DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
---	)	ISCR Case No. 19-01192
	)	
Applicant for Security Clearance	)	

Appearances

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

10/07/2019

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Decision

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding personal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On March 16, 2017, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application. On May 31, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (AG) (December 10, 2016) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guideline E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a notarized statement dated June 10, 2019, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on July 15, 2019, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on July 24, 2019. His response was due on August 23, 2019. Applicant timely submitted one document, which was accepted without objection. The case was assigned to me on September 6, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with comments, all of the factual allegations pertaining to personal conduct (SOR ¶¶ 1.a. through 1.d.). Applicant's admissions and accompanying comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 60-year-old employee of a defense contractor. He has been serving as a senior member of the engineering staff with his current employer since December 2006. A 1977 high school graduate, he received a bachelor's degree in 1982, and a master's degree in 1986. He has never served in the U.S. military. In his 2017 e-QIP, Applicant reported that he had never been granted a security clearance, but in his Answer to the SOR, he said that he had been granted one in June 2007. Applicant was married in 1984, and he has two children, born in 1993 and 1995.

Personal Conduct

Applicant has been consuming alcohol since he was 18 years old. From that point, to when he was married in 1984, he consumed an unspecified amount of beer primarily on weekends. Since 1984, Applicant generally drank one beer with dinner, once a month, on average. He contended that the only exceptions to his stated consumption amount and frequency occurred when he was arrested in 2003 and 2013 for operating a vehicle under the influence of liquor or drugs (DUI). (Item 3, at 4) He claimed that both of those incidents, described further below, occurred when he was "unexpectedly invited" to dinner. (Answer to the SOR, at 2)

Applicant estimated that it would take around two to three beers to become intoxicated or "buzzed" as he described it. Besides his two DUIs, Applicant claims that alcohol has not caused or contributed to any other problems in his life. He denied having

received any alcohol treatment or counseling. He denies having a problem with alcohol, and he intends to continue his current use of alcohol. (Item 3, at 4-5)

On June 30, 2003, Applicant and work colleagues were celebrating a new contract that had been awarded to their employer, and he was invited to join the group for an after-work dinner. During dinner, he consumed five beers. While driving home, his vehicle side-swiped a guard rail, and he was stopped by the police. Applicant was administered a field sobriety test, which he failed, and he was arrested and charged with DUI. He was eventually transported to a location where he was administered a breathalyzer test, and it registered .10 percent blood alcohol content (BAC). (Item 3, at 4) On December 3, 2003, Applicant appeared in court. Although he entered a plea of not guilty, he was found guilty as charged. He was fined a total of $607; his operator's license was revoked for six months; and he was ordered to attend the Intoxicated Driver Resource Center (IDRC) for a two-day, 12-hour educational/screening program. (Item 5; Item 3, at 4)

Applicant contends that when he attended the IDRC program, he was informed by an unidentified source that a DUI is not a criminal offense, but rather it is considered a driving violation. Because he wanted to get or keep a particular job, when Applicant subsequently completed an e-QIP in December 2006, he reportedly asked his employer and the security officer if he had to include "driving violations" on his e-QIP, and he said they told him that "driving violations" did not need to be included. Accordingly, Applicant did not include his 2003 DUI on his e-QIP. (Answer to the SOR, at 3; Response to the FORM) That action was not alleged in the SOR. Applicant's description of a DUI in the state where the DUIs occurred is correct, for a DUI in that state is considered merely a traffic violation, and not a criminal misdemeanor, except in certain instances.

Unalleged conduct can be considered for certain purposes, as discussed by the DOHA Appeal Board. (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3.). *See* ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). *See also* ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant's unalleged omission, concealment, and falsification regarding his history of alcohol consumption described above, will be considered only for the five purposes listed above.

On February 14, 2013, after attending a funeral of a high school classmate, Applicant claims he was unexpectedly invited to have dinner with some other high school friends. He furnished two versions of what occurred next. During his July 2018 interview with an investigator from the U.S. Office of Personnel Management (OPM), he said he consumed one glass of wine with dinner, and then the group went to a bar where, over a period of around two hours, he consumed three beers. (Item 3, at 3) However, in his Answer to the SOR, Applicant said he consumed three glasses of wine with dinner, and

he made no mention of consuming alcohol at a bar. (Answer to the SOR, at 2) Applicant left his final drinking location on February 15, 2013, and while driving home, at about 12:15 a.m., he fell asleep and crashed into a telephone poll. Applicant was administered a field sobriety test, which he failed, and he was arrested and charged with DUI. He was eventually transported to a location where he was administered a breathalyzer test, and it registered .10 percent BAC. (Item 3, at 3) On September 11, 2013, Applicant appeared in court. Although he entered a plea of not guilty, he was found guilty as charged. He was fined a total of $864; his operator's license was revoked for two years; he was ordered to attend the IDRC for a two-day, 12-hour educational/screening program; he was ordered to perform 30 days of community service; and he was required to have an interlock device installed on his vehicle for one year. (Item 4; Item 3, at 3-4)

The SOR alleged that Applicant did not report his February 2013 DUI arrest and conviction to his facility security officer as required by the National Industrial Security Program Operating Manual (NISPOM), Chapter 1, Section 3, Paragraph 1-300. Applicant admitted the allegation, but he claimed that he did not think it was necessary to do so because he had received a security clearance in June 2007 after his earlier DUI. (Answer to the SOR, at 3) The cited reference states:

> Contractors are required to report certain events that have an impact on the status of the facility clearance (FCL), that impact on the status of an employee's personnel clearance (PCL), that affect proper safeguarding of classified information, or that indicate classified information has been lost or compromised. Contractors shall establish such internal procedures as are necessary to ensure that cleared employees are aware of their responsibilities for reporting pertinent information to the FSO, the Federal Bureau of Investigation (FBI), or other Federal authorities as required by this Manual, the terms of a classified contract, and U.S. law. Contractors shall provide complete information to enable the [Cognizant Security Agency] to ascertain whether classified information is adequately protected. Contractors shall submit reports to the FBI, and to their CSA, as specified in this Section.

NISPOM Chapter 1, Section 3, Paragraph 1-302, addresses reports that contain adverse information that contractors are supposed to submit to their CSA, and NISPOM Appendix C provides the following definition of "Adverse Information":

> Any information that adversely reflects on the integrity or character of a cleared employee, that suggests that his or her ability to safeguard classified information may be impaired, or that his or her access to classified information clearly may not be in the interest of national security.

On March 16, 2017, when Applicant completed his e-QIP, he responded to a question pertaining to his consumption of alcohol found in Section 22 – Police Record. That question, and the one alleged in the SOR, was as follows: "Have you EVER been charged with an offense involving alcohol or drugs?" Applicant answered "no" to the question. (Item 2, at 23) He omitted and concealed his two admitted DUI arrest and

convictions. He certified that his response to that question was "true, complete, and correct" to the best of his knowledge and belief, but, because of his omission and concealment, the response to that question was, in fact, false. Applicant subsequently explained that his response was based on the same reasoning that he used when he completed his December 2006 e-QIP: a "driving violation" was not required to be reported.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). "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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The

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

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (*See* Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:
>
> (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes examples of conditions that could raise security concerns for Personal Conduct under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

Excessive alcohol consumption often leads to the exercise of questionable judgment, and can raise questions about an individual's reliability and trustworthiness. As noted above, Applicant was convicted of DUI in both 2003 and 2013. He failed to report his 2013 DUI to his FSO, and when he submitted his 2017 e-QIP, he omitted and concealed both of the DUIs and falsified his response to an inquiry that asked: ”Have you EVER been charged with an offense involving alcohol or drugs?” That response was false, and Applicant was somewhat disingenuous in claiming that since a DUI in that particular state is not a criminal offense, he could deny the DUIs because they were “driving violations.” The specific language of the question was “an offense involving alcohol,” not a “criminal offense” involving alcohol. Furthermore, Applicant’s statement that he previously inquired of his employer and FSO about “driving violations,” not specifically a DUI, seems to indicate that he carefully avoided referring to his “driving violation” as being alcohol-related. With respect to SOR ¶¶ 1.a. and 1.b., AG ¶ 16(c) applies. With respect to SOR ¶ 1.c., AG ¶ 16(a) applies. However, with respect to SOR ¶ 1.d., AG ¶ 16(b) has not been established for the reasons set forth below.

The NISPOM clearly requires that contractors report certain events that have an impact on the status of an employee’s personnel clearance, and that in doing so, contractors shall establish such internal procedures as are necessary to ensure that cleared employees are aware of their responsibilities for reporting pertinent information.

In this instance, there is no evidence that the contractor fulfilled its responsibilities to train its employees generally, or Applicant specifically, on what types of incidents are required to be reported. The NISPOM does not specify, using examples such as drug involvement, maladaptive alcohol use, failure to file income tax returns, etc., other than generally, as to what types of incidents constitute adverse information. While a DUI may constitute such an incident, it is unclear if it might adversely reflect on the integrity or character of a cleared employee such as Applicant, or if it suggests that his ability to safeguard classified information may be impaired.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from Personal Conduct. They include:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (c) the offense is so minor, or so 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; and
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

None of the conditions apply. Although Applicant finally revealed his history of alcohol consumption and the alcohol-related incidents associated with it during his July 2018 OPM interview, he made no efforts to correct the omission, concealment, or falsification associated with his 2017 e-QIP. Although a DUI in the state where these two occurred is not considered a criminal offense, it is not a minor offense. While there were two DUIs during on ten-year period, neither of the DUIs happened under unique circumstances. Furthermore, because Applicant's future intention is to continue his current usage of alcohol, believing he has no problem with alcohol, it is not unlikely that that history will repeat itself if Applicant should be "unexpectedly invited" to dinner where he will consume alcohol to excess. Applicant's lack of candor, and his attitude towards laws, rules, and regulations while seeking eligibility for a security clearance, under the circumstances continue to cast doubt on his current reliability, trustworthiness, and good judgment.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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.

Under SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (*See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some evidence mitigating Applicant's conduct. Applicant is a 60-year-old employee of a defense contractor. He has been serving as a senior member of the engineering staff with his current employer since December 2006. A 1977 high school graduate, he received a bachelor's degree in 1982, and a master's degree in 1986. Applicant was granted a security clearance in June 2007.

The disqualifying evidence under the whole-person concept is more substantial. Applicant is not a reliable or candid historian regarding his history of maladaptive alcohol use because of his inconsistent statements in which he either denied, concealed, or omitted significant portions of his history. Applicant claimed that since 1984, he generally drank one beer with dinner, once a month, on average. He also contended that the only exceptions to his stated consumption amount and frequency occurred when he was arrested in 2003 and 2013 for DUI. He claimed that both of those incidents occurred when he was "unexpectedly invited" to dinner. In both his 2006 and 2017 e-QIPs, Applicant omitted and concealed the DUIs and falsified his response to an inquiry that asked: "Have you EVER been charged with an offense involving alcohol or drugs?" Instead of being candid, Applicant chose to ignore the clear meaning of the question about offenses involving alcohol, and instead substituted the words "driving violations," without any relationship with alcohol.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his personal conduct. *See* SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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 E:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.c.:	Against Applicant
Subparagraph 1.d.:	For 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.

ROBERT ROBINSON GALES
Administrative Judge