DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
---	)	ISCR Case No. 16-02858
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: Alka R. Sharma, Esquire

04/13/2018

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Decision

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding alcohol consumption and criminal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On January 9, 2015, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (1st e-QIP) version of a Security Clearance Application. On November 14, 2015, he submitted another Security Clearance Application (2nd e-QIP). On December 2, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) applicable to all adjudications and

other determinations made under the Directive, effective September 1, 2006.[1] The SOR alleged security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on December 9, 2016. On January 5, 2017, he responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on February 16, 2017. The case was assigned to me on May 26, 2017. A Notice of Hearing was issued on August 4, 2017. I convened the hearing as scheduled on August 23, 2017.

During the hearing, Government exhibits (GE) 1 through GE 6, and Applicant exhibits (AE) A through AE L were admitted into evidence without objection. Applicant and two witnesses testified. The transcript (Tr.) was received on September 1, 2017. I kept the record open to enable Applicant to supplement it. He took advantage of that opportunity and timely submitted an additional document, which was marked and admitted as AE M, without objection. The record closed on October 13, 2017.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with comments, nearly all of the factual allegations pertaining to alcohol consumption (¶¶ 1.a. through 1.i.), but denied portions of ¶¶ 1.h. and 1.i.; and all of the factual allegations pertaining to criminal conduct (¶¶ 2.a. through 2.g.), in the SOR. Applicant's admissions and comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 60-year-old employee of a defense contractor. He has been a field service engineer with the company since January 2009. He previously held an identical position with another employer from July 2007 until January 2009, and before that he was an electronic technician for another employer. He is a 1975 recipient of a General Equivalency Development or General Equivalency Diploma **(**GED**).** He also earned a number of vocational credits, but no degree. Applicant has never served in the U.S. military. Applicant was granted a secret security clearance in 1997, and again in 2008. Applicant was married in July 1985 and divorced in January 1992. He remarried in February 2007 and divorced in May 2015. He has three children, born in 1986, 1987, and 2009.

[1] Effective June 8, 2017, by Directive 4 of the Security Executive Agent (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* (AG) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, were established to supersede all previously issued national security adjudicative criteria or guidelines. Accordingly, those guidelines previously implemented on September 1, 2006, under which this security clearance review case was initiated, no longer apply. In comparing the two versions, there is no substantial difference that might have an effect on Applicant in this case.

Alcohol Consumption and Criminal Conduct

Appellant used a variety of substances, and his choice of substances was apparently alcohol, marijuana, and barbiturates. His use or possession of those substances, as well as other criminal activities, has, directly or indirectly, led to approximately one dozen incidents over a four-decade period that resulted in actions taken by police and court authorities:

○He was arrested on August 1, 1975, when he was 18-years old, and charged with contributing to the delinquency of a minor, a misdemeanor. He was released on bail or his own recognizance that same day. On August 4, 1975, the charge was dismissed.[2] Applicant attributed the incident to being at a friend's house where a girl he knew said she was a little buzzed and not feeling good, and she asked him to drive her to her home. He claimed he did so. The following day, the police called him and requested that he speak with the girl's father. Applicant denied he was arrested;[3]

○He was arrested on April 18, 1976, when he was 18-years old, and charged with (a) possession of marijuana (not specified as a felony or misdemeanor), and (b) loitering or prowling, a misdemeanor. On May 3, 1976, both charges were dismissed.[4] Applicant described the incident as one where he was siphoning gas out of a church bus at the church, but he did not recall being arrested for possession of marijuana. He recalled spending one day in jail, but could not recall if he paid a fine.[5]

○He was arrested on October 9, 1976, when he was 19-years old, and charged with (a) possession of marijuana (not specified as a felony or misdemeanor), and (b) driving while intoxicated (DWI), a traffic offense.[6] He was released on bail or own recognizance that same day. Applicant was convicted of DWI on October 18, 1976, and the possession of marijuana charge was dismissed. Applicant was fined $152, his driver's license was suspended for 90 days, and he was ordered to attend an alcohol counterattack program.[7]

○He was arrested on July 7, 1977, and charged with (a) driving under the influence of drugs, a felony, (b) possession of drug paraphernalia (not specified as a felony or misdemeanor), and (c) possession of a controlled substance without a prescription, a

[2] GE 5 (Criminal History Record, dated December 1, 2015), at 2.

[3] Applicant's Response to the SOR, dated January 5, 2017, at 3-4.

[4] GE 5, *supra* note 2, at 2-3.

[5] GE 3 (Personal Subject Interview, dated January 21, 2016), at 5.

[6] The SOR erroneously alleged that the incident took place on October 18, 1976, but that was actually the date the court took action on the charges. The actual arrest occurred on October 9, 1976.

[7] GE 5, *supra* note 2, at 4-5.

misdemeanor. All charges were dismissed on July 22, 1977.[8] Applicant presented two different stories related to this incident. He acknowledged that after consuming four to five beers at a bar and a friend's house, they were returning to Applicant's house at 7 a.m. when the car ran off the Interstate exit ramp and wrecked. Applicant could not recall who was driving his car at the time. A police search of the vehicle found barbiturates in the ashtray, but Applicant denied that they were his or put there by him.[9] The other story was that he was asleep riding in the back seat of his vehicle with several friends, and the driver had placed drugs in his ashtray. He remembered waking up in jail.[10]

○He was arrested in August 1981, and charged with battery, a misdemeanor. Applicant presented two variations related to this incident. He initially said that he and his band were playing at a rented hall to celebrate a friend's birthday party and his girlfriend was collecting admission fees at the door. An individual without a shirt and armed with a weapon in his belt refused to pay the admission fee. A fight ensued with Applicant swinging a club against armed intruders, and when the police arrived, he was cited to appear in court. He pled no contest to battery and adjudication was withheld and he was placed on six month's self-probation.[11] The second variation was that the band was rehearsing and Appellant merely tried to break up a fight so that the rented hall was not damaged. Applicant and his girlfriend were both arrested for battery. He denied that he was under the influence of alcohol at the time. Applicant accepted a plea bargain on the advice of his attorney.[12]

○He was arrested on July 7, 1991, and charged with DUI, reduced to reckless driving, a misdemeanor. He failed the field sobriety test and spent the night in jail. He was eventually convicted and sentenced to attend a DUI school during one weekend; receive counseling for one to two hours per week for four weeks; serve 40 hours of community service; placed on probation for one year; fined $1,600; and his driver's license was suspended for one year.[13] Applicant explained that he was going through a rough time after his divorce because two of his sons went with his ex-wife to reside with her and her new significant-other, and he made a poor decision to drive while he was intoxicated.[14]

○He was arrested on June 30, 1995, and charged with soliciting prostitution, lewdness, or assignation, a misdemeanor. He spent the night in jail and was released. On August 7, 1995, he entered a plea of *nolo contendre* and was sentenced to a fine of

[8] GE 5, *supra* note 2, at 5-7.

[9] GE 3, *supra* note 5, at 6; Tr. at 41.

[10] 1st e-QIP, dated January 9, 2015, at 59.

[11] GE 3, *supra* note 5, at 6.

[12] Applicant's Response to the SOR, *supra* note 3, at 9-10; Tr. at 42.

[13] GE 5, *supra* note 2, at 7; GE 6 (Court Case Information, dated February 15, 2017, at 3-4; GE 3, *supra* note 5, at 6-7.

[14] Applicant's Response to the SOR, *supra* note 3, a 4-5.

$150.[15] Applicant denied that alcohol was involved or that he ever solicited the woman (an undercover police officer) who approached him at a stop sign, but on the advice of an attorney, it was cheaper to enter a plea than to fight the charge and face costs of $1,000.[16]

○He was arrested on August 19, 1996, and charged with battery domestic violence, a misdemeanor. He spent the night in jail. His ex-wife withdrew the charges against him, and on November 12, 1996, the charge was dismissed.[17] Applicant contended that on one occasion he returned home and found his ex-wife leaving his residence with items that belonged to him and his father. He took the items from her and she left. He went for a run, but when he returned home, the police were waiting for him. He denied that alcohol was involved in the incident.[18]

○He was arrested on June 25, 2003, and charged with (a) possession of cannabis and (b) possessing an open container of alcohol in vehicle. In October 2003, both charges were dismissed provided that Applicant attend drug and alcohol counseling one night per week for four weeks, and submit to random drug tests once a month for an unspecified period. Applicant acknowledged that the program was good.[19] Applicant denied the marijuana or open container were his, and he contended that his son had borrowed the vehicle the night before. He did not want to create a problem for his son, so Applicant took responsibility for the items.[20] This allegation is listed twice in the SOR (¶¶ 1.e. and 2.f.)

○He was arrested on April 6, 2013, and charged with DUI. In December 2013, he was sentenced to 24 hours of community service, ordered to attend counseling, placed on probation for one year, and fined $390.[21] Applicant acknowledged that while celebrating his son's return from a deployment in Afghanistan, he consumed alcohol, and he was remorseful about getting behind the wheel of his vehicle.[22]

○He was arrested on February 26, 2015, and charged with (a) DUI, a felony; (b) DUI with property damage, a misdemeanor; (c) careless driving, an infraction; and (d) refusing a breath-urine-blood test after a previous suspension, a misdemeanor. Applicant

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[15] GE 5, *supra* note 2, at 8; GE 6, supra note 13, at 7-8; GE 3, *supra* note 5, at 7.

[16] Applicant's Response to the SOR, *supra* note 3, at 10; Tr. at 42.

[17] GE 5, *supra* note 2, at 8-9; GE 6, supra note 13, at 11-12; GE 3, *supra* note 5, at 7.

[18] GE 3, *supra* note 5, at 7; Applicant's Response to the SOR, *supra* note 3, at 11; Tr. at 42.

[19] GE 3, *supra* note 5, at 7-8; Applicant's Response to the SOR, *supra* note 3, at 5, 11; Tr. at 45.

[20] GE 3, *supra* note 5, at 7-8; Applicant's Response to the SOR, *supra* note 3, at 5, 11.

[21] GE 4 (Incident History, dated February 15, 2017), at 1; Applicant's Response to the SOR, *supra* note 3, at 5-6.

[22] Applicant's Response to the SOR, *supra* note 3, at 5-6.

performed poorly on the field sobriety exercises. On March 10, 2015, charge (b) was dismissed, and on July 10, 2015, charge (c) was dismissed. Adjudication on charge (a) was purportedly withheld as part of a plea agreement. On July 10, 2015, upon his plea of *nolo contendre* to charge (d), Applicant was found guilty as charged and sentenced to one year of supervised probation, fined $632.49, and ordered to attend a driver improvement course and a victim awareness program.[23] Applicant contended that the day in question on the way home from work he stopped by a friend's home to talk. He claims he did not consume any alcohol. After he departed, he was thinking about a conversation he had with his spouse before leaving for work and not paying attention to his driving. He ran into the rear of another vehicle, deploying Applicant's air bag. Standing by the side of the road after the accident, Applicant claims he was dazed and unable to understand what the police officer was saying to him.[24]

○He was arrested on October 14, 2015, and charged with (a) DUI, a misdemeanor, reduced to reckless driving; (b) refusing a breath urine blood test after a previous suspension, a misdemeanor; and (c) violation of probation. On January 26, 2016, upon his plea of guilty, Applicant was convicted of charges (a) and (b) and sentenced to 59 days in jail (less 29 days' time served); probation for 11 months; fined; 100 hours of community service; no consumption of alcohol; no possession or consumption of illegal drugs; random testing for alcohol or illegal drugs; completion of DUI Level 2 school and any follow-up deemed necessary; and completion of Victim Awareness Program. Because the probation stemming from his July 2015 conviction was violated and unsuccessfully completed, he was sentenced to an additional 18 days in jail, with credit for time served. Applicant paid $1,544.54 in court costs and fines, completed 100 hours of community service, completed the Victim Impact Panel Class, completed the Risk Reduction/DUI School, completed substance abuse treatment, and successfully completed his probation on October 13, 2016.[25]

Applicant claimed that he was at a restaurant for dinner after returning home from a trip and he only had his company credit card in his wallet. When he went out to his car to retrieve his personal credit card the manager thought he was skipping without paying his bill, and he called the police. Applicant returned to the restaurant, paid his bill, and departed as the police were arriving. He thought the police were coming to speak with him so he pulled back into his parking space. Applicant was ordered to step out of his vehicle and when asked if he had consumed any alcohol, Applicant responded that he had two beers. He was administered a field sobriety test which he passed. He was administered a breathalyzer test which he also passed because it indicated a level of

[23] GE 5, *supra* note 2, at 9-10; GE 6, supra note 13, at 14-16; GE 3, *supra* note 5, at 8; GE 4, *supra* note 21, at 1-2; Applicant's Response to the SOR, *supra* note 3, at 6.

[24] Applicant's Response to the SOR, *supra* note 3, at 6.

[25] AE C (Notice/Order of Completion of Probation, dated October 13, 2016); AE K (Judgment Placing Defendant on Probation, dated January 26, 2016); GE 4, *supra* note 21, at 3; AE L (Certificate of Completion, dated February 23, 2016); AE L (Certificate of Completion, dated September 29, 2016).

.046, whereas the legal limit was .08. The officer then requested a urinalysis, but he refused to take one because he had already passed the other two tests.[26]

One of the treatment program requirements was that he enter an outpatient treatment program. Commencing on April 1, 2016, and continuing for five months, until September 29, 2016, Applicant attended and successfully completed 39 hours of required treatment groups.[27] During the period February 12, 2016 through September 21, 2016, Applicant underwent random urinalysis tests for a variety of drugs and alcohol, and the test rests were always negative.[28] His initial treatment plan called for him to abstain from all mind and mood altering substances, and attend one Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meeting per week. No individual counseling or 12-step program were listed as objectives.[29] Applicant claimed to have abstained from alcohol as of October 2015.[30] Although the initial diagnostic impression on April 1, 2016 by the Certified Recovery Support Specialist (CRSS) was substance use disorder severe (303.90),[31] that initial written diagnostic impression is inconsistent with the numbers cited, for 303.90 refers to alcohol dependence.[32] No final diagnosis was made upon the successful completion of the program.

Applicant underwent a substance abuse evaluation on January 20, 2017. He was administered SASSI Institute SASSI-3 Adult Screening test (versus the SASSI-3 Mild Substance Use Disorders (SUD) test), and he scored a 6 for face valid other drugs (FVOD) which indicates a low probability of substance use disorder, and he scored 8 for face valid alcohol (FVA) which indicates a low probability of moderate to severe substance use disorder. The recommendations were that Applicant seek "participation in a support system outside his home environment to reduce any risk of alcohol abuse. Further evaluation may be needed in the future."[33]

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[26] GE 3, *supra* note 5, at 9; Tr. at 51-52.

[27] AE M (Letter, dated January 11, 2017).

[28] AE E (Test Results, various dates).

[29] AE M (Treatment Records, various dates).

[30] AE M (Client Information and Medical History, dated April 1, 2016), at 2. Although Applicant seemed to have written in a specific date in October 2015, it is impossible to decipher the exact date.

[31] AE M (Initial Treatment Plan, dated April 1, 2016).

[32] *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition Text Revision* (DSM-IV-TR) (2000), at 213.

[33] AE F (SASSI-3 Alcohol and Drug Evaluation, dated January 20, 2017). It is significant to note that the SASSI Institute issued the following notice regarding the SASSI-3 Interpretation:

> The initial intent in developing SASSI-3 was to identify adults with a high probability of having substance use disorders of any severity. However, the samples that were used to develop the SASSI-3 included too few individuals diagnosed as having mild substance use disorder to produce reliable decision rules regarding this level of substance use severity; therefore, clinicians may wish to use the SASSI-3 Mild SUD Guideline to flag tentatively for

Appellant acknowledged to an investigator from the U.S. Office of Personnel Management (OPM) that he began drinking beer in high school when he was 16-years old. He had an average of two beers on the weekend. After high school, and continuing up until January 21, 2016, he averaged two to three beers on Friday and Saturday nights. He did not drink during the week. He also might have a couple of glasses of wine or one or two margaritas if he goes out to eat on the weekend. Applicant explained that alcohol relaxes him. He added that he does not feel that he has a problem with alcohol as he can stop and has stopped when required with no issues being encountered.[34]

During the hearing, Applicant's story evolved. He acknowledged that he consumed alcohol at times to excess and to the point of intoxication from about 1976 until October 2015, especially during periods when he was going through divorces.[35] Following his July 1991 DWI arrest, he started to recognize that he had some issues with alcohol. He addressed those issues by abstaining for what he called "quite some period of time," but then he acknowledged he relapsed. Following the relapse, he attended AA every now and then, but when he stopped going to AA, he started drinking again.[36] Following the April 2013 DUI arrest, he again quit drinking for over a year.[37] He returned to regular attendance at AA, but did not have a sponsor.[38] Following the February 2015 DUI arrest, he returned to more regular AA attendance, and started working on the 12-step program, eventually reaching step 3.[39] While he was sitting in jail following the October 2015 DUI arrest, he decided that he needed to make changes regarding his use of alcohol.[40] Applicant now attends AA meetings at two different groups periodically when he feels he needs them. His most recent AA meeting was a week before the hearing. Although he now has a sponsor, as of the hearing, they had not started working together. He still has not returned to the 12-step program.[41] He has received coins commemorating his anniversaries of abstinence, with one indicating one year of abstinence starting on

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> further evaluation for mild substance use disorder. But, there should be a clear understanding that SASSI-3 is not empirically validated as a screening tool for this diagnosis.

SASSI Institute News & Reports, Vol. 15, No. 1, 2013, at www.sassi.com

[34] GE 3, *supra* note 5, at 11-12.

[35] Tr. at 42-43, 68.

[36] Tr. at 44.

[37] Tr. at 46, 48.

[38] Tr. at 48-49.

[39] Tr. at 49.

[40] Tr. at 71-72.

[41] Tr. at 55-56, 63, 66.

December 9, 2015.[42] Applicant acknowledges that he is an alcoholic, that he has issues, and that he can't drink.[43]

Work Performance and Character References

The Training Department Supervisor has known Applicant since September 2010. Applicant has been on loan to his department since June 2016, and he has been selected for cross training as an instructor. Applicant excelled in all aspects of his duties. His enthusiasm is contagious within the department. Applicant is trustworthy, honest, and stable of mind and body. He gets accolades for his work ethic, humility, and enthusiasm.[44]

Applicant's immediate supervisor and manager stated that Applicant meets expectations for all aspects of performance and provides integral contributions to the mission in a variety of capacities. Applicant is considered a valued employee from the perspective of work ethic and performance. With the exception of his inability to report to work when he was being detained following a DUI; his avoidance of assignments that required travel when his driver's license was suspended; and his record is red flagged because of the security clearance issues, Applicant is very dependable and capable.[45]

A coworker at work and an associate pastor at a local church has known Applicant for about seven years. When they initially met, Applicant was what he called a "partier." Because Applicant did not have a driver's license, they drove to work each day and back in the afternoons. At times, he could smell alcohol on Applicant's breath, but over the course of their relationship, he noticed changes in Applicant. They discussed Applicant's activities in AA, and there is no odor of alcohol. They now work together on a daily basis. Applicant told him that he no longer drinks alcohol, and he believes him. Applicant is very knowledgeable. He is a "good guy" and a "go-getter." There are no questions about Applicant's reliability or trustworthiness because Applicant has always proven himself trustworthy.[46]

A next-door neighbor who has resided in the community for nearly five decades knew that Applicant had made bad choices just out of high school when he started to drink. She watched Applicant grow up. He lost his driver's license a number of times and paid for his bad choices. She has noticed changes in Applicant. She is aware that he has gone through the AA program and she sincerely believes that he is on the road to recovery

[42] Tr. at 64-65.

[43] Tr. at 59, 67.

[44] AE H (Character Reference, dated January 10, 2017).

[45] AE A (Character Reference, dated August 21, 2017); AE B (Character Reference, undated); AE I (2016 Performance Appraisal, dated February 11, 2016).

[46] Tr. at 20-28.

and will continue to grow. She believes Applicant is truly taking one step after another to have a full recovery.[47]

Applicant's AA sponsor has known Applicant since October 2015. During that time, Applicant has regularly attended AA meetings, worked the 12-step program, and is making good progress. Applicant has abstained since their relationship commenced. He is very confident of Applicant's continued sobriety. He also noted that Applicant has been active in the community through volunteer work with both the local historical museum and the local soccer club.[48] It should be noted that this witness's recollection of Applicant's participation in the 12-step program differs from Applicant's testimony, reflected above, that as of the hearing he has still not returned to that program.

The secretary of the local soccer club verified that Applicant was a volunteer for two seasons working for five hours each Saturday in the concession stand. Applicant is a reliable and honest volunteer.[49] Applicant's "volunteer" service with the soccer club was part of his court-mandated community service.[50]

A vice admiral, the director of a major defense program, commented on Applicant's unwavering dedication and relentless push of the team with which he was associated, to ensure a system was set up, tested, and operational, and when hardware was discovered missing from the shipment, the team went above and beyond to find the missing hardware or secure replacements, to make the system operational.[51]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[52] 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[53]

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[47] Tr. at 28-32.

[48] AE J (Character Reference, undated).

[49] AE D (Character Reference, undated).

[50] GE 3 (Personal Subject Interview, dated April 25, 2016); Tr. at 72.

[51] AE G (Flag Letter of Commendation, dated October 3, 2013).

[52] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[53] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in 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 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[54] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[55]

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[56]

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[57] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in

[54] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

[55] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[56] *Egan*, 484 U.S. at 531.

[57] *See* Exec. Or. 10865 § 7.

part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Upon consideration of all the facts in evidence, including those in the DOD CAF case file, those submitted by Applicant, his testimony, and the testimony of others, as well as an assessment of Applicant's demeanor and credibility, and after application of all appropriate legal precepts and factors, I conclude the following with respect to the allegations set forth in the SOR:

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set forth 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 guideline notes several conditions that could raise security concerns under 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;
>
> (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;
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> (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;
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> (e) the failure to follow treatment advice once diagnosed;
>
> (f) alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder; and
>
> (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Applicant consumed alcohol at times to excess and to the point of intoxication from about 1976 until at least October 2015, and that use of alcohol has, directly or indirectly, led to a number of incidents over a four-decade period that resulted in actions taken by police and court authorities. He was repeatedly charged with some alcohol-related charges, and while some of those charges were reduced or dismissed, several charges resulted in convictions. He stands convicted of a 1976 and 1991 DWI, a 2013 DUI, a 2015 DUI reduced to reckless driving, and a 2015 refusing a breath urine blood DUI test. In addition, Applicant attended court-mandated substance abuse treatment programs and alcohol education programs, he has undergone evaluations by a qualified mental health professional, and received an initial diagnosis, but not a closing diagnosis of alcohol use disorder. While his consumption of alcohol appears to be repetitive in nature, there is insufficient evidence to conclude that such consumption constituted binge drinking status. Appellant successfully completed the court-ordered programs and the requirements of those programs. AG ¶¶ 22(a) and 22(c) have been established, and AG ¶ 22(d) has been partially established, but none of the other conditions have been established.

The guideline also includes several examples of conditions under AG ¶ 23 that could mitigate security concerns:

> (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.

AG ¶ 23(b) partially applies, but none of the remaining conditions apply. Because of their relative recency, Applicant's 2013 and two 2015 alcohol-related incidents are the most significant, as far as his security clearance review is concerned. Applicant's behavior, stemming from his association with alcohol, has not been infrequent, and the circumstances developed do not appear to be unusual. While Applicant now acknowledges his pattern of maladaptive alcohol use, for far too long he seemingly gave lip-service to it. He abstained briefly after earlier incidents. He continued to abstain for longer periods when required to do so, like during periods of treatment or some periods of probation. However, relapses continued to occur. Moreover, it is troubling that for most

of the incidents, Applicant seems to blame others for his arrests: his friend, his son, the restaurant manager, or others who purportedly placed him in a position where the police were forced to take action. Between October 1976 and October 2015, Applicant failed to demonstrate a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

After decades of alcohol-related incidents, brief periods of abstinence, and relapses, Appellant now claims he is abstinent once again. Unfortunately, the reported date of the commencement of his abstinence is inconsistent. He claims to have been abstinent for over one year as of his January 2017, according to his Answer to the SOR; since October 15, 2015, according to his answers in his client information and medical history and his evaluation interview; since December 9, 2015, according to his testimony during the hearing; and after January 21, 2016, according to his statement to the OPM investigator. Applicant's "sober date" should be one specific date, not a variety of possible dates. Even crediting him with the earliest date offered by him, Applicant would be abstinent since October 2015, only two and one-half years, but that would be after decades of alcohol consumption and abuse.

Appellant successfully completed the series of programs that were court-mandated, and based on his expressed intentions and the testing results, it appears that he has modified his consumption of alcohol, possibly to the point of abstinence. Despite his acknowledgement that AA is a good program for him, he only attends meetings on an irregular basis, when he thinks he needs to do so, and, contrary to the testimony of his sponsor, he is not working the 12-step program. Because of his lengthy history of maladaptive alcohol use, his indefinite period of abstinence, and his irregular attendance at AA, there remain significant questions as to whether such maladaptive alcohol use will recur. Nevertheless, Applicant should be encouraged to remain abstinent for a much longer period. He has failed to demonstrate a clear and established pattern of modified consumption or abstinence, and under the circumstances, there remain doubts on his reliability, trustworthiness, or good judgment.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct 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.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns:

> (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

(d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

My discussion related to Applicant's Alcohol Consumption is adopted herein. In addition, Applicant violated his court-mandated probation as a result of his October 2015 arrest and conviction. Accordingly, based on the actions described above, AG ¶¶ 31(a), 31(b), and 31(d) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from criminal conduct. They include:

(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.

AG ¶ 32(d) partially applies. AG ¶ 32(a) does not apply. Applicant has a four decade history of criminal conduct, commencing in August 1975 and continuing periodically until at least October 2015. He was arrested and charged with a variety of crimes numerous times, spent time in jail, was fined, placed on probation, lost his driver's license, ordered to perform community service, required to attend several treatment and educational programs, and ordered to submit to random urinalysis tests. Over that extensive period, nothing seemed to work, for after completing his sentences, he subsequently returned to the court system for further action. As with his position regarding his alcohol-related incidents, he continued to blame others for his criminal involvement: his friend, his son, his ex-wife, or an undercover police officer. There is evidence of the successful completion of various court-mandated programs, community service, and a good, but partially limited employment record. However, those periods of successful rehabilitation were frequently overcome by relapses and a routine return to criminal conduct. He violated one period of probation, and for that violation, he was jailed and his probation was renewed.

While there is evidence that certain charges have been dismissed or otherwise not prosecuted, those dismissals and non-prosecutions do not, without substantially more, necessarily reflect that Applicant did not commit the individual offenses charged. Generally, the passage of time without recurrence of additional criminal activity can be construed as some evidence of successful rehabilitation. However, in this instance, the

criminal activities have continued over four decades. While a person should not be held forever accountable for misconduct from the past, in this instance the past is relatively recent, and the concerns about future criminal conduct are continuing. Applicant's past history of criminal conduct, under the circumstances, continues to cast doubt on his reliability, trustworthiness, or good judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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.

Under SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[58]

There is some evidence in favor of mitigating Applicant's conduct. Applicant is a 60-year-old employee of a defense contractor, serving as a field service engineer with the company since January 2009. He was granted a secret security clearance in 1997, and again in 2008. He has a good employment record and is highly thought of by his manager, supervisor, a coworker, and neighbors. He has made efforts to remove himself from the clutches of alcohol, and has successfully completed several court-mandated programs.

The disqualifying evidence under the whole-person concept is more substantial. Applicant is a justice-involved individual whose history of criminal conduct took place over a four decade period. Included in that history are various incidents, some fueled by his consumption of alcohol, which led to criminal charges, arrests, convictions, and dismissals, for a variety of actions. He also unrealistically contended that several of his incidents of criminal conduct were caused by the actions of others. All of the above, when added to his minimizing the significance of alcohol on his conduct, his self-proclaimed periods of abstinence, and his position that he will attend AA only when he needs to do so, raises the likelihood that additional alcohol consumption and criminal conduct will

[58] *See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

recur. The combination of Applicant's actions, explanations, and beliefs cast doubt on Applicant's reliability, trustworthiness, and good judgment. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Overall, the evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his alcohol consumption and criminal conduct. *See* SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

Formal Findings

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

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.i:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a. through 2.g:	Against Applicant

Conclusion

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

_____
ROBERT ROBINSON GALES
Administrative Judge