DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-13363
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro Se*

June 17, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted a Security Clearance Application, EPSQ version, on February 3, 2006. On February 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Guideline G, and Guideline E as the bases for its decision to deny his request for a security clearance. 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 answered the SOR in writing on March 4, 2008, and requested a decision without a hearing. On March 17, 2008, the government submitted a File of Relevant Material (FORM) consisting of six exhibits (Items 1-6). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt.

Applicant submitted no response by the April 23, 2008, deadline. On May 27, 2008, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Based upon a review of the government's FORM, including Applicant's Answer to the SOR allegations (Item 4), eligibility for access to classified information is denied.

Findings of Fact

DOHA alleged under Guideline J, criminal conduct, and under Guideline G, alcohol consumption, that Applicant committed three drunk driving offenses, in about January 2006 (SOR ¶¶ 1.a, 2.a), December 1997 (SOR ¶¶ 1.b, 2.a), and March 1996 (SOR ¶¶ 1.c, 2.a). Under Guideline J, Applicant was also alleged to have been issued a citation for open container in 1993 (SOR ¶ 1.d). Under Guideline G, Applicant was also alleged to have consumed alcohol to excess and to intoxication from approximately 1999 to at least January 2006 (SOR ¶ 2.b). DOHA alleged under Guideline E, personal conduct, that Applicant falsified a February 2006 EPSQ by not disclosing his December 1997 DWI (SOR ¶ 3.a) or his March 1996 DWI (SOR ¶ 3.b) in response to question 24 concerning whether he had ever been charged with or convicted of any offense(s) related to alcohol or drugs. Applicant admitted the drunk driving offenses and the consumption of alcohol to intoxication. He denied any falsification of his security clearance application, averring that he understood the ESPQ inquiry covered the last seven years of his history. Applicant did not respond to the alleged open container violation in SOR ¶ 1.d.[1] After reviewing the available evidence, I make the following findings of fact:

Applicant is a 33-year-old electronics technician, who has worked for his present employer since January 2005 (Item 5). He seeks a security clearance for his duties. The available record does not reflect that he has held a clearance.

Applicant drank during his late teens episodically when out with friends. In 1993, when he was 19, he and his friends were drinking outside an apartment. Someone called the police, and after his identification was checked, Applicant believes he, along with others, was issued a citation for open container. To the best of his recollection, he paid a fine (Item 6).

After Applicant turned 21, his consumption of alcohol increased. He consumed as much as six to nine beers on occasion in social settings (at parties, in bars, friends' homes, other social situations), but did not drink on a daily basis (Item 6). His alcohol consumption led to his arrest three times for drunk driving between 1996 and 2006.

In mid-March 1996, Applicant drank four or five beers plus three or four shots of liquor at a local bar when out with a female friend. While taking her home, he was stopped for weaving and speeding. He failed field sobriety and alcohol breath tests and

[1]Contrary to Department Counsel's assertion in the FORM, Applicant did not admit SOR ¶ 1.d. The answer of record (Item 4) does not include a response to that allegation.

was arrested for driving under the influence (DUI). About three months later, he pleaded guilty and was given probation before judgment. The charge was to be dismissed on the fulfillment of certain conditions, including that he abstain from alcohol for 18 months, pay a $500 fine, and attend an eight-week alcohol education program. His license was restricted for three months with driving privileges limited to work and school. Applicant reports he complied with the terms, although there is evidence to the contrary in that he told a government investigator in July 2006 that he had abstained from alcohol for only two to three months after his arrest (Item 6).

Applicant was arrested again for DUI in early December 1997. After drinking one beer at a happy hour with some coworkers, Applicant accompanied some of them to a bar. Over about five hours time, he drank six or seven more beers and three shots of liquor. While driving a companion back to his vehicle, Applicant was pulled over by county police for speeding. Applicant realized at the time that he shouldn't have driven but he was tired and wanted to go home. He failed field sobriety and breath tests (his blood alcohol level was about .18%) and he was arrested for DUI. In March 1998, Applicant was placed on two years probation, required to attend 26 weeks of outpatient group counseling and two weeks of Alcoholics Anonymous (AA) meetings, and assessed $500 court costs plus program fees. During a separate administrative adjudication by the motor vehicle department, Applicant was ordered to have an "interlock system" installed on his vehicle for six months to prevent his car from starting if he had alcohol on his breath (Item 6).

Applicant did not drink alcohol for about six months after his DUI, but resumed drinking thereafter two to three beers per day on the weekends. In mid-January 2006, Applicant consumed a couple of beers at a happy hour with coworkers. He then accompanied a few of them to a bar where he drank seven to eight more beers and a couple of "Jello shooters." He knew he wasn't sober, but elected to drive anyway, and he was pulled over for swerving. Applicant was administered field sobriety tests that he could not fully complete. On the advice of the lawyer who had represented him on an earlier DUI charge, Applicant refused to submit to a breathalyzer, and he was arrested for level B DUI and negligent driving (Item 5, Item 6).[2]

On February 3, 2006, Applicant completed an EPSQ on which he responded "YES" to questions 23 ["Are there currently any charges pending against you for any criminal offense?"] and 24 ["Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs"]. Applicant disclosed in response to both questions 23 and 24 that he had been arrested for DWI in January 2006 and was waiting for a court date. Applicant did not report his 1996 and 1997 DUI offenses in answer to question 24 (Item 4). At an administrative proceeding before the motor

[2]DOHA alleged in SOR ¶ 1.a that Applicant was charged was also charged with negligent driving and driving while impaired with alcohol. When interviewed about the offense in July 2006 Applicant told the investigator that he was arrested for "Driving Under the Influence of Alcohol" and for reckless driving. The government presented no police or court records showing a second alcohol-related charge, although Applicant did not deny the allegation.

vehicle administration in April 2006, Applicant was ordered to have the interlock device installed on his vehicle for two years (Item 6).

On July 25, 2006, Applicant was interviewed by an authorized investigator for the Department of Defense about his alcohol use and police record. He indicated that he had a court date in October 2006 for his latest offense and had an interlock device installed in his vehicle. Applicant expressed his belief that he could have a problem with alcohol and could use some counseling, but that he mainly considered himself a social drinker with bad luck. As for his current alcohol consumption, Applicant averred he was going out with his brother every other weekend to friends' homes where he consumed about three beers over a five-hour time span. Applicant indicated that he had completed a security clearance application in 2004. He told the investigator that he had listed only the 1998 [sic] offense because he thought he only had to go back seven years. Applicant added that he would never again drive after drinking because he did not want to hurt anyone or lose his job (Item 6).

On the advice of his lawyer, Applicant began counseling in a 26-week outpatient program in August 2006 (Item 6). In about December 2006, Applicant appeared in court for the January 2006 DUI. He was sentenced to serve three days in detention, three months house arrest, and three years probation, to complete his outpatient counseling program, to pay $350 court costs plus the costs of counseling, home detention, probation, and the interlock system. Applicant completed his outpatient counseling in February 2007. During his treatment program, he submitted to 18 breathalyser tests that were all negative (Item 6).

On July 24, 2007, Applicant was reinterviewed by a government investigator about his alcohol-related arrests, counseling, and consumption levels. Applicant indicated that his January 2006 DUI led him to realize he had a problem with alcohol. He denied any drinking to intoxication since January 2006, and claimed he last consumed alcohol during the Christmas holiday in 2006 when had only two beers. He indicated he might have one or two beers during the holidays in the future, but he did not intend to drink and drive (Item 6).

On December 5, 2007, Applicant was notified by the state's drinking and driving monitor program that he qualified for "standard low." His case was considered active but he would no longer have to report in, although he would have to pay all monthly fees 30 days before the expiration of his probation case (Item 6).

In December 2007, DOHA asked Applicant to complete interrogatories inquiring into his alcohol consumption, treatment programs, and any changes in his personal or professional situation indicative of a lifestyle free of alcohol abuse. Applicant responded that he was not currently drinking and that he had last consumed alcohol on "New Year's Eve 2006. Beer only, approx. 6 cans." He denied any participation in any recognized alcohol support group such as Alcoholics Anonymous. He provided a letter from the DWI monitor program declaring him eligible for "standard low" and showing his compliance with his probation. Applicant did not provide requested records of the

program he participated in after his second DUI, but attested that he would have been in violation had he failed to complete it. As for lifestyle changes, Applicant averred that he has avoided "past unhealthy relationships, such as 'drinking friends,'" is in compliance with his probation, and has recently been informed of his promotion at work (Item 6). DOHA also provided Applicant with copies of the investigators' reports of his interviews in July 2006 and July 2007. Applicant confirmed they accurately reflected the information he had provided (Item 6).

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 that 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

Guideline J, Criminal Conduct

The security concern for Guideline J, criminal conduct, is set out in AG ¶ 30: "Criminal activity 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." When interviewed by an authorized investigator for the Department of Defense, Applicant indicated that he recalled receiving a citation for open container in 1993. It cannot be determined from the available record whether he violated a local ordinance or a state criminal law. However, Applicant's three DUI offenses implicate AG ¶ 31(a) ('a single serious crime or multiple lesser offenses") and AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted").

For the January 2006 offense, he was sentenced later that year to three days in a county detention center, three months house arrest, and three years probation. In about December 2007, he was placed on "standard low status." This change to unsupervised probation implies he has been in compliance, but he was also informed that should he be newly charged with a criminal offense, he would be required to contact the DWI monitor immediately for reporting instructions. His case remains active and he has probation fees to pay as the DWI monitor indicated in her letter of December 2007 that "all monthly fees will have to be paid 30 days prior to expiration of [his] probation case." AG ¶ 31(d) ("individual is currently on parole or probation") also applies.

As for the potential mitigating conditions, the recency of his January 2006 DUI and the similarity in circumstances to his second DUI preclude me from favorably considering AG ¶ 32(a) (""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"). Inasmuch as Applicant's criminal conduct is all alcohol-related, his completion of outpatient group counseling in February 2007 is relevant to determining whether he is successfully rehabilitated under AG ¶ 32(d) ("there is 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"), as well as of the

Guideline G concerns, *infra*. He started the program before his court appearance for his latest DUI. Although the program cannot be considered completely voluntary since he was required to complete it as part of his sentence, he took 18 breath tests that were all negative. He alluded in his response to interrogatories in December 2007 that he had been informed of a recent promotion at work. Despite these indicia of reform, it would be premature to conclude he is successfully rehabilitated. His latest DUI occurred about nine years after his second DUI and following his completion of alcohol education and outpatient counseling programs. He denies any intent to drive after drinking in the future, and there is no evidence that he has driven after consuming alcohol since his last DUI. Yet he also has an interlock system on his vehicle which prevents it from starting if alcohol is detected on his breath. A truer test of reform is whether he will abide by his stated intention to not drink and drive after that device has been removed from his vehicle. Given the persistent Guideline G concerns, *infra*, a future alcohol-related criminal incident cannot be ruled out.

Guideline G, Alcohol Consumption

The security concern relating to the guideline for alcohol consumption 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 untrustworthiness." Applicant first consumed alcohol at age 14 (Item 6), but it was not until he was in his late teens that he began drinking when out with friends. He told a government investigator in July 2006 that he consumed anywhere from six to eight beers during a night out with friends starting when he was 17 or 18. A year later, he told an investigator that he began experimenting with alcohol at around age 19 with friends, and that his consumption increased after he turned 21. The record before me for review contains little detail about his consumption in terms of frequency or quantity. Applicant does not deny, however, and his DUI convictions confirm, that he abused alcohol on repeated occasions, leading to a relatively recent arrest in January 2006. His three drunk driving offenses raise security concerns under 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"). The record supports limited application of AG ¶ 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"). Applicant had a blood alcohol level of .18% on one or more occasions,[3] and he drank in abusive quantity of at least eight beers before his latest DUI. The record does not otherwise indicate drinking to binge levels.

[3]In July 2006, Applicant told an investigator that his blood alcohol level was .18% on his arrest for DUI in December 1997. One year later, he told an investigator that his blood alcohol content was .18% on the occasion of his March 1996 arrest, and that he was unable to recall the amount consumed before his second arrest for DUI.

Available information suggests he may also have failed to follow a court order concerning abstinence (*see* AG ¶22(g) ("failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence")). Applicant indicated in July 2006 that his first DUI would be dismissed provided he not drink for 18 months and fulfill other conditions. He admitted in July 2006 that he had stopped drinking for only about two or three months. His December 1997 DUI was within 18 months of his first offense.

Applicant bears a particularly heavy burden to overcome the serious judgment concerns raised by repeated intoxication and drunk driving. His December 1997 DUI followed his completion of an eight-week alcohol education course. Six months of outpatient counseling after that offense did not prevent him from again driving under the influence in January 2006. This history of relapse precludes favorable consideration of mitigating condition ¶ AG 23(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").

As of July 2006, Applicant was going out with his brother every other weekend to friends' homes and drinking about three beers over five hours time. In July 2007, Applicant told a government investigator that he consumed only two beers during the Christmas holiday (December 25, 2006), and none since. However, in December 2007 he told DOHA that his last use of alcohol was on New Year's Eve in 2006 and that he consumed about six beers, an amount greater than he had previously reported ("New Year's Eve 2006. Beer only, approx. 6 cans). Irrespective of whether Applicant drank on December 25 or December 31, 2006, his consumption of six beers at a sitting after a third DUI and while in a court-mandated alcohol counseling program, was irresponsible. He has yet to demonstrate the sustained reform required under AG ¶ 23(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)").

Mitigating condition AG ¶ 23(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") cannot be applied because of the recurrence of drunk driving after completing court-ordered counseling for a previous offense. Applicant is credited with completing his latest court-mandated outpatient program, but the fill-in-the-blanks form letter confirming his successful completion falls short of the favorable prognosis required under AG ¶ 23(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"). It provides no information about Applicant's progress during treatment, his prognosis for the future, the qualifications of his counselor, or any recommendations, if

appropriate, to prevent recurrence. A recent favorable assessment by a qualified clinician could have gone a long way toward dispelling the Guideline G concerns raised by his irresponsible drinking after his third DUI. It cannot be determined from the limited record available for review whether his counselor even knew that he had consumed as many as six beers on or about December 31, 2006, when he was still in active counseling.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

> 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.

About two weeks after his arrest for his third DUI, Applicant completed an EPSQ on which he disclosed his then very recent arrest, as a pending charge in response to question 23, and as an alcohol or drug related offense in response to question 24. Applicant did not report his two previous DUI offenses, even though they fell within the scope of question 24 ("Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"), but he denies any intentional falsification:

> On my Electronic Personnel Security Questionnaire, I understood 'Question 24' to require information from a period of **7 years back** in my history. I was not intentionally being deceitful or in any way falsifying my information. I explained this in detail at my first interview with an investigator in the summer of 2006 (Item 4).

A candid disclosure of his recent arrest did not relieve him of his obligation to report his earlier DUI offenses. However, a mistaken belief held in good faith that he had complied with his obligation would negate the willful intent required under AG ¶ 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").

When the subject of the EPSQ omission was broached during his first interview held in July 2006, Applicant indicated that he first completed his security forms in 2004. He listed only the 1998 [sic] offense, because he thought he needed to go back only seven years (*see* Item 6). The record available for review does not include any security clearance application completed in 2004, so Applicant's claim of having listed the second DUI on an earlier form cannot be corroborated. Yet, it is also clear that as of

July 2006, Applicant still thought that the security clearance application only had a seven-year scope. As of February 2006 when he completed the EPSQ at issue, more than seven years had passed since his second DUI. Had Applicant intended to conceal his drunk driving from the government, it stands to reason he would not have disclosed that he had been arrested only two weeks before. His denial of any intentional concealment is accepted. AG ¶ 16(a) does not apply to his EPSQ omissions.[4]

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's abuse of alcohol in 2006 renewed concerns about his judgment and reliability that cannot be attributed to youthful indiscretion. He continued to drink every other weekend after his third DUI, and in irresponsible amounts on at least one occasion while undergoing court-ordered counseling. What insight Applicant has gained into his drinking behavior is not currently being reinforced through any association with AA or other similar recovery organization. While that may not be required to prevent a recurrence in his case, more time is required before I can safely conclude that his abuse of alcohol and related criminal conduct are safely in the past.

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:

[4]While there is conflicting evidence about the amount and date of Applicant's last involvement with alcohol, the government did not allege any additional personal conduct concerns beyond the EPSQ omissions.

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.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.

ELIZABETH M. MATCHINSKI
Administrative Judge