DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-01526
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

08/18/2022

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Decision

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DORSEY, Benjamin R., Administrative Judge:

Applicant did not mitigate the alcohol consumption security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 19, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline G (alcohol consumption). Applicant responded to the SOR on July 28, 2021, and requested a hearing before an administrative judge. After a delay because of the COVID-19 pandemic, the case was assigned to me on May 17, 2022.

The hearing was convened as scheduled on July 20, 2022. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant objected to GE 6 containing police records relating to an arrest, because he disagreed with some of the facts therein. I overruled Applicant's objection and GE 6 was admitted in evidence. At Applicant's request, I left the record open for the parties to provide additional documents. Applicant provided a post-hearing document that was admitted in evidence

without objection as Applicant's Exhibit (AE) A. I received a transcript of the hearing on July 27, 2022.

Findings of Fact

Applicant is a 59-year-old employee of a defense contractor. He has worked for his current employer since about December 2016. He has a high school diploma, earned a certificate from a technical college, and attended college courses without earning an undergraduate degree. Applicant served on active duty with the U.S. Air Force from 1983 until 1999, earning an honorable discharge. He then served on active duty with the U.S. Air Force Reserve from 2000 until 2004, again earning an honorable discharge. Applicant estimated that he was involved in 40 to 50 foreign missions. He has been married since 1984 and has one adult child. (Transcript (Tr.) 18-20; GE 1, 2; AE A)

Applicant has a significant history of alcohol-related criminal offenses. In about January 1999, he was charged with driving while intoxicated (DWI) in State A. Applicant had been drinking at a bar and decided to drive home after a taxi cab he called did not show up. Applicant also claimed that he sought assistance with a cab from someone who worked at the bar, but they would not help him. He had a .15 or higher blood alcohol content (BAC) at the time of his arrest. He pleaded guilty to DWI. Applicant's driver's license was suspended for a year and he was placed on probation for a year. He was also required to undergo court-ordered alcohol-related counseling and he had to pay $500 in fines. Applicant did not believe that he had a drinking problem and did not undertake alcohol-related counseling beyond that mandated by the court. Applicant did not list this arrest in his 2018 Questionnaire for National Security Positions (SF 86). He also admitted to this offense during his 2018 security interview only after being confronted by his investigator. (Tr. 20-22, 37, 42; Applicant's response to SOR; GE 2, 3)

Applicant claimed that he stopped drinking for about five or six years after his 1999 DWI arrest until about 2006. He stopped drinking during this time period because of his military obligations and because he was often on-call for work. Applicant claimed that from 2006 until 2010, he drank occasionally, but did not get "hammered." (Tr. 37, 42-43)

Despite allegedly not consuming alcohol during this time period, Applicant was arrested in July 2004 in State A and charged with driving under the influence (DUI). According to the police report, he was pulled over for speeding after driving his motorcycle 62 miles per hour in a location where the speed limit was 35 miles per hour. The police officer reported that Applicant had trouble stabilizing his motorcycle during the stop and the officer smelled the strong odor of alcohol from Applicant's person and breath. While Applicant claimed that he was not drinking alcohol at the time, the police officer reported that Applicant told him that he had a "few." Applicant denied having this conversation with the police officer or that he made the statement that he had been drinking. The police officer noted that Applicant had a hard time keeping his balance and had a "staggering walk." Applicant refused field sobriety tests, reportedly stating, "not just no, but hell no," and was arrested. He also refused to provide a breath sample.

Applicant claimed that he was not drinking and refused the field sobriety tests and breath sample based on the advice of his attorney from his 1999 DWI. He also believed that he was being unfairly targeted by the local authorities because of a personal grudge and for "political reasons." Applicant pleaded not guilty. His plan was to go to trial to try to expose what he considered to be corruption, but he claimed that he was not permitted to put on evidence at trial of his being unfairly targeted. He was tried and convicted by a jury of DUI. Applicant's driver's license was suspended for a year. He spent two days in jail and had to pay approximately $1,500 in fines. He was placed on supervised probation for approximately 16 months. Applicant denied the SOR allegation relating to this arrest because he believes that the arrest was improper and because the SOR alleged that the arrest occurred in State B when it actually took place in State A. He admitted at hearing that the SOR allegation referring to the 2004 DUI arrest would have been accurate had it alleged that the arrest occurred in State A. Applicant knew that the allegation concerning the 2004 DUI arrest in State B was, in actuality, referring to the 2004 DUI arrest in State A. I base this finding on his admission that the allegation would have been accurate had the location been changed and his ability to describe with specificity the circumstances surrounding the 2004 DUI arrest, as well as what he perceived to be its factual and procedural shortcomings. I also base this finding on the lack of any other DUI arrest, regardless of jurisdiction, within approximately five years of the 2004 arrest. (Tr. 20-21, 23-25, 43-46; Applicant's response to SOR; GE 1, 2, 6)

In June 2010, Applicant was involved in a single vehicle accident in State B. His injuries as a result of this accident were severe enough that he had to be flown by helicopter to a nearby hospital. The police officer who responded to the accident noted that Applicant smelled of alcohol and that there were several empty beer cans near Applicant and the crashed vehicle. The police officer did not charge Applicant with DUI at the scene because of the seriousness of his injuries, but requested that the hospital draw blood from Applicant so that it could be tested for alcohol. The hospital performed a blood draw of Applicant while he was being treated for his injuries and the result was a BAC of .351. Applicant remained in the hospital for about three days. A few months later, the police officer who responded to the accident personally served Applicant with a citation for DUI. Applicant acknowledged that he was impaired by alcohol at the time of the accident and that he had been drinking alone while fishing. Applicant claimed that his BAC was incorrectly calculated, as he speculated without any basis, that the testing could not account for the time lapse between the blood draw and the testing. Applicant does not believe that he had a drinking problem at the time and did not undergo any alcohol counseling as a result of this accident. He denied the SOR allegation alleging this incident because he believes that he was never charged with or convicted of DUI. Despite the seriousness of the accident and Applicant's extremely high BAC, the charges against him were dismissed. (Tr. 26, 28, 30-31, 38-44, 46-49; Applicant's response to SOR; GE 2, 3, 5)

In about December 2017, Applicant was arrested in State B and charged with his fourth DUI. Applicant was arrested after another person driving on the same road reported to police that they saw his vehicle weaving on the road. Applicant claimed that he was not intoxicated at the time. He admitted to having had about six ounces of liquor, but claimed that he was weaving because his dog that was in his car distracted him.

Applicant failed his field sobriety test as it was discontinued because he fell twice while performing it. Applicant again refused any chemical tests to determine his BAC, but a judge issued a warrant for two vials of his blood. Police took two vials of Applicant's blood pursuant to the search warrant and his blood was tested for alcohol. The results of the test were that Applicant had a .14 BAC with a level of confidence greater than 99.73%. Applicant was convicted, had to attend alcohol counseling, which he completed, and had an ignition interlock device installed on his vehicle for two years. After his 2017 conviction, he admitted that he had a problem with alcohol. He claimed that he modified his behavior by drinking less alcohol and taking more taxis and Ubers. He stated that he switched to only drinking beer and cutting out hard liquor. He testified that after his 2017 DUI, he only drinks a couple of beers on a weekend and he no longer drinks and drives. Applicant also credits having his wife move to State B in May 2022 to live together full time as a positive factor that keeps him out of trouble. (Tr. 26-30, 32-33, 35-36; Applicant's response to SOR; GE 2, 4)

There is no evidence that Applicant has been diagnosed with an alcohol use disorder. Applicant claimed that no alcohol counselor or medical professional has advised him to stop drinking, but did not provide any other evidence of treatment recommendations. He has not undergone any alcohol counseling beyond what was court ordered. He claimed that he has reduced his drinking from a 12 pack of beer over the course of a weekend to "pretty much nothing" in about 2010. He acknowledged that he continued to drink and drive between 2010 and 2017, but that he has not done so after his 2017 DUI. He claimed that the higher amount of alcohol he drank before his 2017 DUI was an aberration. (Tr. 35-41)

Policies

This case is adjudicated under Executive Order (EO) 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), which became effective on June 8, 2017.

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

These guidelines 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 Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ 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.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G, Alcohol Consumption

The security concern for alcohol consumption is set out in AG ¶ 21:

> Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes several conditions that could raise security concerns under AG ¶ 22. The following are potentially applicable in this case:

> (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and
>
> (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

SOR ¶ 1.b inaccurately reflects the location of the 2004 DUI arrest as State B when the evidence shows that it took place in State A. As Applicant was aware of the error and understood that the alleged disqualifying conduct related to the 2004 DUI arrest in State A, I find that SOR ¶ 1.b provided Applicant with sufficient notice to meet applicable due process requirements.

Applicant was charged with or cited for DUI or DWI in 1999, 2004, 2010, and 2017. Applicant's elevated BAC for at least three of these DUIs (.15, .351, and .14), and his repeatedly getting behind the wheel after drinking, show habitual or binge drinking that leads to poor judgment. These facts render the foregoing disqualifying conditions applicable and shift the burden to Applicant to mitigate those concerns.

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.

Between 1999 and 2017, Applicant was excessively consuming alcohol often enough to be charged with an alcohol-related driving offense once every five or six years. While it has now been five years since his last DUI, his previously established pattern causes me to doubt that enough time has passed to show that his excessive alcohol consumption is unlikely to recur. This pattern also detracts from his ability to demonstrate a clear and established pattern of modified consumption or abstinence.

While Applicant alleged that he has modified his alcohol consumption, he has done so after earlier DUIs only to be charged again. He has completed court-ordered alcohol counseling, but has not provided evidence of any treatment recommendations. Therefore, he cannot show that his modified consumption complies with those recommendations. Accordingly, Applicant has not provided sufficient evidence to mitigate the alcohol consumption security concerns.

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(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), 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 have incorporated my comments under Guideline G in my whole-person analysis. I have also considered Applicant's lengthy, honorable military service and his multiple deployments.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the alcohol consumption security concerns.

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-1.d:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Benjamin R. Dorsey
Administrative Judge