



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-01791  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Robert E. Coacher, Esq., Department Counsel

For Applicant: Ken Goldberg, Esq.

August 10, 2009

**Decision**

LEONARD, Michael H., Administrative Judge:

This is a security clearance case in which Applicant contests the Defense Department’s intent to revoke his eligibility for an industrial security clearance. The action is based on Applicant’s history of excessive alcohol consumption—to include a diagnosis of alcohol dependence as well as both inpatient and outpatient treatment—and two alcohol-related incidents of criminal conduct during the period 2006–2008. The record contains substantial evidence of reform and rehabilitation such as: (1) Applicant has abstained from alcohol for the last 13 months; (2) he successfully completed inpatient and outpatient programs in 2008, and he has a favorable prognosis; (3) he is actively participating in Alcoholics Anonymous (AA); and (4) his last alcohol-related incident, the April 2008 drunk-driving charge, was resolved in February 2009, when he pleaded guilty and accepted responsibility for his misconduct. Taken together, these circumstances mitigate the security concerns. Accordingly, as explained in further detail below, this case is decided for Applicant.

## Statement of the Case

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on February 5, 2009. The SOR is equivalent to a complaint and it details the factual basis for the action. The SOR alleged security concerns under Guideline G for alcohol consumption and Guideline J for criminal conduct, and it recommended submitting Applicant's case to an administrative judge for a determination to deny or revoke a security clearance.

Applicant replied to the SOR on March 9, 2009, and he requested a hearing. The case was reassigned to me on May 1, 2009. The hearing took place as scheduled on June 4, 2009. The testimony of several witnesses was taken, and Government Exhibits 1–6 and Applicant's Exhibits A–L were admitted. The transcript (Tr.) was received on June 12, 2009.

## Findings of Fact

In his Answer, Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, 1.c, and 2.a, and his admissions are incorporated herein. Based on the record as a whole, the following facts are established by substantial evidence.

Applicant is a 48-year-old employee of a federal contractor. He has been married since 1986. He and his wife have four children, ages 21, 19, 16, and 14. He has a bachelor's degree in electrical engineering, and he has worked for the same company or its predecessor in interest since 1982. He is currently working as a senior software engineer. He is seeking to retain a security clearance previously granted to him by the Defense Department.

He has a history of excessive alcohol consumption and alcohol-related criminal conduct, which he does not dispute. Indeed, he reported the 2006 alcohol-related treatment and the 2006 alcohol-related incident on his security-clearance application, which he completed in April 2007 (Exhibit 1).

During January–March 2006, Applicant obtained counseling for his use of alcohol (Exhibit 3–personal subject interview). He did so because he was worried that he was depending too much on alcohol and it was affecting his life. He enrolled and

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<sup>1</sup> This case is adjudicated under 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). In addition to the Executive Order and Directive, this case is adjudicated 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 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. The Directive is pending revision or amendment.

successfully completed an outpatient program where he attended group sessions for three hours per day for three days per week. According to Applicant's interview, he received a diagnosis of alcohol abuse. Applicant did not drink alcohol while participating in the program, and he passed random alcohol tests given during this period. He continued with his sobriety for several more months until December 2006.

He started drinking beer about one to two weeks before an incident with his wife. His habit was to drink a six-pack of beer at home after work. On or about December 18, 2006, Applicant and his wife argued. He had drunk a six-pack before the argument began. His wife threatened to call his mother during the argument. In turn, Applicant grabbed the cell phone from his wife and threw it against a wall. His wife was not hurt, but she called the police who promptly arrived and arrested Applicant. He spent the night in jail and his wife picked him up the next day when he was released. The matter was resolved in court in early 2007, when Applicant pleaded guilty to a charge of criminal damage of less than \$150, and he elected to attend sessions of domestic-violence counseling. He was also placed on unsupervised probation for six months.

This incident caused Applicant to abstain from alcohol. He also attended AA meetings three to four times during the work week and twice on weekends. He had been sober for about nine months when he was interviewed to discuss the criminal damage offense in September 2007 (Exhibit 3—personal subject interview).

He began drinking beer again on about April 5, 2008. He resumed drinking in response to stress and anxiety he was experiencing due to one of his child's health problems. Three days later on April 8, 2008, he drank a 24-ounce beer he bought on the way to work that morning. He was involved in a traffic accident (hitting traffic cones) while preparing to enter the gate to the company. Security officers suspected Applicant was intoxicated and contacted the police. His blood-alcohol content was measured at near the legal limit of 0.08. Subsequently, he was charged with driving under the influence (DUI) of alcohol.

The DUI charge was resolved in February 2009, when he pleaded guilty (Exhibits 2 and D). He was sentenced to, among other things, 12 months of unsupervised probation, ordered to pay fines and costs of about \$1,800, and served four days in jail. He will serve probation until February 2010. No action has yet been taken against his driver's license.

The DUI charge set off a series of events. The next day his company disciplined him for violating company rules and regulations and required him to enter into a last-chance agreement (Exhibit I). His company also reported the incident as adverse information to the Defense Security Service (Exhibit 5).

From April 21 to May 14, 2008, Applicant received inpatient treatment for his use of alcohol. The program was based in a residential treatment center for people with chemical dependency. He successfully completed the program (Exhibit E).

In early June 2008, Applicant began working with his company's employee-assistance program (EAP) as mandated by the company. As of December 18, 2008, he was in full compliance with all requirements of the EAP (Exhibit 2), and the record contains no evidence of subsequent noncompliance.

After completing the inpatient treatment, he then was enrolled in an intensive outpatient program (Exhibit G). The 90-day outpatient treatment program was through his company's EAP. He was diagnosed as alcohol dependent. The program included 30 group sessions, attending AA meetings, and working with a sponsor. He successfully completed the program in August 2008, and thereafter he has attended an aftercare meeting once a week (Exhibits F and G).

Applicant has received a favorable prognosis. A primary therapist (who is a licensed alcohol counselor) at the outpatient program opined in a letter dated June 2, 2009, that Applicant is making his recovery a priority, and she thinks he will remain sober if he continues to follow the recovery plan (Exhibit G). Applicant's physician, in a note dated June 3, 2009, reported that Applicant has been sober for 13 to 14 months, his blood work is normal, and his prognosis is excellent (Exhibit H).

Applicant is actively participating in AA (Tr. 73–74). He has a sponsor who has been sober for more than 20 years (Exhibit C). His sponsor has observed that Applicant is focused on sobriety in a serious way, and the sponsor believes that Applicant will remain sober.

Applicant appears to have fully immersed himself in AA's 12-step program and is actively working it. For example, he was able to recite from memory the 12 steps (Tr. 91–93). A friend and fellow AA member, with 28 years of sobriety via AA, described the changes and progress he has seen in Applicant as "extraordinary" (Tr. 33). He believes Applicant has made "phenomenal progress" (Tr. 34). He believes Applicant has been "very compliant" with AA's program.

Applicant is a highly successful employee (Exhibits A, B, J, K, and L). He was recently selected to participate in a corporate-level program that focuses on the architecture and design of large-scale systems within the company. This program requires Applicant to travel to another part of the country, and he makes sure he attends AA meetings when he does so. In addition, a senior engineer and a department manager appeared as witnesses, and both vouched for Applicant's knowledge, skills, and abilities, as well as for his trustworthiness and reliability. The senior engineer described Applicant as the "go to person" to get work done (Tr. 49). The department manager described Applicant as "probably my very best section head" and an "excellent staff member" (Tr. 61).

## Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, the only purpose of a security clearance decision is to decide if an applicant is suitable for access to classified information.

A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>2</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>3</sup>

It is well-established law that no one has a right to a security clearance.<sup>4</sup> As noted by the Supreme Court 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.”<sup>5</sup> 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.<sup>6</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>7</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>8</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>9</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>10</sup>

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<sup>2</sup> Directive, ¶ 3.2.

<sup>3</sup> Directive, ¶ 3.2.

<sup>4</sup> *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 (10<sup>th</sup> 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.”).

<sup>5</sup> 484 U.S. at 531.

<sup>6</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>7</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>8</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>9</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>10</sup> *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.<sup>11</sup>

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 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.<sup>12</sup> 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**

The alcohol consumption and criminal conduct concerns will be discussed together because the record shows the concerns are factually related or connected to each other. Under Guideline G, the concern is that "[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."<sup>13</sup> And under Guideline J, the concern is "[c]riminal 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."<sup>14</sup>

Under the alcohol consumption and criminal conduct guidelines,<sup>15</sup> the following disqualifying conditions are raised by the record:

- 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;

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<sup>11</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>12</sup> Executive Order 10865, § 7.

<sup>13</sup> Revised Guidelines at p. 15.

<sup>14</sup> Revised Guidelines at p. 21.

<sup>15</sup> Revised Guidelines at pp. 15–16 and 21–22 (setting forth the security concerns and all the disqualifying and mitigating conditions).

- 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;
- diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
- evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;
- relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program;
- a single serious crime or multiple lesser offenses;
- allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- individual is currently on parole or probation.

The guidelines also provide that certain facts and circumstances may mitigate the concerns. The following mitigating conditions are raised by the record:

- 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);
- 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; and
- 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.

The record contains substantial evidence of Appellant's history of excessive alcohol consumption and alcohol-related criminal conduct. The evidence includes the following: (1) his alcohol-related incident in 2006, when an argument with his wife resulted in a guilty plea to a charge of criminal damage and a sentence that included six months of unsupervised probation; (2) outpatient treatment in 2006, when he received a

diagnosis of alcohol abuse; (3) his alcohol-related incident in 2008, when he was arrested for DUI, for which he is now serving probation until February 2010; and (4) inpatient and outpatient treatment in 2008, during which he received a diagnosis of alcohol dependence. Clearly, Applicant's history of excessive alcohol consumption caught up with him during 2006–2008, and the results were predictable. Moreover, Applicant's drinking-and-driving is viewed with extreme disfavor because it is a high-risk activity that endangers the public, which shows a serious lack of good judgment. Simply put, a man of his age and experience should know better.

The record contains substantial evidence of successful reform and rehabilitation, to include Applicant's abstinence from alcohol since April 2008, a period of about 13 months when the record closed. He successfully completed both inpatient and outpatient treatment, and he is continuing to attend aftercare meetings once a week. He attends AA, has a sponsor, and is actively working AA's 12-step program.

Applicant has a good employment record. This is shown by his selection to participate in a corporate-level program as well as by the endorsements and support he received from several company employees (Exhibits A, B, J, K, and L). These are professional people who work in the defense industry and are likely to be careful when making such endorsements.

The criminal conduct is now resolved for the most part as well. It took nearly a year for Applicant's DUI case to come to conclusion in the state court system, but Applicant accepted responsibility for his misconduct by pleading guilty. Although he is on unsupervised probation until February 2010, the concern here is lessened because there are clear indications that Applicant has his alcohol problem (the basis for the criminal conduct) under control.

I also considered this case in light of the whole-person concept, which requires an administrative judge to evaluate a person's eligibility by considering the totality of the person's conduct and all the surrounding circumstances. An administrative judge should consider the nine adjudicative process factors listed in the Revised Guidelines as follows: (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.<sup>16</sup>

Life is difficult, and the record contains substantial evidence that Applicant brought serious difficulties upon himself by his use of alcohol. Things have improved dramatically for Applicant. He has made substantial progress in addressing his alcohol problems, he knows he suffers from alcoholism, he has provided substantial evidence of

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<sup>16</sup> Revised Guidelines at pp. 1–2.



his actions taken to address this problem, and he has established a pattern of abstinence for 13 months. At the hearing, Applicant impressed me as a serious individual who is focused on maintaining his sobriety and fulfilling his family and work responsibilities. On balance, I am persuaded that Applicant's history of alcohol problems and alcohol-related criminal conduct is a thing of the past and will not be of concern in the future.

In addition to the whole-person concept, there are additional factors to consider. Because Applicant is currently eligible for access to classified information, it is proper to consider if he (1) was truthful and complete in responding to questions, (2) sought assistance and followed professional guidance, (3) resolved or appears likely to favorably resolve the security concern, and (4) has demonstrated positive changes in behavior and employment.<sup>17</sup> All four factors weigh in Applicant's favor.

I found Applicant truthful and credible during the hearing, and I have seen nothing in the evidentiary documents to undermine his credibility. He sought professional assistance after the 2008 DUI, he successfully completed inpatient and outpatient programs in 2008, he is continuing in aftercare, and he is participating in AA. In other words, he is doing everything he can do to address his alcohol problems. He also has gained a new insight or understanding into his use of alcohol, something that did not take place in 2006. This development is important because it serves to counterbalance or neutralize the argument that Applicant is likely to have a relapse as he did in the past. The relapse argument is also counterbalanced by Applicant's last-chance agreement with his company and his participation in the company's EAP. Likewise, since he now has his alcohol problem under control, it is likely that he will favorably resolve his unsupervised probation without violation. All these circumstances, taken together, amount to positive changes in behavior and weigh in Applicant's favor. These circumstances also support my conclusion, noted above, that Applicant's history of alcohol problems and alcohol-related criminal conduct is a thing of the past and will not be of concern in the future.

Although I am deciding this case for Applicant, he should not conclude that the review of his eligibility for access to classified information is over. Like any clearance holder, Applicant is subject to a periodic reinvestigation as required by his level of access. Moreover, his company is required to report new adverse information as it has in the past. And Applicant would be well advised to understand that future incidents of a similar nature will in all likelihood result in revocation of his security clearance.<sup>18</sup>

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns under Guidelines G and J. Applicant met his ultimate

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<sup>17</sup> Revised Guidelines at p. 3.

<sup>18</sup> This paragraph is not intended to suggest a conditional decision. Instead, it is intended to inform Applicant that he will be subject to periodic review, and the Defense Department may take action against him based on new information.

burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

### **Formal Findings**

The formal findings on the SOR allegations, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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

### **Conclusion**

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

Michael H. Leonard  
Administrative Judge