any similar conduct. Thus, it could be argued Applicant's conduct was not recent and was infrequent. However, it does not appear Applicant has changed his drinking habits, even after a second alcohol-related arrest, a year of probation, violation of which would have landed him in jail for a year, a year of court-ordered monitoring (through the ignition interlock device) of his drinking and driving, and after alcohol awareness classes and work with MADD. Applicant's use of alcohol ranges from mildly excessive (three to six beers at once) to abusive (10 beers at once), with no apparent change in sight. In light of all of the information presented, I cannot conclude he will not again drink and drive or that his alcohol consumption does not cast doubt on his "current reliability, trustworthiness, or good judgment." Applicant has failed to mitigate the security concerns presented by the adverse information about his alcohol consumption.

### **Whole Person Concept.**

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline H. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 52 years old and presumed to be a mature, responsible adult. Indeed, he is a father and husband with advanced degrees, he has a stable employment record, and he has held a security clearance for about 19 years. However, in response to the government's concerns about his drinking and alcohol-related arrests, he exhibits an unwillingness to change or to even acknowledge the gravity of the information presented. Absent information that shows he is not likely to engage in alcohol abuse or illegal alcohol-related conduct, the favorable information in his background is insufficient to overcome the security concerns about his drinking. A fair and commonsense assessment<sup>8</sup> of the available information bearing on Applicant's suitability for a security clearance shows he has not yet satisfied the doubts about his ability or willingness to protect the government's interests. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.<sup>9</sup>

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<sup>8</sup> See footnote 4, *supra*.

<sup>9</sup> See footnote 7, *supra*.

### **Formal Findings**

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Alcohol Consumption:      AGAINST APPLICANT

Subparagraphs 1.a - 1.d:                      Against Applicant

### **Conclusion**

In light of all of the foregoing, it is not clearly consistent with the national interest to allow Applicant access to classified information. Request for a security clearance is denied.

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MATTHEW E. MALONE  
Administrative Judge