DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-00570
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

02/07/2022

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Decision

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MURPHY, Braden M., Administrative Judge:

Applicant mitigated the security concerns under Guideline G, alcohol consumption, as he has moderated his drinking. The sole allegation under Guideline K is also mitigated as an isolated incident. However, personal conduct security concerns under Guideline E over Applicant's employment record as a whole, as well as his lack of candor during the security clearance process, are not mitigated. That conclusion also precludes a finding that Applicant's criminal conduct is mitigated under Guideline J, since falsification of a security clearance application constitutes subsequent criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

Applicant seeks renewed eligibility for a security clearance. On November 20, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant alleging security concerns under Guideline G (Alcohol Consumption) Guideline J (Criminal Conduct), Guideline K (Handling Protected Information), and Guideline E (Personal Conduct). The DOD issued the SOR 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on December 11, 2020, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on May 7, 2021. On June 11, 2021, DOHA issued a notice scheduling the hearing for July 6, 2021.

The hearing convened as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through 9, all of which were admitted without objection. Applicant testified and submitted five documents, marked as Applicant's Exhibits (AE) A through E and admitted without objection.

At the end of the hearing, I held the record open until July 13, 2021. I requested that Department Counsel provide a copy of the portions of the National Industrial Security Program Operating Manual (NISPOM) that were cited under Guideline K in the SOR. Department Counsel did so. These excerpts are marked as Hearing Exhibit (HE) III.

I also allowed Applicant the opportunity to submit additional post-hearing documents. On July 13, 2021, he submitted 24 pages of certificates and other documents regarding his recent cybersecurity training. His e-mail and materials are marked as AE F. On July 15, 2021, Applicant submitted 104 pages of additional materials he thought had been previously submitted. This included a Declaration of Federal Employment, dated April 4, 2020 (AE G), and numerous certificates, memoranda, and "Mandatory Core Training Lists" which detail the professional training and education he was required to complete through DOD and other government agencies, annually or otherwise, between 2017 and 2021. (AE H) Applicant's post-hearing exhibits are admitted without objection. The record closed on July 15, 2021. DOHA received the transcript (Tr.) on July 19, 2021.

Findings of Fact

Applicant admitted the allegations at SOR ¶¶ 1.a, 1.b, 2.a, and SOR ¶¶ 4.a – 4.g, all without further comment. He denied the allegations at SOR ¶¶ 3.a, 4.h, 4.i, and 4.j, all with narrative explanations. He did not answer SOR ¶ 2.b, but it is a cross-allegation of subparagraphs ¶¶ 1.a and 1.b, both of which he admitted. Applicant's admissions and explanations are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 48 years old. He has never married and he has no children. (Tr. 52) He earned a bachelor's degree in 1996. He has taken subsequent graduate classes and is about four credits shy of a master's degree. (Tr. 53, 63; GE 3 at 11-12)

Applicant's employment history is detailed in security clearance applications (SCAs) he submitted in connection with his employment, in January 2010 (GE 1),

February 2015 (GE 2), and January 2018 (GE 3) and an SF-85P application for a position of public trust in September 2018. (GE 5) Applicant also submitted a Declaration for Federal Employment (DFE) in September 2018. (GE 4)

From 2007 until July 2012, Applicant worked in various classified positions with a variety of defense contractors. (GE 1 at 17-22, 46, GE 2 at 15) He has held various positions in the IT field, mostly as a contractor, in the years since. Since July 2017, Applicant has worked for his current employer and clearance sponsor, defense contractor S. (GE 5 at 10) He has held a clearance for about 15 years, and he also holds a clearance with another government agency (AGA). (Tr. 13, 53-54, 141-142) At the time of the hearing, he had an annual salary of $120,000. (Tr. 143)

From July 2012 to July 2013, Applicant worked for another department of the U.S. Government as an information security specialist. He testified that he had nationwide responsibility for IT security regarding the Affordable Care Act (ACA), working with each of the 50 states. He described the experience as "a nightmare." He had no prior government experience, and little to no support. He said he had "no idea what to do." He missed deadlines and acknowledged that he "failed to perform up to the expectations" of the job. He said it was "completely my fault." (Tr. 55-57) Following a written warning in January 2013, Applicant was terminated from that position in July 2013 for unsatisfactory performance. (SOR ¶¶ 4.f, 4.g) (GE 2 at 13-14) As Department Counsel acknowledged, the "internet rollout" of the ACA had significant problems, as was widely publicized at the time, and Applicant was by no means solely responsible. (Tr. 98-99) Applicant said he did not have any personality conflicts, and praised the interpersonal and professional skills of his co-workers there. (Tr. 99-100)

Shortly thereafter, in July 2013, Applicant began working for government contractor C. He said he loved his job, which involved travelling to Army bases nationwide and testing IT equipment. He also said the job was in a very stressful environment with lots of travel and little sleep. He said he did not get along with his boss. Following two written warnings, in September 2013 and December 2013 (SOR ¶¶ 4.f, 4.e), Applicant was placed on a probationary performance plan. In about April 2014, he and his boss got into a heated argument. Applicant was terminated soon thereafter for failing to perform to expectations and for losing his temper. (SOR ¶ 4.c) (GE 2 at 12-13, GE 7; Tr. 58-59, 101-102) He did not dispute his employer's version of his work performance. (Tr. 60) He believes they were looking to get him to resign. (Tr. 101-102)

In June 2014, Applicant began working part time for another federal contractor, T. (GE 2 at 11; Tr. 60-62, 107-110) Beginning in December 2015, he also began working full time for another contractor, M. (Tr. 61-62) He worked both jobs until July 2017, when he was terminated by contractor T for unsatisfactory performance, after he missed some important deadlines for the customer (another large defense contractor) because he did not have enough time to devote to the work. (SOR ¶ 4.a) (Tr. 61-62, 110-112) However, Applicant was otherwise well-regarded by contractor T. (Tr. 110-112 and AE E, a July 2017 letter from the president of contractor T)

Guideline K:

In May 2017, Applicant was working for contractor M at an Army facility. He said he was not in a "SCIF" (Sensitive Compartmented Information Facility) but did have access to what he called a "simulated" SIPRNet, which he asserted had not been fully accredited. (Tr. 108-109; Answer) While there, he received an unclassified e-mail from Ms. M, his government supervisor, the contractor office's representative (COR). (Tr. 44) The e-mail listed all of the names of the systems within the lab that were supported by his then employer. Some of the systems processed classified information. The e-mail was labeled as "unclassified," but the spreadsheet document contained the names of some classified systems. (Tr. 36) Applicant was supposed to complete appropriate "patches" for that particular week on the document and then return it to Ms. M, per her instructions, which he did. (Tr. 36, 46; Answer)

Applicant acknowledged in his testimony that he should have encrypted the list when he returned it, but he said the list was also not encrypted when he got it. "I didn't think it needed to be encrypted because of the publically available information and there was no classified information in the e-mail." (Tr. 47) He said that he believes that the COR should have known that "she was setting someone up for aggregation" of classified information. (Tr. 48)

Applicant also denied that any classified spillage took place, because "nowhere within the SEC community classification guide does it say that the names of any classified systems were themselves classified." (Tr. 42) This assertion is unsupported. He said it was the aggregation of certain information that was classified. (Tr. 43) He denied moving any classified information onto an unclassified system. (Tr. 44; Answer)

Applicant said he was he was "accused of committing aggregated spillage." He indicated in his testimony and in his Answer that he was pressured to sign a security form acknowledging culpability for the spill. (Answer) He believes he was "intimidated into telling the government that it was my fault and [that] I'll never do it again." (Tr. 37, 48) The security form referenced by Applicant is not in evidence.

The Government's evidence includes a May 10, 2017 memo from the Army command to Applicant's employer that names Applicant as "the originator of a classified spillage that occurred on 5 May 2017." (GE 8 at 3; GE 8 at 6) In its memo, the Army cited Army Regulation 25-2, Information Management, Information Assurance, Paragraph 4-14, Personnel Security Standards; subparagraph b.(6): "New, credible, derogatory information revokes any standing waiver and results in immediate denial of access to IT systems." (GE 6 at 3)

As a result, Applicant's access to the government customer's information technology (IT) system was suspended that day, pending the results of an Army inquiry. (GE 8 at 3) As a result, Applicant could not perform his duties for contractor M, so he was terminated, on May 12, 2017. (GE 8 at 6, Tr. 49-52) (SOR ¶¶ 3.a, 4.b)

The termination memo to Applicant from his employer began, "This letter serves as your official notice that you have been removed from contract due to unintentional classified spillage." (GE 8 at 4) (Emphasis added) This conclusion comports with Applicant's testimony that his actions were unintentional and not deliberate. (Tr. 50-51, 103-104) He continues to believe that the information at issue in the incident was not in fact classified; and he attested that others working in the lab told him this as well. (Tr. 106-107) However, Applicant stated at the hearing that he acknowledged to his employer at the time that he was culpable for the incident. (Tr. 105-106)

Applicant testified that he was verbally informed of the government customer's concerns about the spillage incident, but was not given an opportunity to respond, either verbally or in writing. (Tr. 103-104) He said he "strongly disagreed with the decision to terminate him, and he said he "did not spill or aggregate classified information." He believes that the government supervisor should have "retracted" (i.e., redacted) or encrypted the information. (Tr. 37-39) He said he was not aware of the result of any government investigation into the incident, and he is not aware that his clearance itself was ever suspended. (Tr. 54-55, 139) Nor is there documentation of any such investigation in the record.

Applicant said he had no other employment issues at contractor M before he was terminated over the spillage incident. (Tr. 107) He said he was told he was eligible for rehire. (Tr. 37) Applicant also noted his stellar security record, with no violations, and said this would not happen again. (Tr. 39-40)

The Government did not offer testimony of any expert witness in the security field regarding whether the spillage was in fact classified; whether it was due to Applicant's culpability; whether Applicant's actions were deliberate, negligent, or inadvertent; and what damage to national security resulted from the spill, if any. Beyond the May 2017 letter from the Army on the matter (GE 8), the Government offered no evidence of the conclusions of any investigating authorities. Nor did the Government offer any testimony about applicability of any of the NISPOM paragraphs cited in the SOR.

Guidelines J & G:

In August 2007, Applicant was arrested and charged with driving under the influence of alcohol. (DUI) (SOR ¶ 1.b) He explained that he was drinking at a pub one evening and was pulled over on his way home after making a left turn at a red light. He failed a roadside breathalyzer test. He was cited or ticketed, and allowed to take a cab home. He said he was not arrested. He went to court in August 2007 and received one year of probation including a six-month alcohol awareness group therapy program. He completed the program early, in April 2008. (Tr. 64-65; GE 1 at 45, 93-96) Applicant was required to abstain from alcohol while on probation, but resumed drinking casually once his probation ended. (Tr. 94-95)

In June 2017, Applicant was out one night at a nightclub and restaurant with a friend. Applicant had about three beers and two shots. While driving the friend home in the early morning hours, he crossed the center line and was pulled over by police. After

failing a roadside sobriety test and refusing a breathalyzer, he was arrested and charged with driving while impaired by alcohol (DWI) (SOR ¶ 1.a (Tr. 118-119) He was later allowed to call a cab. Applicant acknowledged at his hearing that he had had too much to drink, and that it was "completely my fault." (Tr. 66) He pleaded guilty and was sentenced to two years of probation. He also spent three weekends in jail. (Tr. 65-66, 69)

In July 2017, Applicant was evaluated and found appropriate for a 26-week outpatient substance abuse treatment program. No diagnosis of an alcohol use disorder was indicated. (Tr. 67-68, 72; AE B) The program consisted of group sessions. Applicant was an active and positive participant and was regarded as a model client. He completed the program successfully in early March 2018. (AE B)

In November 2017, while on probation for the DWI, Applicant was arrested and charged with a probation violation, after he attempted to purchase a firearm in a neighboring state. (SOR ¶ 2.a) Applicant testified that during this period, when he was "going in and out of jail" on weekends, he would make himself feel better by "buying things." He saw a shotgun that he thought his father would like as a gift. The best deal for the gun was in a neighboring state, where there was no sales tax, so he went there to purchase the weapon. (Tr. 73-74) The attempted firearms purchase was disallowed because of the background check. (Tr. 143-144) Applicant does not own any firearms. (Tr. 74)

Applicant testified that he was not aware that his actions were prohibited while on probation, because he did not read the full details of his probation document and other available information detailing the restrictions. (Tr. 73, 124) His DWI charge came up in the background check for the firearms purchase. A warrant was issued, and he was arrested. Applicant had to perform 10 hours of community service as a result, which he completed in May 2018. (Tr. 68, 71; AE C, AE D) Applicant acknowledged the probation violation was his fault. (Tr. 73) He testified that he reported the violation to his employer. (Tr. 124)

Applicant testified that there was no other negative impact on his probation for the DWI. He completed probation successfully in August 2019. (GE 6 at 3; Tr. 69) He has had no other charges. (Tr. 143)

Applicant said he was required to abstain from drinking while on probation for two years, and did so. (Tr. 119-120) He said that since his second alcohol offense, he has significantly curtailed his drinking. He recalled having "a drink or two" at home on Memorial Day and on the July 4th weekend (2021), but otherwise, "I really don't drink much at all." And he does not drink and drive "no matter how much I've been drinking." (Tr. 71, 119, 123) He said he now consumes alcohol once a week or less ("if that."). He said he consumes at most, three beers, and not to intoxication. (Tr. 120-122) Applicant said he was not currently in any alcohol counseling or therapy and does not believe he has an alcohol problem. (Tr. 122-123)

Guideline E:

Having submitted an SCA in January 2018 (GE 3), Applicant had a related background interview on September 13, 2018. (GE 6 at 5-10) Days later, on September 17, 2018 (addendum signed September 18, 2018), Applicant submitted a Declaration for Federal Employment (GE 4), for a job application with another government department. (Tr. 88-89) He then submitted a Questionnaire for Public Trust Positions (SF-85P). on September 27, 2018. (GE 5) The record does not contain a subsequent background interview after GE 4 and GE 5.

The Guideline E allegations in the SOR concern Applicant's allegedly deliberate failure to disclose some of his arrests and some of his employment terminations on his January 2018 SCA and his September 2018 SF-85P application. Applicant denied all allegations of deliberate falsification in the SOR. (Answer; Tr. 74)

Alleged Falsifications relating to Arrests:

SOR ¶ 4.h alleges in part, that in answering a series of questions on his January 2018 SCA with a seven-year timeframe ("In the past seven (7) years …"), Applicant failed to disclose his first DUI in 2007. (GE 3 at 35) During questioning at his hearing, it became clear that Applicant had no duty to disclose that offense in answer to those questions, since it occurred in 2007, 11 years prior. (Tr. 75-82)

Applicant acknowledged, however, that he also did not list his 2007 DUI in answer to other questions on GE 3, such as "Other than those offenses already listed, have you EVER had the following happen to you? . . . Have you EVER been charged with an offense involving alcohol or drugs?" (GE 1 at 37) Falsification of that question was not alleged in the SOR.

Applicant had disclosed his 2007 DUI on his 2010 SCA, and detailed the circumstances of the arrest, his court case, and alcohol awareness program. (GE 1 at 43-45; Tr. 96-98) He did not list the 2007 DUI on his 2015 SCA, in answer to a question, "Have you EVER been charged with an offense involving alcohol or drugs." (GE 2 at 31-32) When asked why he did not list the 2007 DUI in answer to that question, Applicant said he "must have misinterpreted the question and that it was another seven-year question." He asserted that he would not have "intentionally tried to hide something I already [had] previously disclosed." (Tr. 115, 116) This omission was not alleged in the SOR as a deliberate falsification.

Applicant also explained that when he was interviewed in 2015 about his previous SCA, he was told by the interviewing agent that he did not have to discuss his 2007 DUI after that interview. (Tr. 75-78, 117-118) Applicant also volunteered the 2007 DUI in his September 2018 background interview (GE 6 at 10) and listed it on his September 2018 SF-85P. (GE 5 at 27)

On his January 2018 SCA, Applicant disclosed his 2017 DUI, but did not disclose his November 2017 probation violation arrest for the attempted gun purchase. (GE 3 at 35) This omission is alleged as an additional deliberate falsification in SOR ¶ 1.h.

Applicant acknowledged that he should have disclosed his 2017 probation violation arrest on GE 3. He asserted that he told his security chief and program manager about it, but this is uncorroborated. He denied intentionally failing to disclose it and said he must have overlooked it or misinterpreted the question. (Tr. 82) However, Applicant acknowledged that in January 2018, the charge from the November 2017 probation violation was pending, and had yet to be adjudicated. (Tr. 144-147) As such, he should have disclosed it in answer to the question, "Are you currently on trial or awaiting a trial on criminal charges." (GE 3 at 35) That omission, however, was not alleged in the SOR as a deliberate falsification. The summary of Applicant's September 2018 background interview reflects that he voluntarily disclosed the arrest and the violation to the interviewer. (GE 6 at 9)

When he prepared his September 27, 2018 SF-85-P, Applicant disclosed both the 2007 DUI arrest and the 2017 DWI arrest, but, again, not the subsequent 2017 probation violation arrest, in answer to a question about his criminal history with a seven-year timeframe. (SOR ¶ 4.j) Of this omission, Applicant said, "I don't know why I would intentionally deny it. Maybe because it hadn't gone to trial yet, I'm not sure." (Tr. 83) In fact, the document regarding Applicant's completion of the 10 hours of work release shows a trial date of March 27, 2018, and that he completed the required community service a month later, so the charge was no longer pending by September 2018. (AE D)

Asked why he failed to list his 2017 probation violation arrest on either GE 3 or GE 5, Applicant said, "I don't know why I wouldn't have, Your Honor. I discussed it with both investigators. It must have been an oversight on my part and I'm sorry." (Tr. 90, 130-131)

Alleged Falsifications relating to Employment Terminations:

SOR ¶ 4.i concerns several employment-related falsification allegations on Applicant's September 2018 SF-85P. (GE 5) In answer to a question calling for disclosure of all employment terminations in the past seven years, Applicant disclosed his 2017 termination from contractor M (SOR ¶ 4.b), but he did not disclose his other terminations, from contractor T in July 2017; from contractor C in April 2014 (SOR ¶ 4.c); or from his federal job in January 2013 (SOR ¶ 4.g).

When asked why he did not disclose these other terminations on GE 5, Applicant testified that he had filled out a lot of SCAs and SF-85Ps in the past, and believed he had disclosed them previously. He asserted that the errors he made on his various applications were honest mistakes, and were not an attempt to "obfuscate any sins or past indiscretions whatsoever." (Tr. 91)

On his 2015 SCA, Applicant disclosed his termination from another government department and provided extensive details. (GE 2 at 13-15) He also disclosed his April 2014 termination from contractor C and noted that he had been fired because the customer was not satisfied with his work, (GE 2 at 12-13)

On his January 2018 SCA, Applicant disclosed his July 2017 termination from contractor T, and noted that the customer, a large defense contractor, "didn't need my input anymore." (GE 3 at 14-15; Tr. 125). He disclosed his 2017 termination from contractor M, said that he "left by mutual agreement following charges or allegations of misconduct," noted the spillage incident, and said he had been removed from the contract, but was subject to rehire. (GE 3 at 16; Tr. 125)

On his January 2018 SCA, Applicant also noted other terminations, from contractor C, in April 2014 and from the federal department job, in July 2013, but he gave no details. (GE 3 at 17-18) He also answered "No" in answering questions calling for disclosure of adverse circumstances (if he was fired, quit, or left by mutual agreement following allegations of misconduct or unsatisfactory performance). (GE 3 at 27) Applicant explained that, he was confused by the page break in the middle of the page that he filled out, and did not realize he should have answered "yes" to the question, since he knew he had been fired by contractor C. (Tr. 126-129) No employment-termination-related falsifications of GE 3 are alleged in the SOR.

Applicant discussed his various terminations during his September 13, 2018 background interview. (GE 6 ay 6-7). However, on his September 27, 2018 SF-85P, submitted only two weeks later, Applicant did not disclose his terminations from contractor C and contractor T, both of which had occurred during the previous seven years, in answer to a question calling for disclosure of those events. (GE 5 at 22). Curiously, Applicant disclosed his July 2017 termination from contractor M, which occurred within the seven-year timeframe of the question, but also two other terminations from many years before, in 2002 and 2005. (GE 5 at 22; Tr. 137) Applicant again acknowledged that he should have disclosed the terminations from contractors C and T, but asserted that his omissions were unintentional. (Tr. 137-138) Applicant expressed remorse for his errors and apologized for them. (Tr. 147-148, 161-162)

Applicant also did not list his terminations from contractors C, M, and T on his Declaration for Federal Employment, in September 2018, despite the presence of a question calling for disclosure of all employment terminations in the last five years. (GE 4 at Question 12). As to this form, Applicant explained that he thought the question he was only being asked to disclose terminations from "a federal job or a government job within the last five years. That's how I looked at the question." (Tr. 134-135) Applicant maintained his interpretation of the question under additional questioning at hearing. (Tr. 135-136)

Among the documents Applicant submitted after the hearing was a DFE that he submitted in April 2020. (AE G) On that form, he checked "Yes" to a question asking if, during the last seven years, he had been convicted, imprisoned, been in prison, been on probation or been on parole. The question "includes felonies, firearms or explosives

violations, misdemeanors, and all other offenses." (AE G at Q. 9) He reported an offense as follows:

> Question 9: Misdemeanor DUI **5/17/<u>2019</u>** [City B, State X]. 2. Year probation completed August 2019. No further issues" followed by a phone number (AE G at 2) (Emphasis added).

The year of the offense given, 2019, is likely an error, as probation ended only months later, in August 2019, and there was no discussion at hearing of a May 2019 DUI. I conclude that he likely meant to disclose his 2017 DUI on AE G. Yet Applicant also did not list his November 2017 arrest for the probation violation on AE G, in answer to this question with a seven-year timeframe, and also said that probation was completed with "no other issues."

AE G also contained a question asking, in part,

> During the last five years, have you been fired for a job for any reason, did you quit after being told that you would be fired, did you leave any job because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management or any other Federal agency? (AE G at Q. 12)

Applicant answered "Yes" and disclosed his May 2017 termination from contractor M "per request of the Government COR for allegedly mishandling sensitive information; eligible for rehire." (AE G at 2) He did not disclose his termination from contractor T, in July 2017. Since Applicant submitted AE G post-hearing, he was not questioned about any of these answers.

Since his termination following the spillage incident in May 2017, Applicant has subsequently participated in extensive annual training required for his position. After the hearing, he provided extensive documentation of his remedial and other security training on numerous subjects related to his professional position. (Tr. 140; AE F, AE H)

Applicant's 2020 performance review reflects that he exceeds expectations across the board. He performed "extraordinary work" under difficult circumstances. He is a highly trained and capable security professional and greatly contributed to the mission's success. (AE A)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." 484 U.S. 518, 531 (1988)

The AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the

factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Under ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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. The Government reposes a high degree of trust and confidence in 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 of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline G, Alcohol Consumption

The security concern for alcohol consumption is set forth 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 guideline notes several conditions that could raise security concerns under AG ¶ 22. The following disqualifying condition is applicable in this case, as Applicant has a DUI arrest in 2007 and a DUI arrest in 2017:

> (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 an alcohol use disorder.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

> (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;
>
> (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
>
> (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.

Applicant incurred two alcohol-related driving offenses ten years apart. After the second, more recent charge, he actively participated in a 26-week outpatient substance-abuse treatment program, and completed it successfully. Since then, he has curtailed his drinking and has demonstrated a track record of responsible use, as he consumes alcohol occasionally on holidays at home, and there is no indication that he drinks and drives. He accepted responsibility for his behavior, and has taken steps to moderate his drinking. His alcohol consumption no longer casts doubt on his current judgment, trustworthiness and reliability. AG ¶¶ 23(a), 23(b) and 23(d) apply.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern for criminal conduct:

> 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

> (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;
>
> (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; and

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant's two alcohol-related offenses, noted above, are cross-alleged as criminal conduct security concerns. To these are added his 2017 probation violation, after he attempted to purchase a firearm for his father. AG ¶¶ 31(a) and 31(b) apply to each offense. AG ¶ 31(d) applies to the probation violation.

The following mitigating conditions for criminal conduct are potentially applicable under 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

(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.

Applicant's arrest for violating probation is an added consideration under Guideline J, along with his two alcohol offenses. On the one hand, an arrest for a probation violation is a serious matter, particularly one concerning the attempted purchase of a firearm. However, the circumstances of the violation appear isolated and inadvertent, as Applicant testified that he was not allowed to purchase a firearm out of state while on probation, and he did so only as a gift for his father. Applicant is not a gun enthusiast and does not own guns himself. He also acknowledged that, while his actions were inadvertent, he should have read his probation instructions more carefully. Moreover, his probation was not extended, and the arrest had little impact beyond assignment of 10 hours of community service, which he completed. Applicant otherwise completed probation successfully in August 2019, more than two years ago.

These circumstances suggest that Applicant's offenses are mitigated under AG ¶¶ 32(a) and 32(d). However, I must also consider whether Applicant's criminal conduct is mitigated in light of my conclusions under Guideline E with respect to the falsification allegations (discussed below). Falsification of a security clearance application is a criminal offense under 18 USC § 1001. Since I conclude that Applicant falsified his SCA, that cuts against mitigation of the alleged criminal conduct here. AG ¶¶ 32(a) and 32(d) therefore do not fully apply.

Guideline K, Handling Protected Information

AG ¶ 33 expresses the security concern regarding handling protected information:

> Deliberate or negligent failure to comply with rules and regulations for handling protected information-which includes classified and other sensitive government information, and proprietary information-raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

> (c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling protected information, including images, on any unauthorized equipment or medium; and
>
> (g) any failure to comply with rules for the protection of classified or sensitive information.

The sole Guideline K allegation in the SOR, with identifying information redacted, reads as follows:

> 3.a. You improperly e-mailed a file containing classified information via an unclassified network in about May 2017, while employed with [contractor M, at a U.S. Army facility] creating a data spill in violation of paragraphs 4-200, 4-210b, and 5-100 of the Department of Defense [Manual] 5200.22M, National Industrial Security Program Operating Manual (NISPOM). You were consequently terminated in about May 2017.

In his Answer to the SOR, and his testimony, Applicant did not agree that the information at issue was in fact classified. He denied that any spillage took place, though he admitted that aggregation of certain information was classified, and therefore he should have encrypted the information. Applicant's testimony about the nature of the information at issue in the spillage information is uncorroborated.

The Government's evidence includes a May 10, 2017 memo from the Army command to Applicant's employer that names Applicant as "the originator of a classified spillage that occurred on 5 May 2017." (GE 8 at 3) The termination memo from Applicant's employer also notes that the spillage was inadvertent.

The Government did not offer testimony of any expert witness in the security field regarding whether the information involved in the spillage was in fact classified; whether it was due to Applicant's culpability; whether Applicant's actions were deliberate, negligent, or inadvertent; and what damage to national security resulted from the spill, if

any. Beyond the May 10, 2017 Army memo, the Government did not offer any evidence of the conclusions of any investigating authorities. Nor did the Government offer any testimony about applicability of any of the NISPOM paragraphs cited in the SOR.

With that as the state of the evidence, I conclude that it is more likely than not that when Applicant returned the e-mail to the COR, his government supervisor, Ms. M, he sent the information in an unclassified e-mail. The information was likely classified, at least in aggregate form. Applicant should therefore have sent it through proper means. When he did not do so, this caused a "classified spill," albeit an isolated, inadvertent one, for which Applicant was responsible. Since Applicant's actions involved "transmitting, or otherwise handling protected information, including images, on any unauthorized equipment or medium," AG ¶ 34(c) applies. AG ¶ 34(g) also applies.

In SOR ¶ 3(a), the Government also alleges that Applicant's actions violated certain specific paragraphs in the NISPOM. The most recent version of the NISPOM was issued in February 2006 (change 2, May 16, 2016). The Government did not offer any explanatory testimony about applicability of the three NISPOM paragraphs noted in SOR ¶ 3(a), and made no argument about them at hearing. Department Counsel provided the requested excerpts after the hearing, at my request. (HE I)

Since they are referenced, I briefly address each NISPOM paragraph alleged in the SOR: 1) NISPOM para. 4-200 is a general paragraph in Section 2: Marking Requirements. 2) NISPOM para. 4-210b concerns "E-mail and other electronic messages." 3) NISPOM para. 5-100 is a general paragraph in section 1 of Chapter 5: Safeguarding Classified Information. Section 1: General Safeguarding Requirements, under which "Contractors shall be responsible for safeguarding classified information under their control." (HE I at pages 4-2-1; 4-2-3, and 5-1-1) There is insufficient evidence in the record to determine whether Applicant's actions violated these paragraphs. Indeed, it is not established that the reference to "contractors" in these NISPOM provisions are intended to mean defense contractor employers (i.e., companies), or defense contractor employees (such as Applicant himself).

Nevertheless, the applicability of any particular NISPOM paragraph is not required to establish disqualifying conditions under Guideline K. AG ¶¶ 34(c) and 34(g) are established by the record evidence.

AG ¶ 35 sets forth potentially applicable mitigating conditions under Guideline K:

> (a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) the security violations were due to improper or inadequate training or unclear instructions; and

(d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

It is not established that the spillage was due to improper or inadequate training or improper instructions. AG ¶ 35(c) is not established.

The remaining mitigating conditions, however, all apply. There is no evidence that the spillage was deliberate. Indeed, the termination memo from Applicant's employer notes that the spillage was inadvertent. I therefore conclude that it was an inadvertent, isolated incident, and not part of a pattern of security violations. There is no evidence of compromise. There is no evidence of other security violations, either before, or since. Applicant has had a security clearance for many years. While his access to the Army's IT systems was revoked, there is no indication that his access to classified information was revoked or suspended. Applicant also provided extensive documentation of subsequent security trainings in the years since the incident. Security violations are always a serious matter, as they go to the heart of an applicant's security worthiness. However, I conclude that AG ¶¶ 35(a), 35(b), and 35(d) apply to mitigate SOR ¶ 3(a).

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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;

(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; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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.

The personal conduct allegations in the SOR are in two groups. SOR ¶¶ 4.a-4.g all concern warnings and terminations for employment performance issues. SOR ¶¶ 4.h, 4.i, and 4.j all concern alleged falsifications on SCAs or other similar forms.

Applicant admitted SOR ¶¶ 4.a-4.g. Each termination occurred between July 2013 and July 2017. He provided explanations for each termination, and largely accepted responsibility, even if he did not always believe termination was warranted. His terminations concerned a variety of performance issues, including a personality conflict with his supervisor, removal from government IT systems following a classified spillage, and general dissatisfaction by the customer.

Generally, an applicant's termination for poor performance is an employment matter between the individual and the company that does not in and of itself implicate personal conduct security issues, particularly where there is no evidence of questionable judgment, dishonesty, or intentional failure to comply with rules and regulations. However, in addition to considering each termination independently, I must also consider them together. In that regard, Applicant's terminations (SOR ¶¶ 4.a-4.g) suggest a pattern of employment issues whose security significance I cannot ignore. The general personal conduct security concern in AG ¶ 15 applies to all of the terminations, given the issues with Applicant's questionable judgment and compliance with rules and regulations**.**

AG ¶ 16(d) applies to all but one of terminations and written warnings (SOR ¶¶ 4.a, 4.c-4.g) as credible adverse information not explicitly covered elsewhere. The exception is the termination from contractor M (SOR ¶ 4.b). AG ¶ 16(c) applies to that termination, as it was mitigated under Guideline K as an isolated, inadvertent incident, yet it has independent security significance under Guideline E since a termination resulted.

This leaves the alleged falsifications. They relate to Applicant's arrest record (SOR ¶¶ 4.h and 4.j) and his employment terminations. (SOR ¶ 4.i)

As discussed in the Facts section, above, Applicant had no duty to report his 2007 DUI arrest in answer to a question with a seven-year timeframe on his January 2018 SCA, since the arrest occurred 11 years earlier. SOR ¶ 4.h is partially resolved for Applicant on that basis.

However, Applicant also did not disclose his November 2017 probation violation arrest either in answer to that question (which was alleged as part of SOR ¶ 4.h) or in answer to another question on GE 3 asking about charges for which he was awaiting trial (which was not alleged in the SOR). Applicant testified that his omission was unintentional, but I conclude that falsification is established. The arrest was quite recent, and he was pending trial at the time, which he surely knew. He may well have informed his supervisor and his security manager, as he testified, but this is not corroborated, nor does it absolve him of the responsibility to disclose the offense on GE 3. As to the November 2017 probation violation arrest, SOR ¶ 4.h is established and AG ¶ 16(a) applies.

Similarly, Applicant failed to disclose that arrest on GE 5, his September 27, 2018 SF-85P application for a position of public trust. This omission is particularly inexplicable, since he voluntarily disclosed the arrest during his background interview only days earlier. Yet his explanation at his hearing that he did not disclose the arrest because he had not gone to trial yet is neither credible nor accurate, since he had gone to trial in April 2018, and completed his community service by a month later. As to SOR ¶ 4.j, AG ¶ 16(a) applies.

SOR ¶ 4.i alleges that when Applicant submitted his September 27, 2018 SF-85P (GE 5), he disclosed his 2017 termination from contractor M, but deliberately failed to disclose other terminations that occurred in the previous seven years: from contractor T, in July 2017 (SOR ¶ 4.a); from contractor C, in April 2014 (SOR ¶ 4.c); and from federal employment in July 2013 (SOR ¶ 4.f). The fact that he disclosed the terminations on an earlier SCA, in January 2018, does not eliminate the need to disclose them on a subsequent form, and Applicant has a duty to disclose them each time.

It is curious that Applicant chose to disclose other, earlier terminations, from 2002 and 2005, in answer to an employment question on GE 5 with a seven-year timeframe, yet failed to disclose terminations that did fall within that period.

Applicant also did not list his terminations from contractors C, M, and T on his Declaration for Federal Employment, in September 2018, despite the presence of a question calling for disclosure of all employment terminations in the last five years. (GE 4 at Question 12). While these falsifications are not alleged in the SOR, I can consider them in weighing his credibility, and in weighing mitigation and under the whole-person concept. In that regard, Applicant explained that he thought the question only asked for disclosure terminations from "a federal job or a government job within the last five years." (Tr. 134-135) This explanation is simply not credible, as there is no indication that the plain language of the question is to be limited that way. I conclude that Applicant deliberately failed to disclose any of his employment terminations in the last five years when he submitted GE 4, his DFE.

This evidence may not be considered disqualifying conduct, since it is not alleged in the SOR. But it also makes it more likely that Applicant also deliberately failed to

disclose all his terminations in the last seven years when he submitted GE 5 – which was alleged in the SOR. I therefore conclude that AG ¶ 16(a) applies to SOR ¶ 4.i.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

> (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
>
> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

In weighing mitigation, I look not only to the established falsifications alleged in the SOR, but to other instances of lack of candor, even if not alleged. In this regard, I note the following:

> Applicant failed to disclose his 2007 DUI on both his 2015 SCA and his January 2018 SCA (in answer to the question "Have you ever been charged with an offense involving alcohol or drugs?");
>
> Applicant failed to disclose his November 2017 probation violation arrest, as a pending charge for which he was awaiting trial, on his January 2018 SCA;
>
> As noted above, Applicant failed to disclose any employment terminations in the last five years on his September 2018 DFE;
>
> Applicant also failed to disclose his November 2017 probation violation arrest on his September 2018 DFE; and
>
> Applicant also failed to disclose either his November 2017 probation violation or his July 2017 termination from contractor T on AE G, his April 2020 DFE, submitted post-hearing.

In considering Applicant's answers for his various omissions, I did not find several of them credible. On several occasions, he said he "must have" misinterpreted or overlooked the question. He asserted on one occasion that one question called only for disclosure of terminations related to federal employment. He asserted one occasion to have been confused by a page break. I found that his

explanations were often attempts to justify his omissions after the fact, more than they were explanations of his state of mind at the time. In this regard, many of his explanations did not ring true. And he still did not disclose the probation violation arrest or one of his recent terminations on AE G, which he prepared in April 2020. AG ¶¶ 17(c) and 17(d) do not apply. Given my concerns about Applicant's candor, he did not establish that his falsifications are unlikely to recur, or that they no longer cast doubt on his judgment, trustworthiness, or reliability. The same is true of his employment record, which establishes a pattern of security significant conduct that he has not mitigated.

AG ¶ 17(a) does not apply. Even though Applicant discussed his arrests and his employment terminations in his background interview, and did so voluntarily, his background interview was in September 2018, months after his January 2018 SCA, and also after his probation violation arrest had been adjudicated. It also does not apply to the other established falsifications, which he did not acknowledge.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(c):

> (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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G, J, K, and E in my whole-person analysis.

Applicant is highly intelligent, well educated, and has had a long career in the defense industry with a security clearance. He is well regarded at work, and his performance exceeds expectations across the board. This evidence weighs in his favor. While the allegations under the alcohol consumption, criminal conduct and handling protected information guidelines are mitigated and resolved, I nevertheless have unresolved concerns under personal conduct and the whole-person concept about his employment history and his lack of candor. I have examined all the evidence regarding

the SOR allegations not only individually, but also taken together, so as not to consider them in a piecemeal fashion, not only under the guidelines alleged, but also with due consideration under the whole-person concept. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. Eligibility for access to classified information is denied.

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 G:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline K:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraph 4: Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a-4.g:	Against Applicant
Subparagraph 4.h:	For Applicant (in part) and Against Applicant (in part)
Subparagraphs 4.i-4.j:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Braden M. Murphy
Administrative Judge