



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-00047
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

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

September 30, 2008

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline G (Alcohol Consumption) and J (Criminal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on January 12, 2007. On May 23, 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 J. 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 June 2, 2008; answered it on June 9, 2008; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 10, 2008, and the case was assigned to me on July 29, 2008. DOHA issued a notice of hearing on July 29, 2008, scheduling the hearing for August 26, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through J, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 11, 2008.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the facts alleged in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 29-year-old chemical engineer for a defense contractor. He has worked for his current employer since October 2004. He has never held a security clearance.

Applicant first consumed alcohol at age 13, when he consumed three or four beers and became intoxicated. Two or three months later, he drank to the point of intoxication and became very ill. After that occasion, he abstained from drinking until age 18 (AX A at 4). He told a security investigator that he consumed 10-12 drinks every weekend while in college. He remembers blacking out eight to ten times (GX 6 at 5).

In September 2002, Applicant was charged with driving while intoxicated (DWI), a misdemeanor, after a breathalyzer test indicated a blood-alcohol level of .13%. He was convicted of driving while impaired, a lesser offense, and was fined. In January 2003, he enrolled in a three-day inpatient treatment program and was diagnosed as an alcoholic. The medical credentials of the person who diagnosed him are not reflected in the record (GX 6 at 1-2).

In September 2004, Applicant was charged with DWI, driving with a blood-alcohol level of .08%, and speeding. His blood-alcohol level was about .16%. He was fined and placed on supervised probation. He was released from probation after about 18 months (Tr. 57). Pursuant to a court order, he attended an addiction recovery center and participated in outpatient group counseling from October 2004 to March 2005. He was diagnosed as an alcoholic by a state credentialed alcoholism and substance abuse counselor (AX A at 5; AX C).

After completing treatment at the addiction recovery center, he abstained from consuming alcohol for about 18 months. He avoided contact with his former drinking friends and avoided locations associated with drinking. He did not join any support groups such as Alcoholics Anonymous (AA) (AX A at 5). He relapsed once in February

2006, consuming seven to nine drinks, and he lied to his probation officer about it (AX A at 8).

After about 18 months, Applicant decided he could manage his alcohol consumption. He wanted to associate with his old friends and enjoy their companionship. He “no longer had any outside influence such as probation or outpatient treatment” to remind him of the consequences of his alcohol use (AX A at 5; Tr. 60). He began drinking to the point of intoxication once or twice a week (Tr. 93).

In October 2006, Applicant was charged with felony DWI, driving with a blood-alcohol level of .08%, and speeding. His blood-alcohol level was about .16%. In November 2006, while these charges were pending, he voluntarily enrolled in an outpatient substance abuse treatment program, and he successfully completed it in May 2007. He was again diagnosed as an alcoholic by a credentialed alcoholism and substance abuse counselor. In accordance with his counselor’s recommendation, he began attending Alcoholics Anonymous (AA) meetings twice a week and obtained a sponsor.

In July 2007, Applicant entered pleas to the October 2006 charges, pleading guilty to misdemeanor DWI and speeding. A formal conviction was not entered. In August 2007, he was placed in a drug court program consisting of frequent court appearances, daily call-in requirements, group counseling, meetings with probation officers, random urinalysis, periodic interviews with a case worker, and participation in AA or a similar organization (AX D). His participation agreement with the drug court provided for sanctions for non-compliance, including community service and one year in jail (GX 3 at 4; AX A at 7). In September 2007, he told a security investigator that he believed he was once physically dependent on alcohol, but as of the date of the interview he believed he was no longer alcohol dependent (GX 6 at 5). On August 4, 2008, he successfully completed the drug court program, with no relapses or instances of non-compliance (AX I). He is no longer on probation (Tr. 89). His driver’s license was revoked, and it will not be reinstated until he completes a seven-week course of instruction administered by the department of motor vehicles (Tr. 90-91).

Applicant last drank to the point of intoxication in October 2006, when he was charged with felony DWI. He last consumed alcohol when he took a sip of champagne at Thanksgiving dinner with his grandparents in November 2006 (Tr. 80). As of the date of the hearing, he was attending two to four AA meetings a week, meeting with his AA sponsor or other friends in recovery at least once a week, and serving as treasurer and meeting host for his group (AX A at 13; Tr. 77, 81). His current girlfriend also is a recovering alcoholic (Tr. 81). Other than colleagues at work, most of his friends are also alcoholics in recovery (Tr. 98-99).

In March 2007, April 2008, and May 2008, Applicant received significant promotions and pay increases from his employer (AX H). He has starting exercising regularly. He actively participates as a volunteer in a Junior Achievement Program sponsored by his employer, teaching school children about business and economics

(Tr. 71, 100-01). In July 2008, Applicant was accepted into a master's degree program, with classes beginning in the fall of 2008 (AX J).

Applicant's supervisor for the past two years is aware of his alcohol-related problems. He testified Applicant is one of the finest people he has worked with. He has no concerns about Applicant's reliability, trustworthiness, or judgment, and he describes him an exemplary employee (Tr. 105-08).

Applicant's AA sponsor has known Applicant for about 18 months (Tr. 117). He testified Applicant is "well on his way" through the steps to recovery (Tr. 115). He believes Applicant has "made some pretty substantial strides," changed his behavior, and stepped away from situations that could jeopardize his continued sobriety (Tr. 114-117). He testified there has been a "definite transformation" in the way Applicant interacts at AA meetings. He believes Applicant's active participation in AA is a good indicator that Applicant will not go back to drinking again (Tr. 122).

### **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 that Applicant was charged with alcohol-related driving offenses in September 2002, September 2004, and October 2006; and that after the last offense he was sentenced to a drug court program (SOR ¶¶ 1.a-1.c). It also alleges Applicant completed one alcohol education program and two alcohol abuse treatment programs (SOR ¶¶ 1.d-1.f).

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 . . . , regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.” AG ¶ 22(a). Applicant’s three alcohol-related driving offenses are sufficient to raise this disqualifying condition.

A 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(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 history of heavy alcohol consumption raises this disqualifying condition.

A disqualifying condition also may be raised either by "diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence" or by "evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." AG ¶ 22(d) and (e). Applicant was diagnosed with alcoholism three times. "Alcoholism" is "chronic alcohol abuse, dependence, or addiction." *Stedman's Medical Dictionary* at 44 (26<sup>th</sup> ed. 1995). The term "alcoholism" does not appear in DSM IV. In previous versions of the DSM, it was synonymous with alcohol dependence. The credentials of the person making the first diagnosis are not reflected in the record. The second and third diagnoses were by a certified alcoholism and substance abuse counselor. The government produced no evidence of the qualifications for this designation, nor did it produce any evidence that such a person is qualified or authorized to make a medical diagnosis. I conclude AG ¶ 22(d) and (e) are not raised.

Although the enumerated disqualifying conditions in AG ¶¶ 22(d) and (e) are not raised, I have considered Applicant's admission at the hearing as well as his admission to a security investigator that he was alcohol dependent. These admissions are incorporated below in my whole person analysis.

Finally, a disqualifying condition may be raised by "relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program." AG ¶ 22(f). Applicant completed a three-day inpatient treatment program in January 2003 and a five-month outpatient program in March 2005, and he relapsed after completing each program. The first element of this disqualifying condition is not met, because the record does not reflect the qualifications of the persons who diagnosed Applicant as an alcoholic. I have considered Applicant's admissions of alcohol dependence and the evidence of his two relapses in my whole person analysis.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ (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 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 has four disjunctive prongs. The first prong of this mitigating condition focuses on the recentness of the conduct. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the

totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant’s last alcoholic drink was his sip of champagne in November 2006. His last drinking binge was in October 2006, 22 months before the hearing. On its face, this period of sobriety is “a significant period of time.” He appears to have finally realized he cannot drink in moderation, and to have recognized his need for changed behavior and a support structure. On the other hand, Applicant was constrained by the rigorous requirements of the drug court program until August 4, 2008, less than a month before the hearing. Under the drug court program, he faced a year in jail for non-compliance. He admitted at the hearing that his relapse after 18 months of sobriety in 2006 occurred because he no longer had external constraining influences such as probation or outpatient treatment. I am not satisfied that his abstinence under the strictures of the drug court program is sufficient to establish rehabilitation. More time is needed for him to demonstrate he can maintain sobriety without external constraints. Thus, I conclude the first prong of AG ¶ 23(a) is not established.

Applicant’s alcohol-related conduct was frequent, not the product of unusual circumstances, and raises doubts about his current reliability, trustworthiness, and judgment. Thus, I conclude none of four prongs of AG ¶ 23(a) are established.

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 has acknowledged his alcohol dependence and completed an alcohol treatment program, but he has not yet established a “pattern” of abstinence that is not dependent on external constraints. 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’s previous history of treatment and relapse precludes application of this mitigating condition.

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). Applicant successfully completed the drug court program, which

apparently had no aftercare requirements; but, as noted above, he has not demonstrated an established pattern of abstinence. Furthermore, there is no evidence of a favorable prognosis. I conclude AG ¶ 23(d) is not established.

### **Guideline J, Criminal Conduct**

The SOR cross-alleges under this guideline the same conduct alleged under Guideline G. The concern raised by criminal conduct is that it “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.” AG ¶ 30. Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant's three alcohol-related arrests alleged in SOR ¶¶ 1.a-1.c are sufficient to raise AG ¶¶ 31(a) and (c).

Security concerns under this guideline may be mitigated by evidence that “so 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.” AG ¶ 32(a). This mitigating condition is not established, for the reasons set out above in the discussion of AG ¶ 23(a) under Guideline G.

Security concerns based on criminal conduct also may be mitigated if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” AG ¶ 32(d). As noted above in the discussion of AG ¶¶ 23(a) and (b) under Guideline G, there is insufficient evidence of successful rehabilitation based on passage of time. On the other hand, Applicant has expressed remorse, he is furthering his education, he has performed well at work and received promotions, and he is actively involved in community activities. I conclude AG ¶ 32(d) is partially 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. I have incorporated my above comments concerning Guidelines G and J in my whole person analysis.

Applicant has made great strides toward turning his life around. He was candid, sincere, and credible at the hearing. As of the date of the hearing, he had done everything he could to overcome his past and mitigate his conduct. He admits he is an alcoholic and cannot drink in moderation. He is on the right path. The only unanswered question is whether he can maintain sobriety without external constraints on his behavior. The hearing was less than a month after he graduated from the drug court program, and more time is needed to determine whether he can maintain his sobriety without external constraints on his behavior. See Directive ¶ E3.1.37 through E3.1.40 (reconsideration authorized after one year).

After weighing the disqualifying and mitigating conditions under Guideline G and J, 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 criminal 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.f:	Against Applicant
Paragraph 2, Guideline J (Criminal 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.

LeRoy F. Foreman  
Administrative Judge