DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 17-02324
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

08/10/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 6, 2017. On August 8, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines G and J. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on September 1, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 4, 2017, and the case was assigned to an administrative judge on February 14, 2018. The case was reassigned to me on April 19, 2018. On April 23, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 22, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through K, which were admitted without objection. DOHA received the transcript (Tr.) on June 6, 2018.

Administrative Notice

I have taken administrative notice of the text of the state statute which is the basis for SOR ¶ 1.b and the city ordinance which is the basis for SOR ¶ 1.d. I notified Department Counsel of my intent to take administrative notice, and she did not object. (Hearing Exhibit I.)

Findings of Fact[1]

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.b, 1.c, and 2.a. He admitted in part the allegations in SOR ¶¶ 1.a, 1.d-1.f, and 2.b and denied them in part. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 38-year-old technologist employed by a defense contractor since May 2008. He received a bachelor's degree in computer science in May 2002 and a master's degree in business administration in December 2005. (Tr. 38.) He has never married and has no children. He has held a security clearance since August 2008. His employer sponsored him for a top secret clearance in March 2013, but a decision has been suspended pending resolution of the allegations in the SOR. (GX 2; Tr. 37.)

In September 2003, Applicant was charged with driving while intoxicated (DWI). He pleaded guilty in March 2004. (GX 1 at 34; GX 2 at 33.) He was required to complete an alcohol-intervention program, and his driver's license was suspended for 12 months. He completed the alcohol-intervention program in May 2004. (AX J at 2.)

In August 2007, Applicant was charged with reckless driving by driving 87 miles per hour (mph) in a 55 mph zone. He was tried in absentia and fined $250. (GX 5.)

In October 2009, Applicant was charged with disorderly conduct. He and his roommate were attending an event, and both were consuming alcohol. Applicant was not intoxicated, but his roommate was intoxicated and disruptive, and he was asked to

[1] Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

leave the event. As Applicant and his roommate left the event in a taxi, his roommate began arguing with him, and the taxi driver sought assistance from a police officer. Both Applicant and his roommate were charged with disorderly conduct. The charge against Applicant was dismissed. (GX 9; Answer to SOR at 3.)

In October 2011, Applicant was charged with violating a city ordinance (§ 23-22) which provides: "If any person be intoxicated in public . . . , he shall be deemed guilty of a Class 4 misdemeanor." Applicant was waiting for a ride in a parking lot adjacent to a bar and was arrested by a police officer who thought he was loitering. The case initially was scheduled for a hearing in November 2011, but the charge was dismissed in May 2012. (GX 8; Answer to SOR at 3.)

In August 2012, Applicant was charged with DWI (2nd offense) and refusing a blood or breath test. He pleaded guilty to DWI (1st offense) and the test-refusal charge was dismissed. He was placed on unsupervised probation for 12 months and fined $250. His driver's license was restricted and he was required to complete an Alcohol Safety Action Program (ASAP) and install an ignition interlock on his vehicle. In his answer to the SOR, he stated that this arrest made him realize the seriousness of the charges, and he pledged to never drive after drinking again. (GX 7; Answer to SOR at 2-3.) He completed the ASAP in April 2013. (AX J at 1.)

In October 2016, Applicant was outside a bar when he was cited for violating a state statute (§ 18.2-388). The court records and the SOR list the offense as "profane swearing/public intoxication." However, the statute is written in the disjunctive and provides: "If any person profanely curses or swears or is intoxicated in public . . . , he shall be deemed guilty of a Class 4 misdemeanor." Applicant testified that the person who had driven him to the bar had left earlier, and he left the bar when it closed at 2:00 am. He was trying to engage an Uber or Lyft, but it was difficult to get a ride because it was Halloween weekend. He testified that he did not remember if he used profanity. He was released on his own recognizance, waived a hearing, and prepaid a $25 fine and $91 in court costs. In his answer to the SOR and at the hearing, he admitted that he was cited, but he did not admit that he was intoxicated. (Tr. 49; GX 6; Answer to SOR at 2.)

One of the principals in the consulting firm for whom Applicant works testified in his behalf and submitted a letter recommending that his application for a security clearance be granted. She is a graduate of a service academy with six years of active duty as an officer. She regards Applicant as a "superior performer" and trusts him implicitly. Applicant promptly self-reported his arrests and citations and has continued his high level of performance in spite of the pressure of the pending security adjudication. She has never observed or received reports of alcohol abuse by Applicant in the workplace. She has no reservations about Applicant holding a security clearance. (Tr. 12-19; AX A at 5.)

Another of the firm's principals testified and submitted a letter on Applicant's behalf. This principal worked with Applicant for about five years, interacting two or three

times a week. He regards Applicant as honest, candid, hardworking, and talented. (Tr. 30-35; AX A at 2.) A co-worker submitted a letter describing Applicant as an "exemplary employee" who has earned the trust of his supervisors and colleagues. (AX A at 6.) A client of Applicant's employer submitted a letter describing him as courteous, honest, and professional. (AX A at 7.) Three of Applicant's friends and a professor at a local university attested to his extensive community involvement. (AX A at 1, 3, 4; AX K.)

Applicant's performance evaluation for 2016 praised his increased leadership, development of strong client relationships, and his care and concern for subordinates. (AX E.) In February 2017, Applicant received an information technology excellence award from the Navy for his work on an information technology project in 2016. (AX H.)

Applicant admitted that he sometimes drank to the point of intoxication while in college, and that he had been drinking on the occasions alleged in the SOR. (Tr. 55-59.) He testified that he no longer drives after drinking. He usually consumes one or two drinks in a social situation, but he does not drive even if he has only one drink. (Tr. 53.) He submitted a statement of intent, in which he declared his intent to never abuse alcohol again and agreed to an automatic revocation of his security clearance for any alcohol abuse. (AX I.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline G, Alcohol Consumption

The SOR alleges that Applicant has consumed alcohol, at time in excess and to the point of intoxication, since about 1997-1998 to at least May 2017 (SOR ¶ 1.a). It also alleges that he was cited for "profane swearing/public intoxication" in October 2016 (SOR ¶ 1.b); arrested for DWI (2nd offense) in August 2012 and refusing a blood or breath test and pleaded guilty to DWI (1st offense) (SOR ¶ 1.c); arrested in October 2011 for "public swearing/intoxication" (SOR ¶ 1.d); cited for disorderly conduct in October 2009 (SOR ¶ 1.e); and arrested for DWI in September 2003 (SOR ¶ 1.e).

Applicant admitted that he consumed alcohol in excess when he was in college and for a time after he graduated, but he denied that he consumed alcohol in excess for the duration alleged in SOR ¶ 1.a. His admission partially establishes SOR ¶ 1.a. His admissions and the documentary evidence submitted at the hearing establish the DWI convictions in September 2003 and August 2012, alleged in SOR ¶¶ 1.c and 1.f.

The state statute (§ 18.2-388) cited in the documentary evidence supporting SOR ¶ 1.b is written in the disjunctive and prohibits profane cursing or swearing or public intoxication. It is not clear from the documentary evidence whether Applicant was cited and paid a prepaid fine for cursing, swearing, public intoxication, or a combination of offenses. Because Applicant had stayed in the bar until it closed, his consumption of alcohol in the bar is a reasonable inference, but the court records, standing alone, do not establish that he was intoxicated. Thus, I conclude that SOR ¶ 1.b is established to the extent that it alleges that he was cited for one of the offenses proscribed by the statute, but it is not established to the extent that it alleges that he was cited for public intoxication.

The allegation in SOR ¶ 1.d incorrectly describes the offense as "public swearing/intoxication." The city ordinance cited in the documentary evidence supporting SOR ¶ 1.d prohibits public intoxication but does mention public swearing. Unlike the state statute, it is not written in the disjunctive. The documentary evidence and Applicant's admission establish that he was arrested for public intoxication, which is sufficient to establish one of the offenses alleged in SOR ¶ 1.d.

Applicant admitted that he was cited for disorderly conduct in October 2009, as alleged in SOR ¶ 1.e. He also admitted that he had been drinking but denied that he was intoxicated. The citation for disorderly conduct was dismissed. The evidence is sufficient to establish that he was cited, but insufficient to establish that he was intoxicated.

The concern under this guideline is set out 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's partial admission of SOR ¶ 1.a and his admissions and the documentary evidence regarding his two DWI convictions alleged in SOR ¶ 1.c and 1.f are sufficient to raise the following potentially disqualifying conditions:

> 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; and
>
> 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.

The following mitigating conditions are potentially applicable:

> AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to

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

AG ¶ 23(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.

AG ¶ 23(a) is established. Applicant's last alcohol-related incident established by the evidence was the DWI that occurred six years ago. The evidence does not establish that Applicant's arrest in October 2016 was alcohol-related.

AG ¶ 23(b) is established. Applicant acknowledged his lack of judgment by driving after drinking, and he now refrains from driving, even after consuming only one drink.

Guideline J, Criminal Conduct

SOR ¶ ¶ 2.a alleges reckless driving in August 2007, by speeding more than 80 mph in a 55 mph zone, and SOR 2.b cross-alleges SOR ¶¶ 1.a-1.f. The security concern under this guideline 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."

Applicant's admissions and the documentary evidence submitted at the hearing establish the following potentially disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted;

For the reasons set out in the above discussion of Guideline G, I conclude that AG ¶¶ 31(a) and 31(b) are raised. The following mitigating conditions are potentially applicable:

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;

AG ¶ 32(c): no reliable evidence to support that the individual committed the offense; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) is not established. Applicant's citation for public intoxication in October 2016 was recent and did not occur under unusual circumstances.

AG ¶ 32(c) is established for the conduct alleged in SOR ¶¶ 1.b, 1.d, and 1.e, for the reasons set out in the above discussion of Guideline G.

AG ¶ 32(d) is established for the reasons set out in the above discussion of Guideline G and the following considerations. Applicant's pattern of irresponsible conduct ended with his DWI arrest in August 2012. His employer sponsored him for an upgrade of his security clearance in March 2013. Two senior officials of the company by whom he is employed submitted strong endorsements of his suitability for continuing his clearance. Finally, the evidence does not support a finding that Applicant was intoxicated in October 2016. Even if he was guilty of publicly uttering an illegal expletive because of his frustration in obtaining transportation, this minor infraction, considered in the context of his employment record and constructive community involvement, is insufficient to raise doubt about his trustworthiness, responsibility or good judgment.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).[2]

I have incorporated my comments under Guidelines G and J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

[2] The factors are: (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.

Applicant was candid, remorseful, and credible at the hearing. He self-reported his arrests and citations to his facility security officer, even though he believed he was not guilty of some of them. He has placed himself on probation by submitting his sworn statement of intent to refrain from further alcohol-related misconduct. He is highly regarded by his friends, coworkers, and supervisors. The testimony of two senior members of Applicant's company was particularly impressive. After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his alcohol consumption and criminal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 1.a-2.f:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge