



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



In the matter of:)
)
) ISCR Case No. 22-00262
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

11/17/2022

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline G, alcohol consumption, Guideline E, personal conduct, and Guideline J, criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 5, 2022, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines G, alcohol consumption, Guideline E, personal conduct, and Guideline J, criminal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on May 5, 2022, and elected to have his case decided on the written the record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM), and Applicant received it on July 6, 2022.

He was afforded an opportunity to file objections and submit material in refutation, extenuations or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 6. Applicant submitted documents that were marked as Applicant Exhibits (AE) A and B. There were no objections to any of the Items or exhibits offered, and they were admitted into evidence. The case was assigned to me on September 29, 2022.

Findings of Fact

Applicant admitted the SOR allegations in ¶¶ 1.a through 1.d, 2.a, 2.b, and 3.a. He denied the SOR allegations in ¶¶ 2.c through 2.e. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 38 years old. He served on active duty in the Army from 2002 until he was honorably discharged in 2009. He has served in the Army National Guard since 2010. He married in 2016 and does not have children. He earned a bachelor's degree in 2020.

Applicant was arrested and charged with driving while intoxicated (DWI) in April 2009. He pleaded guilty and was fined. He was ordered by his command to attend an alcohol education class.

In April 2014, Applicant was charged with possession of alcohol and careless driving. Apparently, he was arrested in a dry county and a bottle of whiskey was found open in his vehicle. He paid a fine for the possession charge, pleaded guilty to the careless driving charge, and paid another fine. (Item 6)

In April 2015, Applicant was arrested and charged with driving under the influence of alcohol (DUI). He pleaded guilty and received a fine.

In September 2019, Applicant was arrested and charged with DUI. He was given a breathalyzer and recorded a .17% alcohol reading. He was represented by an attorney who requested a continuance for his trial because he was on military orders. He was granted the continuance until April 6, 2021. He failed to appear for his trial on that date. He was found guilty in absence, charged with contempt of court for failing to appear for trial, and issued a bench warrant. As of the date of the SOR, the bench warrant remained active. In his answer to the SOR, Applicant admitted the facts, stated he had a lawyer and offered no other information. In his response to the FORM, he provided a receipt to show he paid a fine associated with a sentence for the offense of DUI 2nd offense on the alleged date, and he was participating in an alcohol substance course for the next four weeks. (Item 1)

In November 2020, Applicant completed a security clearance application (SCA). Section 22-Police Record of the SCA, asked Applicant if in the past seven years he had been issued a summons, citation, or ticket to appear in court in a criminal proceeding against him; if in the last seven years if he had been arrested by any police officer, sheriff,

marshal or any other type of law enforcement official; in the last seven years if he had been charged, convicted, or sentenced to a crime in any court; and in the last seven years if he had been or was currently on probation or parole. Applicant answered no to the above questions and did not disclose his April 2014 charge for careless driving and possession of alcohol; his April 2015 arrest, charge, and conviction of DUI, to which he pleaded guilty; and his September 2019 arrest and charge for DUI, contempt of court charge for failing to appear, and his bench warrant, which were pending at the time. (SOR ¶ 1.c)

Applicant's SCA also asked under Section 22-Police Record, if other than offenses already listed, if he EVER had been charged with an offense involving alcohol or drugs. He answered no and failed to disclose those offenses listed above and his April 2009 DWI conviction. (SOR ¶ 1.d)

In December 2020, Applicant was interviewed by a government investigator. He was asked if he had ever been arrested, charged, or convicted of any alcohol-related offenses. He disclosed to the investigator that he had been arrested twice for DWI: 2009 and 2015. He disclosed to the investigator that he was arrested in April 2009 after drinking at a pool hall. He was stopped by the police, failed a field sobriety test, and placed under arrest for DWI. He was given a breathalyzer test and was over the legal limit. He plead guilty to DWI in court and was ordered to pay a fine. (Item 3)

Applicant also disclosed to the investigator during his December 2020 interview that in April 2015 he was driving and came upon a DUI checkpoint. He had an open container of alcohol in his vehicle. Applicant said he passed both the field sobriety and breathalyzer tests. He could not recall what he was initially charged with. He could not recall going to court. He possibly recalled receiving a letter from the court ordering him to pay a fine and attend an alcohol education class. Documents from the FBI database and state court records reflect Applicant was arrested and charged with DUI in April 2015 and was found guilty of DUI and fined. (Items 4-5)

Applicant's explanation to the investigator for failing to disclose the required information on his SCA that specifically asked about his past arrests and those for alcohol-related incidents was that he misread the question regarding alcohol-related arrests and thought the question was referring to felony offenses only. Applicant did not disclose to the investigator during this interview that he had been arrested in April 2014 and charged with possession of alcohol and careless driving, and his most recent September 2019 arrest and charge for DUI. (Item 3)

In February 2021, Applicant was interviewed a second time by a government investigator. He told the investigator that he failed to disclose his alcohol-related arrests due to overlooking the alcohol-related questions on his SCA. He said he was not intentionally trying to conceal his alcohol-related arrests. No explanation was provided as to why he did not disclose his April 2014 and September 2019 arrests during his first interview. He disclosed that he had obtained an attorney and pleaded not guilty to the September 2019 charge and the case was pending. (Item 3)

In April 2019, Applicant was accused of shoplifting at a big box store. During the February 2021 interview, he told the investigator that he was at a big box store and had purchased groceries totaling about \$200, which included a bag of shrimp and some steaks. After paying for the groceries, he was stopped by the loss prevention employee and asked to come to the office. Applicant said he was informed by the employee that he had two steaks and a bag of shrimp that he did not register at the checkout. He questioned the employee about why he would purchase \$200 worth of groceries and not pay for the steak and shrimp that cost about \$20. He was released and informed his name would be entered into the store's database and if a similar incident occurred again, he would be arrested. (Item 3)

The SOR (§ 2.c) alleged Applicant deliberately failed to disclose on his SCA his April 2014, April 2015 and September 2019 arrests. In his answer to the SOR, he stated, "I deny. I did not fully read the question, upon being asked I answered honestly and truthfully." (Item 1) The SOR also alleged (§ 2.d) that in his SCA, Applicant was specifically asked about alcohol-related offenses and he denied ever having been arrested or charged with any. Applicant denied this allegation. The SOR alleged he falsified material facts when he was questioned by the government investigator in December 2020 about alcohol-related offenses and failed to disclose his April 2014 and September 2019 offenses (SOR § 2.e). Applicant's SOR answer stated: "I misunderstood the question but when asked an answer was given." (Item 2)

In Applicant's response to the FORM, he provided a receipt from July 2022 to show he completed a payment towards a fine associated with his September 2019 DUI offense. The receipt reflects that the DUI is a second offense. No other information was provided regarding this charge, the sentence, and whether he is on probation. He stated that he was "doing an alcohol substance" that required him to attend weekly for four weeks. He also stated, "I admitted to what I have done but I did misread the questions." (AE A)

I find Applicant deliberately falsified material facts on his SCA when he failed to disclose any of his arrests. The SCA asked if he had any arrests in the past seven years. He answered no. It asked if he had EVER had any alcohol-related arrests, charges, or convictions. He answered no. In December 2020, he was questioned by a government investigator, and when asked if he had any alcohol-related arrests, he disclosed two and did not disclose his most recent DUI arrest of September 2019, which was pending, and his 2014 arrest. He did not disclose these previously because he thought he only had to disclose felonies. I do not believe he misread the SCA or overlooked the questions because when he had an opportunity to disclose all of his past alcohol-related arrests during his first interview, he failed to do so. At that point, he was on notice to report all criminal and alcohol-related offenses and he did not. It was only after the investigator did a second interview that he disclosed his 2014 and 2019 arrests. His explanations are not believable. (Item 3)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision."

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

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G: Alcohol Consumption

AG ¶ 21 expresses the security concern for alcohol consumption:

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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. I find the following to be potentially applicable:

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

Applicant has been convicted three times for DWI or DUI from 2009 to 2019. He also was charged with possession of alcohol in 2014. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from alcohol consumption. I have considered the following mitigating condition under AG ¶ 23:

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

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

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

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant has a history of alcohol-related incidents beginning in 2009. He was required to take an alcohol education class after his 2009 DWI conviction. In his response to the FORM, he stated he was participating in a four-week alcohol substance course, presumably court-ordered after his 2019 conviction. Without additional evidence, I cannot find that he is participating in a counseling or a treatment program and is making satisfactory progress. AG ¶ 23(c) and 23(d) do not apply. He provided no other evidence which would indicate that future alcohol-related issues are unlikely to recur. He has not acknowledged his pattern of maladaptive alcohol use or evidence to overcome it. None of the above mitigating conditions apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns for 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 16, and following that may be 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; and
- (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating 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 individual may not properly safeguard classified or sensitive information; 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, could affect the person's personal, professional, or community standing.

Applicant completed a SCA in November 2020 and did not disclose any of his past criminal arrests, charges, or convictions, which included three charges for DWI and DUI, the most recent in September 2019, and his arrest in 2014 for careless driving and possession of alcohol. When questioned by a government investigator in December 2020, he said the reason he failed to disclose his arrests was that he thought he only had to disclose felony arrests. During the interview, he only disclosed his 2009 DUI conviction and the April 2014 arrest for possession of alcohol and careless driving. He did not disclose his April 2015 DUI conviction or his most recent September 2019 arrest for DUI that was still pending. In his SOR answer, he said he misread the question, but when asked, he gave an answer. However, when he was initially asked by the investigator in December 2020, he did not give a complete answer and intentionally failed to disclose his most recent DUI arrest from a year earlier, which he was pending trial, and his 2015 DUI conviction. Based on the totality of the evidence, I did not find Applicant's explanations credible. The evidence supports finding that he deliberately attempted to conceal his past alcohol-related criminal conduct. I find Applicant deliberately falsified his SCA and provided false information during his December 2020 background investigation. AG ¶¶ 16(a) and 16(b) apply to these facts.

Applicant's four alcohol-related offenses (SOR ¶¶ 1.a through 1.d) alleged under the alcohol consumption guideline, were cross-alleged under the personal conduct and criminal conduct guidelines. There is sufficient evidence for an adverse determination under both of those guidelines and will not be addressed under the personal conduct guideline.

Applicant admitted he was accused of shoplifting in 2019 (SOR ¶ 2.b). He was not charged. This allegation was cross-alleged under the criminal conduct guideline. I find AG ¶¶ 16(d) and 16(e) apply because there may not be sufficient evidence to make an adverse determination under the criminal conduct guideline, but which, when combined with all available information, supports a whole-person assessment of questionable judgement, untrustworthiness, unwillingness to comply with rules and regulations. It is also the type of conduct that, if known, could affect a personal or professional, or community standing and subject to exploitation or manipulation.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

- (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;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken 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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant did not make prompt good-faith efforts to correct his falsifications. His actions were not minor. His failure to provide a complete and accurate account of his past criminal and alcohol-related conduct is a serious security concern. The shoplifting allegation is minor, but combined with Applicant's other conduct, I am unable to conclude that future inappropriate conduct is unlikely. His repeated and deliberate falsifications are serious and cast doubt on his reliability, trustworthiness and good judgment. The above mitigating conditions do not apply.

Guideline J: Criminal Conduct

The security concern for criminal conduct is set out in AG & 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG & 31, and the following three 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 was convicted of DWI or DUI for offenses that occurred in 2009, 2015, and 2019. He was convicted of careless driving and possession of alcohol in 2014. He did not provide information regarding his 2019 DUI conviction as to whether he is on probation. AG ¶¶ 31(a) and 31(b) apply. AG ¶ 31(c) does not apply.

Applicant admitted that he was accused of shoplifting in 2019. He denied he committed the offense, and there is no other evidence regarding this allegation. I find this allegation was adequately addressed under the personal conduct guideline. None of the criminal conduct disqualifying conditions apply to this allegation.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(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 has three DUI convictions from 2009 to 2019 and a careless driving and possession of alcohol conviction. The current status of his most recent DUI conviction is not contained in this record. At the time he provided a response to the FORM, he was participating in an alcohol-related course, but did not provide any other information. Based on his past history and pattern of criminal conduct, I cannot find that future criminal behavior is unlikely to recur. Applicant has not provided evidence of successful rehabilitation. His past behavior casts doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(b) do not 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 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), 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. Applicant failed to meet his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline G, alcohol consumption, Guideline E, personal conduct and Guideline J, criminal conduct.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.e:	Against 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 national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge