



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-00817

**Appearances**

For Government: Brittany Muetzel, Esq., and Andrea Corrales, Esq.,  
Department Counsel  
For Applicant: *Pro se*

04/10/2018

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant was arrested for alcohol-related driving offenses in November 2006 and March 2015. He completed alcohol counseling, and he credibly stated that he ended his alcohol consumption in March 2015. Security concerns under Guideline G (alcohol consumption) are mitigated. Eligibility for access to classified information is granted.

**Statement of the Case**

On September 6, 2012, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Government Exhibit (GE) 1. On April 28, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992. The SOR set forth security concerns arising under Guideline G. Hearing Exhibit (HE) 2.

On May 19, 2017, Applicant provided a response to the SOR. On June 9, 2017, Department Counsel requested a hearing. Tr. 12. On June 28, 2017, Department Counsel was ready to proceed. On December 5, 2017, the case was assigned to me. On December 28, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice

of hearing, setting the hearing for February 21, 2018. HE 1. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered seven exhibits; Applicant offered two exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Transcript (Tr.) 15-17; GE 1-7; Applicant Exhibit (AE) A-AE B. On February 28, 2018, DOHA received a copy of the hearing transcript.

The Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position on or after June 8, 2017. The new AGs supersede the previous AGs, and I have evaluated Applicant's security clearance eligibility under the new AGs.<sup>1</sup>

### **Findings of Fact<sup>2</sup>**

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a through 1.d. HE 3. He also provided mitigating information. HE 3.

Applicant is a 37-year-old employee of a DOD contractor who has worked as an engineering technician since 2012. Tr. 6, 8; GE 1. In 1998, he graduated from high school. Tr. 6. He plans to attend college in the near future. Tr. 7. From 2000 to 2012, he served in the Navy, and his specialty was aviation technician. Tr. 7. The Navy honorably discharged him as a petty officer first class (E-6). Tr. 7. Applicant was involuntarily separated from the Navy, and he received separation pay of \$48,834. HE 3, Encl. 1. In 2001, he married, and he has a 16-year-old child and a 27-year-old stepchild. Tr. 8, 19.

### **Alcohol Consumption**

In November 2006, the police arrested Applicant, and he was charged with operating a vehicle while under the influence of alcohol (OVI). Tr. 19. At that time, Applicant was a petty officer second class in the Navy. Tr. 20. Applicant consumed some rum; hit a mailbox with his truck; drank some more rum; and then he drove to a parking lot. Tr. 21-22. It was raining and snowing, and he was "do[ing] donuts" in the parking lot. Tr. 22. His truck got stuck in the grass, and Applicant was arrested for OVI. Tr. 23. His breathalyzer result was .11. GE 7. In December 2006, Applicant received nonjudicial punishment (NJP) for drunk driving, which included reduction from E-5 to E-4, forfeiture of half of one month's pay for two months, and 45 days of extra duty and restriction. Tr. 25; GE 7. For one year, his command revoked his driving privileges on post. Tr. 25-26. He completed three days' attendance at an alcohol-awareness class. Tr. 26. He was not

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<sup>1</sup> Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at [http://ogc.osd.mil/doha/SEAD4\\_20170608.pdf](http://ogc.osd.mil/doha/SEAD4_20170608.pdf).

<sup>2</sup> Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

diagnosed with an alcohol-abuse disorder, and he was not directed to end his alcohol consumption. Tr. 26. In February 2007, he pleaded guilty in civilian court to OVI. He was ordered to pay a \$500 fine, and his license was revoked for 90 days. Tr. 27. He believed he received an Enlisted Review Board because of the drunk-driving NJP, and he was separated from active duty service in the Navy. Tr. 41-43.

Between the 2006 and 2015 alcohol-related driving incidents, Applicant had a drink or two of alcohol and then he drove; however, he was never arrested for driving under the influence of alcohol (DUI). Tr. 43, 45. He frequently drank alcohol, sometimes on a daily basis, and he consumed it to help him relax. Tr. 43, 45.

In March 2015, Applicant was on temporary duty. Tr. 27. He drank three 20-ounce beers, waited for some time, and started driving towards his hotel. Tr. 29; GE 6. He agreed he drank too much alcohol to safely drive. Tr. 29. Applicant was unfamiliar with the area where he was driving, and he became lost. Tr. 29. He was on a flat straight part of the highway, and he drove his rental car at a speed of about 120 miles per hour (MPH). Tr. 30, 51-52. A police vehicle was following Applicant; however, Applicant did not see any police lights or hear any sirens. Tr. 31. The police arrested Applicant and took him to jail. Tr. 32. Applicant refused a test to determine his blood-alcohol content (BAC) because he knew he would fail it. Tr. 32, 52. He was charged with resisting an officer with violence, reckless driving, and DUI. Tr. 33. In August 2015, he pleaded guilty to DUI; no action was taken on the reckless driving charge; and he received deferred adjudication with three years of probation on the resisting an officer with violence charge. Tr. 33-35; GE 4. He received a fine and court costs of \$515 and a \$40 monthly charge for supervision. Tr. 34. The court terminated his probation in November 2017. Tr. 34; AE B. His driver's license was revoked for one year in one state and for six months in another state. Tr. 35-39. He paid all of his fines. Tr. 35. His driver's license in one state was reinstated, and he has not paid to have his driver's license reinstated in the other state.

Applicant completed alcohol counseling and a victim-impact class. Tr. 36. On August 7, 2015, he completed a 21-hour course of instruction related to the "adverse effects of chemical use on driving ability." HE 3, Encl. 6. He attended Alcoholics Anonymous (AA) classes for six months and then sporadically attended thereafter; however, he has not attended any AA meetings for six or eight months. Tr. 37. AA gave him coins for periods of sobriety. Tr. 52. He decided to stop attending AA meetings because he believes he is beyond having cravings for alcohol, and he did not have any intention of consuming alcohol in the future. Tr. 37. He attended support-group meetings, mostly on a weekly basis, from September 2015 to April 2016. HE 3, Encl. 4-5. He was not diagnosed with an alcohol-use disorder. Tr. 39.

Applicant has not consumed any alcohol since March 9, 2015. Tr. 40, 46. He intends to remain sober going forward. Tr. 40. He acknowledged that he leaned on alcohol and showed impaired judgment for his 2006 and 2015 alcohol-related incidents. Tr. 41, 45. He promised that he would not consume alcohol in the future, and he will report any future alcohol consumption to his security manager. Tr. 54. He understands that his security clearance might be revoked if he resumes his alcohol consumption. Tr. 54.

## Character Evidence

On February 3, 2017, the Navy promoted Applicant to Engineering Technician IV, and his annual salary was increased to \$74,000. AE A. He received multiple medals and ribbons during his Navy service including two Navy and Marine Corps Achievement Medals and three Navy Good Conduct Medals. HE 3, Encl. 1. He completed several Navy training courses. HE 3, Encl. 1. He had excellent Navy Evaluation Report and Counseling Records. HE, Encl. 8-12.

Applicant's team manager described Applicant as very diligent, intelligent, and an "irreplaceable member" of the contractor's team. HE 3, Encl. 2. Another supervisor lauded his integrity, knowledge, and value to the contractor. HE 3, Encl. 3. He received two awards from his current employer. HE 3, Encl. 14, 15.

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the applicant's personal or professional history that may disqualify the applicant for eligibility for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Alcohol Consumption**

AG ¶ 21 articulates the Government's concern about 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 ¶ 22 lists seven conditions that could raise a security concern and may be disqualifying in this case including:

- (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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder;
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;

(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder;

(e) the failure to follow treatment advice once diagnosed;

(f) alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(a) and 22(c) apply. Applicant's two alcohol-related incidents involving the police and the courts occurred in 2006 and 2015. His BAC for the 2006 OVI or drunk-driving offense was .11. He refused a breathalyzer for his 2015 DWI. His BAC level of .11 establishes that he engaged in binge alcohol consumption to the extent of impaired judgment.<sup>3</sup> His level of alcohol consumption in March 2015 constitutes another episode of binge alcohol consumption.

