



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 09-05086
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: John Ward Bane, Esq.

December 8, 2010

**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and E (Personal Conduct). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application on November 11, 2007, and he received a security clearance on a date not reflected in the record. On July 27, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to revoke his clearance, citing security concerns under Guidelines G and E. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on July 30, 2010; answered it on August 9, 2010; and requested a hearing before an administrative judge. DOHA received the request on August 12, 2010. Department Counsel was ready to proceed on August 30, 2010, and the case was assigned to me on September 1, 2010. DOHA issued a notice of hearing on September 2, 2010, scheduling it for September 21, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 14 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on October 1, 2010.

### **Findings of Fact**

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

Applicant is a 25-year-old electronics technician employed by a defense contractor. He graduated from college with honors in May 2006. While he was a full-time student, he also worked as a network support specialist for a city school system from June 2002 to August 2005. He has worked for his current employer since November 2007 and has held a security clearance for most of his current employment. (AX A; AX B; Tr. 33.)

Applicant began drinking alcohol in 2002, while a senior in high school. He drank two or three beers on one or two occasions. At a high school graduation party, he became heavily intoxicated and blacked out. During his first year of college, beginning in August 2002, he drank two or three beers about once a week. During his second year of college, beginning in August 2003, his drinking increased to six beers or a combination of beer and hard liquor about three times a week. (GX 2 at 6.)

On August 30, 2003, Applicant was arrested for underage possession of alcohol and being drunk in public, and he spent the night in the "drunk tank." He testified he had consumed at least five or six beers. (Tr. 36-37.) Adjudication was deferred, and he was ordered to perform 50 hours of community service and complete a weekend alcohol education program. The charges were dismissed after one year. (GX 2 at 3; GX 13; GX 14.)

During his third year of college, beginning in August 2004, he stopped drinking, because his girlfriend did not drink, they were both in an honors program, and they spent their spare time studying. After they broke up, Applicant began drinking again. (Tr. 43.)

During his senior year of college, Applicant was a freshman mentor, involved in counseling freshmen and helping them become involved in college activities. (Tr. 45.) At the same time, he increased his drinking to five or six beers three or four times a week. (GX 2 at 6.)

In March 2005, Applicant and three friends were stopped by police when one of them had an open container of alcohol in their car. Everyone in the car was given a breathalyzer test, and Applicant was charged with underage possession of alcohol because he was over the legal limit of .01%. He had a case of beer under his feet when they were stopped by the police. (Tr. 41.) He was sentenced to 90 days in jail, with 88 days suspended, fined \$100, and required to perform 50 hours of community service and complete a ten-week counseling program. His driver's license was suspended for 90 days. (GX 2 at 4; GX 10; Tr. 41.)

In September 2005, while still underage, Applicant tried to enter a bar with a fictitious driver's license, but the bouncer confiscated it. He was not charged at that time, but he was warned to refrain from further misconduct. However, in October 2005, he was charged with petit larceny after a construction worker's hard hat and some stolen street signs were found in his apartment. At that time, he was charged with his earlier possession of the fictitious driver's license. The petit larceny charge was reduced to trespassing, and he pleaded guilty to the reduced charge and the possession of a fictitious driver's license. He was sentenced to 90 days in jail, with 86 days suspended, fined \$100, and ordered to perform 50 hours of community service. (GX 2 at 5; GX 8; GX 9; Tr. 47.)

After graduating from college, Applicant worked as an information technology specialist for a private-sector company from May 2006 to August 2007, and for his current employer beginning in November 2007. He had no further incidents of misconduct for almost three years.

On March 14, 2009, Applicant and some friends celebrated St. Patrick's Day at a bar. Applicant consumed about six beers. He testified that he had arranged for a friend to drive him home, but he left the bar and tried to drive home alone because of a "stressor event" in a bar, when he encountered an ex-girlfriend. (Tr. 50, 66-67.) While driving home in the rain, he hit a pothole, slid off the road, and got stuck in the mud. While waiting for a tow truck, he was approached by a police officer. After Applicant explained what had happened, the police asked him to take a breathalyzer test. When Applicant refused, he was arrested for driving under the influence (DUI), reckless driving, and refusal to take a breathalyzer test. He spent the night in jail. He pleaded guilty to first offense DUI. The reckless driving and breathalyzer refusal were disposed of by *nolle prosequi*. He was sentenced to 30 days in jail (suspended), fined \$250, and ordered to attend Alcohol Safety Action Program (ASAP) classes. His driver's license was restricted for one year, until May 12, 2010. (GX 3 at 3-4; GX 5; GX 6.)

In accordance with his employer's policy, Applicant reported his arrest and charges to his facility security officer. (Tr. 33-34.) His supervisor, a retired Navy chief petty officer, counseled him about the incident and warned him that he was in danger of ruining his life. (Tr. 55-56.)

Applicant completed the ten-week ASAP requirement, received six months of intensive out-patient care, and attended Alcoholics Anonymous meetings. (Tr. 27-28.)

He has successfully completed all the requirements imposed by the court (AX G.) The record contains no medical evidence of alcohol addiction. His mother states that he “has changed his ways and his friends,” and he now understands the consequences of his behavior. (AX H.)

Applicant testified that his attitude toward alcohol has changed. He consumes beer infrequently at social events like football games and limits himself to one or two beers. (Tr. 52.) He stays away from bars, and he no longer drinks and drives. (Tr. 56, 68.)

Applicant’s performance appraisal for the period ending in September 2008 rated him as a 3.5 on a five-point scale, between a rating of “meets all” performance expectations and “exceeds most” expectations. (AX C.) His performance appraisal for the period ending in December 2009 rated him as a 4.1, slightly above a “exceeds most” rating. (AX D.) A coworker describes him as an outstanding employee who goes “above and beyond” on a daily basis. (AX F.) His supervisor, the same retired U.S. Navy chief petty officer mentioned above, describes him as a “solid and reliable employee” who has stumbled and recovered from his mistake. (AX E; Tr. 22.)

### **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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “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 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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 has consumed alcohol, at times to excess and to the point of intoxication from approximately 2002 to “at least” May 2010 (¶ 1.a). It also alleges the three alcohol related incidents in March 2009 (¶ 1.b), March 2005 (¶ 1.c), and August 2003 (¶ 1.d).

The concern under this guideline is set out in AG ¶ 21: “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.” The evidence establishes two disqualifying conditions under this guideline: AG ¶ 22(a) (“alcohol-related incidents away from work, such as driving while under the influence . . . disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent”); and 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”). Thus, the burden shifted to Applicant 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). The first prong of this mitigating condition (“so much time has passed”) focuses on whether the criminal conduct was recent. 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. 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant’s arrest for DUI, reckless driving, and breathalyzer refusal was his first and only alcohol-related incident after he graduated from college in May 2006. It occurred more than 18 months before his hearing. Since his arrest, he has completed the court-ordered ten weeks of counseling, received six months of intensive out-patient care, received a strong warning from his supervisor, and regained the trust and support of that supervisor. He has changed friends, stays away from bars, and has significantly reduced his alcohol consumption. There is no evidence that he is alcohol dependent or requires further treatment. I conclude that AG ¶ 23(a) is 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). For the reasons set out above in the discussion of AG ¶ 23(a), I conclude that this mitigating condition also is established. No other enumerated mitigating conditions are relevant.

### **Guideline E, Personal Conduct**

The SOR alleges Applicant’s arrest for petit larceny and conviction of trespassing in October 2005 (¶ 2.a) and his arrest and conviction of possessing a fictitious driver’s license in September 2005 (¶ 2.b). It also cross-alleges the conduct alleged in ¶¶ 1.a-1.d under this guideline.

The concern under this guideline is set out in AG ¶ 15: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” The evidence establishes the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness,

unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Security concerns raised by personal conduct may be mitigated if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 17(c). For the reasons set out above in the discussion of AG ¶ 23(a), I conclude that Applicant's conduct has been mitigated by the passage of time and evidence that he has outgrown his college immaturity and has become a responsible citizen and a dependable employee.

Security concerns under this guideline also may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(d). Applicant completed his court-ordered counseling and completed six months of intensive out-patient treatment. He was counseled by his supervisor, who apparently made an impression on him. He has found new friends, matured, and changed his lifestyle. I conclude that this mitigating condition is established.

Finally, security concerns may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). This mitigating condition is established by Applicant's demonstrated change of behavior and attitude.

### **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 relevant 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline G and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is well educated, intelligent, and articulate. I am satisfied that he has left his irresponsible lifestyle behind him. He thinks and acts like an adult rather than an immature college student. He promptly notified his supervisor of his arrest and conviction in March 2009. His arrest, conviction, and sentence, reinforced by strong warnings from his supervisor, apparently gained his attention. He was sincere, candid, and credible at the hearing. After weighing the disqualifying and mitigating conditions under Guidelines G and E, and evaluating all the evidence in the context of the whole-person, I conclude Applicant has mitigated the security concerns based on alcohol consumption and personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.c:	FOR APPLICANT

### **Conclusion**

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge