



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



In the matter of: )  
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----- ) ISCR Case No. 11-00455  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

08/30/2012

**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 Applicant has a history of alcohol-related incidents away from work consisting of three convictions for drunk driving during the period 2003–2009. The June 2009 conviction resulted in a sentence that included 12 months in jail, with 10 months suspended for three years. He did not present sufficient evidence of reform and rehabilitation to mitigate the serious concerns stemming from his alcohol-related incidents. For the reasons discussed below, this case is decided against Applicant.

## Statement of the Case

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on May 18, 2012, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guideline known as Guideline G for alcohol consumption.

Applicant timely answered the SOR. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.<sup>2</sup>

On July 13, 2012, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>3</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who then timely replied. His reply consists of a two-page memorandum and three enclosures or attachments. These matters are collectively admitted without objections as Exhibit A. The case was assigned to me August 24, 2012.

## Findings of Fact

In general, the SOR alleged five matters under Guideline G as follows: (1) a conviction for driving under the influence of alcohol (DUI) in 2003; (2) a conviction for DUI in 2005; (3) attendance at a treatment program following a diagnosis of alcohol abuse/dependence in 2005; (4) resignation from active duty military service and receipt of a general discharge under honorable conditions in 2005; and (5) a conviction for DUI in 2009. In his answer to the SOR, he admitted the allegations with explanations. His admissions and explanations are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 42-year-old employee of a federal contractor. His educational background includes a bachelor's degree from a highly regarded technology university, a master's degree from the Naval Postgraduate School, and he is in the process of completing an MBA degree. He has never married and has no children.

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<sup>1</sup> 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 here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>2</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>3</sup> The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which may be identified as exhibits in this decision.

Applicant has worked as a manager for his current employer since February 2010. His employment history includes military service in the U.S. Navy from 1988 to 2005, when he was discharged due to a pattern of misconduct.<sup>4</sup> The pattern of misconduct consisted of the 2003 and 2005 DUI offenses, both of which were prosecuted in state courts. He resigned his commission as an officer in lieu of a board of inquiry. He worked as a manager with a federal contractor from September 2005 to August 2009. He was unemployed from August 2009 to February 2010, although he enrolled in the MBA program in August 2009.

For his current employment, Applicant completed a security clearance application in September 2010.<sup>5</sup> In doing so, he was required to answer multiple questions about his background and personal history, including questions about his police record. He fully disclosed his three DUI offenses, which he does not dispute. Given its recency, the 2009 DUI offense will be discussed in detail below.

While working for a federal contractor in October 2005, a government agency granted Applicant eligibility for access to sensitive compartmented information (SCI).<sup>6</sup> In July 2007 he signed a code of conduct acknowledging that any future alcohol-related incidents would raise serious concerns about his continued access.<sup>7</sup> He was arrested and charged with his third DUI offense less than two years later in March 2009. He was driving under the influence of alcohol because he had consumed about two bottles of wine during a four-hour period.<sup>8</sup> His blood alcohol content was determined to be .17.<sup>9</sup> He self-reported the DUI to his employer by submitting a written incident report.<sup>10</sup>

Applicant was initially charged with a felony offense (third DUI offense within ten years).<sup>11</sup> But in June 2009, the state court determined that his second DUI offense, which happened in another state, did not meet the requirements for a DUI conviction in the court's jurisdiction. He then pleaded guilty to a misdemeanor offense of DUI. The court's sentence included 12 months in jail (with 10 months suspended for three years), a fine of \$1,500 (with \$1,000 suspended), 100 hours of community service, suspension of his driver's license, and attendance at an alcohol safety action program (ASAP) for

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<sup>4</sup> Exhibits 8, 9, and 10.

<sup>5</sup> Exhibit 4.

<sup>6</sup> Exhibits 4 and 5.

<sup>7</sup> Exhibit 5.

<sup>8</sup> Exhibit 6.

<sup>9</sup> Exhibit 5.

<sup>10</sup> Exhibit 5.

<sup>11</sup> Exhibit 5.

ten weeks. He took a leave of absence from his job to serve his jail sentence. And the government agency revoked his SCI access in August 2009.

Applicant was interviewed in October 2010 as part of his background investigation.<sup>12</sup> In discussing his history of alcohol consumption, he stated that he had no intention to ever drink or to drink and drive again.

In his reply to the FORM,<sup>13</sup> Applicant stated that he has maintained sobriety for more than three years and attended meetings of Alcoholics Anonymous (AA) regularly. He stated that he now understands he cannot engage in moderate use of alcohol and that he must abstain. He stated that abstinence has been a positive influence on him as shown by the success he has achieved in the MBA program. In addition to his statements, he presented documentary proof that he (1) completed the court-ordered ASAP in December 2009, and (2) completed an alcohol counseling program during June 2009–June 2010, consisting of an assessment, two individual sessions, and 32 group sessions.

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>14</sup> As noted by the Supreme Court in *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>15</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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>16</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>17</sup>

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<sup>12</sup> Exhibit 6.

<sup>13</sup> Exhibit A.

<sup>14</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) (no right to a security clearance).

<sup>15</sup> 484 U.S. at 531.

<sup>16</sup> Directive, ¶ 3.2.

<sup>17</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>18</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>19</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>20</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>21</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>22</sup> The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>23</sup>

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 and material information, 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 person a security clearance is not a determination of an applicant's loyalty.<sup>24</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

## Discussion

Under Guideline G,<sup>25</sup> the security concern is that excessive consumption of alcohol often leads to the exercise of questionable judgment or failure to control impulses. It can also raise questions about a person's reliability and trustworthiness.

Here, the evidence is more than sufficient to establish security concerns based on Applicant's history of excessive consumption of alcohol. That behavior resulted in

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<sup>18</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>19</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>20</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>22</sup> *Egan*, 484 U.S. at 531.

<sup>23</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>24</sup> Executive Order 10865, § 7.

<sup>25</sup> AG ¶¶ 21–23 (setting forth the security concern and the disqualifying and mitigating conditions).

three alcohol-related incidents away from work.<sup>26</sup> His three DUI offenses during a period of less than ten years shows a lack of good judgment and raises serious concerns about his reliability and trustworthiness.

With that said, not all the matters in the SOR raise security concerns. First, Applicant presented reliable documentary evidence to rebut the allegation in SOR ¶ 1.c that he was diagnosed with alcohol abuse or dependence in 2005 while in the Navy.<sup>27</sup> Second, as alleged in SOR ¶ 1.d, the fact that he was discharged from the Navy a result or consequence of the alcohol-related incidents is not separate or additional behavior. Although this is relevant evidence of Applicant's history of alcohol consumption, it does not raise independent security concerns under Guideline G's disqualifying conditions.

There are four mitigating conditions to consider under Guideline G. Based on the record before me, the following mitigating conditions are most pertinent:

AG ¶ 23(b) 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

AG ¶ 23(d) 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.

After considering the disqualifying and mitigating conditions, the central issue is whether Applicant presented sufficient evidence to mitigate and overcome the security concerns raised by his three DUI offenses. I conclude that he has not. What is noteworthy here is the number of times Applicant was given an opportunity to correct his course and he failed to do so. The 2003 DUI conviction had little impact on him as he soon had another DUI in 2005. Although the alcohol-related incidents ended his military career, he was given another chance when he was hired by a federal contractor in 2005 and then granted SCI access by a government agency. In 2007 he was put on notice by signing the code of conduct regarding alcohol consumption. He had his third DUI conviction within two years of signing the code of conduct. This series of events displays grossly poor judgment and a lack of insight into the seriousness of his DUI offenses. In saying all this, I recognize that Applicant now appears to understand that he

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<sup>26</sup> AG ¶ 22(a).

<sup>27</sup> Attachment to Answer to SOR (memorandum dated April 25, 2005).

must abstain from alcohol, and I accept his claims of sobriety for the past few years. He deserves credit in mitigation for his efforts. Still, in light of all the facts and circumstances, I am not satisfied that he presented sufficient evidence of reform and rehabilitation to demonstrate that he has earned another chance. Given that he is a repeat offender, and given that his most recent DUI conviction was just a few years ago, a substantial, long-term track record of sobriety and law-abiding conduct is necessary to mitigate the concerns. Although his evidence has persuasive value, it is not substantial.

Following *Egan* and the clearly-consistent standard, I have doubts or concerns about Applicant's fitness or suitability for a security clearance to work in the defense industry. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>28</sup> In this regard, I have especially considered the nature, extent, and seriousness of his three DUI offenses in less than ten years, and I view his conduct as quite serious. Having done so, I conclude that Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline G:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against 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

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<sup>28</sup> AG ¶ 2(a)(1)-(9).