KEYWORD: Alcohol; Criminal Conduct

DIGEST: Applicant is 35 years old and has worked as a tactical software engineer for a defense contractor since 1996. He was convicted of driving while intoxicated in 2002 and again in 2007. He was also convicted of reckless driving in 2000. He was arrested for assault in 2001, but the charges were dismissed when the victim failed to show at court. Applicant received approximately 19 moving traffic violations from August 2000 to December 2004. Applicant failed to mitigate the security concerns raised under Guideline G, alcohol consumption, and Guideline J, criminal conduct. Clearance is denied.

CASENO: 06-19163.h1

DATE: 05/31/2007

DATE: May 31, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 06-19163
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT
John B. Glendon, Esq., Department Counsel

FOR APPLICANT
David Price, Esq.

SYNOPSIS

Applicant is 35 years old and has worked as a tactical software engineer for a defense contractor since 1996. He was convicted of driving while intoxicated in 2002 and again in 2007. He was also convicted of reckless driving in 2000. He was arrested for assault in 2001, but the charges were dismissed when the victim failed to show at court. Applicant received approximately 19 moving traffic violations from August 2000 to December 2004. Applicant failed to mitigate the security concerns raised under Guideline G, alcohol consumption, and Guideline J, criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 28, 2006, under the applicable Executive Order[1] and Department of Defense Directive,[2] DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision–security concerns raised under Guideline G, (alcohol consumption) and Guideline J (criminal conduct) of the revised Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on February 10, 2007, and elected to have a hearing before an administrative judge. In his Answer, Applicant admitted all of the allegations under Guidelines G and J. The case was assigned to me on March 7, 2007. A notice of hearing was issued on March 23, 2007, scheduling the hearing for April 18, 2007.

I conducted the hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance. The Government offered four exhibits for admission in the record, marked as Government Exhibits (GE) GE 1-4. The exhibits were admitted into evidence without objections. Applicant testified on his own behalf, called one witness, and offered two exhibits for admission into the record. They were marked as Applicant's Exhibits AE A-B and were admitted into evidence without objections. Applicant requested the record remain open to allow additional documents to be submitted and until the disposition of pending charges against him were adjudicated on May 1, 2007. I granted the request and held the record open until May 4, 2007. Additional documents were timely received and marked as AE C-E. Department Counsel had no objections and they were admitted into the record. On May 3, 2007, Applicant requested another delay to have the record remain open until May 15, 2007, because his trial date was continued until May 15, 2007. Department Counsel did not object. I granted the request. On May 21, 2007, I received a letter from Applicant's Counsel with the results of his trial, which are included in the findings of fact. The letter and its attachments are marked as AE F. Department Counsel had no objections, but submitted a letter in response to AE F and it is marked as Hearing Exhibit I. DOHA received the hearing transcript (Tr.) on April 27, 2007.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 35 years old and has worked as a tactical software engineer for a defense contractor since December 1996. He is a college graduate with a degree in electrical engineering and

[1]Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) as amended and modified.

[2]Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

is pursing a master's in business administration. He estimated it would be completed in May 2007.[3] He is considered the resident expert in a specialized area in his field.[4] He was responsible for providing security education to employees of his company detailing their responsibilities in the area of security.[5] This included educating them on reporting adverse information and security violations among other things.[6] He was designated by his company a "security champion," which is an on-site advisor to employees regarding security questions and an extension of the security department.[7] He was awarded "security champion" of the year 2006.[8]

On November 5, 2000, Applicant was arrested and charged with reckless driving. He was found guilty and sentenced to deferred adjudication. He received six months supervised probation, community service and a fine. He was observed driving at a high rate of speed. He admitted he was driving in excess of 80 miles per hour (mph)(the speed limit was 65 mph). An officer attempting to catch him reported his speed in excess of 100 mph. Applicant disputes this, but does acknowledge that perhaps the officer had to drive that speed to catch him.[9] He denies and disputes he was tailgating cars, passing them and then cutting them off, as was reported. His explanation for his driving was that he had to go to the bathroom and did not like using public restrooms.[10]

In February 2001, Applicant was arrested and charged with assault. He and his girlfriend were at a local lounge with some friends. They began to argue over her being overly friendly with another man she previously had dated. They left the lounge and continued to argue. A security guard intervened to determine if there was a problem. Applicant stated: "I didn't directly make contact with him. I was trying to get to my door and he decided to file an assault charge."[11] Applicant was interviewed on March 29, 2006, and the report indicated that he stated that he told the security guard to move, and when he didn't, Applicant pushed him out of the way so he could get into his car and leave. Applicant disputes that he told the investigator that he pushed the security guard. He stated that he told the investigator: "that I was trying to get to my door and in effect, you know, did, you know, involuntarily or indirectly pushed him out of the way. I am not saying that I directly pushed him so that I could get to my door."[12] Applicant further explained that he used his body to try to get

[3]GE 1 at 10.

[4]Tr. 42-43.

[5]Tr. 28.

[6]*Id*.

[7]Tr. 29.

[8]*Id*.

[9]Tr. 69-70.

[10]Tr. 73-74.

[11]Tr. 78.

[12]Tr. 80-81.

to the car door.[13] Applicant was arrested and the case was dismissed when the victim failed to show for the hearing.

Applicant was arrested on October 12, 2002, for driving while intoxicated (DWI). He pled guilty to the charge. He served three days in jail and paid a fine. He was stopped for a traffic infraction by a police officer. He took a field sobriety test, failed and was arrested. When asked by Department Counsel if he had been drinking prior to the arrest he stated: "I might have had one beer or some. I don't recall, it's quite awhile. But nothing excessive at all."[14] Applicant refused to take a Breathalyzer because "I knew it was my right, so I did."[15] Applicant was represented by an attorney. His driver's license was suspended. He explained the reason he pled guilty to the offense was because it was simpler than going to trial. There would be no probation or attendance requirement at Alcoholics Anonymous and "it just seemed a lot easier."[16] He stated at his hearing that he did not understand the consequences of actually pleading guilty at this point.[17]

From August 2000 to December 2004, Applicant received approximately 19 moving traffic violations. In 14 of the cases he was found guilty and assessed a fine. Six of those cases involved fines greater than $150. Five of the 19 tickets charged were dismissed in court.

Applicant stated that his work involved transporting classified data from one site to another. Many times he was responsible for physically transporting the data by vehicle to a site sometimes as far as 120 miles away. Applicant stated:

> There was always a time constraint or somebody needed it, you know. ASAP and it, you know, trying to be safe and still get the data there. I mean, I was always just had the customer in mind and making sure that the data got there in a timely fashion. That was my main priority and it led to a lot of my success in being able to run those missions, you know, successfully and being able to deliver the data in a timely manner.[18]

Applicant further stated that some of the speeding tickets he received were when he was transporting data and trying to meet a deadline.

Regarding other speeding tickets, Applicant stated:

> Well, I made the decision to get my MBA and, you know, [Place A] is in the middle of nowhere, you know. So I was taking classes at [College B]. I started the program

[13] *Id.*

[14] Tr. 59.

[15] Tr. 62.

[16] Tr. 48-49.

[17] *Id.*

[18] Tr. 47.

> I think in 2001. And the postgraduate, the professors, I mean, still, you know, they had their attendance requirements. I was under difficult time constraints to make it to my classes based on where I was on the range.[19]

He elaborated further: "I'm not excusing it at all. I'm just saying I was trying to do–to meet all my obligations and, you know, to please everybody as far as, you know professors and being there on time and not miss class."[20] Some of the tickets were received when Applicant was attempting to get to class on time.

Applicant stated other tickets were received when he was required to debrief a mission and a quick assessment was needed. He was required to return to the site quickly, so he speeded and received a ticket.[21]

In about November 2005, Applicant was arrested and charged with DWI and resisting arrest. At a later date the judge ordered Applicant to comply with certain requirements as part of his release. Applicant failed to comply with the judge's order and was detained and confined. He was escorted from jail to his hearing by sheriff's deputies with permission from the criminal court judge. Applicant stated:

> Currently I'm taking a full schedule of graduate classes and I'm taking a Dale Carnegie class that runs for 12 weeks on Mondays. I mean these are all four hour classes roughly. So basically I have school on Monday, Tuesday, Wednesday and Saturday mornings. That leaves me pretty much Thursday and Friday to get a lot of my work done at the office where I can spend extra time to do that. But the demands on turning in homework and doing the studying have kind of–have been a hardship with all the other demands having to do with getting Antabuse in a timely manner. I did manage to get the Interlock on my car-I have the Interlock on my car right now. The Antabuse is just waiting the results of my blood work. And I'm also I have an itinerary or a schedule for the AA meetings which I still need to attend.[22]

Applicant was ordered on March 20, 2006, by the judge to complete the requirements of his release. He did not accomplish what was ordered. He stated: "I was trying to do the best and I believe my priorities, you know, were not–everything should have been second and I think everything the judge ordered should have come first. Otherwise, I wouldn't have found myself here at this."[23]

Regarding the circumstances of the November 2, 2005, DWI arrest Applicant testified that he was having dinner at his friends house. He acknowledged he did drink alcohol that night, stating he had one beer at 7:30 p.m. and another with dinner around 8:00 p.m. He left to return home

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[19]Tr. 47.

[20]*Id.*

[21]Tr. 48.

[22]Tr.52.

[23]Tr. 55.

approximately 11:00 p.m.[24] He stopped at a red light in the city and fell asleep. He stated: "[t]he next thing I remember from that point was being woken up by the EMS who arrived on the scene."[25] He stated he did not fall asleep due to alcohol consumption and he was not intoxicated. He stated that was going to be his defense at his upcoming trial.[26] Applicant admitted that while at the red light and during the time he was asleep the car was in gear and his foot was on the brake.[27] There were no sensors on the red light and it remained red for at least two minutes.[28] He stated he could not have been asleep for more than ten minutes and it could have been less, but he was certain it was not a half hour or an hour.[29] The police arrived and requested Applicant take a field sobriety test. He refused stating he had a bad knee.[30] He also refused to take a Breathalyzer or blood test. He stated he refused the Breathalyzer because he did not trust the instrument and he could not remember being asked to take a blood test.

Applicant refused to exit the car and was forcibly removed by police. He disputes that he refused. He stated:

> They didn't ask me to get out of the car. Had they asked me to get out of the car to arrest me. I would have obliged them and said okay, and you know, do you what you need to do. I don't know if there was confusion or misunderstanding, you know, in what they were asking me or what I was saying, but the next thing I knew was that I was on the ground . . . [31]

He was charged with both DWI and resisting arrest.

On May 15, 2007, Applicant's case was adjudicated. The documents provided to me from both his criminal defense attorney and his attorney for his security clearance states that Applicant pled guilty to the DWI charge and the resisting arrest charge was dismissed.[32] It also states that Applicant accepted responsibility for driving while intoxicated. This contradicts his sworn testimony given at his hearing. Presumably as part of his plea agreement, his DWI charge was reduced to a first time offense. He was placed on two years community supervision with the following conditions: (a) maintain a "deep lung interlock" ignition system in his vehicle; (b) screen for antabuse with a

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[24]Tr. 90.

[25]Tr. 91.

[26]Tr. 91.

[27]Tr. 92.

[28]Tr. 93.

[29]Tr. 121.

[30]Tr. 93.

[31]Tr. 96.

[32]AE F.

physician; (c) complete the DWI class; (d) 200 hours of community service; and (e) curfew from 11:00 p.m. to 6:00 a.m.[33]

Applicant signed his security clearance application (SF 86) on November 8, 2005, six days after he had been arrested for DWI and resisting arrest. In response to Question 23c that asked if he currently had any criminal charges pending against him, he responded "No." He testified that he failed to list his pending charges because he had been advised by his criminal defense attorney that there was a legal definition for the term "pending" and he did not have to list this offense.[34] He did not seek advice from a security expert, nor did he use his background and education in the security arena to answer the question. Applicant's testimony was not credible, lacked candor and was not believable. He also did not list any of his tickets that exceeded a fine of $150, as was required under Question 23f. I did not consider the omissions made by Applicant on his SCA for disqualifying purposes. However, I did consider this testimony along with all of his other testimony in making a credibility determination.[35] Based on all of his testimony and responses I find a pattern of evasiveness and dishonesty based on all of his testimony. Applicant lacked candor and was not credible in his testimony.

A statement provided by the security manager for Applicant's employer believes Applicant to be of excellent character, trustworthy, honest and extremely dedicated to his position and the mission.[36] He further stated he believed Applicant's integrity is beyond reproach.[37]

Applicant's coworker and girlfriend believes him to be honest, considerate and supportive. He is a great listener, a caring and loving person, and ambitious. He is considered an excellent worker. He has assisted the security team in preparing for their annual review and has educated employees on their security responsibilities. He has a good work ethic, energy and creativeness.[38]

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[33] *Id.*

[34] Tr. 101-103.

[35] Conduct not alleged in the SOR may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). Additionally, the Appeal Board has determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those security concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR. ISCR 05-01820 at 3 n.4 (App. Bd. Dec. 14, 2006) (citing ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003)).

[36] AE A.

[37] *Id.*

[38] AE B.

Another coworker who has known Applicant since 2001 considers him an impressive performer. He has been outstanding in a challenging role he has played in the engineering department. He is considered highly focused and sets the example for others.[39]

I considered Applicant's performance reviews, the ratings, and comments, along with school transcripts that were provided.[40]

POLICIES

"[N]o one has a 'right' to a security clearance."[41] 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 occupy a position . . . that will give that person access to such information."[42] The President 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."[43] An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."[44] "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[45] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[46] The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.[47] It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.[48]

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 2a(1)-(9) of the Directive to be considered in evaluating a person's eligibility to hold a security clearance.

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[39]AE C.

[40]AE D and E.

[41]*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[42]*Id.* at 527.

[43]Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

[44]ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

[45]*Id*.

[46]*Id*.; Directive, Enclosure 2, ¶ E2.2.2.

[47]Executive Order 10865 § 7.

[48]*See* Exec. Or. 10865 § 7.

Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Guidelines. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the revised adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline G-Alcohol Consumption is a security concern because excessive alcohol consumption leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Guideline J-Criminal Conduct is a security concern because 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.

Based on all of the evidence, Alcohol Consumption (AC DC) 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*) applies. Applicant has two convictions for driving while intoxicated. One occurred in 2002 and the most recent incident occurred in 2005, with the resulting conviction in May 2007.

I have considered all of the mitigating conditions and especially considered Alcohol Consumption Mitigating Condition (AC MC) 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*), and AC MC 23(b) (*The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)*). I find neither of these mitigating conditions apply. Applicant was convicted of DWI in 2002. He was again arrested in 2005 for DWI

and convicted in 2007. He was ordered by the criminal court judge, as a term of his release pending trial, to arrange for antabuse, have an interlock ignition system installed on his car and attend AA. He failed to comply with the court's order, his bond was revoked and he was confined. He denied at his hearing, regarding the DWI charge, that he was intoxicated, but later pled guilty to the charge. As part of his sentence he is required to screen for antabuse by a physician, maintain a deep lung interlock ignition system on his car and complete a DWI course. This sentence was awarded on May 15, 2007. Applicant's compliance with his sentence is ongoing. Therefore, I find 23(a) does not apply because Applicant is still serving his sentence regarding his DWI and it was not a one time occurrence. These circumstances raise security issues regarding his good judgment, reliability, and trustworthiness. No evidence was presented that Applicant has acknowledged issues of alcohol abuse nor has he taken any action to overcome it. Therefore, I find 23(b) does not apply.

Based on all of the evidence, Criminal Conduct Disqualifying Condition (CC DC) 31(a) (*a single serious crime or multiple lesser offenses*), CC DC 31(c) (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*), and CC DC 31(d) (*individual is currently on parole or probation*) apply. Applicant has two DWI convictions and a reckless driving conviction. He was also charged with 19 speeding violations and an assault charge that was later dismissed. Part of Applicant's sentence for his last DWI conviction is to be under community supervision for two years. I find this is equivalent to probation.

I have considered all of the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*), and CC MC 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*). As detailed above Applicant has a history and pattern of misconduct. Applicant has a pattern of violating laws and rules and not accepting responsibility for his actions. His personal priorities take precedent over traffic rules that protect the safety of those on the roads. It appears that it was more important to Applicant to advance his personal success than it was to obey the law. It also appears that it was more important to abide by his professor's attendance requirements to complete his degree than it was to obey the law. Applicant's criminal conduct reflects a pattern that raises a serious security concern regarding his good judgment, reliability and trustworthiness. Applicant's belief that he can separate his professional conduct from his personal conduct shows a serious gap in security awareness. Despite his extensive training he failed to understand the ramifications of his conduct. Applicant is currently serving the sentence for his latest DWI. He is under community supervision for two years and a curfew, among other requirements. I find 32(a) does not apply.

I also find there is no evidence at this juncture of successful rehabilitation. Applicant denied that he was intoxicated regarding his second DWI offense when testifying at his hearing and later admitted it when he pled guilty. I am not convinced that Applicant is remorseful for his conduct, but only for the consequences of it. I find 32(d) does not apply.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed,

the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person in evaluating the case. I considered Applicant's credibility, demeanor and responsiveness when testifying. Applicant is a very successful engineer who has been a valuable employee and asset to his company. He has outstanding performance reviews and has excelled in the programs he has been involved in. He is well thought of by his colleagues. Applicant has a pattern of rules violations, some involving alcohol. He repeatedly exercised poor judgment in violating the traffic laws. I find Applicant failed to mitigate the security concerns regarding Guideline G, alcohol consumption, and Guideline J, criminal conduct. Therefore, I am not persuaded by the totality of the evidence in this case that it is clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guidelines G and J are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2. Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

DECISION

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

Carol G. Ricciardello
Administrative Judge