



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



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
| REDACTED                         | ) | ISCR Case No. 16-00901 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

10/23/2017

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant mitigated the alleged criminal conduct concern, but did not present sufficient evidence to mitigate security concerns raised by his excessive consumption of alcohol. Clearance is denied.

**Statement of the Case**

On September 2, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging security concerns under the alcohol consumption and criminal conduct guidelines. Applicant answered the SOR. He declined the opportunity to present his case at a hearing and requested that his case be decided on the written record.

On December 14, 2016, Department Counsel sent Applicant the Government's written case, known as a file of relevant material (FORM). With the FORM, Department Counsel forwarded to Applicant ten exhibits (Items 1 – 10) that the Government offers for admission into the record. Applicant submitted a response to the FORM on January 12, 2017. With his Response, Applicant submitted court documents related to his 2015 drunk driving arrest. These documents were collectively marked Exhibit A. Without objection, Items 1 – 10, Applicant's Response, and Exhibit A, are admitted into the record.

On October 1, 2017, after the Hearing Office received confirmation that Applicant remained sponsored for a clearance, I was assigned the case for decision. No additional matters were submitted by either party for my consideration.

### **Findings of Fact**

Applicant, 31, is employed as a contractor in the defense industry. He started consuming alcohol while in high school. Shortly after turning 18 years old, he was arrested for driving under the influence (DUI). He was placed on probation for two years and the DUI charge was ultimately dismissed. He continued to drink throughout college and, in 2007, was charged with public intoxication and possession of an open container. He graduated from college in 2011, and was then hired by a federal contractor. He submitted a security clearance application in connection with this previous federal contracting position. He reported both alcohol-related arrests on his 2011 application and discussed them during a security clearance interview. During the 2011 interview, Applicant told a security clearance investigator that he usually drank about three to four beers on the weekends or when off from work.<sup>1</sup>

Applicant was hired by his current employer, another federal contractor, in February 2015. He submitted another security clearance application and, in June 2015, was interviewed by an investigator as part of the security clearance investigation. During the 2015 interview, Applicant informed the investigator that he was drinking about ten beers at one sitting about once or twice a week. He also told the investigator that he usually became intoxicated after consuming five to seven beers, and was getting intoxicated about once a week.<sup>2</sup>

During the June 2015 interview, Applicant also discussed with the investigator a 2011 arrest for misdemeanor assault. Applicant explained that he got into a heated argument with a cab driver who refused to take him and a female friend home late one evening. Police arrived and charged Applicant with assault. After he completed 40 hours of community service, the charge was dismissed.<sup>3</sup>

In September 2015, Applicant was arrested for driving while impaired (DWI). Applicant explained to a security clearance investigator that he had consumed about ten beers the night before and the next day fell asleep behind the wheel of his car at a red light – a few blocks from his job. An ambulance driver who had stopped behind Applicant's car, got out of the ambulance to check on Applicant's condition. The ambulance driver knocked on Applicant's car window with no response, but smelled alcohol coming from Applicant. The ambulance driver then opened Applicant's car door, put the car in park, and took the keys out of the ignition. Applicant did not wake up until after the police arrived

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<sup>1</sup> Items 2 – 4, 6 – 8.

<sup>2</sup> Items 5, 8.

<sup>3</sup> Item 8.

on the scene. He was arrested for DWI. He refused to provide a breath sample to measure his blood alcohol concentration (BAC).<sup>4</sup>

Applicant, through his lawyer, was able to have the DWI and related charges reduced to reckless driving. He pled guilty to the reduced charge, and received a 30-day suspended jail sentence. He was placed on probation for 12 months and, as a condition of probation, was required to complete an alcohol safety awareness program (ASAP). In March 2016, Applicant appeared in court to answer a show cause order for an ASAP failure. After Applicant pled guilty to the charge, it was dismissed by the court.<sup>5</sup>

### **Law, Policies, and Regulations**

This case is decided under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on June 8, 2017, through Security Executive Agent Directive 4 (SEAD-4). ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

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<sup>4</sup> Item 8; Response; Exhibit A.

<sup>5</sup> Item 8; Response; Exhibit A.

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.<sup>6</sup>

Any doubt raised by the evidence must be resolved by a judge in favor of the national security. AG ¶ 2(b). See *also* SEAD-4, ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Guideline G (Alcohol Consumption)**

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. (AG ¶ 21.)

In assessing Applicant's case, I considered all the disqualifying and mitigating conditions under Guideline G, including the following:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence . . .;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment . . .;

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

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<sup>6</sup> However, a judge's mere disbelief of an applicant's testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on solely non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is put on notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and

AG ¶ 23(d): the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Security clearance assessments about a person require a judge to closely examine the individual's conduct and circumstances, both past and present. Here, despite two previous alcohol-related arrests and having gone through a prior security clearance investigation that, in part, focused on those arrests, Applicant decided to increase the amount of alcohol he drinks. The record reflects that, three months before the September 2015 DWI arrest, Applicant had been consuming 10 beers once or twice a week and getting drunk at least once a week. He reported consuming 10 beers the night before the DWI arrest. Shortly before the DWI arrest, an ambulance driver smelled alcohol coming from Applicant, and Applicant was unresponsive at the scene until after police arrived. He refused to submit a breath sample to measure his BAC. In short, the evidence reflects that Applicant was under the influence of alcohol when he was arrested for DWI in 2015.

Applicant's recent DWI arrest occurred after he submitted his current security clearance application and went through a security clearance interview – an interview that, in part, focused on past criminal arrests and excessive alcohol consumption. The two security clearance applications Applicant filled out and the investigations that followed should have placed Applicant on clear notice that his excessive use of alcohol was a concern. Instead of modifying his alcohol consumption, Applicant decided to increase the amount he drank and, but for the intervention of the ambulance driver, his decision to drink and drive could have resulted in a far more tragic situation. Applicant submitted no evidence that he has reformed his behavior to avoid a recurrence of similar security-significant conduct. See ISCR Case No. 14-05022 (App. Bd. Mar 9, 2016) (judge's adverse decision supported by lack of evidence indicative of positive lifestyle changes).

For all the above reasons, I find that AG ¶¶ 22(a) and 22(c) apply. None of the mitigating conditions fully apply. Applicant may in the future be able to (re-)establish his eligibility for a security clearance. At present, however, security concerns raised by his alcohol use remain.<sup>7</sup>

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<sup>7</sup> In reaching this adverse conclusion, I considered Applicant's candor and cooperation throughout the security clearance process. However, these favorable whole-person matters are insufficient, whether considered individually or collectively with the other favorable record evidence, to mitigate the security concerns at issue. See *generally* AG ¶ 2. See *also* SEAD-4, ¶ E.4; Directive, ¶ 6.3. I also considered the exceptions listed in SEAD-4, Appendix C, but none are warranted in this case.

## **Guideline J (Criminal Conduct)**

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. (AG ¶ 30.)

The SOR alleges Applicant's 2011 arrest for assault as a security concern under Guideline J. The facts and circumstances surrounding that arrest do not raise a security concern. He has not been involved in any other non-alcohol related criminal conduct. Although Applicant's alcohol-related arrests were not alleged under Guideline J, I have considered them and find that the security concerns raised by those incidents are adequately addressed under the alcohol consumption guideline. Criminal conduct security concerns are mitigated.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive, ¶ E3.1.25, are:

|   |                   |
|---|-------------------|
| Paragraph 1, Guideline G (Alcohol Consumption): | AGAINST APPLICANT |
| Subparagraphs 1.a – 1.d:                        | Against Applicant |
| Paragraph 2, Guideline J (Criminal Conduct):    | FOR APPLICANT     |
| Subparagraph 2.a:                               | For Applicant     |

### **Conclusion**

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge