



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 22-00749
)	
Applicant for Security Clearance)	

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: *Pro se*

06/06/2023

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on June 23, 2020. On August 3, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCAS CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The CAS acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on August 17, 2022, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October

11, 2022, and the case was assigned to me on March 24, 2023. On March 31, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 25, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Department Counsel requested that I take administrative notice of the guidance in the Diagnostic and Statistical Manual (5th ed.) (DSM-5) pertaining to alcohol use disorder. I took administrative notice as requested, without objection by Applicant. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on May 15, 2023.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact. His testimony at the hearing regarding SOR ¶¶ 1.e, 1.f, and 2.b indicated that he admitted that he was arrested but did not admit the conduct alleged. I have treated his answer to these allegations as denials.

Applicant is a 38-year-old communications instructor employed by a defense contractor since April 2020. He graduated from a military academy in May 2007 and served on active duty until November 2012, when he received an honorable discharge. He held a security clearance while on active duty. He married in October 2009 and divorced in August 2013. He has a 13-year-old daughter, who lives with his ex-wife.

In January 2003, while Applicant was attending the preparatory school for a military academy, he drank too much beer at an off-base location. He became ill and began to vomit as he and his friends were returning to the base. He and his friends were held by the gate guards until the command duty officer took custody of them and returned them to their quarters. Even though Applicant was underage, he was not cited by civilian authorities for underage drinking. His military superior restricted him to the base for 45 days for underage drinking. (GX 2 at 4; Tr. 18-19) This incident was alleged in SOR ¶ 1.a.

While Applicant was on active duty, he was deployed for about two years and became intoxicated between missions once or twice a month. He had no alcohol-related disciplinary actions while on active duty. (Tr. 20)

In June 2012, Applicant was arrested for assault and battery on a family member and violating protective orders. The incident occurred when his wife began screaming at him and trying to hit him, and he tried to fend her off. He believes that his wife's actions were her reaction to his decision to file for divorce. (Tr. 21) She called the police, who required that one of them leave the house. Applicant volunteered to leave. His wife filed charges of assault and battery and obtained a protective order to keep him away from the family home where she was living. He violated the order when he went into the garage at night to retrieve some of his possessions. His ex-wife called the police, who arrested him. (GX 2 at 14) The charges of assault and violating a protective order were

dismissed. (GX 8 at 9) Alcohol was not involved in this domestic scuffle or the alleged violations of the protective order. (Tr. 33) These incidents were alleged in SOR ¶¶ 2.b and 2.c.

In January 2013, Applicant was again charged with violating the protective order. He asked a friend to go to the house and retrieve some of his belongings. His ex-wife notified the police that Applicant had violated the protective order. When Applicant learned that his ex-wife had contacted the police, he turned himself in. (GX 2 at 14, GX 3 at 16-18) He was convicted and sentenced to 30 days in jail, with 28 days suspended. (GX 8 at 10). This incident was alleged in SOR ¶ 2.d.

In March 2013, Applicant was convicted of driving while intoxicated (DWI), first offense. He was drinking at a bar with several friends and had parked in an area that was a tow-away zone after a certain time. Even though he realized he was drunk, he tried to drive to another parking area. He was arrested and registered a blood-alcohol level of .14 percent on a breathalyzer. (Tr. 28) He was sentenced to confinement for one year (suspended) and unsupervised probation for 12 months. His driver's license was suspended for one year. He was required to install an ignition interlock on his vehicle and to attend alcohol safety action program (ASAP) classes. (GX 5; GX 6 at 1; Tr. 27-29) This incident was alleged in SOR ¶ 1.b.

In March 2014, following a positive reading on Applicant's ignition interlock, he was referred for substance abuse treatment and counseling, and the breathalyzer requirement was extended for one or two months. He was required to attend weekly group therapy and attend two Alcoholics Anonymous (AA) meetings per month. He completed the program in June 2014. He attributed the positive interlock reading to using mouthwash at work before driving home after work. (GX 7 at 3; Tr. 30) The interlock violation was alleged in SOR ¶ 1.c.

In July 2015, Applicant was charged with being drunk in public. He was walking alone at night after spending the evening drinking with friends. Someone accused him of trying to break into cars. The police saw Applicant arguing with a group of people and arrested him. (GX 2 at 10) At the hearing, he testified that he had consumed about four drinks and was "slightly buzzed" at the time. (Tr. 33) He was found not guilty, but he was ordered to seek counseling and treatment. (GX 6 at 3) He attended weekly counseling from August 2015 to August 2016 and completed the treatment program. (GX 1 at 45-46; GX 2 at 15) This incident was alleged in SOR ¶ 1.d.

In March 2017, Applicant was riding his bicycle in a park with friends when he was stopped by police because he and his friends were being loud. (GX 2 at 20) He was charged with being drunk in public. He testified that he had consumed one or two drinks. (Tr. 37) He was found guilty by the general district court. (GX 6 at 5). He appealed to the circuit court, pleaded not guilty, and the charge was dismissed. (GX 6 at 7.) This incident was alleged in SOR ¶ 1.e.

In November 2017, Applicant was charged with DWI, 2nd offense within five years. He and a girlfriend spent an evening drinking wine at her apartment. He left her apartment late in the evening, decided that he was too intoxicated to drive, and went to sleep in his car. A policeman found him sleeping in his car. (GX 2 at 10) He was found not guilty. (GX 6 at 9) This incident was alleged in SOR ¶ 1.f.

In March 2019, Applicant was charged with being drunk in public and fleeing from law enforcement officers. He went to an after-hours bar with a group of friends who had gone to the bar on their bicycles. As the group walked toward their bicycles, policemen who were in the parking lot approached them, and they ran in different directions. The record does not reflect why the police approached them or why they ran away. Applicant ran toward his bicycle but was tackled by a policeman. (GX 2 at 11) At the hearing, he testified that he had consumed about six beers but was not “overly intoxicated.” (Tr. 40) The drunk in public charge was dismissed, and he was found not guilty of fleeing from law enforcement officials. (GX 6 at 11-15) This incident was alleged in SOR ¶ 1.g.

In December 2019, Applicant was charged with DWI, 2nd offense within 5-10 years, and refusing a breathalyzer. He was stopped by police because a taillight on his car was out. The police conducted a field sobriety test, but Applicant declined to take a breathalyzer test. (GX 2 at 11) The results of the field sobriety test are not reflected in the record. He testified that he had consumed three drinks. He was held in jail for a week and then released on bail. While he was awaiting trial, he was required by the court to abstain from alcohol and seek counseling. (Tr. 49) Both charges were disposed of by *nolle prosequi*. (GX 4; GX 6 at 17-20) This incident was alleged in SOR ¶ 1.h.

In March 2020, Applicant was charged with assault and battery on a family member. He was sitting in his car with his girlfriend, now his fiancée, who had found a condom in his car and suspected him of cheating. She started screaming and hitting herself in the face. At the hearing, his fiancée testified that she suffers from anxiety and depression, and when she becomes upset, she tends to hurt herself by hitting herself in the face, scratching her face and pulling out her hair. She testified that Applicant was shouting at her and trying to stop her from hurting herself. Witnesses to the incident heard the shouting, saw her bleeding, and concluded that Applicant had injured her. (Tr. 60-61) The charge was *nolle prosequi* in January 2021. (GX 3; GX 8 at 13) This incident was alleged in SOR ¶ 2.e.

While Applicant was awaiting trial for the incident alleged in SOR ¶ 2.e, he attended AA meetings in 2020 and had a sponsor. He is not currently receiving any counseling or treatment. (Tr. 52)

Applicant testified that he now works in the sensitive area of cybersecurity and no longer associates with his bar-hopping former associates. He now focuses on studying, cybersecurity, working out, staying in shape, and adopting healthier habits. (Tr. 54.) A former supervisor who has known him for 10 years and was his direct supervisor for a year described him as “a fabulous worker.” (GX 7 at 4)

The mother of Applicant's fiancée has been a practicing physician for 30 years. She is familiar with Applicant's past problems with alcohol. She has known Applicant for six years and they have become close during the last five years. He stays with them for about one week a month because they live close to his work site. He joins them for meals and recreation time, works from their home, and goes on trips with them. Even when they go to restaurants, Applicant does not drink. She regards Applicant as a talented and dedicated person who has turned his life around. (Tr. 64-65)

In February 2022, Applicant was evaluated by a licensed psychologist in accordance with a CAS request for a psychological evaluation. The DWI and breathalyzer-refusal charges were pending when Applicant was interviewed by the psychologist. (Tr. 42-43) The psychologist diagnosed him with alcohol use disorder, moderate. The psychologist's report recites the numerous specific incidents that had occurred after Applicant had been drinking. Applicant admitted during the evaluation that while on active duty he would consume 6-10 drinks per incident. He told the psychologist, "When I drink, I may drink a lot." He also told the psychologist that he had reduced his consumption due to his "legal issues." The psychologist concluded that Applicant had not been able to abstain from alcohol for more than six months at any time in his adult life despite DWI charges, alcohol education courses, treatment programs, a requirement for monthly urinalysis tests, and a court order requiring him to abstain from alcohol until his court date for the charges of assaulting his girlfriend. (GX 7)

At the hearing, Applicant disagreed with the psychologist's statement about his continued drinking. He testified that he stopped drinking in early 2020, but he admitted drinking a champagne toast at a New Year's Day celebration, but he did not specify which year or years that he did so. He believes that the psychologist interpreted his comment about drinking a toast on New Year's Day to mean that he continues to drink regularly. (Tr. 50) The psychologist's diagnosis of alcohol use disorder is alleged in SOR ¶ 1.i.

I have taken administrative notice that DSM 5 describes 11 diagnostic criteria for alcohol use disorder. At least two of the diagnostic criteria must have occurred within a 12-month period to warrant a diagnosis of alcohol use disorder. The DSM also provides that an alcohol use disorder is considered to be in sustained remission if none of the criteria have been met at any time during a period of 12 months or longer, except for the criterion of a "craving, or a strong desire or urge to use alcohol." The psychologist did not specifically identify which diagnostic criteria he relied on to make his diagnosis.

In March 2023, Applicant was offered employment by a defense contractor, contingent on verification of a security clearance. (AX A) The employment offer was still open at the time of the hearing. (Tr. 67)

Policies

“[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline G, Alcohol Consumption

The concern under this guideline is set out in AG ¶ 21: “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.” Applicant’s admissions and the evidence presented at the hearing establish the following disqualifying conditions under this guideline:

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;

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; and

AG ¶ 22(d): diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 23(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.

AG ¶ 23(a) is established. The underage drinking alleged in SOR ¶ 1.a was more than 20 years ago. The last alcohol-related event was in December 2019, more than

three years ago. Applicant admitted that he had been drinking when he was stopped by the police for suspected DWI, but his level of intoxication was not established, and the charges based on that event were *nolle prosequi*.

AG ¶ 23(d) is established. Applicant has acknowledged his maladaptive alcohol use. He completed a treatment program in August 2016, attended AA meetings in 2020, and has not consumed alcohol since his arrest for DWI in December 2019, more than three years ago, except for a one or more isolated incidents involving a New Year's champagne toast.

Guideline J, Criminal Conduct

The SOR ¶ 2.a cross-alleges the conduct alleged in SOR ¶¶ 1.a, 1.b, and 1.d-1.h. It also alleges the assault and battery in June 2012 (SOR ¶ 2.b), the violations of protective orders (SOR ¶¶ 2.c, and 2.d), and the assault in March 2020. (SOR ¶ 2.c) The concern under this guideline 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." Applicant's multiple arrests and his violation of the interlock program in 2014 are sufficient to establish the following disqualifying conditions:

AG ¶ 31(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;

AG ¶ 31(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

AG ¶ 31(d): violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

The following mitigating conditions are potentially relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 32(c): no reliable evidence to support that the individual committed the offense; and

AG ¶ 32(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.

AG ¶ 32(a) and 32(d) are established for the domestic incident in 2012 and the related violations of a protective order. Applicant has been divorced since 2013 and has minimal contact with his ex-wife. He has not been involved in any other incidents of domestic assault. These two mitigating conditions also are established for the alcohol-related incidents. Applicant has significantly curtailed his use of alcohol, and there have been no alcohol-related incidents since December 2019. A former supervisor and his future mother-in-law have known him for many years and hold him in high regard.

AG ¶ 32(c) is established for the charge of DWI alleged in SOR ¶ 1.f and the charge of domestic assault alleged in SOR ¶ 2.e, which were not supported by reliable evidence.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines G and J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant was sincere, remorseful, candid, and credible. When he was on active duty, he engaged in heavy drinking while off duty. After he left active duty, he associated with a group of men whose social life revolved around frequent bar hopping and heavy drinking. His social life changed after his arrest in December 2019. Five days in jail apparently gained his attention. He is now involved in a serious relationship. He has earned the respect of a former supervisor and has been offered a demanding and responsible job. He is focused on his work and a healthy lifestyle. The strong and favorable testimony of his fiancée's mother, an experienced medical professional who has known him for six years, was compelling evidence of

rehabilitation. After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his alcohol consumption and criminal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption): FOR APPLICANT

 Subparagraphs 1.a-1.h: For Applicant

Paragraph 2, Guideline J (Criminal Conduct): FOR APPLICANT

 Subparagraphs 2.a-2.e: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge