KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant was arrested and charged with alcohol-related offenses (DUI) in 1983, 1988, 1995, 1997, and 2004. As a result of the 2004 DUI, he remains on probation until April 2008. He has a well-established history of treatment for his alcohol problem followed by relapse. In addition, he deliberately failed to disclose his 1983, 1988, and 1995 DUIs when he completed a security-clearance application in December 2004. Clearance is denied.

CASENO: 06-16475.h1

DATE: 05/30/2007

DATE: May 30, 2007

In re:	)	
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SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT
Jennifer I. Goldstein, Esq., Department Counsel

FOR APPLICANT
C. Michael McLean, Esq.

SYNOPSIS

Applicant was arrested and charged with alcohol-related offenses (DUI) in 1983, 1988, 1995, 1997, and 2004. As a result of the 2004 DUI, he remains on probation until April 2008. He has a well-established history of treatment for his alcohol problem followed by relapse. In addition, he deliberately failed to disclose his 1983, 1988, and 1995 DUIs when he completed a security-clearance application in December 2004. Clearance is denied.

STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on December 8, 2006. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges security concerns under Guideline G for alcohol consumption and Guideline E for personal conduct (falsification). Applicant timely replied to the SOR and requested a hearing.

In addition to the Directive, this case is brought under the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive and Appendix 8 to DoD Regulation 5200.2-R, and they apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.[2] Both the Directive and the Regulation are pending formal amendment. The Revised Guidelines apply to this case because the SOR is dated December 8, 2006. The applicability of the Revised Guidelines was made a matter of record at the start of the hearing (R. 5).

The case was assigned to me February 5, 2007. A notice of hearing was issued scheduling the hearing for February 27, 2007. Before the hearing was convened, Applicant, by counsel, requested a continuance of the scheduled hearing and that request was granted. With the agreement of counsel, the hearing was rescheduled for April 11, 2007. On March 15, 2007, a notice of hearing was issued for the agreed upon date. The hearing took place as scheduled. DOHA received the hearing transcript April 19, 2007.

FINDINGS OF FACT

[1] Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

[2] *See* Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

Applicant admits the five driving under the influence (DUI) offenses, he admits attending outpatient treatment during 2004–2005 and having a diagnosis of alcohol dependence, he denies attending inpatient treatment at a certain facility during 1995–1996, and he denies the allegation that he provided a deliberately false answer in response to a question about his alcohol-related offenses on a security-clearance application signed by him in December 2004. His admissions are incorporated herein. I make the following findings of fact set forth below in numbered paragraphs.

1. Applicant is a 43-year-old computer scientist for a company engaged in federal contracting. He married in 1998. His wife works as a retail manager. He has two stepchildren, a 21-year-old college student and a 17-year-old high school student. He served as a soldier on active duty in the Army during 1985–1987, and then served in the reserves for four years until 1991, when he was honorably discharged.

2. From April 1988 to March 2001, Applicant was employed by a large metals company. He lost that job when the company went out of business, and he was unemployed from March 2001 to January 2004. During this period of unemployment, he went to college on a state-sponsored retraining program for individuals who lost jobs when the metals company went out of business. In August 2003, he was awarded a bachelor's degree in business administration/management information systems. In January 2004, he worked as a research assistant at a local college. He was unemployed again from May 2004 until starting his current job in August 2004. The company develops software for the U.S. Army, and Applicant works as a quality assurance test manager. Also, he serves as the office manager and lead technical support manager.

3. Applicant has a history of consuming alcohol, at times to excess or to the point of intoxication. He started drinking alcohol at about the age of 18 and his drinking increased steadily over time, although there were periods of abstinence. In the more recent years when he was drinking, he would drink four to five nights per week and would drink to the point of intoxication two or three times per week (R. 76). His history of alcohol consumption includes being late to work, blackouts, and drinking in the morning (R. 77, 80, 81). His drinking has resulted in five alcohol-related incidents involving law enforcement, and each incident is discussed below.

4. In 1983, Applicant was charged with his first DUI. He was found guilty of the DUI offense, and his sentence included serving one day in jail and a fine of $355.

5. In 1988, he was charged with his second DUI. As a result, he received deferred prosecution on the DUI charge.

6. In 1995, he was charged with his third DUI. The matter was disposed of in 1996 when he received deferred prosecution on the DUI charge. About two years later in 1998, the DUI charge was dismissed.

7. In 1997, he was charged with his fourth DUI in a neighboring state. The matter was disposed of in 1998 when he was found guilty of the DUI charge. He was sentenced to 30 days in jail (28 days suspended), a fine of about $779, and was placed on probation for one year.

8. On January 19, 2004, he was charged with his fifth DUI. He pleaded guilty to the DUI charge in March 2004. The following month in April, he was found guilty and sentenced to 365 days of

imprisonment (355 days suspended) and a fine of about $1,335. He was placed on supervised probation for four years until April 2008, and placed on the DUI ignition interlock program for 12 months. He was required to have an alcohol assessment, and he was ordered not to consume nor possess alcohol during probation.

9. In conjunction with his current employment, Applicant completed and signed a security-clearance application in December 2004 (Exhibit 1). In signing the application, he certified that his statements were true, complete, and correct to the best of his knowledge and were made in good faith. Also, he acknowledged that a knowing and willful false statement could be punished under federal law. In response to Question 24[3] about alcohol-related offenses, Applicant responded in the affirmative and disclosed the 2004 DUI and the 1997 DUI. He did not disclose the other three DUIs. In his hearing testimony, Applicant maintained that he did not intentionally falsify his application, and that his omission of the three DUIs from 1983, 1988, and 1995 was due to a faulty memory (R. 35–36, 47–48).

10. Applicant has received treatment for his alcohol use on more than one occasion. The first occasion was after the 1988 DUI (R. 70–73). During this time he received a diagnosis of alcohol dependence. The treatment started as an intensive outpatient treatment program, but he had a relapse and then entered the inpatient treatment program for about 28 days. Thereafter, he was sober for about two years until he resumed drinking in about 1990. The second occasion was after the 1995 DUI. It is alleged that Applicant attended a certain inpatient treatment program, was diagnosed as alcohol dependent, and discontinued treatment before completing the program (SOR ¶ 1.h and Exhibit 5). Applicant explained that he contacted the treatment facility named in the SOR and asked them to initiate the paperwork, but he continued to shop around. He found another treatment program and completed it instead (R. 45–47 and Exhibit H).[4] The third occasion was after the 1997 DUI. He attended an outpatient program in 1998 and completed it in August 1998 (Exhibit G).

11. The fourth and most recent occasion was after the 2004 DUI when he participated in a one-year program of intensive outpatient treatment (Exhibit 5). During this time he received a diagnosis of alcohol dependence. The program consisted of group sessions focused on education, processing, and monitoring. Applicant was an active participant in the sessions. He completed the program in November 2005 (Exhibits A and B), and he received a good prognosis if he continued to seek assistance through Alcoholics Anonymous (AA) or Narcotics Anonymous (NA).

12. Applicant has abstained from alcohol since his arrest in January 2004. His wife is essentially a nondrinker and they do not have alcohol in their home. After completing treatment in November 2005, Applicant did not attend AA until approximately February 2007, when be began attending at his attorney's suggestion. Although initially motivated to obtain a security clearance, he has found AA very helpful by working the steps and having a sponsor (R. 78). It has helped alleviate his craving for alcohol. He now regularly attends AA (Exhibit C), he is familiar with the 12-step program, and he is working on the first step. He admits that he has a problem with alcohol that he cannot solve by himself. Unlike the past, he no longer associates with the friends he used to drink beer with to avoid the slippery situations that led him to relapse. Instead of drinking beer, he now

[3] "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"

[4] On this basis, I will enter a favorable finding for Applicant on SOR ¶ 1.h.

spends his free time attending AA, playing volleyball twice a week, working on the computer, doing yard work and other jobs around the house. He acknowledges that his decisions to drink and drive were foolish and he offered no excuses (R. 87). After the 2004 DUI, he was able to obtain an occupational driver's license that allowed him to commute to his job. In October 2006, he obtained a regular driver's license with an expiration date of April 2011.

13. Applicant is a highly regarded and respected employee by people who work with him (Exhibits D, E, and F). None of these individuals have seen anything that suggests Applicant is currently drinking alcohol.

POLICIES

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[5] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[6] There is no presumption in favor of granting or continuing access to classified information.[7] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[8] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[9] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[10]

[5] Executive Order 10865, § 7.

[6] ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

[7] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[8] Directive, Enclosure 3, ¶ E3.1.14.

[9] Directive, Enclosure 3, ¶ E3.1.15.

[10] Directive, Enclosure 3, ¶ E3.1.15.

No one has a right to a security clearance.[11] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[12] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. The Alcohol Consumption Security Concern

Under Guideline G, excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses. It can raise questions about an individual's reliability and trustworthiness.

Here, based on the record evidence as a whole, a security concern is raised by Applicant's five DUIs and his history of alcohol use and treatment or counseling for the same. First, his five DUIs qualify as alcohol-related incidents away from work within the meaning of the guideline. Second, showing up late for work due to drinking the previous night (during his previous employment) qualifies as alcohol-related incidents at work. Third, his history of alcohol consumption qualifies as habitual or binge drinking to the point of impaired judgment. Fourth, his repeated diagnosis of alcohol dependence is also a concern under the guideline. And fifth, his well-established history of treatment followed by a return to drinking qualifies as a relapse after a diagnosis of alcohol dependence and completion of an alcohol rehabilitation program. Taken together, these matters raise a serious concern about Applicant's suitability for access to classified information.

I reviewed the MCs under the guideline and conclude he receives some credit in mitigation. Each MC is briefly summarized and discussed below.

The first MC—so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur—does not apply. The record evidence shows a pattern of behavior resulting in adverse consequences, and the most recent was the 2004 DUI, for which he is serving probation until April 2008. This pattern is not mitigated by passage of time without recurrence, infrequency, or as an isolated incident.

The second MC—the individual acknowledges his alcoholism, provides evidence of actions taken, and has established a pattern of abstinence—applies. Applicant admits that he has a problem with alcohol and presented evidence that he is now working to overcome his problem by abstaining from alcohol (Exhibits 5, A–F). He resumed attendance at AA in February 2007, has a sponsor, is working the 12-step program, and is benefitting from it. He has abstained from alcohol since January

[11] *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"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

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

2004, after his fifth DUI arrest. Given these circumstances, he deserves credit in mitigation for his efforts.

The third MC—the individual is a current employee who is participating in a counseling or treatment program and has no history of previous treatment or relapse—does not apply. Applicant's well-established history of treatment followed by a return to drinking militates against applying this MC.

The fourth MC—the three-part reform and rehabilitation condition—applies. First, Applicant successfully completed his last course of treatment in November 2005 (Exhibits A and B). Second, he has demonstrated a pattern of abstinence by not drinking since January 2004 and his attendance at AA since February 2007. And third, he received a good prognosis when he completed the treatment program in November 2005 (Exhibit 5 at 1, 4). The credit is limited, however, given that his attendance at AA is only a few months old, his good prognosis is not current, and his pattern of abstinence has likely been influenced by his court-ordered probation that requires him to refrain from drinking and possessing alcohol.

Weighing the disqualifying and mitigating information under the whole-person concept, the main issue here can be framed as follows: Does Applicant's track record of abstinence resolve the concern that he will not relapse or backslide, as he has on previous occasions? Clearly, Applicant has made good progress in addressing his alcohol problem, and he should be proud of his efforts. His abstinence since January 2004 and his recent participation in AA are indicators of success. He is also living in an environment that supports his sobriety. But given his lengthy history of drunk driving, his well-established history of treatment followed by relapse, and his status as a probationer until April 2008, it is too soon to make a reliable determination about the potential for recurrence of similar conduct. What is needed here is a clear and established pattern of abstinence once he is no longer under the court's supervision serving a sentence of probation. That would be persuasive and convincing evidence that he is genuinely committed to abstinence. Accordingly, Guideline G is decided against Applicant.

2. The Personal Conduct Security Concern

Personal conduct under Guideline E addresses issues of questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In this regard, the deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

At issue here is the truthfulness of Applicant's answer to Question 24 in his December 2004 security-clearance application. Applicant contends he did not list three of his five DUI offenses because he relied on a faulty memory when he completed the application. His explanation for not disclosing the DUIs from 1983, 1988, and 1995 is not credible. It may be difficult to remember the specific dates and details of his lengthy history of drunk driving, but given his history he had to know that he had more than two DUIs. Although forgetting one of several DUIs may be an honest mistake,

forgetting 60% of his drunk driving record is too much of a stretch. Accordingly, I conclude Applicant deliberately omitted or falsified material facts when he answered Question 24 by understating his history of alcohol-related offenses. In other words, his answer to Question 24 was at best a half-truth—it was not a full, frank, and truthful answer.

I reviewed the mitigating conditions under the guideline and conclude none apply. Making false statements to the federal government during the security-clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated. Accordingly, Guideline E is decided against Applicant.

In conclusion, after weighing the favorable and unfavorable evidence, I conclude that Applicant has failed to rebut, explain, extenuate, or mitigate the security concerns. Likewise, he did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, I also considered Applicant's case under the whole-person concept, and my whole-person analysis does not support approval of a clearance for Applicant.

FORMAL FINDINGS

Here are my conclusions for each allegation in the SOR:

SOR ¶ 1–Guideline G:	Against Applicant
Subparagraphs a–g:	Against Applicant
Subparagraph h:	For Applicant
SOR ¶ 2–Guideline E:	Against Applicant
Subparagraph a:	Against Applicant

DECISION

In light of all the facts and circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard
Administrative Judge