DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
(Redacted)	)	ISCR Case No. 09-01703
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Marc G. Laverdiere, Esq., Department Counsel
For Applicant: Timothy P. Sceviour, Esq.

March 9, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on August 21, 2008. On August 13, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J and G. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on August 20, 2010; answered it on September 30, 2010; and requested a hearing before an administrative judge. DOHA received the

request on October 4, 2010. Department Counsel was ready to proceed on November 30, 2010, and the case was assigned to me on December 6, 2010. DOHA issued a notice of hearing on January 5, 2011, scheduling it for January 19, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 15 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. DOHA received the transcript (Tr.) on January 31, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old engineer technician employed by a defense contractor since November 1998. He married in April 1992 and divorced in December 2000. He married his current spouse in December 2007. He has one adult son from a previous relationship. He served on active duty in the U.S. Navy from September 1978 to September 1998. He retired as a chief petty officer (pay grade E-7) and received an honorable discharge. (GX 5.) He held a security clearance while in the Navy. He received a clearance as a defense contractor employee in March 2002.

In June 1979, Applicant and several Navy friends were detained by the police for shooting fireworks on the beach. The police found several pills in Applicant's wallet, which he claimed were caffeine pills. (GX 2 at 4.) He was charged with illegal drug possession. He pleaded guilty, was fined $100 (suspended), and placed on probation for three years. The charges were thereafter dismissed on motion of the district attorney. (GX 6 at 2.)

In March 1982, Applicant was arrested for disorderly conduct and fined $25. (GX 7.) In July 1982, he was involved in a brawl. (GX 8.) The SOR alleges that he received nonjudicial punishment (a "captain's mast") under Article 15, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 815, for assault, and using provoking speech and gestures. In his answer to the SOR, Applicant admitted the allegation that he was punished for his involvement in the brawl, but there is no documentary evidence of nonjudicial punishment in the record.

In April 1988, Applicant was charged with driving under the influence on a Navy base. (GX 9.) In his answer to the SOR, he admitted the allegation that he was punished and his driving privileges were suspended, but there is no documentary evidence of nonjudicial punishment in the record.

At the hearing, Applicant testified that he could remember only one instance of having a captain's mast, and in that instance the charges were dismissed. He further testified that the captain's mast was for an incident other than the two alleged in the SOR. (Tr. 38-42.)

In August 1991, Applicant was charged with destroying property. He admitted this offense in his answer to the SOR, but there is no documentary evidence of it in the record. No evidence of the circumstances of these charges was presented at the hearing.

In August 1997, Applicant was charged with assault and battery on a family member. In February 1998, the court entered a satisfaction and discharge order, dismissing the charge upon payment of court costs. (GX 10.) Applicant testified that this incident arose after a verbal argument about his then wife's failure to pay the household bills while he was at sea. He denied striking her during the argument, and he testified he could not recall if he had consumed alcohol before the incident. (Tr. 42-44.)

In March 2004, Applicant was charged with two counts of assault and battery as a result of a bar fight. He was convicted, appealed his conviction, and was convicted again on appeal. He was fined $250, ordered to pay court costs, and sentenced to six months in jail. The jail sentence was suspended, conditioned on good behavior for two years. (GX 11; Tr. 44-50.)

In March 2005, Applicant was charged with assault and battery on a family member, as a result of domestic disturbance with his cohabitant. In April 2005, the court deferred findings, placed Applicant on probation for two years, and ordered him to complete alcohol screening and treatment if required. Applicant completed the alcohol screening and no further treatment was required. (GX 12.) At the hearing, Applicant denied striking his cohabitant, and he testified that he did not recall receiving any counseling. (Tr. 50-53.)

In February 2006, Applicant was charged with driving under the influence (DUI). He pleaded not guilty but was convicted. He was sentenced to 90 days in jail (suspended), probation for three years, suspension of his driver's license for one year, and a $350 fine. He was ordered to attend an alcohol safety action program. (GX 13.) The SOR alleges that he was also charged with failure to obey a highway sign, and he admitted the allegation, but there is no documentary evidence of the charge. Applicant testified that he was stopped by a police officer for not stopping completely at a stop sign, and then accused of DUI after he failed a field sobriety test and blood-alcohol test.

Applicant attended an alcohol abuse counseling program as an outpatient from July to September 2006. There is no record of any diagnosis or prognosis. (GX 2 at 11.) Applicant testified that at that time he did not believe he had an alcohol problem. (Tr. 54.)

In June 2008, Applicant was charged with refusing to take a breathalyzer test, DUI (2nd offense), and two counts of assault and battery on his current wife. He was convicted of refusing to take a breathalyzer test, but he was found not guilty on appeal. (GX 14.) At the hearing, he admitted that he refused to take the test because he had just consumed a beer and was afraid that he would not pass the test. (Tr. 60.)

During an interview with a security investigator in October 2008, Applicant declared that he did not have any problems with excessive alcohol consumption. He stated that he had not consumed any alcoholic beverages since June 2008 and did not intend to consume alcohol again because it was not worth the risk of further legal problems. (GX 2 at 15-16.)

In December 2009, Applicant was charged with refusing to take a breathalyzer (2nd offense), failure to obey a highway sign, and DUI (2nd offense within 5-10 years). In January 2010, he was convicted of DUI, and the other charges were disposed of by *nolle prosequi.* He was sentenced to 365 days in jail, with 355 days suspended, and fined $500. His driver's license was suspended for three years, and an ignition interlock was placed on his vehicle for three years. (GX 15.) In response to DOHA interrogatories in June 2010, Applicant submitted a letter from a medical doctor, stating that at the time of these offenses, he had been treated for a broken arm, was taking a prescribed narcotic pain killer, and had a new cast on his wrist and forearm, all of which could have impaired his driving ability. (GX 4 at 4.) At the hearing, he admitted having a couple of mixed drinks after taking his pain medication. He testified he did not read the instructions on his medication cautioning against consuming alcohol while using the medication. (Tr. 62-63.)

In response to DOHA interrogatories in June 2010, Applicant stated that he continued to drink alcoholic beverages. He stated that he consumed six cans of beer biweekly and an occasional glass of wine with dinner, but that he seldom drank liquor. (GX 3 at 2.)

In June 2010, Applicant successfully completed a 12-week substance abuse treatment program. A report from a licensed professional counselor stated that Applicant was "an exceptional participant" in the group counseling program. She stated, "At the time that the group ended, [Applicant] seemed to have a realistic understanding of how alcohol could affect him and was committed to implementing lifestyle changes that would enable him to cope more adaptively." The counselor was a member of a psychiatric services practice composed of medical doctors, psychologists, licensed clinical social workers, and licensed professional counselors. (AX A.) No evidence was presented showing that a licensed professional counselor has credentials equal to or higher than a licensed clinical social worker.

Applicant testified that in January 2010, he and his wife "made a pact" that they would no longer consume alcohol. (Tr. 31-32, 34-35.) He admitted that he had a drink with his son in August 2010, and he had a "few beers" after a golf outing in November 2010. (Tr. 74-75.)

Applicant is attending Alcoholics Anonymous (AA) meetings, but he is still at the first step. He is required by court order to attend at least one meeting a week, but he has been attending two or three a week when his work schedule permits. (Tr. 32.) He testified that he is in the first step of recovery and has not yet admitted at an AA meeting

that he is an alcoholic, even though he has attended about 100 meetings. (Tr. 72-73.) He admitted at the hearing that he now considers himself an alcoholic. (Tr. 31, 66.)

Applicant testified that he has fully disclosed his criminal record and alcohol involvement to his employer. (Tr. 33-34.) Several of Applicant's supervisors, coworkers, and friends submitted sworn statements attesting to his good character. Applicant's immediate supervisor and friend, who has known him for more than 20 years, stated that he is "all business" at work, highly respected, knowledgeable, and extremely careful with classified material. (AX B.) Applicant's manager since April 2007 describes him as highly reliable, trustworthy, honest, and conscientious about handling classified material. (AX C.) Applicant's deputy program manager, who has known him for 12 years, considers him one of their best supervisors and a person of extraordinary character. (AX D.) A coworker and friend, who has known Applicant for 30 years, regards him as a very balanced individual and "a man of dignity with a high regard of duty." (AX E.) Another coworker and friend, who has known Applicant for 11 years, describes him as a hard-working, "no nonsense" worker who is also compassionate and caring. (AX F.)

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.

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 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).

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 J, Criminal Conduct

The SOR alleges 11 instances of criminal charges against Applicant, starting in June 1979 and ending in December 2009 (SOR ¶ 1.a-1.k). The security concern relating under this guideline is set out in AG ¶ 30: “Criminal 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.”

The relevant disqualifying conditions are: AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”); AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”); and AG ¶ 31(d) (“individual is currently on parole or probation”). Applicant’s admissions and the documentary evidence presented at the hearing establish AG ¶¶ 31(a) and (c). Applicant’s three-year probation, imposed in January 2010 for his DUI conviction, which he admitted and which is established by documentary evidence, establishes AG ¶ 31(d). Thus, the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the facts.

Security concerns under this guideline may be mitigated by evidence that "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 32(a). This mitigating condition is not established because Applicant's criminal conduct was recent and did not happen under unusual circumstances.

Security concerns raised by criminal conduct also may be mitigated by "evidence that the person did not commit the offense." AG ¶ 32(c). Applicant denied receiving nonjudicial punishment for the offenses alleged in SOR ¶¶ 1.c and 1.d, and there is no documentary evidence in the record showing nonjudicial punishment, but he admitted the underlying conduct and his admissions are corroborated by documentary evidence. Thus, AG ¶ 32(c) is not established.

Security concerns also may be mitigated if "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement." AG ¶ 32(d). Applicant has taken steps in the right direction, he is remorseful, and he has continued his record of outstanding performance at work. However, AG ¶ 32(d) is not established, because not enough time has elapsed to demonstrate rehabilitation. His last DUI conviction was in January 2010. He last consumed alcohol in November 2010, about two months before the hearing. He is still on probation, the interlock has not yet been removed from his automobile, and he has yet to acknowledge to his fellow AA members that he is an alcoholic.

Guideline G (Alcohol Consumption)

The SOR ¶ 2.a cross-alleges the conduct in SOR ¶¶ 1.d, 1.h, 1.i, 1.j, and 1.k under this guideline. It also alleges Applicant's alcohol treatment in July-September 2006 (SOR ¶ 2.b) and April-June 2010 (SOR ¶ 2.c). Finally, it alleges that he continues to drink alcohol (SOR ¶ 2.d).

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 disqualifying conditions are relevant:

> AG ¶ 22(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;
>
> 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(d): Diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
>
> 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.

Although Applicant was required to undergo alcohol screening after the incident in SOR ¶ 1.h, there is no evidence in the record showing that the incident was alcohol-related. However, the evidence regarding the incidents alleged in SOR ¶¶ 1.d, 1.i, 1.j, and 1.k is sufficient to establish AG ¶ 22(a).

There is no evidence of binge drinking, but there is evidence that Applicant drank to the point of intoxication on several occasions alleged in this SOR. This evidence is sufficient to establish AG ¶ 23(c).

There is no evidence that Applicant has been diagnosed as alcohol dependent or suffering from alcohol abuse. Furthermore, there is no evidence that the "licensed professional counselor" who evaluated Applicant in June 2010 held credentials equivalent to or greater than a licensed clinical social worker. Thus, I conclude that AG ¶¶ 22(d), (e), and (f) are not established.

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). For the reasons set out in the above discussion of AG ¶ 32(a), I conclude that this mitigating condition is not 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). This mitigating condition is partially established by Applicant's acknowledgment that he is an alcoholic, and evidence of his alcohol treatment and participation in AA. However, his period of abstinence is too short to establish a "pattern of abstinence."

Finally, security concerns under this guideline may be mitigated if:

> The individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or

> abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 23(d). Applicant has successfully completed several alcohol treatment programs and is participating in AA. However, this mitigating condition is not established because there is no evidence that the favorable recommendation he received in June 2010 was from a qualified medical professional or the equivalent of a licensed clinical social worker.

The allegations in SOR ¶¶ 2.b and 2.c do not allege conduct falling under any of the enumerated disqualifying conditions under this guideline. Both periods of treatment were consequences of his criminal conduct. Applicant's successful completion of these programs is favorable rather than unfavorable conduct. Accordingly, I resolve SOR ¶¶ 2.b and 2.c in his favor.

The allegation in SOR ¶ 2.d, alleging that Applicant continues to drink alcohol, is not supported by substantial evidence. Applicant's testimony establishes that he last consumed alcohol in November 2010. The Government presented no evidence that he consumed alcohol after that date. Thus, I resolve SOR ¶ 2.d in his favor.

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 relevant 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 Guideline J and G 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, intelligent adult. He served honorably in the Navy and he has served with distinction as an employee of a defense contractor. He has held a security clearance for most of his adult life. He was sincere and candid at the hearing. Unfortunately, he is still struggling to overcome his problems with alcohol, and he has not yet established a track record of sobriety. Insufficient time has passed to demonstrate rehabilitation.

After weighing the disqualifying and mitigating conditions under Guidelines J and G, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct and alcohol consumption. 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 J (Criminal Conduct): AGAINST APPLICANT

Subparagraphs 1.a-1.b: Against Applicant
Subparagraphs 1.c-1.d: Against Applicant
Subparagraphs 1.e-1.k: Against Applicant

Paragraph 2, Guideline G (Alcohol Consumption): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant
Subparagraphs 2.b-2.d: For Applicant

Conclusion

I conclude that 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