



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



In the matter of:)
)
) ISCR Case No. 19-02109
)
Applicant for Security Clearance)

Appearances

For Government: Daniel O’ Reilly, Esq., Department Counsel
For Applicant: *Pro se*

04/03/2023

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to revoke his eligibility for a security clearance to work in the defense industry. Applicant has a history of problematic alcohol use as evidenced by three convictions for driving under the influence in 2014, 2017, and 2019. Although the record contains some evidence in mitigation it is not enough to overcome Applicant’s inability to acknowledge his level of intoxication during his 2014 and 2017 arrests. His failure to do so indicates a continued minimization of the severity of his history of alcohol consumption. Clearance is denied.

Statement of the Case

On February 3, 2020, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the alcohol consumption, criminal conduct, and financial considerations guidelines. This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

DOD adjudicators were unable to find that it is clearly consistent with the national interest to continue Applicant's security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge for a determination whether to grant his security clearance. Applicant timely answered the SOR and a requested hearing.

The hearing convened on March 5, 2022. I appended to the record as Hearing Exhibits (HE) I through III, respectively: (I) the Pre-Hearing Order, dated April 22, 2022; (II) the Government's Disclosure Letter, dated April 4, 2021; and, (III) Applicant's request for administrative notice. I also admitted Government's Exhibits (GE) 1 through 9, and Applicant's Exhibits (AE) A through D, without objection. DOHA received the transcript on May 17, 2022.

Findings of Fact

Applicant, 47, is self-employed as a consultant. He requires a security clearance for a project with a federal contractor. He was previously granted access to classified information by other federal agencies. He completed a security clearance application in January 2018, disclosing that he was convicted of driving under the influence (DUI) of alcohol in November 2014 and August 2017. Applicant's background investigation revealed another DUI arrest in May 2019 as well as several delinquent debts. (Tr. 53; GE 1-9)

Alcohol Concerns

Applicant was born with a benign medical condition that has physical manifestations. Although the condition is not neurological, he has experienced issues in the workplace where his medical condition has made others uncomfortable and unnecessarily concerned about his health or ability to complete his job. In social settings, he had concerns that his medical condition would be off-putting to those who were unfamiliar with it. He tried medications in the past, but ultimately decided against pharmaceutical treatment, citing marginal improvement and negative side effects. He testified that his treating physician recommended one alcoholic beverage before certain events to lessen the appearance of the condition. Applicant submitted a peer-reviewed article on the issue, which is appended to the record as HE III. However, he did not provide a letter from his physician corroborating the recommendation. (Tr. 54-56, 80-81)

Applicant is a competitive athlete. He attends training classes each week and participates in private training. He also practices at social events, usually held at local bars. Concerned that his medical condition would inhibit his ability to interact with strangers, he decided to try using alcohol before social practice events to reduce the appearance of his medical condition. He would not consume alcohol before work, a competition, or a formal training session. In those circumstances, the environments allowed him to communicate easily about his medical condition. However, the loud environment at social practice events prevented similar conversation. He testified that he would typically have one or two drinks at the beginning of the evening. These events could last more than five hours, and he would often attend more than one event on a

given evening. Outside of these events, Applicant described himself as an occasional drinker, who did not regularly consume alcohol to intoxication. (Tr. 60-61, 76, 111-112, 138-139)

Applicant's first DUI arrest occurred in October 2014. He was on his way home after a social practice event at a bar. He was pulled over for speeding. During the traffic stop, he provided a breath sample. He was arrested and charged with reckless driving for going 20 miles per hour over the speed limit and DUI – blood alcohol level .15% - .20%. He admitted that he consumed one shot at the end of the night before driving home. He does not remember if he consumed another drink earlier in the evening. He does not believe that he was intoxicated and attributes his blood-alcohol level to the timing of the shot in relation to the breathalyzer test. In November 2014, he pleaded guilty to the DUI charge and was sentenced to 180 days in jail with 175 days suspended. His driver's license was restricted for 12 months, and he was required to install an interlock device on his car. He was also required to attend an alcohol education class. The speeding charge was not prosecuted. He completed the terms of his sentence. He abstained from alcohol until at least November 2015, one year after the conviction. (Tr. 58-60, 112-117; GE 7)

Applicant was arrested for driving while intoxicated (DWI) in February 2017. Applicant testified that he was at a social practice event and had one alcoholic drink around five or six o'clock in the evening. On his way home around three o'clock in the morning, he swerved his car to avoid hitting a deer in the road. In avoiding the deer, he hit a curb. After the incident, Applicant felt that his car was not driving as smoothly, but it was not enough to stop him from operating the vehicle. Instead of taking his intended exit, he mistakenly ended up on the airport access road. The access road, which is almost 14 miles long, does not have any exits to local-area traffic. Applicant drove the entire west-bound length of the road and circled the airport to access the local-area exits available from the east-bound lanes. As he was rounding the airport, an airport employee observed sparks coming from the bottom of the car and alerted the police, which issued a 'be on the lookout' alert for Applicant's car. (Tr. 63-64, 117-120, 136, 146-148; GE 5-6)

As Applicant drove east bound on the airport access road, he passed a patrol car. The police officer observed Applicant's car was producing smoke, heavy sparks, and was missing two tires, causing him to drive on the remaining rims. When the officer pulled Applicant over, the officer noticed that Applicant smelled of alcohol and that his eyes appeared glassy. The officer also observed that Applicant was wet and appeared to have urinated on himself. Applicant admitted to the officer that he had one drink between nine and ten o'clock p.m. The officer asked Applicant if he was aware of the damage to the car, which, in addition to the two missing tires, also included a shattered rear window. Applicant told the officer he was unaware of the damage. Applicant agreed to submit to field sobriety tests. He failed the test involving physical movements as well as the mental acuity tests. Applicant agreed to submit a breath sample, which yielded a .16% blood alcohol level. He was arrested for driving while intoxicated (DWI) – second offense. At the police station, Applicant was asked to provide another breath sample. The officer believed that Applicant intentionally failed to follow directions for completing the test and charged him with a civil violation for refusal of breath exam. (Tr. 122; GE 5-6)

Applicant disputes the officer's report. He denies that he submitted a breath sample during the traffic stop. He claims that he was given field sobriety tests, which he could not execute due to his medical condition. He also testified that he had not urinated on himself but was still sweating as his body cooled from the physical activity of the evening. He explained that he was asked to provide a second breath sample at the police station and that the results were inconclusive. However, he is adamant that he was not intoxicated. (Tr. 64-68, 123; GE 5-6)

Although Applicant was initially charged with DWI – second offense, the charge was reduced to DWI – first offense. Taking his lawyer's advice, Applicant pleaded guilty in August 2017. He was sentenced to 180 days in jail with 175 days suspended. The court restricted his license for 12 months and required him to install an interlock device on his car. He was also required to attend an alcohol education class. The civil violation was *nolle prossed*. He completed the terms of his sentence and abstained from alcohol until approximately August 2018, one year after the conviction. (Tr. 61-62, 68-69, 127-129; GE 5-6)

Applicant disputes the accuracy of the field breathalyzer test results for his 2014 and 2017 arrests. He maintains that he was not intoxicated during either stop. To support his concern about the inaccuracy of the tests, he submitted a newspaper article on the issue. However, it does not appear that he challenged the accuracy of either reading in court. (HE III)

Ten months after having the restrictions on his driver's license lifted, Applicant was arrested for his third alcohol-related arrest May 2019. Applicant was at another social practice event at a bar close to his home. In celebration of his upcoming birthday, his friends bought him several rounds of drinks. He admits that he was intoxicated and that he chose to drive home. A police officer initiated a traffic stop after observing Applicant driving erratically, swerving off the road and almost hitting a barrier. Upon approaching the car, the officer observed that Applicant smelled of alcohol and that he had vomited inside the car. Applicant admitted that he had been drinking and had consumed too much alcohol but could not state how much he had to drink. He was arrested for DUI. (Tr. 69-70, 76, 133-134; GE 3-4)

Applicant was charged with felony DWI – third. He pleaded guilty in August 2020. He was sentenced to two years' incarceration, with one year and nine months suspended. Because of concerns related to the covid-19 pandemic and its impact on the incarcerated population in his state, Applicant was able to serve his sentence on home confinement. His license was suspended indefinitely. He was sentenced to two years' supervised probation. Initially, he was required to check in in-person with his probation officer, but in August 2022 he was granted permission to check in using a mobile application. Applicant's probation expired in December 2022. He is eligible to apply for a restricted license in 2023 and for the reinstatement of his driving privileges in 2025. (Tr. 71, 135-137; GE 3-4; Ans, Enclosures 6-7)

Applicant's friend, Witness 1, testified at the hearing. Witness 1 has known Applicant personally since 2009 through a men's civic organization. He is aware of

Applicant's history with DUI. He picked Applicant up from jail after the 2014 arrest and spoke to him immediately after the 2017 arrest. The night of the 2019 arrest, Witness 1, picked Applicant up from the police station, took him home, and at Applicant's request, removed all the alcohol from Applicant's home. Since that night, he has not seen Applicant consume alcohol in any social setting. Witness 1 also has a professional relationship with Applicant, whom he has hired as contractor for the business he owns. He has no concerns about Applicant's ongoing security worthiness. He considers Applicant to be a reliable and trustworthy professional. (Tr. 19-35)

Applicant still attends social practice events, but he no longer consumes alcohol. Although his medical condition will intensify with age, Applicant realized that it does not affect his ability to participate comfortably. He realized that the underlying issue was his embarrassment about his medical condition. He has gotten more comfortable with discussing the issue in personal and social settings. He has informed the bartenders at the events he frequents that he no longer drinks alcohol, and he supports them by tipping on the non-alcoholic drinks he purchases. (Tr. 39-42, 45-50, 57, 60-61, 78-79, 80)

As of the hearing, Applicant had abstained from alcohol for 1,075 days, almost three years. His main tool is a manual counter that tracks the number of days that he has abstained from alcohol. He finds the satisfaction of watching the counter turn over as significant motivation. He does not participate in any sobriety management program. Nor did he report attending therapy. He has increased his participation in his sport, entering competitions with his girlfriend of two years. She also testified at the hearing. She is aware of his history of DUIs and his probationary status. They spend their time together in couples' and individual training classes and practicing for competitions. Neither Applicant's girlfriend nor his friend have seen Applicant consume any alcohol since May 2019. (Tr. 39-42, 45-50, 57, 73-74; Answer, Enclosure 9)

Financial Issues

The SOR also alleges that Applicant is indebted to 5 creditors for \$28,713. The SOR alleges that Applicant's mortgage is delinquent (SOR ¶ 3.a, \$11,823). However, this appears to be a reporting error due to the transfer of the mortgage from one servicer to another. Applicant provided documentation that his mortgage is current and paid on time. His April 2022 credit report correctly reports the account as being transferred to another lender, and the new servicer reports the account is current and in good standing. He has disputed the derogatory information with the credit reporting agencies and the dispute was resolved in his favor. (Tr. 82-84; AE A; Ans, Enclosure 10)

The debts alleged in SOR ¶¶ 3.b (\$11,340) and 3.e (\$3,300) were debts incurred during his marriage, which ended in divorce in 2014. His ex-wife was a spendthrift and incurred significant debt using their joint credit cards. Although the marriage ended because of his ex-wife's infidelity during the marriage, Applicant assumed responsibility for the marital debts during the divorce. He resolved SOR ¶ 3.b in June 2020. He also resolved the account in SOR ¶ 3.e and it is no longer being reported on his most recent credit report. Applicant is unfamiliar with the debt alleged in SOR ¶ 3.c. He has repeatedly challenged the account with the credit-reporting agencies. The challenges are resolved

in his favor, but the account reappears. The debt alleged in SOR ¶ 3.d is for a medical account that is \$134. He cannot locate the creditor. (Tr. 85-93; AE A, D)

Applicant is financially stable. He currently earns approximately \$125,000 annually. He lives within his means. He owns his home and has other assets.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, 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 national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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.

Section 7 of EO 10865 provides that adverse 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

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. The record establishes the Government’s *prima facie* case. Between 2014 and 2020, Applicant was arrested for and convicted of three alcohol-related driving offenses. The last conviction, a felony, resulted in Applicant being placed on home confinement for three months and supervised probation for 2 years, which expired in December 2022. The record establishes that he has a maladaptive relationship with alcohol. The following disqualifying conditions apply:

AG ¶ 22(a), alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual’s alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

AG ¶ 22(c), habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

The record also contains mitigating evidence. Of the alcohol consumption mitigating conditions, AG ¶ 23(b) partially applies:

The individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of action taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

The record contains some mitigating evidence. Applicant has not been diagnosed with an alcohol use disorder. Nor has he been advised by his physician or a substance-abuse counselor to abstain from alcohol, though he has decided for himself to do so. At the time of the hearing, he had abstained from alcohol for almost three years. He has increased his involvement in a sporting activity. Although he continues to attend social practice events at bars, he has informed the bartenders of his decision to abstain from alcohol. He no longer keeps alcohol in his home.

Applicant began consuming alcohol as an unconventional method of diminishing the appearance of a medical condition in social settings. At the time he chose to do so, he was in early middle age and had lived with his medical condition since birth. He admitted that his medical condition sometimes served as a source of embarrassment for him. In addition to using the alcohol to lessen the appearance of his medical condition, it

seems that he also used alcohol to self-medicate his feelings of embarrassment in social settings. Although Applicant testified at hearing that his embarrassment is no longer an issue and therefore eliminates his need to consume alcohol, he did not explain what steps he took to resolve the issue. He did not offer any testimony on how he will manage any negative feelings arising from his medical condition, which will only intensify in appearance over time, if negative feelings arise in the future. He is not in therapy to address the underlying issue and he has decided against pharmaceutical treatment for the medical condition. Without a stated method of support for this ongoing issue, it is possible that Applicant may seek to self-medicate in the future.

Applicant's inability to admit that he was intoxicated at the time of his 2014 and 2017 arrests is problematic. Although Applicant maintains that he was not intoxicated for either of the 2014 or 2017 arrests, his testimony is not credible. On both occasions, he was charged with having a blood alcohol level at least twice the legal limit. Furthermore, the details in the 2017 police report do not describe a sober driver. It is unlikely that a sober driver would have been unaware that they were driving on two rims, with a broken window, and sparks emitting from the bottom of their vehicle. It is also unlikely that a sober driver would have continued driving any vehicle in that condition. It is more likely than not that Applicant was, in fact, intoxicated. His failure to acknowledge his level of intoxication during these two events, indicates a minimization of the incidents, and the level of danger Applicant presented to himself as well as other drivers. Furthermore, Applicant's third DWI offense occurred after completing a security clearance application. As a previous clearance holder, Applicant should have been aware of the investigation process and the resulting scrutiny on one's on and off-duty behavior. Despite this, Applicant engaged in illegal behavior that shows not only questionable judgment, but a continued issue with impulse control.

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. Applicant was convicted of three alcohol-related crimes between 2014 and 2020. The most recent of which resulted in his being on probation until December 2022. His license has been suspended indefinitely. Disqualifying condition AG ¶ 31(a) applies:

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.

The following criminal conduct mitigating condition is partially applicable:

AG 32(d) there is successful evidence of rehabilitation; including, but not limited to the passage of time with 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.

p The mitigating evidence applicable to the alcohol consumption concern is also applicable under the criminal conduct guideline. In addition, Applicant's last incident of criminal conduct occurred almost four years ago. He completed the terms of his sentence and was released from probation without incident. However, this is not sufficient to mitigate the criminal conduct concerns. Applicant is a convicted felon. After pleaded guilty to two DUI offenses in three years, Applicant knew or should have known the potential of being charged with a felony for a third DUI offense. Despite the possibility of more severe criminal penalties, Applicant was charged with his third DUI offense less than 10 months after his driving restrictions were reinstated after his 2017 conviction.

Given his past behavior, the restrictions imposed by the state, in particular the loss of Applicant's driving privileges, prevent a finding of full successful rehabilitation. The consequences of a fourth DUI conviction, which could result in incarceration in a state penitentiary, is a strong deterrent. However, it unclear if the passage of time without a recurrence of alcohol-related criminal activity is related to changes Applicant has made in his life to support rehabilitation or the restrictions imposed on him by the state. The criminal conduct concern is not mitigated.

Financial Considerations

Failure to meet one's 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. (AG ¶ 18). The SOR alleges that Applicant owes \$28,713 in delinquent debt, including having a delinquent mortgage. He denies the allegations; however, the credit reports in the record support the allegations, which is sufficient to apply AG ¶ 19(c), "a history of not meeting financial obligations."

He presented sufficient evidence to mitigate the financial considerations concerns. The alleged accounts are not indicative of financial problems or fiscal irresponsibility. He is financially stable and lives within his means. The debts alleged in SOR ¶¶ 3(a) and (c) are the result of errant reporting by the credit bureaus. The debts alleged in SOR ¶¶ 3(b) and (e) are by-products of his 2014 divorce and have been resolved. The remaining debt SOR ¶ 3(d) for a medical debt, while unresolved, is immaterial to a determination of Applicant's ongoing security worthiness. The following financial considerations mitigating conditions apply:

20(b) 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;

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

20(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 action to resolve the issue.

Whole-Person Concept

After reviewing the record and considering Applicant's testimony, doubts about his ongoing security worthiness remain. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). Although Applicant had made some changes to his life to support abstinence, it is not enough to mitigate the concerns about his relationship with alcohol.

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, Alcohol Consumption:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c	Against Applicant
Paragraph 2, Criminal Conduct:	FOR APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Financial Considerations:	FOR APPLICANT
Subparagraphs, 3.a – 3.e	For Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge