DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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SSN: -------------------	)	ISCR Case No. 07-16956
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Ray T. Blank, Esquire, Department Counsel
For Applicant: Jon L. Roberts, Esquire

December 12, 2008

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's request for eligibility for a security clearance is granted.

On December 1, 2005, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor, for whom he has worked since November 2005. (Gx. 1) After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding[1] that it is clearly consistent with the national interest to allow Applicant access to classified information. On April 30, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in

[1] Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

the Revised Adjudicative Guidelines (AG)[2] under Guideline E (personal conduct) and Guideline G (alcohol).

On June 19, 2008, Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on July 22, 2008, and I convened a hearing on September 3, 2008. The parties appeared as scheduled. The government presented four exhibits (Gx. 1 - 4). Applicant testified in his own behalf, submitted two exhibits (Ax. A and B) and presented four witnesses. Another witness for Applicant was unexpectedly called away from the hearing while waiting to testify. After consulting with the parties, I continued this matter to September 19, 2008. At that time, Department Counsel and Applicant's counsel appeared in person at DOHA headquarters, while Applicant appeared by telephone and Applicant's fifth witness appeared by video-teleconference (VTC). DOHA received the transcript of the September 3, 2008, hearing (Tr. I) on September 18, 2008, and the transcript of the September 19, 2008, hearing (Tr. II) on September 25, 2008.

Additionally, I left the record open until September 30, 2008, to allow Applicant time to present additional relevant information. (Tr. II, 28 - 29) Applicant timely submitted additional information admitted without objection as Ax. C. The record closed on October 10, 2008, when I received the parties' written closing arguments.

Procedural Issues

Applicant's Counsel objected to the admission of Gx. 3 based on a lack of foundation. Gx. 3 is a three-page document sent by facsimile on April 24, 2008, to Department Counsel by an employee in the human resources (HR) staff of a company where Applicant worked between March and August 2004. The facsimile cover page reads in relevant part as follows:

> As a follow up to our conversation/correspondence [Applicant] was terminated prior to [current HR manager's][3] employment with [name of company]. The enclosed document is the only document in [Applicant's] personnel file. [HR manager's] understanding is that it was written by [name of Applicant's former boss] who was Vice President of Support Services at the time.

The Directive, Section E3.1.20, provides in relevant part that "official records or evidence compiled in the regular course of business...may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department

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[2] Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005,which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive.

[3] This is assumed from the context of the statement.

or Agency head concerned, to safeguard classified information within industry under E.O. 10865...”

On its face, Gx. 3 was sent directly from Applicant’s former place of employment to DOHA Department Counsel. Even if Gx. 3 was admissible under an exception to the hearsay rule, the government did not present a witness to lay a foundation that would allow admission under Directive E3.1.20. Accordingly, I sustained Applicant’s objection. (Tr. I, 26 - 31)[4]

Findings of Fact

Applicant is 48 years old. He graduated from college in 1982 with a degree in mathematics. His professional experience since about 1994 has been in the information technology (IT) sector as a Unix[5] administrator. Since November 2005, he has been employed as such by a defense contractor that is sponsoring his clearance request. (Gx. 1) The government alleged in the SOR that Applicant was arrested for, charged with and convicted of driving under the influence of alcohol (DUI) on December 16, 2002 (SOR ¶ 1.a) and on July 31, 2004 (SOR ¶ 1.b). As part of the sentence for his 2004 DUI, Applicant was also alleged to have received alcohol counseling in 2007, which resulted in a diagnosis of alcohol dependence. (SOR ¶ 1.c) The government further alleged Applicant first consumed alcohol at age 18 and still consumes alcohol. (SOR ¶ 1.d) Applicant admitted the facts of each allegation, but denied he is dependent on alcohol, that he abuses alcohol, and that his alcohol consumption makes him a security risk.

The government also alleged that, in 1999, Applicant was issued a written warning for “disrespecting” a co-worker (SOR ¶ 2.a); that he was “dismissed” from a job in July 2002 (SOR ¶ 2.b); that he was “fired” from a job at a restaurant in January 2003 (SOR ¶ 2.c); that he was “fired” from another restaurant job in September 2003 (SOR ¶ 2.d); and that he was “dismissed” from a job in August 2004 (SOR ¶ 2.e). Applicant admitted with explanation all of the factual allegations, but denied that he left any of his jobs due to misconduct.

On May 10, 1999, Applicant was working for an IT firm as a Unix Administrator when he and a co-worker argued over how to resolve a technical problem. The argument included shouting at each other and escalated to the point his co-worker tried to slam her office door on Applicant, who blocked the door causing it to strike his co-worker. Both employees received written reprimands. On May 20, 1999, Applicant received a performance evaluation from the same person who issued the written reprimand. In the evaluation, he was rated average or above average in all categories but one. It was noted that he needed improvement in his interpersonal skills, but the evaluation was overall a positive one and he was given a $3,250 raise. Applicant left that company in July 1999, after 28 months, to pursue a better opportunity. A former co-

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[4] *See,* Directive, E3.1.10.

[5] According to a search on **www.google.com**, Unix is “an operating system for a computer that is capable of handling activity from multiple users. It is the most common OS for servers on the Internet.”

worker at the company praised Applicant for his professionalism and integrity. (Answer to SOR; Gx. 1; Gx. 2; Tr. I, 46 - 51, 101 - 103)

In July 2002, Applicant was let go from a Unix administrator's position after only three months and while he was still in a probationary status as a new employee. He disclosed in his e-QIP that he was told by his employer it "was not going to work out" there. While he had professional disagreements over how to go about his assigned duties, a co-worker stated that Applicant was let go as part of a reduction in force and that, in hindsight, Applicant's technical approach should have been adopted. The co-worker also praised Applicant for his honesty, professionalism and judgment. (Answer to SOR; Tr. I, 52 - 54, 104)

Applicant is currently single, but has been married twice. His first marriage ended in 1996, when his wife of 13 years died of heart failure. He remarried in September 2000, but he and his second wife separated in September 2002. Their divorce was finalized in March 2003. Applicant attributes the marriage's failure to stress from the illness and death of his father in 2001, stress from his employment downturns, and stress from his ex-wife's ongoing child custody battles with her ex-husband. In August 2003, Applicant moved to the state where he currently lives and works. This is the same state where he went to college. (Gx. 1)

Between August 2002 and March 2004, Applicant had trouble finding steady work in his chosen field. He attributed his uneven employment record during that time to a general downturn in the IT industry and to his August 2003 relocation after his divorce. To make ends meet, he took part-time jobs outside the IT field. Sometimes he also was able to find concurrent temporary work in the IT field. In September 2002, he found work as a waiter at a local restaurant. The job lasted one month because, as Applicant acknowledged, he was not a very good waiter. Applicant has characterized as a "personality conflict" the fact that he disagreed with the manager's decision to let him go. (Answer to SOR; Gx. 1; Tr. I, 104 - 106) In September 2003, a month after he moved to the state where now lives, he found work concurrently at a carwash and as a bartender. He stopped working at the carwash because he broke his arm on the job. He lost his restaurant job the same month because of reorganization.[6] (Answer to SOR; Gx. 1)

Applicant continued working at available IT jobs and at restaurant jobs through at least May 2005. In March 2004, he was hired as a full-time support engineer at an IT firm. The person who hired him for that job left the company almost immediately after Applicant started. Applicant did not get along with the person who succeeded the person who hired him. (Tr. I, 62 - 64; Tr. II, 10 - 15) Applicant eventually left the company. In his response to e-QIP question 22 (*Your Employment Record*), Applicant disclosed that he left this job in August 2004 under unfavorable conditions. Applicant cited conflicting reasons for the end of his employment there (Gx. 1), but has denied that he was fired or that the end of his employment was related to any misconduct. This conflicts with the testimony of a former co-worker, whose understanding was that

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[6] And possibly because he had broken his arm.

Applicant was fired. (Tr. I, 65 - 66; Tr. II, 15 - 17) A former member of the company's management characterized Applicant as "a model employee...who is honest and ethical, hard working, professional and skilled..." (Answer to SOR)

On December 16, 2002, Applicant was arrested and charged with driving under the influence of alcohol (DUI). He pleaded guilty, was fined, placed on supervision,[7] and ordered to complete a victim impact class. On July 31, 2004, Applicant was again arrested and charged with DUI. He again pleaded guilty, was fined and placed on supervision. He also was ordered to complete an alcohol safety awareness and counseling course, and to complete 240 hours of community service.

Both DUI offenses occurred in the state where he lived when he was married. When he was arrested the second time, he had been visiting from out of state. Applicant completed the community service portion and alcohol counseling portions of his sentence in the state where he now lives. All of the requirements of his sentence were completed satisfactorily. When he began the alcohol counseling portion, he was provisionally diagnosed at intake as being alcohol dependent. (Gx. 2) Applicant was told this was a standard entry required because he had two DUIs in his record. (Tr. I, 70) The diagnosis at discharge was alcohol dependence in early partial remission. But there was no recommendation of further treatment and no concern expressed about whether Applicant should abstain from alcohol or participate in a 12-step recovery program. Applicant was also assessed as having "demonstrated lower risk." Applicant drinks moderately when he drinks at all. (Answer to SOR; Gx. 2; Ax. A; Ax. B)

In July 2008, Applicant was evaluated about his alcohol consumption by a Licensed Psychiatric Counselor (LPC). The evaluation included blood tests designed to detect liver damage from excessive long-term alcohol use. The blood tests were within normal limits, but the evaluation itself was inconclusive pending ongoing evaluation and counseling. (Ax. A) The same LPC evaluated Applicant and gave him the same blood tests in September 2008. The LPC concluded at that time that Applicant was not an alcohol abuser or alcohol dependent. The blood tests were in the normal range for liver function. The LPC's evaluation also reported that he has been providing Applicant with substance abuse counseling and cognitive/behavioral therapy focusing on Applicant's rigidity of thinking and issues related to the loss of his first wife. A supporting psychological evaluation included with the LPC's evaluation showed Applicant does not suffer from any personality disorder and is a low risk for substance abuse or dependence. (Ax. C)

Applicant currently works in computer modeling and simulation efforts in support of a U.S. Navy contract. His record over the past three years has been excellent. Numerous professional and personal associates have vouched, either in person or in writing, for Applicant's trustworthiness, reliability, outstanding professional expertise, and integrity. More importantly, his associates and friends have noted his ability to work well with others. There have been no instances, either at work or in the community, of inappropriate behavior by the Applicant. Applicant is active in his church, through

[7] Not otherwise defined in the record.

weekly bible study classes, he excels as a member of Toastmasters, and he is an accomplished fast-pitch softball umpire and interscholastic wrestling referee. The coordinator of the program through which Applicant completed his court-ordered community service reported he "did an outstanding job of organizing and recruiting volunteers" and "did a superior job in all tasks that were assigned to him." (Answer to SOR; Ax. A; Tr. I, 134 - 177)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,[8] and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole person" concept, those factors are:

> (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 15 (Guideline E - Personal Conduct) and AG ¶ 21 (Guideline G - Alcohol).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest[9] for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.[10]

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[8] Directive. 6.3.

[9] *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

[10] *See Egan,* 484 U.S. at 528, 531.

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.[11]

Analysis

Alcohol.

The government presented sufficient information to support the allegations in SOR ¶¶ 1.a and 1.b, that Applicant was arrested for, charged with and convicted of DUI in December 2002 and July 2004, respectively. It also supported the allegation in SOR ¶ 1.c, that Applicant received court-ordered counseling after his second DUI, and that the counseling included a diagnosis of alcohol dependence. Finally, the record reflects that Applicant started consuming alcohol at age 18 and still consumes alcohol, as alleged in SOR ¶ 1.d.

The facts established by the government's information may raise a security concern, because "[e]xcessive 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." AG ¶ 21. More specifically, Applicant's DUI convictions require application of the disqualifying condition listed at 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 government's information also tends to support application of the disqualifying conditions at AG ¶ 22(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*) and AG ¶ 22(f) (*relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program*). However, the record shows that the basis for the alcohol dependence allegation is a single-page document entitled *Discharge Summary* and provided by Applicant in response to DOHA interrogatories. SOR ¶ 2.c references the name of the facility where Applicant was evaluated, but there is no other identifying information in the record about the facility. Thus, it is unclear if the program Applicant attended to fulfill a court-ordered counseling session is a recognized alcohol treatment program for purposes of AG ¶ 22(e). It is likewise unclear whether the person who made the diagnosis is the same person who evaluated Applicant. The signature on the form belongs to a CAC (Certified Addictions Counselor) as opposed to a Licensed Clinical Social Worker (LCSW). Assuming the person making the diagnosis was qualified to do so, there is no detailed information

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[11] *See Egan;* Revised Adjudicative Guidelines, ¶ 2(b).

from the clinician(s) involved about his history of alcohol use or his insight into any problem Applicant might have with alcohol.

Further, the only known reason why Applicant was diagnosed at intake as alcohol dependent was, as Applicant testified, it was required because he had two DUIs in his record. There is no detailed record of testing or interview that would show the diagnosis is anything more than a perfunctory entry required because of his arrests. (Tr. I, 70) At the end of the counseling program, Applicant was again diagnosed as alcohol dependent in early partial remission. However, it was reported that Applicant "demonstrated lower risk" and "no additional treatment recommendations" were made. Additionally, Applicant's information regarding his evaluations in July 2008 and September 2008 support a conclusion he is not a heavy drinker and at low risk for alcohol dependence or abuse. There is also substantial testimony that for at least the past three years, Applicant has led a stable, sober and responsible lifestyle. All of the foregoing, combined with the absence of any information of heavy drinking since at least July 2004, supports application of the mitigating factors at AG ¶ 22(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*). Applicant's use of counseling and more reliable clinical evaluations of his alcohol use also support at least partial application of AG ¶ 22(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*). I conclude there is no history of treatment and relapse because, despite a diagnosis of alcohol dependence, it was not recommended he abstain from alcohol or engage in any follow-on treatment. Because he successfully completed the court-ordered counseling program and has demonstrated he is, at most, a moderate drinker, Applicant also benefits from AG ¶ 22(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.*). On balance, I conclude that the totality of information probative of the security significance of Applicant's use of alcohol and his past alcohol-related incidents is sufficient to mitigate the security concerns under Guideline G.

Personal Conduct.

A security concern may also exist when, as stated in AG ¶ 15, available information reflects

> [c]onduct 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.

I have reviewed the facts and circumstances of this case in the context of Guideline E, particularly the fact that Applicant was reprimanded in 1999 after he and a co-worker got into an argument that included door slamming and raised voices. That event requires consideration of Guideline E disqualifying condition at AG ¶ 16(d)(2) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:... (2) disruptive, violent, or other inappropriate behavior in the workplace*).

However, contrary to Department Counsel's argument that "Applicant has been involved in multiple disruptive events at work that have resulted in negative job consequences,"[12] I conclude that the record, at worst, shows Applicant is not a good waiter or bartender, that he understandably disagreed with one restaurant managers decision to let him go, and that he had two other jobs where he was not a good fit for what appear to be professional reasons only. Aside from the 1999 argument, there have been no other "disruptive events" in Applicant's employment background. In contrast to the government's information, the record shows Applicant has held 16 jobs without incident since 1994. Most have been within the IT industry, with some jobs held concurrently when the IT industry was faltering. There is ample information showing that Applicant has been and still is an excellent employee. It must be acknowledged, as well, that Applicant may not be a particularly easy person to get along with, owing to the rigidity of thinking mentioned in his recent psychological evaluation.

Nonetheless, all of the available information bearing on Applicant's employment history, does not support "a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information." On the other hand, the record does support application of the mitigating condition at AG ¶ 17(c) (*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*). The lone disruptive workplace event happened nearly 10 years ago and references from that job, as well as from many of Applicant's subsequent employers indicate his workplace behavior has not been a problem or concern. Applicant has also engaged in behavioral counseling to improve his ability to deal with past issues, including stress resulting from his first wife's death. In that regard, it is also appropriate to apply the mitigating condition at AG ¶ 17(d) (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*). While Applicant may need help with his interpersonal skills

[12] Closing Argument, page 7.

in the workplace, available information about his conduct is sufficient to mitigate the stated security concerns under this guideline.

Whole Person Concept.

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and G. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 48 years old and presumed to be a mature adult. He has experienced personal and professional difficulties that resulted in a varied employment history between 2002 and 2005, and may have contributed to carelessness in his use of alcohol on two occasions. However, he has moderated and/or eliminated his drinking and is getting professional counseling about alcohol and other behavioral issues. Applicant has been extremely candid and forthcoming about his employment history and alcohol consumption. Indeed, much of the information which supports the SOR allegations originated with him. In contrast to the adverse facets of his background, the record shows Applicant is honest, active in the community, hard working, and professional. His alcohol-related conduct occurred more than four years ago, he is at low risk of future alcohol dependence or abuse, and the one documented instance of disruptive behavior in the workplace occurred nearly 10 years ago. His job performance in the past three years has been excellent. Over the same period, he has been more stable personally and professionally. A fair and commonsense assessment[13] of all available information shows Applicant has satisfied any doubts about his suitability for access to classified information.

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[13] *See* footnote 8, *supra*.

Formal Findings

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

Paragraph 1, Guideline G:	FOR APPLICANT
Subparagraph 1.a - 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a - 2.e:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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MATTHEW E. MALONE
Administrative Judge