DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 23-00199
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Cynthia Ruckno, Esq., Department Counsel
For Applicant: *Pro se*

03/28/2024

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 1, 2021. On March 3, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G, J, and E. The DCSA CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 May 7, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 23, 2023, and

the case was assigned to me on January 4, 2024. On January 22, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on February 29, 2024. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 13 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses. He did not submit any documentary evidence. I kept the record open until March 11, 2024, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A, B, and C, which were admitted without objection. DOHA received the transcript (Tr.) on March 11, 2024.

Amendment of SOR

At the hearing, Department Counsel moved to amend SOR ¶ 1.f, which alleged that a charge of driving while intoxicated was pending trial. The amendment deletes the words, "The charge is still pending," and substitutes the words, "You were found guilty and sentenced to one year of probation." I granted the motion. (Tr. 14)

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.c, 1.e, and 1.f. He denied the allegations in SOR ¶¶ 1.d and 3.a-3.d. He did not admit or deny SOR ¶ 2.a, which cross-alleges the conduct in SOR ¶¶ 1.a-1.f. His admissions are incorporated in my findings of fact.

Applicant is a 59-year-old information technology specialist employed by a defense contractor since May 2019. He has been employed by various federal contractors since August 2003. He was unemployed from March 2012 to April 2013 to care for a spouse with a complicated medical problem. He served on active duty in the U.S. Navy from May 1983 to August 2003, when he retired and received an honorable discharge. He was awarded several service medals and a Navy and Marine Corps Achievement Medal. (AX A; AX B) He has held a security clearance since 1982.

Applicant received an associate degree in computer information science in September 2012 and a bachelor's degree in computer science in January 2014. He married in May 1982 and divorced in August 1999. He remarried in October 1999 and divorced in November 2020. He initiated both divorces. (Tr. 46-47) He has four children and ten grandchildren. (Tr. 19)

In August 1987, Applicant was charged with driving while intoxicated (DWI). He was convicted, fined $350, and required to complete an alcohol safety awareness program (ASAP). (GX 5 at 3) At the hearing, Applicant could not remember the details of this incident, except that the culture in the Navy at that time was "work hard, play hard." (Tr. 21-23)

In June 1999, Applicant was charged with driving under the influence (DUI). He was convicted and placed on probation for two years. (GX 3 at 15) He testified that he

was driving with his then wife when he hit a curb as he was exiting from a highway and damaged his vehicle. (Tr. 29) He testified that he stopped drinking after this incident. (Tr. 31)

In September 2005, Applicant was charged DWI. He was convicted and required to attend ASAP. (GX 3 at 16) This incident occurred when he picked up his 17-year-old son and his son's friend at a movie theater and was driving home. (Tr. 32) He had consumed wine with dinner and apparently consumed enough to be intoxicated. (Tr. 34)

In April 2009, Applicant was charged with felony DWI, third offense within five years. He pleaded guilty to misdemeanor DWI, second offense within ten years. He was sentenced to 12 months in jail, with 11 months suspended, and placed on unsupervised probation for five years. (GX 7; GX 8) He was required to install an interlock device on his vehicle for six months. (Tr. 37) This incident occurred after Applicant assisted a friend whose car had a dead battery. After assisting his friend, they consumed tequila and a beer. As Applicant was driving home, he was stopped by the police because his turn signal was not working, and he had consumed enough alcohol to be intoxicated. (Tr. 34-35) He voluntarily sought and obtained counseling for three or four months, which he found helpful. (Tr. 35-36)

In January 2021, Applicant was charged with DWI and refusal to take a breathalyzer, a civil violation. The refusal was *nolle prosequi.* (GX 9) He was convicted of DWI and sentenced to 90 days in jail, suspended, and fined $750. (GX 10) Applicant testified that he had not been drinking, but that he passed out while driving to his brother's house to pick up his mother and take her to dinner. He testified that he could not see, could not speak, and was completely disoriented. He testified that he had a copy of the police body camera recording that reflected a disagreement between the two police officers. One officer declared, "I don't smell anything," but the other says, "He's sauced." On the advice of his attorney, he pleaded guilty to DWI. In March 2021, he went to a Veterans' Administration medical facility to determine what had happened, and he was diagnosed as a Type 2 diabetic. (AX C) He believed that his incapacity during this incident was due to diabetic retinopathy. After learning about his diagnosis, he decided to stop drinking. (Tr. 40-43)

In January 2023, Applicant was charged with misdemeanor DWI, second offense within five years. In August 2023, he was convicted and sentenced to six months in jail, with four months and ten days suspended. He was fined $1,000, placed on unsupervised probation for one year, and required to attend ASAP. (GX 13) His period of probation is scheduled to end in August 2024. This incident occurred when he tried to make a three-point turnaround, using someone's driveway. He misjudged the distance and backed into a ditch. It was raining, the ground was slippery, and he could not get out of the ditch. It took about three hours for someone to help him. He had a bottle of alcohol in the vehicle that he had intended to share with his sons to celebrate New Year's Eve. While waiting in his vehicle, he decided to drink some of the alcohol, and he consumed enough to be legally intoxicated. When the police arrived at the scene, they charged him with DWI. At the hearing, he testified that he has not consumed alcohol since this incident. (Tr. 44-46)

Applicant's first civilian job after he retired from the Navy was with a defense contractor. He worked for this employer for about eight and half years. He left the job after a disagreement about a mission. A new resource manager sent him on a mission aboard a Navy ship. While they were at sea, the commanding officer of the ship told him that they did not ask for support and did not need it. He was sent back to shore, and he told a government representative that the resource manager had sent him on an impossible mission. About two weeks later, Applicant's project manager told him that there was a rumor that he had identified the resource manager as "the single point of failure" for the mission. The record does not reflect the source of the rumor. Appellant's project manager told him that he had given the resource manager a "black eye" by blaming him for the failure, but that he could keep his job if he apologized to the resource manager. Applicant refused to apologize, and he quit the job.

The SOR alleges that Applicant falsified SCAs submitted in April 2014, August 2017, and July 2021. He denied the allegations in his answer to the SOR.

When Applicant submitted an SCA in April 2014, he answered "Yes" to the question asking if, in the last seven years, he quit after being told he would be fired. He stated that he was "falsely accused of making a statement concerning a government employee, which was not true." He disclosed that he was unemployed from March 2012 to April 2013 because his then spouse had been diagnosed with a disease that was not properly diagnosed for several months, and that he left the job to care for her and finish his college degree. (GX 12 at 14, 16) In response to questions about his police record, he disclosed that he was arrested for DUI in February 2009. (GX 12 at 27, 28) His answers in this SCA are alleged in SOR ¶ 3.b.

When Applicant submitted an SCA in August 2017, he answered "No" to the question in Section 13A (Employment Activities) asking if, during the last seven years, he had been fired or quit after being told he would be fired. (GX 2 at 18-19) In Section 13C (Employment Record), he answered "No" to the same question but disclosed that he left his job after "being accused of making a statement about a government employee, which wasn't true." (GX 2 at 22) He also disclosed that he had been unemployed from March 2012 to April 2013 because his then spouse had been diagnosed with a disease that was not properly diagnosed for several months, and that he left the job to care for her and finish his college degree. (GX 2 at 20) He answered "No" to a question asking if he had ever been charged with an offense involving alcohol or drugs. However, in the comments section, he stated that he was arrested for DUI in February 2009. (GX 2 at 32). His answers in this SCA are alleged in SOR ¶¶ 3.a and 3.c.

When Applicant was interviewed by a security investigator in November 2018, he was questioned about his record of alcohol-related incidents in 1987, 1988, 1999, 2008, and 2009. He told the investigator that he did not list them in his most recent SCA because they had been previously disclosed. (GX 3 at 14-16) When he was interviewed by a security investigator in August 2019, he discussed his history of alcohol-related arrests in detail. (GX 3 at 26-28)

When Applicant submitted an SCA in July 2021, he answered "No" to a question in Section 22 (Police Record (Ever)), asking if he had ever been charged with an offense involving alcohol or drugs. (GX 1 at 37-38) However, in the preceding Section 22 (Police Record), he disclosed that he had been arrested for DUI in January 2021 and was pending trial, as alleged in SOR ¶ 1.c. (GX 1 at 35-36) He did not disclose the alcohol-related offenses alleged in SOR ¶¶ 1.a, 1.b, 1.c, and 1.d. However, when he was interviewed in November 2021, he disclosed the 2009 DWI and told the investigator that he had three to four DUIs and had talked about them in previous investigations. The investigator did not question him further about the earlier alcohol-related offenses. (GX 3 at 38) His answers in this SCA are alleged in SOR ¶ 3.d.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of

establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline G, Alcohol Consumption

The concern under this guideline is set out in AG ¶ 21: Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

Applicant denied being intoxicated during the incident alleged in SOR ¶ 1.e, but he pleaded guilty at his trial. 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). In short, an Applicant is not permitted to relitigate a criminal trial that resulted in a conviction.

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. None of these exceptions apply to Applicant's conviction of DWI in January 2021.

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; and

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

The following mitigating conditions are potentially applicable:

AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

AG ¶ 23(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(a) is not established. Applicant's alcohol abuse is recent, frequent, and has not happened under unusual circumstances making it unlikely to recur.

AG ¶ 23(b) is not established. Applicant has acknowledged his maladaptive alcohol use, but except for the short period of counseling after the April 2009 incident, he has not sought or received counseling. He has been required to attend ASAP courses, but those courses provide education, not treatment. He declared his intent to stop drinking after each of the alcohol-related incidents, but he has not adhered to his intentions.

Guideline J, Criminal Conduct

The SOR cross-alleges the alcohol-related conduct in SOR ¶¶ 1.a-1.f under this guideline. The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

Applicant's admissions and the evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

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.

The following mitigating conditions are potentially applicable:

> 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; 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.

Neither mitigating condition is established. Applicant's alcohol-related criminal conduct is recent and did not occur under unusual circumstances. He is still on probation, and he submitted no evidence reflecting successful rehabilitation.

Guideline E, Personal Conduct

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

SOR ¶ 3.a alleges that Applicant falsely answered "No" to a question in his 2017 SCA, asking if in the last seven years, he quit a job after being told he would be fired or left a job by mutual agreement following notice of unsatisfactory performance. This allegation is not established. He answered "Yes" to this question and explained that he quit his job after he was falsely accused of making a derogatory statement about a government employee. (GX 12 at 14)

SOR ¶ 3.b alleges that he falsely answered "No" in his 2014 SCA, asking if he had ever been charged with an offense involving alcohol or drugs. This allegation is not established. His SCA reflects that he disclosed his 2009 DUI arrest in a preceding question about his police record. (GX 12 at 27-29)

SOR ¶ 3.c alleges that he falsely answered "No" in his 2017 SCA, asking if he had ever been charged with an offense involving alcohol or drugs. This allegation is established. His SCA reflects that he answered "No" to this question, but in the preceding questions about his police record, he disclosed February 2009 DUI arrest, alleged in SOR ¶ 1.d. However, he did not disclose his arrests for DUI and DWI in 1987 and 1999, alleged in SOR ¶¶ 1.a and 1.b. (GX 2 at 32-33) When he was questioned by a security investigator

in November 2018, he admitted the two previous arrests but explained that he did not list them in the 2017 SCA because he had disclosed them during a previous investigation. (GX 3 at 15.)

SOR ¶ 3.d alleges that he falsely answered "No" in his July 2021 SCA, asking if he had ever been charged with an offense involving alcohol or drugs. This allegation is established. His SCA reflects that answered, "No," but he disclosed his January 2021 DUI arrest in response to a preceding question about his police record. (GX 1 at 34-36) However, he did not disclose his earlier alcohol-related incidents alleged in SOR ¶¶ 1.a-1.d. When he was questioned by a security investigator in November 2021, he admitted all his previous alcohol-related arrests and convictions and told the investigator that he had talked about them in previous background investigations. (GX 3 at 38)

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence to determine an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

The relevant disqualifying condition is AG ¶ 16(a):

> AG ¶16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

This allegation is established by the evidence supporting SOR ¶¶ 3.c and 3.d. I am satisfied that Applicant intentionally omitted information in later SCAs that he had previously disclosed. His omissions appear to have been caused, at least in part, by his reluctance to repeat his entire record in each iteration of the SCA. Nevertheless, he knew, based on his experience, that his SCAs would be closely scrutinized and that he probably would be questioned about them, especially after the first iteration.

The following mitigating conditions are potentially applicable:

> AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and
>
> 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(a) is not established. Applicant readily admitted his previous offenses during each interview by a security investigator, but only after being confronted with the evidence.

AG ¶ 17(c) is not established. Applicant's omissions from his SCAs were recent, frequent, and did not occur under unique circumstances. Falsification of an SCA is not minor. It "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

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

I have incorporated my comments under Guidelines G, J, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). At the hearing, Applicant was sometimes resentful and argumentative, but he was sincere, candid, and credible. I have considered his long record of public service, both in and out of uniform. After weighing the disqualifying and mitigating conditions under Guidelines G, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted some of the allegations under Guideline E, but he has not mitigated the security concerns raised by his alcohol consumption, criminal conduct, and personal conduct.

Formal Findings

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

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant

Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 3.a and 3.b:	For Applicant
Subparagraphs 3.c and 3.d:	Against Applicant

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