



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



In the matter of:)
)
-----) ISCR Case No. 09-07084
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

April 7, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows he has a history of heavy drinking and alcohol-related incidents beginning in 1999, with his most recent incident taking place in 2008. And he used cocaine on about three occasions in 2006, while he was on active duty with the U.S. Navy; he also tested positive for cocaine the same year. As a result of his drug-related misconduct, he was separated from the Navy with a less than honorable discharge. He no longer drives after consuming alcohol, and he has not used illegal drugs or associated with those that do since testing positive for cocaine. Although it appears he has modified his behavior, given the nature, extent, and seriousness of these matters, it is too soon to tell if these matters are a thing of the past or a harbinger of things to come. He did not present sufficient evidence of reform and rehabilitation to mitigate the security concerns. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on September 13, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline G for alcohol consumption. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. Department Counsel then amended the SOR as follows: (1) adding a second paragraph under Guideline H for drug involvement; and (2) adding a third paragraph under Guideline E for personal conduct. Applicant timely answered the amendments as well.

The case was assigned to me October 7, 2010. The hearing took place pursuant to written notice on November 15, 2010. The transcript (Tr.) was received November 23, 2010.

Findings of Fact

Applicant admitted all the SOR allegations, and his admissions are incorporated herein as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 30-year-old employee of a federal contractor. He married for the first time in 2000 and divorced in 2004. He has a minor son with his ex-wife. He remarried in 2010. He and his wife have no children. His wife is employed outside the home in a medical-related field. He has worked as an electronics technician since March 2009. His duties include working aboard ships at a naval shipyard. He was recently promoted to the next level from his entry-level position. Both his departmental manager and supervisor vouch for his reliability, trustworthiness, and work ethic.²

Applicant's employment history includes military service in the U.S. Navy. He served on active duty as an electrician's mate during 2000–2006, until discharged for drug-related misconduct as discussed below.

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines contained in Enclosure 2 to the Directive.

² Exhibits A and B.

Applicant has a history of heavy drinking dating back to about 1999. He has had several alcohol-related incidents beginning in 1999, with his most recent incident taking place in 2008. And he used cocaine on about three occasions in 2006, while he was on active duty with the U.S. Navy. His history of heavy drinking includes drinking to the point of blacking out. He estimated blacking out about ten times during and shortly after the period he was in the Navy.³ During this period, he would consume eight to ten drinks (beer or shots of liquor) in a short period two to three times weekly.⁴ He now drinks far less, but he has not abstained from alcohol. He has never received alcohol counseling or treatment; he has never received a diagnosis of alcohol abuse or alcohol dependence; and he has never attended Alcoholics Anonymous or a similar organization.

His first alcohol-related incident was in 1999, when he was arrested and charged with driving under the influence of alcohol (DUI). He was involved in a single car accident, and he now admits he was driving under the influence of alcohol. The court records show the charge was dismissed,⁵ but he reports he paid a fine and was required to attend a DUI camp or education program.⁶

His second alcohol-related incident was in 2000, when he was arrested and charged with DUI. He now admits he was driving under the influence of alcohol. The court records show the charge was dismissed,⁷ and he reports the dismissal was granted based on his pending enlistment into the Navy and completion of boot camp.⁸

His third alcohol-related incident was in 2005 (after his divorce), when he was arrested and charged with DUI. He refused to submit to a blood-alcohol test of any kind. He now admits he was driving under the influence of alcohol. Court records show that he pleaded guilty to a lesser offense, and the court imposed a fine of \$500 and 30 days in jail (suspended).⁹

Applicant used cocaine on about three occasions in 2006, while dating a particular woman who used cocaine as well.¹⁰ He then tested positive for cocaine during a routine drug test administered by the Navy. As a result, he was awarded nonjudicial

³ Tr. 42.

⁴ Tr. 42–43.

⁵ Exhibits 8 and 9.

⁶ Tr. 58.

⁷ Exhibits 11, 12, and 13.

⁸ Tr. 56.

⁹ Exhibit 14.

¹⁰ Tr. 35–39.

punishment under the applicable military law, and he was administratively discharged from the Navy due to his drug-related misconduct. His discharge was characterized as under other than honorable conditions (UOTH), which is the most severe type of administrative discharge, and it carries a certain stigma.

His fourth alcohol-related incident was in 2007, when he was charged with public intoxication. He reports he was in a beach town and became intoxicated to the point of nearly blacking out.¹¹ The police arrested him when they saw him get in his car and attempt to drive. Court records show that he prepaid a small fine for this misdemeanor offense.¹²

His fifth alcohol-related incident was in 2008, when he was charged with multiple offenses, including driving while intoxicated, stemming from a single car accident. He reports that he does not remember leaving a bar, but recalls waking up in a hospital where he was being treated for minor injuries.¹³ He now admits he was driving under the influence of alcohol. Court records show that he pleaded guilty to the misdemeanor offense of reckless driving and the other charges against him were *nolle prossed*.¹⁴ He paid a \$250 fine plus court costs, but otherwise received no punishment. His last alcohol-related incident was a wake-up call for Applicant, and he reports that he no longer drinks and drives.¹⁵ If he and his wife go out for dinner or socializing with friends, he uses a designated driver or taxi. He reports that his wife is supportive of his moderate use of alcohol and she is opposed to drinking and driving.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.¹⁶ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent

¹¹ Tr. 50.

¹² Exhibit 7.

¹³ Tr. 44.

¹⁴ Exhibits 3–6.

¹⁵ Tr. 47–48.

¹⁶ *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) (no right to a security clearance).

standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁷ 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.¹⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁴ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁵

The AG set forth the relevant standards to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

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

¹⁷ 484 U.S. at 531.

¹⁸ Directive, ¶ 3.2.

¹⁹ Directive, ¶ 3.2.

²⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²¹ Directive, Enclosure 3, ¶ E3.1.14.

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ *Egan*, 484 U.S. at 531.

²⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

person a security clearance is not a determination of an applicant's loyalty.²⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

1. The Alcohol Consumption Security Concern

Under Guideline G for alcohol consumption,²⁷ the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive alcohol consumption. The overall concern under Guideline G is:

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.²⁸

The evidence here supports a conclusion that Applicant has a history of heavy drinking and alcohol-related incidents. The following disqualifying conditions are most pertinent:

¶ 22(a) 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; and

¶ 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.

The evidence of Applicant's five alcohol-related incidents, all of which resulted in law-enforcement intervention, raise security concerns because it indicates questionable judgment, unreliability, and untrustworthiness.

There are four mitigating conditions under Guideline G.²⁹ Of those four, there is only one that might apply to Applicant's case, and it provides as follows:

¶ 23(a) 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

²⁶ Executive Order 10865, § 7.

²⁷ AG ¶¶ 21, 22, and 23 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁸ AG ¶ 21.

²⁹ AG ¶ 23.

does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

Applicant does not receive full credit under this mitigating condition. His behavior was not infrequent because he committed multiple alcohol-related offenses over a period of years. His pattern of conduct cannot be considered stale or remote in time because his last incident took place about three years ago in January 2008. None of the circumstances were particularly unusual, as they were the result of simply drinking excessively. He continues to drink alcohol, although he reports doing so moderately and he does not operate a vehicle thereafter. Although it appears that he has modified his behavior, his five alcohol-related incidents continue to cast doubt on his security suitability.

2. The Drug Involvement Security Concern

Under Guideline H for drug involvement,³⁰ the overall concern is:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises concerns about a person's ability or willingness to comply with laws, rules, and regulations.³¹

The evidence here supports a conclusion that Applicant has a history of illegal drug involvement. The following disqualifying conditions are most pertinent:

¶ 25(a) any drug abuse; and

¶ 25(b) testing positive for illegal drug use.

The evidence of Applicant's use of cocaine, his positive drug test, and the resulting UOTH discharge from the Navy due to drug-related misconduct raise security concerns because it indicates questionable judgment, unreliability, and untrustworthiness.

There are four mitigating conditions under Guideline H.³² Of those four, I have specifically considered the following two as most pertinent:

¶ 26(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

³⁰ AG ¶¶ 24, 25, and 26 (setting forth the security concern and the disqualifying and mitigating conditions).

³¹ AG ¶ 24.

³² AG ¶ 26.

¶ 26(b) a demonstrated intent not to abuse any drugs in the future, such as:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used;
- (3) an appropriate period of abstinence; or
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant has an abbreviated history of drug abuse in 2006, when he used cocaine with a then girlfriend. His drug abuse, after his divorce, occurred when he was a sailor on active duty in the Navy, and he knew or should have known that using cocaine violated Navy policy and military law. Since his UOTH discharge from the Navy, he has not used any illegal drugs and he does not associate with those that do. He has no intention to use cocaine or any other illegal drug in the future. Given these circumstances, he deserves credit in mitigation.

3. *The Personal Conduct Security Concern*

In addition to Guidelines G and H, the SOR alleges concerns under Guideline E for personal conduct.³³ It cites, in ¶ 3.a, Applicant's UOTH discharge from the Navy, and, in ¶ 3.b, it cross-alleges all the matters alleged under Guidelines G and H. As to Applicant's UOTH discharge based on his drug-related misconduct, this is a circumstance or consequence stemming from his drug abuse and positive drug test for cocaine. Accordingly, it merely duplicates the matters under Guideline H. As to the cross-allegations, these matters do not raise independent security concerns about Applicant's reliability, trustworthiness, or good judgment, and these matters were fully addressed under Guidelines G and H. For these reasons, Guideline E is decided for Applicant.

To conclude, the evidence as a whole justifies current doubts about Applicant's judgment, reliability, and trustworthiness. The evidence as a whole shows Applicant engaged in a pattern of heavy drinking over a period of years that resulted in multiple alcohol-related incidents. Given his reckless pattern of drinking and driving, it has been mere chance that he has not seriously injured or killed someone. The incidents resulted in arrests, charges, or convictions. He also engaged in drug abuse by using cocaine while serving in the Navy, and he received a less than honorable discharge as a result. Taken together, this series of events raise serious questions about his reliability, trustworthiness, or good judgment. Although it appears he has modified his behavior, given the nature, extent, and seriousness of these matters, it is too soon to tell if these matters are a thing of the past or a harbinger of things to come. Time will tell if Applicant is willing and able of being a responsible user of alcohol and a law-abiding citizen. He did not present sufficient evidence of reform and rehabilitation to mitigate the security

³³ AG ¶¶ 15, 16, and 17 (setting forth the security concern and the disqualifying and mitigating conditions).

concerns under Guidelines G and H. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept³⁴ and Applicant's favorable evidence. Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline G:	Against Applicant
Subparagraphs 1.a–1.f:	Against Applicant
Paragraph 2, Guideline H:	Against Applicant
Subparagraphs 2.a–2.b:	Against Applicant
Paragraph 3, Guideline E:	For Applicant
Subparagraphs 3.a–3.b:	For Applicant

Conclusion

In light of the record as a whole, 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.

Michael H. Leonard
Administrative Judge

³⁴ AG ¶ 2(a)(1)–(9).