DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 14-05414
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

03/31/2016

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline G (alcohol consumption). Clearance is denied.

Statement of the Case

On September 11, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline G. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program,* dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD adjudicators could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance. On October 1, 2015, Applicant answered the SOR and requested a hearing. The case was assigned to me on January 8, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on February 1, 2016, and the hearing was convened as scheduled on February 24, 2016.

At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 3. Applicant testified and offered Applicant's Exhibits (AE) A through E. All exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 3, 2016.

Findings of Fact

Applicant is a 55-year-old illustrator who has been working for a defense contractor since August 2014. He graduated from high school in 1978. He earned a bachelor's degree in 1993 and a master's degree in 2009. He is divorced and has no children. He is seeking a security clearance for the first time.[1]

The SOR alleged that Applicant was charged with and later pled guilty to driving under the influence of alcohol (DUI) in 1993 or 1994, in May 1994, and in May 1996 (SOR ¶¶ 1.a, 1.b, and 1.d); that he was charged with DUI and reckless driving in January 2001 and pled guilty to reckless driving (SOR ¶ 1.e); that he was charged with DUI in January 2008 and February 2011 and those charges were dismissed on both occasions (SOR ¶¶ 1.f and 1.g); and that he consumed alcohol to the point of intoxication about once a week (SOR ¶ 1.h). SOR ¶ 1.c alleged that he was convicted of careless driving in November 1995, but the allegation did not indicate that incident was alcohol related. In his Answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.g. Those admissions are incorporated as findings of fact. He denied the allegation in SOR 1.h. He indicated he previously consumed alcohol to the point of intoxication but has since curtailed that behavior.[2]

Applicant testified that he began consuming alcohol when he was 18 years old while working in a bar. At that time, he did not drink alcohol during the work week, but would do so on the weekends. He was married from about 1989 to 1993 while he was attending school, which he said was a very stressful time. His marriage did not survive that period. Although he was never diagnosed as an alcohol abuser or as alcohol dependent, he acknowledged that he abused alcohol and engaged in habitual consumption of alcohol in the 1990s. He speculated that stress contributed to his drinking.[3]

Applicant was charged with DUI in 1993 or 1994, in May 1994, and in May 1996. He was convicted of DUI on each of those occasions. He could not remember how much alcohol he drank before being arrested on those occasions, but speculated he may have consumed about four to six drinks. He was never sentenced to jail, but was directed to attend Alcohol and Drug Safety Action Programs (ADSAP) for each conviction. He could not recall the length of the courses, but thought they were about

[1] Tr. 6-7, 57-61; GE 1, 3.

[2] Applicant's Answer to the SOR.

[3] Tr. 28-30, 52-57, 66-67; GE 3.

three months. They consisted of lectures, videos, group discussions, and attendance at Alcoholics Anonymous meetings. He never attended any inpatient or outpatient alcohol treatment program.[4]

In November 1995, Applicant was charged with careless or reckless drinking and was found guilty of careless operation. Applicant claimed he did not consume alcohol prior to being stopped on that occasion. No evidence in the record reflected that this was an alcohol-related incident. I find in favor of Applicant on SOR ¶ 1.c.[5]

In January 2001, Applicant was involved in an automobile accident. No one was injured in the accident. He was charged with DUI and reckless driving. He testified that he refused a breathalyzer test on that occasion. He pled guilty to reckless driving and the DUI charge was dropped. In an Office of Personnel Management (OPM) interview, he acknowledged that he was intoxicated during this incident. He was directed to attend ADSAP classes.[6]

Applicant was charged with DUI in January 2008 and February 2011. On both occasions, he refused breathalyzer tests and indicated that he may have also refused to participate in field sobriety tests. He was arrested on both occasions and the charges were eventually dropped. His driver's license was suspended for short periods (less than a week) before reinstatement. He testified that he drank two drinks before the 2008 arrest and two or three drinks over a two-hour period before the 2011 arrest. He indicated that he does not submit to breathalyzer tests as a rule of thumb and would recommend to anyone that they refuse a breathalyzer because he believes their accuracy is questionable.[7]

In his November 2012 OPM interview, Applicant indicated that he drank to the point of intoxication about once a week during weekends; that his behavior, temperament, personality, interaction with other, and judgment were not affected by alcohol; and that he does not have a problem with alcohol, but acknowledged that he has not always used good judgment where alcohol was concerned. In the OPM

[4] Tr. 44-45, 50-52, 62-65, 67-68; GE 1-3. In the OPM interview, Applicant stated his DUI charge in 1993 or 1994 occurred in a different state than his DUI charge in May 1994. *See* GE 3.

[5] Tr. 44-50; GE 1-3.

[6] Tr. 44, 63-65, 89; GE 2, 3. GE 2 (an FBI rap sheet) indicated that the DUI charge resulted in a non-conviction. In his OPM interview, Applicant stated that he was given a breathalyzer test, but did not recall the results. He also stated that he was convicted of the DUI charge. *See* GE 3.

[7] Tr. 33-44, 65-66, 71-75; GE 1, 2. In his Electronic Questionnaire for Investigation Processing (e-QIP) and OPM interview, Applicant did not list a 2008 DUI arrest, but listed a 2007 DUI arrest. He was apparently confused about the date of the 2008 arrest. In the OPM interview, he stated that he consumed four or five beers before that arrest, but could not recall the specific amount. He also stated that he was not intoxicated. His 2011 arrest occurred almost immediately after he left a bar.

interview, he also stated that he drives after drinking alcohol, but is aware of how much he consumes before driving.[8]

At the hearing, Applicant testified that he has changed his lifestyle for health reasons. He now works out daily and keeps a chart of his workouts. He has lost about 30 pounds in the past couple of years. He testified that he feels better not using alcohol. He stated that he now drinks on very rare occasions and could not recall the last time he consumed alcohol, but indicated that it was a few months ago. He also stated that, when he drinks, he usually consumes about three to five 12-ounce vodka and soda drinks but has switched to drinking four or five glasses of wine in the past six months. He also noted that he soon would be celebrating his birthday and would not rule out drinking alcohol on that occasion. He indicated that the last time he was intoxicated was a few months ago, but also stated he has not driven a vehicle after consuming alcohol in years.[9]

Applicant has had a successful career as an illustrator. He served as the illustrator for popular motion pictures. Applicant's current vice president stated that his work performance has been exceptional and he has learned from his prior mistakes. The vice president noted that he has attended events at which Applicant refrained from consuming alcohol. He believed Applicant has mitigated the security concerns in the SOR.[10]

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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, *Safeguarding Classified Information Within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's

[8] GE 3.

[9] Tr. 26-28, 33, 52-53, 61, 67-71, 75-79; GE 3; AE D.

[10] AE A-C, D.

adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in reaching a decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern for alcohol consumption:

> 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 guideline notes several conditions that could raise security concerns under AG ¶ 22. Two are potentially applicable in this case:

> (a) alcohol-related incidents away from work, such as driving 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
>
> (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 has been has been charged with DUI six times between 1993 and 2011. He was convicted of DUI three times and once of reckless driving. He acknowledged that he engaged in the habitual consumption of alcohol in the past. AG ¶¶ 22(a) and 22(c) apply.

AG ¶ 23 sets forth four mitigating conditions:

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unique circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (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);
>
> (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and
>
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Although Applicant's last alcohol-related arrest occurred over five years ago, his alcohol problems continue to cast doubt on his current reliability, trustworthiness, and good judgment. He has a significant history of alcohol problems that did not occur under unusual circumstances. He has not received alcohol treatment. After being arrested six

times for DUI, Applicant continued to drink and drive until at least November 2012. He also indicated that back then he became intoxicated about once a week. At the hearing, he claimed that he had not consumed alcohol for months; that he had not consumed alcohol before driving in years; but also indicated that he last drank to the point of intoxication a few months before the hearing. He further acknowledged that he would likely continue to consume alcohol in the future and, when he drank, he usually consumed about three to five mixed drinks or four or five glasses of wine. Based on the evidence presented, I cannot find that his alcohol-related problems are unlikely to recur. None of the above mitigating conditions fully apply in this case.

Whole-Person Concept

Under the whole-person concept, the 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (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.

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.

My comments under Guideline G are incorporated in this whole-person analysis. Although Applicant is a valued employee and has not had an alcohol-related incident in the past five years, I cannot conclude that his alcohol problems are behind him for the reasons stated above. Overall, the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. Applicant failed to mitigate the security concerns under the alcohol consumption guideline.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline G:	Against Applicant
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Subparagraphs 1.d-1.h: Against Applicant

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Clearance is denied.

_____
James F. Duffy
Administrative Judge