



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



In the matter of:)
)
) ISCR Case No. 21-02329
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

11/10/2022

Decision

HARVEY, Mark, Administrative Judge:

Guideline G (alcohol consumption) security concerns are mitigated, and Guideline E (personal conduct) security concerns are refuted. However, Guidelines J (criminal conduct) and F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On December 16, 2020, Applicant completed and signed a Questionnaires for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1). On November 20, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to

determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines G, J, and E. (HE 2.) On December 15, 2021, Applicant provided a response to the SOR, and he requested a hearing. (HE 3) On March 1, 2022, Department Counsel was ready to proceed.

On March 18, 2022, the case was assigned to me. On April 11, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 7, 2022. (HE 1A) On May 18, 2022, the hearing was rescheduled to June 9, 2022. (HE 1B) On June 7, 2022, Applicant emailed that his attorney was unavailable on June 9, 2022, and his hearing was cancelled. (HE 1C) On June 9, 2022, DOHA issued the third notice of hearing which scheduled the hearing for July 7, 2022. (HE 1D) The hearing was held as scheduled on July 7, 2022.

Department Counsel offered three exhibits into evidence, and Applicant did not offer any exhibits into evidence at his hearing; however, he provided four documents as attachments to the SOR. (Transcript (Tr.) 16-17, 22-26; GE 1-GE 3) There were no objections, and all proffered exhibits were admitted into evidence. (Tr. 23-26) On July 25, 2022, DOHA received a transcript of the hearing. After the hearing, Applicant provided two exhibits. (Applicant Exhibit (AE) A (111 pages) and AE B (53 pages)) Department Counsel objected to admission of AE B because it was not timely. (AE B at 1) I overruled the objection and admitted AE B. (AE B at 1) The record closed on September 19, 2022. (Tr. 104, 111; AE B at 1-2)

Department Counsel moved to amend the SOR to add SOR ¶¶ 4.a and 4.b under the financial considerations guideline. SOR ¶ 4.a alleges that Applicant filed his federal income tax returns for tax years (TYs) 2016, 2017, 2018, and 2019 in 2021. (Tr. 62-65) SOR ¶ 4.b alleges that Applicant filed his state income tax returns for TYs 2016, 2017, 2018, and 2019 in 2021. (Tr. 65-66) Applicant did not object to the amendments, and I granted the motion to amend the SOR.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a through 1.f, 1.h, 2.a, and 2.b. (HE 3) He denied allegations in SOR ¶¶ 1.g and 3.a. He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 41-year-old senior field engineer who concentrates on test engineering and systems integration. (Tr. 6, 9-10, 53) He has worked for his current employer since November of 2018. (Tr. 10, 53) His resume and performance overview for 2021 provide additional details about his background and professional experiences. (SOR response, Exhibit (Ex.) B, Ex. D) In 1999, he graduated from high school, and in 2008, he received a certification in aviation maintenance which is equivalent to an

associate's degree. (Tr. 6-7, 45-47; GE 1; SOR response) He said he needs to complete one course to receive a bachelor's degree in aeronautics. (Tr. 7) His resume erroneously indicates he has a bachelor's degree; however, he may be able to get a diploma if some administrative details are resolved at his university. (Tr. 48-49) He has never married, and he does not have any children. (Tr. 9; GE 1 at 29)

In 2003, Applicant joined the Marine Corps. (Tr. 7, 49) He completed five years of active duty service in the Marine Corps in April 2008, followed by one year in the inactive Reserve, and he was in the Marine Corps Active Reserve from April 2009 to April 2012. (Tr. 7, 50; GE 1 at 26) He served in Iraq from March to November 2004, and from May to October 2005. (Tr. 8; AE A at 43) His active duty Marine Corps specialty was helicopter mechanic. (Tr. 9) His Marine Corps Reserve specialty was intelligence imagery analyst. (Tr. 9) His Marine Corps evaluations in 2008, 2009, 2010, and 2011 indicated "One of the many highly qualified professionals who form the majority of this grade." (AE A at 87, 92, 97, 102, 107) He was a sergeant when he was discharged, and he received an honorable discharge. (AE A at 4, 43, 103)

Applicant received the following Marine Corps awards: Military Outstanding Volunteer Service Medal; Marine Corps Good Conduct Medal; Sea Service Deployment Ribbon with 1 Bronze Star; Global War on Terrorism Service Medal; Global War on Terrorism Expeditionary Medal; National Defense Service Medal; Certificate of Commendation; Iraq Campaign Medal with 1 Bronze Star; three Certificates of Training; and Armed Forces Reserve Medal. (Tr. 8; AE A at 43, 67, 80-82) In November 2020, he received a certificate of achievement from his employer. (SOR response, Ex. C)

Alcohol Consumption, Criminal Conduct, and Personal Conduct

SOR ¶ 1.a alleges Applicant consumed alcohol, at times to the point of intoxication, from about 1998 to at least September 2020. In his SOR response, he admitted this allegation. His April 7, 2021, Office of Personnel Management (OPM) personal subject interview (PSI) indicates that during the period from 2008 to 2015, he consumed alcohol on a near daily basis, and he drank to intoxication three to four times a week. (GE 3 at 1) When he drank to intoxication, he consumed four or more beers or a bottle and a half of wine. (*Id.*)

In his SOR response, Applicant said he reduced his alcohol consumption in 2016. At his hearing, he said he did not consume alcohol during the week. (Tr. 29) He generally limited his alcohol consumption to a drink or two with dinner. (Tr. 29) He has not excessively consumed alcohol since December 15, 2021. (Tr. 30; SOR response) He consumed alcohol excessively as a coping mechanism. (Tr. 32)

SOR ¶ 1.b alleges in about March 2003, Applicant was arrested and charged with driving while alcohol impaired (DWI) and careless driving. He admitted this allegation. (Tr. 31) He said his blood alcohol content (BAC) was close to .08; however, he did not remember the specific BAC. (Tr. 67, 93; AE B at 9) He pleaded guilty to a lesser charge than the DWI, and the careless driving charge was dismissed. (Tr. 31) The offense in the docket is "unclassified misdemeanor," and it may not be an alcohol-related offense. (AE

B at 9) He was sentenced to 12 months of probation, 24 hours of community service, and a fine. (Tr. 31) He was under the age of 21 at the time of this offense.

SOR ¶ 1.c alleges in about September 2014, Applicant was arrested and charged with driving under the influence of alcohol (DUI). Applicant was sitting in his vehicle when he was arrested for DUI. (Tr. 33; GE 2 at 4-5) His girlfriend called the police and accused him of stalking her. (Tr. 69) Prior to his arrest, he was drinking excessively in the aftermath of the break up with his girlfriend. (Tr. 33) The BAC related to this arrest is unknown. In April 2015, he was convicted of DUI and sentenced to 36 months of probation, 48 hours in jail, to pay a fine, and to attend a 40-hour alcohol-awareness class. (Tr. 34, 69-70; AE B at 47) He completed his sentence to jail and the alcohol-awareness class, and he paid his fine. (Tr. 70) One of the conditions of his probation was to not commit any criminal offenses, and to not operate a motor vehicle with any intoxicant in his body. (Tr. 71; AE B at 46)

In November 2016, the court was informed that Applicant violated probation by driving with alcohol in his system as set forth in SOR ¶ 1.e, *infra*. (AE B at 44) In November 2016, he was arraigned on the probation violation, and he received a fine of \$1,666. (AE B at 43) In January 2017, Applicant was tried for a probation violation, and he was sentenced to six days in jail. (AE B at 42-43) In April 2018, his probation expired by operation of law, and the court noted all fines and fees were paid. (AE B at 42) It is unclear from the record whether probation violations are considered separate convictions under state law.

SOR ¶ 1.d alleges in about February 2015, Applicant was arrested and charged with public intoxication. (GE 2 at 20-11) Applicant admitted this allegation. (Tr. 34) He was walking from a bar back to his hotel, and he said he slipped on some ice and fell. (Tr. 34; GE 2 at 2) There was no breathalyzer test. (Tr. 94) He was unsure about whether his conviction was for an alcohol-related offense. (Tr. 92) He received a small fine from the court. (Tr. 34; GE 2 at 2).

SOR ¶ 1.e alleges and Applicant admitted that in about July 2016, he was arrested and charged with DUI. (Tr. 36; GE 2 at 9-10; SOR response) He refused a breathalyzer and blood-alcohol test. (Tr. 94) He pleaded guilty to DUI, and he received a deferred sentence. (Tr. 36; GE 2 at 10)

SOR ¶ 1.f alleges that in about January 2017, Applicant was arrested and charged with three counts of DUI. He denied that he was charged with three counts of DUI. (Tr. 37) He admitted that he violated the terms of his three-year probation, which was based on his SOR ¶ 1.c September 2014 DUI offense, and his probation was revoked. (Tr. 37, 74-75) He served six days in jail, and he paid his fine. (Tr. 76-77) His probation “expired” on April 21, 2018. (Tr. 37) His probation violation is resolved. (Tr. 78)

SOR ¶ 1.g alleges Applicant admitted that he drove under the influence of alcohol about 30 times. He denied this allegation. (Tr. 37) Applicant’s April 7, 2021 OPM PSI indicates “From 2008 until 2015, subject speculated that he drove under the influence about 30 times.” (GE 3 at 1) Applicant said he told the OPM investigator that he drank a

beer and then drove on multiple occasions; however, he did not believe he was under the influence of alcohol when he was driving. (Tr. 37, 78-80)

SOR ¶ 1.h alleges that in 2015, Applicant consumed alcohol to the point of having a blackout. Applicant admitted the allegation. (Tr. 38; SOR response) Applicant's April 7, 2021 OPM PSI indicates "he has blacked out on a few occasions; he was not more specific. Subject last consumed alcohol to the point of having a blackout . . . in 2016." (GE 3 at 2) At his hearing, he said he had not had a blackout. (Tr. 80, 97-98)

Applicant has never been hospitalized for alcohol consumption. (Tr. 80) He has not attended any Alcoholics Anonymous (AA) meetings. (Tr. 86) He denied that he had been ordered to seek alcohol-related counseling. (GE 1 at 43) He did not receive any recommendations for additional alcohol treatment after he completed the court-ordered alcohol awareness class. (Tr. 86) He promised not to drive after consuming any alcohol. (Tr. 37, 43) He promised not to excessively consume alcohol. (Tr. 43; SOR response, Ex. A)

In sum, Applicant has five alcohol-related arrests or charges and about three alcohol-related convictions. (Tr. 91-92) His 2003 DUI arrest resulted in an unspecified misdemeanor conviction, and his February 2015, public intoxication arrest may not have resulted in an alcohol-related conviction. His 2017 alcohol-related charge was a probation violation for his 2016 DUI arrest. Applicant believes he has been responsibly consuming alcohol for several years. His current alcohol consumption is an occasional glass of wine with dinner. (Tr. 86) He most recently drank three or four beers during a single day about six days before his hearing. (Tr. 99)

SOR ¶ 2.a cross alleges that the information in SOR ¶¶ 1.b through 1.e under the criminal conduct guideline.

SOR ¶ 2.b alleges in June 2016, a protective order was filed against Applicant, and in December 2019, three counts of violation of the protection order were filed against Applicant. Applicant's live-in girlfriend filed a protective order; however, after she filed it, she and her daughter sent Applicant messages over the Internet. (Tr. 38-39) Applicant responded to their messages in violation of the protection order. (Tr. 39) In his December 16, 2020 SCA, Applicant said that he was aware of two warrants issued in 2016 and 2017. (GE 1 at 40) He said the warrants were for emails he sent in violation of the protection order. In the SCA, he described his plans for resolution of the warrant as follows:

I've recently found out that [she] had previously complained that I violated the protective order and there are court proceedings regarding this issue . . . I have an attorney and plan to fight the allegations. We are waiting for the window of opportunity to address these issues. COVID-19 has been a major inhibitor in being able to address these issues faster. I plan on visiting [the city where the court is located] after Christmas and New Year break to address the issue. (GE 1 at 39)

At his hearing, Applicant said he learned about the arrest warrant during the security clearance process. (Tr. 82) The three counts are unresolved; however, Applicant has a counsel who is helping him get the charges resolved. (Tr. 40) The bond is \$8,000, and Applicant is saving money for the bond. (Tr. 40; AE B at 2) There is a possibility the bond might be waived or reduced. (Tr. 81) He intends to travel to the court where he has an open warrant for violations of a protection order “as soon as possible.” (Tr. 101) On September 19, 2022, he promised to report to the court to address the charges in the next calendar year. (AE B at 11)

SOR ¶ 3.a cross alleges the information in SOR ¶¶ 1 and 2 under the personal conduct guideline.

Applicant is actively involved in his community. (Tr. 43) He does charity bike rides and teaches yoga classes. (Tr. 43) He loves his work and his coworkers. (Tr. 43)

Financial Considerations-Federal Income Tax Returns

In Applicant’s December 16, 2020 SCA, Applicant disclosed that he had not filed his tax returns for TYs 2016, 2017, 2018, and 2019. (GE 1 at 46-47) He did not owe any taxes. (*Id.*) He made arrangements to file these tax returns, and he was “honestly not aware that not filing was adverse information as [he] had been letting the Government keep some of [his] money.” (*Id.*)

In 2021, Applicant filed his federal and state income tax returns for TYs 2016, 2017, 2018, 2019, and 2020. (Tr. 62-63; AE B at 33-37) His TY 2016 federal income tax return is dated April 6, 2021. (AE B at 34) Most of the other tax documents he provided are undated and unsigned. (AE B at 33, 35-37) He filed the overdue tax returns before he received the SOR in November 2021. (Tr. 96) He was traveling frequently for his employment, and he said his failure to timely file his tax returns was “neglectful.” (Tr. 96) He did not owe any taxes. (Tr. 62)

Credibility Issues

Applicant’s resume submitted as Exhibit D to his SOR response indicates he received a “BS” in aeronautical science in July 2014. In his December 16, 2020 SCA, he indicated he attended a university from May 2011 to October 2014 (Estimated); however, he did not receive a degree in aeronautical science. (GE 1 at 14) At his hearing, he said he does not have a bachelor of science degree. (Tr. 48-49)

In Applicant’s December 2016 SCA, Applicant said he had only two DUIs, which were in September 2014 (Estimated) and July 2016 (Estimated). (GE 1 at 43) At his hearing, he said he failed to disclose his 2003 DUI on his December 16, 2020 SCA because it was disclosed on previous SCAs. (Tr. 87) He said he unintentionally failed to disclose his February 2015 public intoxication arrest. (Tr. 87-90)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Alcohol Consumption

AG ¶ 21 articulates the Government’s concern about alcohol consumption, “[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.”

Two alcohol consumption disqualifying conditions could raise a security concern and may be disqualifying in this case. AG ¶¶ 22(a) and 22(c) provide:

(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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

AG ¶¶ 22(a) and 22(c) are established. The SOR alleges five alcohol-related incidents involving the police and courts. Applicant was arrested or charged in 2003, 2014, 2015, 2016, and 2017 (probation violation due to 2016 DUI) for alcohol-related offenses. His OPM PSI indicates he has a history of drinking to intoxication and having alcohol-related blackouts. His denial of having alcohol-related blackouts is not credible. Although the term “binge” drinking is not defined in the Directive, his alcohol-related blackouts are an indication of alcohol consumption at a high enough level to establish Applicant engaged in binge-alcohol consumption to the extent of impaired judgment.

Four alcohol consumption mitigating conditions under AG ¶¶ 23(a)-23(d) are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and

has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant reduced his alcohol consumption in 2016. He does not consume alcohol during the week. He generally limits his alcohol consumption to a drink or two with dinner. He has not excessively consumed alcohol since December 15, 2021. He has not been arrested for an alcohol-related offense since 2016. His first probation violation related to his most recent DUI in 2016. His alcohol-related criminal offenses are not recent. He completed an alcohol-related class. He acknowledged his issues of alcohol abuse, provided evidence of actions taken to overcome this problem, and established a pattern of responsible alcohol use.

Applicant currently consumes alcohol responsibly. Because of his reduced levels of alcohol consumption, his alcohol offenses are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 23(a) and 23(b) are established. Alcohol consumption security concerns are mitigated.

Criminal Conduct

AG ¶ 30 describes the security concern about 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 lists three conditions that could raise a security concern and may be disqualifying in this case:

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

From 2003 to 2017, Applicant had five arrests or criminal charges. He admitted that he engaged in criminal conduct. He served a six-day jail term and received a fine for probation violations. AG ¶¶ 31(a), 31(b), and 31(d) are established.

AG ¶ 32 describes four conditions that could mitigate security concerns including:

- (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;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;
- (c) no reliable evidence to support that the individual committed the offense; and
- (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 presented some important mitigating information. He received job training and counseling; he obtained higher education; he successfully served nine years

in the Marine Corps and completed two combat tours in Iraq. His resume indicates he has achieved substantial professional development. His alcohol-related offenses ended in 2016, and they are not recent. He reduced his level of alcohol consumption in 2016. His current level of alcohol consumption is at a responsible level.

Applicant's arrests and convictions from 2003 to 2016 remain relevant as they show a pattern of disregarding laws and legal requirements. He has known about warrants for his arrest for the violations of the protective order for more than one year, and he has not reported to the court to resolve the matter. He has not provided a specific date within the next calendar year when he intends to report to the court. The offenses show a serious lapse of judgment.

In addition, Applicant submitted an inaccurate resume about his education as part of his SOR response. His SCA minimized his history of alcohol-related offenses. These lapses raise questions about his creditability and rehabilitation. See ISCR Case No. 20-01577 at 3 (App. Bd. June 6, 2022) (citing ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (listing the purposes for which non-alleged conduct can be considered)).

There is insufficient proof of rehabilitation. The totality of circumstances continues to cast doubt on Applicant's reliability, trustworthiness, and good judgment. Criminal conduct security concerns are not mitigated.

Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The SOR alleges three disqualifying conditions in AG ¶ 16 that are relevant in this case. AG ¶¶ 16(c), 16(d)(3), and 16(e)(1) provide:

(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;

(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 person may not properly safeguard classified or sensitive information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing

The conduct described under Guideline J is sufficient for an adverse security determination. AG ¶¶ 16(c) and 16(d) are not established. Security officials and law enforcement officials are aware of Applicant's history of criminal activity. AG ¶ 16(e) is not established. Personal conduct security concerns are duplications of security concerns addressed under other guidelines, and they are refuted.

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes one disqualifying condition that could raise a security concern and may be disqualifying in this case: “(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.” The record establishes AG ¶ 19(f). Further discussion of this disqualifying condition and the applicability of mitigating conditions is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 are as follows:

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

(b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant failed to timely file his federal and state income tax returns for TYs 2016, 2017, 2018, and 2019. He filed these income tax returns in early 2021.

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense. Title 26 U.S.C. § 7203, willful failure to file return or supply information, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who

willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to the existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931). For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as a crime. In regard to the failure to timely file federal and state income tax returns, the DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted); ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [his or her] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 & n.3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an applicant's course of conduct and employing an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

In ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board explained that in some situations, even if no taxes are owed when tax returns are not timely filed, grant of access to classified information may be inappropriate. In ISCR Case No. 15-1031 (App. Bd. June 15, 2016) the applicant filed his 2011 federal income tax return in December 2013, his 2012 federal tax return in September 2014, and his 2013 federal tax return in October 2015. He received federal tax refunds of at least \$1,000 for each year.

Nevertheless, the Appeal Board reversed the administrative judge's decision to grant access to classified information.

In ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) the Appeal Board reversed the grant of a security clearance, discussed how AG ¶ 20(g) applied, and noted:

The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, applicant's filing of his Federal income tax returns for 2009-2014 after submitting his SCA, undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit.

Applicant filed his federal and state income tax returns for TYs 2016, 2017, 2018, and 2019 in early 2021, after he completed his December 16, 2020 SCA. Under all the circumstances including careful consideration of the Appeal Board's jurisprudence, I conclude Applicant failed to establish mitigation of financial considerations security concerns.

Whole-Person Concept

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

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

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines G, J, E, and F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 41-year-old senior field engineer who concentrates on test engineering and systems integration. In 2008, he received a certification in aviation

maintenance, which is equivalent to an associate's degree. He needs to complete one course to receive his bachelor's degree in aeronautics.

Applicant served five years on active duty in the Marine Corps, and four years in the Marine Corps Reserve. He served in Iraq from March to November 2004, and from May to October 2005. His Marine Corps evaluations in 2008, 2009, 2010, and 2011 indicated "One of the many highly qualified professionals who form the majority of this grade." (AE A at 87, 92, 97, 102, 107) He was a sergeant when he was discharged, and he received an honorable discharge. His two deployments show his significant sacrifices on his nation's behalf. His resume describes his important contributions to the nation as a government contractor. Applicant received multiple Marine Corps awards. In November 2020, he received a certificate of achievement from his employer.

Applicant's arrests, charges, and convictions from 2003 to 2017 show a pattern of disregarding laws and legal requirements. He has known about warrants for his arrest for the violations of the protective order for more than one year, and he has not reported to the court to resolve the matter. He did not provide a specific date within the next calendar year when he intends to report to the court. Waiting up to a year to address an arrest warrant shows a lack of judgment and trustworthiness. He did not timely file his federal and state income tax returns for TYs 2016, 2017, 2018, and 2019. His filing of the overdue tax returns in early 2021 occurred after he submitted his December 16, 2020 SCA, and the untimely filing of these tax returns is too late to fully mitigate this violation of IRS regulations.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards establishing a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Guideline G (alcohol consumption) security concerns are mitigated, and Guideline E (personal conduct) security concerns are refuted. However, Guidelines J (criminal conduct) and F (financial considerations) security concerns are not mitigated.

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:	FOR APPLICANT
Subparagraphs 1.a through 1.h:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraph 4, Guideline F:	AGAINST APPLICANT
Subparagraphs 4.a and 4.b:	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 or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge