



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-06931
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: John R. Teakell, Esq.

August 24, 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 two alcohol-related incidents away from work. The first was a citation for drinking in public in 1999. The second was an arrest for driving under the influence of alcohol (DUI) in April 2008. The record contains substantial evidence of reform and rehabilitation such as: (1) Applicant has abstained from alcohol for the last 15 months; (2) he has not received a diagnosis of alcohol abuse, alcohol dependence, or alcoholism, and he has not been required to obtain counseling or treatment; and (3) his most recent alcohol-related incident, the April 2008 DUI, was resolved in February 2009, when he entered a year-long pretrial diversion program and prosecution was deferred. 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,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on November 26, 2008. 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. The SOR also recommended submitting the case to an administrative judge for a determination to deny or revoke Applicant's security clearance.

Applicant answered the SOR on December 16, 2008, and he requested a hearing. The case was assigned to me on May 4, 2009. The case was delayed at the request of Applicant's counsel to accommodate his litigation schedule. The hearing took place as scheduled on July 17, 2009. The testimony of three witnesses, including Applicant, was taken, and Government Exhibits 1 through 4 and Applicant's Exhibits A-1 through A-8 were admitted. The record was kept open until July 31, 2009, to allow Applicant to submit additional documentary evidence. Those matters were timely received per e-mail, and they are marked and admitted without objections as follows: (1) Exhibit B-traffic ticket and complaint for the 1999 alcohol-related incident; and (2) Exhibit C-conditions of release and order for the 1999 alcohol-related incident. The hearing transcript (Tr.) was received July 27, 2009.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, and 2.a, and his admissions are incorporated herein. Applicant testified on his own behalf and I found his testimony credible. 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 a 12-year-old son. Applicant has a bachelor's degree in electrical engineering and an MBA in engineering management. His job title or position is engineering manager for the electrical engineering department of the company. He has worked for his current employer since 2001, although he previously worked for the company from 1986 to 1999. He held a security clearance during that period as well. He is seeking to upgrade an existing security clearance to a higher level.

Applicant has a history of alcohol-related incidents away from work, which he does not dispute. Indeed, he reported the 1999 citation for drinking in public and the

¹ 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, because the SOR was issued after September 1, 2006, the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005, then modified by the Defense Department, and made effective September 1, 2006, apply to this case. They supersede or replace the guidelines published in Enclosure 2 to the Directive.

2008 DUI arrest on his security-clearance application, which he completed and certified as true in 2008.²

The 1999 alcohol-related incident occurred when Applicant was on a business trip. At the time, he was not working for a federal contractor and did not hold a security clearance. Applicant and a business colleague were at a hotel playing pool and having a few drinks. Unexpectedly, another colleague called and needed a ride from the airport. Applicant went along as a passenger and took his drink with him. The end result was the local police cited Applicant at the airport for the misdemeanor offense of “consuming spiritous liquor in pubic,” otherwise known as drinking in public.³ Applicant was released and allowed to return to the hotel. He returned to his state of residence upon completing the business trip. Thereafter, he pleaded guilty to the offense and paid a small fine through the mail.

The 2008 alcohol-related incident also occurred when Applicant was on a business trip. He had drunk about four and one-half glasses of wine at the hotel after work.⁴ Later in the evening, Applicant left the hotel and drove to a local restaurant where he had something to eat and had two beers.⁵ The police stopped Applicant on the way back to the hotel based on a traffic violation (driving left of the center line). The police gave Applicant field-sobriety tests and then arrested him for DUI. At the station, Applicant took a Breathalyzer test with results of .119, which was in excess of what is permissible under state law.⁶ He was released on a bond, completed the business trip, and returned to his state of residence. He reported the DUI arrest to company officials when he returned to work.⁷

Applicant sought to have the DUI case resolved through a pretrial diversion program. In January 2009, he returned to the state of the DUI arrest and underwent an alcohol evaluation.⁸ Applicant does not know the results of the evaluation, but the results were reported to the pretrial diversion program.⁹ Thereafter, on February 13, 2009, Applicant entered into a seven-page agreement wherein the local district attorney agreed to defer prosecution for 12 months (until February 2010), and Applicant agreed

² Exhibit 1.

³ Exhibits B and C.

⁴ Tr. 55.

⁵ Tr. 56–57.

⁶ Tr. 57; Exhibit A–1.

⁷ Exhibit 4; Tr. 36–37.

⁸ Exhibit A–2.

⁹ Tr. 35, 59–60.

to abide by certain conditions and requirements of the program.¹⁰ If he successfully completes the program, no prosecution will be instituted and the case will be dismissed with prejudice.¹¹ If he violates the agreement, the district attorney may revoke or modify the agreement, change the period of supervision, or ask the court to reinstate the case on the docket for further prosecution.¹²

As part of the agreement, Applicant stipulated that the allegations in the complaint or information were true and factually correct, and he admitted that he was guilty of the following charges: (1) the traffic offense of driving on the left half of the road; (2) unlawfully driving and operating a motor vehicle with an alcohol concentration in his breath of .119, which exceeds the amount allowed under state law; and (3) unlawfully driving and operating a motor vehicle under the influence of alcohol.¹³ But under the terms of the agreement, Applicant is not now convicted of any offense.

Applicant has abstained from alcohol as required by the program. Indeed, he has abstained since his arrest in April 2008.¹⁴ In the past, Applicant never drank at home and only drank alcohol when he was on business trips three to four times per year.¹⁵ He intends not to drink alcohol in the future.¹⁶ To date, he completed the program's requirements except for monthly reporting, which is an ongoing requirement.¹⁷ In July 2009, officials advised Applicant that he may apply for early dismissal, but he has not taken action on it.¹⁸

Applicant has not received a diagnosis or evaluation of alcohol abuse, alcohol dependence, or alcoholism.¹⁹ Likewise, Applicant was not required to attend alcohol counseling, treatment, or a rehabilitation program, and he was not required to participate in Alcoholics Anonymous (AA) or a similar organization.²⁰

¹⁰ Exhibit A-1 at pp. 2-4 (setting forth 13 conditions of pretrial diversion).

¹¹ Exhibit A-1 at p. 2.

¹² Exhibit A-1 at p. 1.

¹³ Exhibit A-1 at p. 6.

¹⁴ Tr. 54, 61.

¹⁵ Tr. 54.

¹⁶ Tr. 50, 54, 61.

¹⁷ Exhibits A-3 and A-4; Tr. 33-34.

¹⁸ Tr. 34.

¹⁹ See Tr. 59-60.

²⁰ Tr. 60.

Applicant is a highly successful employee.²¹ For example, he received an achievement award for exceptional performance in June 2009. Likewise, he received an overall performance rating of exceeds expectations for his 2008 annual performance review, which noted his strengths as (1) work ethic, (2) knowledge, and (3) quality of work. A senior engineering manager and a program manager appeared as character witnesses for Applicant. They praised Applicant's reliability, competence, and value to the program. Of particular note was the senior engineering manager's description of the meeting with Applicant to discuss the 2008 DUI offense, and the manager described Applicant as remorseful and disappointed in himself.²²

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 clearance decision is to decide if an applicant is suitable for access to classified information.

It is well-established law that no one has a right to a security clearance.²³ 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."²⁴ 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁵ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁶

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁷ The government has the burden of presenting

²¹ See Exhibits A-5, A-6, A-7, and A-8; Tr. 63-84 (testimony of two character witnesses).

²² Tr. 73-74.

²³ *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.").

²⁴ 484 U.S. at 531.

²⁵ Directive, ¶ 3.2.

²⁶ Directive, ¶ 3.2.

²⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.²⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.³¹ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.³²

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.³³ 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 general 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."³⁴ Under Guideline J, the general concern is "[c]riminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it

²⁸ Directive, Enclosure 3, ¶ E3.1.14.

²⁹ Directive, Enclosure 3, ¶ E3.1.15.

³⁰ Directive, Enclosure 3, ¶ E3.1.15.

³¹ *Egan*, 484 U.S. at 531.

³² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

³³ Executive Order 10865, § 7.

³⁴ Revised Guidelines at p. 15.

calls into question a person's ability or willingness to comply with laws, rules, and regulations."³⁵

Under the alcohol consumption and criminal conduct guidelines,³⁶ 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;

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); 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 Applicant's excessive alcohol consumption and two alcohol-related incidents that resulted in law-enforcement action. Taken together, the 1999 citation for drinking in public and the 2008 DUI demonstrate that Applicant would, from time to time, drink to excess during business trips away from home. It caught up with him on these two occasions. Currently, he is about 5 months into a 12-month pretrial diversion program for the 2008 DUI. Although this is not parole or probation, which typically follow a conviction and sentence, it is similar in character because it is lawful supervision imposed pursuant to a prosecution in state court. Moreover, Applicant's drinking-and-driving is viewed with extreme disfavor because it is

³⁵ Revised Guidelines at p. 21.

³⁶ Revised Guidelines at pp. 15–16 and 21–22 (setting forth the security concerns and all the disqualifying and mitigating conditions).

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 start, Applicant is addressing his alcohol-related issues in a mature and serious way. This is established by his abstinence from alcohol since April 2008, a period of about 15 months when the record closed. He has not received a diagnosis or evaluation of alcohol abuse, alcohol dependence, or alcoholism. Likewise, he was not required to attend alcohol counseling, treatment, or a rehabilitation program, and he was not required to participate in Alcoholics Anonymous (AA) or a similar organization. Taken together, these circumstances strongly suggest that Applicant does not have an alcohol problem that requires further attention.

The criminal conduct is now resolved for the most part as well. In February 2009, Applicant accepted responsibility for his misconduct by agreeing to enter the pretrial diversion program and admitting that he was guilty as charged. Although he will be in the program until February 2010, the concern here is lessened because there are clear indications that Applicant has addressed his issues with alcohol (the basis for the criminal conduct) and they are resolved and under control. Given these circumstances, it is likely that Applicant will successfully complete the pretrial diversion program resulting in dismissing the charges with prejudice. This means disposing of the charges and barring any future action on the charges.

Applicant also has a good employment record. This is shown by his record of performance as well as by the endorsements and support he received from company employees. These are professional people who work in the defense industry and are likely to be careful when making such endorsements.

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 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.³⁷

Applicant is a mature, experienced, and successful professional. By itself, the 1999 citation for drinking in public is of little, if any, security significance. Combined with the 2008 DUI, however, the two incidents raise concerns about Applicant's judgment. Currently, he has made substantial progress in addressing these issues, as shown by a

³⁷ Revised Guidelines at pp. 1–2.

pattern of abstinence for 15 months. At the hearing, Applicant impressed me as a serious individual who has a firm grasp on his situation and who is focused on fulfilling his family and work responsibilities.³⁸ On balance, I am persuaded that (1) there is little to no potential for pressure, coercion, exploitation, or duress, and (2) there is little to no likelihood of continuation or recurrence of similar problems.

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) voluntarily reported the information, (2) was truthful and complete in responding to questions, (3) sought assistance and followed professional guidance, (4) resolved or appears likely to favorably resolve the security concern, and (5) has demonstrated positive changes in behavior and employment.³⁹ Factors (1), (2), (4), and (5) weigh in Applicant's favor; factor (3) is inapplicable given the facts here. These four factors further support a conclusion that Applicant's alcohol-related issues are in the past and will not be of concern in the future.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns under Guidelines G and J. Applicant met his ultimate 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.b:	For Applicant
Paragraph 2, Guideline J:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record as a whole, 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

³⁸See Tr. 50.

³⁹ Revised Guidelines at p. 3.