



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 17-01645
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tara R. Karoian, Esq., Department Counsel  
For Applicant: *Pro se*

04/09/2018

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**Decision**

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MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on April 4, 2016. On August 11, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The DOD CAF acted under Executive Order (EO) 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 by the DOD on June 8, 2017.

Applicant answered the SOR on September 8, 2017, and requested a decision on the record without a hearing. On November 8, 2017, the Government sent a complete copy of its written case, a file of relevant material (FORM) including documents identified as Items 1 through 5, to Applicant. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He received the FORM on November 13, 2017, and did not

respond. Items 1 and 2 are the pleadings in the case. Items 3 through 5 are admitted into evidence. The case was assigned to me on March 15, 2018.

### **Findings of Fact<sup>1</sup>**

Applicant, age 23, has no children and is not married. He received his high school diploma in 2013 and earned an associate's degree in 2015. He has been employed by defense contractors since May 2015; most recently, as of July 2016. This is his first application for a security clearance.

The SOR cross-alleged, under Guidelines G and J, Applicant's 2014 Driving while Under the Influence (DUI) (SOR ¶¶ 1.a and 2.a) and his 2016 DUI (SOR ¶¶ 1.b and 2.a). In his SOR answer, Applicant admitted to each of the allegations.

In April 2014, Applicant consumed three beers over an unspecified period of time while at a friend's house. He did not feel impaired and believed that he was okay to drive. He was pulled over by a police officer for not coming to a complete stop at a flashing red light. During the stop, the officer smelled alcohol on Applicant's breath and administered a breathalyzer and an alcohol blood test (the result of which was 0.04%). Applicant was charged with DUI (underage), among other charges. In June 2014, a court found him guilty of all charges, suspended his driver's license for three months, and placed him on probation pending his completion of fifty hours of community service, six months of alcohol treatment, attendance at a DUI class and victim impact panel, and payment of a \$2,000 fine. The court later added an additional 100 hours of community service because Applicant missed the victim impact panel for which he had been scheduled. Applicant completed the terms of his probation in May 2015. In February 2016, the court expunged his record.<sup>2</sup>

In June 2016, Applicant consumed ten beers throughout an evening while at a bar with friends. At some point, he decided to drive even though he knew that he was impaired. He was pulled over by a police officer for having an expired inspection tag. During the stop, the officer smelled alcohol on Applicant's breath and performed a field sobriety test, including administering a breathalyzer, which Applicant failed. Applicant was arrested and charged with DUI. In September 2016, Applicant pled guilty to the charge. The court suspended his driver's license for three months, ordered him to pay a \$700 fine plus a \$1,000 surcharge per year for three years, to attend a wet and reckless course, and undergo an alcohol and drug assessment. As of January 2017, he had not completed

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<sup>1</sup> Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR answer (Item 2), his SCA (Item 3), and the summary of his January 2017 security clearance interview (Item 5). Item 5 was not authenticated as required by Directive ¶ E3.1.20. However, Applicant was informed by the Government that he was entitled to make corrections, additions, deletions, and updates to Item 5. Applicant was also informed that he was entitled to object to consideration of Item 5 on the ground that it was not authenticated. Applicant did neither in his response to the FORM. Therefore, I conclude that he has waived any objection to Item 5.

<sup>2</sup> Item 3 at 24-26; Item 5 at 4.

the course. The status of the other requirements was not specified in the record.<sup>3</sup> In January 2017, Applicant stated that he no longer drives after drinking, and that he was not diagnosed as being alcohol dependent or an alcohol abuser during the alcohol treatment he underwent following his 2014 DUI.<sup>4</sup>

## Policies

“[N]o one has a ‘right’ to a security clearance.”<sup>5</sup> 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.”<sup>6</sup> The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”<sup>7</sup>

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”<sup>8</sup> Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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<sup>3</sup> Item 5 at 5.

<sup>4</sup> Item 5 at 5.

<sup>5</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>6</sup> *Egan* at 527.

<sup>7</sup> EO 10865 § 2.

<sup>8</sup> EO 10865 § 7.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR.<sup>9</sup> “Substantial evidence” is “more than a scintilla but less than a preponderance.”<sup>10</sup> The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.<sup>11</sup> Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.<sup>12</sup> An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.<sup>13</sup>

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”<sup>14</sup> “[S]ecurity clearance determinations should err, if they must, on the side of denials.”<sup>15</sup>

## **Analysis**

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

The concern under this guideline is set out in AG ¶ 21: 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.

Applicant’s underage and excessive alcohol consumption, resulting in his 2014 and 2016 DUIs, establishes the following disqualifying conditions under this guideline:

AG ¶ 22(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; and

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

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<sup>9</sup> See *Egan*, 484 U.S. at 531.

<sup>10</sup> See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

<sup>11</sup> See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

<sup>12</sup> Directive ¶ E3.1.15.

<sup>13</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>14</sup> ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>15</sup> *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

Neither of the following applicable mitigating conditions under this guideline are established:

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; and

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.

The security significance of Applicant's 2014 DUI is brought current by his more recent 2016 DUI. Together they raise questions about Applicant's good judgment, reliability and trustworthiness. Of particular concern is the fact that he was arrested for his second DUI three months after he completed his SCA. Moreover, Applicant chose to drive in 2016 when he knew that he was impaired. Applicant has not demonstrated a sufficient pattern of modified behavior for me to conclude that his excessive consumption of alcohol and questionable judgment are behind him.

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

The concern under this guideline is set out in AG ¶ 30: 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.

Applicant's 2014 and 2016 DUIs establish the following disqualifying conditions under this guideline:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

AG ¶ 31(c): individual is currently on parole or probation.

Neither of the following applicable mitigating conditions under this guideline are established:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's 2014 and 2016 DUIs establish a pattern of criminal misconduct that casts doubt about Applicant's judgment, reliability, and trustworthiness, and calls into question his ability or willingness to comply with laws, rules, and regulations. Although the word "probation" does not appear in the record with respect to his 2016 DUI sentence, the court still has jurisdiction over Applicant for at least the remaining years that he is ordered to pay the \$1,000 surcharge, and perhaps also because he has not yet completed his other requirements (the record was silent as to whether he had). There has not been a passage of time sufficient to conclude that his questionable judgment and criminal misconduct will not recur.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guidelines G and J in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by his excessive alcohol consumption and criminal misconduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption): AGAINST APPLICANT

Subparagraphs 1.a – 1.b:                      Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a:                              Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine  
Administrative Judge