



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 07-16210
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro Se*

July 16, 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 February 29, 2008. 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 J for criminal conduct, Guideline G for alcohol consumption, and Guideline H for drug involvement. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, 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.

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).

The Revised Guidelines were then 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's response to the SOR was received on April 7, 2008, and he requested a hearing. The case was assigned to me on May 19, 2008. The hearing took place as scheduled on June 25, 2008. The transcript (Tr.) was received on July 3, 2008.

Findings of Fact

Under Guideline J, the SOR alleges seven alcohol-related incidents of criminal conduct. Under Guideline G, the SOR alleges a pattern of alcohol consumption to the point of intoxication during the period 1995–2006, and it refers to the alcohol-related incidents under Guideline J. And under Guideline H, the SOR alleges Applicant engaged in drug abuse by using cocaine, crack cocaine, and marijuana, and by misusing a prescription drug. In his Answer, Applicant admitted the factual allegations in the SOR and he provided a detailed explanation about his efforts to rectify his situation. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 43-year-old employee of a federal contractor. He has worked for his current employer since September 2006. His educational background includes a bachelor's degree in computer science, and he currently works as a senior database administrator. His manager is very satisfied with Applicant's work performance and describes Applicant as a "highly competent, completely reliable, and absolutely trustworthy" employee (Exhibit A).

Applicant is seeking to obtain an industrial security clearance. To that end, he completed security-clearance applications in October and December 2006 (Exhibits 1 and 2). In each, he reported that he was a recovering alcoholic and disclosed multiple alcohol-related offenses. Also, he disclosed his use of cocaine, crack cocaine, marijuana, and his misuse of the prescription drug.

He married in 1987 and divorced in 1994. There is one child from the marriage, a son. Alcohol was not a problem during the marriage, but it appears his problems with alcohol started after the divorce. Both he and his ex-wife attribute his substance-abuse problems to falling in with the wrong crowd (Tr. 78, 121–122). At one point in 2006, his wife became concerned enough about his condition that she refused to allow him to see their son, although that is no longer the case.

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).

Applicant has a history of criminal conduct, which he does not dispute. The several incidents alleged in the SOR and admitted by Applicant are summarized as follows:

- August 1995—arrested and charged with driving under the influence (DUI) of alcohol; pleaded guilty.
- September 1998—arrested and charged with DUI, driving with a suspended driver's license, and carrying a pistol in a vehicle without a permit; guilty of DUI and the other charges against him were *nolle prossed*.
- May 2000—arrested and charged with third-degree assault and menacing; he had been drinking alcohol at the time. Charges dismissed.
- June 2004—arrested and charged with third-degree domestic violence; he had been drinking alcohol at the time. Charge dismissed.
- December 2004—arrested and charged with DUI; found guilty of lesser offense of open container.
- September 2005—arrested and charged with DUI; pleaded guilty.
- February 2006—arrested and charged with DUI and possession of a controlled substance (a prescription drug); guilty of DUI and the possession charge was dismissed.

The most recent incident is discussed below.

The February 2006 charges were adjudicated in approximately March 2007, and the court sentenced Applicant to serve confinement for one year (suspended) and probation for two years. His probation was scheduled to conclude in March 2009 (Tr. 111). According to his court-referral officer (probation officer), as of March 26, 2008, Applicant was in good standing and had completed 6 of 12 monitoring sessions, passed drug screens, and attends Alcohol Anonymous (AA) meetings four times per week (Exhibit H). In addition to the criminal case, on March 21, 2007, the state administratively revoked Applicant's driver's license for four years (Tr. 118–120).

Although his license is revoked, Applicant has been driving on a regular basis (Tr. 115–121, 125–127). Several days before the hearing in this case, on June 14, 2008, the police stopped Applicant because his vehicle matched the description of a stolen vehicle. As a result, the police discovered and cited Applicant for driving with a revoked driver's license. Applicant was not arrested, but was given a court date of July 11, 2008. He had not yet reported the incident to his probation officer, but he had plans to do so. He has continued to drive after the incident on June 14, although he is trying to minimize his driving.

Applicant has abstained from alcohol and drug abuse since May 16, 2006. He no longer associates with people who abuse alcohol or drugs, and he no longer goes to bars or nightclubs. He is an active participant in AA, he is quite familiar with the 12-step program and is working the program, and he attends several AA meetings per week. In addition to attending AA, he was also active in a church-based 12-step program led by a qualified counselor (Exhibit G). Also, he has been under the care of a medical doctor

and a licensed clinical social worker since October 2006 (Exhibit J). The main focus is treating Applicant's depression and other issues related to his recovery. He has made good progress and is clinically stable.

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.³ 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."⁴ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁵ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.⁶ 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.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹¹

³ *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.>").

⁴ *Egan*, 484 U.S. at 531.

⁵ Directive, ¶ 3.2.

⁶ Directive, ¶ 3.2.

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹²

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.¹³ 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.

Analysis

Under Guideline J for criminal conduct,¹⁴ 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."¹⁵

In general, a security concern is raised by Applicant's pattern of criminal conduct. In particular, DC 1,¹⁶ DC 3,¹⁷ and DC 4¹⁸ apply against Applicant as evidenced by his multiple arrests, charges, and convictions, as well as his status as a probationer until March 2009. In addition, his admitted practice of driving with a revoked driver's license is of concern because it shows a willful disregard of the law. Although the state court has not yet determined the outcome of the June 14 incident, it is a misdemeanor

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Executive Order 10865, § 7.

¹⁴ Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at 21.

¹⁶ DC 1 is "a single serious crime or multiple lesser offenses."

¹⁷ DC 3 is the "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

¹⁸ DC 4 is the "individual is currently on parole or probation."

criminal offense.¹⁹ This means that Applicant is facing the possibility of yet another conviction, a probation violation, or the state court could set aside or vacate the suspended sentence to confinement, or all three. To sum up, the totality of Applicant's criminal conduct calls into question his judgment as well as his ability or willingness to comply with laws, rules, and regulations.

The guideline also contains several conditions that could mitigate security concerns, but none apply in Applicant's favor. It is true that Applicant has abstained from alcohol and drug abuse since March 2006. But the 2006 DUI was not resolved until 2007, and Applicant is now a probationer until about March 2009. This means he is now serving a lawful sentence imposed by a state court. In addition, he was pending disposition of a misdemeanor offense for driving with a revoked license with a court date of July 11, 2008; this may also constitute a probation violation. These are key facts. They show that Applicant's criminal conduct is current and ongoing, and they militate against a successful case in reform and rehabilitation. In other words, it is too soon to tell if Applicant will serve probation without violation and then go on to be a law-abiding citizen. Accordingly, Guideline J is decided against Applicant.

The alcohol consumption and drug involvement guidelines will be discussed together because Applicant's drug abuse was intertwined with his alcohol use. Under Guideline G for alcohol consumption,²⁰ 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."²¹ Under Guideline H for drug involvement,²² the security concern is that "use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."²³ The definition of drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."²⁴

Applicant's pattern of alcohol-related incidents and his drug abuse raise security concerns. But unlike his criminal conduct—which is an ongoing concern—he has

¹⁹ See Ala. Code 1975 § 32-6-19 (driving a motor vehicle while a license is cancelled, denied, suspended, or revoked is a misdemeanor that carries with it a penalty of a fine of \$100 to \$500 and imprisonment for not more than 180 days.).

²⁰ Revised Guidelines at 15–16 (setting forth the security concern and the disqualifying and mitigating conditions).

²¹ Revised Guidelines at 15.

²² Revised Guidelines at 17–18 (setting forth the security concern and the disqualifying and mitigating conditions).

²³ Revised Guidelines at 17.

²⁴ Revised Guidelines at 17.

successfully resolved the concerns under Guidelines G and H. Importantly, he has acknowledged that he is a recovering alcoholic. He has abstained from alcohol and drugs since March 2006, a period of more than two years. He has sought out professional counseling and medical assistance. He attends AA regularly and is actively working the 12-step program. And he no longer associates with people who abuse alcohol and drugs. Taken together, his efforts constitute substantial evidence of reform and rehabilitation. On this basis, Guidelines G and H are decided for Applicant.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the criminal conduct security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept (to include his good employment record, his several favorable character witnesses, Exhibits A–Q, and his rehabilitation efforts) was given due consideration and that analysis does not support a favorable decision. This case is decided against 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 J:	Against Applicant
Subparagraphs 1.a–1.g:	Against Applicant
Paragraph 2, Guideline G:	For Applicant
Subparagraphs 2.a–2b:	For Applicant
Paragraph 3, Guideline H:	For Applicant
Subparagraphs 3.a–3c:	For Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge