



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



In the matter of: )  
)  
) ISCR Case No. 08-10852  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Robert D. Coacher, Esq., Department Counsel  
For Applicant: *Pro se*

September 30, 2009

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant has failed to mitigate security concerns pertaining to alcohol consumption and criminal conduct. Clearance is denied.

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on June 8, 2008. On April 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). 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 April 21, 2009. He answered the SOR in writing on May 5, 2009, which was received at DOHA on May 11, 2009. Applicant elected to have his case decided at a hearing. Department Counsel was

prepared to proceed on July 14, 2009. On July 16, 2009, the case was assigned to me. On July 28, 2009, DOHA issued a notice of hearing scheduling the case for August 26, 2009. The hearing was convened as scheduled.

The government offered Government Exhibits (GE) 1 through 5, which were received without objection. Applicant offered Applicant Exhibits (AE) A and B, which were received without objection, and he testified on his behalf. I held the record open until September 4, 2009 to afford the Applicant the opportunity to submit additional material. Applicant did not submit any additional material. DOHA received the hearing transcript (Tr.) on September 1, 2009.

### **Procedural Matters**

Department Counsel stated that SOR ¶¶ 1.c. and 1.d. were duplicate allegations and as such, he would not be going forward with evidence with regard to SOR ¶ 1.d. Tr. 8-9. Department Counsel moved to substitute the correct city where Applicant's June 2007 Driving Under the Influence (DUI) arrest occurred as alleged in SOR ¶ 1.e. Without objection from the Applicant, I granted Department Counsel's motion. Tr. 28-31.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a. – 1.c., and 1.f. He denied SOR ¶¶ 1.d. and 1.e. After Department Counsel moved to amend SOR ¶ 1.e. to reflect the correct city, Applicant changed his response from denial to admission to SOR ¶ 1.e. After a thorough review of the record, I make the following findings of fact.

### **Background Information**

Applicant is a 33-year-old financial analyst, who has been employed by a defense contractor since May 2008. GE 1, Tr. 13-14. He is a first-time applicant for a security clearance. Tr. 17-18.

Applicant was awarded a Bachelor of Science Degree in Business Economics in December 2002. He recently completed his first class towards a Master's in Business Administration. Tr. 13-16, GE 1.

Applicant married in September 2005, and has a two-year-old son. Applicant moved out of state to begin his current job and planned for his wife and son to join him. In mid-2008, Applicant's wife informed him that she would not be joining him, and they have been separated since that time. Tr. 16-17, 46-47, GE 1.

### **Alcohol Consumption**

The facts are not in dispute. Applicant has a history of episodic alcohol abuse. He has a history of consuming alcohol to excess and to the point of intoxication

beginning in high school around 1992, and continuing to at least December 2008. Additionally, Applicant has a history of four alcohol-related arrests.

His first arrest was in March 2001, and he was charged with DUI. He pled guilty to the lesser charge of Reckless Driving and was fined. His second arrest was in June 2002, and he was charged with DUI/Drugs/Toxic Vapors/or Combination, DUI with a BAC of .08 or more, and Speed Greater Than Reasonable and Prudent. He pled guilty to DUI/Drugs/Toxic Vapors/or Combination, and the remaining charges were dismissed. He was sentenced to 24 hours in jail and ordered to attend 16 hours of alcohol awareness training.

His third arrest was in June 2007, and he was charged with DUI with a BAC of .17. He was found guilty and sentenced to four days in jail, mandatory alcohol awareness training, and fined. His fourth arrest was in September 2008 and he was charged with DUI. The charge is still pending with a court date in December 2009. (SOR ¶¶ 1.a. – 1.f.) Tr. 11-12, 23-36, GE 2 – GE 5.

Applicant attended an intensive outpatient alcohol treatment on a voluntary basis from October 2008 to November 2008. He relapsed and resumed drinking “around New Years of 2009.” Tr. 36-38, GE 2. Applicant was fully aware that he had a drinking problem and enrolled in an inpatient alcohol treatment program from July 17, 2009 to August 14, 2009. He stopped drinking on July 16, 2009, the day before he entered the program. Applicant’s aftercare program consists of attending seven AA meetings per week for three months. He was also prescribed Celexa for depression. As of the hearing date, Applicant had been sober a total of 12 days. Tr. 39-45, 49-53, AE A.

During an Office of Personnel Management (OPM) interview on August 5, 2008, Applicant stated that he did not intend to drink again as his responsibilities had changed. At his hearing, Applicant added regarding his commitment to stop drinking, “I can say one day at a time, I can’t tell you what to think. I can’t say anything to that effect, but I know that I’m going to do this. I don’t have any other options.” Tr. 45, GE 2.

### **Criminal Conduct**

The four alcohol-related arrests *supra* have been cross-alleged under this concern. (SOR ¶ 2.a.) The discussion under Alcohol Consumption *supra* is incorporated by reference under this section.

### **Character Evidence**

Applicant has been working in the defense industry since 2003. Tr. 48. He shares a house with a co-worker, who holds a top secret clearance, who does not drink. Applicant spends his discretionary free time going to the gym. Tr. 54-55. His counselor from his inpatient treatment program submitted a favorable reference letter. He described Applicant as being “engaged fully in both group and individual therapy thoroughly addressing issues of guilt, remorse, personal responsibility et al.” The

counselor added that Applicant completed treatment and was discharged WSA (With Staff Approval). AE B.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 an applicant 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 overarching adjudicative goal is a fair, impartial, and commonsense 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. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. 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 (4<sup>th</sup> 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). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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**

Under Guideline G (alcohol consumption), the government's 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. AG ¶ 21.

The government established its case under Guideline G through Applicant's admissions and the evidence presented. In addition to a history of consuming alcohol to excess from 1992 to 2009, Applicant had four separate DUI arrests in 2001, 2002, 2007, and 2008.

A review of the evidence supports application of two alcohol consumption disqualifying conditions. AG ¶ 22(a): "alcohol-related incidents away from work, such as driving while under the influence," applies because of his four alcohol-related arrests. AG ¶ 22(c): "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," applies because of his 17-year history of alcohol consumption to excess.

Considering the totality of the circumstances in this case, the evidence does not warrant application of any of the four alcohol consumption mitigating conditions. A brief discussion of three potentially applicable mitigating conditions follows. AG ¶ 23(a) states "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." Applicant's alcohol consumption problems have been ongoing from 1992 to 2009, a period of 17 years.

AG ¶ 23(b) states "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)." As of his hearing date, Applicant had been sober 12 days since being discharged from an inpatient treatment program.

AG ¶ 23(d) stated “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” Again, Applicant was only able to establish a 12-day period of alcohol abstinence as of his hearing date.

It is clear that Applicant wants to overcome his alcohol consumption problems. He deserves credit for recognizing that he has a problem and seeking the necessary help. Time will tell whether the recent inpatient program Applicant attended will result in his achieving long-term sobriety. At his hearing, Applicant acknowledged the problems the misuse of alcohol has caused him, demonstrated remorse, and a steadfast commitment to continue lifestyle changes consistent with abstinence from alcohol.

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

Under Guideline J (criminal conduct), the government’s 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.

The government established its case under Guideline J through Applicant’s admissions and the evidence presented. Applicant had four separate DUI arrests in 2001, 2002, 2007, and 2008.

A review of the evidence supports application of two criminal conduct disqualifying conditions AG ¶ 31(a): “a single serious crime or multiple lesser offenses;” and AG ¶ 32(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” for reasons discussed *supra*.

After reviewing the five criminal conduct mitigating conditions, I find none of them are applicable, again for reasons discussed *supra*.

### **Whole Person Concept**

Under the whole person concept, the 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. The 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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant has been struggling with his alcohol consumption problems his entire adult life. It has taken a severe toll on him, both personally and professionally. No one knows this more than Applicant. While he is to be commended for seeking alcohol treatment on his own volition, 12 days of sobriety does not establish a sufficient track record. I do believe Applicant demonstrated a sincere desire to overcome his alcohol consumption problems. However, Applicant must demonstrate that he has gained the upper hand on remaining alcohol-free over a period of time.

To conclude, Applicant has not presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>1</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is not eligible for access to classified information.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a. – c.:	Against Applicant
Subparagraph 1.d.:	For Applicant
Subparagraphs 1.e. – 1.f.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

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<sup>1</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

## **Conclusion**

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

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ROBERT J. TUIDER  
Administrative Judge