DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-03110
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jeffrey T. Kent, Esq. Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

11/14/2022

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Decision

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MURPHY, Braden M., Administrative Judge:

Applicant has incurred numerous arrests and convictions for alcohol-related driving offenses between September 2004 and August 2021, including one that occurred after issuance of the Statement of Reasons. He remains on probation until April 2023. He also was not fully candid about his record during the security clearance process on multiple occasions. He did not provide sufficient evidence to mitigate the resulting security concerns alleged under Guideline G (alcohol consumption), Guideline J (criminal conduct), and Guideline E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on December 26, 2019. On January 4, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant alleging and cross-alleging security concerns under Guidelines G (alcohol involvement), Guideline E (personal conduct) and Guideline J (criminal conduct). The CAF issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on February 24, 2021, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). His four attached documents were marked at his hearing as SOR Exhibits 1 through 4. (Tr. 18) Processing of this case was delayed significantly by the COVID-19 pandemic. The case was first assigned to another DOHA administrative judge on March 16, 2022. On April 20, 2022, DOHA issued a notice scheduling an in-person hearing on May 18, 2022 at a location near where Applicant lives and works. The case was assigned to me on May 10, 2022, after the initial administrative judge became unavailable.

The hearing convened as scheduled. Department Counsel offered Government's Exhibits (GE) 1 through 8, and Applicant's counsel offered Applicant's Exhibits (AE) A through I. All of the exhibits (including the SOR attachments) were admitted without objection. Applicant and two other witnesses also testified. DOHA received the hearing transcript (Tr.) on May 31, 2022.

Amendment to the SOR

During his hearing testimony, Applicant disclosed an alcohol-related offense that occurred after issuance of the SOR. Department Counsel therefore moved to amend the SOR under ¶ E.3.1.17 of the Directive by adding the following allegation for good cause shown.

> 1.h. You were arrested in August 2021, in [City, State] and charged with DUI. In April 2022, you pleaded guilty to DUI and were sentenced to one year of probation.

The cross-allegations under Guidelines E and J (SOR ¶¶ 2.a and 3.a) were also amended to incorporate SOR ¶ 1.h. The amendments were accepted without objection and Applicant's counsel did not request to provide additional evidence. (Tr. 51-55, 145-146)

Findings of Fact

In answering the original SOR, Applicant admitted SOR ¶¶ 1.a through 1.g. He admitted the cross-allegation at SOR ¶ 2.a, but denied SOR ¶¶ 2.b through 2.e, as well as the cross-allegation at SOR ¶ 3.a. Each of his answers included explanations. Applicant's SOR admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 36 years old. His only marriage (2013-2019) ended in divorce. He has no children. He lives with his long-term girlfriend. He served in the U.S. Army from 2006 to 2014. His duties included a 17-month combat tour in Iraq (2008-2009), a one-year deployment to Qatar (April 2010 to April 2011), and several months in Afghanistan (2013). He held a clearance in the Army, first granted in 2007 and then granted on a conditional basis in 2012. Applicant earned his bachelor's degree in 2017, graduating *cum laude*, and he earned a master's degree in business administration (MBA) in May 2021, with a 3.73 GPA. He has worked for a defense contractor as a research analyst for about two years. (Answer; GE 1, AE D, AE H, AE I; Tr. 10, 22-33)

In the Army, Applicant was awarded three Army Commendation Medals, five Army Achievement Medals, campaign medals for service in Afghanistan (one campaign star) and Iraq (two campaign stars), the Combat Action Badge, and other appropriate service medals, ribbons, and badges. (AE D; AE E) He received a general discharge under honorable conditions, following his 2013 alcohol-related offense discussed below. He has a 70% service-connected disability rating from the Department of Veterans Affairs, due to PTSD. (AE B, AE C)

Guidelines G and J:

Applicant has a history of alcohol-related offenses, from 2004 to August 2021. (GE 4 – 8; SOR Ex. 2) They are detailed as follows:

(1) In December 2004, around Christmas, Applicant was arrested and charged in his home state (State 1) with driving under the influence of alcohol (DUI) and underage possession of alcohol. At the time, he was grieving the recent death of his grandmother. In April 2005, he was convicted of both offenses, placed on probation, and ordered to attend an alcohol safety awareness program. (ASAP) (SOR ¶ 1.a) He initially failed to complete the ASAP program, as alleged, because he had difficulty attending daytime ASAP classes without reliable transporation. The judge gave him another chance, and he completed the classes. (Answer; GE 6; Tr. 83, 87-88, 90) There is no indication that his probation was "revoked" as alleged, particularly in August 2006 (as alleged), a month before he enlisted in the Army. Applicant also disclosed the offense on his September 2006 SCA, prepared at the time. (GE 2)

(2) In early December 2009, Applicant was arrested in State 2 and charged with DUI. In March 2010, he pleaded guilty to a lesser charge of first-degree negligent driving. He was fined about $1,260 and sentenced to 90 days in jail, of which all but five days were suspended. (SOR ¶ 1.b) Three months before the arrest, he had returned stateside from a lengthy combat tour in Iraq and had difficulty readjusting due to PTSD. He testified that he was with friends in a large, nearby city. He was pulled over after getting lost on the drive back to post. He was taken into custody by local police. He did not serve time in jail, but instead was in a work release or weekend program, which he fulfilled in September 2010 (when he was in the U.S. for a court hearing for his next offense, discussed below). (Answer; Tr. 88-92)

(3) A few weeks after Offense # 2, in late December 2009, Applicant was arrested on his home U.S. Army post in State 2, and charged with DUI. (SOR ¶ 1.c) He testified that he drove a fellow soldier to the airport and returned to post in the friend's car. He had been drinking earlier in the day, and stumbled when he got out of the car at the post gate. (Tr. 92-94; GE 8, GE 9 at 1-19)

In April 2010, while Applicant's offense was pending in federal court, a federal magistrate judge allowed him to deploy for a year with his Army unit to Qatar. Since alcohol use was not permitted there, Applicant could deploy and fulfill his court-ordered abstention requirement. While in Qatar, he also participated in court-ordered counseling, though he said it was not specifically "alcohol counseling." (Tr. 82-83) (See discussion of SOR ¶ 2.c, below)

Applicant was subsequently evaluated and found to be chemically dependent on alcohol and amenable to treatment. (GE 5 at 2) (This diagnosis is referenced in a September 2010 court order but is not itself documented in the record here). Relying on this diagnosis, the federal magistrate authorized Applicant's placement into a five-year deferred prosecution program. Applicant was also ordered to attend and successfully complete a two-year alcohol treatment program. (SOR ¶ 1.d) (Answer; SOR Ex. 3; Tr. 65-70, 95-96; GE 5 at 7, GE 8)

As part of the deferred prosecution program, Applicant was, in part, required: a) to abstain from alcohol consumption; b) to comply with the law and not to "commit any alcohol/drug offenses or other criminal offenses during the period of deferral;" and c) to notify U.S. Probation "within 72 hours of being arrested, questioned, or cited by law enforcement." Failure to comply was potential grounds for removal from the deferred prosecution program. (GE 5 at 8, 10) Applicant signed the judge's order and also acknowledged the requirements of his probation. (GE 5 at 9, 10; Tr. 68-69)

Applicant said he fulfilled the requirements of his counseling in Qatar before he returned to the U.S. in April 2011. (Tr. 68) He said he did not have contact with his U.S. probation officer when he returned to this country. (Tr. 100) It is not clear that he fulfilled the requirements of the "two-year treatment program" after he returned from Qatar.

(4) In September 2011, months after he returned from Qatar, Applicant was arrested in State 1, where he was then serving in the Army, and charged with driving while intoxicated (DWI), 2nd Offense within 5-10 years, and with refusing a blood or breath test. In February 2012, he was found not guilty on both counts after a bench trial. (SOR ¶ 1.e) Applicant explained that he was stopped by a police officer after a gas station attendant reported seeing multiple highly intoxicated individuals exiting a red SUV. Applicant said he was driving a red SUV but was alone, in military uniform, and not intoxicated. (Answer; GE 7 at 1-3; Tr. 70-71, 96-100)

Applicant acknowledged under questioning that he knew and understood at the time that he had been arrested, taken into custody by the police, taken to jail, and charged with DWI, even though he was later found not guilty at trial. He did not recall if he had been drinking at the time. (Tr. 96-100) He said he disclosed the offense to his

chain of command, but acknowledged that he did not inform his federal probation officer of this arrest, and, in hindsight, said that he should have done so. (Tr. 71, 100, 103)

(5) In December 2013, Applicant was arrested on an Army post in State 3 and charged with drunk driving. He had a blood-alcohol content (BAC) of 0.187. He appeared at an Article 15 hearing and was found guilty under Article 111 of the Uniform Code of Military Justice (UCMJ) of being in "Physical Control of a Vehicle while Drunk." (SOR ¶ 1.f) (GE 8, GE 9 at 21-30) Applicant asserted that when he was arrested, he had not been driving, but was sitting in his car listening to music (with the key in the ignition but the engine off). The day before, he had returned from a combat deployment to Afghanistan. He chose to accept the Article 15 findings rather than request a court-martial, since he was soon to leave the Army and pursue an education. (Answer) He received a general discharge under honorable conditions, as noted above. (Tr. 30; AE D)

Applicant acknowledged that he had been drinking prior to this arrest, and that, in hindsight, he should not have done so under the terms of his federal deferred prosecution following offense # 3. (Tr. 71-73; GE 5 at 10)) However, he also asserted that he believed his chain of command and security officials were aware of the offense. (Tr. 101-102)

In October 2015, the federal magistrate judge dismissed the deferred prosecution of Applicant's December 2009 DUI (Offense # 2), on the grounds that he had successfully completed the program. (GE 5) (There is no indication that the court was aware of either Offense #4 or Offense # 5, above).

(6) In January 2020, Applicant was arrested in State 1 and charged with DUI, refusing a breath sample, and drinking while driving with an open container of alcohol. In October 2020, he was found guilty of DUI. He received a 90-day suspended jail term, two years of probation and a fine. The remaining charges were dismissed. (SOR ¶ 1.g) (GE 7) Applicant said in his answer that he was returning home from a family social event, and was stopped because he did not have his headlights on. He had an open container of alcohol in the vehicle. He attended a court-ordered alcohol treatment assessment and six weeks of counseling. He also attended voluntary behavioral counseling. (Answer; Tr. 82) His probation for this offense was scheduled to end in October 2022. (Tr. 55, 117)

(7) During his direct testimony at his DOHA hearing, Applicant disclosed that in August 2021, he was arrested in State 4, where he now lives, and charged with DUI. (SOR ¶ 1.h) Applicant said he had been at home and had "a couple drinks." He had been doing yard work and left the house to get a massage for his back. He was pulled over for speeding. In April 2022, he pleaded guilty to DUI and was sentenced to one year of probation. He was referred to a substance abuse counselor for a 12-hour course. At the time of his DOHA hearing he had attended four or the required nine sessions. He is required to call in weekly and to provide urine samples as needed. He has passed them all and has paid all fines and fees. He is required to remain "clean and

sober" and to obey the law. He has a probation officer. He remains on probation for the offense until April 2023. (Tr. 35-36, 47-51, 81-82, 121-122)

Applicant acknowledged in his testimony that he had yet to report his latest DUI to his State 1 probation officer. He was unclear as to the terms of that probation, and was not sure he was required to report the arrest when it occurred. His most recent DUI was adjudicated only two weeks before his DOHA hearing, and he intended to disclose the matter to his State 1 probation officer as soon as his DOHA hearing was concluded. (Tr. 55-57, 117-120)

Applicant was sober for about six years while attending college after the Army and afterwards. He did well in schoo and was happier. He later resumed drinking, believing he was mature and responsible enough to do so. (Tr. 84-85)

Applicant said he does not believe he has ever been diagnosed with alcoholism or alcohol dependence by a professional counselor, assessor, or treatment professional. (Tr. 111-112) However, the federal magistrate's 2010 order placing him into the deferred prosecution program addresses the fact that Applicant was found chemically dependent on alcohol in an assessment. (GE 5) That assessment is not alleged in the SOR, so I will not consider it as disqualifying conduct.

When he was married, Applicant attended counseling through the VA at the urging of his wife, in about 2014, after he was discharged from the Army. He solicited the VA for an assessment of his PTSD and was referred to a counselor. He also saw a counselor twice in the summer of 2018. He has not been in treatment or counseling for his PTSD since then. Applicant acknowledged a "linkage" between his alcohol issues and his PTSD, noting that his December 2009 DUIs and his 2013 DUI all occurred shortly after he returned from deployments. (Tr. 75-79)

Following his 2020 DUI, Applicant attended voluntary substance abuse counseling with Ms. W between about January and March 2021. He successfully completed the program, which included five behavioral health education and counseling sessions over six weeks. Further treatment was not recommended. (Tr. 56-61; SOR Ex. 1; AE A) (Applicant's most recent DUI occurred five months later).

Applicant said he attempted sobriety after his 2020 arrest, but it was not until his most recent arrest that he "really sat down and talked with my family and became honest with myself. Everything states that I have an addiction" to alcohol. He believes that without alcohol, he would have had more success in the military. He gets a lot of support from his family and his girlfriend. He said this latest incident led to an "epiphany" and he realized that he is battling addiction and alcoholism. He said he has not had a drink since his latest DUI, in August 2021. He sought out on-line AA meetings soon thereafter, including some with military veterans. He attends AA meetings several times a week. This is voluntary and not court ordered. He has deep regrets that his alcohol issues ended his Army career. He described alcohol as "my Achilles heel." (Tr. 34-41, 80-86, 120-121)

Applicant acknowledged his history of alcohol use but asserted that it does not define who he is. He has excelled at many things, including in the Army, in leadership courses as a distinguished graduate, and in earning a bachelor's degree and an MBA with honors and excellent grades. He is a hardworking, trusted employee with excellent references and evaluations. He loves his job and values the opportunity to serve the military. He is now more accepting of his alcohol issues and continues to deal with his service-connected PTSD. He does not believe he is a risk and wants to continue to serve. (Tr. 44-47)

Guideline E

In 2012, following Applicant's first four offenses above, the Army CAF granted him a conditional clearance. The CAF noted that "failure to successfully complete your probation requirements or other subsequent unfavorable information may result in the suspension of your clearance." The CAF noted that, at the time, Applicant was in the five-year deferred prosecution program, following his second December 2009 DUI, GE 4 at 32)

In SOR ¶ 2.e, the Government alleged that Applicant's December 2013 DUI arrest (Offense # 5) constituted a violation of both his federal probation and the terms of his conditional clearance. Applicant denied SOR ¶ 2.e and asserted that his conduct did not violate any probation requirements. (Answer) He also testified that DOD took no action to revoke or suspend his conditional clearance following his arrests in either 2011 or 2013. (Tr. 102-104) During closing argument, Department Counsel conceded that there was no documentary evidence to support a finding that SOR ¶ 2.e was established. Specifically, there was no record evidence that the federal magistrate judge had ruled that Applicant had violated his probation following his December 2009 arrest. Nor was there evidence to show that the DOD CAF had ever acted upon Applicant's 2013 DUI offense (at least as to his 2012 conditional clearance). (Tr. 151-152)

Applicant first submitted an SCA in 2006, when he joined the Army. He disclosed his December 2004 DUI arrest in detail. (GE 2 at 19-23; Tr. 73-75)

When Applicant submitted his December 2019 SCA, he disclosed some of his DUI arrests, but not all of them. He disclosed offense #s 1, 2, and 5, above, but not offense #s 3 or 4 (GE 1 at 32-36). The Government alleged that these omissions were deliberate falsifications, an allegation he denied. (SOR ¶ 2.a)

As to SOR ¶ 2.b, the SCA question at issue asks, "Have you EVER been charged with an offense involving alcohol or drugs?" Applicant asserted in his Answer that he interpreted the question as requiring disclosure of offenses of which he had been "convicted" rather than "charged." (Answer) He testified that he also did not have the proper paperwork with him when he completed the SCA. He said he was confused about whether he should report the second December 2009 offense (Offense # 3), since it led to a deferred prosecution. He also said he paid for an online criminal background check and it was not listed. (Tr. 106) He said he did not intend to hide anything from the Government, and acknowledged that his various offenses "tend to blend together." He

knew, however, that he had been arrested in December 2009 on a federal military installation and appeared in federal court. As to Offense # 4, he also asserted that he did not have to list the 2011 DUI charge in State 1 since he was found not guilty. He also said he regarded Offense # 3 in a similar fashion since he was placed in a deferred prosecution program, and the charge was later dismissed. (Tr. 41-43, 64-65, 105-09)

Applicant also allegedly failed to disclose on his SCA both that he had been ordered to seek counseling or treatment as a result of his use of alcohol, and that he had received such counseling or treatment, as ordered by the federal magistrate in September 2010. (GE 1 at 37; SOR ¶ 2.c) Applicant denied the allegation of deliberate falsification. He said he had monthly monitoring sessions while he was in Qatar (an alcohol-free country) but did not consider that to be sufficiently related to alcohol "counseling" or "treatment" to be considered reportable within the context of the question on his SCA. (Answer; Tr. 83-84, 109-111)

Even so, the federal magistrate's September 2010 order states that Applicant "shall enroll in and successfully complete the two-year treatment program" recommended by the behavioral treatment agency evaluators who diagnosed Applicant as having a chemical dependency on alcohol. (GE 5 at 7)

In his February 2020 interview, Applicant discussed his 2004 charges, his first December 2009 DUI arrest, by civilian authorities in State 2, and his 2013 DUI arrest on the Army post in State 3 at length. (GE 3) At the start of his March 2020 interview, Applicant was confronted with evidence of his second December 2009 DUI in State 2, as well as evidence of his January 2020 DUI in State 1, which he failed to mention in his first interview, in February 2020. (GE 3) In November 2020, Applicant authenticated and adopted the summaries of both interviews without comment. (GE 3 at 14)

SOR ¶ 2.d alleged that Applicant deliberately withheld information from the interviewer, in both interviews, about the fact of his second December 2009 DUI. As above, he continued to assert that he had not been convicted in the latter incident. (Answer) Applicant acknowledged that the interviewing agent confronted him with evidence of the December 2009 DUI before he disclosed it. (Tr. 113-116)

Applicant also did not disclose in those background interviews that he had been arrested for DUI in January 2020, only weeks before. He asserted that he "didn't think about it. I was just being reactionary with her. She asked the question, I answered the question." He acknowledged that, in hindsight, he should have been more candid. (Tr. 61-64, 116) Deliberate lack of candor in Applicant's February 2020 interview about his January 2020 DUI was not alleged as part of SOR ¶ 2.d.

Applicant's girlfriend is trained as a nurse. She testified that she is aware of all aspects of his alcohol issues. He has been "very open" with her about them. He has not had a drink since his most recent DUI, in August 2021. She was disappointed and shocked after that incident. She believes he made a mistake. He attends AA regularly, several times a week, often twice a day. He is passionate about the meetings and they are helpful to him. She believes he will continue with his sobriety long term. She does

not drink and they have no alcohol in their home. She believes his most recent DUI was "the last straw" and that he "has his life in a new direction." (Tr. 124-131)

Applicant's witness, Mr. W, retired from the Army in early 2019 as a colonel (O-6) after 30 years on active duty. He has had a clearance for many years. He first met Applicant in 2012, when Mr. W. was Applicant's battalion commander. Applicant served as a supply sergeant and they worked together for two years. Mr. W wrote recommendation letters for Applicant for graduate school and followed his career. Now employed by a defense contractor, Mr. W hired Applicant for his current job two years ago. Applicant interfaces with two-star commands and is trusted to do so. Applicant has integrity, honesty, an excellent work ethic and is "mission-focused." Mr. W. is aware of the SOR allegations in the case. (Tr. 131-144; SOR Ex. 4) Mr. W's evidence corroborates Applicant's recent performance evaluations. (AE F, AE G)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." 484 U.S. 518, 531 (1988)

The AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Under ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline G, Alcohol Consumption

The security concern for 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.

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

> (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with an alcohol use disorder.

Applicant has incurred numerous arrests for alcohol-related offenses, beginning in 2004, when he was 17 years old, up to August 2021. AG ¶ 22(a) applies.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
>
> (b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and
>
> (d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant has a long and troubled history of alcohol involvement that spreads throughout his adult life. He has incurred six alcohol-related arrests and convictions (not counting 2011, when he was found not guilty). He has incurred two offenses in the last

two years, and, at the time the hearing ended, he was on probation for both of them (with the second probation period to end in April 2023). He attested that his most DUI arrest was an "epiphany" that has led him to acknowledge his alcohol issues. He began attending AA regularly, and has not consumed alcohol since August 2021. But his efforts must be balanced against his entire record. The fact remains that his history and pattern of DUIs is too established, his latest offenses are too recent, and his period of abstinence and AA are too short. He did not establish that his offenses occurred under unusual circumstances, that his alcohol-related misconduct is unlikely to recur, or that his behavior no longer casts doubt on his current reliability, trustworthiness, or judgment.

Additionally, there is the matter of Applicant's established pattern and ongoing nature of falsifications and lack of candor, addressed below under Guideline E, which significantly undercuts any showing of mitigation under other Guidelines. Applicant did not establish that any of the above Guideline G mitigating conditions should apply.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern for criminal conduct:

> 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

> (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;
>
> (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
>
> (c) individual is currently on parole or probation.

Applicant has incurred numerous arrests and convictions for DUIs and other alcohol-related offenses, from 2004 until August 2021, including two such charges and convictions after he submitted his December 2019 SCA, and one after the January 2021 SOR. At the time of the hearing, he was on probation for his two most recent offenses. AG ¶¶ 31(a), 31(b), and 31(c) all apply.

The following mitigating conditions for criminal conduct are potentially applicable under 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;
>
> (c) no reliable evidence to support that the individual committed the offense;
>
> (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 was found not guilty of Offense # 4, his DWI arrest in 2011. While the arrest is established (as is the fact that he did not disclose the arrest to his federal probation officer, as he should have), it is not established that he was drinking at the time. Having been found not guilty, AG ¶ 32(c) is established to mitigate SOR ¶ 1.e (as cross-alleged by reference under Guideline J in SOR ¶ 2.a).

Notwithstanding Applicant's excellent work record and recent participation in AA, no other Guideline J mitigating conditions apply, for the same reasons as set forth under Guideline G, above. Most significantly, as of the date of the hearing, he was on probation for his two most recent offenses, until October 2022 and April 2023, respectively. Applicant did not provide sufficient evidence to mitigate the criminal conduct security concerns.

Guideline E

AG ¶ 15 details the security concern regarding personal conduct:

> 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 following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:
>
> (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or

releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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;

(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; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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.

SOR ¶ 2.a is a cross-allegation of Applicant's alcohol-related offenses, already discussed above under both Guidelines G and J. Since those allegations are "sufficient for an adverse determination" under both guidelines, AG ¶ 16(c) does not apply. However, his conduct as detailed under the cross-allegation remains a personal conduct security concern under the general concern of AG ¶ 15 due to Applicant's repeated instances of poor judgment and failures to comply with rules and regulations that are clearly established by his record.

SOR ¶ 2.e alleges that Applicant "violated the terms of [his] federal probation" and the terms of his 2012 conditional clearance granted by the DOD CAF "by drinking alcohol and committing alcohol-related offenses on, at least, December 11, 2013." As noted during closing argument, there is no record evidence that the federal magistrate ever made such a finding, or was aware of conduct by the Applicant that might have led him to do so. (Tr. 151-152) Indeed, what is documented here is the fact that Applicant completed the five-year deferment program successfully. While he likely "violated the terms of his federal probation" by consuming alcohol while in the deferred prosecution program, that is a question better left to the magistrate judge who had authority to make that determination at the time.

With respect to whether Applicant violated the terms of his conditional clearance, that, too, was not determined at the time, since there is no record of a subsequent adjudication of that conduct before this one, either by DOHA or the CAF. Further, that conduct is already alleged under Guideline E as part of SOR ¶ 2.a. As such, that portion of SOR ¶ 2.e is essentially duplicative. The allegation is therefore not established, under AG ¶ 16(d) or otherwise.

The alleged falsifications are another matter. On his 2019 SCA, the SCA question at issue asks, "Have you EVER been charged with an offense involving alcohol or drugs?" Applicant disclosed some of his DUI arrests, but not all of them. He disclosed his offenses from December 2004, early December 2009, and December 2013, but not the ones from late December 2009 or September 2011. He asserted that he believed he had to report only offenses of which he was convicted. The plain language of the question says otherwise. For both of the omitted offenses, he acknowledged that he knew he had been arrested, taken into custody, and charged. One of them, the December 2009 offense, was on federal property, a U.S. Army post, circumstances that make his omission less credible, particularly on a DOD security clearance application. His explanations for his omissions are not credible, and SOR ¶ 2.b is established.

SOR ¶ 2.c is also established. On his 2019 SCA, Applicant was asked, among other related questions, "Have you EVER been ordered, advised, or asked to seek counseling or treatment as a result of your use of alcohol?" Applicant did not disclose that the federal magistrate had ordered him to participate in a two-year alcohol treatment program – a recommendation made in an assessment provided by Applicant himself (through counsel) in support of his petition for acceptance into the five-year deferred prosecution program. Applicant also signed acknowledgment of that treatment program at the time, in September 2010. Whether the counseling he received in Qatar was "alcohol counseling" is beside the point. SOR ¶ 2.c is established.

Finally, as to SOR ¶ 2.d, Applicant allegedly failed to disclose that he had two DUIs in December 2009, rather than one. SOR ¶ 2.d alleged that Applicant deliberately withheld information from the interviewer, in both his February 2020 and March 2020 interviews, about the fact of his second December 2009 DUI. As above, he continued to assert that he had not been convicted in the latter incident. (Answer) Applicant acknowledged that the interviewing agent confronted him with evidence of the December 2009 DUI before he disclosed it. (Tr. 113-116)

Applicant also did not disclose in those background interviews that he had been arrested for DUI in January 2020, only weeks before. He asserted that he "didn't think about it" and was just reacting to the questions he was being asked. Deliberately failing to disclose his January 2020 DUI was not alleged as part of SOR ¶ 2.d. However, it significantly undercuts the validity and credibility of his explanations for why he did not disclose the second December 2009 DUI, an instance of lack of candor which was alleged in SOR ¶ 2.d. I find that SOR ¶ 2.d is therefore established.

AG ¶ 17 details the personal conduct mitigating conditions. The following warrant discussion:

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

None of these mitigating conditions are established. Applicant has a long record of alcohol-related poor judgment, lack of impulse control, and repeated failures to comply with rules and regulations. He not only has a long criminal record, he has an established history of lack of candor about it – not only during the security clearance process, but to probation authorities. Applicant also failed to disclose not only the full extent of his alcohol-related criminal offenses on his SCA, he failed to exercise full candor during his background interviews. His failure to disclose his January 2020 DUI in security clearance background interviews that occurred within weeks of that offense is particularly damaging. Whether his alcohol issues and related arrests constituted a violation of "the terms of his probation," he clearly has multiple instances of failure to inform probation authorities about his subsequent offenses. And this, of course, is ongoing, since he had yet to inform his State 1 probation officer about his most recent arrest at the time of his hearing. No personal conduct mitigating conditions apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(c):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G, J, and E in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

Under the whole person concept, I credit Applicant's decorated military service, including in combat, on multiple deployments to Iraq and Afghanistan. I also credit his excellent work record and his efforts to come to grips with his ongoing alcohol issues. But Applicant's alcohol-related offenses are simply too numerous, too similar, and too recent to warrant a finding that they are mitigated. At the close of the record, he remained on probation for two recent offense, which occurred after the SOR. His falsifications and lack of candor about his record significantly undercut the credibility of his assertions that he is rehabilitated. The risk of recurrence is too great at this time for him to overcome. He needs to establish a significant, sustained track record of abstinence or modified consumption, supported by appropriate counseling or treatment, as well as a considerable track record of compliance with the law before he can again be considered a suitable candidate for access to classified information. Applicant did not mitigate the personal conduct, alcohol involvement or criminal conduct security concerns.

During closing argument, Applicant requested consideration of a conditional clearance, under DOD Directive 5220.6, Enclosure 2, Appendix C. (Tr. 156-157. Government Counsel noted his opposition (Tr. 161) and I noted Applicant's ongoing probationary status. (Tr. 161-162) In addition, Applicant already received a conditional clearance from the Army CAF in 2012, and has had multiple alcohol-related offenses in the years since then. A conditional clearance is not warranted.

Formal Findings

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

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f-1.h:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Braden M. Murphy
Administrative Judge