DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-02122
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Julie R. Edmunds, Esquire, Department Counsel
For Applicant: Robert Skipworth, Esquire

January 18, 2008

Decision

WESLEY, Roger C., Administrative Judge

Statement of the Case

On August 15, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on September 6, 2007, and requested a hearing. The case was assigned to me on October 18, 2007, and was scheduled for hearing on November 28, 2007. A hearing was held on November 28, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of eight exhibits; Applicant relied on two witnesses (including himself) and seven exhibits. The transcript (R.T.) was received on December 7, 2007.

Procedural and Evidentiary Rulings

Before the convening of the hearing, Department Counsel moved to amend the SOR. Specifically, Department Counsel asked to strike the reference in subparagraph 1.b to the incident involving Applicant's use of alcohol and marijuana and replace the reference with "You had been drinking alcoholic beverages prior to this incident." Additionally, Department Counsel requested the substitution of May for February in subparagraphs 1.d and 2.a(3), and approved striking altogether subparagraph 2.c. For good cause shown, the requested amendments were approved.

Summary of Pleadings

Under Guideline G, Applicant is alleged to have been (a) arrested, charged, or cited with five alcohol-related offenses between 1976 and May 2002. Those five offenses are as follows: (1) in October 1976 for Driving Under the Influence of Alcohol (DuI) and driving too fast for conditions (with injuries), for which he was convicted and sentenced to one year probation; (2) in September 1981 for assault upon a military policeman (a violation of Art. 128 of the UCMJ), resisting apprehension (a violation of Art. 95 of UCMJ), and domestic disturbance, which involved his use of alcohol and marijuana (since amended), and for which he received a written reprimand; (3) in February 1989 for DuI; (4) in February 1993 for DuI, speeding, improper lane usage, and safety belt violation, to which he *pleaded nolo contendere,* and was sentenced to 12 months of probation and fined $1,150.00; and (5) in May 2002 for DuI, for which he was convicted and sentenced to 180 days in jail and a fine of $500.00.

Additionally, under Guideline G, Applicant is alleged to have been (a) evaluated by a Mr. C (a licensed clinical social worker) in July 2003, who diagnosed him with alcohol dependence and saw him regularly for alcohol treatment group sessions between July 2003 and May 2004, and (b) diagnosed with alcohol dependence by a Dr. R in June 2007, who recommended discontinuance of alcohol, begin VA Healthcare System Substance Abuse Treatment Program (VASAT) treatment and attend Alcoholics Anonymous (AA) or similar program.

Under Guideline E, Applicant is alleged to have (a) falsified his security clearance application (e-qip) of February 2006 by listing only a May 2001 DuI offense and omitting his other DuI offenses and (b) falsified his security clearance application (SF-86) of April 1992 by listing only his 1989 DuI arrest and failing to disclose two other alcohol-related arrests covered by the questionnaire. He is also alleged to have been fired from a prior job for unethical conduct.

For his response to the SOR, Applicant admitted each of the allegations. He provided explanations of the events and circumstances associated with the alleged conduct and claimed to be working on his alcohol problem.

Findings of Fact

Applicant is a 50 year-old technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are

incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was introduced to alcohol in high school. Following his enlistment in the Army in 1974, he increased his consumption of alcohol (R.T., at 64). He generally drank two to three times a week, and on the occasions he drank, his consumption varied from a 12-pack or six-pack of beer per sitting (R.T., at 64). After 23 years of military service, he retired with an honorable discharge in 1997.

Over a period of 25 plus years Applicant was involved in a number of alcohol-related incidents. In October 1976, he was arrested in State one for DuI and driving too fast for conditions (with injuries). He was convicted of both of these offenses and sentenced to one year probation and fined $250.00 (*see* ex. F). Applicant had completed football practice and had consumed alcohol after practice (R.T., at 54). While speeding he was struck by a couple who were hurt in the accident. The MP who came to the scene smelled alcohol on Applicant and arrested him. Applicant claims he had only one eight ounce beer after the football game and was never administered a sobriety or breathalyzer test (R.T., at 54-57). Collateral estoppel principles preclude him, however, from factually challenging his court conviction for DuI in this security clearance proceeding.

Applicant was arrested in September 1981 in State two and charged with (1) assault upon a military policeman (a violation of Art. 128 of the UCMJ), (2) resisting apprehension (a violation of Art. 95 of the UCMJ), and (3) domestic disturbance. According to the arrest report, Applicant had been drinking prior to the incident (*see* ex. H). He received a written reprimand from his command that doesn't mention any of the specific charges or his use of alcohol as a contributing cause. Applicant challenges the arrest report's statements that he had been drinking, refused entry and resisted apprehension (R.T., at 58-60). He insists that he had just come from the gym and had not consumed alcohol. Without anymore information in the reprimand to corroborate Applicant's drinking prior to the incident, the report standing alone is insufficient to find alcohol to be a contributing factor to Applicant's actions in the incident. Inferences warrant, accordingly, that the 1981 domestic disturbance incident was not an alcohol-related one.

In February 1989, Applicant was arrested and charged with DuI while driving in State three. Applicant says he was en route to his training site and picked up a hitch-hiker along the way (R.T., at 60-61). He later became sick (initially stating he may have been poisoned) and turned the driving duties over to the hitch-hiker. He claims the hitch-hiker (not himself) was driving at the time his vehicle became inoperable (R.T., at 61, 65). When he returned to the vehicle following an unsuccessful attempt to secure a tow truck, he was transported by police to a local police station where he was charged with DuI and leaving the scene (R.T., at 61-65). He could not recall being administered a breathalyzer test and vaguely remembers paying a $300.00 fine at the station for leaving the scene of an accident (R.T., at 64, 82). Applicant then was permitted to return to his duty station where he was briefly hospitalized. He did not return to court on the appointed day of his trial to contest the charges; however, as a result of his failure to appear, he was tried in absentia and convicted of DuI (R.T., at 64-65). Collateral estoppel principles preclude Applicant from challenging the court's DuI conviction in this

proceeding. To date, he has not followed his attorney's advice to seek a reopening of the proceedings to obtain an expungement of the DuI. Inferences warrant that his charged DuI offense in 1989 is an alcohol-related offense.

Applicant was involved in another incident in May 1993. He was arrested in State one and charged with DuI, speeding, improper lane usage, and safety belt violation. At the scene, he was administered a breathalyzer test, and he assures he passed the test (R.T., at 67). But Applicant has been drinking earlier in the day at his brother's house before returning to his duty station (R.T., at 66-67). Having no idea why he was charged with DuI, he pled *nolo contendere* to the charges and was convicted of the lesser offense of reckless driving. On this conviction, the court sentenced him to 12 months of probation and fined him $1,150.00 (*see* ex. G). The commander's report makes no mention of alcohol and provides no reasons for his acceptance of a lesser plea. Without more evidence of alcohol involvement in this arrest, it may not be considered an alcohol-related offense.

Applicant's last arrest for an alcohol-related offense occurred in May 2002 in State four. Applicant had been drinking off and on during the day (more beer than usual) and was stopped by local police, who spotted him weaving in the roadway (R.T., at 68). Upon administering a breathalyzer and evaluating Applicant at the scene, police arrested him and charged him with DuI (*see* ex. E; R.T., at 68). As a result of his DuI conviction, the court sentenced him to 14 months of probation and fined him $500.00 plus court costs (R.T., at 86). He was instructed by the court to attend counseling.

Applicant is credited with attending group counseling between July 2003 and March 2004 (ex. 5), which was comprised of group sessions under the direction of a licensed social worker (Mr. C). During his counseling sessions, Mr. C emphasized the importance of sobriety and encouraged AA participation for all of the group's members. Applicant attended a number of these sessions with Mr. C, who diagnosed him as alcohol dependent (*see* exs. D, 5 and 6). However, Mr. C never shared his diagnosis with Applicant (R.T., at 88-90). Unaware that he had a drinking problem, let alone a diagnosis of alcohol dependence, Applicant continued to drink after these sessions with Mr. C and never attended AA meetings (R.T., at 71, 90). He currently drinks beer from time to time, but not every day or week (R.T., at 91).

In May 2007, Applicant twice consulted with Mr. B (also a licensed social worker). Mr. B found no indicators of alcohol dependence in Applicant and made no recommendation for alcohol treatment, sustained abstinence, or AA participation (ex. 5). When Applicant returned to the same clinic the following month on a walk-in basis he was assigned to Dr. R (a licensed clinical psychologist). While Applicant apparently did not specifically request an evaluation, he referenced his prior sessions with Mr. B and his continued drinking. Applicant acknowledges Dr. R's recommending that he not drink anymore, but did not accept Dr. R's recommendation at the time (R.T., at 73-74). Following his session with Applicant, Dr. R retrieved the notes of Applicant's prior sessions with Mr. C. Based on his verbal exchange with Applicant and his review of the latter's case history, Dr. R diagnosed Applicant with an alcohol dependent diagnosis (*see* ex. 6). In turn, Dr. R recommended Applicant quit drinking altogether and attend AA meetings regularly (*see* ex. 7).

Applicant has a friend who socializes with him at family-oriented social exchanges. This friend considers Applicant to be a moderate drinker (R.T., at 94-95). He does not think he has an alcohol problem based on his experiences with him.

Asked to complete an SF-86 in February 2006, Applicant understated his alcohol-related offenses when responding to question 23 (*see* ex. A). Question 23 asked him to report all charges or convictions related to alcohol and drugs, unqualified by any time limitations. He responded in the affirmative to the question, but listed only a May 2001 DuI offense. This offense corresponds to his admitted May 2002 arrest and conviction and for reporting purposes was treated as his 2002 offense. However, he omitted his 1976, 1989 and 1993 DuI arrests. He attributes his omissions to a mistaken understanding that the question asked for arrest information only for the previous seven years (*see* response; R.T., at 76-80).

In the SF-86, Applicant completed in April 1992, the form asked for the disclosure of information to all of previous arrests (not just his alcohol-related ones). In answering question 21 of the form. When responding to question 21 of the questionnaire, which asked him to list all arrests (except for minor traffic violations, without any time limitations, he reported only his 1989 DuI arrest, and omitted his 1976 and 1981 arrests. Applicant attributes these omissions, too, to his understanding at the time that the question only called for arrests within the previous seven years (R.T., at 83-84).

Both of the questionnaires at issue involve straight-forward questions about Applicant's arrest history without any time qualifiers. The 1992 SF-86 is actually much broader in its arrest coverage: It asks for "All arrest information . . ." and did not limit the inquiry to alcohol and drug-related arrests. His 2006 application is more case specific: It limits the inquiry to charges or convictions related to alcohol or drugs. To misread arrest history questions so completely in two separate applications places too much strain on credibility limits. Acceptance of Applicant's explanations require more corroborative proof of a good-faith misapprehension of the questions posed in each questionnaire than Applicant was able to provide. Candor lapses attributable to Applicant's concerns over the affects that derogatory information about his alcohol-related arrest history might have on his military career and security clearance are better explanations of his omissions in both security clearance applications.

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the conditions that could raise a security concern and may be disqualifying (Disqualifying Conditions), if any, and all of the Mitigating Conditions, if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial, common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Alcohol Consumption

"The Concern. 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" (Adjudicative Guidelines, para. 21).

Personal Conduct

"The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process" (Adjudicative Guidelines, para. 15).

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is an honorably discharged military veteran with a history of regular alcohol consumption over a 30-year period and three established alcohol-related incidents between 1976 and 2002. Applicant's history of alcohol-related incidents and

continued consumption in the face of diagnoses for alcohol dependence by certified clinicians, reflect both a recent pattern of alcohol abuse outside the work place and a potential dependency problem that raise security concerns. Additional security concerns are raised over Applicant's omissions of many of his alcohol-related and other arrests in his answers to security clearance application in April 1992, and again in February 2006 with respect to his omitted alcohol-related arrests.

Alcohol issues

On the strength of the evidence presented, several disqualifying conditions (DC) of the Adjudication Guidelines for alcohol consumption may be applied: 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"), 22(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"), 22(d) ("diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence"); and (e) ("evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program").

Applicant's diagnosed alcohol dependence reflects habitual drinking at various times over a 30-year period. Even though he has denied having a drinking problem, he has not furnished any documentation of his own from a clinician or licensed substance abuse counselor that challenges the dependence evaluations of Mr. C and Dr. R. The combination of his years of abusive drinking that manifested in a series of alcohol-related offenses (three proven ones altogether) and dependence diagnoses by certified health clinicians experienced in substance abuse issues justify assigning some application to DC 22(c) of the guidelines for alcohol consumption as well.

Because Applicant has not acknowledged an alcohol problem, he has continued to drink and avoid his recommended AA attendance. His failure to challenge the disputed diagnoses from the certified clinicians who evaluated him and/or enlist substance abuse counseling and a favorable prognosis for any identified alcohol problem to date, preclude application of any of the mitigating conditions of the guidelines for alcohol consumption. Favorable views from his social friend about his impressions of Applicant's drinking pattern, while helpful, are not enough to mitigate alcohol concerns under any of the covered mitigating conditions.

Whole person assessment does not alter risk concerns associated with Applicant's pattern of alcohol-related offenses and current drinking patterns in the aftermath of his alcohol dependence assessments by certified clinicians and applicant's corresponding failure to either mount a successful challenge of these diagnoses or give up drinking and turn to AA for support in maintaining his sobriety. Applicant has a long history of recurrent alcohol abuse that are reflected in both alcohol-related incidents over a 25-year period and his more recent diagnoses of alcohol dependence. With his denials of a dependence problem and continued drinking, he fails to demonstrate any sustained commitment to address his established alcohol problem.

Considering the record as a whole, Applicant failed to make a convincing showing that he has both the maturity and resource support at his disposal to avert any recurrent problems with judgment lapses related to alcohol. There is insufficient evidence to warrant safe predictions that he is no longer at risk of judgment impairment associated with such alcohol-related conduct. Unfavorable conclusions warrant with respect to subparagraphs 1.a, 1.c and 1.e through 1.h of the SOR. Subparagraphs 1.b and 1.d are favorably concluded.

E-qip and SF-86 omissions

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's failure to list all of his arrests in his1992 SF-86 and all of his alcohol-related arrests in his more recent 2006 e-qip. So much trust is imposed on persons cleared to see classified information that the margins for excusing candor lapses are necessarily narrow.

By omitting his 1976 and 1981 arrests in his 1992 SF-86 and his 1976 and 1989 DuI arrests in his more recent 2006 e-qip, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His claims of misunderstanding the scope of the arrest-related questions lack substantiation. Weighing all of the circumstances surrounding his SF-86/e-qip omissions, Applicant's claims lack the necessary probative showing to avert drawn conclusions he deliberately withheld material background information about the extent of his arrest history.

Applicant's claims of misunderstanding the scope of the pertinent questions in his respective applications are not convincing. The questions involved in each application contain no time qualifications and could not plausibly be so misread on two separate occasions. Applicant's omissions require application of a disqualifying condition (DC) for personal conduct of the Guidelines: 16(a) ("deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities").

Mitigation is difficult to credit Applicant with, because his omissions are neither isolated nor followed by prompt and good faith corrections of his omissions. Under these circumstances, he cannot claim the benefit of any of the potentially applicable mitigating conditions. Not only has the Appeal Board found the use of the predecessor to mitigating condition (MC) 17(c) (which is A5.1.3.2) of the Adjudicative Guidelines for personal conduct ("the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment"*)* to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 17(a) and its predecessor mitigating condition ("the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts"). *Compare* ISCR Case No. 97-0289 (January 1998) *with* DISCR Case No. 93-1390 (January1995).

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 2.a and 2.b of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE G (ALCOHOL CONSUMPTION):	AGAINST APPLICANT
Sub-para. 1.a:	AGAINST APPLICANT
Sub-para. 1.b:	FOR APPLICANT
Sub-para. 1.c:	AGAINST APPLICANT
Sub-para. 1.d:	FOR APPLICANT
Sub-para. 1.e:	AGAINST APPLICANT
Sub-para. 1.f:	AGAINST APPLICANT
Sub-para. 1.g:	AGAINST APPLICANT
Sub-para. 1.h:	AGAINST APPLICANT
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 2a:	AGAINST APPLICANT
Sub-para. 2.b:	AGAINST APPLICANT

Conclusion

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

Roger C. Wesley
Administrative Judge