DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-00295
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Timothy W. Shaw, Esquire

June 15, 2009

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA) on February 16, 2007. On November 26, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under criminal conduct (Guideline J) and excessive alcohol consumption (Guideline G). The action was taken pursuant to 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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant provided his answer to the SOR on December 8, 2008. DOHA issued a notice of hearing on March 3, 2009, and the hearing was held on March 25, 2009. At the hearing, 11 government exhibits (GE 1 through 11) were admitted in evidence without objection to support the Government's case. Applicant testified and submitted 10 exhibits (AE A through AE J) in support of his case. DOHA received a copy of the transcript (Tr.) of the proceedings on April 9, 2009. Based upon a review of the case file,

pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Rulings on Procedure

Subparagraph 1.a. incorrectly identifies January 25, 2007 as the date the alcohol-related driving offense occurred. GE 6 clearly shows the offense occurred on January 31, 2007.[1] Hence, the date that appears in the subparagraph is hereby changed to January 31, 2007 to conform the allegation in the SOR to the evidence presented. *See*, E.3.1.17. of the Directive.

Findings of Fact

Paragraph 1 of the SOR alleges five criminal conduct allegations. In response to each allegation, Applicant admitted he was arrested. In response to SOR 1.a., he indicated, and the records reflect, the case was dismissed. Concerning the remaining allegations, Applicant neither admitted nor denied the substantive offense, but stated that the evidence shows successful rehabilitation. Under paragraph 2 of the SOR, Applicant indicated that SOR 1.a., 1.d., and 1.e. have unusual circumstances. Furthermore, the behavior is unlikely to recur based on the passage of time and the infrequency of the conduct. In addition to Applicant's admissions in his answer to the SOR, I make the following factual findings.

Applicant is 46 years old and married. He has two children from a previous marriage, and his current wife has two children from a previous marriage. Applicant retired from the United States Air Force in 2003 with an honorable discharge after 20 years of service.

Criminal Conduct

On January 25, 2007 (SOR 1.a.), Applicant was arrested for driving while under the influence of alcohol (DUI), and refusal to submit to a test for alcohol. He admitted to the arresting officer he had consumed two or three beers (GE 2). He contested the observations of the officer about having trouble keeping his balance (*Id*.). Also, Applicant requested video evidence to support the officer's claim he crossed the yellow line (Tr. 144; GE 3), but Applicant never saw video evidence (GE 2).[2] Applicant declined to take a breath test, "Because I thought I had a better chance by going to 12 peers and for them to judge whether it was a legal stop or not." (Tr. 142-143) After the case was scheduled for hearing several times, the matter was dismissed when the police officer

[1] The date January 31, 2007 appears (1) on the first page of the offense report, on the third page under the case status section, on the fourth page under the offense status section, on the fifth page in section titled probable cause affidavit, on the sixth page in the breath test operator permit affidavit, and in the refusal to submit to a breath test form (seventh page of the exhibit).

[2] Applicant testified the officer had videotape evidence that he never produced (Tr. 132).

did not appear for the hearing (GE 6). A no prosecution order was issued on April 23, 2007 (AE I).

Applicant was arrested on October 11, 2006 (SOR 1.b.) for a battery domestic violence offense that occurred on September 24, 2006 (GE 7). In GE 3, Applicant noted he and his soon-to-be wife became involved in an argument over a business they operated. Applicant testified he had not been drinking before the incident. (*Id*.; Tr. 128) He believed his wife had been drinking, though he did not know how much (*Id*.). He claimed he did not strike her. (Tr. 129).

Applicant's wife testified that on September 24, 2006 (SOR 1.b.) she and Applicant got involved in a scuffle by grabbing each other (Tr. 62). She testified she had consumed a large amount of alcohol, but he had not consumed any alcohol before the incident (Tr. 60). The police were called. Applicant's wife indicated repeatedly to the police she did not want to file charges (Tr. 59-63).

There is information in the incident report (SOR 1.b., GE 7) that the children of Applicant's then-girlfriend indicated they saw Applicant punching her, and that the arresting officer noticed marks on his wife's neck and face (*Id*.). Applicant's wife testified she punched herself in the eye (Tr. 64), resulting in the marks that appear in her picture on the first page of GE 7. Applicant's wife could recall no scuffles with Applicant before or since the encounter in September 2006 (Tr. 65).

During cross-examination, Applicant's wife was asked to provide information about the police officer's investigative statement (GE 7) concerning witnesses in the domestic violence of September 2006 (SOR 1.b.), and the statement's reference to a location where Applicant might be found. After acknowledging she had read the statement, she denied she provided the information in the statement. She stated she would not answer the question regarding the location identified in the statement or a location where Applicant frequented (Tr. 76-77).[3]

Returning to the procedural path of SOR 1.b. through the court system, on January 25, 2007, Applicant pled guilty to battery, domestic violence, and was sentenced to 12 months probation, ordered to pay $502 in court fines, and required to attend the Battery Intervention Program (BIP).

The BIP program cost about $1,100 for 29 classes, meeting once every Tuesday (GE 2; AE A). Applicant's licensed mental health counselor, qualified to testify as an expert in the field of domestic violence treatment, but not in the field of alcohol treatment (Tr. 88-96), testified that Applicant successfully completed the BIP program (Tr. 98). The 29 meetings consisted of three classes of initial assessment, 24 weeks of group sessions, a feedback session half way through the program, and a final

[3] The refusal of Applicant's wife to answer questions concerning the officer's statement, coupled with her nervous demeanor while she testified (Tr. 82), reduces the believability of her testimony concerning the domestic violence offense on September 24, 2006.

assessment/critique session (Tr. 97). The mental health counselor did not believe Applicant was likely to be involved in similar behavior in the future based on:

> His participation [in the program], his insight that they have gained, just an overall feel for how they participate and share with other people, confront other people, on their behaviors. It's not one specific thing. It's just a lot of pieces that I picked up during the 29 sessions (Tr. 100-101).

The mental health counselor also saw Applicant on March 9, and March 23, 2009. The counselor conducted an evaluation of Applicant consisting of a personal history, records review, a clinical interview, and administration of two tests. The counselor opined that nothing in the records precluded Applicant from holding a security clearance (AE A). In the 29 weeks of counseling, the counselor did not become aware of Applicant's April 2002 domestic violence offense (Tr. 107, 109).

Applicant's wife testified that after Applicant completed the BIP course in 2007, she noticed a change in his behavior. According to his wife, when he gets angry to the point of being upset, he knows how to talk about it (Tr. 71).

On April 28, 2002, Applicant was arrested for battery domestic violence (SOR 1.c.). He was on active duty in the United States Air Force and had just returned from extended deployment (GE 3). The supporting documents reflect statements by the victim his former wife alleging he grabbed her and threatened her. Applicant maintains that his former wife was startled by his hug, and began to strike him (GE 3; Tr. 119). Applicant indicated he had not consumed any alcohol before the April 2002 domestic violence (Tr. 156). He recalled pleading no contest to the charges. On June 7, 2002, Applicant received pre-trial diversion. He successfully completed a four-day anger management course and a family advocacy course on the military installation (AE G; Tr. 120). AE G also refers to completion of the BIP program on December 20, 2002, although there is no corresponding entry earlier in the journal record directing Applicant to enroll in the program. I consider the BIP reference an administrative error.

On March 12, 2001, Applicant was arrested for DUI (SOR 1.d.). He had been on a long deployment and returned home after realizing his 17-year marriage was over. Applicant indicated he had two beers at a bar and one beer at a restaurant (Tr. 117-118). Shortly after leaving the restaurant, he was stopped by the police for weaving between the lines. Applicant does not believe he was weaving (GE 3). After four field tests conducted by the arresting officer, the officer placed Applicant under arrest (GE 10). Applicant's refusal to take the breath test resulted in his license being suspended for 18 months because it was the second time he refused. Applicant refused the test because it was his right to refuse, not because he was intoxicated (GE 3). He also testified that:

> I refused on that particular incident because I thought that I would have a better chance in court of putting my evidence out and seeing what the police officers had. There are a lot of police officers, in my opinion, in this

> country that are overzealous and pull you over for any reason, especially if it's after midnight (Tr. 145-146).

The state amended the charge from DUI to reckless driving and Applicant pled no contest. He was found guilty of reckless driving and ordered to attend DUI awareness school. He also paid a fine of $533, and was placed on probation for 6 months. He successfully completed DUI school, along with all other conditions, and was discharged from probation on January 18, 2002 (AE J).

Before Applicant's July 1994 arrest for DUI, he had been on a fishing trip. He stated in GE 3 he drank two beers on the trip, and one beer while his fishing equipment was being unloaded. He was stopped for DUI. The arresting officer told him he was stopped for erratic driving, but the police officer never explained to him what his erratic driving was, nor did Applicant believe he was intoxicated (GE 3). His reasons for refusing the breath test in 1994 were that he did not want to jeopardize his position and security clearance in the military. He added:

> . . . I would have a better chance with a jury trial than just having an officer pull me over with his observations conducting trial and jury and convicting me on the spot, when I believe that I wasn't guilty for, number one, the reason for the stop or number two, for the amount of alcohol that I consumed (Tr. 147).

The DUI charge was reduced to reckless driving and Applicant was found guilty of the amended charge. He completed all conditions of his sentence that included a fine, DUI school and probation for 6 months. His license was also suspended for 6 months for refusal to take the breath test (Tr. 142).

Alcohol Consumption

Applicant began consuming alcohol in 1983 when he entered the service. When he was not on deployment, he occasionally consumed a 12-pack of beer on the weekends with friends and family (GE 3). After the alcohol-related offense in March 2001, Applicant decreased his drinking to a 6-pack of beer over a weekend on occasion, and two or three beers on occasion. In June 2008, Applicant indicated he consumed alcohol to relax and not to become intoxicated. He intended to drink in the future, but would no longer drink alcohol then drive a car (GE 3). Applicant testified he never had blackouts, has never missed work, or lied about his drinking (Tr. 152).

Applicant's wife believes Applicant's drinking changed after the incident in September 2006 (Tr. 69). In her estimation, Applicant currently consumes alcohol about once every six months (Tr. 70). Applicant testified that from January 2007 (SOR 1.e.) until the hearing, he consumed alcohol six months before the hearing, and also during the professional football championship in January 2009. He believes he will probably remain abstinent in the future because of the security investigation (Tr. 138). With 20 years of service in the military and five years employment with a defense contractor, he

did not think he would have to come to a hearing to explain his alcohol consumption (*Id*.).

Character Evidence

Witness A, who worked the day shift before he retired in 2008, testified he has known Applicant since 1991, and worked with him daily as senior technician on the same shift from 2005 to 2008. In 2005, Witness A recommended that Applicant be hired for his position, and still believes he is trustworthy (Tr. 37). Applicant has shown no sign of alcohol use on the job. Witness A has seen Applicant at a bar (Tr. 36).

Witness B has known Applicant since June 2004. While he has no contact with Applicant away from the job, he has never seen any sign of alcohol use by Applicant on the job (Tr. 43-45).

Witness C, lead supervisor of the day shift, hired Applicant in July 2004. He has never smelled alcohol on Applicant (Tr. 48-49), and recommends him for a position of trust (Tr. 48). Witnesses A and C recalled Applicant attending battery intervention counseling in 2007 (Tr. 56).

Applicant received recognition by the Air Force for his non-combat service between November 1991 and December 1996 (AE B).

Applicant's personal record (AE C) reflects education at the non-commissioned academy. The record also shows a Bachelors degree in astronautical engineering and an associate degree in systems technology.

On November 10, 1998, Applicant received recognition for spending 30 consecutive days at a location in the Middle East, in support of a military program (AE D). AE E, which shows Applicant's flying history, reflects that he compiled 925.2 hours of flight time behind enemy lines.

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 flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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. Reasonable 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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.

Analysis

Criminal Conduct (CC)

¶ 30. *The Concern*. "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."

The government has established a criminal case under the criminal conduct guideline. Between 1994 and January 2007, Applicant engaged in four criminal offenses by violating the traffic laws and/or breath test regulations, and the domestic violence statute of the state. Significantly, Applicant's explanation for the two alcohol-related offenses in 1994 and 2001 is that he did nothing wrong. In the 2002 domestic violence offense, he claims the only action he took toward his former wife was to hug her. In the September 2006 domestic violence offense, his only adverse conduct was a mutual scuffling where he and his current wife grabbed each other. CC disqualifying condition (DC) ¶ 31.a. (*a single serious crime or multiple lesser offenses*) and CC DC ¶ 31.c. (*allegation of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) apply.

There are two of four mitigating conditions that potentially apply to the facts: CC mitigating condition (MC) ¶ 32.a. (*so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) and CC MC ¶ 32.d. (*there is 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 development*).

Considering the evidence as a whole, CC MC ¶ 32.a. does not apply because the second domestic violence offense, which occurred less that four years ago, represents a pattern of criminal conduct that began in 1994. Applicant's explanation for each offense demonstrates minimization and denial of the full scope of his conduct in each crime. Even though he completed all terms of his sentence, including the completion of the BIP program in 2007, Applicant still believes he did nothing wrong. His position continues to cast doubt on his reliability and trustworthiness.

The evidence of successful mitigation under CC MC ¶ 32.d. comes from Applicant's completion of the BIP program. Likewise, Applicant's job performance evidence and academic accomplishments have been recognized. But, not enough time has passed since the September 2006 offense. Applicant has not persuaded me he accepts full responsibility for his actions in the domestic violence behavior, and the other alcohol-related offenses, including the refusals to take breath tests for alcohol. The opinion of the licensed mental health counselor (qualified to testify in domestic violence course of treatment) that he did not believe Applicant was at risk to engage in this kind of behavior in the future, would usually be entitled to considerable weight. However, the counselor's opinion is assigned less weight because he did not know Applicant had committed battery domestic violence in April 2002. Having weighed all the evidence, particularly his refusal to take the test for alcohol on three occasions between 1994 and January 2007, the CC guideline is resolved against Applicant.

Alcohol Consumption (AC)

21. *The Concern*. "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

AC DC ¶ 22.a. (*alcohol-related incidents away from work regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent*) applies to Applicant's two alcohol-related offenses in 1994 and 2001. However, Applicant indicated that he moderated his drinking after the 2001 offense. Though Applicant continued to consume alcohol subsequent to the 2001 offense, there is no evidence he used alcohol in the domestic violence offenses of April 2002 and September 2006. Though he was charged with DUI and admitted consuming two or three beers before his DUI arrest in January 2007, the charges were dismissed when the arresting officer failed to appear for the hearing. Accordingly, the documentation (except the documentation verifying

Applicant refused to take the breath test) supporting SOR 1.a. receives no weight. Based on Applicant's reduced use of alcohol since 2001, I employ AC MC ¶ 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*) to resolve the AC guideline in Applicant's favor.

Whole Person Concept (WPC)

¶ 2. The adjudicative process is an examination of a sufficient period of a person's life, and a careful consideration of nine variables that comprise whole person model:

> (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 was 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 and recurrence. ¶ 2, p.18 of the Directive.

Having carefully weighed and balanced the adverse evidence with the favorable evidence, I find against Applicant under the criminal conduct guideline because I am not persuaded he accepts full responsibility for his alcohol-related behavior in 1994, 2001, and the domestic violence offenses in 2002 and 2006. The reason for breath tests and other field sobriety tests is a convincing public policy of keeping drunk drivers off the road. Though an individual's refusal to take the breath test is his right, Applicant's refusal is based on his claim that police officers are more inclined after midnight to stop drivers for any reason. This position demonstrates poor judgment and a lack of respect for regulations designed to promote public safety.

I have carefully evaluated the commendations/awards/education Applicant has received during his 20-year career in the Air Force. His good job performance serves as a basis for Witnesses A, B and C to recommend him for a position of trust. Having weighed the entire record with the testimony of Applicant and his witnesses, Applicant has not met his ultimate burden of persuasion under the CC guideline. Conversely, the supporting evidence from his wife regarding his decreased alcohol consumption establishes a finding in his favor under AC guideline.

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 (Criminal Conduct, Guideline J): AGAINST APPLICANT

Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	Against Applicant
Subparagraph 1.c.	Against Applicant
Subparagraph 1.d.	Against Applicant
Subparagraph 1.e.	Against Applicant

Paragraph 2 (Alcohol consumption, Guideline G) FOR APPLICANT

Subparagraph 2.a.	For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge