DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 21-01298
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jeffrey T. Kent, Esq., Department Counsel
For Applicant: Eric Leckie, Esq.

05/12/2022

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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 granted.

Statement of the Case

Applicant submitted a security clearance application on October 26, 2020. On July 21, 2021, 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 September 14, 2021, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

Department Counsel was ready to proceed on September 30, 2021. Scheduling of the hearing was delayed by travel and duty restrictions imposed in response to the COVID-10 pandemic. The case was assigned to me on March 8, 2022. After coordinating with Applicant's attorney, I scheduled the hearing to be conducted by video teleconference on April 4, 2022. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. I kept the record open until April 15, 2022, to enable him to submit additional evidence. He did not submit anything further. DOHA received the transcript (Tr.) on April 13, 2022.

Legal Issues

In Applicant's response to the SOR, he asserted that the SOR was legally defective because it did not "provide the disqualifying conditions and mitigating conditions for each adjudicative guideline cited," as required by DOD Manual 5200.02, paragraph 10.4.2. I overruled Applicant's objection to the SOR on the ground that DOD Manual 5200.02 is not applicable to employees of defense contractors. I noted that Department Counsel's letter to Applicant dated March 30, 2021 (Hearing Exhibit I) and the letter transmitting the SOR to Applicant dated July 26, 2021 (Hearing Exhibit II) specifically advised Applicant of the allegations and the applicable adjudicative guidelines.

In Applicant's response to the SOR, he also submitted the equivalent of a motion *in limine*, objecting to the admission of court records that had been expunged in accordance with state law. Department Counsel responded by citing 5 U.S.C. ¶ 9101, which requires all criminal agencies to provide records upon request by specified federal officials. Department Counsel argued that state law does not bind the federal government. He also pointed out that when Applicant submitted his SCA, he signed an authorization for release of criminal records and that he voluntarily submitted the expunged records in his answer to the SOR. I noted that the instructions for Section 22 of the SCA require disclosure of information regardless of whether the record has been sealed, expunged, or otherwise stricken from the court record. I overruled the objection.

Amendment of SOR

At Applicant's request and with the concurrence of Department Counsel, the first sentence of SOR ¶ 1.d was amended to cite SOR subparagraph 1.c instead of subparagraph 1.b. As amended, the first sentence of SOR 1.d alleges, "You received non-judicial punishment for Article 92 failure to report/obey a lawful order for failing to immediately report the arrest as set for in subparagraph **1.c**." (Changed language in bold.) (Tr. 16.)

Findings of Fact

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

Applicant is a 25-year-old engineer hired by a defense contractor in October 2020, contingent on his ability to obtain a security clearance. (Tr. 39.) He served on active duty in the U.S. Navy from December 2015 to November 2018 and received an honorable discharge. He held a security clearance in the Navy. He has been a university student from January 2019 to the present, using his GI Bill educational benefits and seeking a degree in electrical engineering. (Tr. 39-40.) He was married from March 2018 to October 2020. He has no children.

In March 2016, Applicant received non-judicial punishment for underage alcohol consumption. His punishment was restriction to the base for 45 days and forfeiture of one-half of his pay per month for two months. He was required to attend a 20-hour alcohol and drug impact course, which he completed. (GX 2 at 11.). At the hearing, he testified that this incident occurred after he had completed his engineering school, where he was the top graduate, and he was celebrating with several classmates. After he and his classmates returned to their barracks, they were unruly and rowdy. When questioned, Applicant's classmates identified him as one of the participants at the graduation celebration. He was 19 years old at the time, and he was punished for underage drinking. (Tr. 25-27.)

Applicant was arrested in September 2017 and charged with driving while intoxicated (DWI), first offense, and refusal of a blood or breath test. The blood or alcohol test refusal was disposed of by *nolle prosequi.* (GX 6 at 1.) He was convicted of misdemeanor DWI and appealed the conviction. In April 2019 he withdrew his appeal. He was sentenced to 180 days in jail (suspended) and fines and costs of $546. His driver's license was suspended for one year and restricted to use for work and medical treatment, and he was required to install an ignition interlock device. (GX 6 at 3-6.) At the hearing, Applicant stated that he intends to apply for expungement of the court records of this incident. The petition for expungement submitted at the hearing showed no indicia that it had been filed. (AX E.) I have taken judicial notice that the law of the jurisdiction where Applicant was charged limits expungement to cases where there was an acquittal, a *nolle prosequi* , or dismissal of the charge. (§19.2-392.2.)

In April 2018, Applicant received non-judicial punishment for failure to report his September 2017 arrest to his command. He was reduced from paygrade E-4 to paygrade E-3, restricted for 45 days, required to perform extra duty for 45 days, forfeited one-half of a month's pay for one month, and ordered to receive treatment in a substance abuse rehabilitation program (SARP). He received treatment and was diagnosed with Alcohol Use Disorder-Mild. Treatment at Level 1 was recommended. (GX 4 at 7.) He completed the Level 1 treatment at a military medical facility in April 2018. (GX 2 at 9; GX 3.) The record reflects that he was briefed on the mandatory one-year aftercare program, but it does not reflect whether he completed it. (GX 2 at 10.)

In June 2018, Applicant was arrested and charged with public intoxication. He testified that he and a group of friends were asked to leave a bar, but he returned to the bar to retrieve his cellphone, became involved in a discussion about his reason for

returning to the bar, and was arrested. (Tr. 34-35.) He appeared in court with an attorney, and the charge was dismissed. (GX 2 at 14.)

In January 2020, Applicant was waiting for a rideshare service outside a bar, and he became involved in a loud argument after someone made a derogatory comment about his cousin, whose funeral was earlier in the day, and was charged with public intoxication. In February 2020, the charge of public intoxication was dismissed, and in June 2020, the record was expunged. (AX B at 3-4.)

In March 2020, Applicant was arrested and charged with public intoxication after he and an intoxicated family member were involved in an altercation. He completed treatment through a SARP program in April 2020. In July 2020, the charge of public intoxication was dismissed, and in October 2020, the record was expunged. (AX B at 1-2.)

After Applicant's non-judicial punishment in April 2018, he was required to attend Alcoholics Anonymous (AA) meetings as part of his treatment. He continued to attend AA meetings sporadically through 2019. During an interview with a security investigator in January 2021, he stated that he was consuming four or five beers at a sitting once a month. (GX 2 at 15.) In response to DOHA interrogatories in May 2021, he stated that he was consuming one to three beers once a week or every two weeks. (GX 2 at 6.) He resumed regular AA attendance in May 2021. (Tr. 32-33.) He testified that, after a "lot of trial and error with responsible drinking," he stopped drinking alcohol in May 2021. At the time of the hearing, he had stopped attending AA meetings. He testified that AA is very helpful, but over time it becomes very depressing and its value is diminished. (Tr. 41.) He has separated himself from his Navy friends, found new hobbies, and worked on physical fitness. (Tr. 28-29.)

Applicant's former division officer aboard a Navy ship for two years considers him an honest, reliable, and inspiring sailor. (AX D at 5.) A chief petty officer who has known Applicant for about five years describes him as "tirelessly hard working, trustworthy, courteous, and honest." He believes that Applicant always achieves what he decides to do "with dedication and sheer force of will." He is aware of the allegations in the SOR and believes that they will not be repeated. (AX D at 2.) A retired chief petty officer who was Applicant's leading petty officer believes that the conduct alleged in the SOR is not a true representation of Applicant's character and that it will not recur. (AX D at 6.) A first class petty officer who has known Applicant for about three years states that Applicant had a reputation as one of the most hard-working and trustworthy sailors in the engineering department of their ship. (AX D at 3). A former shipmate and personal friend considers Applicant honest, dependable, and trustworthy. (AX D at 4.) A fellow petty officer third class states that Applicant was one of the hardest working, trustworthy, well-respected, and honest sailors in the command. (AX D at 1.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

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

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline G, Alcohol Consumption

The 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."

Applicant's admissions and the evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

> 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;
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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; and
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> AG ¶ 22(d): diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.
>
> 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;
>
> AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and
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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 established. Applicant's alcohol-related incidents were not infrequent and they did not occur under unusual circumstances making recurrence unlikely, leaving only the question whether "so much time has passed." This prong of AG ¶ 23(a) 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 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. *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's last alcohol-related incident was more than two years ago, which is a "significant period of time." During that time, he has returned to college and is working toward an engineering degree. He has found new hobbies and interests. He attended AA meetings for a while but stopped because he believed that their value had diminished. He has not consumed alcohol for one year, since May 2021. He has been offered a responsible job with a defense contractor, contingent on receiving a security clearance. He has convinced the state court that his two incidents of public intoxication should be expunged. I am satisfied that his alcohol-related conduct is mitigated by the passage of time.

AG ¶¶ 23(b) and 23(d) are established. Applicant has acknowledged his maladaptive alcohol use, completed a SARP program, moderated his alcohol consumption until May 2021, and thereafter has abstained from alcohol until the present.

Guideline J, Criminal Conduct

The allegations in SOR ¶¶ 1.c and 1.g-1.i are cross-alleged under this guideline. The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations." Applicant's admissions and the evidence submitted at the hearing establish two disqualifying conditions under this guideline:

> AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
>
> AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.
>
> The following mitigating conditions are potentially relevant:
>
> AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Both mitigating conditions are established, for the reasons set out in the above discussion of Guideline G.

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 military service and the accolades he has received regarding his personal traits and the quality of his military service. He was sincere, remorseful, and credible at the hearing. His last conviction was more than four years ago. His last arrest was more than two years ago. He has abstained from alcohol for a year. 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 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):	FOR APPLICANT
Subparagraphs 1.a-1.i:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge