DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-01006
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro se*

December 23, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and J (Criminal Conduct). Eligibility for continued access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on August 26, 2007. On July 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines G and J. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant acknowledged receipt of the SOR on August 6, 2008; answered it on August 20, 2008; and requested a hearing before an administrative judge. DOHA received the request on August 21, 2008. Department Counsel was ready to proceed on September 25, 2008, and the case was assigned to me the following day. DOHA issued a notice of hearing on October 2, 2008, scheduling the hearing for October 28, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through S, which were admitted without objection. The record closed on October 28, 2008. DOHA received the transcript (Tr.) on November 6, 2008.

Request for Continuance

On October 2, 2008, Applicant requested that his hearing be postponed until the second week of December 2008, in order to be represented by an attorney who is a friend of the family (Hearing Exhibit (HX) I). On the same day, I informed Applicant that I would not postpone the hearing based on the information provided. I told Applicant I needed an entry of appearance from his intended attorney and a detailed justification for lengthy delay he had requested (HX II). On October 23, 2008, I reminded Applicant of my earlier ruling (HX III), and he replied that he would not be represented by an attorney and that he was ready to proceed on the scheduled date (HX IV; Tr. 56).

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.b-f and 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 36-year-old aviation mechanic employed by a defense contractor. He served on active duty in the U.S. Marine Corps from January 1997 until January 2002, and he has worked for his current employer since leaving active duty. He held a clearance during his Marine Corps service and retained it when he was hired by his current employer (Tr. 15). He was separated from active duty under honorable conditions and received the Good Conduct Medal (AX A at 2).

In 1989, when Applicant was 16 or 17 years old, he was charged with assault after he slashed a man's face with a bottle during a bar fight (Tr. 70-72). He testified he came to the defense of his older brother (Tr. 121-22). He was tried as a juvenile, fined, and placed on probation.

In 1990, Applicant was charged with criminal mischief, disorderly conduct, and possession of liquor by a minor. He pleaded guilty to illegal possession of liquor and was placed on probation. In August 1991, he was again charged with illegal possession of liquor by a minor. His probation was revoked, and he served 15 days in jail (Tr. 72).

In October 1992, Applicant was charged with driving under the influence of liquor (DUI). He was sentenced to 60 days in jail, with all jail time suspended except 72 hours (Tr. 73). In 1994, he was charged with DUI and eluding the police. He pleaded guilty to DUI and was fined. Regarding the charge of eluding the police, he testified he was lost and did not realize the police were following him (Tr. 74).

In May 2001, while serving on active duty in the Marine Corps, Applicant was charged by civilian police with inflicting corporal injury on a cohabitant. He and his girlfriend had an argument, and he tried to restrain her after she slapped and scratched him. A neighbor called the police, who detained Applicant because he accidently struck her lip while they were scuffling and the police noticed her lip was bleeding. He posted bond and his girlfriend later picked him up at the police station. He notified his military commander of the incident. He was not prosecuted by military or civilian authorities (GX 4 at 3; GX 6; Tr. 56, 78-80, 125). This incident was not alcohol-related.

In November 2003, Applicant was charged with second degree assault. He testified he came home late from a bachelor party and saw that his girlfriend had left their six-month-old son unattended. He saw his girlfriend talking to a neighbor across the street. He and his girlfriend began arguing, and he unintentionally knocked a cell phone from her hand. The neighbor, apparently believing Applicant had struck her, knocked him to the ground. During the ensuing struggle, Applicant defended himself by "choking the neighbor out" and injuring his esophagus. Applicant's girlfriend called the police. Both Applicant and the neighbor were intoxicated. Applicant was placed on probation before judgment for 30 days and required to pay the neighbor's $400 medical bill (GX 4 at 4; GX 5 at 3-6; AX S; Tr. 81-90, 127-28).

In June 2005, Applicant stopped at a bar near his house and had several drinks, knowing he could walk home if necessary. A female bartender with whom he was acquainted asked him to remove her ex-boyfriend from the bar because he was causing a commotion. Applicant agreed to take the ex-boyfriend to another bar about three miles away (AX B; Tr. 56-57). Police stopped him on the way and charged him with failing to drive to the right of the center line, driving while impaired, and driving under the influence. Pursuant to his lawyer's recommendation, he began an outpatient program for alcohol abuse in July 2005, while awaiting trial. He began attending AA meetings at about this time.

In September 2005, he pleaded guilty to driving under the influence and not guilty to the other charges, which were disposed of by nolle prosequi. He was placed on probation before judgment and paid a fine (GX 4 at 5). As a condition of his probation, he continued his outpatient treatment for alcohol abuse until May 2006, when he successfully completed it. His prognosis by a licensed clinical alcohol and drug abuse counselor was "good." The discharge notes stated, "No further treatment needed." His primary diagnosis was alcohol abuse in early partial remission. The staff recommendations upon discharge were to abstain from alcohol, continue his AA involvement, and to stay focused on recovery (AX D).

In February and March 2006, Applicant voluntarily received inpatient treatment for alcohol abuse. He testified that during his outpatient treatment issues from his family history had surfaced and he felt they needed to be addressed with one-on-one counseling (Tr. 59). His mother is an alcoholic and was married four times. Applicant changed his last name after his mother's first divorce and replaced his birth father's name with his grandfather's name (Tr. 70). During his inpatient treatment he was diagnosed by a medical doctor as alcohol dependent. His discharge summary recites that he was always attentive and actively participated in his treatment. His counselor commented that he needed to continue working on relapse prevention. His prognosis for recovery at discharge was "guarded" (AX C). He stopped drinking at about this time (Tr. 100).

Shortly after completing his inpatient treatment, Applicant obtained a prescription for a drug to reduce his craving for alcohol. He did not use it regularly because of its bad effects on his digestive system, but he keeps it with him in case he feels stressed and is unable to contact someone in his support network (Tr. 112-14).

In March 2003, while continuing to work as an aviation mechanic, Applicant started a lawn care business to generate some additional income (AX E). In October 2006, all his equipment was stolen, and he borrowed $5,000 to replace it (AX F; Tr. 60-61).

In March 2007, Applicant purchased a home. In January 2008, Applicant's lawn-service business declined, some of his clients stopped paying him, and he lost one of his larger commercial contracts (Tr. 63). He fell behind on his home mortgage payments (AX G).

In September or October 2007, Applicant had two relapses, after about a year and eight months of sobriety (Tr. 100). The first occurred when he drank several beers at home because he was embarrassed by his delinquent mortgage payments and under stress by his level of indebtedness and the downturn in his lawn care business (Tr. 102-07). The second occurred within two or three weeks as a result of the same stressors (Tr. 108-11).

Applicant currently attends AA meetings twice a week, and he has a local sponsor (Tr. 120). In addition, his mother, an AA participant for many years, is his "long distance sponsor." They talk at least once a day (Tr. 115). One of Applicant's co-sponsors in AA describes him as a "strong influence" in their meetings. He is the first person to arrive at meetings, helps with administration, and is the last to leave (AX H). Another co-sponsor believes he has become a stronger person because of his past problems (AX I).

Applicant and his long-time girlfriend (the same person involved in the May 2001 incident) were married about three weeks before the hearing. His wife has taken over many of the responsibilities of the lawn service business, significantly reducing his stress level (Tr. 115). His financial situation is now under control (Tr. 118-19).

Applicant's mother and stepfather consider him a hard worker who has become stronger, healthier, happier, and more productive and certain of his path in life (AX J). His spouse believes he works hard at maintaining sobriety and takes it very seriously. In her written statement and her testimony at the hearing, she described him as trustworthy, loyal, and dedicated to his family (AX K; Tr. 133). She testified that, after he completed the outpatient treatment in March 2006, they had a "whole new life," being happy and doing things together as a family (Tr. 129). His father-in-law and mother-in-law have helped and supported his rehabilitation efforts. They regard him as a dedicated, strong, trustworthy, and caring person (AX L).

One of Applicant's supervisors considers him one of the best, most dedicated mechanics in the shop (AX M). A coworker for the past six years regards him as trustworthy, fair, and helpful (AX N). The lead technician in his shop states that his performance has been exemplary and his integrity is unquestioned (AX O). The lead technician nominated Applicant as employee of the quarter. Applicant has twice received cash bonuses of $200 for his performance (AX O and P). He received a letter of appreciation from his division manager for his initiative and hard work in the summer of 2006 (AX Q). Applicant's annual performance appraisals for the past six years all rated him in the top category of "distinguished" on a five-level scale. (AX R)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline G, Alcohol Consumption

The SOR alleges Applicant consumed alcohol to excess from 1991 to "at least" September 2007 (SOR ¶ 1.a), was charged with multiple alcohol-related offenses between 1990 and June 2005 (SOR ¶¶ 1.b-f), received outpatient alcohol-related counseling from July 2005 through May 2006 and was diagnosed as suffering from alcohol abuse (SOR ¶ 1.g), and received inpatient treatment of alcohol abuse in February 2006 and was diagnosed as suffering from alcohol dependence (SOR ¶ 1.h).

The concern under this guideline is set out in AG ¶ 21 as follows: "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." Conditions that could raise a security concern and may be disqualifying include: "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." AG ¶ 22(a). Applicant's record of alcohol-related violence, underage drinking, and DUI arrests raise this disqualifying condition.

A disqualifying condition also may be raised by "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent." AG ¶ 22(c). This disqualifying condition is raised by Applicant's numerous instances of drinking to the point of impaired judgment.

A disqualifying condition also may be raised either by "diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence." AG ¶ 22(d). Applicant's diagnosis of alcohol dependence by a medical doctor in the inpatient treatment program raises this disqualifying condition.

A disqualifying condition also may be raised by "evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." AG ¶ 22(e). Applicant's diagnosis of alcohol abuse was by a licensed clinical alcohol and drug abuse counselor. Because there is no evidence showing that the licensed clinical alcohol and drug abuse counselor had the same qualifications and diagnostic authority as a licensed clinical social worker, this disqualifying condition is not raised.

Finally, a disqualifying condition may be raised by "relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program." AG ¶ 22(f). Applicant's two relapses in September and October 2007 raise this condition.

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

Security concerns under this guideline may be mitigated if "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 23(a). The first prong of this mitigating condition focuses on the recentness of the conduct. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*.

Applicant stopped drinking after completing his inpatient treatment in early 2006. He voluntarily sought treatment beyond the requirements of his probation and gained valuable insights into his behavior. He abstained from drinking until his two relapses in

September and October 2007, a period of about 20 months. He abstained from the date of his last relapse in October 2007 until the date of the hearing, about a year later. He has diligently participated in AA, and he has strong support from his spouse, mother, and in-laws. He has continued his outstanding performance at work. There have been no alcohol-related incidents since his arrest in June 2005. According to his spouse, there has been a dramatic change in his attitude, stress level, family involvement, and level of happiness. He was candid, sincere, and credible at the hearing. I conclude the first prong of AG ¶ 23(a) is established.

The second prong ("so infrequent") and third prong ("unusual circumstances unlike to recur") of AG ¶ 23(a) are not established; however, the final prong ("does not cast doubt") is established. Applicant has aggressively addressed his alcohol dependence, gained insight into his behavior, surrounded himself with a support network, and conducted himself in a lawful and responsible manner. His focus has shifted from irresponsible drinking to focusing on his job and his family. He has demonstrated his determination to maintain his sobriety. I conclude the mitigating condition in AG ¶ 23(a) is established.

Security concerns also may be mitigated if "the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)." AG ¶ 23(b). Applicant acknowledged his alcohol problems, sought treatment, established a support network, abstained from alcohol for 20 months before a relapse, and abstained from alcohol for a year after his relapse. I conclude AG ¶ 23(b) is established.

Finally, security concerns under this guideline may be mitigated if "the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program." AG ¶ 23(d). Applicant has met all the elements of this mitigating condition except the favorable prognosis. His prognosis from the inpatient program was "guarded." His prognosis from the outpatient program was "good," but that prognosis was from a licensed clinical alcohol and drug abuse counsel, not a "medical professional" as defined in AG¶ 22(d) or a licensed clinical social worker.

Guideline J, Criminal Conduct

The SOR alleges Applicant was charged with assault in 1989 (SOR ¶ 2.a), inflicting corporal injury on a cohabitant in 2001 (SOR ¶ 2.b), assault in 2003 (SOR ¶ 2.c), and the alcohol-related offenses alleged in SOR ¶¶ 1.b-f (SOR ¶ 2.d). The concern raised by criminal conduct is that it "creates doubt about a person's judgment, reliability,

and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30.

Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c). The evidence is sufficient to raise AG ¶¶ 31(a) and (c), shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.

Security concerns under this guideline may be mitigated by evidence that "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 32(a). As discussed above under Guideline G, a substantial time has passed since Applicant's criminal behavior, and he has abstained from alcohol for a substantial period. I conclude this mitigating condition is established.

Security concerns arising from criminal conduct also may be mitigated if "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 involvement." AG ¶ 32(d). For the reasons set out above in the discussion of Guideline G, I conclude this mitigating condition is established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines G and J in my whole person analysis. Some of the factors

in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant was well-prepared for the hearing. He presented himself as contrite for his past, candid, intelligent, credible, and committed to a responsible lifestyle. In spite of his alcohol-related problems, he has held a security clearance for more than ten years, apparently without incident. Most of his criminal conduct was alcohol-related, and he appears to have his alcohol problem under control.

Applicant is now a mature adult, married, the father of a child, a homeowner, and a talented and dedicated aviation mechanic. He has grown out of his youthful behavior, dealt with the demons from his childhood, received counseling, established a support network, and focused himself on his family and his job. He has candidly disclosed his past, eliminating the potential for pressure, coercion, exploitation, or duress. He has taken significant steps to minimize the likelihood of recurrence.

After weighing the disqualifying and mitigating conditions under Guidelines G and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on alcohol consumption and criminal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 1.a-h:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 2.a-d:	For Applicant

Conclusion

In light of all of the circumstances, 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.

LeRoy F. Foreman
Administrative Judge