DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 07-12342
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nichole Noel, Department Counsel
For Applicant: *Pro Se*

March 9, 2009

Decision

HEINY, Claude R., Administrative Judge:

Applicant has been arrested three times for alcohol-related offenses. His latest arrest and conviction occurred in April 2006. It is too soon to find his alcohol-related problems will not recur. Applicant has failed to rebut or mitigate the government's security concerns under alcohol consumption. Applicant's answers on his security questionnaire and sworn statement were not deliberate concealments or falsifications. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a

[1] 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.

Statement of Reasons (SOR) on July 30, 2008, detailing security concerns under alcohol consumption and personal conduct.

On July 30, 2008, Applicant answered the SOR, and requested a hearing. On October 28, 2008, I was assigned the case. On November 5, 2008, DOHA issued a notice of hearing scheduling the hearing which was held on November 21, 2008. The government offered Exhibits (Ex.) 1 through 6, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits A through E, which were admitted into evidence. The transcript (Tr.) was received on December 31, 2008.

Findings of Fact

In his Answer to the SOR, Applicant denied the allegations in ¶¶ 1.c, 1.d, 2.a, and 2.b. He admitted the remaining allegations.

Applicant is a 53-year-old production manager who has worked for a defense contractor since May 2005, and is seeking to obtain a security clearance. He manages a team of supervisors, technicians, and employees. (Ex A) His 2007 job performance rated him as "outstanding," stating he is a great team leader, team builder, and great asset. (Ex B) Applicant spends considerable time mentoring leads and technicians. He has high integrity, is dependable, truthful, honest, self-motivated, and willing to devote long hours and hard work to completing the job. He strives for excellence in his work. (Ex B, C)

Co-workers, supervisors, and colleagues state Applicant has consistently moved to more challenging assignments in the company, working 52 to 60 hours per week. He is a strong leader and dependable team player who has good judgment, a mature outlook, and displays a high degree of integrity and responsibility. (Ex. D)

In March 1991, Applicant—then age 36—was arrested and charged with Driving While Intoxicated (DWI). (Gov Ex 6) No breath test was conduct. He had been at the park with friends playing ball and drinking beer. (Tr. 35) He was arrested after he dropped off his cousin. The police officer thought he was in the neighborhood buying illegal drugs. The record contains no finding of guilt or sentence. Applicant states he received six months probation. It was Applicant's understanding that after six month the matter would be dismissed. (Tr. 54)

On December 24 1998, Applicant—then age 43—was stopped for speeding and charged with DWI and deadly conduct. Applicant and his wife were on a two and a half hour drive returning from a visit to his mother-in-law's home. He was attempting to get home before freezing ice made the roadways hazardous. (Tr. 41) In May 1999, he pleaded guilty to deadly conduct[2] and was placed on supervised probation for six months. (Gov Ex 2) Applicant thought the charge had been changed from "deadly conduct" to "reckless conduct." (Tr. 33) He was ordered to perform 80 hours of community service, pay a $400 fine, pay $40 per month in supervision fees, and

[2] Under the state law a person commits the offense of deadly conduct if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.

$199.25 in court costs. He was required to undergo evaluation by the county community supervision and corrections department to determine if alcohol/drug rehabilitation was necessary and if necessary participate in treatment. He was ordered to complete an alcohol evaluation and the Alcohol Education Program. Count 1, DWI, was dismissed. (Gov Ex 2) Following his conviction, he attended some group counseling. (Tr. 46) Traveling to court and for probation involved a 300 mile round trip drive. (Tr. 34)

In April 2006, Applicant—then age 51—was stopped for speeding and charged with DWI, third offense, and open container. (Gov Ex 4, 6) Applicant and his wife were traveling to his mother-in-law's home and had stopped and each purchased a 16 ounce beer. (Tr. 42) He was found guilty and sentenced to six months confinement (suspended), 18 months probation, 75 hours of community service, to pay a $1,000 fine, to pay $333 in court costs, and to attend DWI class. (Gov Ex 5) DWI class was for four days in December 2007. (Gov Ex 3) He was placed on probation in November 2007 and will remain on probation until May 2009. He has completed all of the required programs for his probation and attended all scheduled appointments. January 9, 2009, was his next scheduled appointment and was to be his last provided all fees had been paid. (Ex. E) Applicant traveled 110 miles each way each month to see his probation officer. (Tr. 30-31) Applicant has not had any alcohol since his arrest. (Tr. 45, 52)

In March 2007, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). Some of the questions on the e-QIP are limited to the prior seven year. When asked in question 23.d about having ever been charged with or convicted of any offense related to alcohol or drugs, he listed his April 2006 offense, for which he was awaiting a court date. He did not list any other arrests. Even though the question is not so worded, Applicant took the question to reflect arrest occurring during the seven year period prior his completion of the e-QIP. (Tr. 47)

In November 2007, he made a signed, sworn statement to an investigator relating the facts of his 2006 arrest, conviction, and sentence. He stated he had been arrested in 1999 for reckless driving. He stated he went to court and was found guilty of reckless driving forfeited his $500 bond and received six months probation, which he completed in 2000. (Gov Ex 3) He revealed a 1994 domestic disturbance arrest and a 1991 charge for DWI when empty beer cans were found under his car seat. In the sworn statement, he stated he had been arrested only once for DWI during the prior seven years. He failed to list his 1998 DWI and deadly conduct.

Applicant is involved with his church and community outreach programs with the church. (Tr. 51) Applicant realizes the mistakes he has made drinking and driving. He thought about it a good deal on the long drives to court and to see his probation officer. (Tr. 52) He has not consumed alcohol for 18 months and does not believe it will be a problem for him in the future.

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition

to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Alcohol Consumption

Adjudicative Guideline (AG) for determining eligibility for access to classified information ¶ 21 expresses the security concern pertaining to 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."

Applicant is 53 years old and has had three arrests for DWI. In 1991, Applicant, then age 36, was arrested after playing ball and drinking beer in a park with friends. He received six months probation. In 1998, Applicant, then age 43, was again arrested for DWI and deadly conduct and found guilty of the "deadly conduct," which he believed had been changed to "reckless conduct." Under the state law deadly conduct is reckless conduct that places another in imminent danger of serious bodily injury. His court appearance and probation involved making a 300 mile round trip drive. It cost him in excess of $800, 80 hours of community service, and attorney fees.

In 2006, Applicant, then age 51, was charged with DWI 3rd and open container. After being found guilty, he paid a $1,000 fine, $333 in court costs, received 18 months probation, and had to perform 75 hours community service. His round trip from home to court and the probation office was in excess of 200 miles. He was going to visit his mother-in-law and stopped and purchased a beer while on the trip. After having been arrested eight years earlier for DWI, one would have thought he would have purchased coffee or a soft drink for the trip and waited until arriving at this destination before drinking beer.

AG ¶ 22(a) "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," applies as evidenced by the three alcohol related arrests.

AG ¶ 23 lists conditions that could mitigate the alcohol consumption security concerns. Those conditions include:

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (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 a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

None of the mitigating factors listed in AG ¶ 23 apply. Applicant states he has not drank alcohol since the 2006 arrest. Applicant is still on probation and a normal requirement for probation is to abstain from all alcohol or abstain from alcohol before driving during the term of probation. Applicant's second arrest was seven years after the first. Applicant's third arrest was eight years after the second. It has now been two years since his last arrest. It is too early to predict Applicant's alcohol problem is a thing of the past.

AG ¶ 23(a) does not apply because it has only been two years since his last arrest and the conduct did not occur under such unusual circumstances that it is unlikely to recur. Additionally, his conduct especially after two prior arrests, does cast doubt on the Applicant's current reliability, trustworthiness, or good judgment.

AG ¶ 23(b) does not apply. Applicant believes alcohol will not be a problem for him in the future. He has abstained since his last arrest, but that may be a condition of his probation, which ends in May 2009. There is no evidence of actions to overcome his problem. Neither AG ¶ 23(c), requiring participation a counseling or treatment program and to be making satisfactory progress, nor AG ¶ 23(d), which requires successfully completed inpatient or outpatient counseling or rehabilitation and demonstrating a clear and established pattern of modified consumption or abstinence, apply. There is no favorable prognosis by a doctor only Applicant's self serving statement that alcohol will not be a problem in the future.

With three arrests over the course of 17 years, with the last arrest only two years ago, it is too early to state Applicant's alcohol consumption is no longer a problem.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct, which is conduct involving questionable judgment, 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.

In March 2007, Applicant completed his e-QIP and listed his most recent DWI arrest. Even though the clear and plain language of question 23.d asks if Applicant had "ever" been charged or arrests for an alcohol-related offense, Applicant limited his response to the prior seven years. Other questions in the e-QIP so limit the period of time, however, this question is not so limited.

Deliberate omissions, concealment, or falsifications of material facts in any written document or oral statement to the Government, when applying for a security clearance, are certainly of security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

I found Applicant's explanation for failure to list his other two alcohol-related arrests plausible. After hearing his testimony, observing his demeanor, and evaluating all the evidence of record, I found his testimony credible on the falsification issue. I am satisfied Applicant's answers on his e-QIP was not a deliberate concealment or falsification.

In a November 2007 sworn statement, Applicant stated he was arrested for reckless driving in 1999. He explains how he was stopped for speeding, held at the detention center, posted $500 bond, later appeared in court, was found guilty, forfeited the bond and was given six months probation. He was actually arrested Christmas eve in 1998 and not 1999. He said it was for reckless driving when it was for DWI and deadly conduct. I will not hold Applicant chargeable with legalize or terms of art.

Under the state law, deadly conduct is reckless conduct and it is easy for one unversed in the law to substitute reckless for deadly. Reckless conduct is more frequently associated with drinking and driving then is deadly conduct. It does not appear Applicant was deliberately trying to conceal his 1998 arrest when he misstated the charge. There was no deliberate concealment or falsification, I find for Applicant as to SOR ¶ 2. a and 2.b.

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 the 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is an outstanding worker, highly thought of by his supervisors and colleagues. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has had three alcohol-related arrests. His alcohol-related arrests have cost him thousands of dollars and numerous hours traveling to court and to see his probation officer. Yet he does not believe alcohol has been or is a problem for him. Having abstained from alcohol for only two years, it is too soon to say his alcohol-related problems will not recur. It is noted there was a seven year period between his first and second arrest and an eight year period between his second and third arrests.

Although his evidence of rehabilitation is insufficient at this time, this decision should not be construed as a determination that Applicant can not or will not attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance. In the future, should he be afforded an opportunity to reapply for a security clearance, with the passage of sufficient additional time, continued rehabilitation, and no future incidents of misconduct, the alcohol consumption could be found in Applicant's favor. He may well demonstrate persuasive evidence of security worthiness. But that time has not yet arrived. Because the Applicant meets the disqualifying conditions and none of the mitigating conditions, the alcohol security concern is resolved against him.

Formal Findings

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

Paragraph 1, Alcohol Consumption:	AGAINST APPLICANT
Subparagraph 1.a – 1.d:	Against Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT
Subparagraph 2.a and 2.b:	For 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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge