DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 21-01958
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

08/01/2022

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was arrested for drunk driving and possession of marijuana in February 2014, and for drunk driving in September 2018 and October 2018. He omitted the marijuana charge when completing his security clearance application and exhibited a lack of candor during his personal subject interview (PSI). His failure to report his 2018 offenses to his facility security officer (FSO) is mitigated because he informed his supervisors and was unaware of any requirement to self-report, but he has shown a lack of reform in some aspects. Clearance eligibility is denied.

Statement of the Case

On December 1, 2021, the then Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline G, alcohol consumption; Guideline H, drug involvement and substance misuse; Guideline J, criminal conduct; and Guideline E, personal conduct. The SOR explained why the DCSA CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him.

The DCSA CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On January 11, 2022, Applicant responded to the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On March 24, 2022, a DOHA Department Counsel indicated that the Government was ready to proceed to a hearing. On April 11, 2022, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national security interests of the United States to grant or continue a security clearance for Applicant. I received the case file and assignment on April 18, 2022.

After some coordination with the parties, on May 12, 2022, I scheduled a hearing for June 8, 2022. At the hearing, five Government exhibits (GE 1 through 5) and two Applicant exhibits (AE A-B) were admitted into the record without any objections. One witness, the special agent who conducted Applicant's PSI, testified for the Government. Applicant and his chief union steward also testified, as reflected in a hearing transcript (Tr.) received on June 24, 2022.

I held the record open for two weeks after the hearing for Applicant to submit additional documentation. On June 20, 2022, Applicant timely submitted five character-reference letters, which I accepted in evidence without objection as AE C through G. The record closed on June 27, 2022, on receipt of the Government's response to Applicant's post-hearing submissions.

Findings of Fact

The SOR alleges under Guideline G (SOR ¶ 1), and cross-alleges under Guideline J (SOR ¶ 3.a) and Guideline E (SOR ¶ 4.f), that Applicant was arrested for driving under the influence (DUI) offenses in February 2014 (SOR ¶ 1.a) and September 2018 (SOR ¶ 1.b), and for operating under the influence (hereafter DUI) in October 2018 (SOR ¶ 1.c). Under Guideline H (SOR ¶ 2.a), and cross-alleged under Guideline J (SOR ¶ 3.a) and Guideline E (SOR ¶ 4.a), Applicant is alleged to have been arrested in February 2014, while granted access to classified information, and charged with possession of less than one-half ounce of cannabis.

Under Guideline E, Applicant is also alleged to have falsified a May 17, 2017 Electronic Questionnaire for Investigations Processing (e-QIP) by not disclosing the 2014 marijuana possession charge in response to the police record inquiries (SOR ¶ 4.a) and by denying any illegal drug involvement in response to a question concerning any drug use while possessing a security clearance (SOR ¶ 4.b). Applicant is also alleged to have concealed the September 2018 and October 2018 DUI offenses and the 2014 marijuana possession charge when questioned during his December 2019 PSI (SOR ¶ 4.c).

Additionally, Applicant allegedly failed to self-report his September 2018 (SOR ¶ 4.d) and October 2018 (SOR ¶ 4.e) DUIs to his FSO.

Applicant denied all of the allegations when he responded to the SOR, including the DUIs, which he denied on the basis that he had passed the outpatient programs without incident and no recurrence since the October 2018 offense. He explained about the marijuana charge that he was ticketed $50, but that the marijuana was left in his car by a former colleague. He asserted he had forgotten about the ticket for marijuana possession, and he denied any intentional concealment of his DUIs or the marijuana charge.

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 37-year-old high school graduate, who subsequently completed vocational training in July 2005. (GE 2.) He worked as a technician in the automotive repair industry for over a decade before going to work in equipment repair for his current employer, a defense contractor, in late May 2017. (AE A; Tr. 56.) He served honorably as a wheeled vehicle mechanic with a clearance in the U.S. Army Reserve (USAR) from May 2007 to June or July 2020. (GE 1; Tr. 49-50, 56-57.) He has never married and has no children. (GE 1; Tr. 56.)

On November 14, 2006, Applicant completed and certified as accurate an e-QIP in application for a secret clearance for his Army enlistment. He listed two speeding tickets from September 2005 and September 2006, but no other issues. (GE 2.) He was granted a secret clearance for his duties in the military. (GE 1.)

On February 23, 2014, Applicant was stopped by the police in the parking lot of a local convenience store. He exhibited signs of intoxication, including glassy eyes and slurred speech. He told the police he had consumed four beers at a local pub and admitted that he was "inebriated." The police directed him to a dry portion of the sidewalk. After failing field sobriety tests, he was arrested for DUI. During an inventory search of Applicant's vehicle, the police found marijuana and two glass pipes containing marijuana under his driver's seat; marijuana residue in his center console; and a marijuana grinder in the pocket of his driver's door. (GE 5.) Applicant was subsequently charged with DUI and possession of less than one half ounce of cannabis, first offense. He was fined $50 for the marijuana charge. (GE 3; Tr. 48.) Applicant asserts that he was told by the prosecutor that "it was the equivalent of a parking ticket with a $50 fine." (Tr. 48.) For the DUI, he was required to attend 15 alcohol-education classes. On his completion of the classes, the charge was dismissed and his record was sealed. (GE 3.) He asserts that his command in the USAR was aware of his arrest. (Tr. 51.)

On May 17, 2017, Applicant completed and certified as accurate an e-QIP for the security clearance needed for his current employment. In response to the police record inquiries, he reported his 2014 arrest for DUI and indicated that he had to attend 15 classes for the offense. He did not disclose that he had also been charged with, and fined

for, marijuana possession, and responded negatively to questions regarding illegal use of drugs or drug activity including the following:

> Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed? (GE 1.)

Applicant's clearance eligibility was renewed through the military about four or five months after he submitted his e-QIP, and it was transferred for his work with a defense contractor. (Tr. 60.)

On September 23, 2018, Applicant was on a business trip in another state for his employer when he was pulled over for not having his headlights on. He told the police that he had consumed three beers with dinner, but he had a strong odor of alcohol about him and slurred speech. He failed field sobriety testing and was arrested for DUI. At the police station, his blood alcohol content (BAC) tested at .14% by breathalyzer. (GE 4.) Applicant pled guilty to DUI, was fined $460, and ordered to attend alcohol-education classes within one year. As of December 4, 2019, he had not completed the required alcohol-education classes as he was asking the court to accept classes taken as a result of a subsequent DUI offense, committed in October 2018 in his state. (GE 3.)

Applicant consumed about four to five beers at a bar while out on a date in October 2018. He and his date drove separately, and he did not feel too impaired to drive safely. He was pulled over while exiting a highway on suspicion of drunk driving. Applicant told the officer that he had consumed some alcohol on a date, and he failed field sobriety tests. He was arrested for DUI and brought to the police station. Applicant recalls that his breathalyzer result showed a .12% BAC. In April 2019, his driver's license was suspended pending the installation of an Interlock device on his vehicle, which he had installed in November 2019. He was placed on probation for 18 months, and was required to attend eight alcohol-education classes, and complete 100 hours of community service. As of December 2019, he had attended seven alcohol-education classes but had yet to start his community service or complete the alcohol-education classes required for his September 2018 DUI in another state. (GE 3.)

On December 4, 2019, Applicant was interviewed by a government investigator, who confirmed that Applicant was very nervous. (Tr. 26-27.) When asked about his disclosed February 2014 DUI arrest, Applicant stated that he had consumed three to four beers while playing video games in his home before driving to a local convenience store. He claimed that he failed only one field sobriety test in that he could not walk a straight line because of ice on the ground. He denied that any drugs were involved in that arrest; that he ever used any illegal drugs; and that he had an additional criminal charges to report since completing his e-QIP in May 2017. (GE 3; Tr. 19.) Additional questioning by the investigator elicited an admission and details from Applicant about his October 2018 DUI, including that his BAC tested at .12% and that he was on 18 months of probation. He expressed regret for the incident, but asserted that he did not believe he has an alcohol problem. (GE 3.)

When asked again by the investigator about any additional arrests or any association with drugs or drug-related arrests, Applicant responded negatively. (GE 3; Tr. 19-20.) He was then confronted about the February 2014 marijuana possession charge. Applicant asserted that the marijuana found in his vehicle belonged to a former co-worker who must have dropped it in his vehicle, although he also stated that he had never seen this co-worker use or possess an illegal drug. Applicant expressed that he pled guilty to possession of marijuana because the drug was in his vehicle, and he paid a fine. He denied any intention to conceal the drug charge, and explained that he had forgotten about it when he completed his e-QIP and when questioned during his PSI. (GE 3.)

After discussing the drug charge with the investigator, Applicant again denied any additional arrests or charges involving drugs or alcohol before additional questioning by the investigator disclosed his arrest for DUI while out of state on business in September 2018. (GE 3; Tr. 20-21.) He explained that he believed he passed field sobriety testing, but admitted that he "blew a .12 failing the [breathalyzer] test." He admitted that, in February 2019, he pled guilty to DUI, paid a $460 fine, and was sentenced to complete alcohol-education classes within one year. He explained that he had not disclosed the arrest in response to previous questioning because he was scared that it would adversely affect his security clearance eligibility. He stated that he reported the incident to his supervisor, co-workers, and military command, but not to his FSO because he did not know that it was required. (GE 3.) The investigator recalls that Applicant provided him with contact information for his military chain of command and for his civilian department head, who could corroborate his self-report (Tr. 27), and that Applicant told him that he did not know he had to notify his FSO. (Tr. 31-32.)

The investigator flagged Applicant as having questionable integrity because he had to question Applicant numerous times, and had to confront him with the evidence of the charges before Applicant provided the information about his 2018 DUIs and 2014 drug charge. (Tr. 22-23.) However, the investigator believes that, after Applicant admitted that he had not disclosed his September 2018 DUI because of fear it would affect his clearance, Applicant was "as transparent as possible with [him] after the fact in regards to self-admitting." (Tr. 23.)

Applicant testified about his PSI as follows:

> As the interview went along, yes, I was very nervous. It was an interview that randomly came up with no knowledge of anything that was occurring. So yes, I was absolutely nervous. And I do not believe I was asked that many times to recollect. From my memory I do remember Special Agent [name omitted] asking me was there anything else. And I stuttered when I told him. And told him about the DUIs. And my verbiage at the end was, yes, I am aware that these can affect your security clearance that's why that makes me nervous. Not the fact that I was hiding it made me nervous. So that was also a clear misinterpretation of what I was saying or what I thought I clearly came across with towards him. And still, I was very nervous of what

> was going on, not knowing what was going on. Because this process has also, the actual investigation is also, came up when it started in 2020. Has also stopped me from reenlisting in the [USAR]. (Tr. 49-50.)

Applicant testified at his hearing that he never tried to hide his DUIs from anybody and that he "clearly and openly" talked to his bosses and co-workers as a group. He also testified that he made his motor sergeant, platoon sergeant, first sergeant, and commander in the USAR aware of his DUIs because he knew they could affect his career. (Tr. 51.) He asserts that he was told by his co-workers to make sure he reported any DUIs on his e-QIP. (Tr. 52-53.) As for his alleged concealment of the marijuana charge, Applicant testified as follows:

> And [the special agent] asked me several times about the marijuana. I honestly didn't remember that charge. Or that ticket. Because my information was that it was a ticket so I could throw that out of my memory. The thing to worry about was the DUI and making sure that got out on my e-QIP. And then going from my DUIs, making sure I don't get another one. (Tr. 53.)

When asked on cross-examination to explain why he did not tell the investigator about his 2018 DUIs when asked about any additional alcohol offenses, Applicant responded that he did inform the investigator. As to why he had to be questioned so many times, Applicant disputed that the interview went as the investigator reported in his summary (GE 3) and testified. Applicant maintains he never denied any other arrests (Tr. 59), and provided the following account of the PSI:

> I'm saying that's not what happened. The way he was asking the questions is not the way that that is written down. Because the way he was asking me the questions is, are you sure, and I said, I'm sorry, let me correct that. He asked me, is there anything else. And I can adamantly say, I wasn't reluctant but nervously saying yes there is, there was this, Okay, is there anything else. Still reluctantly saying, yes. Because I'm nervous as hell. (Tr. 61.)

During his December 2019 PSI, Applicant expressed a belief that he does not have an alcohol problem. He attributed his DUI arrests to bad luck. He initially described his current alcohol consumption as four to five 12-ounce beers within a four to five-hour period once weekly, usually on the weekends, and said that has been his drinking pattern before and after his February 2014 DUI. Later during his PSI, Applicant reportedly said that he was drinking four to five beers approximately once a month. (GE 3.) Neither Applicant nor the investigator was asked about the discrepancy. At his June 2022 hearing, Applicant described his current consumption as "maybe one beer on a Friday." (Tr. 68.) He explained that he drank out of habit, and that once he resumed raising animals and doing his community service and other activities that he enjoys, he found his drinking habit easy to break. (Tr. 71.)

