DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: December 15, 2023

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 14, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On September 21, 2023, Defense Office of Hearings and Appeals Administrative Judge Carol G. Ricciardello denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Judge's Findings and Analysis

Applicant, in his mid-40s, has worked for his federal contractor employer since 2015. In 2000, he was arrested and charged with Driving Under the Influence (DUI). Applicant completed a security clearance application (SCA) in 2007 and responded "No" to the question of whether he had ever been charged with or convicted of an offense related to alcohol, and instead disclosed a

2000 reckless driving charge. At hearing, he testified that he failed to disclose the 2000 DUI arrest in his 2007 SCA because the original charge was reduced to reckless driving pursuant to a plea, and he did not believe he needed to report the DUI because he was not ultimately convicted of that charge.

In 2013, Applicant was again arrested and charged with DUI, during which he refused a breathalyzer. He told the arresting officer that he had consumed two beers and two shots about forty-five minutes before the arrest; however, during a May 2019 security clearance interview, he denied consuming any alcohol prior to this arrest. Applicant failed to report this incident to his facility security officer or employer. The charge was later dismissed by entry of nolle prosequi.

Applicant completed another SCA in 2017 wherein he denied having been arrested at all in the prior seven years and also denied having ever been charged with an offense involving alcohol. At hearing, he testified that the foregoing charges were not reported as required because they were dismissed. During a 2018 security clearance interview, Applicant again initially denied having ever been charged with an offense involving alcohol until confronted with the 2000 arrest record, at which time he admitted the charge and expressed that he did not disclose his prior arrests in his 2017 SCA because the information had been previously provided in his initial security clearance investigation and 10-year renewal process. He testified at hearing that he did not volunteer the information about his arrests during the interview because he thought he only had to disclose convictions. The Judge did not find Applicant's explanation regarding his failure to disclose the 2013 arrest credible.

In February 2019, Applicant was arrested for DUI after his car was observed still running with its hazard lights on, parked half on grass and half on pavement, and Applicant was slumped in his seat. The police officer was unable to conduct a field sobriety test because Applicant was too intoxicated, and he refused a breathalyzer. During his December 2021 clearance interview, Applicant reported that he entered a pretrial diversion program for this charge, during which he was required to be regularly tested for alcohol consumption and to attend alcohol awareness class through Alcoholics Anonymous (AA).

Applicant participated in another clearance interview in May 2019 for which the investigator reported that Applicant denied having ever been arrested or charged with an alcohol-related offense. Applicant contests this reporting, asserting instead that he told the investigator he had been charged but not convicted with such an offense. At the time of his May 2019 interview, the February 2019 DUI charge had not been adjudicated. Applicant told the investigator that this type of incident was unlikely to recur because he does not drink and drive.

Applicant was arrested for DUI again in June 2020 and January 2021. During the 2020 incident, he was found passed out in the driver's seat of his car at a traffic light. A breathalyzer reflected his blood alcohol content (BAC) was .24%. During the 2021 incident, Applicant failed a field sobriety test and was reported to have a .11% BAC. He entered a pretrial diversion program for the 2021 charge, during which he was required to complete a 12-week alcohol rehabilitation class and regularly test for alcohol consumption. Applicant successfully completed the rehabilitation class, and the director of the class testified that Applicant was a model student and

occasionally stops by the class and inspire current participants. Applicant testified that he is an alcoholic and no longer consumes alcohol. He has not attended AA since completing the diversion program for his 2021 arrest, although he maintains regular contact with his cousin who is a recovering alcoholic and acted as Applicant's sponsor while he attended court-ordered classes.

Under Guidelines G, E, and J, the SOR cross-alleged Applicant's arrests for DUI in 2000, 2013, 2019, 2020, and 2021. Additionally, under Guideline E, the SOR alleged that Applicant deliberately failed to disclose the 2000 arrest as required on his 2007 SCA, deliberately failed to disclose the 2000 and 2013 arrests on his 2017 SCA, and deliberately failed to disclose the 2000 and 2013 arrests during his 2018 security clearance interview.

The Judge found that Applicant's five DUI arrests supported application of Guideline G disqualifying conditions AG ¶¶ 22(a) and 22(c). Although he testified that he had not consumed alcohol since July 2021 and did not intend to be involved in any further alcohol-related incidents, he made similar assertions prior to his DUI arrests in 2020 and 2021. Moreover, Applicant's recent acknowledgement that he has an alcohol problem is of limited mitigation because he has not attended AA since completing the court-ordered program and there is "limited corroboration as to him being involved in a structured support system." Decision at 11. The Judge concluded that insufficient time had passed to determine that Applicant's alcohol-related behavior is unlikely to recur in the future. She concluded similarly under her Guideline J analysis.

Turning to the Guideline E allegations, the Judge found the evidence insufficient to conclude that Applicant deliberately provided false information about his 2000 arrest during the 2018 interview and resolved that portion of SOR ¶ 2.e in Applicant's favor. She went on to find, however, that Applicant's explanations for the remaining failures to disclose – that he believed he did not have to disclose his arrests and charges because he was not convicted – were not credible and ruled against him on all other Guideline E falsification allegations. The Judge also found that Applicant's five DUI arrests amounted to conduct that "creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group" and established disqualifying condition AG ¶ 16(e).

Discussion

On appeal, Applicant first challenges the Judge's finding that he was untruthful during the various stages of his multiple security clearance investigations, arguing that his evidence established that he did not deliberately provide false answers. With respect to the falsification allegations, the Judge "did not find Applicant credible that he believed he did not have to disclose his arrests and charges because he was not convicted" and concluded that Applicant deliberately failed to disclose the information. *Id*. at 9. The Judge provided robust findings regarding Applicant's multiple, repeated failures to disclose information plainly and explicitly during his investigations, and she sufficiently explained why, based on the complete record, she found his explanations to be incredible. The Board gives deference to such credibility determinations, and we find no cause to disturb the Judge's determination in this matter. Directive ¶ E3.1.32.1.

Applicant also contends that the Judge erroneously found that his participation in an alcohol rehabilitation program was court-ordered when, in fact, it was voluntary. The record reflects that the conditions of the diversion program for Applicant's 2020 DUI included that he "must attend and complete any and all treatment recommended by the Court Referral Officer." Government Exhibit 12. Court records further reflect that, pursuant to his diversion program conditions for both the 2020 and 2021 arrests, Applicant completed level II of the court-ordered alcohol treatment program in January 2022 and level III of the program in March 2023. *See* Applicant Exhibit (AE) F; AE I. The Judge's finding that Applicant's participation in alcohol rehabilitation classes was court-ordered is therefore supported by the record.[1]

Applicant next argues that the Judge's mitigation analysis overlooked his successful participation in the alcohol rehabilitation program and more than two years of sobriety. This argument amounts to a disagreement with the Judge's weighing of evidence, which is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Finally, Applicant argues that, in the more than 15 years that he has worked for DoD, he has never mishandled classified information and he is therefore not a threat to national security. Security clearance adjudications are predictive in nature, and it is foreseeable that individuals with prior good records may nevertheless engage in conduct or undergo circumstances that raise doubts about their future judgment or reliability. *See, e.g.*, ISCR Case No. 03-04927, 2005 WL 1382028 at *5 (App. Bd. Mar. 4, 2005) (citing *Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988)). The Government need not wait until an individual mishandles classified information before it can make an unfavorable security clearance decision. *Id*. (citing *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970)). Rather, an unfavorable clearance decision can be based on circumstances that raise security concerns sufficient to preclude a determination that it is clearly consistently with the national interest to grant or continue a security clearance for a given applicant, such as a significant history of alcohol-related arrests and falsification of security clearance application materials.

Applicant failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for her decision, and the record evidence is sufficient to support the Judge's findings and conclusions. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Egan*, 484 U.S. at 528. "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b).

[1] To the extent that Applicant is arguing that his occasionally stopping by his former rehabilitation class to speak to current attendees or his ongoing contact with his cousin constitutes continued voluntary alcohol treatment, we do not find these arguments persuasive or sufficient to determine the Judge's finding was erroneous.

Order

The decision is **AFFIRMED**.

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board