DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-03334
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Fahryn Hoffman, Esq., Department Counsel
For Applicant: Greg D. McCormack, Esq.

February 25, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines G (Alcohol Consumption) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on June 1, 2006. On June 12, 2009, 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 E. 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 received the SOR on June 26, 2009; answered it on July 15, 2009; and requested a hearing before an administrative judge. DOHA received the request on July 17, 2009. Department Counsel was ready to proceed on October 9, 2009, and the case was assigned to me on October 20, 2009. DOHA issued a notice of hearing on October 27, 2009, scheduling the hearing for November 19, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 12 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. I kept the record open until December 4, 2009 to enable Applicant to submit additional documentary evidence. He timely submitted AX E through G, which were admitted without objection. Department Counsel's response to AX E through G is attached to the record as Hearing Exhibit I.[1] DOHA received the transcript (Tr.) on December 4, 2009.

Findings of Fact

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

Applicant is a 49-year-old mainframe technician employed by a federal contractor. He has worked for his current employer since June 2008. He is a high school graduate. He received a security clearance in June 2000 and retained it as of the date of the hearing (GX at 28; Tr. 6).

Applicant was married in March 1984 and divorced in August 2002. No children were born during the marriage. He described the break-up of his marriage as "nasty," "messy," accompanied by financial problems, and involving a dispute over the disposition of the family home (Tr. 33, 74, 82-83). He has been in a "committed relationship" with a registered pharmacist since April 2007. They have lived together since June 2008 (AX C-1).

Applicant previously worked for federal contactors from June 1999 to June 2008. An annual performance appraisal for the period ending in June 2001 rated him as "exemplary," the highest rating (AX A-1). A probationary performance review from his current employer, dated October 1, 2008, rated him as very knowledgeable, self-motivated, detail-oriented, creative, dedicated, and a team player (AX A-2).

Applicant's agency received a Department of Defense Joint Meritorious Unit Award in October 2002 (AX A-3). He was personally commended on several occasions for his work with a previous employer (AX A-4 and A-5). In his current job, he has continued to gather frequent commendations for his expertise, dedication, and attention to detail (AX A-5 through A-8).

[1] Hearing Exhibit I referred to the three post-hearing submissions as AX D through F. I have corrected the lettering to reflect that AX D was admitted during the hearing and that AX E through G were submitted after the hearing.

In May 1999, Applicant was arrested for operating a motor vehicle while intoxicated (OWI), after he struck another vehicle that was stopped for a red light. He failed several field sobriety tests and declined to take a breathalyzer test because he believed it would be used against him in the processing of his security clearance application (GX 7 at 2; GX 12 at 2). In July 1999, he was sentenced to 120 days in jail, with all but two days suspended. He was placed on unsupervised probation for one year and fined $1,000 (GX 4 at 2). He was required to pay $225 for court-appointed attorney fees, pay restitution of $250 for damage to the victim's vehicle, submit to a substance abuse evaluation at his own expense, and submit to treatment if the evaluation indicated it was needed (GX 11). He was evaluated and diagnosed with alcohol abuse. He testified that the counseling consisted of one session lasting one or two hours and was not very effective (Tr. 51).

In September 1999, Applicant submitted an affidavit to a security investigator. In his affidavit, he stated he began consuming alcohol in 1976, while he was in high school. From 1976 to 1979, he consumed about three beers a day during the week and about 20 beers on the weekend. He abstained from alcohol from 1979 to 1990 or 1991, and then began drinking about five beers a week. From October 1998 to June 1999, he was unemployed and depressed, and he drank 60 to 70 beers a week. He then reduced his consumption to about five beers a week plus five or six beers on his bowling night (GX 12 at 2).

At the hearing, Applicant recanted parts of his September 1999 affidavit. He testified that he did not begin consuming alcohol until 1995, and that he did not recall telling the investigator that he began drinking in 1976 (Tr. 57).

Applicant's OWI arrest in May 1999 was not his first instance of driving while intoxicated. He testified that his drinking and driving occurred when he went bowling, and that he drove while under the influence of alcohol at least once a week before his arrest (Tr. 52-53).

In April 2003, Applicant was arrested for driving while intoxicated (DWI) (GX 4 at 2). He was stopped for erratic driving and found to have a blood-alcohol level of .18%. He pleaded guilty to careless and imprudent driving and was ordered to attend group counseling sessions three times per week for three weeks. He entered a clinical intervention program in June 2003 and completed it in July 2003 (GX 3 at 11-12).

Applicant was again arrested for DWI in March 2004 (GX 4 at 2). He fell asleep at a traffic light after leaving a bowling alley. His car rolled forward and struck another car. He drove away from the scene but was arrested. His blood-alcohol was .20%. He pleaded guilty to careless and imprudent driving and was ordered to attend weekend treatment (GX 2 at 3). He completed the program in June 2004 (GX at 14).

Applicant was arrested in March 2005 for driving under the influence of alcohol (DUI). He was convicted and placed on probation for two years and ordered to seek counseling (GX 1 at 25; GX 2 at 3). He attended counseling three times a week from

August 2005 to January 2006 (GX 3 at 5). He was diagnosed as alcohol dependent and suffering from severe depression that resulted from the death of his parents and his estrangement from his sister for fifteen years (GX 2 at 5; AX B-1 at 4). The counseling was provided by a "certified reciprocal alcohol and other drug abuse counselor" (CRADC)[2], with a bachelor's degree in social work, who was licensed to provide intervention and treatment for adult outpatient DUI evaluation and DUI risk education (AX E, F, and G). Applicant testified that the CRADC was the first to "get through [his] head" and convince him to make drastic changes in his lifestyle (Tr. 43). He also testified he is very afraid of going back to his old lifestyle (Tr. 46). Applicant completed the required counseling in January 2006. The prognosis from the CRADC was favorable, but it was contingent on Applicant following his aftercare plan, which included participation in Alcoholics Anonymous (AA) (AX B-1 at 3).

Applicant began his aftercare treatment and began participating in AA in August 2009, more than three years after completing the counseling. He described the aftercare program as a "four hour ordeal" each week. He qualified this description by explaining that the meetings lasted for an hour and a half but that it took an hour to drive each way to and from the meeting (Tr. 69-70). He completed the aftercare program about three weeks before the hearing (Tr. 44). When asked why he waited so long to initiate his aftercare plan, he testified he was focused on remodeling his house and trying to sell it (Tr. 66-67).

During an interview with a security investigator in May 2007, he stated he had reduced his alcohol consumption to less than six beers a month and that he was no longer drinking to intoxication (GX 2 at 6). In August 2008, he responded to DOHA interrogatories, stating that he last consumed alcohol when he drank one beer with dinner on his birthday in August 2007 (GX 3 at 3). In response to the same interrogatories, Applicant submitted an evaluation from a licensed clinical social worker, who opined that he did not have an alcohol-related problem when he was evaluated on August 8, 2008 (GX 3 at 9; AX B-2).

As of mid-October 2009, Applicant had been attending AA meetings once a week for three months (AX B-6). He has an AA sponsor. He informed the CRADC that he intended to join an additional AA group and attend its meetings once a week (AX B-3). The CRADC believed he was motivated to change his lifestyle and avoid future alcohol-related problems. On October 19, 2009, the CRADC changed his diagnosis from alcohol dependence to alcohol abuse (AX B-4 at 5-6).

Applicant testified that all his alcohol-related driving offenses occurred while bowling in a highly competitive league. Since his DUI conviction in 2005, he has given up competitive bowling, and he has surrounded himself with a different group of friends (Tr. 42). At the hearing, he submitted an affidavit stating that he has not consumed any alcohol since August 2007, that he will not consume any alcohol in the future, that he is willing to submit to any testing or evaluation deemed appropriate, and that if he is

[2] This acronym does not incorporate the entire description of his credentials, but it is the official acronym on his professional license.

allowed to keep his security clearance, he agrees that any future alcohol-related incident will cause his clearance to be revoked without any challenge from him (AX B-7).

Applicant submitted a previous security clearance application in July 1999, in which he disclosed the OWI arrest in May 1999 (AX D at 5). When he submitted his security clearance application in June 2006, he disclosed the alcohol-related arrests in 2003, 2004, and 2005, but he did not disclose the 1999 OWI arrest. He told a security investigator his failure to disclose the 1999 arrest was intentional (GX 2 at 4). He testified he was going through major stresses at the time his submitted his 1999 application, and he was afraid of losing his job if he disclosed the 1999 OWI arrest (Tr. 49).

Applicant also did not disclose the 1999 arrest to the CRADC who treated him in 2005 (AX B-1). He testified he did not recall why he failed to disclose it to the CRADC (Tr. 64-65).

Applicant's companion describes him as a "great man" who takes great pride in his work (AX C-1). His companion's brother has never suspected that Applicant was still drinking. He considers Applicant very dedicated and generous (AX C-5). His companion's sister-in-law also describes him as warm, caring, and conscientious (AX C-6). Two social friends who have known Applicant for three years consider him to be honest, reliable, hard working, conscientious, and courteous (AX C-2; AX C-7). Two colleagues describe him as knowledgeable, dedicated, and caring (AX C-3; AX C-8). Applicant's current supervisor regards him as very personable, diligent, honest, reliable, and stable (AX C-4).

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 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 made "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, at times to excess and to the point of intoxication, from at least May 1999 to at least August 2007 (SOR ¶ 1.a). It alleges he was charged with OWI in May 1999, received alcohol counseling in May 1999, and was diagnosed with alcohol abuse (SOR ¶¶ 1.b-1.c). It alleges that he was charged with DWI in April 2003, pleaded guilty to a lesser offense, and received alcohol counseling in June and July 2003, and was diagnosed with alcohol dependence (SOR ¶¶ 1,d-1.e). It alleges that he was charged with DWI in March 2004, pleaded guilty to a lesser offense, and completed two days of alcohol counseling in June 2004 (SOR ¶¶ 1.f-1.g). It alleges that he was arrested for DUI in July 2005, pleaded guilty to DUI,

received court-ordered alcohol counseling from September 2005 to January 2006, and was diagnosed with alcohol dependence (SOR ¶¶ 1.h-1.i). Finally, it alleges that Applicant continued to consume alcohol after completing the court-ordered counseling in January 2006 (SOR ¶ 1.j). Applicant admitted SOR ¶¶ 1.b-1.j. He denied SOR ¶ 1.a, but I conclude it is supported by his arrest record and his admission at the hearing that he consumed alcohol in August 2007.

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." The following potentially disqualifying conditions are relevant:

> AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence. . . , regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> 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.

All four disqualifying conditions are raised by the evidence. Although the evidence reflects that Applicant consumed only a single beer after completing his alcohol rehabilitation program in January 2007, the single drink is sufficient to constitute a "relapse" within the meaning of AG ¶ 22(f).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 22(a), (c), (e), 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 whether the conduct was recent. 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's last instance of excessive drinking was in July 2005, more than four years ago. He consumed one beer in August 2007, and he has abstained from alcohol since then. He has found new friends, responded favorably to the court-ordered counseling he completed in January 2006, and found a new romantic relationship. He has changed jobs and earned the respect of his current supervisor. Applicant's belated completion of the aftercare program and participation in AA appear to have been motivated in large part by his pending hearing and the realization that his security clearance was at risk. Nevertheless, he appears to have changed his lifestyle and is determined to remain abstinent from alcohol. I conclude 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). For the reasons set out above concerning AG ¶ 23(a), I conclude AG ¶ 23(b) is established.

Finally, security concerns under this guideline may be mitigated under AG ¶ 23(d) if —

> [T]he 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.

For the reasons set out above, I conclude that this mitigating condition also is established. Although the favorable prognosis in this case was provided by a CRADC rather than a medical doctor or licensed clinical social worker, his certification, license to practice, and educational qualifications are sufficiently similar to those of a licensed clinical social worker to warrant application of this mitigating condition.

Applicant's statement of intent, willingness to undergo testing, and agreement that any alcohol-related incidents will result in revocation of his clearance does not fall under any of the enumerated mitigating conditions under this Guideline. Nevertheless, it is patterned on the statement of intent specifically enumerated in AG ¶ 26(b)(4) under Guideline H (Drug Involvement), and it is relevant in determining the strength and sincerity of Applicant's intent to abstain from using alcohol.

Guideline E, Personal Conduct

The SOR alleges Applicant falsified material facts on his security clearance application by intentionally failing to disclose his OWI arrest in March 1999 (SOR ¶ 2.a). He admitted this allegation in his response to the SOR and at the hearing. The concern under this guideline is set out in AG ¶ 15 as follows:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition in this case is "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire." AG ¶ 16(a). Applicant admitted the intentional falsification in his answer to the SOR and at the hearing, thereby raising AG ¶ 16(a).

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). Applicant submitted his security clearance in June 2006, but he made no effort to correct the intentional omission until he was interviewed by a security investigator in May 2007. Even during this interview, he did not disclose the May 1999 arrest until he was specifically asked if he had been arrested in the town where the arrest occurred. He then admitted being arrested for OWI in May 1999.

Security concerns arising from personal conduct may be mitigated if "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." AG ¶ 17(c). Applicant's falsification of his security clearance application was not minor. It was intended to undermine the integrity of the security clearance process. It was a repeat of his deception during the court-ordered counseling in 2005. He initially repeated the deception during a security interview in May 2007, but he finally told the truth after further questioning. At the hearing he recanted his September 1999 affidavit, in which he admitted a history of alcohol abuse beginning in 1976. His recantation means that either his affidavit or his hearing testimony was false. In light of this track record, I am not satisfied that further attempts to deceive will not recur. I conclude AG ¶ 17(c) is not established.

Security concerns arising from personal conduct also may be mitigated if "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." AG ¶ 17(d). For the reasons set out above in my discussion of AG ¶ 17(c), I conclude this mitigating condition is not established.

Finally, security concerns under this guideline may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). Applicant receives some credit under this mitigating condition because he has finally disclosed the full extent of his alcohol abuse to his companion, friends, colleagues, and his supervisor.

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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines G and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult who is technically proficient and very devoted to his work. He has held a clearance for many years. He appears to have changed his lifestyle after completing the court-ordered counseling, and alcohol abuse is no longer part of his life. However, he has not overcome his tendency to minimize or conceal his past. He deceived the CRADC, falsified his security clearance application, tried to deceive a security investigator, and admitted the 1999 OWI arrest only after the investigator indicated he already knew about it. He recanted his September 1999 affidavit at the hearing. Considering these events and all the evidence together, I have doubts about his reliability and trustworthiness.

The SOR does not allege Applicant's concealment of his May 1999 arrest from the CRADC or his initial attempt to deceive the security investigator in May 2007. I have considered this conduct for the limited purpose of deciding which adjudicative guidelines

are applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether Applicant has demonstrated successful rehabilitation; and as part of my whole-person analysis. *See* ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted).

After weighing the disqualifying and mitigating conditions under Guidelines G and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on alcohol consumption, but he has not mitigated the security concerns based on personal conduct. Accordingly, I conclude he has not 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 on the allegations in the SOR:

Paragraph 1, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 1.a-1.j:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge