



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-01884
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Allison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

July 29, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has failed to mitigate security concerns pertaining to Criminal Conduct and Alcohol Consumption. Clearance is denied.

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on January 16, 2007. On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct), and G (Alcohol Consumption). 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 acknowledged receipt of the SOR on October 27, 2008. Applicant answered the SOR in writing on November 11, 2008, and elected to have his case decided at a hearing. Department Counsel was prepared to proceed on February 10,

2009. On February 11, 2009, the case was assigned to me. On March 12, 2009, DOHA issued a notice of hearing scheduling the case for April 9, 2009. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 20, which were received without objection. Applicant offered Applicant Exhibits (AE) A through J, which were received without objection, and he testified on his behalf. I held the record open until April 17, 2009 to afford the Applicant the opportunity to submit additional material. Applicant timely submitted AE K and L, which were received without objection. DOHA received the hearing transcript (Tr.) on April 17, 2009.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the allegations alleged. After a thorough review of the record, I make the following findings of fact.

Applicant is a 48-year-old network engineer, who has been employed by a defense contractor since October 2008. GE 1, Tr. 27, 33. Except for brief periods, he has continuously held a security clearance since April 1982 that was initially granted to him when he enlisted in the U.S. Air Force, discussed *infra*. Tr. 30, 37-38. He seeks to retain his clearance which is required as a condition of his employment. Tr. 39.

Applicant graduated from high school in May 1979. Tr. 35. Following high school, he completed vocational school in October 1980 where he studied technical illustration. Tr. 35-36. He served in the Air Force from April 1982 to September 1988, and was honorably discharged as a staff sergeant (pay grade E-5). Tr. 30, AE F. Applicant has taken a number of college courses over the years and estimates he has accumulated 68 credit hours. Tr. 36-37.

Applicant was married to his first wife from October 1980 to July 1984. That marriage ended by divorce. He has been married to his second wife since November 1986. He has a 21-year-old son from his second marriage, who is independent and lives on his own. GE 1, Tr. 27-29.

Applicant has a history of episodic alcohol abuse, marked by an extensive history of 13 alcohol-related arrests spanning a 13-year period from August 1992 to January 2005. This hearing was Applicant's second DOHA hearing in which alcohol formed the basis of security concerns.

His previous hearing was held on September 22, 1994, and eight alcohol-related concerns were substantiated. They are: (a) he was found to have consumed alcohol, at times to excess and to the point of intoxication and blackout, from approximately 1976 to at least June 1993; (b) he was arrested in August 1992 and charged with assault (domestic violence), having consumed alcohol before his arrest. He was convicted and fined approximately \$283.00; (c) he was arrested in October 1992 and charged with driving under the influence of alcohol and driving with a blood alcohol content level over

.10 percent. He was convicted and fined approximately \$559.00 and ordered to attend alcohol counseling; (d) he was arrested in February 1993 and charged with domestic violence and criminal damage, having consumed alcohol before his arrest. He was convicted and fined approximately \$480.00; (e) he was arrested in May 1993 and charged with disorderly conduct and unreasonable noise, having consumed alcohol before his arrest. He was convicted and fined approximately \$100.00; (f) he was arrested in June 1993 and charged with disorderly conduct, fighting, and violent or seriously disruptive behavior, having consumed alcohol before his arrest. He was convicted and imposition of sentence was withheld on the condition he obtained treatment; (g) he received counseling at an alcohol treatment center from approximately June 1993 to July 1993 for a condition diagnosed as alcoholic; and (h) he received inpatient treatment from July 1993 to August 1993 for a condition diagnosed, in part, as alcohol dependency.

He stated at his September 1994 hearing, "I've had fourteen months of sobriety since that treatment, longer than the period of time that it took to get arrested five times. I'm never going to touch alcohol again and that's it." GE 13, p. 62. Following his hearing, the Administrative Judge granted Applicant's security clearance.

The October 2008 SOR restated the five arrests above; however, with the exception of the October 1992 arrest for driving under the influence, the remaining four alcohol-related convictions had been vacated pursuant to state law. (SOR ¶¶ 1.a. – 1.e.)

Since Applicant's previous 1994 DOHA hearing, he was arrested eight more times for alcohol-related incidents. Summarized, they are: (1) he was arrested in 1996 for driving under the influence. He was convicted and fined, sentenced to 10 days in jail with 9 days suspended, his driver's license was suspended for 90 days, and he was ordered to participate in an alcohol screening program; (2) he was arrested in July 1996 for domestic violence and disorderly conduct; (3) he was arrested in August 1996 for domestic violence and assault. The charges were dismissed; (4) he was arrested in November 2001 for driving under the influence. He was sentenced to a fine and incarceration; (5) he was arrested in June 2003 for driving under the influence. He was convicted of extreme DUI – BAC of .15 percent or more. He was sentenced to a fine and served 10 days in jail; (6) he was arrested in May 2004 for driving under the influence. He was convicted and fined, sentenced to 10 nights in jail, and attended an alcohol counseling program; (7) he was arrested in January 2005 for criminal damage/deface. The charges were amended to disorderly conduct. He was convicted, fined, ordered to attend alcohol awareness class, and placed on one year of probation; (8) he was arrested in April 2005 for driving under the influence. He was convicted, fined, sentenced to 10 nights in jail, attended alcohol awareness class, and placed on one year of probation. (SOR ¶¶ 1.f. – 1.m.)

The evidence also established that Applicant consumed alcohol since high school, at times to excess, until at least July 2005; that he had consumed alcohol before all of his arrests to include those arrests adjudicated at his first DOHA hearing; that his drinking had affected his work performance; that he had been diagnosed as alcohol

dependent by medical professionals; and that following his 1993 alcohol treatment, he relapsed and consumed alcohol to excess in 1996 and from 2001 to 2005. (SOR ¶¶ 2.a. – 2.h.) Response to SOR, GE 1-20.

In seeking to retain his clearance, Applicant stated, “I have found the Holy Grail to prevention of alcohol consumption, in my case, and am sharing that in community activities in order to provide the possibility to others.” Response to SOR.

Applicant testified he has stopped drinking since July 1, 2005. Tr. 44, 120, 125, AE A. He described that day as the day his counselor saw him drinking in a local restaurant and gave him a “look” and it was at that point he “had to make a decision.” Tr. 110. Applicant testified he has not had anything with alcohol in it since that day with the possible exception of Nyquil, adding that it was a struggle for him whether or not to take Nyquil because it had alcohol in it. He admitted to taking the Nyquil sometime last year. Tr. 111, 131-133. After July 2005, he attended AA meetings on a regular basis, but described his current AA attendance as “not very often anymore.” 105-106. He added that he maintains a lifestyle that does not include or involve alcohol. Tr. 117-119, 123-124.

Applicant submitted a DUI – Related Substance Abuse Evaluation from his licensed independent substance abuse counselor dated September 16, 2008, who described his prognosis as “good.” AE A. He last saw his counselor in an office setting in “July or August 2008.” Tr. 122, 126. He does not attend AA meetings anymore and believes his current course of conduct is sufficient to stop drinking. Tr. 126-128. The last time he attended an AA meeting was in January 2009. Tr. 134. He said, “I don’t trust AA. I don’t trust them. I don’t trust the people and stuff because I just don’t, you know, I understand the program, I understand getting with God and all of this stuff.” Tr. 135.

Post-hearing, Applicant submitted an undated letter from his counselor, who is the same counselor who prepared the September 16, 2008 evaluation. She stated in part:

[Applicant]’s history is one of episodic abuse with 4 year intervals of sobriety. He began outpatient therapy including individual sessions with this therapist after the screening. [Applicant] also completed 16 hours of alcohol education, 18 hours of defensive driving instruction and listened to the experience of Mothers Against Drunk Drivers (MADD).

[Applicant’s] last drink was on July 1, 2005. He remained in outpatient group therapy on his own volition as a self-pay client. He attended AA regularly and has a sponsor, [name of sponsor].

[Applicant] has walked the extra mile in acknowledging his alcohol abuse by speaking about his experiences for the DUI Task Force of [name of state], as well as engaging in other community service. His continuous sobriety is undeniable and his rescreening on 09-16-08 indicated no

problems at work, in his marriage and family or medically. The client's lifestyle has completely changed since 2005.

No one, to [Applicant's] knowledge, drank in his family for several generations. However, obviously the genetic abnormality existed although it was never manifested. He has Native American heritage and research has correlated that ethnicity with predisposition for alcoholism. He understands that he is alcohol intolerant by heredity.

There is a plethora of evidence that [Applicant] has acknowledged his problem and been proactive in his continuous abstinence from alcohol. His work has not been impaired ever. He received a commendation as "employee of the month" at his workplace, as well as having a record of excellent work performance evaluations. His marital relationship has improved and his 12 step program has generated heightened spirituality.

[Applicant], in the past, used alcohol as a coping mechanism for stress. His negative consequences from alcohol have provided insight into the progressive, chronic, even terminal nature of this disease.

There are to my knowledge no mitigating circumstances in [Applicant's] life that would raise a security concern.

I have [been] a licensed behavioral health and addiction therapist for 25 years. [Name of community] is a small community with few places to hide. In my network of contacts, if [Applicant] were to relapse I would soon know.

I highly endorse [Applicant] as a reliable person with strong morals and values. He has a flawless work ethic and is open and honest about his past mistakes. I know he is 100% trustworthy. AE L

Applicant submitted four work-related reference letters. All of the authors of the reference letters were positive in their assessment of Applicant and view him as trustworthy and reliable. AE B – E. He submitted a certificate reflecting that he was qualified to participate as a [state] site steward, that he was employee of the month for March 2001, and that he was awarded two company awards in May 2005 and June 2006. AE G – J.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

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

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

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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

Analysis

Criminal Conduct

AG ¶ 30 articulates the Government's concern concerning criminal conduct stating, "[c]riminal 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."

Two criminal conduct disqualifying conditions could raise a security concern and may be disqualifying in this case. AG ¶¶ 31(a) and 31(c) provide:

- (a) a single serious crime or multiple lesser offenses; and
- (b) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The Government established these two disqualifying conditions through Applicant's admissions and evidence presented.

AG ¶ 32 provides for potentially applicable criminal conduct mitigating conditions:

- (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; and
- (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 involvement.

AG ¶ 32 does not provide a "bright line" rule for determining when a crime is "recent."¹ 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."² Applicant's 13 alcohol-related arrests from August 1992 to April 2005 show a documented inability or unwillingness over time to comply with the law. Particularly troubling are his repeated decisions to get behind the wheel while under the influence on at least five occasions endangering himself and others, the most recent occurring in April 2005. Applicant's repetitive behavior precludes application of AG ¶ 31(a).

Applicant is able to receive partial credit under AG ¶ 32(d) because of his good employment record, remorse, and constructive community involvement. However, the passage of time does not overcome the recurrent alcohol-related criminal behavior that Applicant engaged in for 13 years nor has he sufficiently demonstrated successful

¹See *generally, e.g.* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (Although the passage of three years since Applicant's last act of misconduct did not, standing alone, compel the Judge to apply CC MC 1, as a matter of law, the Judge erred by failing to give an explanation why he did not apply that mitigating condition.).

² *Id.*

rehabilitation precluding full application of this mitigating condition. See discussion *supra* under AG ¶ 32(a).

Guideline G (Alcohol Consumption)

AG ¶ 21 articulates the Government’s concern concerning alcohol consumption, “[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.”

Five alcohol consumption disqualifying conditions could raise a security concern and may be disqualifying in this case. Guidelines ¶¶ 22(a), 22(b), 22(c), 22(d) and 22(f) provide:

- (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;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless, of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (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;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and
- (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

Applicant’s 13 alcohol-related arrests from 1992 to 2005, admitted periodic excessive drinking from high school to at least July 2005, admission that alcohol affected his work performance, diagnosis as alcohol dependent by medical professionals, and alcohol relapses by drinking to excess in 1996 and from 2001 to 2005 warrant application of AG ¶¶ 22(a), 22(b), 22(c), 22(d), and 22(f). The Government produced substantial evidence supporting these five disqualifying conditions, and the burden shifted to Applicant as it did under criminal conduct, *supra*, to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government.³

³See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Two alcohol consumption mitigating conditions under AG ¶ 23 are potentially applicable:

(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; and

(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).

AG ¶ 20(a) does not define the sufficiency of the passage of time, and there is no "bright-line" definition of what constitutes "recent" conduct. Based on my evaluation of the record evidence as a whole,⁴ for reasons discussed *supra*, and Applicant's having been granted a clearance following a DOHA hearing in September 1994 and his return to drinking with assurances he would not do so, I am unable to apply AG ¶ 20(a). AG ¶ 20(b) does not fully apply because Applicant had a relapse and furthermore did not provide sufficient corroborating evidence suggesting he has overcome his problem. While the evidence from his counselor was helpful, his statement that he has not had a drink since July 2005 is insufficient to overcome his history of alcohol abuse and alcohol-related problems. I am still left with doubts regarding his commitment to abstain from alcohol and that his alcohol consumption problems are "unlikely to recur."⁵

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) 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.

⁴See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)).

⁵These two mitigating conditions are discussed further in the whole person analysis portion of this decision, *infra*.

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.

Applicant has stated that he has not consumed alcohol since July 2005 and claims he has found the “Holy Grail” to avoid further alcohol consumption. He submitted statements of positive work-related references, and evidence of community involvement as a state site steward. He honorably served in the Air Force over six years and has worked in the defense industry since his release from active duty in 1988.

However, given Applicant’s lengthy history of alcohol abuse and the related problems that alcohol consumption has caused him and others leaves me with doubt regarding his eligibility to hold a security clearance. Particularly troubling is his prior history of having gone through this hearing process in 1994 and serious relapses. Assurances from his counselor, while helpful, are insufficient to overcome his history. Applicant stated he does not believe in AA and does not attend AA meetings. His last appointment with his counselor was in July or August 2008. While he is free to reject AA, he does not offer an alternative support system. Given his history, more is required than his assurances that he will not drink.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to alcohol consumption and criminal conduct. The evidence leaves me with doubts as to Applicant’s security eligibility and suitability.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”⁶ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is not eligible for access to classified information.

⁶See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a. – m.:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a. – 2.h.:	Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge