



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-15419  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

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

July 31, 2008

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted his security clearance application on June 7, 2007. On March 3, 2008, 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 Guidelines G and E. 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 March 18, 2008; answered it on April 29, 2008; and requested a hearing before an administrative judge. DOHA received the request on May 2, 2008. Department Counsel was ready to proceed on May 16, 2008, and the case was assigned to me on May 20, 2008. DOHA issued a notice of hearing on June 5, 2008, scheduling the hearing for June 25, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 10 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. I granted Applicant's request to keep the record open until July 9, 2008, to enable him to submit additional documentary evidence. Applicant timely submitted AX C through F, and they were admitted without objection. Department Counsel's response to AX C through F is attached to the record as Hearing Exhibit I. DOHA received the transcript of the hearing (Tr.) on July 3, 2008. The record closed on July 9, 2008.

### **Evidentiary Ruling**

Department Counsel offered GX 10, 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. 28-30.) Accordingly, I admitted GX 10.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the three allegations under Guideline G, but he denied the allegation of falsifying his security clearance application under Guideline E. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact.

Applicant is a 24-year-old computer technician employed by a federal contractor. He has worked for his current employer since March 2007. He holds an interim clearance, but he has never received a final security clearance.

Applicant's co-workers consider him hard working, knowledgeable, responsible, and helpful. (AX A, B, and F.) One of his co-workers testified at the hearing about Applicant's dedication and sense of responsibility. (Tr. 68-70.) His supervisor describes him as organized, efficient, and extremely competent, with a strong work ethic. (AX E.) Applicant works on his parents' poultry farm about 24 hours a week, and he is described by his mother as a serious worker, a truthful person, and a person with a "warm heart" who makes friends easily. (Tr. 56-57; AX D.)

Applicant began consuming alcohol when he was 19 years old. He consumed alcohol twice weekly, consuming 10 to 12 drinks of beer or liquor each time. He usually drank at a friend's house, but he occasionally went to a bar. (GX 10 at 2.)

Applicant was arrested on the afternoon of October 13, 2006, for driving under the influence of alcohol (DUI). Police found him asleep behind the wheel of his car in a parking lot of a bowling alley. His car was straddling a concrete parking divider and the engine was running. (Tr. 38.) The police observed several empty beer bottles in the car. He had consumed about eight beers, and his blood-alcohol level was .13%. (GX 10 at 1.) In March or April 2007, he was placed in an accelerated rehabilitation program. He was required to perform 50 hours of community service, attend three highway safety classes, and attend eight group sessions of a drug and alcohol awareness program. (Tr. 39; GX 6, 7, and 10 at 2.)

Applicant was stopped by police in April 2007, as he left a construction site that had experienced recent thefts. The police officer smelled alcohol and asked Applicant to perform several sobriety tests, which he failed. Applicant was arrested for DUI and found to have a blood-alcohol level of .15%. He pleaded guilty and was ejected from the diversion program. On October 22, 2007, he was sentenced to confinement for 15 days, license suspension for 2 years, a \$500 fine, \$2,500 in costs, and attendance at an impaired driver program. (GX 3, 4, 5, 8, and 9.) He served five three-day weekends in jail on a work release program. (Tr. 42.)

Applicant is in a court-ordered counseling program, but he has not joined Alcoholics Anonymous or a similar group, and he continues to consume alcohol. He last drank to the point of intoxication about four or five months before the hearing. (Tr. 43-45.) He has never been diagnosed by a qualified medical professional or licensed clinical social worker as an alcohol abuser or alcohol dependent.

Applicant submitted his security clearance application on June 7, 2007. He answered "no" to question 23c, asking if there were currently any charges pending against him for any criminal offense. He also answered "no" to question 23d, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs. He did not disclose either of his two DUI arrests.

On September 13, 2007, Applicant told a security investigator he did not list his arrests because he was in the diversion program at the time he executed his application and had no convictions on his record. (GX 10 at 1). In his answer to the SOR, he stated he did not disclose the pending charges because he believed his record would be expunged. He also stated he was focused on completing the form so he could start his job, and he did not realize that his DUI arrests would affect his eligibility for a clearance. At the hearing, he testified he was arrested for his second DUI while his application was "in the process," and he "just let it go." (Tr. 35.) He made several corrections and changes in his application in May 2007, after his second DUI arrest. (Tr. 60.) He testified he thought his first arrest need not be disclosed because it would be expunged from his record. He admitted he did not think he would get the job if he disclosed his DUI arrests. (Tr. 51.) He testified a "career services lady" at his computer training school advised him not to list them. (Tr. 50-52.) His advice from the "career services lady" was general, not focused on any particular document, and occurred well before Applicant initiated the security clearance process. (Tr. 51, 61-62.)

## 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

### Guideline G, Alcohol Consumption

The SOR alleges two arrests and convictions for DUI. The concern under this guideline 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.”

Conditions that could raise a security concern and may be disqualifying include: “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.” AG ¶ 22(a). Applicant's two DUI convictions raise this disqualifying condition.

A potentially disqualifying condition also may be raised by “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(b). “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>. The evidence concerning Applicant's drinking habits and his DUI convictions raise AG ¶ 22(b).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 22(a) and (b), 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 under this guideline 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). This mitigating condition is not established, because Applicant's excessive alcohol consumption has been recent, frequent, and not attributable to unusual circumstances. It raises doubt about his current reliability, trustworthiness, and good judgment.

Security concerns 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 acknowledged his “issues of alcohol abuse,” and he testified he is undergoing court-ordered counseling. However, he continues to consume alcohol to the point of intoxication. I conclude AG ¶ 23(b) is not established.

Security concerns under this guideline also may be mitigated if “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.” AG ¶ 23(c). Applicant is in a court-ordered counseling program, but the only evidence of progress is his own testimony, in which he admitted recent drinking to the point of intoxication. I conclude this mitigating condition is not established.

Finally, security concerns under this guideline may be mitigated if “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.” AG ¶ 23(d). This mitigating condition is not established because Applicant has not completed his court-ordered counseling, has not demonstrated a pattern of modified consumption, does not participate in Alcoholics Anonymous or a similar organization, and has not received a favorable prognosis.

### **Guideline E, Personal Conduct**

The SOR alleges Applicant falsified his security clearance application by answering “no” to the question about pending criminal charges and not disclosing his two DUI arrests that were pending disposition. The concern under this guideline is set out in AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition in this case is “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.” AG ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). It is not necessary for the government to prove that Applicant understood the security significance of the omitted information; it is only necessary to prove he intentionally omitted it.

Applicant has offered several explanations for his omissions. He asserted that he misunderstood the questions and believed he was not required to disclose the October 2006 arrest because he expected it to be expunged from his record. This explanation is somewhat plausible for the October 2006 arrest but not for the April 2007 arrest. He also asserted he was focused on completing the form as soon as possible and did not realize his DUI arrests could affect his eligibility for a clearance. This explanation is inconsistent with his reliance on advice from the "career services lady" and his concern that he might not get the job because of his DUI arrests. Based on all the evidence, I conclude Applicant knew the second DUI arrest should have been disclosed, and he intentionally chose not to disclose it. Accordingly, I conclude the disqualifying condition in AG ¶ 16(a) is raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). Applicant had an opportunity to correct his application when it was returned to him in May 2007, after his second arrest. There is no evidence of any attempt on his part to correct the record until he was confronted with the facts by a security investigator in September 2007. I conclude AG ¶ 17(a) is not established.

Security concerns based on false or misleading answers also may be mitigated by showing that "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process," and that, "[u]pon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully." AG ¶ 17(b). This mitigating condition is not established, because the "career services lady" was not an "authorized" person and her advice was generic and not directed specifically toward the security clearance process.

Security concerns based on personal conduct may be mitigated if "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 17(c). Applicant's falsification of his application violated 18 U.S.C. § 1001. It was a felony, not a minor offense, and it was recent. It is his only offense involving candor, but it is part of a

pattern of irresponsible conduct demonstrated by his history of excessive alcohol consumption and DUI convictions. His falsification did not happen under unique circumstances, and it casts doubt on his current reliability, trustworthiness, and good judgment. I conclude AG ¶ 17(c) is not established.

Security concerns under this guideline may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(d). At the hearing, Applicant equivocated about his falsification, but he acknowledged his alcohol-related problems. His court-ordered counseling is focused on his DUI convictions, but it is also designed to motivate responsible behavior. He is working hard at his regular job and at the family farm. It is too soon to tell, however, whether his DUI convictions and the security implications of his behavior will motivate him to change his behavior. I conclude he has not carried his burden of establishing AG ¶ 17(d).

### **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 presented himself as intelligent and articulate at the hearing. He obviously enjoys his work. His behavior for the last four or five years, however, raises serious doubts about his reliability, trustworthiness, and good judgment. He has not demonstrated the level of maturity required for access to sensitive and classified information. More time is needed to determine if he will heed the recent “wake-up calls” in his life and change his behavior.



After weighing the disqualifying and mitigating conditions under Guidelines G and E, 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 and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him 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:

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances, 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.

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LeRoy F. Foreman  
Administrative Judge