



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



In the matter of:

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ISCR Case No. 15-05850

Applicant for Security Clearance

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel

For Applicant: *Pro se*

01/26/2017

**Decision**

RIVERA, Juan J., Administrative Judge:

In 2010 and 2014, Applicant was convicted of operating a vehicle while intoxicated (OWI). He attended alcohol-related classes, and he currently drinks alcohol responsibly. There is no diagnosis of alcohol abuse or dependence. He committed to not driving after consuming alcohol and intends to maintain complete sobriety. Alcohol consumption security concerns are mitigated. Access to classified information is granted.

**History of the Case**

Applicant submitted his most recent security clearance application (SCA) on February 25, 2015. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on February 8, 2016, issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline G (alcohol consumption).<sup>1</sup> Applicant answered the SOR on February 25, 2016, and requested a decision based on the written record.

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<sup>1</sup> DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

The Government prepared a file of relevant material (FORM) on April 11, 2016. Applicant received the FORM on April 18, 2016. He was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant timely responded to the FORM on May 18, 2016, and he submitted a one-page statement and a statement from his substance abuse counselor. The case was assigned to me on January 17, 2017.

### **Findings of Fact**

In Applicant's response, he admitted both allegations in SOR ¶¶ 1.a and 1.b. He also submitted explanations and provided comments in mitigation and extenuation. Applicant's admissions are accepted as findings of fact.

Applicant is a 30-year-old employee of a defense contractor. He has never married, and he does not have any children. He graduated from high school in 2005, and received a bachelor's degree in 2009. Applicant started working for a federal contractor shortly after his college graduation in 2009, and he was hired by his current employer, a federal contractor, in June 2011.

Applicant disclosed in his 2015 SCA that his 2011 application for a security clearance was denied. He needed the clearance to qualify for his U.S. Coast Guard merchant marine credentials. Applicant believed his clearance was denied because he failed to disclose in his 2011 SCA that he was convicted of operating a vehicle while intoxicated (OWI) in 2010. Applicant explained that he did not disclose the 2010 OWI conviction because the record had been expunged and he believed that the conviction no longer existed and there was no need for him to disclose it.

Applicant disclosed in his 2015 SCA that he was convicted of operating a vehicle while intoxicated in both 2010 and 2014. Applicant admitted he did not make any changes in his alcohol consumption habits after his first OWI in 2010. He suffered little financial, work related, legal, or personal repercussions and he went back to his old habits. His second arrest for OWI opened his eyes because of the adverse legal and financial consequences: his driver's license was suspended, his car was damaged, his clearance was denied and he lost work opportunities, and he had to pay legal fees.

Applicant started consuming alcoholic beverages at age 16 with friends over the weekends. He drank to intoxication every time he consumed alcoholic beverages up until July 2014. Applicant claimed that after his 2014 OWI arrest he reduced his alcohol consumption, and now he drinks alcohol once or twice a week. He also reduced the magnitude of his alcohol consumption. He avoids situations where he might be tempted to drive after consuming alcohol. He has not driven after consuming alcohol after his 2014 OWI. He is not alcohol dependent. Applicant claimed he now consumes alcohol responsibly and does not drink to intoxication. He is remorseful for his DUIs.

In his answer to the SOR, Applicant stated that after receipt of the SOR, he went back to his substance abuse counselor for a reevaluation. The counselor deemed Applicant was at a low risk of becoming alcohol dependent. Notwithstanding, Applicant

decided there was no sense in taking any risks with consuming alcohol and decided to follow the path of complete sobriety.

## **Policies**

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Alcohol Consumption**

AG ¶ 21 articulates the Government’s concern about alcohol consumption, “[e]xcessive 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.”

Two alcohol consumption disqualifying conditions under AG ¶ 22 could raise a security concern and may be disqualifying in this case:

(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

(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.

Applicant admitted and the evidence establishes that in 2010 and 2014, he was convicted for OWI. His alcohol consumption established that he engaged in binge-alcohol consumption to the extent of impaired judgment.<sup>2</sup> AG ¶¶ 22(a) and 22(c) are established by the evidence.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) are potentially applicable:

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

(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);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(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

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<sup>2</sup>Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), <http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf>.

professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 23(a) applies. Applicant was convicted twice for OWI in both 2010 and 2014. After his 2014 OWI conviction, Applicant consumed alcoholic beverages more responsibly. Following his receipt of the SOR, Applicant contacted his substance abuse counselor for a reevaluation. The counselor stated Applicant has been consuming alcohol responsibly since 2014. He also indicated Applicant's intent to maintain complete sobriety. The counselor stated Applicant "does not fall into a category of problematic or alcohol dependent use of alcohol." (Response to the FORM, Counselor's May 18, 2016 letter).

Applicant is committed to not driving after consuming alcohol, and an OWI is unlikely to recur because of this change in circumstances. Applicant is now more mature. He has reduced the frequency and magnitude of his alcohol consumption. He has demonstrated remorse for his OWIs and has taken responsibility for his past misconduct.

Applicant attended and successfully completed alcohol-related classes. He did not receive a diagnosis of alcohol abuse or dependence. Applicant has eliminated doubts about his current reliability, trustworthiness, and good judgment. Alcohol consumption security concerns are mitigated.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. (AG ¶¶ 2(a) and 2(c)) I have incorporated my comments under Guidelines G in my whole-person analysis. Some of the factors in AG were addressed under those guidelines, but some warrant additional comment.

Applicant is a 30-year-old employee of a defense contractor. He has worked for federal contractors since 2009. In 2010 and 2014, Applicant committed OWIs, which are misdemeanor-level criminal offenses. He attended alcohol-related classes, and after 2014, he consumed alcohol responsibly. He reduced the frequency and magnitude of his alcohol consumption. There is no diagnosis of alcohol abuse or dependence. He has not had any alcohol-related incidents involving the police and courts since 2014. He expressed remorse about his OWIs, and he committed to not driving after consuming alcohol. Applicant has established his current reliability, trustworthiness, and good judgment. I believe such incidents are unlikely to recur. Alcohol consumption security concerns are mitigated.

### **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: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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JUAN J. RIVERA  
Administrative Judge