DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 15-08360
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

04/10/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 20, 2014. On June 29, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline G and E. The DOD 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) implemented by the DOD on September 1, 2006. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replaced the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on August 14, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 27, 2016, and the case was assigned to me on December 14, 2016. On December 19, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for January 12, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified but did not present the testimony of any witnesses. He submitted a demonstrative exhibit setting out a timeline of events and an outline of his testimony, which was attached to the record as Hearing Exhibit (HX) II.[1] I kept the record open until January 19, 2017, to enable him to submit documentary evidence. He timely submitted AX A, which was admitted without objection. Department Counsel's comments regarding AX A are attached to the record as HX III. DOHA received the transcript (Tr.) on January 17, 2017.

Findings of Fact[2]

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.d and denied the allegation in SOR ¶ 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 53-year-old senior staff engineer employed by a federal contractor since October 2003. He was previously employed by the same federal contractor from June 1992 to October 1997, when he voluntarily resigned to take another job. He has held a security clearance since June 1986 (GX 6 at 5.).

Applicant earned an associate's degree in May 1983 and a bachelor's degree in May 1986. He married in October 1989. He and his wife have two sons, ages 21 and 19.

In 2003, Applicant received a prescription for an anti-anxiety drug. He saw his doctor twice per year and renewed the prescription as needed. In 2012, Applicant felt that the drug was no longer working, and he wanted to discontinue its use, but his doctor encouraged him to continue using it.

In May 2014, Applicant was riding his motorcycle while on vacation. He stopped for dinner and drank beer with his dinner. During a personal subject interview (PSI) in October 2014, Applicant stated that he drank two beers with dinner. (GX 6 at 3). At the hearing, he testified that he consumed "a number of beers" but he could not remember how many. (Tr. 44.) He had forgotten to take his anti-anxiety drug on that day. He became dizzy and tipped over his motorcycle while stopped at a red light. A local police officer approached Applicant and asked him for his driver's license. When Applicant

[1] Hearing Exhibit I is the letter transmitting Department Counsel's documentary evidence to Applicant, as required by Directive ¶ E3.1.13.

[2] Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

complied, the local police officer observed a police "courtesy badge" that Applicant's neighbor, also a police officer, had given him. The local police officer asked Applicant if he was a police officer, and Applicant said, "Yes, just like you." Applicant testified that he was being sarcastic because he thought the local police officer was being sarcastic. Applicant was arrested for impersonating a police officer and public intoxication.

Applicant notified his security officer of his arrest. (Tr. 47.) He appeared in court in August 2014, represented by an attorney. The charge of impersonating an officer was dismissed and the case was continued until February 2015. Applicant told the court that he was receiving treatment from a psychiatrist. In September 2014, the charges were dismissed, conditioned on Applicant's completion of an alcohol education class and obtaining treatment for his withdrawal from the anti-anxiety drug. (Tr. 43-44; GX 6 at 3; GX 5 at 6-9.)

In June 2014, after being informed by a medical doctor that withdrawing from the anti-anxiety drug was a slow process and would take considerable time, Applicant became depressed and consumed three or four beers at a nearby bar. A bar patron became concerned about his mood and behavior and called the police. The police took him to a hospital, where he was seen by a nurse practitioner. In accordance with the advice of the nurse practitioner and his attorney, Applicant enrolled in a ten-day evaluation program and was treated with medications to assist him in withdrawing from the anti-anxiety drug. (GX 6 at 4.) He took a leave of absence from work to complete the ten-day program and three months of medical leave to deal with his withdrawal from the anti-anxiety drug. (GX 6 at 2.)

After the June 2014 incident at the bar, Applicant's father-in-law notified the county child protective services because of his concern for Applicant's children. Applicant testified that he did not know who contacted the child protective services office, but the family court issued a restraining order after he had a loud argument with his wife in the presence of their children. (Tr. 78-79.) The restraining order required Applicant to move out of his home and refrain from using alcohol or drugs, abusing proscribed drugs, possessing firearms, or engaging in any acts of violence. The order was lifted on August 7, 2014, conditioned on Applicant obtaining psychotherapy and counseling, participating in a substance abuse rehabilitation program, and participating in a domestic violence prevention program. (GX 5 at 10-17; GX 6 at 4-5.)

Applicant entered an addiction recovery program in September 2014 and was diagnosed as alcohol dependent and having a mood disorder. He was required to abstain from alcohol during treatment, but he had one relapse in December 2014. He completed the program and was discharged in February 2015. His medical providers were a licensed clinical social worker, a licensed mental health clinician, and a medical doctor. (GX 5 at 3, 18-21.) His completion of the addiction recovery program satisfied the conditions imposed by the court in August 2014, and the charge of public intoxication was dismissed in February 2015. (GX 5 at 7, 9.)

In the October 2014 PSI, Applicant told the investigator that he had stopped drinking and did not intend to resume his use of alcohol. (GX 6 at 4.) In a sworn response to DOD CAF interrogatories in July 2015, Applicant answered "No" to questions asking whether he was currently drinking any alcoholic beverages and whether he intended to drink them in the future. (GX 5 at 2.) At the hearing, Applicant testified that when he answered the interrogatories he was not drinking and did not know whether he would resume drinking in the future. (Tr. 45.)

In a sworn response to DOD CAF interrogatories in September 2015, Applicant stated that he was currently drinking alcoholic beverages and that he consumed 3 or 4 glasses of beer "weekly or monthly." (GX 4 at 2.) He testified that after the court order was withdrawn in August 2014, he decided to resume drinking. (Tr. 46.) At the hearing, he testified that he was currently consuming three or four beers a couple times a week, usually on weekends. (Tr. 51.)

Applicant testified that he had problems with alcohol consumption only when he was taking the anti-anxiety drug, because it amplifies the effect of alcohol. He believes that a person who consumed alcohol along with the anxiety drug he was using would be diagnosed with alcohol dependence. He also testified that withdrawing from the drug produces a mood disorder, with a duration dependent on how long the anti-anxiety drug was used. (Tr. 42.) After using the drug for 11 years, it took him about a year and a half to recover from it. (Tr. 42-43.)

Applicant has decided to resume his alcohol consumption because he has withdrawn from the anti-anxiety drug, and his response to alcohol now "is that of your average person out there." (Tr. 41.) He now consumes beer "twice a week or less" and he consumes three or four beers at a time, usually on weekends. (Tr. 43, 51.) He admitted that his testimony about the interaction between his anti-anxiety drug and alcohol was based on his personal research and experience, not on advice from a medical professional. (Tr. 58.) Similarly, his conclusion that he is no longer alcohol-dependent was based on his self-diagnosis and not on a medical professional's diagnosis. (Tr. 63-64.)

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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; *see* AG ¶ 2(b).

Analysis

Guideline G, Alcohol Consumption

The SOR alleges that Applicant was arrested in May 2014 with "impersonation of a law enforcement officer" and "public swearing/intoxication" (SOR ¶ 1.d); that he

received court-ordered substance-abuse treatment from September 2014 to February 2015 and was diagnosed with alcohol dependency and a mood disorder (SOR ¶ 1.c); and that he consumed alcohol and intends to continue alcohol consumption after being diagnosed with alcohol dependency (SOR ¶¶ 1.a and 1.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." The following disqualifying conditions under this guideline are potentially relevant:

> 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> AG ¶ 22(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
>
> AG ¶ 22(e): evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and
>
> AG ¶ 22(f): relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

AG ¶ 22(a) is established. Applicant's arrest for public intoxication in May 2014 and his bizarre behavior after drinking beer at a bar in June 2014 are sufficient to establish this disqualifying condition.

AG ¶ 22(c) is established. The evidence does not establish binge drinking, but it establishes that Applicant's alcohol consumption, combined with the effects of a prescription drug, resulted in impaired judgment and his arrest in June 2014 for impersonating a police officer and public intoxication.

AG ¶¶ 22(d) and 22(e) are established. Applicant was diagnosed with alcohol dependence during his addiction recovery program, and the medical professionals involved in his treatment included a medical doctor and a licensed clinical social worker.

AG ¶ 22(f) is established. Applicant's relapse during treatment in December 2014 does not establish this disqualifying condition because he had not completed the

program, but his resumption of alcohol consumption in September 2015 in spite of the diagnosis of alcohol dependence establishes it.

The following mitigating conditions are potentially relevant:

> 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 good judgment;
>
> AG ¶ 23(b): the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and
>
> AG ¶ 23(d): the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

None of the above mitigating conditions are established, because Applicant has decided that he is no longer alcohol dependent and has resumed his alcohol consumption.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified material facts in his July 2015 response to interrogatories by answering "No" to the question whether he was currently drinking alcoholic beverages (SOR ¶ 2.a). The 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition is AG ¶ 16(b): "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." When

a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An incorrect statement, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the statement. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

AG ¶ 16(b) is not established. When Applicant answered the interrogatories in July 2015, he was not consuming alcohol, because the restraining order forbad it. His answer was consistent with his statement during the October 2014 PSI that he had stopped consuming alcohol and did not intend to do so in the future. When he answered the subsequent interrogatories in September 2015, the restraining order had been lifted, he was satisfied that he had completely withdrawn from his anti-anxiety drugs, and he resumed his alcohol consumption.

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(a):

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

I have incorporated my comments under Guidelines G and E in my whole-person analysis and considered the factors in AG ¶ 2(a). After weighing the relevant disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted allegation that he falsified his answers to DOD CAF interrogatories, but he has not mitigated the security concerns raised by his alcohol consumption. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

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.d:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge