DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-04470
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Stephanie Hess, Esquire, Department Counsel
For Applicant: Etta L. Walker, Esquire

January 22, 2010

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on September 21, 2006. On February 3, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, G, and E for Applicant. 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 requested a hearing before an Administrative Judge. I received the case assignment on September 18, 2009. DOHA issued a notice of hearing on October 1, 2009, and I convened the hearing as scheduled on October 29, 2009. The Government offered Exhibits (GE 1-6), which were received into the record without objection. Applicant testified on his own behalf and presented the testimony of four witnesses. He submitted Exhibits (AE A-C) at the hearing which were admitted into the

record without objection. I held the record open until November 12, 2009, so that Applicant could submit additional documents. The submission was timely received, marked as (AE D) and entered into the record. Department Counsel did not object to the documents. DOHA received the transcript on November 6, 2009. Based upon a review of the record, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated February 23, 2009, Applicant admitted the factual allegations in ¶¶ 1.a., 1.b., 1.d, and 1.e. through 1.h, and 2.a. and 2.b. He denied the allegations in ¶¶ 3.a. and 3.b of the SOR. He provided additional information to support his request for eligibility for a security clearance.

Applicant is a 51-year-old employee of a defense contractor. He received his undergraduate degree in 1980. He is a licensed realtor. Applicant is divorced and has a step-daughter who lives with him and his wife. He was employed as an engineer from 1981 until 2004 with a large company. He worked as a consultant until 2007. Applicant has held a security clearance during his professional career. He has been with his current employer since May 2007 (Tr. 121).

In November 1982, Applicant was with some friends in a bar. He consumed approximately three to five alcoholic beverages. As he was driving home, Applicant was stopped by the police. He was charged with (1) possession of a controlled substance, (2) driving while intoxicated, and (3) driving under the influence of drugs. He pleaded guilty and was sentenced to two years probation and received a fine (GE 5).

Applicant admits that he was driving his own car, but it was also an assigned company car. He had two roommates who also used the car and he believes that the controlled substance belonged to one of the roommates (Tr. 127). He also claimed that he pled guilty because he did not have an attorney. He believes he was not intoxicated (Tr. 128).

In April 1986, Applicant was at a restaurant where he had consumed two alcoholic beverages. He was stopped by the police while he was driving home. He was charged with (1) driving while ability impaired, (2) illegal turn around, (3) expired license plates, and (4) failure to use or no turn signal. The alcohol-related charge was dismissed. He was found guilty of counts (3) and (4). He was also fined. Applicant believed that he was the subject of police harassment.

In May 1991, Applicant attended a bachelor party for a friend. He was “ticketed for mooning out the window of a bus.” He was charged with unlawful public indecency, and he pleaded guilty. He believes he was singled out and ticketed. He claims he was “ticketed” and not arrested (Tr. 130). He explained that it was an embarrassing event but it was harmless. Applicant was 33 years old at the time.

In October 1995, Applicant was out with friends for the evening drinking. His friend was too impaired to drive home, so Applicant decided to drive (Tr. 130). He was charged with (1) failure to use or no control turn signal, and (2) driving while under the influence of alcohol (DUI). He pleaded guilty to DUI. He was sentenced to probation and received a fine. His driver's license was revoked. Applicant completed a level 1 alcohol education class. He also completed 24 hours of community service (GE 2).

After Applicant divorced his first wife, he resided in a home with several roommates. He denies that he was ever in the residence when complaints were made about noise. From 2000 until 2005, neighbors made complaints about noise (loud music) coming from his home. Applicant explained that he was single at the time and had other people, including a girlfriend, stay at the house, without his permission (Tr. 131). He believes that no charges were filed against him (Tr. 132).

In 2005, Applicant had a party at his residence. A live band was playing and the neighbors complained about the noise. A complaint was made to the county sheriff concerning the noise. Applicant believes he was given a warning (Tr. 132).

In February 2006, Applicant was charged with disorderly conduct/noise. He was sentenced to one year of probation and he received a fine (GE 4). Applicant blamed this incident on a friend who was staying at his condominium, who became very loud, intoxicated, and unmanageable one evening. She caused a disturbance and the police were called (Tr. 133).

In January 2007, Applicant and his wife had dinner in a restaurant (Tr. 137). They had consumed alcohol and he drove home because he believed she was too intoxicated to drive. He was stopped on his way home and was charged with (1) driving under the influence second offense, (2) ran a stop sign, and (3) failure to maintain a single lane. He pleaded nolo contendere to count (1) and was sentenced to one year probation, a fine, revocation of his driver's license, and DUI school. (GE 3).

Applicant argued at the hearing that he was followed by the police from the restaurant. He was adamant that he did not run a stop sign nor did he weave on the road (Tr. 137). Applicant also believed he was not "illegally driving under the influence."

Applicant completed a Security Clearance Application on September 21, 2006. He answered "No" to Section 23(f) "In the last seven years have you been arrested for, charged with, or convicted of any offense not listed above" He did not list his February 2006 disorderly conduct charge. He states that he completely forgot about it. He also stated that he did not feel that it fell under "that area" (Tr. 141) and did not have to be reported. He elaborated that it was the result of an unruly acquaintance of his, and he did not want to deal with it anymore (Tr. 141). At the hearing, he explained that he was focusing on the DUI incidents and "I considered that very minimal" (Tr. 142).

In a July 5, 2007, interview with an investigator from DoD, Applicant did not mention that police were called to his residence in February 2006 for the noise

complaints and disorderly conduct charge. He states that he completely forgot about the charge because it was the result of an incident caused by an acquaintance with whom he no longer associates. He denies that he deliberately failed to disclose this information (Tr. 159). In the interview, Applicant stated that he had no other alcohol-related arrests and he advised that he had not had any other "problems with law enforcement or been questioned by authorities in the last seven years (GE 2).

In July 2007, Applicant was referred to a state treatment agency for the January 2007 DUI offense (AE B). He met with a licensed clinical social worker (LCSW), who is also a certified abuse counselor (CAC). Applicant completed an initial written assessment and attended group meetings twice a week. Applicant was evaluated and was given a low probability of having alcohol dependence (AE B; Tr 43). He received a diagnosis of alcohol abuse (Tr. 54). Applicant abstained from drinking during the treatment. In April 2008, Applicant successfully completed 68 hours of Level II therapy (AE B).

At the hearing, the LCSW testified that it is highly unlikely that Applicant would have another alcohol-related driving charge because he took responsibility for his actions. Applicant completed the level II program (alcohol classes for 34 weeks) (Tr. 77). The LCSW explained that Applicant was conscientious in his attendance and was a thoughtful individual. Upon cross-examination, the LCSW acknowledged that Applicant did minimize his responsibility for use of alcohol in his answers to the SOR (Tr. 63).

Applicant claims that he occasionally has wine with his wife at dinner. He does not drink during the week (Tr. 151). He believes he drinks every other weekend (Tr. 152). He also stated that he no longer kept alcohol in the house (Tr). He amended that by stating that his wife does keep some wine in the home (Tr. 150). Applicant does not drive after drinking outside the home (Tr. 152).

In 2009, Applicant responded to the SOR. When he admitted an allegation, he consistently offered a reason why the arrest or charge should not have occurred. Specifically, with regard to the April 1986 DUI, he believed he was the subject of police harassment. Applicant denied that he was illegally driving under the influence in January 2007, and noted that the police car followed him from the restaurant until he was pulled over when he was almost home. He explained that he believed he was discriminated against and unlawfully charged with offenses that he did not commit. However, he also acknowledged that his drinking was "borderline." As for the disorderly conduct charge in 2006, he pleaded guilty but blamed the incident on a friend. For his earlier alcohol-related incidents in 1982, he maintained that he did not have an attorney and pleaded guilty even though he knew he was not over the legal limit (Tr. 127). He also said that he was "singled out" for the unlawful public indecency charge (Tr. 129).

Applicant was adamant that since he has held a clearance for 20 years and has never had any security violations, he should be granted his clearance. He claims he has learned from his mistakes in the past and has adjusted his behavior accordingly.

At the hearing, Applicant appeared smug and noted that he learned from the group counseling that "consequences could happen to *even me*, you know, if you don't control things" (Tr. 169). His attitude, despite, what the LCSW reported, did not appear to be one of taking responsibility for his actions. He had an excuse for almost every incident that had occurred over the years. He distanced himself from each event. His job importance appeared to override his ability to accept responsibility for "minor rules and regulations," such as the noise complaints. I find he minimized the severity of each charge.

Applicant has many letters of commendation and certificates of recognition from 1993 until the present (AE A). He has 20 years' service recognition with one employer (AE A) He has made outstanding contributions to launch and satellite systems over the past years. Applicant is rated as an outstanding manager who has excellent communication and time management skills (AE C).

The security manager has known Applicant for 15 years. He has never observed any behavior on Applicant's part that would cause him to question his judgment or reliability (Tr. 94). He is aware that Applicant has several alcohol-related driving offenses, but does not believe that it rises to the level of concern (Tr. 98).

Applicant's current manager described Applicant as a valuable employee (Tr.107). He praised Applicant's vast knowledge and level of experience. Applicant displays a high degree of honesty, loyalty, and integrity to his management and his team (Tr. 115).

Applicant's evaluations rate him as a "successful contributor" to his employer. He has outstanding and advanced management skills. He is praised by his colleagues and former supervisors as highly skilled and invaluable to the team mission.

Applicant is lauded for his integration management skills. His technical expertise in the satellite program is key. He has many years of crucial experience (Tr. 27). He is a trustworthy and reliable engineer and manager (Tr. 34). His former manager praised Applicant and has no hesitation in recommending Applicant for a security clearance (Tr 36).

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 required 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 overarching

adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2, 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

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By it's very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying, "(a) a single serious crime or multiple lesser offenses," and "(c) allegation

or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

Applicant was arrested in 1982, 1986, 1991, 1995, and 2007. Applicant has four arrests for DUI or driving while impaired by alcohol. He was convicted of DUI in 1995. In 2007, Applicant was arrested, charged, and pleaded nolo contendere to DUI Second Offense. He was charged and pleaded guilty to disorderly conduct in February 2006. AG ¶ 31(a) and (c) apply in this case.

AG ¶ 32 provides conditions that could mitigate security concerns:

> (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.

Applicant had four incidents involving alcohol/driving from 1982 until 2007. He was convicted of several misdemeanor offenses. He completed probation successfully in 2008. He attended court-ordered alcohol treatment in 2008.

Applicant's last incident of criminal conduct was the 2007 DUI (second offense). He completed probation last year. However, insufficient time without offenses has passed when compared to the more than 20 years, from 1982 to 2007, of alcohol-related offenses to mitigate the government's case. He has shown that he is on the right track, but it is too soon to find that he is successfully rehabilitated. Thus, AG ¶ 32(a) and (d) do not fully apply in this case

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption, "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."

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying, "(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," and "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."

In this case, Applicant admitted that he consumed alcohol, at times to excess and to the point of intoxication, from approximately 1979 to at least July 2007. He was diagnosed as an alcohol abuser in 2007, after his second DUI offense. Although, he argues he was not DUI, he acknowledges his other alcohol-related arrests. Some of the charges were dismissed, but Applicant was convicted of DUI twice. AG ¶¶ 22 (a) and (c) apply.

AG ¶ 23 provides conditions that could mitigate security concerns:

> (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;
>
> (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);
>
> (C) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and
>
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant has not fully acknowledged his problem with alcohol. Although he completed a treatment program, he consistently minimized his involvement in the alcohol-related incidents. He denied that he was illegally driving under the influence in 2007. He did not believe he was intoxicated in several other incidents. He has modified his drinking habits and does not drink and drive. His therapist believes that Applicant is very unlikely to re-offend. I am not convinced that Applicant has taken full responsibility for his past excessive alcohol consumption.

Applicant has an outstanding work record spanning 20 years. He is recommended for his fine work. He has many letters of commendation and appreciation for his diligence in his field. The last alcohol-related incident occurred in January 2007. Given the poor judgment shown over the years and minimization of his alcohol-related incidents there is still an issue of concern. Applicant has not fully mitigated the alcohol consumption concerns under AG ¶¶ 23(a), (b), and (d).

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> 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 cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security eligibility or trustworthiness, or award fiduciary responsibilities" is potentially disqualifying.

Applicant denied that he had a deliberate intent to falsify his answers to the questions. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish pr prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine where there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.

Applicant was not credible in his various explanations concerning the omissions described above. He stated that he forgot about the February 2006 incident and then contradicted that statement with the fact that it was a nightmare and he wanted to forget it or that he was focusing on DUIs rather than any other incidents. He also had been on probation for the incident in September 2006, and completed his security clearance application shortly thereafter. Applicant also did not disclose to the investigator during his interview that he had any problems with the law or had been questioned by authorities during the last seven years. At one point, he stated that it did not rise to the level of something that needed to be reported.

After considering the mitigating conditions, I find that none of them apply in this case.

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) 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a well-educated, highly respected employee. He has held a security clearance for many years without security violations. Several character witnesses highly recommended Applicant for a security clearance.

Applicant's patterns of criminal conduct and problems with alcohol span a long period. His most recent incident was in 2007. He completed probation in 2008. He has taken steps in the right direction, but at this time Applicant has not met his burden of proof to overcome the government's case.

Applicant is a seasoned employee who has completed security clearance applications several times. His explanations as to why he did not list his February 2006 disorderly conduct charge on his security clearance application are not credible. He intentionally omitted the information from the application and the interview in 2007. He did not fully disclose alcohol use to the investigator.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct , alcohol consumption, and personal conduct concerns.

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:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	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.

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NOREEN A. LYNCH
Administrative Judge