DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 16-02617
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: *Pro se*

12/07/2017

Decision

DAM, Shari, Administrative Judge:

Applicant has a history of alcohol-related arrests and delinquent Federal tax debts. He mitigated the resulting financial and alcohol security concerns, but failed to mitigate the criminal conduct security concerns. National security eligibility for access to classified information is denied.

History of Case

On March 10, 2015, Applicant submitted a security clearance application (SF 86). On October 15, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption) and Guideline F (Financial Considerations). The action was taken under Executive Order (EO) 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) effective within the DoD after September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date. [1]

Applicant answered the SOR in writing on November 16, 2016 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on May 16, 2017. DOHA issued a Notice of Hearing on May 16, 2017, setting the hearing for June 29, 2017. Department Counsel offered Government Exhibits (GE) 1 through 5 into evidence. Applicant testified, and offered Exhibits (AE) A through E into evidence. All exhibits were admitted.[2] DOHA received the hearing transcript (Tr.) on July 10, 2017.

Findings of Fact

Applicant is 44 years old and divorced since 2009. He has a teenage child from that marriage. He graduated from high school and attended college for a semester. He started working for defense contractors in 2003 and obtained a secret security clearance in 2006. He worked in Iraq from November 2008 to April 2009. He has received promotions during his employment and completed training programs. He is a baseball coach for his son's team (Tr. 19-26; GE 2; AE E.)

Applicant admitted his history of criminal arrests and charges as alleged in the SOR. In September and November 1991, he was arrested and charged with driving under the influence (DUI), both misdemeanors. He was convicted and placed on probation for one year after each conviction. He was 19 years old. He admitted that he made poor decisions relating to drinking and driving. (Tr. 28-29.) In August 1995, he was arrested after he was stopped by a police officer for not having an inspection vehicle sticker. At the time, there was an outstanding warrant for his arrest because he failed to attend a mandated check writing class after he wrote a worthless check in 1994. In October 1995, he was arrested and charged with possession of marijuana under 2 ounces, a misdemeanor. He said he has not used marijuana since then. (Tr. 29-30; GE 2.)

Between 1998 and 2000, Applicant worked for a country club and supervised a service team. He again worked for that club from 2002 to 2003, at which time he was terminated for consuming alcohol on the job.[3] (Tr. 26-27, 39; GE 4.)

In May 2010, Applicant was arrested and charged with two counts of DUI with child under 15 years of age, both felonies. One count was dismissed. His blood alcohol content (BAC) was 0.258 at the time of the arrest. When he was arrested, his six-year-old son

[1]I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

[2] Applicant made several corrections to information contained in GE 2, which is the summary of his personal interview in November 2015 and February 2016. Department Counsel did not object to any of the corrections. (Tr. 12-15.)

[3]According to Applicant's 2004 SF 86, he worked for this country club from 2002 to 2003, and 1998 to 2000. His testimony noted that he worked there from 2001 to 2002, which is a minor inconsistency. (Tr. 26; GE 5.)

was in the car. In December 2010, he was convicted and sentenced to eight years of confinement, with eight years suspended, and eight years of probation. His supervised probation will end in December 2018. He completed an alcohol impact program; a life skills program; participated in about 10 Alcohol Anonymous (AA) meetings; and performed between 160 and 200 community service hours, as ordered by the court. (Tr. 31-34, 41; GE 2.)

Applicant was also ordered to have an ignition interlock device installed on his automobile in January 2011. In March 2011, he began wearing an ankle monitor after he disclosed that he consumed alcohol earlier. Between September 2011 and June 2012, the ignition interlock device registered eight positive readings. (Tr. 33-38, 40; GE 2.) In July 2012, he was arrested because of the positive readings.[4] That charge was not prosecuted. Both the ankle monitor and interlock device were removed in March 2015. He is current with all probation requirements and court fees. (Tr. 40-42.)

Applicant attended an alcohol and drug outpatient treatment program from May to September 2011. During that program he was diagnosed as alcohol dependent. Since completing the program, he occasional attends AA meetings, including about six weeks before the hearing. He stated that the last time he consumed alcohol was in March 2011. Neither he nor his girlfriend drink alcohol. (Tr. 42-46; 56.)

Applicant admitted that he did not timely file or pay his Federal taxes for 2009, 2010, and 2011.[5] He attributed the delay to his 2009 divorce and subsequent personal issues that arose. In October 2014, he sought assistance from an accountant and asked him to prepare his Federal taxes for years 2009, 2010, 2011, 2012, and 2013. (Tr. 50.)

Subsequently, Applicant filed his 2009 Federal taxes in December 2014 and his 2010 Federal taxes in January 2015. The Internal Revenue Service (IRS) filed a substitute tax form for his 2011 Federal taxes in June 2014. The IRS assessed a delinquent liability of $3,214 for 2009; $3,927 for 2010; and $2,230 for 2011. In April 2015, he established a monthly installment agreement with the IRS to pay his delinquent taxes which totaled $9,372 for those years. He submitted evidence that as of May 2017, his outstanding balance is about $4,400. He is in compliance with that agreement. He does not owe taxes for any year subsequent to 2011 and all tax returns have been timely filed. (AE A.)

Applicant submitted a budget. His net total monthly income is about $3,800. After paying expenses, including $250 to the IRS and $70 to the probation department, he has $260 remaining at the end of the month. (Tr. 52; AE C.)

Applicant submitted three character references. A retired Army officer who is also Applicant's co-worker considers Applicant a trustworthy person and citizen. Two other

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[4]Applicant stated that the interlocking device had been malfunctioning. (GE 2.)

[5] The SOR did not allege that Applicant failed to timely file his 2009, 2010, and 2011 Federal tax returns. Hence, that negative information will not be considered in analyzing disqualifying conditions. It may be considered in the analysis of mitigating conditions and whole person.

retired soldiers, who have known and worked with Applicant for many years, stated that Applicant is a good father and would not jeopardize national security. All of them recommend that he receive a security clearance. (AE B.)

Applicant testified credibly. He admitted that he made many mistakes in his past life, but has changed over the years. His supervisor is aware of this proceeding. (Tr. 61-62.) During a November 2015 interview, he acknowledged that alcohol has had a negative effect in his life, including in his relationships and with his child. It has caused him legal and financial problems. He recognized his irresponsible behavior involving alcohol abuse. (GE 5.)

Policies

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

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

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline J: Criminal Conduct

AG ¶ 30 sets out the security concern related to 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.

AG ¶ 31 lists five conditions that could raise a security concern and may be disqualifying. The following three are potentially applicable in this case:

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

Applicant has a history of criminal conduct, which includes arrests, charges, and convictions that began in 1991 when he was 19 years old and continued into 2012. Those charges include misdemeanors and felonies involving marijuana, alcohol, and other violations. He remains on probation until December 2018. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate the resulting security concerns.

AG ¶ 32 describes conditions that could mitigate criminal conduct security concerns raised under this guideline. The following two are potentially applicable:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and

does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

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

The last time Applicant engaged in serious criminal activity occurred in May 2010, when he was charged with a DUI felony, while his young son was present. The last time he was arrested was in 2012 after his interlocking device registered the presence of alcohol in his car. However, that charge was not prosecuted. The passage of five years without evidence of additional criminal behavior, Applicant's compliance with most terms of his criminal probation, and a good employment record establish some evidence of rehabilitation under AG ¶ 32(a) and AG ¶ 32(d). However, he remains on supervised probation for another year.

Guideline G: Alcohol Consumption

AG ¶ 21 expresses the security concerns pertaining to 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.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following four may potentially apply:

> (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;

> (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder;

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

> (d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder.

Applicant was convicted of three DUIs, two misdemeanors and one felony with his young son in the car. He was terminated from an employment position after he consumed alcohol while at work. At the time of the DUI arrests, he was inebriated and over the legal limit for driving. He was diagnosed by a mental health care professional as alcohol dependent, which is an alcohol use disorder. The evidence established the above four disqualifying conditions.

AG ¶ 23 provides conditions that could mitigate security concerns raised under this guideline:

> (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;
>
> (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;
>
> (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; and
>
> (d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Applicant testified that the last time he consumed alcohol was in March 2011. He acknowledged his problems with alcohol and demonstrated a six-year period of sobriety without a relapse. He occasionally attends AA. There is evidence to establish mitigation under AG ¶¶ 23(a), (b) and (c). There is insufficient evidence to establish full mitigation under AG ¶ 23(d), as the record contains limited information about the outpatient alcohol program he completed, the diagnosis he received, or treatment recommendations for aftercare.

Guideline F: Financial Considerations

The security concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

> Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to

protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personal security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

AG ¶ 19 describes two conditions that could raise security concerns and may be disqualifying in this case:

(c) a history of not meeting financial obligations; and

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant failed to pay Federal taxes for years 2009, 2010, and 2011. He did not begin to resolve them until April 2015. The evidence established the above disqualifying conditions.

The guideline includes a condition in AG ¶ 20 that could mitigate the security concerns arising from Applicant's alleged tax difficulties:

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Between December 2014 and January 2015, Applicant filed his delinquent Federal tax returns. In April 2015, he established an installment payment agreement with the IRS. At that time, he had an unpaid liability of $9,372. As of May 2017, his balance was about $4,400. For the past two years he has complied with the installment agreement, making a good-faith effort to abide by his commitments. He timely filed and resolved taxes for all years subsequent to 2011. There is sufficient evidence to establish mitigation under AG ¶ 20(g).

Whole-Person Concept

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

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to

> which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult and is accountable for the decisions that lead to his history of criminal conduct, alcohol-related incidents, tax issues, and the resulting security concerns. He credibly accepted responsibility for his conduct. For the past six years, he has established a pattern of sobriety to address his alcohol issues and making payments to the IRS on his delinquent tax obligation. The evidence indicates that he will continue to remain sober and fulfill his tax obligations. Those are positive factors in this case. He has also completed most of the court-ordered terms of his criminal probation. Those actions are also positive facts. While fully recognizing Applicant's actions to date, they do not sufficiently outweigh the fact that the court ordered him to serve an eight-year probation in place of a jail sentence for a felony conviction, and that he remains on probation for another year. The sentence for his third DUI emphasized the seriousness of his past behaviors and the court's concern that similar conduct does not recur. Given that, there is insufficient evidence to fully mitigate the criminal conduct security concerns and my concerns as to Applicant's eligibility and suitability for a security clearance at this time.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a through 1.f:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraphs 2.a through 2.d:	For Applicant
Paragraph3, Guideline f:	FOR APPLICANT
Subparagraphs 2.a through 2.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. National security eligibility is denied.

SHARI DAM
Administrative Judge