



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 18-00039
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel  
For Applicant: *Pro se*

08/23/2018

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application on April 8, 2014, seeking eligibility for access to sensitive compartmented information (SCI). On November 22, 2016, his application for SCI access was denied, and the file was transmitted to the Department of Defense Consolidated Adjudications Facility (DOD CAF) for adjudication of his underlying collateral clearance. On February 12, 2018, the DOD sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The DOD acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on March 3, 2018, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on May 8, 2018. On May 9, 2018, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence.

The FORM included Item 8, a summary of a personal subject interview (PSI) conducted on May 15, 2014. The PSI was not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the PSI summary; make any corrections, additions, deletions or updates; or object to consideration of the PSI on the ground that it was not authenticated. Applicant submitted a detailed response to the FORM but did not comment on the accuracy or completeness of the PSI summary, nor did he object to it. I conclude that he waived any objections to the PSI summary. See ADP Case No. 17-03252 (App. Bd. Aug. 13, 2018) (holding that it was reasonable for the administrative judge to conclude that any objection had been waived by an applicant's failure to object after being notified of the right to object). Department Counsel did not object to Applicant's response, and it was marked as Item 9 and admitted as evidence. The case was assigned to me on July 26, 2018.

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

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 47-year-old network administrator employed by a federal contractor since March 2015. He has worked for federal contractors since March 2004. He has a high-school education. He married in May 2008.

The SOR alleges that Applicant was charged with driving under the influence (DUI) in January 1992, August 1993, July 1995, October 2001, and September 2008; and that he was charged with being drunk in public in January 1992. It also alleges that he continues to drive after consuming alcohol, as recently as July 2016. The evidence supporting the allegations is set out in Form Item 4 and summarized below.

**SOR ¶ 1.a:** Applicant was charged with DUI in September 2008. He pleaded guilty to reckless driving and was fined \$500. His driver's license was suspended for six months, and he was required to complete an alcohol safety-action program.

**SOR ¶ 1.b:** Applicant was charged with DUI in October 2001. He pleaded guilty and was fined \$200. His driver's license was suspended for six months.

**SOR ¶ 1.c:** Applicant was charged with DUI in July 1995. The charges were dismissed.

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<sup>1</sup> Applicant's personal information is extracted from his security clearance application (GX 3) unless otherwise indicated by a parenthetical citation to the record.

**SOR ¶ 1.d:** Applicant was charged with DUI August 1993. There is no evidence supporting this allegation in the FORM. However, Applicant admitted it in his answer to the SOR.

**SOR ¶ 1.e:** Applicant was charged with being drunk in public in January 1992. He prepaid a \$25 fine.

**SOR ¶ 1.f:** Applicant was charged with DUI in June 1991. He pleaded guilty and was fined \$200. His driver's license was suspended for six months.

**SOR ¶ 1.g:** While being considered for SCI eligibility, Applicant told an investigator in July 2016 that he consumes a six-pack of 12-ounce beers per day on average, and that about every other month he drives while having a blood-alcohol content (BAC) of .08% or higher. (FORM Item 4.)

In Applicant's response to the FORM, he recanted his admission that he drives about every other month with a BAC exceeding .08%. He claimed that he exaggerated his alcohol consumption during the July 2016 interview by erroneously applying a "one alcoholic drink per hour" standard and concluding that consuming six or seven beers in a five-hour period would cause his BAC to exceed .08%. Upon consideration of two charts calculating the effects of drinking on BAC, he concluded that six or seven beers, consumed in a five-hour period by a person of his weight (240 pounds), would result in a BAC of .075%.

### **Policies**

"[N]o 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 applicants 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 § 2.

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, 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.” Exec. Or. 10865 § 7. 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.

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. 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## **Analysis**

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

The security 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 admissions and the documentary evidence in the FORM establish two potentially disqualifying conditions:

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.

The following mitigating conditions are potentially relevant:

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;

Neither mitigating condition is established. Although almost ten years have elapsed since Applicant's last DUI arrest, he has continued to drink heavily, and he has admitted driving on multiple occasions with a BAC above or dangerously near the legal limit. His recantation of this admission is not credible, occurring only after the adverse decision on his application for SCI access.

## **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 record of arrests and convictions is sufficient to establish the following potentially disqualifying conditions:

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; and

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.

The following mitigating conditions are potentially relevant:

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.

Neither mitigating condition is established, for the reasons set out in the above discussion of Guideline G.

### **Whole-Person Concept**

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 applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).<sup>2</sup>

I have incorporated my comments under Guidelines G and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). 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 Applicant has not mitigated the security concerns raised by his alcohol consumption and criminal conduct.

### **Formal Findings**

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

Guideline G, Alcohol Consumption:	Against Appellant
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Guideline J, Criminal Conduct:	Against Appellant
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<sup>2</sup> The factors are: (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.

## **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge