DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-11882
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

March 30, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Adjudicative Guideline (AG) G, Alcohol Consumption and AG J, Criminal Conduct. Applicant's eligibility for a security clearance is denied.

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on August 26, 2008. On November 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under AG G, Alcohol Involvement and AG J, Criminal Conduct. 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.

On November 12, 2009, DOHA received Applicant's answer to the SOR and his request for a hearing before an administrative judge. The case was assigned to me on

January 4, 2010. I convened a hearing on February 26, 2010, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6 and admitted to the record without objection. Applicant testified on his own behalf, introduced no exhibits, and called no witnesses. I left the record open until March 5, 2010, so that Applicant could, if he wished, provide additional information for the record. On March 4, 2010, Applicant filed one exhibit, which was marked as his Ex. A and admitted to the record without objection. DOHA received the hearing transcript (Tr.) on March 5, 2010.

Procedural Matters

Applicant's hearing was originally scheduled for February 10, 2010. A Notice of Hearing, dated January 14, 2010, was sent to Applicant notifying him of the February 10, 2010 hearing date. On February 10, 2010, federal agencies in the vicinity of Washington, D.C. were closed for public safety reasons as the result of two snowstorms, and it was necessary to cancel Applicant's hearing. When federal offices reopened on February 12, 2010, Applicant and Department Counsel agreed that his hearing would be rescheduled for February 26, 2010, and a Notice of Hearing reciting the change was issued on February 17, 2010. On February 24, 2010, Applicant notified Department Counsel that he had not yet received the Notice of Hearing for the February 26, 2010 hearing. Department Counsel then sent Applicant an e-mail copy of the Notice of Hearing.

At issue, then, is whether Applicant received notice 15 days in advance of his hearing, as required under ¶ E3.1.8. of the Directive. At his hearing, Applicant, after a thorough discussion of the 15-day notice provision, stated that he was prepared to go forward with his hearing and believed he had adequate time to prepare for the hearing on February 26, 2010. He affirmatively waived his right to assert that, because he had not received his Notice of Hearing 15 days in advance of his hearing, he had insufficient time to prepare. (Tr. 10-13.)

In his response to the SOR, Applicant amended the allegation at ¶ 1.f. by striking "2009" after "July" and writing "2008" instead. At the hearing, Department Counsel moved to amend the allegation at ¶ 1.f. to conform to Applicant's handwritten change and the record evidence as found in Ex. 6. Applicant did not object to the amendment, and it was granted. (Answer to SOR; Tr. 26-27.)

Findings of Fact

The SOR contains six allegations of disqualifying conduct under AG G, Alcohol Involvement (SOR ¶¶ 1.a. through 1.f.), and four allegations of disqualifying conduct under AG J, Criminal Conduct (SOR ¶¶ 2.a. through 2.d.). In his Answer to the SOR, Applicant admitted the six AG G allegations and the four AG J allegations. Applicant's admissions are admitted herein as findings of fact. (SOR; Answer to SOR.)

Applicant is 30 years old, never married, and employed as a senior consultant by a federal contractor. In 2003, he received a Bachelor of Science degree in Marketing. He has worked for his current employer since June 2008. He has not previously held a security clearance. (Ex. 1; Tr. 33-37.)

In 1998, when he was about 18 years old, Applicant was at a party at the home of a girl he knew. He joined with a group of other young people at the party who decided to steal the television set and radio from the girl's parent's home. Applicant helped to carry off the speakers to the family's radio. Applicant was arrested and charged with Theft, Under $300. He cooperated with police, provided evidence against his accomplices, and was not prosecuted. (Tr. 40-41.)

Applicant began drinking alcohol in about 1998, when he was approximately 17 or 18 years of age. In January 1999, he was cited for Possession of Alcohol Under 21. He pleaded guilty, was sentenced to community service, and fined. Before he was 21 and able to consume alcohol legally, he drank alcohol to intoxication once or twice a month. (Ex. 3; Tr. 42-45.)

In 2002, when he was 22 years old, Applicant went to a bar, where he drank about six to eight beers. On the way home, he was arrested and charged with (1) Driving or Attempting to Drive under the Influence,[1] (2) Driving or Attempting to Drive a Vehicle While Impaired by Alcohol, and (3) Exceeding Posted Speed Limit. Applicant pleaded guilty to Count (1).[2] He was sentenced to two years of supervised probation[3] and fined. As a condition of his probation, Applicant was required to abstain from using alcohol and to attend a six-week outpatient alcohol-treatment program. He attended the alcohol-treatment program and also resumed drinking alcohol weekly about six months after he began his probation. After Applicant's first year of supervised probation, his probation officer placed him on unsupervised probation, beginning in June 2003. He continued to drink a six-pack of beer weekly. (Ex. 1; Ex. 2 at 2; Tr. 46-54.)

Applicant also used marijuana. He estimated that, during his college years, he used marijuana about 15 times. In June 2003, he was arrested and charged with (1) CDS Possession with Intent to Distribute and (2) Possession of Marijuana. He was found guilty of Count (2) and it was placed on the Stet Docket. Count (1) was dismissed. Applicant was ordered by the court to complete a 26-week substance-abuse treatment program. He attended and completed such a program. (Ex. 1; Ex. 2; Ex. 4; Tr. 54-59, 79-80.)

[1] Applicant stated that the charge was Driving While Intoxicated (DWI) and not Driving Under the Influence (DUI). (Tr. 47-48.)

[2] Counts (2) and (3) were placed on the Stet Docket for one year.

Applicant's drug possession conviction occurred while he was on probation for his 2002 conviction for Driving or Attempting to Drive Under the Influence. His probation officer put him back on supervised probation. Applicant stated that he has not used an illegal drug since June 2003. He further stated that he was last in the presence of individuals who were using illegal drugs "more than four years" ago. (Tr. 59-62.)

Applicant became interested in playing poker. He went to a private home and played poker several times. He knew that those running the poker game were making a profit on the gambling proceeds and that the activity was illegal. In February 2005, the house where he was playing poker was raided by police, and he was arrested and charged with illegal gambling. He pleaded guilty to the offense and was sentenced to community service. Applicant now goes to Las Vegas on occasion, where he participates in legal gambling. (Ex. 3 at 3-4; Tr. 62-66.)

In May 2008, Applicant and a friend went to a bar, where Applicant consumed approximately eight beers. On the way home, Applicant, who was driving, was arrested and taken to the police station. At the station, he was given a breathalyzer test which showed his blood alcohol content to be 0.13 %. Applicant was charged with (1) Driving While Impaired By Alcohol, (2) Driving, Attempting to Drive Vehicle While Under the Influence, Per Se (3) Driving, Attempting to Drive While Under the Influence,[4] and (4) Failure to Drive Right of Center. On September 5, 2008, Applicant pleaded guilty to Count (1)[5]. Counts (2), (3), and (4) were nolle prossed. (Ex. 3 at 3-4; Ex. 5; Tr. 67-69.)

Applicant was sentenced to 60 days in jail, with 50 days suspended, and three years of probation.[6] His probation will end in September 2011. Under the terms of his probation, Applicant was not permitted to drink alcohol or to use any illegal drugs. His driver's license was restricted for 45 days: his driving was limited to traveling to and from work and to and from alcohol-treatment class. Currently, under the terms of his driver's license, he is prohibited from consuming alcohol and driving a vehicle. (Ex. 5; Tr. 70-72.)

On July 28, 2008, Applicant voluntarily sought substance-abuse treatment at an alcohol-treatment facility. With a counselor, he completed a questionnaire intended to measure substance abuse or dependence. Official records of the alcohol-treatment facility reveal that two of his answers were diagnostic of alcohol abuse. Clinical notes in the official records of the alcohol-treatment facility state: "Client meets criteria for

[4] Charges (2) and (3) were identified as separate traffic violations under the state statute.

[5] Applicant stated that the charge he pleaded guilty to was DUI, Driving Under the Influence of Alcohol. (Tr. 68-69.)

[6] Applicant claimed that his probation officer told him his probation ran for only two years. If that is true, he is currently on probation, and his probation will end in September 2010. (Tr. 70-71.)

alcohol abuse . . . ."[7] On February 17, 2009, Applicant completed the six-month outpatient treatment program, with the following prognosis: "Good prognosis based on client completing treatment goals, and [c]omplying with all treatment recommendations. Client was also one of the best [p]articipants in group discussions, and was seen as a leader in the group." (Ex. 6; Tr. 75-77.)

Since completing the program, Applicant has not participated in any aftercare treatment or counseling. He does not attend Alcoholics Anonymous or any other support program. (Tr. 77-78.)

Applicant continues to drink alcohol on holidays and special occasions. He last drank alcohol to intoxication on December 31, 2009. Additionally, he drank alcohol to intoxication at weddings in November 2009 and December 2009. (Tr. 78-79.)

Under cross-examination by Department Counsel, Applicant also admitted the following: he has been late for work or missed work because of his consumption of alcohol; he has experienced hangovers: his last hangover was on January 1, 2010. He has experienced a blackout because of his consumption of alcohol. (Tr. 81-82.)

Applicant stated that the longest period that he has abstained from alcohol was about six to eight months. He does not believe that he has a drinking problem. He drinks alcohol even though he acknowledges that he is forbidden from doing so under the terms of his probation. (Tr. 82-85.)

Applicant's manager and supervisor, who has supervised Applicant since June 2008, provided a letter of character reference. He praised Applicant's strong work ethic, his positive attitude, and his dependability. He considers Applicant's work quality to be excellent, and he considers Applicant to be a valued employee. (Ex. A.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no 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 an applicant's 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.

[7] Applicant stated he was not seen by a physician or social worker while at the facility. It is unclear from the record what the professional credentials were of the individuals who diagnosed Applicant's condition as alcohol abuse. (Ex. 6; Tr. 77.)

When evaluating an applicant's suitability for a security clearance, an 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 used 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, the administrative judge applies these guidelines 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(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

Guideline G, Alcohol Consumption

Guideline G, Alcohol Consumption, applies in this case to a determination of eligibility for access to classified information. Under Guideline G, "[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."

The following conditions could raise disqualifying security concerns under ¶ 22 of the alcohol consumption adjudicative guideline:

> (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 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;
>
> (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;
>
> (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program;
>
> (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

I have considered all of the disqualifying conditions under AG ¶ 22. I find that there is insufficient record evidence to conclude that a duly qualified medical professional or a licensed social worker diagnosed Applicant with the condition of alcohol abuse. Therefore, I conclude that AG ¶¶ 22(d), 22(e), and 22(f) do not apply in this case. However, I find that AG ¶¶ 22(a), 22 (b), 22(c), and 22(g) are applicable.

Applicant was cited for underage possession of alcohol in 1999. In 2002 and 2008, he was arrested for driving while intoxicated or while under the influence of alcohol. He has consumed alcohol, in excess and at times to intoxication, from 1998 to at least May of 2008, when he was arrested for his second DUI. At his hearing, he admitted that he had reported for work late or had missed work because of his consumption of alcohol. He also admitted that he continues to drink alcohol to intoxication, even though the terms of the probation which he is currently serving do not allow it. He also denies that he has an alcohol problem. These facts raise security concerns under AG ¶¶ 22(a), 22(b), 22(c), and 22(g).

The Guideline G disqualifying conduct could be mitigated under AG ¶ 23(a) 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." The disqualifying conduct could also be mitigated under AG ¶ 23(b) 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)." If "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," then AG ¶ 23(c) might apply. Finally, mitigation might be possible under AG ¶ 23 (d) 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."

Applicant is now 30 years old. He admitted alcohol-related conduct in high school, in college, and as a post-college professional. His most recent arrest for driving under the influence of alcohol occurred in May 2008 and is therefore recent. He has participated in alcohol awareness education. He continues to drink alcohol to intoxication, he intends to drink alcohol in the future, and he denies that he has an alcohol problem. He drinks alcohol even though the terms of his current probation proscribe it. Accordingly, I conclude that none of the Guideline G mitigating conditions fully applies to the facts of Applicant's case.

Guideline J, Criminal Conduct

Under the Criminal Conduct guideline "[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." AG ¶ 30.

Applicant, who is 30 years old, admits a criminal history that spans more a decade. In 1998, he was arrested and charged with theft, under $300. In 1999, he was charged with underage possession of alcohol. In 2002 and 2008, he pleaded guilty to driving while intoxicated or driving under the influence of alcohol. In 2003, he was found guilty of marijuana possession. In 2005, he pleaded guilty to illegal gambling. He is currently serving court-ordered probation for his second driving offense related to alcohol. He admits that the terms of his probation prohibit alcohol consumption, and yet he continues to consume alcohol. This behavior raises concerns under AG ¶¶ 31(a), 31(c), 31(d), and 31(e). AG ¶ 31(a) provides: "a single serious crime or multiple lesser offenses." AG ¶ 31(c) provides: "allegation or admission or criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." AG ¶ 31(d) provides: "individual is currently on parole or probation." AG ¶ 31(e) provides: "violation of parole or probation, or failure to complete a court-mandated rehabilitation program."

Two mitigating conditions might apply to Applicant's case. If "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) might apply. 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 involvement," then AG ¶ 32(d) might apply.

The record demonstrates that Applicant's criminal behavior, which began in 1998 and has continued to the present, is, therefore, recent. A supervisor provided a letter of character reference indicating he valued Applicant as a good and reliable employee. However, Applicant has not yet established a record of sobriety to assure that his long-standing criminal behavior and rule violations related to alcohol use are unlikely to recur. His inability or unwillingness to comply with his probation by abstaining from alcohol use continues to cast doubt on his reliability, trustworthiness, and good judgment. I conclude that neither AG ¶ 32(a) nor AG ¶ 32 (d) applies.

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 an applicant's conduct and all relevant 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 commonsense 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 young adult who is well educated and skilled. His employer considers him to be a dependable and an excellent worker.

At the same time, Applicant has been arrested twice for driving a vehicle while under the influence of alcohol. He has also been convicted of marijuana possession, and he pleaded guilty to illegal gambling. After his first alcohol-related arrest in 2002, he was ordered to take a course in alcohol education. Even after being made aware of the dangers of drinking and driving, he was again arrested for driving under the influence of alcohol in 2008. After his second arrest for driving under the influence, Applicant voluntarily enrolled in a substance abuse program. However, despite completion of the program, he continues to drink alcohol, which violates the terms of his existing probation. He denies he has an alcohol problem and persists in drinking to intoxication. He has a history of violating rules, laws, and legal orders, raising security concerns about his judgment, trustworthiness, and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his alcohol consumption and criminal conduct.

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 G:	AGAINST APPLICANT
Subparagraphs 1.a. - 1.f.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a. - 2.d.:	Against Applicant

Conclusion

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

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Joan Caton Anthony
Administrative Judge