DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 17-03900
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

08/17/2018

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On March 5, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guidelines G and E. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); 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 March 21, 2018, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the

Government's written case on April 6, 2018. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on April 16, 2018. He responded in a one-page note with attachments, which was received by the Defense Office of Hearings and Appeals on May 4, 2018. Applicant's response consists of a one-sentence statement referring to his "excellent credit report for the past 28 years." He attached two pages from his credit report reflecting Applicant's credit score. Department Counsel did not object to Applicant's evidence, and it is admitted into the record. In his response to the FORM, Applicant did not object to the Government's evidence, which was attached to Department Counsel's FORM as Items 1 through 9. This evidence is admitted into the record and is referred to herein using Department Counsel's numbering for each Item. The case was assigned to me on June 27, 2018.

Findings of Fact[1]

In Applicant's response to the SOR, he admitted the three allegations made under Guideline G and set forth in SOR ¶¶ 1.a-1.c and denied the three allegations made under Guideline E and set forth in SOR ¶¶ 2.a-2.c. His admissions are incorporated in my findings of fact.

Applicant is a 60-year-old senior engineer and is being sponsored for a security clearance by a U.S. Government contractor. He was born in a foreign country. He immigrated to the United States with his parents when he was nine years old and became a U.S. citizen when he was 20. He graduated from high school and college in the United States and earned a master's degree from a U.S. technology institution. He also served as an enlistee in the U.S. Army for three years. Applicant has been married for about 26 years and has two children, ages 21 and 19. (Item 6 at 6-8.)

During the period March 2008 through August 2014, Applicant was arrested three times for driving while intoxicated. He was first arrested on March 3, 2008 after being stopped for speeding. In an August 2017 Personal Subject Interview (PSI), he reported that he had too many beers after a happy hour. (Item 5 at 8.) He failed the field sobriety tests and was test results established that he had a blood alcohol content (BAC) of 0.11. He was charged with driving while intoxicated (DWI) 1st Offense and held overnight. On April 21, 2008, he waived his right to counsel and pled guilty to the charge. He was fined, sentenced to 90 days in jail with 90 days suspended and ordered to perform community service and to attend a victim impact program. He was also placed in a community supervisory program until he completed the terms of his sentence. In addition, his driver's license was suspended for 12 months, and he was ordered to enter an alcohol safety program. Following his completion of the victim impact program, Applicant wrote a thoughtful, one-page essay discussing how drunk driving can affect himself and others. He vowed: "I will never drink again. . . . " (Item 7 at 15.)

[1] Applicant's personal information is extracted from his security clearance application, dated June 15, 2016 (FORM Item 3), unless otherwise indicated by a parenthetical citation to the record.

Applicant completed a security clearance application (SCA) on July 19, 2011 seeking his initial security clearance. He disclosed his 2008 arrest and conviction in this SCA. He was subsequently granted a top secret clearance. (Item 4 at 26; Item 3 at 30.)

On November 8, 2012, Applicant was again stopped by the police for speeding and was tested for alcohol intoxication. He was unable to perform the field sobriety tests, and he refused a preliminary breath test (PBT). He was then arrested and when tested for alcohol consumption, he measured .07 on a breath test. He was charged with DWI 2nd offense within 5 years. In this prosecution, he was represented by an attorney, and on December 4, 2012, he pled guilty to a lesser charge of Reckless Driving. He was fined, sentenced to 90 days in jail with 90 days suspended, and ordered to serve 20 hours of community service, which was monitored by a community supervisory program, and to attend the victim impact and alcohol safety programs. He was also placed on probation for 12 months. (Item 8.)

In his August 2017 PSI, Applicant stated that he had stopped drinking and that there was no likelihood of a recurrence of this behavior after the embarrassment of being arrested a second time. He did not disclose his second arrest and conviction, however, in his current SCA, certified on June 15, 2016. In his PSI, he said he made an error by not realizing that this incident was covered by a question on the SCA. (Item 5 at 9.) With one exception, the questions on his SCA were limited to the past seven years, so he was not required to disclose his 2008 arrest. The exception was a question that asked if he has "**EVER** been charged with an offense involving alcohol or drugs?" (Emphasis in the original.) This question required him to disclose all of his DWI arrests, including his March 2008 arrest. (Item 3 at 27-30.)

Applicant was arrested again on August 14, 2014, after a police stop for speeding. He failed the field sobriety tests and a breath test produced a result of 0.12 BAC. Applicant was charged with DWI 2nd offense within 5 -10 years. (Item 6 at 3; Item 7.) The FBI Report reflects that he was convicted of DWI on January 13, 2015, and sentenced to six months in jail with five months and 20 days suspended, meaning he served about ten days in jail. (Item 6 at 3.)

The police "Incident Report" reflects the arrestee's name as a variant of his real name with the same address as that which appears in Applicant's two SCAs in the record (Items 3 at 8; Item 4 at 8) and in the police and court records of his two prior arrests. (Item 8 at 1; and Item 9 at 1.) The FBI report in the record reflects both of Applicant's names (Item 6 at 2), though neither of his SCAs reflect that he used an alias. (Item 3 at 5-6; Item 4 at 5.) The record is unclear how the police identified Applicant with his alias name. In his PSI, Applicant suggested that he may have told the police that this name was an alias he used. (Item 5 at 9.) He also admitted in his Interrogatory responses that he had previously identified himself to governmental officials using his alias. (Item 7 at 3.) Nothing in the record reflects that Applicant had a driver's license or other governmental identification under his alias name.

In his August 2017 PSI, Applicant denied that he was arrested on August 14, 2014, for DWI 2nd offense within 5 - 10 years. He told the interviewer that he had no recollection of being pulled over and arrested. He also claimed that he had no recollection of being sentenced for this offense. Applicant misleadingly told the interviewer that he did not disclose this incident on his June 2016 SCA because he disagreed that this ever occurred. (Item 5 at 9.)

Applicant, however, changed his position and admitted the SOR allegation regarding his 2014 arrest and 2015 conviction in his response to SOR ¶ 1.c. (Item 2 at 1.) He also wrote that since his "last arrest in January 2014," he no longer consumes alcohol. His third DWI arrest occurred in August 2014, which suggests that he intended to claim abstinence since August 2014 or perhaps since his guilty plea in January 2015.

In his response to the SOR, Applicant provided the names and phone numbers of three persons whom he claimed could vouch for his character and sobriety, but he did not provide written statements from these persons for the record. He also provided performance appraisals from his employer, his DD 214 reflecting his honorable discharge from the U.S. Army in 1979 as a private first class (pay grade E-3), and a letter confirming the completion in January 2016 of his participation in an alcohol safety program following his August 2014 arrest. In addition he provided with his response to the FORM two pages from his credit report evidencing a high credit score, which was noted as "excellent."

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 security 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.

The following disqualifying conditions under this guideline are potentially relevant:

> 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant's admissions and the documentary evidence in the FORM establish the potentially disqualifying conditions in AG ¶ 22(a) and, to a lesser extent, AG ¶ 22(c). Applicant's three DWI arrests in six years support the conclusion that he has regularly consumed alcohol to the point of impaired judgment, though they may not fully evidence habitual or binge consumption of alcohol to the point of impaired judgment

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 good judgment;

AG ¶ 23(b): the individual acknowledges his or her maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear pattern of modified consumption or abstinence in accordance with treatment recommendations;

AG ¶ 23(c): the individual is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress in a treatment; and

AG ¶ 23(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(a) is not established. Applicant's last known use of alcohol was in August 2014 when he was arrested for DWI. In his March 2018 response to the SOR, he claims he has not consumed alcohol since that arrest, though he erroneously provided the date of the arrest as January 2014. Applicant failed to comment about his sobriety in his May 2018 response to the FORM. Accordingly, the record only contains Applicant's uncorroborated statement in March 2018 that he has been abstinent for about three and one-half years.

Applicant provided in his SOR answer the names and phone numbers of three persons whom he claims can vouch for his character and sobriety, but he failed to provide written statements from these individuals. The Directive does not authorize an administrative judge to act as an investigator for either party in a security clearance proceeding. ISCR Case No. 15-01515 at 3 (App. Bd. Aug. 17, 2016). Under the Directive, an administrative judge has no obligation to gather information for either party in a case.

The Directive makes it clear that it is the responsibility of the parties to present evidence for the administrative judge's consideration. ISCR Case No. 08-10170 at 4 (App. Bd. Jul. 8, 2011). More specifically, it is an applicant's burden to provide evidence to mitigate the government's security concerns. Directive ¶ E3.1.15. Given Applicant's three DWI arrests over a six and one-half year period, his uncollaborated claim that he has been abstinent from August 2014 until at least March 2018 is inadequate evidence to establish that sufficient time has passed to render his past drunk driving incidents as unlikely to recur.

Moreover, Applicant's promise after his first DWI arrest in 2008 that he "will never drink again" proved to be a commitment he did not keep. The Government subsequently granted Applicant a security clearance with that written statement in the record. In his August 2017 PSI, he claimed that he had stopped drinking alcohol after his 2012 DWI arrest. His arrest in August 2014, however, established that he was not forthcoming in admitting the recency of his drinking alcohol and related misconduct. Also, his past behavior was sufficiently frequent and did not occur under any unusual circumstances as to otherwise render AG ¶ 23(a) applicable, and after just three or four years, his past conduct continues to cast doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 23(b) is partially established. While Applicant has not explicitly acknowledged his pattern of maladaptive alcohol use, he has expressed his embarrassment over his arrests and his desire to avoid further embarrassment. However, he has not provided evidence of any actions taken to overcome this problem other than his uncorroborated assertion that he has ceased drinking alcohol. Moreover, in the absence of evidence of any alcohol treatment recommendations, Applicant cannot establish mitigation in the form of demonstrating "a clear pattern of modified consumption or abstinence in accordance with treatment recommendations."

AG ¶¶ 23(c) and (d) are not established. There is no evidence that Applicant has participated in any counseling or treatment programs. Moreover, his November 2012 and August 2014 DWI arrests evidence that his previous, unfulfilled commitment to stop drinking undercuts his mitigation evidence that he has remained abstinent since August 2014 and intends to remain abstinent in the future. Applicant has not carried his evidentiary burden to demonstrate a clear and established pattern of abstinence.

Guideline E (Personal Conduct)

The security concern under this guideline is set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The following disqualifying condition under this guideline is potentially relevant:

AG ¶16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant's admissions and the documentary evidence in the FORM establish the above disqualifying condition under this guideline. The record satisfies the Government's burden of proving by substantial evidence that Applicant intentionally falsified his responses to Sections 24 and 22 of his June 15, 2016 SCA. Section 24 asked Applicant to disclose whether his use of alcohol in the last seven years has "resulted in intervention by law enforcement/public safety personnel." He answered "No," knowing that in November 2012 and again in August 2014, he had been arrested by law enforcement personnel and charged with DWI. He even served ten days in jail as part of his sentence for his most recent conviction. His intent to avoid disclosure of these arrests is evidenced by his false denial in his PSI that he had been arrested for DWI in August 2014. The same rationale applies to his failure to disclose these two arrests in response to questions in Section 22 of the SCA asking whether he had been arrested, charged and convicted of criminal charges in the last seven years and whether he had ever been charged with an offense involving alcohol.

In his SOR response, he claimed that made a mistake by failing to read the questions carefully. All questions in Sections 24 and 22 are written in simple English and are readily understandable by anyone with a high school education. Applicant has earned bachelor's and master's degrees and has served in the U.S Army for three years. He works in a responsible position as a senior engineer for a U.S. Government contractor and has the necessary English language skills to be fully capable of understanding his obligation to disclose his DWI arrests in response to the questions in Sections 24 and 22 of his SCA. It is not credible, in light of all the evidence, when viewed as a whole, that Applicant's omission of the only derogatory information in his history was a careless mistake. Applicant knowingly and intentionally provided false information in his 2016 SCA.

The following mitigating conditions are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy,

unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

None of the above mitigating conditions apply. The report summarizing Applicant's PSI indicates that he failed to make prompt, good-faith efforts to correct his omissions in his June 2016 SCA about his DWI arrests and criminal convictions before being confronted about this history. (Item 7 at 8-9.) His omissions were hardly minor, and they cast serious doubt on his reliability, trustworthiness and good judgment. Although Applicant acknowledged his omissions in his SOR Answer, he was not candid when he wrote that the omissions were the result of carelessness. Moreover, there is no evidence that he obtained any counseling to change his dishonest behavior or taken any other steps to support a conclusion that his behavior is unlikely to recur in the future.

The security clearance investigation is not a forum for an applicant to intentionally omit potentially derogatory information. The Federal Government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions, based on complete and accurate information, about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the government's industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).

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 E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some of the factors in AG ¶ 2(d) were addressed above, but other factors warrant additional comment. I have considered Applicant's age at the time of his arrests. He was a mature, educated man, who knew better than to drink and drive and certainly understood the legal risks and consequences of doing so after his first DWI arrest. Applicant's misconduct was not only criminal in nature, it was serious in that he endangered the safety and lives of himself and others. The frequency and recency of his misconduct is particularly troublesome.

[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 has provided some documentary evidence on tangential issues, such as his work appraisals, his DD 214 reflecting his honorable discharge from the U.S. Army in 1979, his completion of a court-ordered alcohol safety program in January 2016, and his credit report reflecting a high credit score and his financial responsibility. I have considered this whole-person evidence as potentially mitigating, however, Applicant presented no evidence that he participated in an alcohol-treatment program or evidence to corroborate his relatively brief, recent period of sobriety. Applicant's false denial in his PSI of his third arrest under an undisclosed alias significantly undercuts the mitigation value of his whole-person evidence. His subsequent reversal of that denial in his response to the SOR does not minimize the security significance under the whole-person concept of those false responses during his background interview. His intentional failure to disclose his arrests in his most recent SCA also raises serious security concerns about his integrity and reliability. Applicant has not carried his burden of persuasion to mitigate the Government's security concerns under the whole-person concept. Directive ¶ E3.1.15.

After weighing the disqualifying and mitigating conditions under Guidelines G and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his past actions.

Formal Findings

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

Paragraph 1. Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge