DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-00077
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel
For Applicant: *Pro se*

10/06/2023

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense's (DOD) intent to revoke his eligibility for a security clearance to work in the defense industry. Applicant has a history of problematic alcohol use as evidenced by his history of alcohol-related criminal incidents. In addition to the alcohol-related arrests, Applicant also has multiple instances of criminal conduct that reflect negatively on his judgment. He has demonstrated a pattern of disregard for rules and regulations that casts doubt on his ongoing security worthiness. Clearance is denied.

Statement of the Case

On January 15, 2021, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the alcohol consumption and criminal conduct guidelines. This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

DOD adjudicators were unable to find that it is clearly consistent with the national interest to continue Applicant's security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals (DOHA) administrative judge for a determination whether to grant his security clearance. Applicant timely answered the SOR and requested a decision on the administrative record without a hearing. (Answer) The Government, exercising its right under Directive, Additional Procedural Guidance ¶ E3.1.7, requested a hearing, and informed Applicant of this election in a letter dated January 18, 2022. The hearing conversion letter is included in the record as Hearing Exhibit (HE) I.

In advance of the hearing, the Government served Applicant with the documents it planned to use in its case against him. The disclosure letter, dated March 11, 2022, is included in the record as HE II. The hearing convened on January 12, 2023. I admitted Government's Exhibits (GE) 1 through 10, without objection. Applicant provided several documents to offer into evidence; however, they were duplicates of the documents he submitted with his answer to the statement of reasons. I advised the parties that the documents were already considered part of the record and that I would not admit the duplicate copies into the record. I destroyed the duplicate documents in accordance with DOD policy. DOHA received the transcript on January 23, 2023, and the record closed.

Procedural Matters

At the hearing, Department Counsel moved to amend the SOR to conform to the record and to correct clerical errors. Specifically, Department Counsel moved to amend SOR ¶¶ 1.f, 2.c, and 2.d to correct the allegations. Applicant was not arrested, but received citations for incidents that occurred in December 2016 (SOR ¶ 1.f) and January 2019 (SOR ¶ 2.c), respectively. The Government also moved to amend SOR ¶ 2.d to reflect that Applicant was not arrested but received a citation after a June 2019 incident. The Government also sought to strike the second sentence of the allegation, because it contained incorrect information about the resolution of the case. I amended the allegations without objection from Applicant. (Tr. 12-15)

During the hearing, both parties made multiple references to the implied consent law in Applicant's state of residence. However, neither party offered the statute for inclusion in the record. The statute is included in the record as HE III, so as not to reveal Applicant's state of residence in the decision. A copy of the statute was sent to the parties.

Findings of Fact

Applicant, 50, has worked for his current employer, a federal contracting company, since September 2014. He was initially granted access to classified information in March 1999. On his most recent application, submitted in dated July 2019, he disclosed six alcohol-related criminal incidents for suspicion of driving under the influence of alcohol. The investigation revealed that he was also stopped for traffic violations in April 2015, June 2018, and June 2019. (Tr. 27-28; GE 1)

Applicant admits that he was arrested in November 2008 (SOR ¶ 1.a/ GE 3; Answer), November 2009 (SOR ¶ 1.b/ GE 10), April 2011 (SOR ¶ 1.c), July 2013 (SOR ¶1.d/ GE 4), April 2015 (SOR ¶ 1.e/ Answer), and June 2018 (SOR ¶ 1.g/ GE 6) for suspicion of driving under the influence of alcohol. Applicant also admits that during each stop he refused to take a breathalyzer test, which resulted in his arrest. With the exception of the charges against Applicant after the July 2013 arrest, the criminal cases from the five other arrests were *nolle prossed*. In response to the July 2013 charges, Applicant pleaded guilty to driving a vehicle while impaired by alcohol and was sentenced to probation before judgment. Applicant also admits that he received a citation in December 2016 for having an open container of alcohol in his vehicle, which a police officer noticed while admonishing Applicant for a parking violation. (SOR ¶ 1.f/ GE 5; Answer) He received a fine, which he paid. (Tr. 33-37, 40, 43-44; GE 3; Answer)

Applicant admits he received a citation in April 2015, in an incident separate from the April 2015 DUI arrest, for driving on a suspended license – the charge was *nolle processed*. (SOR ¶ 2.b/ GE 7; Answer) He admits receiving a citation in January 2018 for driving nearly 30 miles per hour over the speed limit. He was fined. (SOR ¶ 2.c/ GE 8) He also admits that he received a third citation in June 2019 for driving over 20 miles per hour over the speed limit and driving on a suspended license. He was convicted of the speeding violation and received probation before judgment. The charge for driving on a suspended license was *nolle prossed*. (SOR ¶ 2.d/GE 9) (Tr. 43-44, 48, 52-53, 67-68)

During each stop for suspicion of DUI, Applicant refused to take breathalyzer tests, because he did not believe that he was intoxicated. He also wanted to "prove his innocence" in court. He testified that he was also advised by his friends employed in law enforcement to refuse to provide a breath sample. He believed that the consumption of one beer would be enough to render a result above the legal limit. He testified that he was not aware that refusal to take a breathalyzer test could result in the suspension of his license. He claims that the two times he was cited for driving on a suspended license, he was unaware of the suspension because he still had his driver's license in his possession. (Tr. 41-43, 50, 62, 64-66, 68)

Applicant testified that before all of the alleged alcohol-related driving incidents, he consumed between two and four beers while socializing with friends, usually while watching football games. Each time he was stopped, he claims that it was for speeding, not erratic driving. However, on two occasions, in April 2015 and June 2018, he was approached by police officers after sitting in his car on the side of the road. In the April 2015 incident, Applicant pulled off the road because he felt tired while driving after leaving a friend's business where he consumed alcohol. In the June 2018 incident, Applicant pulled over because he started feeling unwell while driving home from a social event where he had been consuming alcohol. He was less than five miles from home. The police officer approached Applicant's vehicle because the car was partially blocking a lane of traffic. He does not believe that alcohol affected his ability to drive in either incident. (Tr. 29-33, 37-39, 49-50)

Applicant does not believe that he has a problem with alcohol. He has not been ordered by the court or advised by family members to take any alcohol education classes.

Nor has he taken any on his own. When asked about losing a job in 2010 because of attendance issues, Applicant admitted that he often took Mondays off during football season. He denied needing the days off to recover after drinking too much, but because he was too tired after staying up late watching football. Applicant was terminated from another job in July 2013 for attendance issues. The termination occurred shortly after he was arrested for DUI. He claims that his termination was not related to any alcohol consumption issues, but that he frequently took time off to look for a higher paying job. He also admitted that after the June 2018 incident, he and his wife decided that it would be best if she accompanied him to future social gatherings. She does not drink and agreed to drive him. (TR. 62, 64-65, 56-59)

Applicant's state of residency enacted an informed consent law in 1977. Under the statute any person who drives or attempts to drive a motor vehicle on a highway or on any private property that issued by the public in general in the State is deemed to have consented to provide a breath or blood sample to determine alcohol concentration, if they are detained on a suspicion of driving or attempting to drive while under the influence of alcohol or while impaired by alcohol. Although a person cannot be forced to provide a breath sample, they are advised by the detailing officer that failure to do so will result in a suspension of their driver's license by the State's motor vehicle administration. An officer is only directed to confiscate a person's driver's license if they are suspected of operating a vehicle under the influence of alcohol or impaired by alcohol in violation of an alcohol restriction order or if operating a commercial vehicle. (*See* HE III)

In April 2022, Applicant suffered a medical event that left him unable to drive or work for an indeterminate amount of time. Given his current medical condition, he cannot drink alcohol. While serious, Applicant's medical condition could improve enough for him to resume his regular activities. (Tr. 56-58, 62-63)

Policies

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security

eligibility will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

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

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

Analysis

Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses and can raise questions about an individual's reliability and trustworthiness. The record establishes the Government's *prima facie* case. Between 2008 and 2018, Applicant had seven alcohol-related criminal incidents, resulting in six arrests, one DUI conviction, and a fine for having an open container of alcohol in his car. (SOR ¶¶ 1.a – 1.g) Despite his statements to the contrary, Applicant's history of alcohol-related criminal conduct is evidence of a maladaptive relationship with alcohol. His repeated decisions to drive after consuming alcohol and to do so in excess of the speed limit show the adverse effect of alcohol on his judgment. Accordingly, the following alcohol consumption disqualifying conditions apply:

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

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

Applicant did not present sufficient evidence to mitigate the alcohol consumption concerns. Although he is currently abstaining from alcohol, that decision was not borne out of an acknowledgment of his maladaptive relationship with alcohol, but out of medical necessity. As such, his current period of abstinence does not mitigate the alcohol concern in this case. Applicant does not believe that he has an alcohol problem. Despite his arrest record, he has never availed himself to any alcohol education classes or substance abuse counseling. Given that he is unable to acknowledge the maladaptive nature of his relationship with alcohol, he is likely to resume his alcohol consumption at a similar level when his health improves.

Criminal Conduct

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. Applicant's six alcohol-related arrests, the September 2013 guilty plea, and the open container violation is also alleged under this guideline (SOR ¶¶ 1.a – 1.g, 2.a), in addition to a 2015 arrest for driving on a suspended license (*nolle prosequi)*, and 2018 and 2019 misdemeanor convictions for speeding. His criminal record demonstrates a pattern of behavior that is indicative of poor judgment and a blatant disregard for the law, rules, and regulations. Accordingly, the following disqualifying conditions apply:

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; and

AG ¶ 31(b) evidence, 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.

None of the mitigating conditions apply. Applicant claimed that he was innocent of five of the six charges of driving under the influence. However, he did not provide reliable evidence to support a finding that he did not commit the charged offenses. He cites as proof of innocence the absence of breathalyzer test results to establish his intoxication, and that five suspicion of DUI cases were *nolle prosessed*. While breathalyzer results are direct evidence of intoxication, they are not the only type of evidence required to meet a state prosecutor's burdens of proof and production in a criminal case. A prosecutor's decision to abandon prosecution or a court's decision to dismiss charges against a defendant does not equate to a finding of innocence. There are many reasons unrelated to a determination of guilt that the state may choose to not prosecute a criminal case.

The criminal concern is not mitigated by the fact that Applicant no longer engages in the underlying conduct, consuming alcohol or driving a car, due to the state of his health at the time of the hearing. It is possible, as his health improves, that Applicant may resume these activities. Given that he has not demonstrated rehabilitation of his alcohol issue or demonstrated an understanding of the safety concerns raised by his driving record, he did not establish that the underlying conduct is unlikely to recur. As a result of Applicant's view toward his criminal history, the passage of time since his last incident of criminal conduct, four years, is not sufficient to mitigate the criminal conduct concerns in this case.

Whole-Person Concept

After reviewing the record and considering Applicant's testimony, doubts about his ongoing security worthiness remain. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). In addition to the security concerns raised by the alleged misconduct, I am also concerned about the implications of intentional disregard of the implied consent law in his state.

The security clearance adjudications are a predictive process by which an individual's past behavior is used as an indicator of his future conduct. Here, Applicant demonstrated an unwillingness to comply with rule and regulations related to the privilege of maintaining a driver's license. Applicant testified that he routinely refused to provide breath samples when stopped by law enforcement on suspicion of DUI. Applying the principle that government officials act with good-faith and regularity in the execution of their duties, it is more likely than not that Applicant was advised of the consequences of his failure to provide the requested sample. His refusal to participate indicates that he will not voluntarily comply with reasonable, lawful requests when they could result in adverse consequences. Similarly, the rules regarding the safeguarding of classified information require an individual to voluntarily submit to processes that may result in adverse consequences. This when considered with the alleged disqualifying conduct, supports a negative whole-person assessment of unwillingness to comply with rules and regulations and other characteristics indicating that he may not properly handle or safeguard classified information.

Formal Findings

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

Paragraph 1, Alcohol Consumption:	AGAINST APPLICANT
Subparagraphs 1.a – 1.g	Against Applicant
Paragraph 2, Criminal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a – 2.d:	Against Applicant

Conclusion

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

____
Nichole L. Noel
Administrative Judge