



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



In the matter of:)	
)	
)	ISCR Case No. 21-00196
)	
Applicant for Security Clearance)	

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel,
For Applicant: Troy Nussbaum, Esq.

09/26/2023

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the alcohol consumption and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 26, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline G (alcohol consumption) and Guideline J (criminal conduct). The action was taken 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR on December 9, 2021 (Answer), and he requested a hearing before an administrative judge. On November 3, 2022, Department Counsel amended the SOR to add an allegation numbered as ¶ 1.g under Guideline G, and to reword allegation ¶ 2.h under Guideline J so that it cross-alleged all the allegations under Guideline G, including the newly added ¶ 1.g. Applicant responded to the amended SOR on December 6, 2022 (Answer 2) and admitted both new allegations. The case was

assigned to me on February 16, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice on February 23, 2023, scheduling the matter for a video teleconference hearing on April 14, 2023. I convened the hearing as scheduled.

At the hearing, I granted Department Counsel's motion to amend the SOR pursuant to ¶ E3.1.17 of the Directive, without objection. She amended SOR ¶ 1.g to reword it so that it reads, "In about February 2022, you were arrested and charged with driving while intoxicated, 2nd offense within ten years, and refusal of a breath test, 2nd offense within ten years." I admitted in evidence, without objection, Government's Exhibits (GE) 1 and 3 through 9. I sustained Applicant's objection to GE 2, a report of investigation summarizing background interviews conducted in 2020, and I did not admit it in evidence. Applicant testified and submitted documentation that I marked as Applicant's Exhibits (AE) A through D and admitted in evidence, without objection. He did not call any witnesses. DOHA received the hearing transcript (Tr.) on May 1, 2023. Applicant's counsel withdrew his representation of Applicant in this matter on August 1, 2023, and he requested that all future correspondence be provided directly to Applicant.

Findings of Fact

Applicant admitted all the SOR allegations in his answers to the SOR, except for any references in the allegations to sections in the state code, which he denied. He is 34 years old. As of the date of the hearing, he was engaged to be married and he has two minor children. He has owned his home since December 2018. (Answer; Answer 2; Tr. at 8-9, 20, 22-23, 79, 101; GE 1; AE D)

Applicant obtained his high school diploma in 2007. He has also received several professional certifications. He has worked in the security field since 2010. As of the date of the hearing and since January 2021, he has worked as an industrial security specialist for his employer, a DOD contractor. He also has worked as a part-time security officer for an agency or department of the U.S. government since January 2023. He was first granted a security clearance in approximately 2011. (Tr. at 5, 20-23, 79-80, 85-87, 91-93; GE 1; AE A)

Applicant's parents separated when he was four years old. He and his three older brothers were raised by their mother. His father "was in and out of my life growing up so that kind of took a toll on me, didn't understand why he didn't want to be, you know, part of me and my brother's lives." He testified:

Just – well, my mother was always working so I kind of – you know, kind of just grew up watching stuff in the neighborhood, you know, really not any type of, like real discipline. I felt like that, you know, kind of led me down a path of wrong decisions. (Tr. at 24-26)

Between 2009 and 2022, Applicant was involved in seven alcohol-related incidents. In December 2009, at age 20, he was charged with misdemeanor public swearing/intoxication, and he was found guilty in absentia. (SOR ¶¶ 1.f, 2.h) He recalled living with his mother and believed he had just been laid off from his job as an electrician.

He acknowledged consuming alcohol before age 21, but he could not recall the circumstances surrounding this incident. (Tr. at 27-28, 80; GE 5)

In November 2010, at age 21, Applicant was charged with misdemeanor Driving While Intoxicated (DWI), 1st offense. He pled guilty to the reduced charge of misdemeanor reckless driving, and he was sentenced to 90 days in jail, suspended, unsupervised probation for one year, his driver's license was restricted for six months, he was ordered to attend an alcohol safety action program (ASAP), and he was fined. (SOR ¶¶ 1.e, 2.h; Tr. at 28-31, 83-88; GE 4, 5)

This was Applicant's first DWI. He consumed around three to four 12-ounce mixed drinks while he was at a bar with a friend for a birthday party. It was raining as he drove home, and he lost control of his vehicle and hit a street pole. He was hospitalized for "breaks in my pelvis, fractures in my spine, and a laceration in my hand," and the passenger had a ruptured spleen and possibly a broken rib. Applicant testified:

Well, in the past, I blamed [the car crash] on the weather. Always considered myself good enough to, you know, drive that day. And looking back now on it, I believe alcohol definitely played a factor in my decisions that night. I made a poor decision to make the turn doing 40 miles an hour and having summer tires on the vehicle and losing control. I definitely shouldn't have been driving if I wasn't able to make the correct decision in the weather. (Tr. at 28-31, 83-88; GE 4, 5)

In March 2013, at age 23, Applicant was arrested and charged with DWI, 1st offense, blood alcohol content (BAC) greater than .20%, and carrying a concealed weapon, both misdemeanors. He was convicted of the amended charge of misdemeanor DWI, 1st offense, no BAC, and sentenced to 90 days in jail, with 88 days suspended, his driver's license was restricted for one year, he was ordered to have an ignition interlock device installed on his car for six to 12 months and to attend an ASAP program, and he was fined \$500. The latter charge was *nolle prosequat*. He attended and successfully completed an ASAP program in August 2014. He did not believe he underwent an alcohol evaluation at this time. His driver's license was reinstated after one year without restriction. (SOR ¶¶ 1.d, 2.f, 2.h; Tr. at 31-38, 89-101, 148-149; GE 1, 3, 4, 5)

Applicant consumed around three to four, 12-ounce beers earlier that day while he was replacing a broken headlight on his brother's car. Later that evening, after he had slept for around three to four hours, he drove his brother's car to the home of his then-girlfriend, now fiancée. A police officer pulled him over for disobeying a traffic signal. In response to the officer's questioning, he admitted to consuming alcohol earlier in the day. The officer administered a breathalyzer and conducted a search of the car, and the officer found a butter knife in the center console. Applicant was unaware there was a knife in the car, and he believed it belonged to his brother who owned the car. He acknowledged that he should not have consumed alcohol when he knew he had to later drive, but at the time he stated that he did not think he was intoxicated because he had slept after he drank and before he drove. (Tr. at 31-38, 89-101; GE 1, 3, 4, 5)

In August 2015, at age 26, Applicant was arrested and charged with DWI, 2nd offense within five years, and refusal of blood or breath test, 2nd offense, both misdemeanors. Both charges were *nolle prossed*. (SOR ¶¶ 1.c, 2.h) He denied consuming alcohol before this incident. He stated that his day was an early and a long one, as he drove his mother two and a half hours to see his brother, and then he drove her back to her home where he hung out with her before driving to visit a friend who lived near his apartment. He testified that as he was driving home:

It was pretty late at night. I don't remember the exact time. But I was driving, and I fell asleep. And when I woke up – like I dozed off for a second. When I woke up, I was doing probably like 45 miles an hour on [the highway]. Woke up, and at the last minute, tried to correct the steering wheel because there was like a concrete barrier on the side. They were doing, like, construction. And so when I did that, the car swerved back and forth and it hit the concrete barrier. The airbag deployed. I hit my head on the steering wheel. I wasn't wearing a seatbelt at the time. So when the officers arrived on the scene, I was, like, leaning on the car, you know, still in a daze from smacking my head and having the airbags flow in my face. The officers never asked me did I need any aid or anything. It was just more so, Have you been drinking? Like, no. Okay. Do you mind taking a sobriety test? I'm like, I'm not going to take one because you all didn't offer me any aid. At that point, I was . . . arrested and taken to jail. (Tr. at 38-41, 106-112; GE 3, 5)

In March 2017, at age 27, Applicant was arrested and charged with DWI, 2nd offense within five years, and refusal of breath test, 2nd offense, both misdemeanors. He pled guilty to the reduced charge of misdemeanor reckless driving, and he was sentenced to 90 days in jail, suspended, placed on unsupervised probation, his driver's license was restricted for six months, and he was fined. The latter charge was *nolle prossed*. (SOR ¶¶ 1.b, 2.h) He consumed around four to six 12-ounce beers at a party at a friend's house. He decided to try to "sleep it off" in his car, which he acknowledged was "probably not the best idea," but his intention was to leave the party, otherwise he likely would have continued drinking. He left his keys in his ignition after rolling down a window, but his engine was off. He woke up when a police officer tapped on his door and asked if he had been drinking, to which he acknowledged that he had. (Tr. at 41-43, 112-115; GE 3, 4, 5)

In September 2019, at age 30, Applicant was charged and convicted of misdemeanor public swearing/intoxication, and he was fined \$50. (SOR ¶¶ 1.a, 2.h) He drank around three to four 12-ounce beers at home and was smoking cigarettes on the steps in front of his home when police officers, who were walking through the neighborhood, approached and told him they had received a noise disturbance. The officers, who recognized him from an incident that occurred in July 2019, as discussed below, "made a comment about [the July 2019 incident], to which I got kind of, you know, mouthy with them after that." The officers then "came up on the steps and said that they smelled alcohol." After he told the officers, "Hey, you know, I'm on my property, not bothering anybody, not doing anything; you all came up messing with me, pretty much," the officers arrested him. He stated that the police officer who showed up to court told

him that it would only be a civil penalty and not a criminal charge, so he did not fight it and paid the fine. He stated that he should not have listened to that officer. He acknowledged that he should have been smart when the police officers approached him that day and either gone into his house or listened to what they had to say and tried to diffuse the situation. (Tr. at 43-47, 69-75, 137-141; GE 1, 6)

In February 2022, at age 32, Applicant was arrested and charged with DWI, 2nd offense within five to ten years, and DWI, refusal of breath test, 2nd offense within ten years. (SOR ¶¶ 1.g, 2.h) In December 2022, he was convicted of the amended charge of misdemeanor reckless driving and sentenced to 30 days in jail, suspended, placed on one year of unsupervised probation, his driver's license was restricted for six months, he was ordered to attend a week-long ASAP program and an outpatient program, and he was fined \$250. The latter charge was *nolle prossed*. (Tr.at 47-52, 141-162; GE 7, 8, 9)

Earlier that day, Applicant consumed around two to four 12-ounce beers. That night, he moved his car within his neighborhood to a better parking spot, and when he got out of his car to see how close he was to the curb, he did not notice that it was still in reverse, and it rolled back and hit the car behind it. The owner of that car witnessed the incident and contacted the police. The officer that arrived asked Applicant if he had been drinking, and he responded affirmatively. When the officer asked Applicant to do a sobriety test, he refused because he was not in the car when the officer arrived. He acknowledged at the hearing that he should not have operated his car after he had been consuming alcohol, even if it was to move his car to a better parking spot in his neighborhood. (Tr. at 47-52, 141-162)

Applicant stated that he last consumed alcohol in December 2022. Up until then, he had been consuming approximately four 12-ounce beers once or twice weekly. As of the date of the hearing and since December 2022, his driver's license was still restricted, he was still on probation, and he was in a 19-week outpatient alcohol program, which required him to remain sober and attend Alcoholics Anonymous (AA) meetings twice weekly. He paid the court-ordered fine in March 2023, and at a date not in the record, he completed the court-ordered ASAP program. He intended to successfully complete the 19-week outpatient program. He stated that he has not received any other alcohol-related treatment and he has never received an alcohol-related diagnosis. Although he does not believe he has an alcohol problem, he stated that he intends to remain sober, and his family and friends are supportive of his decision. When asked whether he was choosing to abstain from alcohol because he wanted to do so or because the outpatient program required it, he responded:

I'm doing it for, I would say, both. I kind of want to, you know, start making better decisions, you know. I had plenty of chances, you know, but I think that, you know, now that this being the fifth time, you know -- or I think that I just, you know, just tired of, you know, making poor decisions. (Tr. at 51-58, 141-162)

In addition to his alcohol-related incidents, Applicant has a history of criminal involvement. In May 2010, he was charged and convicted of reckless driving,

endangering life, limb, and property. He was fined. He was first at a traffic light with other cars to the side of him, and he intentionally accelerated his car to burn the rubber on his tires when the light turned green. The police officer who pulled Applicant over told him that he could smell the rubber from his car tires, and the officer gave him a summons to appear in court. (SOR ¶ 2.g; Tr. at 58-60, 81-83; GE 4, 5)

In October 2014, Applicant was charged with misdemeanor assault on a family member, and he was found not guilty in January 2015. (SOR ¶ 2.e) He and his then-girlfriend, now fiancée, got into an argument. As he tried to leave through the front door, she stood in front of it and continued to yell at him. He asked her to move, she refused, and he “pushed her out of the way.” He spent the night at his mother’s house. His then-girlfriend, now fiancée, contacted the police. The next day, he turned himself into the police after learning from his brother, who was informed by his then-girlfriend, now fiancée, that there was a warrant out for his arrest. He was released on his own recognizance on the condition that he appear at the court date, and a “no contact” order was issued. She testified at court that she did not recall what happened that night. (Tr. at 60-64, 101-106; GE 3)

In January 2019, Applicant was charged with misdemeanor assault on a family member, and the charge was *nolle prossed*. (SOR ¶ 2.d) He and his then-girlfriend, now fiancée, got into another argument and “I got really mad and I punched the glass picture frame that was on the wall and punched a hole in the wall.” He cut his hand as a result. She contacted the police, he was arrested, taken to jail, released on his own recognizance, and a no contact order was issued. She failed to appear at court. He understood that he dealt with his frustration and anger, in 2014 and 2019, inappropriately. He attended and completed an anger management class in December 2021 and learned methods such as “try not to argue back, don’t take an aggressive tone, and separate myself from the situation,” that he intends to utilize in the future. (Tr. at 64-68, 115-120; GE 3; AE B)

In April 2019, Applicant was charged and convicted of misdemeanor reckless speeding for driving 103 miles per hour (mph) in a 65-mph zone. He was sentenced to 180 days in jail, with 176 days suspended, and fined \$500. He spent two days in jail. (SOR ¶ 2.c) He was driving home at night after spending the day with his brothers, and he was speeding, because he was “just tired, just trying to get home.” He did not realize how fast he was driving. The state trooper who pulled him over asked him if he had been drinking, which he denied, and the trooper gave him a summons to appear in court. (Tr. at 69-75, 120-124; GE 1, 4, 6)

In July 2019, Applicant was charged with misdemeanor violation of a fire prevention code, and the charge was dismissed in March 2021. (SOR ¶ 2.b) He drank around three beers and then began working on his car that had been giving him problems. As he attempted to trigger his car’s check engine light to determine the source of the problem, he “revved the gas on the car continuously. And then eventually the car caught on fire.” He did not realize the car was on fire until he saw smoke, and when he got out of the car to try to extinguish the fire, he sustained second-degree burns to two toes on his right foot. A neighbor contacted the fire department when Applicant could not, because

his phone and personal belongings were still inside the car. The firefighters extinguished the fire, he was transported to the hospital and released the same night, and a fire marshal charged him with violation of a fire prevention code the next day. (Tr. at 72-75, 124-132; GE 1, 3, 6)

In August 2019, Applicant was charged with misdemeanor reckless speeding, for driving 101 mph in a 70-mph zone. In November 2020, he pled *nolo contendere* and he was sentenced to 30 days in jail, suspended, his driver's license was restricted for 30 days, and he was fined \$500. (SOR ¶ 2.a) He lost track of time while fishing with his brother, and he was speeding to pick up his children from daycare before it closed. The state trooper who pulled him over asked him if he had been drinking, which he denied, and the trooper gave him a summons to appear in court. He completed a mandated driver improvement class, and he understood that speed limits exist to protect him and others on the road and he does not intend to speed in the future. (Tr. at 75-78, 132-137, 157-158; GE 1, 6)

At the hearing, Applicant acknowledged that "I made some poor decisions and put myself in some bad situations." He stated that he has matured and "I'm hoping to show the court that I've learned and grown from my prior actions and prove that it won't happen again." He completed 106 hours of community service in November 2020. He did not begin to receive annual security training until he started working for his current employer in January 2021. Since receiving such training, he is aware that holding a security clearance requires him to abide by the laws, comply with rules and regulations, and exercise good judgment in his decision-making. He is also aware of the reporting requirements for security clearance holders. Character references, to include from two of his brothers, his sister-in-law, a former neighbor, his children's grandfather, and two friends, attested to his integrity, trustworthiness, and reliability. (Tr. at 23-24, 78, 91-93, 158-162; AE C, D)

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(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

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 Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G: Alcohol Consumption

The security concern for alcohol consumption 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.

The guideline notes the following applicable conditions that could raise security concerns under 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

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

Applicant has six alcohol-related convictions between 2009 and as recently as December 2022. As of the date of the hearing, his driver’s license was restricted, he was on probation, and he was in a 19-week outpatient alcohol program for his 2022 alcohol-related conviction. AG ¶¶ 22(a) and 22(c) are established.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. Potentially applicable is 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.”

Applicant’s six alcohol-related convictions between 2009 and as recently as December 2022 continue to raise doubts about his reliability, trustworthiness, and judgment. While he has not consumed alcohol since December 2022, his driver’s license was still restricted, he was still on probation, and he had yet to complete the court-ordered outpatient program. He needs more time to show that he has matured and learned from his poor decisions. I find that AG ¶ 23(a) is not established.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct as: “[c]riminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual’s judgment, reliability, or trustworthiness;
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
- (c) individual is currently on parole or probation.

In addition to his alcohol-related convictions, as discussed above in my analysis under Guideline G, Applicant has three reckless-driving-related convictions, from 2010 and two from 2019. He also has two assault charges from 2014 and 2019 involving his then-girlfriend, now fiancée. As of the date of the hearing, he remained on probation for his December 2022 alcohol-related conviction. AG ¶¶ 31(a), 31(b), and 31(c) are established.

AG ¶ 32 provides the following relevant mitigating conditions:

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

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

For the same reasons stated above in my Guideline G analysis, I find that not enough time has elapsed since Applicant's criminal behavior and without recurrence of criminal activity, and the record evidence continues to cast doubt on his reliability, trustworthiness, and judgment. AG ¶¶ 32(a) and 32(d) are not established.

Whole-Person Concept

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

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines G and J. in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the alcohol consumption and criminal conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G: Subparagraphs 1.a - 1.g:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraphs 2.a - 2.h:	AGAINST APPLICANT Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge