



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 17-03193
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Carroll Connelley, Esq., Department Counsel  
For Applicant: *Pro se*

07/02/2018

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**Decision**

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BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the security concerns stemming from his alcohol-related conduct. Eligibility for access to classified information is denied.

**Statement of the Case**

On October 5, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline G (alcohol consumption) and Guideline E (personal conduct).<sup>1</sup> Applicant responded to the SOR on October 28, 2017, and he requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 1, 2018, scheduling the hearing for February 20, 2018. I convened the hearing as scheduled. Government Exhibits (GE) 1-5 were admitted without objection. Applicant testified and did not submit any documents. After the hearing, Applicant timely

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<sup>1</sup> The action was taken 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.

submitted an email and two attachments, which I admitted as Applicant Exhibits (AE) A-C without objection. DOHA received the hearing transcript (Tr.) on February 28, 2018.

### **Findings of Fact**

The SOR alleges alcohol consumption and personal conduct security concerns stemming from Applicant's three alcohol-related arrests. Applicant admitted all three arrests but denied the personal conduct security concerns that cross-alleged these arrests. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 36 years old. He earned an associate's degree in 2002 and a bachelor's degree in 2007. From 2003 to 2011, he served first on active duty in the U.S. Army and then in the U.S. Army Reserve, and he was honorably discharged. Since 2008, he has been employed full time for a DOD contractor.<sup>2</sup>

In May 2003, Applicant was arrested and charged with driving while intoxicated (DWI). Applicant had consumed approximately 8 to 10 alcoholic beverages over the course of the evening. The next morning he was pulled over for speeding and failed a field sobriety test. Applicant was found not guilty due to lack of probable cause; Applicant admitted that his blood-alcohol level was measured at 0.08% and was over the legal limit.<sup>3</sup>

In November 2010, Applicant was arrested and charged with DWI and refusal. He failed a field sobriety test and refused a breathalyzer test, because he knew that he was over the legal limit. In February 2011, he was convicted of DWI, and the refusal charge was dismissed. He was fined approximately \$300 and was sentenced to approximately 180 days in jail, of which 180 days were suspended.<sup>4</sup>

In June 2016, Applicant was arrested and charged with driving under the influence (DUI). Applicant had consumed about one or two alcoholic beverages an hour over the course of about ten hours. His blood alcohol level was measured at 0.22%. In October 2016, he pled guilty to DUI – 2<sup>nd</sup> offense. He was sentenced to six months of probation, alcohol monitoring, and five days of house arrest. Applicant's driver's license was suspended from October 2016 to October 2017.<sup>5</sup>

On the advice of his criminal lawyer, Applicant participated in a drug and alcohol evaluation in July 2016. A licensed clinical social worker (LCSW) at a substance-abuse treatment facility determined that Applicant met the criteria for a substance-related disorder and met placement criteria for intensive outpatient treatment. He completed the

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<sup>2</sup> GE 1; GE 5; Tr. 20-21.

<sup>3</sup> GE 1; GE 5; Tr. 49.

<sup>4</sup> GE 1; GE 2; GE 5.

<sup>5</sup> GE 3-5; Tr. 36-37.

prescribed group and individual counseling, with regular urinalysis, in August 2016. The LCSW recommended that Applicant continue outpatient counseling on a less frequent basis. Applicant has not attended any further counseling since the conclusion of his probation in March 2017.<sup>6</sup>

Applicant's alcohol consumption began in about 2001, when he would consume about 8 to 10 alcoholic beverages on the weekends. While in the Army, his alcohol consumption was about six to eight alcoholic beverages on the weekends. During his August 2013 security interview, Applicant explained that he had abstained from alcohol for about eight months after his November 2010 DWI arrest, and he had resumed consuming alcohol on a weekly to bi-weekly basis. He continued to consume alcohol to the point of intoxication about once or twice a year, but he had no future intent to drive after consuming alcohol. During his August 2017 interview, Applicant stated that he had abstained from alcohol for about six months following his June 2016 arrest, and he admitted to having experienced blackouts due to his past alcohol consumption. He further explained that his expenses associated with his 2016 DUI totaled approximately \$15,000, including his daily transportation to and from work while his driver's license was suspended. Applicant testified that he continued to consume alcohol about once every couple months. Applicant acknowledged that his consumption of alcohol has caused him problems; however, he did not consider himself an alcoholic. While employed by a DOD contractor, Applicant came to work while hung over.<sup>7</sup>

Applicant's work performance is well regarded by his employer. Applicant received several awards and citations for his military service.<sup>8</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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<sup>6</sup> Response to SOR.

<sup>7</sup> GE 5; Tr. 40, 43, 59.

<sup>8</sup> AE B; AE C.

The protection of the national security is the paramount consideration. As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>9</sup> Under *Egan*, EO 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.

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

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 and endures throughout off-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 the 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.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline G, Alcohol Consumption**

The security concern for alcohol consumption 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following is potentially applicable 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 the frequency of the individual’s

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<sup>9</sup> *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). See *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

alcohol use or whether the individual has been diagnosed with alcohol use disorder.

Appellant's alcohol consumption resulted in three criminal offenses between 2003 and 2016. AG ¶¶ 22(a) applies. The burden thereby shifts to Applicant to rebut, explain, extenuate, or mitigate the facts. An applicant has the burden of proving a mitigation condition, and the burden of disproving it never shifts to the Government. The following mitigating conditions are potentially applicable:

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 good judgment;

AG ¶ 23(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); and

AG ¶ 23(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 with treatment recommendations.

Under AG ¶ 23(a), the first prong of this mitigating condition ("so much time has passed") focuses on the recency of the conduct. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."

Applicant abstained from alcohol for about six months after his June 2016 arrest, in part to comply with the terms of his probation. In December 2016, he resumed consuming alcohol. Applicant's alcohol history spans approximately 17 years and includes binge drinking, blackouts, and three alcohol-related arrests. During his August 2013 security interview, Applicant acknowledged his alcohol problem and averred to refrain from driving while impaired. Nonetheless, he continued to drink to the point of intoxication and engaged in criminal conduct. He currently consumes alcohol despite the LCSW's conclusion that he met the criteria for a substance-abuse disorder and despite significant financial consequences following his 2016 arrest.<sup>10</sup> Notwithstanding Applicant's uncorroborated claims of reduced alcohol consumption, it is simply too early to conclude that such problems are unlikely to recur. AG ¶ 23(a) does not apply.

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<sup>10</sup> See ISCR Case No. 08-09232 at (App. Bd. Sep. 9, 2010)("[A] Judge may nevertheless consider unalleged conduct for certain limited purposes. These including assessing an applicant's credibility, evaluating his evidence in mitigation, and considering the extent to which an applicant has demonstrated rehabilitation.").

Applicant has acknowledged his alcohol problem and claimed to have reduced his alcohol consumption. Notably, Applicant acknowledged his alcohol problem and contended that his alcohol problem was under control during his August 2013 security interview. A LCSW concluded that Applicant met the criteria for a substance abuse disorder, though Applicant does not know whether he was diagnosed with alcohol abuse or alcohol dependence. Applicant's claims of reduced consumption are uncorroborated, and there is no evidence that a mental-health professional has concluded that Applicant's level of alcohol consumption is acceptable. AG ¶ 23(b) does not apply.

Similarly, without evidence that a mental health professional has concluded that Applicant can engage in responsible or modified consumption of alcohol, AG ¶ 23(d) does not apply.

Applicant's lengthy history of alcohol consumption culminated in three alcohol-related criminal incidents. Despite Applicant's claims during his August 2013 interview to avoid such circumstances, they recurred in June 2016. Even after the significant criminal and financial consequences of his 2016 DUI conviction and the conclusions of the LCSW, Applicant continues to consume alcohol. Applicant has not mitigated the alcohol consumption security concerns.

#### **Guideline E, Personal Conduct**

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The guideline notes several conditions that could raise security concerns under AG ¶ 16. The following disqualifying conditions are potentially applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . .

(3) a pattern of dishonesty or rule violations.

Applicant's alcohol consumption culminated in alcohol-related criminal conduct on three occasions. Applicant continues to consume alcohol despite the legal and

financial consequences, his own acknowledgement of an alcohol problem, and a medical professional's conclusion that Applicant met the criteria for a substance-abuse disorder. AG ¶ 16(d)(3) applies.

The following mitigating condition under AG ¶ 17 is potentially relevant:

(c) the offense is so minor, or such much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Less than 20 months had passed between Applicant's most recent alcohol-related criminal conduct and his February 2018 hearing. Applicant's two most recent arrests are separated by about six years. Applicant consumes alcohol despite his admitted alcohol problem and the significant consequences he has incurred. Given his past relapses and his continued alcohol consumption, personal conduct security concerns regarding Applicant's reliability and judgment remain.

### **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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In light of all the facts, I have considered the potentially disqualifying and mitigating conditions, and I have incorporated my comments under Guidelines G and E and the factors in AG ¶ 2(c) in this whole-person analysis.

Applicant's work performance is well regarded by his employer, and he received several commendations and awards during his military service. Nonetheless, he continues to demonstrate poor judgment as to his alcohol consumption. There is no evidence that Applicant's ongoing alcohol consumption is consistent with the conclusions and aftercare recommendations of a medical professional. As a result, the totality of the record evidence leaves me with questions and doubts as to Applicant's

eligibility and suitability for a security clearance. I conclude that Applicant did not mitigate the alcohol consumption and personal conduct security concerns.

### **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: Subparagraphs 1.a.-1.c.	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraph 2.a.:	AGAINST APPLICANT Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Eric H. Borgstrom  
Administrative Judge