The alcohol-education classes required for the October 2018 DUI were apparently accepted in fulfillment of the alcohol-education required by the out-of-state court for his September 2018 DUI. (Tr. 72.) Applicant admitted triggering his Interlock device in December 2019, when he consumed some alcohol-laced egg nog. (Tr. 71-72.) He was originally ordered to have an Interlock device on his vehicle for two years, but it was extended to five years because he missed two calibrations, which each added a year, and he drove a vehicle without an Interlock device in July 2020, which added another year. (Tr. 74-75.)

In October 2021, Applicant was pulled over while driving to work in a new car for him. He did not have an Interlock device in the vehicle, and was charged with driving on a suspended license. He testified that he thought he was no longer subject to the Interlock requirement based on paperwork that he had and that he did not know his license had been suspended. He testified there is conflict between the Interlock device provider and the state as to whether he had the device removed. He paid a fine for texting while driving and had the Interlock device installed (Tr. 77-78), but he is having problems with the device. He has been reported three times, most recently in about February 2022, for violating the Interlock. He asserts it is due to faulty installation in that if he leaves the car with the lights on, the Interlock is recorded as still being on ("if you leave the lights on and walk away the machine is still going and it reported him as missing a breath."). (Tr. 79-80.) He explained that he has not had the wiring of the device inspected because he has to take time from work. (Tr. 80-81.) He does not want to be accused of tampering so has not tried to correct the issue. (Tr. 81.) The driving while license suspended charge is still pending, and he has appeared four times in court on that charge. (Tr. 78.)

Applicant performed his community service for his October 2018 DUI by providing assistance to a local Boy Scout troop starting in June 2020. He continued to volunteer after completing his community service, and as of June 2022 he had provided over 250 hours. The scoutmaster attested to his completion of those hours. She has no knowledge of any information that would compromise Applicant's status with the scouting organization. (AE B.) Applicant has been a registered den leader for a Cub Scout pack for the past six months. (Tr. 54-55.)

Applicant denies any use of marijuana. He testified that he was subjected to drug testing by urinalysis primarily once a month during his 13 years in the USAR, and he never failed a drug screen. (Tr. 50-51.) He testified to recalling that the police found marijuana "hidden underneath the passenger seat" of his vehicle. (Tr. 64.) When confronted with the police report of marijuana being in a glass jar under the driver's seat, Applicant responded, "I thought it was under the passenger seat, but it was not my marijuana." As for the police finding glass pipes with burnt marijuana in the center console of his vehicle, Applicant stated, "They weren't mine, so they had to have been his." (Tr. 65.) As for the grinder found in the pocket of the driver's door, Applicant explained:

> In the interview I stated that I gave [his former co-worker] a ride earlier and dropped him off at a place called [pub name omitted] where he waited for a ride. I waited with him, then I went home and played video games. I was

> drinking at my house and then went to the [convenience store] to where i got pulled over. (Tr. 65.)

Applicant maintains that he did not know any of the drug paraphernalia had been in his car before he was provided a copy of the police report by DOHA Department Counsel as he had only paid a $50 "ticket" in court. (Tr. 66.)

Character References

Applicant's chief union steward authored a character reference letter for Applicant (AE A) and also testified (Tr. 38-46.) The union steward has worked for their employer since 1989 and has a secret clearance. He has been a union steward for 15 years, and president and chief steward of the union "going on seven years now." (Tr. 40-42.) He testified that he did not understand until a couple of months ago that employees have a duty to self-report information that could affect security clearance eligibility. (Tr. 40.) The chief steward previously understood that it is when individuals come up for the ten-year review of their clearance that they are required to be forthcoming about everything that has happened understood "within the first ten years and the second." (Tr. 39.) The chief steward recalled an issue involving an employee who had an incident while intoxicated that the employee reported to his supervisor and not the FSO, but he could not recall whether their employer took any steps to inform employees of a duty to self-report to the FSO. (Tr. 43-44.) The chief steward believes that he is "probably not" required to report a union member who informs him of a legal problem, but he would advise him or her to inform his or her supervisor. (Tr. 44-45.) The chief steward attests that Applicant "has been a model employee gaining respect of management, fellow employees, and [his] entire team of union officers." (AE A.)

Applicant provided character reference letters from five co-workers (AEs C-G), who attest to it being common knowledge that Applicant was arrested for DUI while on a road job for their employer in 2018. A co-worker who works with Applicant on a daily basis recalled hearing in 2018 about Applicant's arrest. He indicated that Applicant was forthright about the arrest when questioned on his return, and that Applicant was also candid about his subsequent DUI. This co-worker stated that if it was common knowledge to notify their FSO of arrests, he would have asked Applicant if he had self-reported and encouraged him to do so. He asserts that Applicant has taken positive steps to better himself in the last five years and requests consideration of the negative impact on Applicant's personal growth should he lose his clearance. (AE E.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 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 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. Section 7 of EO 10865 provides that 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 about alcohol consumption is set forth 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 three DUIs establish the security concerns in 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"). He showed very poor judgment in driving under the influence of alcohol in October 2018 when he had a DUI charge pending from only weeks prior.

Under ¶ E3.1.15 of the Directive, Applicant has the burden to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. AG ¶ 23 provides for mitigation under the following conditions:

> (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 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;
>
> (c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and
>
> (d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrate a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

AG ¶ 20(a) has minimal applicability. While there has been no recurrence of drunk-driving behavior in almost four years, the passage of time is not particularly persuasive on the issue of whether the conduct is likely to recur, given that Applicant's second and third DUIs occurred more than four years after his first DUI. The recidivism of his drunk driving is troubling, even if it may be said to have been infrequent. He triggered the Interlock device by attempting to drive after drinking as recently as December 2019.

Regarding AG ¶ 23(b), Applicant completed 15 alcohol-education classes after his February 2014 DUI, which had little impact on his drinking behavior. He completed another alcohol-education program after his 2018 DUIs. As of December 2019, after three DUIs and two alcohol-education programs, he was still drinking in the same pattern that existed prior to his first DUI — four to five 12 ounce beers within four to five hours, once weekly, usually on the weekends. He showed little appreciation for the seriousness of his drunk-driving behavior during his PSI, as he attributed his DUIs to bad luck. Applicant now asserts that since starting his community service, which other evidence shows began in June 2020, he broke his drinking habit and consumes "maybe one beer on a Friday." Applicant's character references do not suggest that Applicant has a drinking problem that would trigger the need for treatment of the type contemplated within AG ¶ 23(d). He has become involved in Scouting, which is a positive development in ensuring against

recurrence of drunk-driving behavior. Applicant has taken positive steps to minimize the risk of recurrence of the alcohol consumption security concerns. Even so, the alcohol consumption security concerns are not fully mitigated in light of his December 2019 Interlock violation and his lack of insight into the problem with drunk-driving behavior. Three DUIs cannot reasonably be attributed to "bad luck."

Guideline H: Drug Involvement and Substance Misuse

The security concerns about drug involvement and substance misuse are set forth in AG ¶ 24:

> The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

In addition to the above matters, I note that, effective July 1, 2021, the possession and use of up to 1.5 ounces of marijuana became legal in the state where Applicant lives and works. However, marijuana is a Schedule I controlled substance under federal law pursuant to Title 21, Section 812 of the United States Code. Schedule I drugs are those which have a high potential for abuse; have no currently accepted medical use in treatment in the United States; and lack accepted safety for use of the drug under medical supervision. Section 844 under Title 21 of the United States Code makes it unlawful for any person to knowingly or intentionally possess a controlled substance not obtained pursuant to a valid prescription.

On October 25, 2014, the then Director of National Intelligence (DNI) issued guidance that changes to laws by some states and the District of Columbia to legalize or decriminalize the recreational use of marijuana do not alter existing federal law or the National Security Adjudicative Guidelines, and that an individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.

Moreover, on December 21, 2021, the current DNI issued clarifying guidance concerning marijuana, noting that prior recreational use of marijuana by an individual may be relevant to security adjudications, but is not determinative in the whole-person evaluation. Relevant factors in mitigation include the frequency of use and whether the individual can demonstrate that future use is unlikely to recur. The DNI also made clear that products that contain more than 0.3 percent of THC remain illegal to use under federal law and policy.

The police record of Applicant's February 2014 DUI arrest shows that some marijuana and drug paraphernalia, including a grinder, were seized from his vehicle after his arrest during a vehicle inventory, even though the basis of his arrest was the DUI. When confronted during his PSI about a charge of possession of less than one-half ounce of cannabis, first offense, Applicant recognized the charge. He admitted that he pled guilty and paid a fine because the drug was in his vehicle, even though he denied that he had ever used marijuana. AG ¶ 25(c) provides as a basis for disqualification the "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." While he may have considered it a ticket rather than an arrest, his guilty plea is sufficient to establish AG ¶ 25(c).

Applicant's denial of any knowing possession of marijuana is difficult to believe. He stated during his PSI that a co-worker, whom he transported to work on occasion, must have dropped the drug in his vehicle at some point. At his hearing, he testified that, to his recollection, the marijuana was found under the passenger's seat. The police, who were acting within the scope of their duties, reported finding a small jar with marijuana under the driver's seat; two glass pipes with burnt marijuana residue in the center console; and a marijuana grinder in the pocket of the driver's door. Applicant provided no credible explanation for how this co-worker, as a passenger during commutes to work would have "dropped" marijuana under Applicant's driver's seat or put a grinder in the driver's door without Applicant's knowledge. There is considerable reason to doubt the veracity of Applicant's repeated denials of any marijuana use. Even so, the Government did not allege that Applicant used marijuana. Neither AG ¶ 25(a), "any substance misuse," nor AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," can be properly considered in disqualification.

Given the passage of some eight years since the illegal possession and no other evidence of any drug involvement, AG ¶ 26(a) has some applicability. That mitigating condition states:

> (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

Without an acknowledgement by Applicant of any drug involvement, consideration of AG ¶ 26(b) ("the individual acknowledged his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence . . . ."), is not warranted. Applicant has not fully mitigated the drug involvement security concerns. That said, given the limited evidence of proven drug involvement in this case, Applicant's illegal drug possession is primarily of security significance in assessing the criminal conduct and the personal conduct security concerns.

Guideline J: Criminal Conduct

The security concern about criminal conduct is articulated 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 unwillingness to comply with laws, rules, and regulations." Applicant's three DUI offenses and the illegal marijuana possession offense establish two disqualifying conditions under AG ¶ 31. They are:

> (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
>
> (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The recidivism of Applicant's drunk driving is an aggravating factor that weighs against him under AG ¶ 32(a) regarding whether enough time has passed to guarantee against recurrence of criminal behavior. That mitigating condition provides:

> (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.

A co-worker attests that he has witnessed the personal growth Applicant has made in the last five years to better his life at home and at work. The positive change in Applicant's drinking habits and his volunteer duties in service of the Cub Scouts are additional evidence of reform with respect to the criminal conduct security concerns raised by his DUIs. AG ¶ 32(d) has some applicability in this case. It provides:

> (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.

Applicant's reform is undermined by his failure to admit any culpability for the drug possession charge and by his Interlock violations, which led to him being charged with driving on a suspended license in October 2021. He explained that there is an issue over whether he had the device removed, and more recently with the wiring of the device itself, but because of the pending driving on a suspended license charge, he lacks a track record of compliance with the law. The criminal conduct concerns are not fully mitigated.

Guideline E: Personal Conduct

The security concerns about personal conduct are set forth in AG ¶ 15, which provides:

> 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 Appeal Board has long held that conduct may have security significance under more than one guideline and weighed differently. *See e.g*., ISCR Case No. 13-01281 at 4 (App. Bd. Aug. 4, 2014). In that regard, Applicant's DUIs and his illegal drug possession (SOR ¶ 4.f) reflect questionable judgment and unreliability under AG ¶ 15.

Applicant is also alleged under Guideline E to have falsified his May 2017 e-QIP by not disclosing the February 2014 marijuana possession charge, either in response to the police record inquiries (SOR ¶ 4.a) or the drug inquiry concerning any illegal drug involvement while holding a security clearance (SOR ¶ 4.b). Applicant denies any intentional concealment. During his December 2019 PSI, he stated that he forgot about the drug charge. At his hearing, he testified that "it was just a ticket, it wasn't an arrest. And I put that out of my mind." In analyzing an applicant's intent, I have to consider Applicant's answers in light of the evidence as a whole. *See e.g*., ISCR Case No. 10-04821 at 4 (App. Bd. May 21, 2012).

Applicant did not provide a consistent credible explanation for how or when the marijuana ended up in his vehicle. He stated during his PSI that the marijuana was dropped in his vehicle by a co-worker at some point and that he used to transport this co-worker to and from work at times. At his hearing, Applicant stated that the marijuana was found under his passenger's seat. When confronted with the information in the police report that the marijuana was found in a glass jar under the driver's seat, that two glass pipes were in the center console, and that a marijuana grinder was in the driver's door pocket, Applicant responded as follows:

> In the interview I stated that I gave him a ride earlier and dropped him off at a place called [pub name omitted] where he waited for a ride. I waited with him, then I went home and played video games.

Furthermore, the evidence reflects a serious reluctance on Applicant's part to admit to adverse information that could hinder his clearance. As reflected in the investigator's report of Applicant's December 2019 PSI, Applicant denied that any drugs were involved in his February 2014 arrest. The investigator then asked Applicant whether he had been associated with illegal drugs or been arrested for using drugs and whether he had any additional charges involving alcohol to report. Applicant responded negatively.

Additional questioning of Applicant led to Applicant admitting his October 2018 DUI. However, after discussing that arrest, Applicant was asked, and he again denied, any additional alcohol arrests and any arrests for illegal drugs or drug involvement. Applicant responded negatively until he was specifically confronted about the drug charge. Additional inquiry elicited an admission by Applicant of his September 2018 DUI and that he had not been forthcoming during his interview about that DUI because he feared the negative impact on his clearance eligibility. His repeated failure to be fully frank about his criminal record when questioned during his PSI (SOR ¶ 4.c) shows a lack of good faith and makes it difficult to believe that his omission of the marijuana charge from his e-QIP was unintentional.

Applicant's record of repeated misrepresentations during his PSI notwithstanding, the evidence falls short of establishing a knowing failure to report his September 2018 DUI (SOR ¶ 4.d) and October 2018 DUI (SOR ¶ 4.e) to his FSO. His chief union steward and some co-workers indicate that it was not common knowledge to self-report any adverse information other than on security clearance applications completed to update security clearance eligibility. His co-workers indicate that Applicant's 2018 DUIs were common knowledge at work. Applicant's testimony that he was unaware of any requirement to inform his FSO is accepted as credible.

Three disqualifying conditions under AG ¶ 16 apply to the facts in this case. They are:

> (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;
>
> (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; and
>
> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

The following mitigating conditions under AG ¶ 17 warrant some discussion:

> (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; and
>
> (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.

AG ¶ 20(c) cannot reasonably apply in light of the seriousness of Applicant's repeated drunk driving and his lack of candor during his December 2019 PSI. His false denials of any drug arrests or additional alcohol arrests to a government investigator are inconsistent with the good judgment, reliability, and trustworthiness expected of someone with clearance eligibility. The reform required under AG ¶ 20(d) is undercut by Applicant's Interlock violations, a recent charge of driving on a suspended license, or by his effort to explain away his lack of candor during his PSI in claiming that the questioning did not go as the investigator reported and he was very nervous. When taken together, Applicant's DUI and drug possession offenses and his lack of candor on his e-QIP and during his PSI support a whole-person assessment of questionable judgment, unreliability, and untrustworthiness. The security concerns about Applicant's personal conduct are not fully mitigated.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). Those factors are:

> (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.

The security clearance adjudication involves evaluating an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. Applicant's 2018 DUIs are not a source of pressure or vulnerability for him because they are common knowledge at work. He is credited with making favorable changes in his drinking behavior and volunteering his time to the Scouts. Yet, for the reasons previously discussed, his reform is incomplete. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant

or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). The adverse impact of a clearance decision on an applicant or his employer is not a relevant consideration in determining national security eligibility. *See*, *e.g.*, ISCR Case No. 19-01759 at 3 (App. Bd. June 8, 2020) (citing ISCR Case No. 11-13180 at 3 (App. Bd. Aug. 21, 2013)). For the reasons previously discussed, I am unable to find at this time that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance.

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.c:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a.:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a-4.c:	Against Applicant
Subparagraphs 4.d-4.e:	For Applicant
Subparagraph 4.f:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge