DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-07994
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

April 10, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on November 28, 2006. On September 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 5, 2007; answered it on October 16, 2007; and requested a hearing before an administrative judge. DOHA received his request on October 17, 2007. Department Counsel was prepared to proceed on November 30, 2007, and the case was assigned to me on December 10, 2007. DOHA issued a notice of hearing on February 7, 2008, setting the case for

February 28, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of two witnesses, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. I granted Applicant's request to keep the record open until March 10, 2008, to enable him to submit additional evidence. Applicant timely submitted AX B and C, and they were admitted without objection. Department Counsel's responses to AX B and C are attached to the record as Hearing Exhibits I and II. DOHA received the transcript of the hearing (Tr.) on March 7, 2008. The record closed on March 10, 2008. I received an email dated March 13, 2008, and marked it as AX D, but I did not admit it because it was untimely. Eligibility for access to classified information is denied.

Evidentiary Ruling

Department Counsel offered GX 6, a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and he waived it (Tr. 23-25).

Findings of Fact

In his answer to the SOR, Applicant admitted all the factual allegations. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 45-year-old systems engineer for a federal contractor. He has worked for his current employer since May 2006. He attended college for two years but did not receive a degree (Tr. 7-8). He served in the U.S. Navy from March 1986 to March 2006, retiring as a chief petty officer (pay grade E-7). He served as an alcohol counselor in the Navy for a total of about six years (Tr. 43, 71). He has held a clearance since March 1995.

Applicant has been married since February 1987. He has two daughters, ages 19 and 17, and a 14-year-old son. His children live with him at home (Tr. 53).

Applicant began consuming alcohol while in college. While in the Navy, he usually consumed wine or beer on weekends with dinner (GX 4 at 2). His normal consumption was three or four drinks at a sitting (Tr. 76). He believed that it took about five or six drinks to make him intoxicated (GX 6 at 2).

In October 2001, Applicant was charged with driving under the influence of alcohol (GX 5 at 3), after he drove across the center of the road into incoming traffic and hit two cars (Tr. 55). He testified he had consumed "at least four" mixed drinks (Tr. 55). His breathalyzer test showed a blood-alcohol level above 2.0 (Tr. 56). He admitted he was doing "a lot of drinking" during that period (Tr. 58). He testified the incident occurred because he was using alcohol to relieve severe back pain and depression (Answer to

SOR; Tr. 42-43). He was convicted and sentenced to a fine of $150, his driver's license was suspended for 90 days, and he was required to attend a driver retraining course. He did not seek counseling or report the incident to his military unit, for fear of jeopardizing his career (Tr. 57).

Some time in 2004, Applicant had an argument with his wife and oldest daughter, after the children returned late from a movie and came home with friends without notifying their parents. His wife called the military police, and his commander imposed a military protection order (Tr. 54, 69-70). The family argument was not alcohol-related.

Applicant was upset by his family situation, and, in March 2005, after living separately from his family for 5-6 months, he consumed alcohol to the point of intoxication while flying home from a duty assignment (Answer to SOR; Tr. 45). He testified he began drinking at the departure airport, consumed "a little alcohol" on the aircraft, and went to a bar after his flight landed (Tr. 58-59). He admitted he was impaired "to a certain point" by his alcohol consumption (Tr. 60). He was stopped by police after he crossed over the center line of the road. He failed a field sobriety test and refused a breathalyzer test (Tr. 59-60). He was charged with refusal to take the breathalyzer test. At his trial, he pleaded no contest and voluntarily disclosed his previous alcohol-related conviction to the judge (Tr. 46). He was sentenced to a fine of $1,175, 20 hours of community service, and suspension of his driver's license for four months. He also was ordered to complete an alcohol treatment program (GX 4 at 5). He received nonjudicial punishment from his military commander for drunk driving, but the punishments were suspended (Tr. 66, 79). He went to sea about a week later, believing that a court official would contact him about his community service (Tr. 46). He made no inquiries about scheduling his community service.

Applicant was screened for substance abuse by the Navy in October 2001 and May 2005 and diagnosed as not dependant on both occasions (GX 1 at 27). After his arrest in March 2005, he decided to continue drinking moderately, limiting himself to two or three glasses of wine at dinner (GX 6 at 1-2).

After Applicant retired in March 2006, he was unable to obtain a driver's license because he had not completed his community service. He finally completed it in January-February 2007 (AX A; Answer to SOR). He decided to stop drinking, and had his last drink on July 3, 2007, when he consumed three beers (GX 4 at 3). He began alcohol abuse treatment with a licensed clinical social worker on July 19, 2007, to comply with the court order requiring him to complete an alcohol treatment program (GX 4 at 4-5).

By the time of the hearing, Applicant had met with the social worker about ten times (Tr. 68), but his treatment had not been completed because of his frequent, work-related travel. He was continuing to abstain from alcohol and had attended to Alcoholics Anonymous (AA) meetings within two weeks of the hearing (Tr. 64). He did not have an AA sponsor, but he relied on his pastor for counseling and support (Tr. 51, 72; AX B at 2). His social worker recommended that his initial participation in AA become "sustained

and committed" and that he establish a relationship with a sponsor to improve the likelihood that he will maintain sobriety after the treatment is completed (AX B at 3). Applicant testified his social worker believed he should stop drinking entirely because otherwise it would only be a matter of time before there was another incident (Tr. 83).

Applicant's direct supervisor for the past two years testified that Applicant works without direct supervision, travels frequently, and is on the road 20-30 percent of the time. He described Applicant as dependable, trustworthy, and demonstrating a lot of initiative (Tr. 30). Clients have frequently sent unsolicited feedback about Applicant's performance, and it has been uniformly very positive (Tr. 37-38).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 have access to such information." *Id.* at 527. The President has 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." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines 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 over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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 the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant 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 therein 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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[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

The SOR alleges an arrest and conviction for driving under the influence in October 2001 (¶ 1.a), an arrest and conviction for refusing a breathalyzer test in March 2005 (¶ 1.b), and commencement of alcohol counseling in July 2007 (¶ 1.c). The security concern relating to Guideline G is set out in AG ¶ 21: "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."

A disqualifying condition may arise from "alcohol-related incidents away from work, such as driving while under the influence . . , regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent." AG ¶ 22(a). Applicant's two alcohol-related convictions raise this potentially disqualifying condition.

A disqualifying condition also may arise from "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. AG ¶ 22(c). "Binge drinking" is "the consumption of five or more drinks in a row on at least one occasion." U.S. Dept. of Health & Human Services, Substance Abuse and Mental Health Services Administration, *The National Household Survey on Drug Abuse: Binge Drinking Among Underage Persons*, Apr. 11, 2002, available at http://www.oas.samhsa.gov. Applicant's admission that he consumed "at least four" mixed drinks before the October 2001 incident and was drinking "a lot" during this period strongly suggests habitual or binge consumption of alcohol. Although the evidence is not conclusive on this point, it is more than a scintilla and enough to be "substantial evidence." I conclude AG ¶ 22(c) is raised.

A disqualifying condition also may be raised by an "evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." AG ¶ 22(f). The evaluation of alcohol abuse by the licensed clinical social worker who is treating Applicant raises this disqualifying condition.

Finally, a disqualifying condition may arise from "failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence." AG ¶ 22(g). Although Applicant was ordered in early 2005 to obtain treatment for alcohol abuse, he did not begin his treatment until July 2007, more than two years later. I conclude AG ¶ 22(g) is raised.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 22(a), (c), (f), and (g), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns arising from alcohol consumption may be mitigated if "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" AG ¶ 23(a). Even though Applicant's last incident was more than three years ago, the first prong ("so much time has passed") is not established, because the record reflects habitual alcohol abuse before the October 2001 incident, an unsuccessful effort to moderate his drinking after that incident, and failure to seek court-ordered treatment for more than two years after his conviction in March 2005. The second prong ("so infrequent") is not established, because his first alcohol-related conviction was preceded by frequent alcohol abuse, and he failed to moderate his drinking after his first conviction. The third prong ("unusual circumstances") is not established, because the circumstances of his alcohol abuse were not unusual. The fourth prong ("unlikely to recur") is not established, because he has not completed his alcohol abuse treatment and his social worker believes he needs to do more with AA to improve the likelihood of continued sobriety. Finally, his alcohol consumption casts doubt on his current reliability, trustworthiness, and good judgment because he continued to abuse alcohol after his first life-threatening incident, engaged in similar behavior in March 2005, and did not begin the court-ordered alcohol-abuse treatment for more than two years. I conclude that AG ¶ 23(a) is not established.

Security concerns under this guideline also may be mitigated if "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)." AG¶ 23(b). Applicant has acknowledged his alcohol abuse and is undergoing treatment. However, he has concluded that his efforts at responsible use are risky, and his social worker has concurred. His abstinence for seven months (as of the date of the hearing) is not long

enough to establish a new "pattern," when considered in the context of his record of alcohol abuse. I conclude AG ¶ 23(b) is not established.

Security concerns based on alcohol consumption may be mitigated if "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." AG ¶ 23(c). Although Applicant was required to attend driver retraining classes after his first alcohol-related conviction, the classes were not an alcohol counseling or treatment program, and his second conviction was not a relapse in the sense of this mitigating condition. I conclude AG ¶ 23(c) is established.

Finally, security concerns under this guideline may be mitigated if,

> 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 a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 23(d). This mitigating condition is not established because Applicant has not completed his treatment program, has not yet complied with his social worker's aftercare recommendations, and has not yet received a favorable diagnosis.

The SOR ¶ 1.c alleges that Applicant "began alcohol counseling" with a licensed clinical social worker. It does not allege a diagnosis. Standing alone, entering into alcohol counseling is not a disqualifying condition. To the contrary, the mitigating conditions in AG ¶¶ 23(b), (c), and (d) are premised on obtaining counseling or treatment. I resolve SOR ¶ 1.c in Applicant's favor.

Guideline J, Criminal Conduct

The SOR ¶ 2.a cross-alleges the same conduct alleged in ¶¶ 1.a and 1.b. The concern raised by criminal conduct is that it "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." AG ¶ 30. Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses." AG ¶¶ 31(a). Applicant's multiple convictions of alcohol-related crimes raise this disqualifying condition, shifting the burden to rebut, explain, extenuate, or mitigate the facts.

Security concerns under this guideline may be mitigated by evidence that "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." AG ¶ 32(a). For the reasons set out above regarding AG ¶ 23(a) under Guideline G, I conclude this mitigating condition is not established.

Security concerns arising from criminal conduct also may be mitigated by "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." AG ¶ 32(d). Applicant had abstained from alcohol for seven months and appeared to be genuinely remorseful at the time of the hearing. He is well regarded by his supervisor. On the other hand, he has been reluctant to acknowledge his alcohol abuse. He was dilatory in carrying out his court-ordered community service, and he has not yet completed his alcohol abuse treatment. I conclude insufficient time has passed to determine whether he is rehabilitated.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature, intelligent adult who held responsible positions in the Navy and has gained a good reputation in civilian life. He is the father of three children. He has held a clearance for many years. However, even though he spent six years as an alcohol counselor in the Navy, he engaged in life-threatening behavior in October 2001 and repeated it in March 2005, apparently not learning from his first experience. His dilatory approach to alcohol abuse treatment detracts from his expressions of remorse and statements of good intentions. Although he is a valuable employee with much to offer and has finally taken positive steps to avoid further alcohol abuse, he needs a longer track record of responsible behavior to carry his burden of showing his current

reliability, trustworthiness, and good judgment. *See* Directive ¶¶ E3.1.37-E3.1.39 (reconsideration authorized after one year).

After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on alcohol consumption and criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

_____
LeRoy F. Foreman
Administrative Judge