DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 14-04842
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Alexander M. Laughlin, Esq.

03/27/2018

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. Applicant's role in a case involving fraudulent travel claims that led to his then spouse's resignation in lieu of termination from federal employment is no longer a security concern. The travel fraud occurred during 2008-2010 under unusual circumstances during his second marriage, which ended in 2010. His role in the travel fraud is mitigated by the passage of time without recurrence of similar conduct. But he did not present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his record of alcohol-related criminal conduct, which includes a recent December 2016 arrest for driving while under the influence of alcohol. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on March 24, 2014.[1] This document is commonly known as a

[1] GE 1.

security clearance application. Thereafter, on June 12, 2015, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed a single allegation under the security guideline known as Guideline E for personal conduct based on his role in a case involving fraudulent travel claims that led to his then spouse's resignation in lieu of termination from federal employment.

Applicant, who was then without the assistance of counsel, answered the SOR on August 26, 2015. In an extensive written submission, he denied the allegation and explained that he had an honorable intent when he was assisting his then spouse with the travel claims. He also requested an in-person hearing before an administrative judge.

The case was assigned to me on December 7, 2016. The hearing was originally scheduled for February 17, 2017, but it was postponed based on Department Counsel's intention to amend the SOR. The SOR was then amended on February 21, 2017, to add allegations under Guideline G for alcohol consumption and Guideline J for criminal conduct. Two allegations are alcohol-related criminal conduct under both guidelines. The third allegation is an allegation of excessive consumption of alcohol during 2001-2016 under Guideline G. The fourth allegation is a 2010 misdemeanor conviction under Guideline J. He answered the amended SOR on March 15, 2017, admitting the allegations with explanations.

Also on March 15, 2017, Applicant amended his answer or response to the SOR. He admitted that he established his former mother-in-law's house as a bed and breakfast; he admitted that he created a merchant's account for credit-card use at the bed and breakfast; he admitted that he provided his former spouse with receipts for her stay at the bed and breakfast; and he admitted that he did those things so his former spouse could file 15 travel claims with the U.S. Government during 2008-2010. He denied that he undertook any of those actions with any fraudulent intent.

The hearing took place as re-scheduled on March 24, 2017. Applicant appeared with counsel. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Government Exhibits (GE) 1-13 and Applicant's Exhibits (AE) 1-21. The hearing transcript (Tr.) was received on April 4, 2017.

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4 establishing the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG). The AG are applicable to all covered people who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede and replace the AG implemented in September 2006, and are effective for any adjudication made on or after June 8, 2017.

Accordingly, I have applied the June 2017 AG to this case, although I note that application of the previous AG would not have changed the outcome of this case.

Findings of Fact

Applicant is a 49-year-old chief executive officer of a small company he founded in 2012. He owns and operates the company with a business partner, although he is the majority owner. He is seeking to retain a security clearance previously granted to him; his security clearance was suspended in March 2014.[2] His employment record includes 20 years of honorable and exemplary service in the U.S. Marine Corps with an extensive background in logistics, which ended in 2007.[3] His educational background includes a bachelor's degree and a master's degree from the Naval Postgraduate School. His first two marriages ended in divorce, and he married for the third time in 2011. He has three surviving adult children from his first marriage, and an adult son who passed away due to drug overdose in September 2016.[4] He also has two minor stepchildren from his current marriage.

Applicant's second marriage spanned the years of 2003-2010. Similar to Applicant, his second spouse had an employment history in acquisitions and logistics. She resigned in lieu of termination from federal employment following an investigation revealing that she filed 15 false travel claims during 2008-2010. The travel claims resulted from her business travel to a military command where she had previously been employed and where her family still lived. She would stay with her mother while on temporary duty, but she also occasionally stayed with her brother. Initially, she did not request reimbursement for lodging but did request reimbursement for per diem expenses. Those claims were paid until at some point the command would not accept her travel claim without a receipt for billeting or lodging.

She discussed the issue with Applicant, who suggested establishing her mother's home as a bed and breakfast with her as the only client. It was done without the knowledge and permission of his then mother-in-law. Applicant established the bed and breakfast as a sole proprietor business in his name in March 2008. He also applied for and obtained an IRS tax identification number for the business. Thereafter, he created lodging receipts for his wife's stays at the bed and breakfast and those receipts were used to obtain reimbursement for an amount about half of the allowable rate. In early 2010, the rules changed and required all federal employees to charge their lodging on a government-issued credit card. Applicant established a merchant's account for the bed and breakfast so his then wife could use the government-issued credit card to pay for the lodging. Thereafter, a travel claim triggered an audit of his wife's travel claims, which established the 15 fraudulent travel claims during 2008-2010.

[2] GE 4.

[3] Answer to SOR; AE 1, 2, 4, 5, 6, and 7.

[4] AE 16.

The above scenario played out during the dissolution of Applicant's marriage to his second wife; indeed, they had separated in 2009 and divorced in 2010. He was also dealing with the strain of his father's illness and eventual death in September 2010, and the frustration he encountered in trying to address his father's medical needs. Applicant viewed his recommended course of action as a creative solution in dealing with bureaucracy, and it saved the government money because the bed and breakfast charged less than traditional commercial lodging. He concedes he was acting like a head-strong Marine who thought he had an answer for every problem, and that he did little research or seeking of expert assistance to support his actions. He acknowledges that his judgment was clouded during this time and led him to aggressively defend their actions in submitting the travel claims. He now appreciates the seriousness of his role in submitting the travel claims, is embarrassed by his conduct, and deeply regrets his involvement.

A non-drinker until the time of his first divorce, Applicant, at times, drank excessively and to the point of intoxication from about 2001 to December 2016, when he stopped drinking. As a result of his drinking, he has been arrested and charged with alcohol-related misdemeanor offenses in 2010 and 2016, and he had a non-alcohol-related offense in 2010.

Applicant was arrested the first time in July 2010 and charged with driving while under the influence of alcohol.[5] He was stopped by the police at about 2:00 AM after making an illegal U-turn. The police officer observed that his eyes were glassy and bloodshot. Applicant told the officer that he had had four Redbull vodka cranberries and a beer. In his hearing testimony, he stated that he had two to three glasses of wine.[6] He was unable to recall or reconcile his statement to the police officer with his hearing testimony.[7] He failed three of the four field sobriety tests, and after he consented to a breath test, the results were .07.

Applicant subsequently pleaded guilty to an amended charge of reckless driving, also a misdemeanor offense. He was sentenced to 60 days in jail, suspended; his driver's license was suspended for six months, although he was granted restricted driving privileges; he was ordered to complete an alcohol and safety program; and he was fined $500 and assessed costs of $119.

Applicant was arrested the second time in October 2010 and charged with driving under a restricted or suspended license.[8] He was stopped by the police for a traffic infraction--failing to obey a traffic signal. He had forgotten the necessary paperwork for the restricted driver's license due to the urgent but non-emergency situation for which he was driving his daughter to obtain medical assistance. Alcohol was not involved in

[5] GE 6, 7, 8, 9, and 10.

[6] Tr. 92.

[7] Tr. 92-94.

[8] Tr. 46-48.

this incident, and he attributed his failure to carelessness given the urgent circumstances involving his daughter. He was convicted as charged and sentenced to 30 days in jail, suspended; his driver's license was suspended for 30 days; and he was fined.

In May 2014, Applicant provided an extensive sworn statement or affidavit in conjunction with his then ongoing background investigation.[9] He addressed many matters, including his then current level of alcohol use. He stated that he did not drink alcohol. He described his previous use of alcohol since his first divorce, and he explained that he was not drinking because his daughter was a recovering alcoholic. He further stated that he did not plan on ever drinking alcohol again.

Applicant was arrested the third time in December 2016 and charged with driving while under the influence of alcohol, first offense, and reckless driving by speed.[10] He was stopped by the police at about 2:00 AM while driving his car 85 mph in a posted 55 mph zone. After smelling alcohol, the officer asked Applicant where he was coming from, how much he had to drink, and when he had his last drink. Applicant replied that he had been at a work function and had two glasses of wine around 7:00 PM. He failed several field sobriety tests, and after he consented to a breath test, the results were .07.

Applicant subsequently pleaded guilty to an amended charge of reckless driving, generally, also a misdemeanor offense. He was sentenced to 180 days in jail, suspended; he was placed on unsupervised probation for one year starting February 6, 2017; his driver's license was suspended for six months, although he was granted restricted driving privileges; he was ordered to attend the alcohol and safety program; and he was fined $300 and assessed costs of $92. The reckless driving by speeding misdemeanor offense was treated as a traffic infraction for speeding, and he was ordered to pay a $150 fine. At the hearing, he explained that he was out that evening talking with a friend or colleague and had two large glasses of red wine at a restaurant-bar and then topped off whatever was left shortly before leaving the establishment.[11] The reason for the outing was in light of the upcoming birthday of his son who had passed away due to a drug overdose two months earlier in September 2016.[12]

Applicant has been in psychotherapy with a licensed clinical social worker since September 2015.[13] The focus of the psychotherapy has been to improve emotional regulation, including anger management, and to improve interpersonal relationships. It stems from an incident Applicant had with one of his daughters that resulted in a felony

[9] GE 2.

[10] GE 11, 12, and 13.

[11] Tr. 98-99.

[12] Tr. 110.

[13] AE 20.

kidnapping charge, but the charges against Applicant were *nolle prossed* (and not alleged in the SOR).

In addition to the psychotherapy, Applicant was admitted into substance-abuse treatment as an outpatient in February 2017, about a month before the hearing in this case.[14] He was scheduled to attend a one-hour group session weekly and individual sessions as needed for a minimum of 20 weeks. He screened and tested negative for alcohol three times. Per the substance-abuse counselor, he appeared to be invested in treatment based on his attendance, level of participation, and motivation.

Applicant also presented three letters of recommendation on his behalf,[15] and he called two character witnesses, one of whom is business partner and close friend. Collectively, the information presented describes Applicant as highly suitable for and deserving of a security clearance.

Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865*, Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.[16]

It is well-established law that no one has a right to a security clearance.[17] As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[18] Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[19] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[20]

[14] AE 21.

[15] AE 17, 18, and 19.

[16] The 2017 AG are available at http://ogc.osd.mil/doha.

[17] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[18] 484 U.S. at 531.

[19] 484 U.S. at 531.

[20] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[21] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[22]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[23] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[24] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[25] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[26]

Discussion

Under Guideline E for personal conduct, the suitability of an applicant may be questioned or put into doubt due to conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In analyzing the facts of this case, I considered the disqualifying and mitigating conditions at AG ¶ 16(d) and AG ¶¶ 17(c) and (d).

The evidence supports a conclusion that Applicant's role in a case involving fraudulent travel claims that led to his then spouse's resignation in lieu of termination from federal employment, while raising questions about his judgment and honesty, is no longer a security concern. First, the main events occurred during 2008-2010, which is now several years ago. Second, this matter occurred during the dissolution of Applicant's marriage to his then second wife. The marriage ended years ago, he has remarried, and he is no longer involved in his second wife's business affairs. Third, he was also going through a difficult time caring for an ailing parent who passed away in 2010. The latter two matters, Applicant believes, clouded his judgment at the time. Fourth, Applicant has now acknowledged the seriousness of his conduct, realizes the magnitude of his poor judgment, and expressed deep regret for his conduct. To sum up, the facts and circumstances present in Applicant's life during 2008-2010 when the travel fraud was committed are no longer present, they are unlikely to recur, and his role in the travel fraud is mitigated by the passage of time without recurrence of similar conduct.

[21] Directive, ¶ 3.2.

[22] Directive, ¶ 3.2.

[23] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[24] Directive, Enclosure 3, ¶ E3.1.14.

[25] Directive, Enclosure 3, ¶ E3.1.15.

[26] Directive, Enclosure 3, ¶ E3.1.15.

The same conclusion cannot be reached concerning Applicant's excessive use of alcohol and the two alcohol-related incidents that occurred in 2010 and 2016. The alcohol consumption and criminal conduct matters are discussed together because they are largely based on the same set of facts and circumstances. In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent under Guidelines G and J, respectively:

> AG ¶ 22(a) alcohol-related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;
>
> AG ¶ 22(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;
>
> AG ¶ 23(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
>
> AG ¶ 23(b) the individual acknowledges [their] pattern of maladaptive alcohol use, provides evidence of actions taken to overcome the problem, and has demonstrated a clear and established patter of modified consumption or abstinence [per] treatment recommendations;
>
> AG ¶ 23(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program;
>
> AG ¶ 31(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
>
> AG ¶ 31(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;
>
> AG ¶ 31(c) individual is currently on parole or probation;
>
> 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.

The evidence supports a conclusion that Applicant has been a problem drinker, which resulted in alcohol-related incidents of criminal conduct. This goes back to 2010 when he was first arrested for driving while under the influence of alcohol and then pleaded guilty to an amended charge of reckless driving, a misdemeanor. More recently in December 2016, he had a similar incident with a similar disposition. He was placed on probation for one year, beginning in February 2017, about a month before the hearing in this case. Although his status as a probationer when the record closed in this case is not a *per se* rule against a favorable clearance decision, it strongly militates against one. Taken together, the facts and circumstances suggest he is not a good candidate for eligibility for access to classified information.

With that said, I am no longer concerned about the 2010 misdemeanor offense for driving under a restricted or suspended driver's license. The incident occurred under unusual and urgent circumstances involving his daughter. There is no evidence of a repeat of similar conduct. Accordingly, the allegation in SOR ¶ 3.b is decided for Applicant.

I considered the mitigating conditions noted above and none are sufficient to decide this case in Applicant's favor. The evidence shows Applicant, as a mature and well-educated adult, has been a problem drinker who exercised poor judgment when he was under the influence of alcohol. This is established by arrests for two alcohol-related incidents and subsequent misdemeanor convictions six years apart. In other words, the separate incidents cannot be viewed in isolation because they are part of a larger pattern or practice of drinking-and-driving.

Applicant was contrite and respectful during the hearing. His willingness to accept responsibility for his exercise of poor judgment is a step in the right direction. Nevertheless, it is too soon to tell if his days of being a problem drinker are safely in the past. On that point, I note that he had only just begun substance-abuse treatment in February 2017, about a month before the hearing in this case. Given his record of alcohol-related criminal conduct, additional time is necessary in order for Applicant to demonstrate a clear and established pattern of consuming alcohol in a responsible fashion and being a law-abiding person. This is especially so given that he was serving probation when the record closed in March 2017.

Applicant's record as a problem drinker creates serious doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. In this regard, I considered Applicant's honorable military service, his higher education, his success as an entrepreneur with a small business,

and his challenging and difficult family-related life events. Nevertheless, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline E:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraphs 2.a-2.c:	Against Applicant
Paragraph 3, Guideline J:	Against Applicant
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge