



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 20-03284
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

September 21, 2022

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines G (alcohol consumption) and E (personal conduct). Clearance is denied.

Statement of the Case

On September 28, 2019, Applicant submitted a Questionnaire for National Security Positions (SF-86). On January 12, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines G and E. The SOR detailed reasons why the DCSA CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On February 1, 2021, Applicant answered the SOR (Answer) and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated April 15, 2021, was provided to him by letter dated April 20, 2021. On April 28, 2021, Applicant received the FORM. Department Counsel

attached as evidence to the FORM Items 1 through 6. Applicant was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He did not submit any additional information for consideration within the 30-day period. On June 21, 2021, the case was assigned to me. I received Items 1 through 6 into evidence.

Findings of Fact

Background Information

Applicant is a 74-year-old Government contractor employed by a defense contractor since October 2019. He seeks a security clearance in conjunction with his employment. (Item 2) Applicant stated in his SOR Answer that he spent four years on active duty in the Navy, 33 years as a DOD employee, and 14 years as a Government contractor, and “held both Secret and Top Secret clearances for much of that time.” (Item 1)

Applicant was awarded a bachelor’s degree in June 1987. (Item 2) He served in the U.S. Navy from June 1967 to March 1971, and was honorably discharged. He has been married three times. His first marriage was from 1970 to 1976, his second marriage was from 1980 to 2003, and his third and current marriage also took place in 2003. His first two marriages ended by divorce. Applicant has three adult children. (Items 2, 3)

Alcohol Consumption

Applicant’s five allegations under this concern are established by his September 28, 2021 SF-86; his Office of Personnel Management (OPM) background investigation conducted from December 2, 2019, to December 20, 2019, containing his December 13, 2019 OPM Personal Subject Interview (PSI); his October 1, 2019 FBI Criminal Background record; his February 19, 2020 local county sheriff’s criminal record; his local hospital medical records for alcohol treatment printed on January 10, 2020; and his February 1, 2021 SOR Answer. (Items 1 – 6)

The following is a summary of the five allegations against Applicant under the alcohol consumption concern and his response to those allegations.

SOR ¶ 1.a – Alleged that Applicant consumed alcohol, at times in excess to the point of intoxication, from approximately 2005 to at least 2006 and from 2011 until at least December 2019. Applicant admitted this allegation. He explained that, “Beginning in 2006 I abstained from alcohol consumption [u]ntil approximately 2011. To the best of my recollection, I also did not have a problem with alcohol until I began suffering from depression in late 2017.” (Item 1)

SOR ¶ 1.b – Alleged that Applicant received treatment at a local hospital, on multiple occasions in 2018 and 2019 for a condition diagnosed as Alcohol Dependence and Alcohol Use Disorder (Severe). Applicant admitted this allegation. He explained

that, "I was diagnosed with depression while at (the local hospital) in 2018. It took me several visits to get a handle on my problem which I believe I am now free of." (Item 1)

SOR ¶ 1.c – Alleged that Applicant continues to consume alcohol, notwithstanding his diagnosed condition. Applicant admitted this allegation. He explained that, "I admit. I occasionally have a beer when at Caution-home [sic]."

SOR ¶ 1.d – Alleged that Applicant was arrested in about July 2019 in his state of residence and charged with misdemeanor driving under the influence of alcohol and /or misdemeanor driving under the influence of alcohol with .08 percent or higher blood alcohol level. Applicant admitted this allegation. He explained that, "Following my conviction of Misdemeanor Driving under the influence of alcohol, I completed the 9 month DUI program which consisted of 40 hours of community service at Habitat for Humanity, 30 AA meetings, 30 individual counseling sessions, and weekly group counseling meetings from February 2020 to December 2020. I completed this program in December 2020. All of this DUI program occurred after my background investigation which took place in December 2019." (Item 1)

SOR ¶ 1.e – Alleged that Applicant was terminated from his employment at his Government contractor employer in about July 2019 for going to work intoxicated. Applicant admitted this allegation. He did not add anything beyond his admission to this allegation in his SOR Answer.

Personal Conduct

Applicant's two allegations under this concern are established by his September 28, 2021 SF-86; his Office of Personnel Management (OPM) background investigation conducted from December 2, 2019, to December 20, 2019, containing his December 13, 2019 OPM Personal Subject Interview (PSI); and his February 1, 2021 SOR Answer. (Items 1 – 3)

The following is a summary of the two allegations against Applicant under the personal conduct concern and his response to those allegations.

SOR ¶ 2.a – Alleged that Applicant falsified material facts on his September 28, 2019 SF-86 when queried whether in the last seven years he had ever been fired from a job; quit after being told he would be fired; left a job by mutual agreement following charges or allegations of misconduct; left a job by mutual agreement after notice of unsatisfactory performance; received a written warning; or been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy, to which he answered, "No." Applicant admitted this allegation. He explained that, "I erred in answering this question and I now acknowledge that I was terminated from [Government contractor employer] for coming to work intoxicated. I had been up late the night before celebrating my 71st birthday and should not have gone to work at 6 am, my usual start of my shift. I found it hard to believe at the time that I could have had a measurable quantity in my system. I now acknowledge that I was wrong in answering 'No' (to) this question." (Item 1)

SOR ¶ 2.b – Alleged that Applicant falsified material facts on his September 28, 2019 SF-86 when queried whether in the last seven years his use of alcohol had a negative impact on his work performance, his professional or personal relationships, his finances, or resulted in intervention by law enforcement/public safety personnel, to which he answered “No.” Applicant admitted this allegation. He explained, “Same as 1.a. above.”

Although not alleged, it is noteworthy that in addition to the two Guideline E allegations discussed, *infra*, Applicant also told two different versions about his termination from his Government contractor employer in July 2019. While he told the OPM investigator that he showed up for work with alcohol in his system from drinking the night before, he told his doctor that he had been terminated from his job after returning from lunch with alcohol on his breath. (Item 6)

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 AG ¶ 2(d), describing 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 clearance 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

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.”

AG ¶ 22 lists conditions that could raise a security concern and may be disqualifying 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;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder;
- (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; and
- (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 record establishes disqualifying conditions AG ¶¶ 22(a) through 22(d). Further inquiry is necessary about the potential application of any mitigating conditions.

Although the term “binge” drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours or “as a pattern of drinking alcohol that brings blood alcohol concentration (BAC) to 0.08 percent - or 0.08 grams of alcohol per deciliter - or higher.” For a typical adult, this pattern corresponds to consuming 5 or more drinks (male), or 4 or more drinks (female), in about 2 hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), https://pubs.niaaa.nih.gov/publications/Newsletter/winter2004/Newsletter_Number3.pdf. See also NIAA website, “Drinking Levels Defined,” <https://www.niaaa.nih.gov/alcohol-health/overview-alcoholconsumption/moderate-binge-drinking>. Applicant’s BAC for the 2019 DUI is high enough to establish he engaged in binge-alcohol consumption to the extent of impaired judgment.

Four alcohol consumption mitigating conditions under AG ¶ 23 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 in ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013):

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).

None of the mitigating conditions fully apply. Applicant did provide some important mitigating information. After his 2019 DUI arrest, he completed a nine-month DUI program, which consisted of 40 hours of community service, attended 30 Alcoholics Anonymous meetings, 30 individual counseling sessions, and weekly group counseling meetings from February 2020 to December 2020. He did not have an alcohol-related criminal offense in two years. He acknowledged his excessive alcohol consumption, 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 has a lengthy history of self-admitted excessive alcohol consumption, was diagnosed with alcohol dependence and alcohol use disorder (severe) in 2019, continues to consume alcohol, was arrested for a DUI in 2019, and was fired from his Government contractor job in 2019 for going to work intoxicated. As noted under the personal conduct section, *supra*, Applicant deliberately failed to report his alcohol-related termination, which indicates the adverse and negative impact his drinking has had on him. This calls into question not only his truthfulness, but the degree to which he is willing to admit that he has a problem. As also noted, he told two versions surrounding his termination. This pattern of minimization and unwillingness to be forthcoming raises larger questions about Applicant's suitability for a clearance and compounds the significant issues raised from his problems with alcohol.

In spite of this history, Applicant claimed in his SOR Answer that he "occasionally" has a beer when he is at home. The only documentation that accompanied Applicant's February 1, 2021 SOR Answer was in large part his written answers which are quoted verbatim, *supra*. He did not submit any evidence that would have demonstrated his behavior happened under unusual circumstances, that the behavior is unlikely to recur, or does not cast doubt on his current reliability, trustworthiness, or judgment. Nor did he submit any evidence of actions taken to overcome his problem or that would demonstrate a clear and established pattern or modified consumption or abstinence in accordance with treatment recommendations. In

short, Applicant's FORM response did not contain any documentation that mitigated his SOR allegations.

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 security concerns are not mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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 lists one condition that could raise a security concern and may be disqualifying pertaining to SOR ¶¶ 2.a and 2.b:

(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.

Applicant's September 28, 2019 SF-86 asked clear and easily understood questions about Applicant's employment record and negative impact alcohol may have had on his work performance. He has a bachelor's degree, and by his own admission an extensive history of holding security clearances. He was required to disclose any alcohol-related work terminations or the negative impact alcohol use may have had on his work performance. Applicant said he "erred" when answering these questions and acknowledged that he was "wrong" in answering the questions the way he did.

"Applicant's statements about his intent and state of mind when he executed his Security Clearance Application were relevant evidence, but they were not binding on the Administrative Judge." ISCR Case No. 04-09488 at 2 (App. Bd. Nov. 29, 2006) (citation omitted). In ADP Case No. 17-03932 at 3 (App. Bd. Feb. 14, 2019) the Appeal Board recognized the importance of circumstantial evidence of intent in falsification cases:

When evaluating the deliberate nature of an alleged falsification, a Judge should consider the applicant's mens rea in light of the entirety of the record evidence. See, e.g., ADP Case No. 15-07979 at 5 (App. Bd. May 30, 2017). As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. *Id.*

I find that Applicant understood the questions on his 2019 SF-86 about his 2019 termination, or the negative impact alcohol has had on his work performance, and he intentionally failed to disclose this information with intent to deceive.

The record establishes disqualifying condition AG ¶ 16(a). Further inquiry is necessary about the potential application of any mitigating conditions.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions fully apply to Applicant's failure to disclose his employment termination or the negative impact his alcohol use had on his work performance. His intentional omission of such relevant information on his 2019 SF-86

continue to cast doubt on his reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

Conclusion

I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant has been gainfully employed for the majority of his adult life, and he is presumed to be a mature, responsible citizen. Nonetheless, without other information suggesting his long-standing alcohol-related problems are being appropriately addressed, doubts remain about his suitability for access to classified information. Protection of the national interest is the principal focus of these adjudications. Accordingly, those doubts must be resolved against Applicant.

Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the alcohol consumption and personal conduct security concerns. By failing to provide such information, and in relying on an explanation lacking sufficient detail to fully establish mitigation, alcohol consumption and personal conduct security concerns remain.

Formal Findings

Formal findings for or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G: Subparagraphs 1.a – 1.e:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline E: Subparagraphs 2.a – 2.b:	AGAINST APPLICANT Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT TUIDER
Administrative Judge