AG ¶ 23 details conditions that could mitigate security concerns including:

(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;

(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;

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

(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.

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<sup>3</sup> "Binge drinking is the most common pattern of excessive alcohol use in the United States." See the Center for Disease Control website, (stating "The National Institute on Alcohol Abuse and Alcoholism defines binge drinking as a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 grams percent or above. This typically happens when men consume 5 or more drinks, and when women consume 4 or more drinks, in about 2 hours."), <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm>. There are other definitions of "binge alcohol consumption" that involve different alcohol-consumption amounts and patterns.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). See *also* ISCR Case No. 08-04232 (App. Bd. Oct. 9, 2009) (affirming denial of security clearance for Applicant with alcohol-related criminal offenses for six years prior to hearing). For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) the Appeal Board reversed the administrative judge's grant of a clearance and noted, "That Applicant continued to drink even after his second alcohol-related arrest vitiates the Judge's application of MC 3."

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge's grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and capricious. See *also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (reversing grant of a clearance for applicant with four alcohol-related incidents, most recent alcohol-related incident was three years before hearing, and substantially reduced alcohol consumption for three years before hearing, but not abstinence).

I have carefully considered the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption and poor judgment involving the two alcohol-relating driving offenses in November 2006 (OVI or drunk driving) and March 2015 (DUI, reckless driving, excessive speed, and eluding the police). However, six factors weigh towards mitigation of alcohol consumption security concerns: (1) Applicant attended alcohol counseling, including numerous AA meetings; (2) he received counseling and classroom instruction about the risks entailed in driving after consumption of alcohol; (3) he received early release from probation imposed for his March 2015 DUI; (4) he ended his alcohol consumption in March 2015; (5) if he consumes alcohol in the future, he promised to inform his security manager; and (6) he understands his security clearance might be revoked if he resumes alcohol consumption. Applicant has established his current reliability, trustworthiness, and good judgment. Alcohol consumption security concerns are mitigated.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. "In evaluating an applicant's case, a Judge must carefully consider the record as a whole. This includes not only considering the extent to which an applicant's circumstances raise concerns about his or her reliability but also giving fair consideration of the applicant's mitigating evidence." ISCR Case No. 12-09900 at 3 (App. Bd. Dec. 7, 2016) (citing ISCR Case No. 15-00424 at 2-3 (App. Bd. Apr. 20, 2016)). My comments under Guideline G are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 37-year-old employee of a government contractor who has worked as an engineering technician since 2012. From 2000 to 2012, he served in the Navy, and his Navy specialty was aviation technician. He was honorably discharged from the Navy. He presented important good-character evidence. The general sense of the statements of Applicant's coworkers is that he is competent, diligent, honest, and reliable. He made significant contributions to the Navy when he was on active duty, to his current employer, and to the nation's defense.

Some evidence weighs against grant of access to classified information: (1) Applicant's two alcohol-related driving offenses involving the police and courts occurred in November 2006 and March 2015; and (2) his most recent DUI was particularly dangerous as it involved reckless driving, excessive speed, and eluding the police. However, the six factors supporting mitigation of alcohol consumption security concerns listed in the mitigation section in Guideline G are more substantial. Applicant credibly described his misconduct and his rehabilitative efforts. Applicant has established his current reliability, trustworthiness, and good judgment. Alcohol consumption security concerns are mitigated.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that Guideline G security concerns are mitigated, and it is clearly consistent with the national interest to grant Applicant security clearance eligibility at this time.

### **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 through 1.d: For Applicant

### **Conclusion**

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

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MARK HARVEY  
Administrative Judge