



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 18-00018  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Benjamin R. Dorsey, Esq., Department Counsel  
For Applicant: Greg D. McCormack, Esq.

10/31/2018

**Decision**

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 February 20, 2015. On March 9, 2018, 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 (Exec. Or.) 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) 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 16, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 25, 2018,

and the case was assigned to an administrative judge on June 11, 2018. Applicant requested a change of venue, which was granted, and the case was reassigned to another administrative judge on June 29, 2018. It was reassigned to me on August 15, 2018 to consolidate the docket. On August 27, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 25, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 11 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on October 3, 2018.

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

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

Applicant is a 40-year-old employee of a defense contractor. He is working as a maintenance supervisor for a military housing area. He has been offered a position as a subject-matter expert embedded with tactical Army units conducting ground operations in a combat zone. His job offer is contingent on him qualifying for a top secret clearance and eligibility for access to sensitive compartmented information (SCI). (Tr. 28-29.)

Applicant married in June 2003. He and his wife have four children, ages 14, 12, 7, and 4. (Tr. 20.) He has taken online college courses and accumulated about 75 credit hours, but he does not have a degree. He and his wife own their home and are actively involved in church and community activities. (Tr. 19-21.)

Applicant enlisted in the U.S. Army shortly after graduating from high school, served on active duty from July 1997 to August 2017, and retired as a master sergeant (pay grade E-8). While on active duty, he was awarded the Bronze Star Medal four times, one of which was for valor; the Meritorious Service Medal twice; the Army Commendation Medal four times; the Air Force Commendation Medal once; the Joint Service Achievement Medal once; the Army Achievement Medal four times; the Army Good Conduct Medal six times; the National Defense Service Medal once; and various campaign medals, ribbons, tabs, and qualification badges, including campaign medals for service in Afghanistan and Iraq. (AX B at 1-2.) He deployed to Afghanistan seven times, for four to six months each time. He deployed to Iraq four times for four to seven months each time. His total time deployed to combat zones was about five years. (Tr. 26-27.) His last active-duty assignment was as the first sergeant of an infantry company in the United States. He received a security clearance in May 2002 and held it for all of his military service. He did not have an active security clearance at the time of the hearing.

In September 2012, Applicant was arrested by civilian authorities for simple battery, a misdemeanor. He testified that he had attended a hail-and-farewell party at an

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

Irish pub. He and a “Ranger buddy” had several drinks, decided that it was time to leave, and started walking toward a military van that was available for transportation back to their post. Applicant estimated that he had consumed about five beers over a three-hour period. (Tr. 64.)

As Applicant and his “buddy” were walking toward the van, one of two men sitting on a park bench asked, “What the f--- are you looking at?” Applicant responded, “I guess I’m looking at you,” and they continued walking toward the van. Applicant was shoved from behind by one of the men, turned around, and was shoved in the face. Applicant punched the man and knocked him out. The other man from the park bench came toward Applicant, and Applicant knocked him out as well. Applicant and his “buddy” walked quickly to the van. A civilian police officer stopped the van as they were driving away. Applicant was arrested and charged with simple battery. When he appeared in court with an attorney, disposition was deferred, and his case was placed on the “dead docket,” where it remains. (Tr. 31-33; GX 4 at 3.)

In July 2013, Applicant was arrested by civilian authorities for driving under the influence of alcohol (DUI). He was a platoon sergeant at the time. He and his platoon leader went to a local pub for an informal farewell to the platoon leader, who was leaving the Army to attend medical school. They were joined by two squad leaders from the platoon. According to Applicant, they had one drink before dinner, three drinks with dinner, and another drink after dinner.

As Applicant was driving home, he was stopped by the police. The record does not reflect why he was stopped, but he was charged with DUI. He pleaded guilty to reckless driving and was placed on supervised probation for 12 months, fined about \$1,300, and required to perform 40 hours of community service. He was referred to the military installation’s substance use disorder clinical care (SUDCC) program and completed a two-day alcohol-education program. (Tr. 35-36; GX 4 at 4; GX 8 at 2; GX 9.) There is no evidence that he was diagnosed with an alcohol-use disorder at this time.

Applicant was arrested in October 2016 after he and some friends had several beers at a bar, while watching a football game on television. He testified that he tried to call someone to drive him home, but the battery on his cellphone was too weak. He asked the bartender to call a cab, but the bartender told him that there was no cab service because the bar was too far out in the country. He decided to ride his motorcycle home, using back roads to reduce the risk of being stopped for DUI. He got lost, and tried to revive his cellphone long enough to view a map. He dropped his cellphone, and he then tipped over his motorcycle when he reached down to pick it up. A policeman drove up behind him, smelled alcohol, and administered a field sobriety test. The policeman asked Applicant to take a breath test, and Applicant refused. (Tr. 38.)

Applicant was arrested and charged with driving while intoxicated (DWI), refusal to take a breath test, driving across a hazard mark, and driving at an unreasonable speed. In August 2017, he pleaded guilty to driving while his ability was impaired (DWAI) and was sentenced to a conditional discharge for one year. He was fined and his driver’s

license was suspended for 90 days. He was warned by the court that any further incidents would result in his arrest and 15 days in jail. (GX 10.) He was relieved for cause from his duties as a company first sergeant and received an adverse evaluation report. (AX C at 1-2.)

After his arrest in October 2016, Applicant was again referred to the SUDCC, and he was diagnosed with an alcohol-use disorder. It is not clear who made the diagnosis, but the two clinicians identified in the records are both clinical psychologists. He completed a two-day alcohol education course. He was enrolled in the installation's SUDCC treatment program, but he was administratively removed from the program in December 2016 after he was selected to take charge of a specialized military training course at another installation. He did not complete any further treatment.

A drug and alcohol evaluation summary by a civilian psychologist in May 2017 reflected that Applicant no longer met the criteria for an alcohol-use disorder. The evaluator noted that Applicant had not completed an alcohol-treatment program, but that his current alcohol consumption was moderate and non-problematic, and that it did not appear that treatment was needed. The evaluator's immediate and long-term prognosis was "fair." (GX 11.)

In another psychological evaluation in June 2017, a military psychologist noted Applicant's failure to complete an SUDCC treatment program or its equivalent and commented, "This is not the behavior of a person who takes his actions and/or potential alcohol problems seriously." He concluded that Applicant "does have a material defect in judgment, but no defect in reliability or emotional stability." He stated that Applicant's "lack of personal insight, and known history of alcohol-related incidents, indicates that he is at high risk for further alcohol-related incidents." (GX 2 at 3.) At the hearing, Applicant testified that he spent only 15-20 minutes with this psychologist and that they "clashed personality-wise" because the psychologist asked questions about Applicant's family that Applicant did not believe were relevant. (Tr. 41.)

Applicant testified that he modified his alcohol consumption after his arrest in October 2016. He no longer drinks to excess. He no longer goes to bars to drink. He usually limits his consumption to one or two beers. He will not drive if he has consumed more than one drink. (Tr. 44-46.) He admitted that after his arrest he consumed about six beers over a nine-hour period on two occasions. (Tr. 54.)

At the hearing, Applicant submitted an affidavit stating that he has not been stopped, arrested, charged, or held by any law enforcement authority for any reason since his arrest for DWI in October 2016. He also stated that, if he receives a security clearance, he will submit to any alcohol testing or evaluation deemed appropriate by proper authority or qualified professionals, and that he will not challenge any determination to revoke his clearance if he is involved in any alcohol-related incidents. (AX E at 1.)

## 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 SOR alleges that Applicant was arrested in 2012 and charged with battery for an affray that occurred after he had been drinking (SOR ¶ 1.a). It also alleges that he was arrested and charged with DUI in July 2013 and DWI in August 2016, and that he pleaded guilty in both cases (SOR ¶¶ 1.b and 1.c). Finally, it alleges that Applicant was diagnosed with an alcohol-use disorder in October 2016; that the SUDCC determined in May 2017 that he no longer met the criteria for an alcohol-abuse disorder; and that in May 2017 he was determined by an Army psychologist to be likely to consume alcohol in excess in the future (SOR ¶ 1.d).

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.” The following disqualifying conditions are potentially relevant:

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;

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;

AG ¶ 22(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;

AG ¶ 22(e): the failure to follow treatment advice once diagnosed; and

AG ¶ 22(f): alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

AG ¶¶ 22(a), 22(c), and 22(d) are established by Applicant's alcohol-related convictions in 2013 and 2016 and the SUDCC diagnosis of an alcohol-use disorder. Applicant's arrest for battery in 2012 occurred after he had been drinking, but there is no evidence that the affray alleged in SOR ¶ 1.a was caused by his drinking. He has refuted the allegation that the affray was alcohol-related.

AG ¶¶ 22(e) and 22(f) are not established. Applicant was referred to an SUDCC after his July 2013 DWI arrest. He was placed on "extended evaluation" in August 2013 and completed a two-day alcohol education program. However, there is no evidence that he was diagnosed with an alcohol-use disorder at this time, and no evidence of treatment or advice beyond the two-day education program.

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;

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.

AG ¶ 23(a) is not established. Applicant's excessive alcohol consumption was frequent and did not happen under circumstances making it unlikely to recur. The key issue is whether sufficient time has passed since the last incident alcohol-related incident. There are no "bright line" rules for determining when sufficient time has passed to mitigate excessive alcohol consumption. The determination must be based on a careful evaluation of the totality 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." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In this case, two years have passed since Applicant's last alcohol-related incident. However, during the first year he was subject to his conditional release and the threat of arrest and jail time for another alcohol-related incident; and during the second year he had received the SOR and was under pressure to regain his security clearance.

AG ¶¶ 23(b) and 23(d) are not established. Applicant has acknowledged his problematic use of alcohol. However, he has not sought or obtained any treatment beyond a two-day alcohol education class. He testified that he has modified his consumption to one or two drinks at a sitting, but he admitted that on at least two occasions he has consumed about six beers over a nine-hour period. His testimony falls short of demonstrating a “clear and established pattern” of modified consumption. The May 2017 psychological evaluation concluded that his prognosis is “fair.” The June 2017 psychological evaluation noted that he does not take his potential alcohol problems seriously, that he lacks insight, and that he is at high risk for further alcohol-related incidents.

### **Guideline J, Criminal Conduct**

The SOR cross-alleges the conduct alleged in SOR ¶¶ 1.a-1.c under this guideline. 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 arrests and convictions establish the following potentially 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; 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 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;

AG ¶ 32(c): no reliable evidence to support that the individual committed the offense; 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.

AG ¶¶ 32(a) and 32(d) are not established for the allegations in SOR ¶¶ 1.b and 1.c, for the reasons set out in the above discussion of AG ¶¶ 23(a) and 23(d). AG ¶ 32(c) is established for the allegation in SOR ¶ 1.a. Applicant admitted that he was arrested for battery, but the evidence reflects that Applicant acted in self-defense and was not guilty of the charge.

### **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. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

In terms of military skills, devotion to duty, and courage under fire, Applicant has been a "soldier's soldier." He is seeking employment as a contractor in order to "get back into the fight." He has not experienced any problems with alcohol abuse or criminal conduct while on his many deployments to hostile-fire areas. All his alcohol-related incidents have occurred when he has been between deployments and in a garrison environment.

On the other hand, the psychologist who evaluated Applicant in May 2017 gave him a weak prognosis of "fair." The psychologist who evaluated him in June 2017 was concerned about his bad judgment in failing to recognize his alcohol problem. His alcohol-related arrest and conviction while serving as the first sergeant of an infantry company was a serious breach of trust, and it caused him to be relieved for cause and given an adverse evaluation report.

Applicant presented significant mitigating evidence at the hearing. However, "[o]nce a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant has not overcome that presumption. After weighing the disqualifying and mitigating conditions under Guidelines

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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.

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:

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

    Subparagraph 1.a:      **For Applicant**

    Subparagraphs 1.b-1.d:      **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 security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge