DATE: December 21, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-19773

ECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Mark W. Good, Esq.

SYNOPSIS

Applicant is a 43-year-old employee of a defense contractor, seeking renewal of his security clearance. He has a record of two convictions for drunk driving. The first incident was in 1984 when he was about 22 years old. The second was in September 2002. Applicant drank alcoholic beverages until about 2:00 a.m., slept, got up early, ran errands, and became involved in a traffic accident at about noon. His blood-alcohol content was at or above .10% eleven hours after he stopped drinking. Applicant mitigated the security concerns arising from his first conviction, because it was not recent. Applicant failed to mitigate the security concerns arising from his second conviction, or the excessive alcohol consumption that resulted in the offense, because his claims of successful rehabilitation are not credible. 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 under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On June 15, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, Guideline J, Criminal Conduct, and Guideline G, Alcohol Consumption.

Applicant answered the SOR in writing on July 7, 2004. He elected to have a hearing before an administrative judge.

The case was assigned to me on August 11, 2004. With the concurrence of the parties, I conducted the hearing on September 17, 2004. The government introduced five exhibits. Applicant presented eight exhibits and the testimony of three witnesses. Department counsel called Applicant as a witness in rebuttal. The DOHA received the transcript (Tr.) on October 1, 2004.

FINDINGS OF FACT

Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, and 2.a of the SOR, but denied that the facts constituted disqualifying conditions as alleged in ¶¶ 1 and 2. Applicant's Answer to SOR, dated July 7, 2004. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a 43-year-old microwave radar antenna test technician, working for a defense contractor. Ex. 2 at 1, 2; Tr. at 48. He seeks renewal of his security clearance.

Applicant served in the U.S. Marine Corps between 1980 and 1984, and rose to the rank of Sergeant (E-5). Ex. 2 at 4. He held a security clearance successfully while in the Marine Corps. *Id.* at 8.

In July 1984, while still on active duty in the Marine Corps, Applicant was found guilty of driving drunk. Ex. 2 at 7; Ex. A at 1-2. He was driving home with other marines after a going-away party when he was arrested for driving under the influence of alcohol. Ex. A at 2. Applicant pled guilty to the offense. *Id.* The sentence of the court included a fine and suspension of his driver's license. *Id.* Applicant denied attending any alcohol abuse counseling at that time. *Id.*

Applicant was honorably discharged from the Marine Corps in 1984. *Id.* at 5. Immediately thereafter, he went to work for a defense contractor and retained his security clearance until he left that position in 1988. Ex. A at 5. Between 1988 and 1997, Applicant worked at various jobs and obtained an associate's degree in electronics from a local university. *Id.*

Applicant began working for his present employer in 1997. Ex. 2 at 2. He received a security clearance from the Department of Defense at that time. Ex. A at 2, 5; Ex. 2 at 8. He held the clearance without incident for about five years. Ex. A at 5; Ex. 2 at 8.

In July 2001, Applicant applied for a renewal of his clearance. Ex. 2. While that was pending, Applicant was arrested a second time for drunk driving.

On a Saturday evening in September, 2002, Applicant's brother came to Applicant's home to watch television, listen to music, and have a few drinks. Ex. A at 2. Applicant claimed that between about 9:00 p.m. and about 2:00 a.m., Applicant consumed about six mixed drinks. He stated he awoke early the next morning and at about 8:00 a.m. took his truck to an auto center to have the tires rotated. *Id.* While Applicant was driving home on the freeway, the engine stalled. *Id.* In an attempt to restart the engine while the truck was moving, Applicant turned off the ignition switch. That caused the steering wheel to lock. The truck swerved across the next lane of traffic and struck another vehicle.

A state highway patrol officer arrived at the scene of the accident. His observations led him to suspect Applicant was under the influence of alcohol. Applicant denied drinking alcohol that day, but admitted consuming an unknown quantity of alcohol the night before. Ex. 5 at 16. Applicant performed poorly on the field sobriety test. *Id.* At 12:40 p.m., a preliminary alcohol screening device indicated Applicant's blood-alcohol level was between .126% and .130%. Applicant consented to a blood test, and a blood sample was drawn at 1:35 p.m. *Id.* at 8. Applicant reports his blood-alcohol concentration at that time was .10%. Ex. A at 3.

State authorities charged Applicant with two misdemeanor offenses: driving under the influence of alcohol and driving with a blood-alcohol level of more than .08%. Ex. 5 at 4. Applicant pled no contest to the second charge, and the first was dropped. Ex. A at 3. The court sentenced Applicant to a $1,251.00 fine, three years probation, eight hours of community service, a 15-week alcohol awareness program, and a restricted driver's license for 90 days. *Id.*

Applicant paid the fine (Ex. A at 3), and completed the alcohol awareness program. Ex. 5 at 3. The program consisted of group therapy sessions with other DUI offenders. Ex. A at 4. He indicated that,

Because of my ability to cease using alcohol altogether, I learned from these sessions that I am not an alcoholic, nor do I have a chronic alcohol problem. I have modified my lifestyle and drinking habits so as to permanently prevent any re-occurrence of driving with any alcohol in my system. If I consume even a single drink, I do not drive, at all.

Ex. A at 5.

Applicant reported his arrest to the security officer for the defense contractor, who notified the Defense Industrial Security Clearance Office. Ex. 4; Ex. B. The employer's security officer interviewed Applicant and concluded the second DUI was an isolated incident, and that Applicant met the criteria to hold a security clearance. Ex. B.

Government security investigators questioned Applicant in August 2003. Ex. 3. Applicant stated he had about six mixed drinks the night before the incident, between about 9:00 p.m. and 2:00 a.m. He went on to compare his regular drinking habits before and after the incident in question.

Prior to the arrest, I would have one beer per night, an average of three or four days a week. I still continue to do this because I do not think that this is excessive. On every other weekend, I used to drink an average of six mixed drinks (alcohol being vodka or rum) while listening to music or watching TV. . . . Since the arrest, I have ceased doing this.

An expert witness testified on behalf of Applicant at the hearing. The expert was a psychiatrist who specialized in substance abuse recovery programs. Tr. at 32; Ex. F. The expert evaluated Applicant in August, 2004, and reviewed relevant documents. He opined that Applicant did not suffer from alcohol dependence or alcohol abuse as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM)-IV. Tr. at 36-37; Ex. G, H. The expert concluded Applicant did not meet the diagnostic criteria for alcohol dependence because he did not exhibit signs of alcohol tolerance or withdrawal. Ex. G at 7. He also concluded Applicant did not meet the diagnostic criteria for alcohol abuse because he had not experienced recurrent (more than one) substance-related legal, social, or occupational problems within a 12-month period. *Id.* at 7.

Cross-examination revealed that the expert met with Applicant for only one hour on one occasion, before rendering his diagnosis. Tr. at 38. The expert indicated that "binge drinking" is defined as more than five drinks on a single occasion. Tr. at 40.

Applicant did not testify as part of his presentation of evidence, but was called as a witness in rebuttal by the Department Counsel. Tr. at 47. Applicant testified that consuming six drinks on the night before his September 2002 DUI was a very infrequent occurrence. Tr. at 51. Department Counsel confronted him with his sworn statement to the security investigator (Ex. 3), quoted above, indicating that it was normal for him to have six drinks per night on weekends. Applicant testified he did not remember making that statement, but it must have been truthful. Tr. at 53.

During further questioning by Department Counsel, Applicant testified that he stopped drinking alcohol in the evenings during the work-week after his arrest for drunken driving in September 2002. Tr. at 55. Department Counsel confronted Applicant a second time with his sworn statement to security investigators (Ex. 3), quoted above, indicating that as of August 2003 he continued to drink alcohol in the evenings after work. Tr. at 56. Applicant indicated he was mistaken. *Id.* Upon further questioning by his counsel, Applicant testified that he may have stopped drinking in the evenings during the work-week after being notified of the hearing. Tr. at 58.

Applicant admitted that he drank about six mixed drinks the night before his second drunk driving incident. Tr. at 60. He denied feeling unusually intoxicated that night. Tr. at 61. Applicant admitted he used to drink an average of six drinks every other weekend while watching television at home. Tr. at 60.

The expert witness was recalled for further testimony. Tr. at 70. He considered the scenario where an individual drank alcoholic beverages between 9:00 p.m. and 2:00 a.m., got up about 8:00 a.m., ran some errands, got into a traffic accident at about noon, and at about 12:30 p.m. had a blood-alcohol concentration of about .12%. Tr. at 76. He indicated those facts suggested a high level of intoxication the prior evening. *Id.* The expert testified that if a person drank to that level of intoxication every other weekend, that would be consistent with alcohol abuse. Tr. at 78.

POLICIES

In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (August 4, 1995), the President provided that eligibility for access to classified information shall be granted only to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion,

and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive, ¶ E2.A10.1.1.

Guideline G, Alcohol Consumption: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. Directive, ¶ E2.A7.1.1.

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

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence 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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

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

Guideline J, Criminal Conduct

The Government's documentary matters and Applicant's admissions constitute substantial evidence of potentially disqualifying conditions under Guideline J of the Directive. Specifically, under ¶ E2.A10.1.2.1 of the Directive, an "admission of criminal conduct" is potentially disqualifying. Similarly, under ¶ E2.A10.1.2.1 of the Directive, "[a] single serious crime or multiple lesser offenses" could raise security concerns. In this case, Applicant admitted that he drove a vehicle while under the influence of alcohol in violation of state law on two occasions. This calls into question his judgment, reliability, and trustworthiness.

The Directive provides that these security concerns can be mitigated under certain circumstances. Under ¶ E2.A10.1.3.1,

it may be mitigating where "[t]he criminal behavior was not recent." Applicant's first drunk driving offense occurred in 1984, when he was about 22 years old. There is no evidence of any other criminal conduct for about 20 years after that date. In fact, the Department of Defense gave Applicant a security clearance in 1997. I find Applicant's drunk driving offense in 1984 is not recent, therefore this mitigating condition applies to the allegation in ¶ 1.b of the SOR.

Applicant's counsel maintains the second drunk driving offense in September 2002 is not recent. He cites ISCR Case No. 02-31457 (Jan. 14, 2004), in support of his position. Of course, opinions issued by administrative judges may be cited as persuasive authority, but they are not legally binding on other administrative judges. ISCR Case No. 98-0761, 1999 DOHA LEXIS 405 (December 27, 1999). Applicant's drunk driving offense and subsequent conviction were the basis for the present action. Applicant is still on probation for the offense under the sentence imposed on March 20, 2003. I find the drunk driving offense on September 2002 is recent, therefore this mitigating condition does not apply to the criminal conduct set out in ¶ 1.a of the SOR.

It may also be mitigating where "[t]he crime was an isolated offense." Directive, ¶ E2.A10.1.3.2. Applicant's counsel argues that, because of the separation in time, the two drunk driving offenses should be considered as "two isolated incidents." Tr. at 87. However, the mitigating effect of the passage of time is fairly embraced by the mitigating condition discussed above. The essence of this mitigating condition is, in substantial part, that the applicant has not previously committed another crime. Given Applicant's history of two convictions for drunk driving offenses, I cannot conclude the second offense was an isolated incident. I find this mitigating condition does not apply.

Under ¶ E2.A10.1.3.4 of the Directive, it is potentially mitigating where "[t]he person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur." Applicant's counsel argues Applicant's most recent drunk driving incident was not "voluntary." Tr. at 90. He reasons that, because Applicant only drank alcohol the night before and then went to sleep, he was not aware that he was still intoxicated the next day, therefore his conduct was not willful or intentional. *Id.* Certainly Applicant's intent or willfulness is a factor in considering the seriousness of the offense. However, "intentional" and "willful" are not synonymous with "voluntary" in this circumstance. Those who voluntarily drink alcohol to excess and then voluntarily drive a vehicle have committed the offense of drunk driving, regardless of whether the believed themselves to be intoxicated, or intended to drive while drunk. I find this aspect of the mitigating condition does not apply.

With regard to the second aspect of this potentially mitigating condition (i.e., "the factors leading to the violation are not likely to recur"), Applicant has not provided persuasive evidence this condition applies. Applicant maintains he has resolved any concerns about drunk driving in the future because he no longer drives after drinking any amount of alcohol. It is not clear whether he did so out of a desire to avoid future offenses, or because it was required as part of his two-year probation.

The substantial evidence indicates Applicant is or was an alcohol abuser. He admitted he normally drank about six mixed drinks every other weekend, a quantity the expert witness described as "binge drinking." Moreover, on the night before his second drunk driving incident, he stopped drinking at 2:00 a.m., and still had enough alcohol in his system 11 hours later to exceed .10% blood alcohol concentration on the blood test. The expert witness describe this as a significant level of impairment, but Appellant related that he could function. Nonetheless, even after his second drunk driving conviction and completion of the 15-week alcohol awareness program, Applicant believes he does not have a problem with alcohol and continues to drink, albeit at a reduced rate. Of course, the insidious effect of alcohol is that it affects a drinker's judgment-Applicant's denial that he has an alcohol problem makes him more vulnerable to a future lapse in judgment concerning his drinking.

In terms of the potentially mitigating condition at issue, it appears Applicant identified the "factor leading to the violation" as his driving after drinking alcohol. Applicant is managing a symptom rather than resolving his underlying alcohol problem. I find that the principal "factor" leading to Applicant's violations was his excessive drinking, and I am not convinced he has addressed that problem. I conclude this mitigating factor does not apply.

Under the Directive, ¶ E2.A10. 1.3.6, it may be mitigating where there is "clear evidence of successful rehabilitation." Applicant completed the 15-week alcohol awareness program. He concluded he did not have an alcohol problem, writing, "I learned from these sessions that I am not an alcoholic, nor do I have a chronic alcohol problem." Ex. A at 5.

For the reasons discussed above, I am not persuaded by Applicant's evidence that he has been successfully rehabilitated from his problems with alcohol. Most significantly, I am not convinced Applicant was candid about how much he had to drink the night before the second incident, the extent of his alcohol problem, or when he curtailed his drinking. These matters go to the very heart of his success in rehabilitation.

I considered all the circumstances in light of the "whole person" concept. With regard to the drunk driving incident in 1984, Applicant was a young marine at the time, participating in a farewell party with his companions. There is no evidence the incident resulted in personal injury or property damage. Also, he did not commit another offense for many years, and was awarded a security clearance in 1997. I find Applicant has mitigated the security concerns arising from his drunk driving in 1984.

With regard to Applicant's most recent drunk driving incident, a different result follows. Applicant was then a mature adult, responsible for his conduct. Because of his earlier difficulties, he had good reason to be careful about drinking and driving. His misconduct was voluntary, if not intentional, and resulted in a traffic accident. I am not persuaded Applicant has addressed his problem with alcohol, a prerequisite to successful rehabilitation. I conclude Applicant has not mitigated the security concerns arising from his recent drunk driving incident.

Guideline G, Alcohol Consumption

Under ¶ E2.A7.1.2.1 of the Directive, conditions that could raise security concerns include "[a]lcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use." As discussed above, Applicant admitted to two instances of drunk driving. Also, under ¶ E2.A7.1.2.5 of the Directive, "[h]abitual or binge consumption of alcohol to the point of impaired judgment" may be disqualifying. Applicant admitted that he had six drinks the evening before his second DUI offense, and the expert witness testified that "binge drinking," is defined as five or more drinks on one occasion. I conclude the substantial evidence raises security concerns under Guideline G, Alcohol Consumption.

Under the Directive, certain conditions may mitigate these security concerns. Paragraph E2.A7.1.3.1 provides that it might be mitigating where "[t]he alcohol-related incidents do not indicate a pattern." Applicant's counsel argues that two incidents of drunk driving separated by 20 years do not constitute a pattern. He cites ISCR Case No. 00-0339, 2001 DOHA LEXIS 56, (App. Bd. March 22, 2001), in support of his argument. In that case, the Appeal Board held that the administrative judge was not compelled to find that three alcohol-related offenses in 36 years constituted a pattern. I note the mitigating condition in question focuses on the "alcohol-related incidents." Considering the alcohol-related incidents in light of the 20-year separation, I conclude they do not indicate a pattern. I conclude this mitigating condition applies.

It may also be mitigating where "[t]he problem occurred a number of years ago and there is no indication of a recent problem." Directive, ¶ E2.A7.1.3.2. In this case, Applicant had an alcohol-related incident a number of years ago, but the second DUI, and the additional evidence of Applicant's habit of excessive drinking that resulted in the DUI, indicates a recent problem. I find this mitigating condition does not apply.

Paragraph E2.A7.1.3.3 of the Directive provides that it may be mitigating where there is evidence of "[p]ositive changes in behavior supportive of sobriety." Applicant's counsel argues that Applicant meets this criterion because, "He does not drink to excess anymore. He no longer drinks more than two to three drinks maximum on a single day and usually only occasionally on weekends. Finally, he never drives or operates a motor vehicle after drinking even a single beer." Tr. at 93. Applicant admitted he does not abstain from alcohol, but states that he now drinks only in moderate amounts, and never drinks before driving.

With regard to this important mitigating condition, the only substantive evidence whether Applicant has really made behavioral changes supportive of sobriety is Applicant's testimony. However, he was not completely credible. His various statements about how much he normally drank on weekends, and how much he drank the night before his second drunk driving arrest, are inconsistent. Moreover, during cross-examination he testified that he stopped drinking alcohol on week-nights after his second arrest in September 2002. Tr. at 55. When confronted by his statement from August 2003 admitting that he still drank on week-nights, Applicant stated he was "mistaken" because he "did not remember the exact specifics of the statement that I gave the agent." Tr. at 56. As a result, I am not persuaded Applicant

was entirely truthful about the "positive changes" he claimed to have made supportive of sobriety. Applicant has failed to persuade me that this mitigating condition applies.

I considered all the circumstances in light of the "whole person" concept, and balanced the potentially disqualifying and mitigating conditions. I conclude Applicant has failed to mitigate the security concerns arising from his alcohol consumption.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Paragraph 2, Guideline G: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

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

Michael J. Breslin

Administrative Judge