DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-03047
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: Andrea Batres, Esq.

07/22/2022

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Decision

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HARVEY, Mark, Administrative Judge:

Applicant was arrested four times for alcohol-related driving offenses from 2007 to 2017. He states that he continues to consume alcohol, albeit at a responsible level. Guideline G (alcohol consumption) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 30, 2018, Applicant completed and signed a Questionnaires for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1). On February 2, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to

determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline G. (HE 2) On August 27, 2021, Applicant provided a response to the SOR, and he requested a hearing. (HE 3) On November 3, 2021, Department Counsel was ready to proceed.

On March 25, 2022, the case was assigned to me. On April 12, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 9, 2022. (HE 1) The hearing was held as scheduled.

Department Counsel offered 7 exhibits into evidence, and Applicant offered 14 exhibits into evidence. (Transcript (Tr.) 17-23, 44, 74; GE 1-GE 7; Applicant Exhibit (AE) A-AE N) There were no objections, and all proffered exhibits were admitted into evidence. (Tr. 17-23, 74) On June 22, 2022, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted most of the information in SOR ¶¶ 1.a through 1.d. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 56-year-old senior avionics acquisition and integration analyst. (Tr. 31) He worked for the same DOD contractor from 2008 to 2020, and then from 2020 to present, for a different contractor doing the same type of work. (Tr. 31, 55; GE 1 at 12) He needs a security clearance to continue his employment. (Tr. 33) He was married from 1985 to 2009. (GE 1 at 17-18) His children were born in 1986, 1989, and 1997. (Tr. 30) He has six grandchildren. (Tr. 64) In 2015, he received a master's degree. (GE 1 at 11)

Applicant served in the Army from 1986 to 2008. (Tr. 24-25) He was assigned to an elite aviation unit in the Army from 1993 to 2007 as a pilot, training officer, safety officer, and integration officer. (Tr. 25-29) He served overseas in the Republic of Korea, Iraq, and Afghanistan. (Tr. 25) His highest Army award is a meritorious service medal. (Tr. 127) He has five air medals for flying missions in combat zones. (Tr. 127) His frequent and lengthy deployments had an adverse effect on his family life. (Tr. 30) There is no evidence of security violations or abuse of illegal drugs.

Alcohol Consumption

SOR ¶ 1.a alleges in about March 2007, Applicant was charged with driving under the influence of alcohol (DUI). Applicant said he had three drinks at a unit hail and farewell function over about a three-hour period. (Tr. 32, 75-76, 118) The drinks were not "big ones" or "doubles." (Tr. 118-119) A police officer stopped him for swerving on his motorcycle. (Tr. 32,75) He refused a breathalyzer because he believed he was impaired. (Tr. 119) He did not receive a blood-alcohol test. (Tr. 119) The police arrested him for DUI, and he stayed in jail overnight. (Tr. 32) After six months of probation, the charge was

reduced to and he was convicted of reckless driving. (Tr. 32, 121) He completed a two-day alcohol awareness class. (Tr. 33, 77) He did not receive alcohol counseling or treatment. (Tr. 33) He said he disclosed the arrest to his supervisor and possibly to his security officer. (Tr. 78-79)

Applicant received a memorandum of reprimand for the 2007 DUI arrest, and he was transferred from the elite aviation unit in the United States to another unit in Korea. (Tr. 79, 120) The reprimand was filed in his personnel file. (Tr. 120) He was taken off of the promotion list for CW5, and he realized he would not be promoted to the rank of CW5. (Tr. 120) He also completed the standard Army alcohol-counseling program consisting of about six weeks of classes for two hours a week. (Tr. 130) His heaviest period of alcohol consumption was from 2006 to 2009, and during this period he occasionally had five drinks during a single sitting. (Tr. 82, 112)

SOR ¶ 1.b alleges in about August 2009, Applicant was charged with DUI. He claimed he drank four drinks over about a three-hour period at a party. (Tr. 80) At his hearing, he said that he did not remember the blood-alcohol content (BAC) test result, and then he said it could have been a .2. (Tr. 121-122) The Office of Personnel Management (OPM) report of investigation (ROI) indicates his BAC was .23 percent. (AE M at 80) After considering the OPM ROI BAC test result, he conceded that he did not remember how much he had to drink at the party. (Tr. 163) He believed he was impaired but not intoxicated. (Tr. 81) The police arrested him for DUI on his way home from the party. (Tr. 82) He was found guilty of DUI first offense. (Tr. 123; AE M at 81) He received 11 months and 29 days of probation, 2 days in jail, a $350 fine, and loss of driver's license for one year. *Id*. He did not participate in any alcohol counseling or treatment after the 2009 DUI. (Tr. 83) Applicant disclosed the DUI arrest to his supervisor. (Tr. 84, 123) However, no incident report from his security record was offered as an exhibit at his hearing. (Tr. 84, 93)

SOR ¶ 1.c alleges in about March 2013, Applicant was charged with DUI. Applicant claimed that he drank two to five beers at a friend's residence over a five-hour period, and then he elected to drive a friend home before going to his own home. (Tr. 85-86, 123) The police stopped Applicant because he was blocking an intersection. (Tr. 86) Applicant was stopped in the intersection because he was unsure about which way to turn. (Tr. 86) He was arrested for DUI, but not charged with DUI. (Tr. 90) He refused a breathalyzer even though he was aware that he should have metabolized one beer per hour and not been intoxicated by the time the police stopped him. (Tr. 123-124) He was also aware that the refusal of a breathalyzer would result in suspension or revocation of his driver's license, and the refusal would be admissible in a DUI trial. (Tr. 125)

Applicant received a pretrial diversion for the 2013 DUI. (Tr. 90) He completed two years of unsupervised probation and about 12 hours of alcohol classes. (Tr. 87, 91; GE 6 at 3) He performed community service, and he went to two Alcoholics Anonymous (AA) meetings. (Tr. 88) He said he was told by the county alcohol counselor that his DUI was a one-time event, and because he did not drink during the week, he did not have a problem with alcohol. (Tr. 88-89) However, Applicant realizes now that he had an alcohol problem. (Tr. 89) He did not have a document from the counselor indicating he did not

have an alcohol problem; however, he believed such a document was possibly submitted to the court adjudicating the DUI offense. (Tr. 89-90) He said he disclosed the DUI arrest to his supervisor and security officer; however, no incident report from his security record was offered as an exhibit at his hearing. (Tr. 92-93)

SOR ¶ 1.d alleges in about May 2017, Applicant was charged with Operating a Vehicle While Under the Influence of Alcohol (OUI). He claimed that he went to dinner and had three, maybe four drinks over about a three-hour period. (Tr. 39, 95, 125) The police stopped him possibly for swerving while driving; he refused a breathalyzer; and he was arrested for OUI. (Tr. 39, 95, 125) The police report indicates he swerved and almost hit a "passing semi." (Tr. 96; AE N (police report)) However, Applicant did not remember much about his driving before the arrest. (Tr. 95) He was charged with OUI Second Offense. (AE N (arraignment)) He pleaded guilty to OUI First Offense. (file) He received a fine of $1,250. In November 2017, he completed a 24-hour class over a weekend and learned about alcohol consumption. (Tr. 40-47, 96-97; AE B; AE F) He abstained from alcohol consumption from May to November 2017. (Tr. 41, 53) No incident report from his security record concerning the 2017 OUI was offered as an exhibit at his hearing. (Tr. 102)

Applicant admitted he had a problem with alcohol consumption, and it is a "lifelong issue" for him. (Tr. 43, 49, 63) He described himself as a "recovering alcoholic." (Tr. 63) He decided to limit his alcohol consumption after November 2017 to two standard drinks in an evening. (Tr. 49, 51-52, 165-166) He claimed he has only consumed about 20 drinks in the last year, or perhaps it was 24 or 25 drinks. (Tr. 50, 62) He typically drinks no more than three beers in a weekend or possibly two or four drinks in a month. (Tr. 50-51, 53, 105; SOR response ¶ 39) He may not drink anything for a month. (Tr. 105) He has not become intoxicated since 2017. (Tr. 53) He most recently consumed alcohol a month before his hearing, and on that occasion, he drank one beer. (Tr. 102-103)

Applicant occasionally reviews the workbook he received from his alcohol-related class in 2017 to reinforce and refresh what he learned about limiting his alcohol consumption. (Tr. 60, 66, 97; AE F) He understands the risks of excessive alcohol consumption and believes he will not engage in excessive alcohol consumption in the future. (Tr. 66) In June 2021, he moved overseas, and attendance at alcohol counseling or classes was difficult. (Tr. 100) He attended two sessions over the Internet about alcohol consumption in 2021 after he received the SOR. (Tr. 61, 97-98) Those two sessions are the only counseling or treatment he has received for alcohol since 2017. (Tr. 65) He never had a one-on-one session where an alcohol or medical counselor reviewed his history of alcohol consumption. (Tr. 128) He was never advised that his history warranted a recommendation of abstinence from alcohol consumption. (Tr. 128)

Applicant has never been diagnosed with alcohol dependence or alcohol use disorder. (Tr. 113) He exercises to reduce stress. (Tr. 54, 62) He has not engaged in any questionable conduct after 2017. (Tr. 110) His support group is his girlfriend and a close friend. (Tr. 64) He does not drive after consuming alcohol. (Tr. 100, 105, 134, 165; SOR response ¶ 39)

Character Evidence

Applicant had the same supervisor, a retired Army lieutenant colonel, from 2008 to 2020 while working for a DOD contractor. (Tr. 35; AE C) He and another supervisor described Applicant as honest, reliable, mission focused, and diligent. (Tr. 36, 142-159) Their statements and statements from friends and coworkers support Applicant's continued access to classified information.

Applicant received excellent performance evaluations from the DOD contractor. (Tr. 67; AE G; AE I-AE L) In 2021, he received an award from his employer, and he was lauded for his trustworthiness and diligence. (AE G)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "[e]xcessive 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."

Two alcohol consumption disqualifying conditions could raise a security concern and may be disqualifying in this case. AG ¶¶ 22(a) and 22(c) provide:

> (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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and
>
> (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

AG ¶¶ 22(a) and 22(c) are established. The SOR alleges four alcohol-related incidents involving the police and courts. Applicant was arrested in 2007, 2009, 2013, and 2017 for alcohol-related driving offenses. In his 2009 DUI, his test indicated a .23 percent BAC. He refused to consent to a BAC test for the other three arrests. Although the term "binge" drinking is not defined in the Directive, his BAC for the 2009 DUI is high enough to establish Applicant engaged in binge-alcohol consumption to the extent of impaired judgment.

Four alcohol consumption mitigating conditions under AG ¶¶ 23(a)-23(d) 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 good judgment;
>
> (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);
>
> (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and
>
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> 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. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions fully apply; however, Applicant provided some important mitigating information. He completed alcohol-related classes after each arrest, and he has a good academic understanding of the perils of alcohol abuse. He did not have an alcohol-related criminal offense in almost five years. He acknowledged his

alcoholism or issues of alcohol abuse, provided evidence of actions taken to overcome this problem, and claimed that he established a pattern of responsible use. *See* AG ¶ 23(b).

The evidence against mitigation is more persuasive. Applicant attended two alcohol-related sessions over the Internet in 2021; however, he had relapses after previous classes, and he is not currently "participating in a counseling or treatment program." *See* AG ¶ 23(c). He did not provide a written "favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." *See* AG ¶ 23(d).

Applicant claimed at his hearing that he drank four drinks over about a three-hour period at a party in 2009. He said he did not remember the BAC test result, but finally said it could have been a .2. The OPM ROI indicates his BAC was .23 percent. Applicant had a right to refuse to consent to tests for BACs when he was arrested for DUI; however, those refusals leave me without evidence to corroborate his claimed low levels of alcohol consumption. His erroneous description of his alcohol consumption for his DUI in 2009 casts doubt on the credibility of his description at his hearing of his current alcohol consumption. Absent a credible, persuasive description of alcohol consumption, there is no assurance that Applicant is currently consuming alcohol responsibly. AG ¶ 23(b) is not fully established in this instance.

After careful consideration of the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption, I have continuing doubts about the risks of poor decisions after excessive alcohol consumption. It is too soon to conclude alcohol-related incidents involving the police and courts or compromise of classified information are unlikely to recur. Not enough time has elapsed without alcohol-related misconduct to eliminate doubt about Applicant's current reliability, trustworthiness, and good judgment. Alcohol consumption concerns are not mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at 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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline G are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 56-year-old senior avionics acquisition and integration analyst. He worked for DOD contractors from 2008 to present. In 2015, he received a master's degree. He honorably served in the Army from 1986 to 2008 and overseas in Republic of Korea, Iraq, and Afghanistan. He had an exemplary Army career, rising to the rank of CW4 and being on the promotion list for CW5. His highest award is a meritorious service medal. He has five air medals for flying missions in combat zones. His frequent and lengthy deployments had an adverse effect on his family life, and he made significant sacrifices on his nation's behalf over his many years of service on active duty and as a contractor. There is no evidence of security violations or abuse of illegal drugs.

The evidence against grant of Applicant's access to classified information is more persuasive at this time. Applicant has four alcohol-related driving offenses in 2007, 2009, 2013, and 2017. He refused tests for BAC for three of the arrests and consented to a test in 2009 which resulted in a BAC result of .23. He initially claimed that he only consumed about one beer per hour for four hours before the 2009 DUI arrest. This claim damaged his credibility, and his assertions of responsible alcohol consumption are not accepted without corroboration. He is not participating in an alcohol counseling or treatment program, and he did not provide a written "favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." *See* AG ¶ 23(d). The DUIs did not happen under unusual circumstances, future alcohol-related incidents are likely to recur and continue to cast doubt on his current reliability, trustworthiness, and good judgment.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Guideline G security concerns are not mitigated at this time.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	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 or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

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Mark Harvey
Administrative Judge