DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 17-00506
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert B. Blazewick, Esq., Department Counsel
For Applicant: Barbara T. Hanna, Esq.

04/16/2018

_____

Decision

_____

MURPHY, Braden M., Administrative Judge:

Applicant did not provide sufficient information to mitigate the security concerns arising under Guideline G, alcohol involvement, and Guideline J, criminal conduct, arising from his history of alcohol-related offenses. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 3, 2015. On April 11, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant alleging security concerns under Guideline G, alcohol involvement, cross-alleged under Guideline J, criminal conduct. The action was taken under Executive Order (Exec. Ord.) 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 implemented by the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG). SEAD 4 became effective on June 8, 2017, for all adjudicative decisions on or after that date, including this one.[1] Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Applicant answered the SOR on May 2, 2017, and requested a hearing. The case was initially assigned to another administrative judge from the Defense Office of Hearings and Appeals (DOHA) and scheduled for hearing on September 12, 2017. That hearing was cancelled following entry of appearance by counsel.

The case was reassigned to me on September 7, 2017. The hearing was initially rescheduled for November 15, 2017, but was then set for November 16, 2017 by mutual consent due to a scheduling issue for Applicant's counsel. The hearing convened on that date. At the hearing, Department Counsel offered documents that were marked as Government Exhibits (GE) 1 through GE 3 and admitted without objection. Applicant submitted Applicant's Exhibit (AE) A, which was admitted without objection. He and his wife also testified. DOHA received the hearing transcript (Tr.) on November 30, 2017.

Amendment to the SOR

At hearing, Department Counsel amended SOR ¶ 1.d to add the words "in jail" to the second sentence of the allegation. The SOR was so amended without objection. That sentence, in pertinent part, now reads, "You were found guilty, sentenced to six months in jail (suspended) . . . ." (Tr. 19-20)

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b and 1.d, and denied SOR ¶ 1.c, with a brief explanation. He did not answer SOR ¶ 2.a, but since it is a cross-allegation, I consider that he admitted it in part and denied it in part, incorporating his answers to ¶ 1. His admissions and other comments are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 42 years old. He and his wife have been married since January 2004. They have two children, a daughter, age 15, and a son, age 5. Applicant also has a son, age 17, from a prior relationship. Applicant has worked at a naval shipyard since 2001. He has worked for his current employer in the defense industry since 2003. He has held a security clearance since 2005. Applicant completed a four-year certification program at work. He also has an associate's degree. (Tr. 12, 22-30, 68; GE 1; GE 2)

One evening in May 2007, Applicant was drinking at a bar with friends. He had four shots of vodka and two beers. At the end of the evening, he got into a friend's car to go home. He was in the passenger seat. The friend, who was driving, backed the car

[1] Applicant's counsel confirmed that she received a copy of SEAD 4 with the Notice of Hearing. (Tr. 7-8)

into another vehicle in the bar's parking lot. By the time the police came to investigate, Applicant had fallen asleep. The police officer tapped on the window and asked Applicant who had been driving. Applicant "talked back" to the police, and said "I was driving" (or words to that effect). In fact, Applicant's friend was the driver. Applicant said he was being sarcastic and "was just trying to be funny" when he made this comment. (Tr. 35-37, 53, 68-70; GE 2 at 6)

Applicant was arrested and charged with obstructing justice and public swearing or intoxication. (SOR ¶ 1.a) The charges were later reduced to disorderly conduct and being drunk in public. Applicant paid a $50 fine for each offense. (Tr. 35-37, 53, 68-70; GE 2 at 6) Applicant did not list this arrest on his SCA as an alcohol-related offense. (GE 1)

In March 2011, Applicant went to a comedy club with his wife. He had a few drinks with dinner during the show (two shots and a beer). While driving home, he was pulled over for speeding. He stated that he was driving about 35 miles an hour in a 25-mile-an-hour zone that he said came up suddenly. Applicant was given a roadside sobriety test. He was arrested and charged with driving under the influence of alcohol (DUI). He was later found guilty of a reduced charge of misdemeanor reckless driving. He was sentenced to 30 days in jail (suspended), his driver's license was restricted for six months, and he was placed on two years' unsupervised probation, which he completed. (SOR ¶ 1.b)(Tr. 38-41, 55-57, 70-71, 93-97; GE 2 at 4) Applicant reported this offense to his facility security officer (FSO). (Tr. 58) On his SCA, Applicant listed this offense as a reckless driving charge, and not as a DUI. (GE 1 at 28-29)

In May 2014, Applicant was hanging out with friends outside a fast food restaurant after they had been out at a bar. He was in a friend's car which was idling in the "drive through" line. His friend asked him to get behind the wheel so the friend could go talk to friends outside, in case the line moved. Applicant fell asleep behind the wheel. He had been drinking before then, "maybe a shot or two" over a two-hour period (Tr. 58-59, 71-73). Applicant was cited with being drunk in public, and fined. (SOR ¶ 1.c) (Tr. 41-42; GE 2 at 4-5) Applicant did not report the citation to his FSO, but did disclose it on his SCA. (Tr. 60; GE 1 at 29-30)

Applicant's most recent arrest (SOR ¶ 1.d) occurred in September 2014. He was leaving work in the middle of the night after a long double shift of about 16 hours or more. Applicant testified that he pulled off the road before entering a tunnel because his car was overheating. He dozed off. The police came to investigate. The police officer wanted Applicant to submit to a sobriety test. Applicant refused "because I felt I was being interrogated" and "targeted." He felt the officer should have first inquired as to his well-being. (Tr. 63-64, 78) Applicant did a "heel to toe" sobriety test, which he failed. Applicant testified that he could not perform the test, because of medical issues. Applicant was arrested and spent several hours in jail. He was charged with driving while intoxicated (DWI), refusing a breathalyzer test, and another unspecified traffic offense. (Tr. 43-48; 61-63; 76-78; GE 2 at 5-6)

In his Answer, Applicant denied SOR ¶ 1.c and admitted SOR ¶ 1.d. At hearing, he testified that he intended to admit SOR ¶ 1.c and deny SOR ¶ 1.d. The basis of his denial of ¶ 1.d at hearing was because he had not been drinking before his September 2014 arrest. (Tr. 74-76)

In May 2016, Applicant pleaded guilty to DWI. the other two charges were dismissed. He testified that his lawyer advised him to plead guilty to DWI because of his drunk in public charge a few months before this arrest. Applicant was sentenced to six months in jail (suspended), his driver's license was suspended for one year and restricted until May 2017, and he had an interlock device placed on his car for six months. He also had to participate in a 10-week alcohol safety awareness program (ASAP), and he was fined about $500. (SOR ¶ 1.d) He testified that he has completed probation. (Tr. 43-51, 65; 83; GE 2 at 5)

Applicant did not disclose his September 2014 arrest on his September 2015 SCA. He testified he did not list the arrest because his case was pending. His SCA, however, contained a question asking, "Are you currently on trial or awaiting a trial on criminal charges?" (GE 1 at 28, 30) Applicant disclosed the offense during his August 2016 personal subject interview (PSI), though the interviewing agent also already knew about it. (Tr. 81-82, 104-105; GE 2 at 5-6)

The record does not contain the police reports or court documents regarding any of the SOR offenses. The record also does not contain any medical records (concerning Applicant's claim that his medical issue was what caused him to fail the roadside "heel-toe" test in September 2014). The record contains no documentation about Applicant's completion of the ASAP program, completion of probation, or participation in any alcohol counseling.

Applicant testified that he modified his drinking after the 2007 charge. (Tr. 55) He stated that after the 2011 offense, he spent more time at home. He also said he had less time to drink and socialize because of work constraints. (Tr. 57-58)

Applicant testified that after the May 2014 charge, he stopped drinking for about two months. (Tr. 59-60, 65, 75) He also said he had not resumed drinking at the time of his September 2014 DUI. (Tr. 75) Since then, he has had no further alcohol incidents. Applicant did not consume alcohol while he was on probation between May 2016 and May 2017, and said he was not allowed to consume alcohol during the ASAP program (October to December 2016). (Tr. 50, 84-85) He testified that he has not consumed alcohol in almost a year. (Tr. 85-86) He later said he had not consumed any alcohol since before his September 2014 arrest. (Tr. 88-89)

Applicant testified that he now spends more time with his family. He has not participated in Alcoholics Anonymous or similar programs. His chief source of support in this regard is his wife. Applicant is also concerned about the impact on his job. (Tr. 52, 64, 85-87)

Applicant's wife works as a counselor in the local high school system. She testified that she used to witness her husband drinking. She became concerned that her husband was focusing too much on work, and they had a long discussion about their relationship. She told her husband that his actions were affecting not only Applicant and his job, but also his children and family. Applicant used to go out more to socialize with friends, but he has become more family-oriented and responsible. (Tr. 90-102)

Applicant is regarded as "one of the top supervisors" in his area of responsibility. He supervises 12 other workers. In his most recent annual review, he is rated as "exceeding standards" or "far exceeding standards" in most categories. He is also regarded as having "high ethics, values, integrity and honesty" (Tr. 30-35; AE A)

Policies

It is well established that no one has a right to a security clearance.[2] As the Supreme Court noted in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials."[3]

The AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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." Under ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under ¶ E3.1.15, the 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." 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 the applicant may deliberately or inadvertently fail to safeguard

[2] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance").

[3] 484 U.S. at 531.

classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline G, Alcohol Consumption

The security concern 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. The following disqualifying condition is applicable in this case:

> (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 an alcohol use disorder.

Applicant incurred four alcohol-related offenses between 2007 and September 2014. Applicant ultimately admitted each of them, either in his answer to the SOR or at hearing. His offenses include two charges of public intoxication or being drunk in public. He was arrested for DUI in 2011 (reduced to reckless driving). He was arrested for DWI and refusing a breathalyzer in 2014. He pleaded guilty to the DWI in May 2016. AG ¶ 22(a) applies.

Conditions that could mitigate alcohol consumption security concerns are provided under AG ¶ 23. The following are potentially applicable:

> (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; and
>
> (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 incurred four alcohol-related offenses between 2007 and 2014. Notwithstanding his claim that he had not been drinking prior to his arrest in September 2014, he was arrested for DWI and refusing a breathalyzer test. In May 2016, he

pleaded guilty to DWI. He was on probation until May 2017, six months before the hearing. Applicant has a good work record, and a supportive, stable family life. He provided no documentation regarding his participation in the ASAP program. Applicant's alcohol issues are recent and not isolated. He has not pursued any alcohol-related counseling such as AA or a similar program.

Applicant also failed to disclose either his May 2007 public intoxication charge or his September 2014 DWI arrest, on his January 2015 SCA, as required. This last omission is especially troubling, since the charge was pending at the time he completed his SCA, and Applicant therefore had a duty to report it. He also under-reported his earlier DUI arrest, disclosing only the reduced charge of reckless driving.

I cannot consider this evidence as disqualifying conduct, since it was not alleged in the SOR. However, I can consider this evidence in weighing mitigation or changed circumstances, whether Applicant has demonstrated sufficient rehabilitation, under the whole person concept, and in weighing Applicant's credibility.[4] Applicant's lack of candor undercuts his claims that he has modified his behavior. In addition, the fact that Applicant pleaded guilty to DWI in May 2016 significantly undercuts the credibility of his statements, both before and during the hearing, that he had not been drinking at the time he was arrested in September 2014.

AG ¶¶ 23(a) and 23(b) do not apply. Applicant did not provide sufficient evidence to mitigate the alcohol involvement security concerns.

Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for 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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

> (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; and
>
> (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.

[4] ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

Applicant committed four alcohol-related criminal offenses between 2007 and 2014. AG ¶¶ 31(a) and 31(b) apply.

The following mitigating conditions for criminal conduct are potentially applicable, under AG ¶ 32:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
>
> (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(a) and 32(d) do not apply for the same reasons that AG ¶¶ 23(a) and 23(b) do not apply under Guideline G, above. Applicant did not provide sufficient evidence to mitigate the criminal conduct 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 the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(c):

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline G and Guideline J in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not provide sufficient evidence to mitigate the security concerns arising due to his alcohol-related arrests and citations. He

did not mitigate the alcohol involvement and criminal conduct security concerns. Eligibility for access to classified information is denied.

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-1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Braden M. Murphy
Administrative Judge