



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-05170

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel

For Applicant: *Pro se*

05/10/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. He is a problem drinker who has demonstrated an inability or unwillingness to comply with law, rules, or regulations. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on March 9, 2015. This document is commonly known as a security clearance application. Thereafter, on February 6, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, 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 eligibility for access to classified

information.¹ The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline G for alcohol consumption and Guideline J for criminal conduct.

Applicant answered the SOR on March 1, 2016. His response consisted of a two-page memorandum in which he addressed each SOR allegation. He also requested a decision based on the written record in lieu of a hearing.

On April 25, 2016, Department Counsel submitted all relevant and material information that could be adduced at a hearing. The file of relevant material (FORM) consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision. The FORM was mailed to Applicant, who received it May 2, 2016. He did not reply within 30 days from receipt of the information as required under the Directive. The case was assigned to me on May 3, 2017.

Procedural Matters

Department Counsel's FORM includes Exhibits 7 and 8, which are reports of investigation (ROI) summarizing Applicant's interviews that took place during the January 2012 and October 2011 background investigations, respectively. The ROI are not authenticated by a witness, which is required under ¶ E3.1.20 of the Directive.² In addition, the Directive provides no exception to the authentication requirement. Indeed, the authentication requirement is the exception to the general rule that prohibits consideration of an ROI.

Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, the record does not demonstrate that Applicant, who has not replied to the FORM, understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. In addition, because the ROI are based on interviews that took place more than five years ago, it calls into question whether Applicant would have sufficient recollection to authenticate the ROI. Accordingly, given the lack of authentication, Exhibits 7 and 8 are inadmissible and I have not considered them.

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (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).

² See generally ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process in security clearance cases. Judge Ra'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

Findings of Fact

Applicant is a 33-year-old employee who requires a security clearance for his employment as a federal contractor. He has worked as a help-desk technician since 2015. His employment history includes honorable military service on active duty with the U.S. Air Force during 2005-2013. The Defense Department previously granted him a security clearance in 2006. He married in 2008 and divorced in 2009. He has one child, born in 2008.

Applicant has a history of alcohol-related incidents. He admits that he was charged with driving under the influence of alcohol (DUI) and careless driving in 2009. The charged was dropped without an adjudication of guilt. He admits that he was charged and convicted of the offense of transporting or carrying alcohol as a passenger in 2010. He was cited for the offense and paid a \$75 fine. He denies that he was charged with a DUI offense in 2012. But he fully disclosed this DUI offense in his 2015 security clearance application.³ He reported that he was pulled over and subsequently charged with DUI in October 2012, and that the charge was dropped after he paid a fine. He admits he was charged with a DUI offense in 2013; he was also charged with driving on a suspended or revoked license.⁴ In his answer to the SOR, he admits drinking alcohol during three of the four alcohol-related incidents. In addition to the alcohol-related incidents, Applicant was charged with driving on a suspended or revoked license in 2011 and 2014.⁵

The most recent incident occurred in 2015, when a state court issued an arrest warrant due to his failure to appear and that warrant is outstanding.⁶ He explained in his answer to the SOR that the warrant stems from his failure to obtain a court-ordered alcohol evaluation in connection with the 2013 DUI charge. He further stated that he would take care of the outstanding warrant as soon as possible. He has not provided any documentation showing that the warrant was resolved. He also stated that he no longer drinks alcohol, but he has not provided any documentation in support of his claim.

Law and Policies

It is well-established law that no one has a right to a security clearance.⁷ As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent

³ Exhibit 3 at 32.

⁴ Exhibit 5.

⁵ Exhibit 6.

⁶ Exhibit 5.

⁷ *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.”⁸ 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.⁹ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁰

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹¹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹² An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹³ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁴

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁵ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁶

Discussion

The SOR allegations under Guideline G for alcohol consumption and Guideline J for criminal conduct are discussed together because they are largely factually interrelated. The record evidence raises obvious doubts about Applicant’s fitness for access to classified information, because he is a problem drinker who has a demonstrated inability or unwillingness to comply with law, rules, or regulations.¹⁷ Despite holding a security clearance since 2006, Applicant has been charged with DUI three times during 2009-2013, and he has failed to comply with state laws by driving on

⁸ 484 U.S. at 531.

⁹ Directive, ¶ 3.2.

¹⁰ Directive, ¶ 3.2.

¹¹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹² Directive, Enclosure 3, ¶ E3.1.14.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ Directive, Enclosure 3, ¶ E3.1.15.

¹⁵ *Egan*, 484 U.S. at 531.

¹⁶ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁷ AG ¶¶ 21 and 22, AG ¶¶ 30 and 31.

a suspended or revoked license. A state court issued an arrest warrant for him in 2015. The arrest warrant is outstanding, which shows that his criminal conduct is unresolved and ongoing. In addition, although he claims he no longer consumes alcohol, he has not provided reliable evidence to establish the length of his claimed abstinence from alcohol and how he is maintaining his sobriety.

Based on the written record before me, I am unable to credit Applicant in explanation, extenuation, or mitigation.¹⁸ He has had ample time and opportunity to address the 2015 arrest warrant and have documentation showing that he has done so. Likewise, he has had ample time and opportunity to present a case in reform and rehabilitation. Given the paucity of mitigating evidence, his history of alcohol-related incidents and criminal conduct is simply too much and too recent to justify a favorable clearance decision.

Applicant's problematic history of alcohol-related incidents and criminal conduct creates doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. 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 considered the whole-person concept. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline G:	Against Applicant
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a-2.e:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge

¹⁸ AG ¶ 23 and AG ¶ 32.