



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



In the matter of:)) [Redacted])) Applicant for Security Clearance)	ISCR Case No. 21-01586
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Appearances

For Government: Jeffrey T. Kent, Esq., Department Counsel
For Applicant: *Pro se*

11/14/2022

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct), G (Alcohol Consumption) and E (Personal Conduct). Applicant mitigated the concerns under Guideline G, but he did not mitigate the Guideline J and Guideline E concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 10, 2020. On October 22, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, G, and E. The DCSA 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), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on November 2, 2021, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 17, 2021. Scheduling of the hearing was delayed by COVID-19. The case was assigned to me on September 6, 2022. On September 20, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on October 13, 2022. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 10 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until October 29, 2022, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on October 25, 2022.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.h and 2.b. He did not expressly admit or deny SOR ¶ 2.a, which cross-alleges SOR ¶¶ 1.a, 1.b, 1.d, 1.e, and 1.g. He admitted the allegations in SOR ¶¶ 3.a and 3.b, but with explanations that amount to denials. His admissions are incorporated in my findings of fact.

Applicant is a 33-year-old mechanical technician employed by a defense contractor since June 2008. He graduated from high school and attended some college courses but did not receive a degree. (Tr. 21.) He has held a security clearance since July 2009. He married in March 2017 and separated in December 2019. He has no children.

In May 2008, Applicant was charged with carnal knowledge of a child, a felony. He was 19 years old, was dating a 15-year-old girl, and had a sexual relationship with her. The girl's sister told their parents about the relationship. He pleaded guilty to contributing to the delinquency of a minor, a misdemeanor. He was sentenced to eight weekends in jail. (GX 10.) During an ESI in June 2018, Applicant told a security investigator the he did not think he was doing anything wrong, because the girl's mother consented to their relationship. (GX 4 at 18.)

In July 2008, Applicant was convicted of being a minor in possession of alcohol. He was required to complete 50 hours of community service.

In November 2008, Applicant was charged with misdemeanor driving while intoxicated (DWI). He was convicted and served two weekends in jail.

In July 2009, Applicant was charged with failure to appear in court. He was convicted and required to pay restitution. (GX 9 at 4.) At the hearing, he could not remember missing a court date, but he accepted the fact that court records reflected the offense. (Tr. 24.)

In February 2010, Applicant was charged with being drunk in public. He was convicted in April 2010 and required to pay restitution. (GX 9 at 5.)

In March 2011, Applicant was charged with misdemeanor DWI, 2nd offense. He pleaded guilty to DWI and was sentenced to a \$250 fine and 6 months in jail, with 5 months and 25 days suspended, He served two weekends in jail. (GX 8; GX 9 at 5.)

In February 2016, Applicant was suspended from work for three days because he overslept due to alcohol consumption and missed his flight to a job location. He overslept after drinking and arrived at the airport too late to check in. Someone else took his place on the flight, and he switched places with his replacement two weeks later. (Tr. 24-25.)

In May 2018, Applicant was cited for urinating in public. He pleaded guilty and paid a \$60 fine. (GX 7.)

In August 2019, Applicant was charged with DWI, 2nd offense. He had been drinking, took the wrong exit off a highway, and ended up at the gate of a military installation where he could not turn around. He was arrested, pleaded guilty, was placed on probation for 12 months, and was sentenced to ten days in jail, which he served on four weekends. The terms of his probation included refraining from excessive use of alcohol, and he was required to complete an alcohol safety action program (ASAP). (GX 6; Tr. 18-19.) He did not report this conduct to his employer until he went to court. His employer suspended him without pay for a "few days" for failure to report the incident. (Tr. 27.)

In July 2020, Applicant was charged with misdemeanor public drunkenness. This incident occurred when he went to a friend's house, found that the friend was not at home, and discovered that his cellphone was dead. He lingered around the house, "trying to figure out how to get home." Neighbors were suspicious and called the police. The police arrived, smelled alcohol, and arrested him. He had consumed about eight beers and a shot of alcohol. (Tr. 12-15.) He pleaded guilty, paid a \$15 fine, and his probation for the August 2019 DWI was extended for six months. (GX 5.) He reported this incident to his employer, having learned his lesson for not reporting the August 2019 incident. (Tr. 27.)

Applicant testified that he has abstained from alcohol since this incident in July 2020. (Tr. 12.) He testified that he had attended Alcoholics Anonymous (AA) meetings "in and out" since 2019. His last AA meeting was in 2021. He stopped attending AA meetings because he believed that he was finally on the right path. In 2020, he attended counseling for about two months. He knows he has a drinking problem. He testified, "I wouldn't say I'm dependent on alcohol. I mean, I –it's just, once I start, it's always been difficult for me to stop. It always go extreme. And sadly enough, it took all this trouble for me to start realizing that I needed to make changes." (Tr. 20.)

Applicant does not keep alcohol in his house. He enjoys playing golf, spending time with his two young nieces, and hiking and camping with his girlfriend. He recently bought a home, and he enjoys outdoor yard work. (Tr. 23.)

Applicant submitted an SCA in April 2009. He answered “No” to the question, “Have you EVER been charged with any felony offense?” He did not disclose that he was charged with felony carnal knowledge of a child in May 2008. (GX 3 at 33.)

During a personal subject interview (PSI) in May 2009, Applicant told the investigator that he did not disclose the carnal knowledge charge in his SCA because he was told by an unknown person that his record would be cleared if he completed his community service after his arrest for underage possession of alcohol. (GX 10 at 1.)

Applicant submitted another SCA in July 2016. In response to the same question about ever being charged with a felony, he again answered “No,” and he failed to disclose that he was charged with felony carnal knowledge of a child in May 2008. (GX 2 at 25.) When he was interviewed by a security investigator in June 2018, he asserted that he did not read the question carefully enough to understand that the question asked “ever” instead of a specific timeframe. (GX 4 at 18.)

Applicant submitted a third SCA in August 2020. In response to the same question about ever being charged with a felony, he again answered “No,” and he again failed to disclose the felony charge of carnal knowledge in May 2008. (GX 1 at 31.) In his answer to the SOR, he stated that he misunderstood the difference between being charged and being convicted.

At the hearing, Applicant testified that when he was talking to investigators, he was talking about “the situation” and not about whether it was a felony. He denied that he was hiding anything, and he insisted that he was confused about the difference between being “charged” and “convicted.” (Tr. 31.)

Two former supervisors submitted statements on Applicant’s behalf. One former supervisor has known Applicant personally and professionally for 15 years. He describes Applicant as a natural leader and a reliable, trustworthy, and dependable worker. (AX B.) Another former supervisor has known Applicant professionally for 14 years. She regards Applicant as a trustworthy, responsible, and dependable individual. (AX A.)

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 J, Criminal Conduct

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 the following 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;

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; and

AG ¶ 31(d): violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

The following mitigating conditions are potentially applicable:

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.

Neither mitigating condition is established. The incident with the 15-year-old girl was more than 14 years ago, and there has been no recurrence of similar conduct. The last alcohol-related criminal conduct was more than two years ago. Applicant has acknowledged that he has an alcohol problem. He sought and received counseling, attended AA meetings, and has abstained from alcohol since July 2020. However, he has repeatedly concealed the fact that he was charged with a felony in May 2008, and he has offered conflicting and unconvincing explanations for his lack of candor. A deliberately false answer on a security clearance application is a felony under 18 U.S.C. § 1001 and is a serious crime within the meaning of Guideline J. Although the SOR does not specifically allege that Applicant violated 18 U.S.C. § 1001, his repeated falsifications may be considered to determine whether he has been rehabilitated. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

An act of falsification has security significance independent of the underlying conduct. See ISCR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003). The mitigation of the underlying conduct has little bearing on the security significance of the falsification, particularly where there are multiple falsifications. ISCR Case No. 08-11944 at 3 (App.

Bd. Aug 15, 2011). Applicant has repeatedly failed to accept responsibility for his lack of candor during the adjudication of his suitability for a security clearance. His failure to accept responsibility for his conduct detracts from a finding of rehabilitation. See ISCR Case No. 96-0360 at 5 (App. Bd. Sep. 25, 1997).

Guideline G, Alcohol Consumption

The security 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;

AG ¶ 22(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;

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

AG ¶ 22(g): failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

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; and

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.

AG ¶ 23(a) is established. Applicant's last alcohol-related incident was more than two years ago. Applicant has acknowledged that he has an alcohol problem. He sought and received counseling, attended AA meetings, and has abstained from alcohol since July 2020.

AG ¶ 23(b) is partially established. Applicant has acknowledged his maladaptive alcohol use, participated in AA, sought and received counseling, and abstained from alcohol from more than two years. However, his abstinence was not “in accordance with treatment recommendations,” because there is no evidence that he has received treatment for his alcohol consumption. His ASAP attendance was not “treatment” within the meaning of this mitigating condition.

Guideline E, Personal Conduct

The security concern under this guideline is set out in AG ¶ 15:

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. . . .

The evidence submitted at the hearing establishes the following disqualifying conditions under this guideline:

AG ¶16(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; and

AG ¶16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Both disqualifying conditions are established. Applicant went through the adjudication process three times, and each time he repeatedly and intentionally failed to disclose that he was charged with a felony in May 2008, and he provided conflicting explanations when confronted with this omission by investigators. In May 2009, he told an investigator that he did not disclose the carnal knowledge charge because he was told

by an unknown person that his record would be cleared if he completed his community service. In June 2018, he told an investigator that he did not understand that the question asked if he had "ever" been charged with a felony, as opposed to being charged during a specific timeframe. In his answer to the SOR, he asserted that he misunderstood the difference between being "charged" and "convicted." At the hearing, he testified that when he was being interviewed by investigators, he talked about "the situation" and not whether the situation was a felony. By the time he submitted his most recent SCA, he had been questioned at least twice about his answer in the SCA and knew it was a concern.

The following mitigating conditions are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. Applicant made no effort to correct the omission, even after being confronted with the evidence.

AG ¶ 17(c) is not established. Applicant's repeated falsifications were not "minor." Falsification of a security clearance application is a serious crime and "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

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 J, G, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I have considered that Applicant was worked for a defense contractor since June 2008, held a security clearance since July 2009, and is highly regarded by two former supervisors. I have considered that he has acknowledged his problems with alcohol and appears to be on the path to sobriety. However, the evidence is insufficient to mitigate his criminal conduct and repeated lack of candor during the security-clearance process. After weighing the disqualifying and mitigating conditions under Guidelines J, G, and E, 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, but he has not mitigated his criminal conduct and his lack of candor in three consecutive security investigations.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.h:	Against Applicant
Paragraph 2, Guideline G (Alcohol Consumption)	FOR APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant
Paragraph 3, Guideline E (Personal Conduct):	Against Applicant
Subparagraphs 3.a and 3.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge