DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 16-03171
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: Thomas Albin, Esq.

12/04/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant consumed alcohol at times to excess despite four alcohol-related incidents in ten years. He has abstained from alcohol since approximately March 2017, has never been diagnosed with alcohol use disorder, and has only one conviction for drunk driving on his record. The alcohol consumption security concerns are not yet fully mitigated. Clearance is denied.

Statement of the Case

On December 3, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline G, alcohol consumption, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action 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 for*

Determining Eligibility for Access to Classified Information effective within the DOD on September 1, 2006.

On December 21, 2016, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On March 2, 2017, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On April 19, 2017, I scheduled a hearing for May 23, 2017. On May 22, 2017, I had to continue the hearing because of medical reasons. On June 28, 2017, I rescheduled the hearing for July 31, 2017.

While this case was pending final a hearing, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4 establishing the National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require national security eligibility or eligibility to hold a sensitive position. On May 18, 2017, I provided Applicant's counsel with a copy of the updated Directive incorporating the new AG which supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. I advised him that I would be adjudicating his client's security clearance eligibility under the new AG,[1] and that I would consider a request to leave the record open after his hearing for additional information if necessary in light of this change in the AG.

I convened the hearing as rescheduled on July 23, 2017. Three Government exhibits (GEs 1-3) and five Applicant exhibits (AEs A-E) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on August 7, 2017.

Findings of Fact

The SOR alleges under Guideline G that Applicant was arrested in December 2005 (SOR ¶ 1.a) and in April 2010 (SOR ¶ 1.b) for driving under the influence of alcohol (DUI); that he was arrested in January 2013 after driving his vehicle into a tree while he was intoxicated but convicted of a lesser charge of reckless driving (SOR ¶ 1.c); that he was convicted in March 2016 of illegally operating a motor vehicle under the influence of alcohol in November 2015 (SOR ¶ 1.d); and that Applicant indicated during his August 2016 interview with an authorized investigator that he consumes alcohol to intoxication monthly (SOR ¶ 1.e). When he answered the SOR, Applicant admitted the arrests and convictions as alleged, but he denied SOR 1.e and explained that he had told the investigator that "if [intoxication] occurred it would be no more than once a month." After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 30-year-old carpenter with some community college credits but no degree. He has never been married, has no children, and has not served in the U.S. military. (GE 1: Tr. 41.) Applicant was employed by a defense contractor from mid-August

[1] Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

2015 until December 2016. After the SOR was issued, he was walked off the job. He is subject to recall if his security clearance is adjudicated favorably. Applicant had been a self-employed licensed and insured home-improvement contractor from March 2014 to August 2015. He collected unemployment for a few months after he was laid off by the defense contractor before renewing his insurance for his contracting business. He intends to return to work for the defense contractor if he is granted his clearance. (GEs 1-2; Tr. 35-39.) He has had enough work to support himself and his dog but it has not been easy. (Tr. 43.)

During his senior year of high school, Applicant was stopped by the police in December 2005 and charged with misdemeanor operating a motor vehicle under the influence of alcohol (OUI).[2] The charge was dropped after he completed a court-ordered pretrial alcohol education course. (GEs 1-2; Tr. 17-18.) When he was interviewed in August 2016 for his background investigation, Applicant explained that he was by himself when he was pulled over, and that he failed a field sobriety test. (GE 2.) At his hearing in July 2017, Applicant testified discrepantly that he consumed two beers at a party with friends in December 2005 and was driving some of his intoxicated friends to their homes when he was stopped by the police. He told the police that he had consumed two beers, and after he passed field sobriety tests, he was arrested "for his honesty" in admitting that he had consumed two beers. Applicant recalls paying a fine and completing the alcohol education class. (Tr. 28-29.) The evidence does not conclusively establish that Applicant was legally intoxicated.

In April 2010, Applicant was stopped at a sobriety checkpoint. He failed a field sobriety test and was arrested for OUI. Applicant admits that he had been drinking alcohol before approaching the checkpoint, but the drunk-driving charge were dropped because his second breathalyzer registered his blood-alcohol level under the legal limit. (GEs 1-2.)

Applicant continued to consume alcohol despite expressed concerns from his parents about his drinking. (Tr. 60-61.) In January 2013, Applicant was driving home from a drinking establishment when he crashed his car into a tree. Applicant admits that he had been intoxicated, although he now recalls that he had only "a couple of drinks." He had been driving at a reckless speed. He sustained traumatic injuries and was in a coma for four weeks after the accident. He was arrested in June 2013, and in September 2013, he pleaded guilty to a charge of reckless driving, for which he was ordered to pay a fine of $200 and fees of $145. (GEs 1-2; AEs A, C; Tr. 18-28, 58.) Applicant was not charged with OUI because he was unable to consent to a blood alcohol test. (Tr. 27-28.)

Applicant was out of work for six to eight months and lived with his parents for about two years as he recovered. (Tr. 23-24.) He abstained from alcohol for almost a year after

[2] Applicant was alleged to have been arrested in the same state for illegal operation of a motor vehicle under the influence of alcohol (OUI) and for driving under the influence (DUI). With the repeal of the previous statute § 14-227, which made punishable driving while intoxicated, drunk driving has been punishable since 1963 under § 14-227(a), operation while under the influence of liquor or drug or while having an elevated blood alcohol content, which since 2002 is .08 % (from .10%) or higher. For commercial vehicle drivers, the elevated blood content is .04% or higher. The correct designation for the charge is OUI.

his accident, but he believed at the time that alcohol had little to do with his "freak accident." He resumed drinking a couple of times a week when socializing with friends or family. (Tr. 26-27.)

On April 29, 2015, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) in application for a security clearance needed to work for a defense contractor. He disclosed his arrest record, which included the alcohol-related offenses and a 2006 possession of marijuana charge. (GE 1.) He started his defense-contractor employment in mid-August 2015. (Tr. 36.)

Applicant was stopped by the police for passing a vehicle on the right and speeding in November 2015. Applicant had consumed "a couple of beers while shooting pool" at a local bar, and he failed a field sobriety test. A breathalyzer showed his blood-alcohol level to be .09%, just over the legal limit. Applicant was charged with OUI, failure to comply with rules regarding passing on the right, and for traveling unreasonably fast. Applicant reported his arrest to his supervisor within the week. He pleaded guilty to OUI, and he was sentenced on March 1, 2016, to serve six months in jail (execution suspended) and one year of probation, and to pay $583 in fines and fees. After three or four months, he no longer had to report to a probation officer. As conditions of his probation, Applicant was required to abide by the law, avoid drinking alcohol if driving, and complete 100 hours of community service. He satisfied his community service at a nonprofit visual arts and performance center. Applicant's driver's license was administratively suspended for 30 to 45 days. He was then required to have an interlock device installed on his truck. (GEs 2-3; AE B; Tr. 32-34, 46, 51, 56, 58.)

On August 3, 2016, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant provided details about his arrests and did not deny criminal record information that was obtained in the course of his background investigation. Applicant denied any intention of committing any illegal activity in the future or any intention of driving after drinking alcohol. He explained that he now takes a taxi if he uses alcohol. Regarding his alcohol consumption, Applicant indicated that he drinks a few beers on the weekends at home, at bars, or at restaurants. The agent reports that Applicant expressed his belief that he would become intoxicated if he drank six beers in four hours' time, which he does once a month. Applicant expressed an intention to continue to use alcohol with the same frequency and in the same quantity. He denied that he had a problem with alcohol or that his use of alcohol had an adverse impact on his health, reputation, judgment, reliability, financial responsibility, or ability to hold a confidence. (GE 2.) Applicant admitted at his hearing that he continued to drink after the interview "maybe a couple of beers every couple of nights. Typically at home." (Tr. 44.) He testified that if he drank to intoxication, "it occurred about once a month at most." (Tr. 50.)

In approximately March 2017, Applicant and a friend went out to have a beer to thank the friend for assistance on a job. Applicant drank a beer while his friend became intoxicated. Shortly after Applicant brought his friend home, his friend's girlfriend called him and asked him to return. Applicant found his friend heavily intoxicated. Applicant contacted a Veterans Affairs (VA) facility because his friend is a former Marine. At the VA's

suggestion, Applicant had his friend admitted to a detoxification facility. The incident caused Applicant to think about the problems alcohol had caused him, so he decided to stop drinking shortly thereafter. (Tr. 54-55.) Abstinent for five months as of his hearing, Applicant did not drink alcohol at Easter dinner in April 2017, even though his uncles offered to pay the bar tab for everyone. (Tr. 44-45.)

Applicant denies ever being diagnosed as having an alcohol dependency problem by a medical professional. (Tr. 44.) Applicant attended one Alcoholics Anonymous (AA) meeting while he was on probation for the November 2015 offense. In April 2017, thinking that AA might be helpful, he went to another meeting of the same AA group. He found it as depressing as previously. Shortly thereafter, he attended a meeting in another town to see if his experience would be different, but he did not find a good reason to continue with AA. He did not find it beneficial to hear stories "about people's worst moments in life over and over." (Tr. 62-63.) Applicant has not had any alcohol treatment since 2006, when he attended an outpatient program for substance abuse following an arrest for possession of marijuana. (Tr. 48.) He denies any issue with not drinking. He does not intend to drink any alcohol in the future, whether or not he returns to work for the defense contractor. On a couple of occasions while grilling at his home, he has had urges to drink but he has not consumed any alcohol, even though he still has a bottle of scotch in his home that he was given as a present. Applicant has not purchased any alcohol since he stopped drinking. He has lived alone for the past two years, but he has had a girlfriend since January 2017. He also has daily contact with his parents and sister. His family and girlfriend are supportive of him not drinking. (Tr. 39-46, 59-60.)

During his defense-contractor employment, Applicant was often loaned out to different teams because of his qualifications and experience. (Tr. 53.) A supervisor familiar with Applicant's work attests favorably to Applicant's work ethic, dependability, and punctuality. Applicant worked efficiently and was able to stay focused when on the job. He was a good mentor to newer employees. The supervisor hopes that Applicant can again be part of his team. (AE D.)

Applicant continues to volunteer at the local nonprofit visual arts and performance center. He helps with repairs and necessary maintenance of the facility, and assists with staffing of events and cleanup afterwards. The director of the center considers Applicant to be a "huge asset" to the organization. (AE E; Tr. 56-57.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. 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 the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 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. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G: Alcohol Consumption

The security concern for alcohol consumption is articulated in AG ¶ 21:

> Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Applicant was convicted of OUI in March 2016 for an offense committed in November 2015. Although he pleaded guilty to reckless driving for the incident in January 2013, he admits that he was intoxicated when he crashed his vehicle. These incidents implicate disqualifying condition AG ¶ 22(a), which provides:

> (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 an individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder.

There is limited or conflicting evidence of alcohol-related impairment with regard to the December 2015 and April 2010 incidents. Applicant was ordered to attend a pretrial education program for the December 2015 OUI charge, but he claims that he had only consumed two beers. Even so, his underage drinking in 2005 raises security concerns. Regarding the April 2010 OUI charge, he was arrested after he failed a field sobriety test, but a second breathalyzer showed his blood-alcohol level to be under the legal limit.

Concerning 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," there is some evidence that Applicant was drinking to intoxication on occasion, no more than once a month, as of August 2016. However, the reported quantity of six beers over four hours would not qualify as binge drinking.[3] Applicant may well have minimized his consumption somewhat when he claims he had only two beers before his November 2015 OUI, but there is no evidence to contradict his assertion that his blood-alcohol level was just over the legal limit. Likewise, although he admitted drinking to intoxication before his January 2013 accident, the evidence does not establish that he engaged in binge drinking. His parents expressed concern about his drinking between 2005 and 2013, but it has not been shown that he engaged in habitual consumption to impairment. There is no evidence of a qualifying medical diagnosis of alcohol use disorder that would warrant consideration of AG ¶¶ 22(d), 22(e), or 22(f), which pertain where there is such a diagnosis, failure to follow treatment advice after a diagnosis, or alcohol consumption against medical advice after being diagnosed. Nor is there any indication that Applicant failed to comply with any court order, including with the terms of his probation for his November 2015 OUI, so AG ¶ 22(g) does not apply.

Regarding mitigation, Applicant engaged in a pattern of maladaptive alcohol use that persisted after he completed an alcohol education course, after his parents expressed concerns about his drinking, and after he sustained life-threatening injuries in an alcohol-related accident. His November 2015 OUI is too recent to favorably consider AG ¶ 23(a) given his history of alcohol-related arrests. AG ¶ 23(a) provides:

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

[3] Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. This definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. *See* U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), http://www.pubs.niaaa.nih.gov/publications/Newsletter/ winter2004/NewsletterNumber3.pdf.

Applicant moderated his drinking somewhat after his November 2015 OUI in that he no longer operated a vehicle after drinking alcohol. However, as of August 2016, he was still consuming alcohol to intoxication on occasion. Applicant was still in denial of the negative impacts alcohol had in his life even after he lost his defense-contractor employment because of his alcohol-related arrests.

Consideration of AG ¶ 20(b) is warranted, however, because of Applicant's abstinence since March 2017 with an intention to maintain his abstinence in the future. AG ¶ 20(b) provides:

> (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.

Applicant's experience of observing his friend's extreme intoxication and taking his friend to a detoxification program triggered some introspection about his own drinking and a recognition of alcohol's negative consequences in his own life. His response to stop drinking is a significant action, which, if maintained, will preclude a recurrence of maladaptive alcohol use. However, his abstinence is recent and brief when compared to the decade over which he at times abused alcohol. He attended only three AA meetings because he found them depressing. AA is not for everyone, but Applicant would have a stronger case for full mitigation under AG ¶ 20(b) had he obtained recent alcohol counseling or a favorable substance-use assessment by a qualified medical provider. I have no reason to doubt Applicant's assertion that he has the support of his girlfriend and his family in his efforts to maintain sobriety. His youth was likely a contributing factor in his abusive drinking and his failure to acknowledge the problem alcohol has caused him. Yet, some concerns persist that he may have minimized his alcohol use at his hearing. He claimed that he passed all the field sobriety tests administered to him in December 2005 and was arrested for being honest in volunteering that he had consumed two beers. He had told an OPM investigator that he had failed field sobriety tests. Concerning his drinking as of August 2016, the OPM investigator reported that Applicant expressed his belief that he would become intoxicated if drank six beers in four hours, which he does once a month. Applicant asserts that he told the investigator that if this occurred, it would be no more than once a month, which suggests that he may not have consumed alcohol to intoxication as reported. Applicant presented positive evidence in mitigation, but it is not enough to fully mitigate the alcohol consumption security concerns.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d).[4] In making the overall commonsense determination required under AG ¶ 2(a),

[4] The factors under AG ¶ 2(d) are as follows:

Applicant did not allow his alcohol consumption or the adverse legal consequences of his drinking to adversely affect his work. A supervisor familiar with Applicant's work for the defense contractor would welcome Applicant back on his team. The nonprofit organization for which Applicant served his community service continues to benefit from Applicant's assistance. It shows a level of commitment and responsibility that augurs favorably for Applicant's growing maturity and continued sobriety.

The Appeal Board has repeatedly held that the government need not wait until an applicant mishandles or fails to safeguard classified information before denying or revoking security clearance eligibility. *See*, *e.g.*, ISCR Case No. 08-09918 (App. Bd. Oct. 29, 2009, citing Adams v. Laird, 420 F.2d 230, 238-239 (D.C. Cir. 1969)). It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). At some future date, Applicant may be able to show reform for a sufficiently sustained period to safely conclude that his maladaptive use of alcohol is safely in the past. For the reasons discussed, it would be premature to grant Applicant security clearance eligibility at this time.

Formal Finding

Formal finding 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, is:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.e:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

Elizabeth M. Matchinski
Administrative Judge

(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.