DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 19-03083
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

06/24/2020

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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 (SCA) on July 5, 2016. On December 11, 2019, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (CAF), sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The 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).

Applicant answered the SOR on January 16, 2020, and requested a decision on the written record without a hearing. Department Counsel submitted the Government's

written case on April 10, 2020. On April 14, 2020, 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. He received the FORM on April 21, 2020, and responded with a two-page statement (Applicant's Exhibit (AX) A), a two-page press release about his current employer (AX B), and a one-page statement from his lawyer reflecting his intention to appeal the conviction alleged in SOR ¶ 1.b (AX C). All three exhibits were admitted without objection. The case was assigned to me on June 11, 2020.

The FORM included a summary of an interview by a security investigator on November 9, 2017. Applicant objected to the interview summary, which was not authenticated as required by Directive ¶ E3.1.20. I have sustained his objection and have not considered the interview summary in my decision.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a, 1.b, and 2.a, with explanations. His admissions are incorporated in my findings of fact.

Applicant is a 36-year-old engineer employed by defense contractors since January 2009. (AX A.) He has never married and has no children. He worked for a federal contractor as a computer programmer from September 2005 to February 2006 and for non-government employers from March 2006 to December 2008. He received a bachelor's degree in computer science in September 2006. His SCA reflects that he received a security clearance in July 2006 and is seeking to continue that clearance. (FORM Item 2 at 35.)

On January 1, 2008, Applicant was arrested for driving under the influence (DUI). He was convicted on April 3, 2008, fined $1,488, placed on probation for 18 months, and sentenced to jail for 10 days, with 9 days suspended. He was required to undergo an alcohol evaluation and counseling, attend a victim-impact panel, and install a vehicle ignition interlock. (FORM Item 2 at 29-30.) On December 30, 2010, he submitted an application to set aside the judgment and order on the ground that he had fulfilled the conditions of the probation. His application was granted on January 5, 2011, and his conviction was set aside. (GX 2 at 29; Answer at 7-8.)

On September 3, 2017, while Applicant's application to continue his security clearance was pending decision, he was arrested for speeding and DUI. (FORM Item 5.) When asked by a police officer whether he had been drinking, he declined to answer. He declined a request to undergo a field-sobriety test or provide a breath sample. He requested an opportunity to talk to a lawyer. The police officer allowed him to call a lawyer and observed him talking to someone. The police officer declined to allow him to attempt to contact another lawyer. The police officer obtained a search warrant from a magistrate, obtained a blood sample, and allowed Applicant to go home in a ride-share vehicle. The laboratory analysis of Applicant's blood sample reflected a blood-alcohol content (BAC) of .183. (FORM Item 5.)

At Applicant's trial in June 12-13, 2019, he requested that he be given the chromatograms for his blood samples. The trial judge deferred ruling until the state's expert from the laboratory testified. It is not clear from the record whether Applicant renewed his request after the state's expert testified. The jury acquitted him of DUI but convicted him having a BAC of more than .08 and "Extreme DUI," with a BAC of more than .15. In July 2019, he was fined $2,779; sentenced to jail for 180 days, with 171 days suspended; and placed on probation for 36 months, with 12 months on supervised probation and 24 months on unsupervised probation. The terms of his probation include alcohol screening and evaluation, treatment, attending a victim-impact program, violating no laws, and possessing or consuming no alcohol. (SOR Answer at 9.) The sentence and probation were stayed pending his appeal.

In October 2019, Applicant appealed his conviction, alleging that he was illegally detained following the initial traffic stop, that the arresting officer lacked probable cause to arrest him, that the arresting officer violated his right to counsel, and that the trial court erred by denying his request for disclosure of the chromatograms from his blood test. (SOR Answer at 10.) On April 9, 2020, the state superior court upheld Applicant's conviction. (FORM Item 6.)

In Applicant's response to the FORM, he admitted his September 2017 DUI. He included a letter from his attorney dated April 29, 2020, stating that he was appealing to the state court of appeals and raising the constitutional violations that were raised before the state superior court. His appeal does not contradict his admission that he was intoxicated, but focuses on constitutional issues. (AX C.)

In Applicant's answer to the SOR, he stated that he moderated his alcohol consumption after his DUI conviction in 2008, either limiting his consumption to two alcoholic beverages at a sitting or parking his vehicle and taking a cab home after drinking. He submitted no evidence reflecting how often he exceeded his two-drink limit and by how much. He stated that he had not consumed any alcohol at entertainment establishments since his arrest, and that he now spends considerable time biking and hiking. (SOR Answer at 1-2.) In his response to the FORM, he stated that he now focuses on off-duty activities that do not involve drinking and has not visited a drinking establishment since his arrest. (AX A at 2.) He submitted no evidence in his SOR answer or his response to the FORM reflecting his drinking habits at home.

Applicant was required to undergo counseling after his DUI conviction in 2008. There is no evidence in the FORM that he was diagnosed with an alcohol-abuse disorder or that he was advised by a medical professional to abstain from alcohol or moderate his consumption. The conditions of his probation after his second conviction included alcohol screening, evaluation, treatment, attending a victim-impact panel, and abstinence from alcohol, but these requirements were stayed pending his appeal. He submitted no evidence of treatment or counseling after his conviction in June 2019. His answer to the SOR and response to the FORM indicate his intention to moderate his alcohol consumption but not to abstain.

In April 2019, Applicant was nominated for a $500 bonus in recognition of his contributions to the company, "going above and beyond the expectations for [his] job position. His team lead commented that he "consistently over-delivered more quickly than expected and provided extraordinary value to the team." (SOR Answer at 4.) A co-worker for the past 10 years has never him "reason to doubt his integrity or trustworthiness. The co-worker respects him for his consistent work ethic and technical excellence. (SOR Answer at 5.) Applicant's chief engineer and immediate supervisor states: "His work is impeccable attention to detail second to none. . . . Never once during our tenure as colleagues has [Applicant] demonstrated anything less than professional character and attitude in the workplace." (SOR Answer at 6.)

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

SOR ¶ 1.a alleges Applicant's arrest and conviction of DUI in January 2008, and SOR ¶ 1.b alleges Applicant's arrest for DUI in September 2017 and his subsequent conviction in June 2019. 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 under this guideline are potentially applicable:

> 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
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> 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.

Applicant's admissions and the documentary evidence in the FORM establish AG ¶ 22(a). His BAC level after his DUI arrest in September 2017 establishes AG ¶ 22(c). The National Institute on Alcohol Abuse and Alcoholism defines "binge drinking" as "a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 percent or above," which typically occurs when a man has five or more drinks or a woman has four or more drinks within a two-hour period. Centers for Disease Control and

Prevention, *Fact Sheets – Binge Drinking,* www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm.

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 judgment;
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> 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;
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> AG ¶ 23(c): the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and
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> 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. The first prong of AG ¶ 23(a) ("so much time has passed") focuses on whether the conduct was recent. There are no "bright line" rules for determining when conduct is "recent." 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).

Applicant's September 2017 DUI was more than two years ago. His two DUI arrests were more than nine years apart. In his answer to the SOR, he stated that he moderated his alcohol consumption after his DUI conviction in 2008, either limiting his consumption to two alcoholic beverages at a sitting or parking his vehicle and taking a cab home after drinking. He submitted no evidence reflecting how often he exceeded his two-drink limit and by how much. He submitted no evidence reflecting his drinking habits at home. The evidence is insufficient to establish reform or rehabilitation.

AG ¶ 23(b) is not fully established. Applicant has acknowledged his maladaptive alcohol use, but he provided no evidence of counseling or treatment after his second DUI conviction. His answer to the SOR indicates that he intends to moderate his alcohol consumption but not to abstain. It is too soon to determine whether he will adhere to his

goal of moderate consumption after the combined pressures of litigating his conviction and qualifying for continuance of his security clearance are lifted. He has not demonstrated a "clear and established pattern of modified consumption."

AG ¶¶ 23(c) and 23(d) are not applicable, because there is no evidence that Applicant sought or received counseling or treatment after his most recent DUI conviction.

Guideline J, Criminal Conduct

SOR ¶ 2.a cross-alleges the conduct alleged in SOR ¶¶ 1.a and 1.b 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."

The evidence of Applicant's two DUI convictions and his ongoing probation establish the following 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
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> 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.

AG ¶ 31(c) ("individual is currently on parole or probation") is not established. The probation imposed after Applicant's second DUI conviction was stayed pending his appeal, which is still pending.

The following mitigating conditions are potentially applicable:

> 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
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> 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. Applicant has expressed remorse, and he is well respected at his place of employment. However, he is facing the punishments

imposed by the trial court if his appeal is unsuccessful, and insufficient time has passed to determine that his maladaptive alcohol use is unlikely to recur once he is relieved of the pressure of litigating his conviction, complying with the terms of his probation if his appeal is unsuccessful, and qualifying to continue his security clearance.

Applicant's appeal seeks to exclude evidence on constitutional grounds. DOHA proceedings are administrative and civil in nature, and they are not conducted with a strict application of evidentiary rules required in criminal cases. The federal exclusionary rule for illegally obtained evidence is not applicable to DOHA administrative proceedings. ISCR Case No. 11-05079 (App. Bd. Jun. 6, 2012), *citing* ISCR Case No. 02-012199 at n. 7 (App. Bd. Aug. 8, 2005; *see also* ISCR Case No. 95-0792 (App. Bd. Jun. 27, 1996). Applicant has admitted that he was found guilty of the two DUIs, and his assertion of unconstitutional behavior by the police and state authorities has limited relevance to his suitability for a security clearance.

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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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.

I have incorporated my comments under Guidelines G and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have considered Applicant's acknowledgement of his maladaptive alcohol consumption, his 11 years of service in support of national defense, and his reputation for integrity, trustworthiness, and attention to detail. Because he 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).

"Once 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 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). 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:

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	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