KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant has a history of excessive consumption of alcohol, which includes four alcohol-related incidents when he was arrested for DUI in 1971, 1984, 2000, and 2005. During the 2005 incident, his level of intoxication was tested twice with results of .226 and .243, although he disputes the validity of those results. The 2005 incident concluded when the court dismissed the charge because the arresting officer did not appear to testify. But the state administratively revoked his driver's license for two years until March 28, 2008. Applicant has abstained from alcohol in the past, but he is currently consuming alcohol at a moderate to low level. Applicant did not present sufficient evidence to explain, extenuate, or mitigate the alcohol consumption security concern. Eligibility for a security clearance is denied.

CASENO: 06-18998.h1

DATE: 06/21/2007

DATE: June 21, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 06-18998
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD

APPEARANCES

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

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant has a history of excessive consumption of alcohol, which includes four alcohol-related incidents when he was arrested for DUI in 1971, 1984, 2000, and 2005. During the 2005 incident, his level of intoxication was tested twice with results of .226 and .243, although he disputes the validity of those results. The 2005 incident concluded when the court dismissed the charge because the arresting officer did not appear to testify. But the state administratively revoked his driver's license for two years until March 28, 2008. Applicant has abstained from alcohol in the past, but he is currently consuming alcohol at a moderate to low level. Applicant did not present sufficient evidence to explain, extenuate, or mitigate the alcohol consumption security concern. Eligibility for a security 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 November 17, 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 his written response to the SOR, Applicant admitted the six allegations under Guideline G, but he denied the two falsification allegations under Guideline E.

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 November 17, 2006, which is after the effective date. The applicability of the Revised Guidelines was made a matter of record at the start of the hearing (R. 12–15).

The case was assigned to me on February 21, 2007. A notice of hearing was issued scheduling the hearing for April 11, 2007. The hearing took place as scheduled. DOHA received the hearing transcript on April 19, 2007.

---

[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).

The record was kept open until May 31, 2007, to allow Applicant an opportunity to submit additional documentary evidence. Applicant made a timely submission, and those matters were forwarded to me by department counsel who voiced no objections to the post-hearing exhibits. Those matters are described and admitted as follows:

- Exhibit E–a two-page cover letter from Applicant with two enclosures. This first enclosure is a letter summarizing his participation in an alcohol-treatment program during 2000–2002. The second enclosure is an order of revocation informing Applicant that the court sustained the department of licensing action revoking his driver's license for two years until March 28, 2008.
- Exhibit F–the court order dismissing the 2005 DUI charge.

FINDINGS OF FACT

Based on the record evidence as a whole, I find that the following facts are true:

1. Applicant is a 59-year-old senior engineer seeking to retain a security clearance. His job involves providing engineering and management support for submarine overhauls at a Naval shipyard. He was married in 1981, and his divorce was finalized in 2005. He is the father of four children, ages 25, 23, 21, and 19.

2. His employment history includes more than 20 years of honorable military service in the U.S. Navy. He was commissioned an officer in 1969, and he retired as a commander (pay grade 0-5) in 1991. He served onboard submarines during his first ten years of service. He then converted to an engineering duty officer, and he was sent to the Navy's postgraduate school where he earned a master's degree in electronic engineering. He then served in a series of assignments, including acquisition and submarine repair. He held a security clearance at the secret and top-secret levels. Since retiring from the active military service, he has worked as a contractor employee supporting the Navy in maintenance and modernization of submarines. Applicant is a highly regarded, respected, and trusted employee by people who work with him (Exhibits B, C, and D).

3. Applicant has a history of consuming alcohol, at times to excess or to the point of intoxication. He started drinking alcohol as a young man, and his drinking increased while in the Navy. The high point was probably in 2000, when he was arrested and charged with his third offense of driving under the influence of alcohol (DUI). His history of alcohol consumption includes two blackouts, and he admits that his drinking was one of the causes of his divorce (R. 66, 56–57). His drinking has resulted in four alcohol-related incidents involving law enforcement.

4. In 1971, Applicant was charged with DUI. He pleaded guilty and paid a $100 fine.

5. In 1984, he was charged with DUI (Exhibit 2). Initially, he pleaded not guilty, but later changed his plea to guilty. The court's sentence included three years of probation, about $860 in fines, fees, and court costs, and his driver's license was restricted for 90 days. After this incident was resolved, Applicant abstained from alcohol for about two and a-half years.

6. For his first job as a contractor employee, Applicant completed a security-clearance application in May 1991, a few months after his retirement from the Navy (Exhibit 3). He disclosed his 1971 and 1984 DUI offenses in response to the relevant questions.

7. In 2000, he was charged with DUI. He was arrested on a Saturday morning at about 11:00 a.m. after binge drinking in reaction to a situation with his spouse (R. 76–77). He petitioned for and was granted a deferred prosecution under certain conditions. The court ordered him to pay an $875 fine, make restitution of $93, undergo alcohol assessment and treatment, submit to an ignition interlock for two years, and serve probation for five years.

8. As required by the terms of the deferred prosecution, Applicant received outpatient treatment at a chemical dependency center (Exhibit E at enclosure 1). During 2000–2002, he completed the two-year program at the center successfully. He was diagnosed as alcohol dependent, although there is no evidence about who made the diagnosis. According to a letter from the center, Applicant's attendance was almost perfect, he was a role model for other clients, and he was in compliance with the entire treatment program.

9. In September 2005, Applicant completed and signed a security-clearance application for a periodic reinvestigation. When he signed 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 23d[3] about his police record, Applicant responded in the affirmative and disclosed the 2000 DUI offense. He did not disclose the 1971 and the 1984 DUI offenses. In addition, he disclosed his alcohol-related treatment during 2000–2002 in response to another question. In response to Question 14/15 about his relatives and associates, he listed his mother, father, and sister as required, but he did not list any of his children, which was also required.

10. In October 2005, the court dismissed the DUI charge against Applicant based on completing the deferred prosecution program. About two months later in December, Applicant was arrested for and charged with DUI. According to Applicant, he had consumed one 16-ounce beer with a meal, and he was stopped by a police officer within a few minutes after leaving the restaurant while driving home (R. 79–80). He was taken to a police station and his level of intoxication was tested twice by using a Breathalyzer machine. The results were .226 and .243, although Applicant disputes the validity of the results. Likewise, he does not believe he was intoxicated. He retained legal counsel who sought to suppress evidence (Exhibit F). At the motions hearing in July 2006, the police officer, who was now employed by another police agency in a distant state, did not appear. The court declined to exercise its discretionary authority to obtain the presence of the police officer. Instead, the court dismissed the DUI charge without prejudice.

11. Although his criminal case was resolved favorably, the state took administrative action against Applicant (Exhibit E at enclosure 2). On March 28, 2006, the state department of licensing revoked his driver's license for two years. With assistance of counsel, Applicant appealed the revocation alleging numerous errors (Exhibit 7 at 8–11). In May 2007, the court heard Applicant's appeal and sustained the two-year revocation for his 2nd Administrative Per Se incident. He is eligible to have his driver's license reinstated on March 28, 2008. He is now eligible for an occupational driver's license (Exhibit A), but has elected not to apply for it.

12. In November 2006, Applicant responded to interrogatories from the department (Exhibit 7). In response to questions about alcohol, he indicated that he was currently drinking alcohol (beer and

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

wine) in moderation. He estimated the frequency as biweekly and the amount as a combination of two beers or two glasses of wine or one of each in the evening. He denied drinking to the point of intoxication. Also, he was asked why he omitted his 1984 DUI arrest in response to Question 23d of his security-clearance application. He explained it was an oversight on his part, because he failed to read the question completely thinking that the scope of the question was limited to 15 years. He was not asked why he omitted his 1971 DUI arrest. Nor was he asked why he did not list his children in response to Question 14/15.

13. Applicant does not believe he has a problem with alcohol (R. 65–66). He continues to drink beer and wine because he enjoys the taste. He has reduced his level of consumption since responding to the interrogatories in November 2006 (R. 109–110). He probably drinks a beer or a glass of wine about once a week (R. 58–59). He currently attends Alcoholics Anonymous (AA) periodically, although he is not working the 12-step program and he does not have a sponsor. He stated that he learned two lessons from attending the alcohol-treatment program (R. 108). The first lesson was that he could drink and get away with it, which he did not want to do. The second lesson was that although complete abstinence was advocated, in some borderline cases it was okay to drink alcohol so long as you paid attention to what you were doing.

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.[4] 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.[5] There is no presumption in favor of granting or continuing access to classified information.[6] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[7] An applicant is responsible for presenting evidence to refute, explain, extenuate, or

[4] Executive Order 10865, § 7.

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

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

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

mitigate facts that have been admitted or proven.[8] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[9]

No one has a right to a security clearance.[10] 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."[11] 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 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 answers to two questions on his 2005 security-clearance application. Both allegations are resolved in his favor.

The first allegation is that he deliberately failed to disclose his 1971 and 1984 DUI offenses in response to Question 23d. Applicant contends this happened due to an honest mistake about the scope of the question. His explanation is accepted as credible. In reaching this conclusion, I rely, in part, on the government's evidence, the 1991 security-clearance application (Exhibit 3), wherein Applicant reported the 1971 and 1984 DUI offenses. His disclosure of those matters in 1991, coupled with his disclosure of his 2000 DUI arrest and his alcohol treatment in 2005, shows that he was making a good-faith effort to report his history of alcohol-related offenses and was not trying to conceal them.

The second falsification allegation accuses Applicant of deliberating concealing or omitting his children in response to Question 14/15 and makes reference to his divorce proceedings. Applicant maintains this was the result of an honest mistake he made when he completed the on-line

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

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

[10] *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.").

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

application, because he had no reason to hide the fact he had children. Indeed, he had previously disclosed his children on his 1991 security-clearance application. At bottom, this falsification allegation has no merit because the government has not established his deliberate intent to mislead or conceal this particular information. Accordingly, Guideline E is decided for Applicant.

2. The Alcohol Consumption Security Concern

The general concern under Guideline G is that 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 four DUI arrests and his history of alcohol use and treatment for the same. I reviewed the DCs under the guideline and conclude that three apply. Each DC is briefly summarized and discussed below.

The first DC—alcohol-related incidents away from work—applies. His four DUI arrests and the consequences he suffered as a result are ample evidence of alcohol-related incidents that raise a security concern.

The second DC—alcohol-related incidents at work—does not apply. There is no evidence that Applicant has reported to work or duty under the influence of alcohol. Indeed, the evidence suggests Applicant is a capable employee (Exhibits B, C, and D).

The third DC—habitual or binge consumption of alcohol—applies. Applicant admits that his 2000 DUI resulted from a binge-drinking episode in reaction to a situation with his ex-wife. Also, he also admits two episodes of blackouts, which is further evidence of heavy drinking to the point of intoxication.

The fourth DC—diagnosis by a duly qualified medical professional of alcohol abuse or alcohol dependence—does not apply. In response to SOR subparagraph 1.d, Applicant admits he was diagnosed as alcohol dependent during his treatment in 2000–2002. But there is no evidence showing the qualifications of the individual who made the diagnosis, and I cannot assume it was made by a duly qualified medical professional.

Likewise, the fifth DC—evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program—does not apply. Again, there is no evidence showing the qualifications of the individual who made the diagnosis.

The sixth DC—relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol-rehabilitation program—applies, but with diminished weight. In response to SOR subparagraph 1.d, he admits he was diagnosed as alcohol dependent during his treatment in 2000–2002. And the evidence shows he resumed drinking in 2005 after completing the deferred prosecution program in October 2005. His resumption of drinking in light of the dependence diagnosis is viewed as a relapse, but I give it less weight because there is no evidence showing the qualifications of the individual who made the diagnosis.

The seventh DC—failure to follow a court order—does not apply. There is no evidence showing Applicant violated a court order regarding alcohol education, evaluation, treatment, or abstinence.

The three applicable DC raise a serious concern about Applicant's suitability for access to classified information. Taken together, they show questionable judgment, and they raise questions about his reliability and trustworthiness. In particular, his well-established record of drinking-and-driving suggests that he believes the rules of the road do not apply to him.

Turning to the evidence in mitigation, I reviewed the MCs under the guideline and conclude none apply. 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 his fourth DUI arrest in 2005, a few months after completing the deferred prosecution program. And he is still suffering the consequences from that arrest as shown by the revocation of his driver's license. 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—does not apply. Despite his history of alcohol consumption and the problems it has caused him, he believes he does not have an alcohol problem (R. 65–66). Given that statement, the MC cannot be applied in his favor.

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 history of treatment in 2000–2002 followed by a return to drinking in 2005 militates against applying this MC.

The fourth MC—the three-part reform and rehabilitation condition—does not apply because Applicant fails the second and third parts of the MC. He has not demonstrated a pattern of abstinence as shown by his return to drinking in 2005, which continues to date. And he has not received a favorable prognosis from a qualified individual.

3. Conclusion

I have also considered the record evidence in light of the whole-person concept and conclude the disqualifying evidence outweighs the mitigating evidence. I reach this conclusion based on his well-established history of drinking-and-driving resulting in four DUI arrests. In addition, his successful treatment during 2000–2002, followed by a return to drinking in 2005, followed by his fourth DUI arrest in 2005, speaks volumes about the likelihood that he will continue to put himself in a position where he is involved in alcohol-related incidents. It is apparent that he is not interested in abstinence. And the fact that the state has elected to revoke his driver's license also militates against eligibility for a security clearance. In other words, as the state is unwilling to entrust him with the privilege of a driver's license until March 2008, that suggests that the federal government should not entrust him with the privilege of access to classified information.

To sum up, it appears Applicant lacks insight into his use of alcohol and the problems it has caused him. His lack of insight is problematic, because it means he may once again make a foolish decision to drink-and-drive. Accordingly, Guideline G is decided against Applicant.

After weighing the favorable and unfavorable evidence, I conclude that Applicant has failed to explain, extenuate, or mitigate the alcohol considerations security concern. Likewise, he has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

Here are my conclusions for each allegation in the SOR:

SOR ¶ 1–Guideline G:	Against Applicant
Subparagraphs a–f:	Against Applicant
SOR ¶ 2–Guideline E:	For Applicant
Subparagraphs a–b:	For 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. Eligibility for a security clearance is denied.

Michael H. Leonard
Administrative Judge