



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 22-00994
)	
Applicant for Security Clearance)	

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*

08/25/2023

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), I (Psychological Conditions), G (Alcohol Consumption), D (Sexual Behavior), and E (Personal Conduct). Security concerns under Guidelines G and D are mitigated, but security concerns under Guidelines J, I, and E are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on September 11, 2019. On June 13, 2022, the Department of Defense Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, I, G, D, and E. The CAF 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 June 29, 2022, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 31, 2022, and the case was assigned to me on March 24, 2023. On May 15, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on June 20, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 13 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through J, which were admitted without objection. AX A through D and AX H duplicate the SOR and Applicant's response to the SOR. DOHA received the transcript (Tr.) on June 30, 2023.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.b-1.g, 2.a, 3.a, 3.b, 5.a, and 5.b. He denied the allegations in SOR ¶ 1.a and 4.a. His admissions are incorporated in my findings of fact.

Applicant is a 38-year-old systems engineer employed by defense contractors since June 2012. He was unemployed from June to November 2014 when he left a job by mutual agreement after he was accused of making a racial comment to a female servicemember and touching her hair without consent. He served on active duty in the U.S. Navy from August 2004 to May 2012 and received a general discharge under honorable conditions.

Applicant has never married. He lived with a cohabitant from November 2017 to April 2020. Before they separated, he and his cohabitant had difficulties due in part to his sexually suggestive text message exchanges with five other women. (GX 12 at 2; Tr. 57) He has a four-year-old son, and he shares custody of his son with his son's mother, his former cohabitant. (Tr. 56)

Applicant received a security clearance in January 2006, while he was on active duty in the Navy. His clearance was revalidated in 2013, while he was employed by a defense contractor.

In January 2002, Applicant was charged with underage possession of alcohol. He was fined and his driver's license was suspended for six months. (GX 1 at 43-44; GX 13 at 2)

In January 2003, Applicant was convicted of reckless driving resulting in an accident. (GX 11) The accident occurred when he drove too fast around a curve and hit a guardrail. No other vehicles were involved. He had not been consuming alcohol before driving. (Tr. 58)

In August 2003, Applicant was convicted of reckless driving by driving 92 miles per hour (mph) in a 55-mph zone. The record reflects that the maximum sentence for

this offense was six months in jail, but it does not reflect the sentence that was imposed. (GX 10)

In December 2007, Applicant was convicted of driving under the influence of intoxicants (DWI). His blood-alcohol content (BAC) was .24, well above the legal limit. He was fined \$350, his driver's license was suspended for six months, and he was required to attend alcohol safety classes. (Tr. 59-60; GX 5 at 7-8)

In November 2009, Applicant was again convicted of DWI. He was sentenced to jail for 12 months and five days, all of which was suspended. He was placed on unsupervised probation, and his driver's license was suspended for one year. He was required to attend alcohol safety classes. (Tr. 60-61; GX 5 at 5)

In October 2011, Applicant was charged with DWI, 2nd offense within five years and refusal to submit to a breath test. He was convicted of DWI and sentenced to jail for 12 months and five days, with 11 months and 15 days suspended. His driver's license was suspended for 36 months, and he was required to complete alcohol safety classes. (GX 5 at 5-6; Tr. 62) Disposition of the charge of refusing to submit to a breath test was deferred and then dismissed in March 2013. (Tr. 66; GX 5 at 6)

While Applicant was in jail, he missed the sailing of his ship, and he received nonjudicial punishment for unauthorized absence, missing movement, and violating a general order or regulation. (Tr. 64) In May 2012, he received a general discharge under honorable conditions, based on a pattern of misconduct. (GX 1 at 22)

While Applicant was pending discharge from the Navy, he self-referred to the Navy Substance Abuse Rehabilitation Program (SARP) and completed a 31-day inpatient rehabilitation program. His alcohol use declined after he completed the program. He stopped drinking between 2014 and 2016. (GX 3 at 4)

In June 2014, Applicant was terminated from his job for making a racially insensitive comment to a coworker, an enlisted woman in the Air Force. He considered the coworker a good friend. While off-duty he offered his coworker a drink because he had two drinks in front of him. She declined, and he made a comment that she interpreted as racial profiling. She complained to their supervisor, and he was terminated. Applicant disclosed this incident in his SCA as follows:

Formal complaint regarding professionalism was submitted by Air Force member against me. Terminated by company without being fully investigated. . . . Formal complaint stated I made racial comments towards Air Force member and touched her hair without consent. Air Force member attempted to take complaint back during investigation however company found it easier to terminate than continue with investigation.

When Applicant was interviewed by a security investigator in January 2021, he told the investigator that he offered his coworker a red fruit punch drink and, when she

declined, he told her that everyone loves red fruit punch. (GX 12 at 2). He told the investigator that he was called into his manager's office on the following morning and told that he was terminated effective immediately. He told the investigator that his employer did not conduct an investigation because the Air Force member no longer worked in the building. However, when the Air Force investigated the incident, they found that the Air Force member's complaint was "incorrect." He told the investigator that his employer later determined that the coworker's complaint was unfounded and offered him another job within the company, but he no longer wanted to work for the company. (GX 12 at 2) The record does not contain any documentation of the complaint against Applicant, the investigation of that complaint, or the termination of Applicant's employment.

In August 2019, Applicant and his cohabitant hosted a joint birthday party for him and her son, which was attended by about 30 guests, including Applicant's neighbor and his neighbor's granddaughter. The party ended at about 2:00 am. Applicant testified that he consumed three or four beers during the day but did not believe he was intoxicated. (Tr. 76)

Applicant testified that, while cleaning up after the party, he noticed that his cohabitant's son was not in his room, and he could not find him anywhere in the house. He knew that some of the children who had attended the party were spending the night in his neighbor's house. He texted his neighbor, asking if his cohabitant's son was at the neighbor's house. When the neighbor did not respond to the text, Applicant went to the neighbor's house and knocked on the door, but no one responded. Applicant then entered the house through an unlocked back door and asked a friend of the cohabitant's son if he was in the house, and the friend stated that he was "in the back." Applicant looked in one bedroom, but the cohabitant's son was not there. He then went to a second bedroom and saw a person in bed who had blonde hair similar to the son's hair. He testified that he "just kind of peeked in," "might have had one foot in the door to peek around the door," and softly called out the cohabitant's son's name. The neighbor's granddaughter, who was sleeping in the bed, was startled. He apologized and told the granddaughter that he was looking for his cohabitant's son, and she responded that the son was "on the couch." (Tr. 42-43, 50) He found his cohabitant's son under some blankets. At about this time, the neighbor came out of his bedroom and confronted Applicant. Applicant apologized, explained why he was there, and left.

The neighbor's granddaughter called the police and told them that Applicant had attempted to kiss her, caressed her hips, and invited her to "do some coke" with him. The granddaughter also told the police that Applicant had touched her breasts during the party on the previous day.

Applicant was charged with felony breaking and entering with intent to commit a misdemeanor and sexual battery. He was represented by an attorney at the trial. Pursuant to a plea agreement, he pleaded guilty to trespassing and assault and battery, both misdemeanors. He was sentenced to one year in jail, suspended for five years, conditioned on good behavior, completing a ten-week alcohol-abuse treatment program,

and having no contact with the victim or the victim's family. He will be on probation until November 2024. In his answer to the SOR and at the hearing, he admitted trespassing, but he maintained that he was not guilty of the assault and battery and that he pleaded guilty to avoid jail time.

Applicant's neighbor testified on his behalf at the hearing. His neighbor testified that they continued to have casual contact with each other after the August 2019 incident. His neighbor also testified that his granddaughter had several "traumatic issues" in her life and that at the time of the incident, "she was seeking a lot of attention and known to tell fibs." (Tr. 28) He stopped short of testifying that his granddaughter was lying, but said that he was skeptical about her accusation against Applicant. (Tr. 28-29, 33-34)

When Applicant was interviewed by a security investigator in January 2021, he told the investigator that before his last DUI, he drank six to twelve beers about four times a week, but he stopped drinking for two years beginning in 2014. At the time of the interview, he had resumed drinking. He told the investigator that he consumed two or three beers about once a week, but that about once a year he drank about six beers and became intoxicated. (GX 12 at 3)

In November 2021, Applicant underwent a psychological evaluation at the request of the DOD CAF. The evaluation was conducted by video teleconference. The psychologist noted that he "presented in this evaluation with a moderately antisocial manner," "appeared to minimize his responsibility in the problem situations described in his background information," and "blamed others in instances that appeared to be matters of his own lack of behavioral control." The psychologist concluded that Applicant attempted to mislead him about the details of past events to cast himself in a more positive light than may have been warranted by his actions.

Applicant told the psychologist that he suffered an estimated 20 instances of broken bones in his lifetime, engaging in sky diving, riding an off-road four-wheeler, playing basketball, and being punched in the face. (GX 3 at 3) At the hearing, he admitted that he has always been a high-energy, adventuresome person. (Tr. 51)

The psychologist found that if Applicant entered his neighbor's home for the purpose of sexual encounter with the neighbor's granddaughter, and touched her and confined her in her room for a time, particularly if he was intoxicated, "then this act would represent a nexus between his alcohol use problems, antisocial style, impulsivity, and stimulus seeking tendencies." He diagnosed Applicant with "alcohol-use disorder, severe, in sustained remission (by subject report)." He suggested the following as "diagnostic possibilities," stopping short of a formal diagnosis: attention deficit/hyperactivity disorder (ADHD), predominately hyperactive/impulsive presentation; and other specified personality disorder (with features of antisocial personality disorder).

The psychologist concluded that Applicant's ADHD symptoms and a history of alcohol use did not present a significant risk to his reliability, trustworthiness, and

judgment, but that “his personality condition certainly could contribute to a lack of trustworthiness in safeguarding national security information.” The psychologist concluded that Applicant’s prognosis “is uncertain given that he did not seem to be entirely forthright with [him].” (GX 3 at 9)

The psychologist listed the following examples of inconsistencies in information provided by Applicant that suggested a lack of candor:

- Applicant told him that he could not remember when he last drank more than three beers, but he told an investigator in 2021 that he drinks six or more beers and becomes intoxicated once a year.
- Applicant used the term “retired” to describe his departure from the Navy even though he was discharged for misconduct.
- Applicant said that he “left” a job in 2014 when in fact he was terminated because of a racially related comment, and he provided an exculpatory explanation of the event, when the records reflected that he “very likely” made racially offensive remarks.
- Applicant pleaded guilty to a crime but told the psychologist that he did not sexually assault the victim.
- Applicant told him that he had consumed some alcohol but was not intoxicated on the night of the alleged sexual assault in 2019.

The psychologist’s conclusion that Applicant was not “entirely forthright” appears to be based on the psychologist’s conclusion that all the allegations against Applicant probably were supported by the evidence. While Applicant’s guilty pleas at his trial would justify a conclusion that he trespassed into his neighbor’s home and touched the neighbor’s granddaughter, the psychologist apparently believed that Applicant groped his neighbor’s granddaughter at the party, touched her inappropriately after he entered his neighbor’s house, looking for his cohabitant’s son, and invited her to “do coke” with him. The civil authorities did not charge Applicant with groping the granddaughter or offering cocaine to her, and these acts were not alleged in the SOR.

The psychologist also appeared to believe that Applicant made an inappropriate remark to a coworker that caused him to be fired. The psychologist stated in his report that he was told by Applicant’s mother that he made a comment such as “all black people like Kool-Aid.” (GX 3 at 3) There is no statement from Applicant’s mother in the record. There is no record of the investigation of the complaint. The psychologist determined that Applicant’s description of what he said to a coworker was untrue, because Applicant’s mother described the comment differently. It is not clear whether the psychologist knew that the complaint was investigated and determined to be

unfounded, or that he knew that Applicant's employer offered to give him another job in the company.

The psychologist also concluded that Applicant falsely claimed that he was not intoxicated on the night of the party, because Applicant admitted to his supervisor that he was intoxicated. The psychologist's report lists a document from Applicant's supervisor as one of the documents he reviewed, but at the hearing, Department Counsel stated, "We weren't able to look at that report because of our rules." (Tr. 115) The security investigator's report does not include a statement from Applicant's employer. There is no documentary evidence in the hearing record of any admissions by Applicant to his supervisor regarding this event, and no evidence from other witnesses that Applicant was intoxicated at the party.

Finally, although there is no evidence that Applicant ever was involved with cocaine, the psychologist appears to have accepted the granddaughter's assertions that Applicant touched her inappropriately and offered to "do some coke" with her as true, and he concluded that Applicant was not being truthful with him when he denied her accusation.

Applicant decided to stop drinking in 2022, when his son was born. His cohabitant left him shortly after the birth, but they share custody of their son. (Tr. 56) He testified that he last consumed alcohol on July 2, 2022. (Tr. 67) Applicant's older brother corroborated his testimony about his decision to stop drinking and the effect it had on his behavior. (Tr. 98-100; 103-05)

Applicant is receiving counseling from a therapist once a week, and he receives prescriptions from a nurse practitioner in the counselor's office. (Tr. 72, 83) In a report dated August 8, 2022, the nurse practitioner stated that Applicant had abstained from alcohol for ten weeks. Applicant receives prescription drugs for ADHD, anxiety, depressive disorder, and panic disorder. (AX J) He testified that he stopped taking drugs for anxiety and panic attacks about a year ago. (Tr. 84) Although he was evaluated for post-traumatic stress disorder (PTSD), he and his counselor have determined that he does not have PTSD. (Tr. 81, AX J)

Applicant attends AA meetings once or twice a month, but he has not found the "right group." He testified that he has completed all of the 12-Step Program. (Tr. 74) He sees a therapist regularly, and he realizes the negative effect of alcohol on his life. (Tr. 71-72)

Applicant has become more active in his community and has started coaching baseball. He testified, "I'm trying to be a person that I should have been a long time ago, and it just took me way too long to get here." (Tr. 72)

Applicant testified that he started having panic attacks in July 2022. He and his cohabitant had started seeing each other again, but when he returned from a 30-day deployment, he learned that she was seeing someone else and he was no longer part

of her life, even though they had three children together. (Tr. 79) He admitted that he still suffers from panic attacks and depression, which he attributed to abstaining from alcohol. He testified, "It's definitely a little harder when you have to face things face to face and not just hide them or drown them." (Tr. 51)

A friend of Applicant who has known him for ten years and was at the party in August 2019 submitted a statement attesting to his good character. The friend also stated that he did not observe any inappropriate interaction between Applicant and the neighbor's granddaughter. (AX G)

Applicant's father, a retired Navy petty officer, testified that Applicant meticulously complied with the revocation of his driver's license. Applicant's father, mother, sister, and some friends drove him to and from work each day. (Tr. 91-92) His father is proud of the progress he has made in turning his life around. (Tr. 89)

A Navy commander serving as the combat systems officer on a U.S. Navy combatant ship, who has known Applicant for three years and served with him on multiple ships, submitted a statement attesting to his skill as a fleet systems engineer and his personal trustworthiness and integrity. She has observed Applicant's change in behavior during the past year. She states, "[Applicant's] mindset has shifted away from destructive thought and behaviors and has been laser focused on good decisions, personal growth, and impacting others by sharing wisdom he has gained on his journey and providing motivation through all circumstances." (AX I at 1)

A retired master chief petty officer who has known and served with Applicant since 2020 submitted a statement attesting to his technical expertise, dedication, honesty, and integrity. (AX I at 2) An active-duty lieutenant commander who has known Applicant since August 2022 describes him as a loving and doting father, who is full of life, energy, and positivity. (AX I at 4) An active-duty chief petty officer has watched Applicant make significant changes in his lifestyle and become a great father and role model for his son and an exceptionally skilled fleet engineer. (AX I at 3) A former shipmate who has known Applicant since 2006 believes that he has overcome his "personal demons" and "found love, purpose, and a peace that . . . that has forever changed him." He states that Applicant is now "patient, more measured when speaks, and most importantly, he thinks before [he] acts." (AX I at 5) A neighbor for two years who has known Applicant for seven years describes him as "very dependable, selfless, giving, trustworthy, and a joy to be around." (AX I at 6)

The parents of Applicant's former cohabitant are both retired sailors. Her mother is a retired Navy limited-duty lieutenant with 20 years of service, and her father is a retired senior chief petty officer with 26 years of service. They consider Applicant a devoted father to his own biological child as well as two of his former cohabitant's children, treating them as his own. They have remained in contact with Applicant after he and cohabitant separated, and they have the "utmost respect" for him and are confident that he has turned his life around. (AX I at 7)

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 J, Criminal Conduct

The SOR alleges that in August 2019, Applicant was charged with felony breaking and entering with intent to commit a misdemeanor and sexual battery. It further alleges that he pleaded guilty to “unlawful entry/trespassing” and assault and battery and was sentenced to one year in jail, suspended for five years conditioned on good behavior, successfully completing probation, successfully completing an alcohol-abuse program, and having no contact with the victim and staying away from her residence (SOR ¶ 1.a). It also alleges three incidents of driving while intoxicated (SOR ¶¶ 1.b, 1.c, and 1.d), two incidents of reckless driving (SOR ¶¶ 1.e and 1.f), and one incident of underage possession of alcohol (SOR ¶ 1.g).

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.” The following disqualifying conditions are relevant:

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(c): individual is currently on parole or probation.

AG ¶ 31(a) is established for some of Applicant's early traffic offenses, each of which, standing alone, would be unlikely to affect a national security eligibility decision, but when considered together show a pattern of irresponsible behavior. Applicant's overall criminal record establishes AG ¶ 31(b), and his probation until November 2024, imposed for the conduct alleged in SOR ¶ 1.a, establishes AG ¶ 31(c).

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 not established for the conduct alleged in SOR ¶ 1.a. Although the conduct occurred almost four years ago, it was a continuation of a long pattern of impulsive and irresponsible behavior. Applicant has been on probation and under the pressure of retaining his security clearance since his arrest in August 2019.

AG ¶¶ 32(a) and 32(d) are established for the criminal conduct alleged in SOR ¶¶ 1.b-1.g, all of which were alcohol-related. Applicant stopped drinking for two years, from 2014 to 2016, drank moderately until 2018, and stopped drinking in July 2022. He is highly regarded by coworkers and supervisors for his technical expertise, dedication, and reliability. He is highly respected as a father by friends as neighbors, and he is involved in his community as a baseball coach.

AG ¶ 32(c) is established for the allegation of sexual battery alleged in SOR ¶ 1.a. The alleged victim's credibility was judged by her grandfather as questionable, and the alleged victim's accusation was undermined by her unsupported and incredible assertion that Applicant invited her to use cocaine.

I have considered whether the doctrine of collateral estoppel applies to Applicant's testimony at the hearing that he did not sexually touch his neighbor's granddaughter. The doctrine of collateral estoppel generally applies in DOHA hearings and precludes applicants from contending that they did not engage in criminal acts for which they were convicted. ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997). There are exceptions to this general rule, especially with respect to misdemeanor convictions based on guilty pleas. Relying on federal case law, the Appeal Board has adopted a three-part test to determine the appropriateness of applying collateral estoppel to misdemeanor convictions. First, the applicant must have been afforded a full and fair opportunity to litigate the issue in the criminal trial. Second, the issues presented for collateral estoppel must be the same as those resolved against the applicant in the criminal trial. Third, the application of collateral estoppel must not result in "unfairness," such as where the circumstances indicate lack of incentive to litigate the issues in the original trial. ISCR Case No. 04-05712, (App. Bd. Oct. 31, 2006).

Department Counsel did not assert collateral estoppel during the hearing. Applicant was represented by counsel at his criminal trial and had an opportunity to fully

litigate the issues. His plea of guilty to assault and battery was a tactical decision, based on advice of counsel, to avoid the possibility of a jail sentence. His conviction, based on his guilty pleas, establishes only that he entered his neighbor's house without permission and touched the granddaughter. It does not establish that he fondled or kissed her on the night in question, that he groped her on the preceding day, or that he invited her to "do some coke" with him.

Guideline I, Psychological Conditions

The SOR ¶ 2.a alleges that Applicant was evaluated by a licensed psychologist in March 2022 and diagnosed with alcohol use, severe, in sustained remission, attention deficit/hyperactivity disorder, predominantly hyperactive/impulsive presentation; and other specified personality disorder, with features of antisocial personality disorder. It also alleges that the psychologist opined that his prognosis was uncertain because of his lack of forthrightness during the evaluation. Finally, it alleges that the psychologist concluded that Applicant's personality condition could contribute to a lack of trustworthiness in safeguarding national security information.

SOR ¶ 2.a is partially established by the psychologist's diagnosis of alcohol use, severe, in sustained remission. It is not established for the other psychological conditions alleged, because the psychologist suggested them as "diagnostic possibilities" but stopped short of a formal diagnosis.

The concern under this guideline is set out in AG ¶ 27:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline and an opinion, including prognosis, should be sought. No negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

The following disqualifying conditions under this guideline may be applicable:

AG ¶ 28(a): behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors; and

AG ¶ 28(b): an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness.

AG ¶¶ 28(a) and 28(b) are established by the psychologist's report and Applicant's admissions. The psychologist concluded that Applicant's alcohol use disorder was in sustained remission, and this conclusion is supported by Applicant's testimony as well as the testimony of family members, professional colleagues, neighbors and friends. The psychologist stopped short of a formal diagnosis of any other disorders, but Applicant admitted that he suffers from and receives treatment for ADHD, anxiety, and panic disorder.

The following mitigating conditions are potentially applicable:

AG ¶ 29(a): the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

AG ¶ 29(b): the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

AG ¶ 29(c): recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

AG ¶ 29(e): there is no indication of a current problem.

AG ¶ 29(a) is established. Applicant's alcohol use and impulsive behavior are controllable. He is receiving counseling and he is complying with his medication program.

AG ¶ 29(b) is not fully established. While Applicant has sought and obtained treatment, he has not provided evidence of a favorable prognosis.

AG ¶ 29(c) is established for his alcohol use disorder, which the psychologist found to be in sustained remission. The psychologist declined to make a prognosis for Applicant's other behavior, in large part because he did not believe Applicant was truthful. Unfortunately, the psychologist's belief that Applicant was untruthful was based in part on his own conclusions, unsupported by the evidence in the record, that Applicant was terminated from employment for making a racist comment and that he probably was guilty of sexual misconduct with an 18-year-old young woman.

AG ¶ 29(e) is not established. Applicant is abstaining from using alcohol. He is receiving counseling and adhering to his treatment regimen for ADHD, depression, anxiety, and panic attacks. His colleagues and supervisors have confidence in his technical skills and his apparent changes in behavior and attitude. However, he admitted at the hearing that he still suffers from panic attacks and depression.

Guideline G, Alcohol Consumption

The SOR alleges that Applicant was under the influence of alcohol during the conduct alleged in SOR ¶ 1.a (SOR ¶ 3.a) and cross-alleges the conduct alleged in SOR ¶¶ 1.b, 1.c, 1.d, 1.g, and 2.a (SOR ¶ 3.b). 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 submitted 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;

AG ¶ 23(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;

AG ¶ 23(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

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) and 23(b) are established. Applicant's last alcohol-related incident was in October 2011. Although it was alleged that Applicant was under the influence of alcohol when the incident in August 2019 occurred, that allegation was not supported by the evidence. Applicant reduced his alcohol consumption when his son was born in 2018, and he decided to totally abstain from alcohol in July 2022.

AG ¶ 23(c) is not established. Although Applicant is receiving regular counseling and treatment, it is focused on his behavioral disorders and not on alcohol consumption.

AG ¶ 23(d) is established. Applicant was required to complete an alcohol-abuse program as a condition of his probation imposed in November 2019. He completed the program, modified his consumption, and has abstained from alcohol since July 2022.

Guideline D, Sexual Behavior

SOR ¶ 4.a cross-alleges the conduct alleged in SOR ¶ 1.a. The concern under this guideline is set out in AG 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The following disqualifying conditions under this guideline are relevant:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(b): pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

No disqualifying conditions under this guideline are established. Applicant's plea of guilty was to assault and battery. He did not plead guilty to a sexual offense. The alleged victim's credibility was judged by her grandfather as questionable, and the alleged victim's accusation was undermined by her unsupported and incredible assertion that Applicant invited her to use cocaine.

Guideline E, Personal Conduct

The SOR alleges that Applicant was terminated from employment in June 2014 for making an inappropriate comment to a coworker (SOR ¶ 5.a), and that he was administratively separated from the Navy with a general discharge under honorable conditions for misconduct (SOR ¶ 5.b), and it cross-alleges the conduct alleged in SOR ¶¶ 1.a through 1.g (SOR ¶ 5.c).

The security concern under this guideline is set out in AG ¶ 15: "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. . . ." The following disqualifying conditions are potentially applicable in this case:

AG ¶ 16(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;

AG ¶ 16(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. This includes, but is not limited to, consideration of . . . any disruptive, violent, or other inappropriate behavior . . . ; and

AG ¶ 16(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 . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

AG ¶ 16(c) and 16(d) are not applicable. The SOR alleges multiple incidents that are specifically covered by Guidelines J, I, and G that would be sufficient, if supported by substantial evidence, for an adverse determination.

AG ¶ 16(e) is established. Applicant's criminal conduct and alcohol abuse, if known, could affect his personal, professional, and community standing.

The following mitigating conditions are potentially applicable:

AG ¶ 17(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;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(f): the information was unsubstantiated or from a source of questionable reliability.

AG ¶¶ 17(c), 17(d), and 17(f) are established for Applicant's alcohol-related conduct. His last alcohol-related incident was in October 2011. He reduced his alcohol consumption in 2018, when his son was born, and he decided to abstain from alcohol in July 2022. These mitigating conditions are also established for his discharge from the Navy, which occurred 21 years ago and was based on his alcohol-related conduct. They are not established for Applicant's impulsive and irresponsible behavior, including his trespassing into his neighbor's home. Although the last incident was in August 2019, he is still on probation for that conduct.

AG ¶ 17(f) is applicable to the allegation that Applicant was terminated from employment in June 2014. The investigation into the allegation determined that it was unfounded, and Applicant was offered another job by the same employer.

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 J, I, G, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant was sincere, candid, and credible at the hearing. He admitted his misconduct, except for the allegation of sexual behavior with the 18-year-old granddaughter of his former neighbor. Based on the testimony of the 18-year-old's grandfather and the unsupported suggestion that Applicant was involved with cocaine, I found his denial of sexual contact credible.

However, I share the psychologist's concern that Applicant's past conduct and personality raise concerns about future impulsive and irresponsible behavior. "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." ISCR Case No. 09-01652 at 3 (App. Bd. Aug. 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant has not overcome that presumption. After weighing the disqualifying and mitigating conditions under Guidelines J, I, G, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns under Guideline G and refuted the allegations under Guideline D, but he has not mitigated the security concerns under Guidelines J, I, and E.

Formal Findings

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

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Subparagraphs 1.b-1.g:	For Applicant
Paragraph 2, Guideline I, (Psychological Conditions):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 3.a and 3.b:	For Applicant
Paragraph 4, Guideline D (Sexual Behavior):	FOR APPLICANT
Subparagraph 4.a	For Applicant
Paragraph 5, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 5.a and 5.b:	For Applicant
Subparagraph 5.c:	Against Applicant as to Subparagraph 1.a; for Applicant as to subparagraphs 1.b-1.g

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge