



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 09-06220
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: Woody Thompson, Esq.

March 14, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines G (alcohol consumption) and J (criminal conduct). Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on June 1, 2009. On May 11, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on May 25, 2010, and DOHA received his answer on May 28, 2010. Department Counsel was prepared to proceed on July 12, 2010. The case was assigned to me on July 16, 2010. DOHA issued a notice of hearing on July 22, 2010, scheduling the hearing for August 18, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 9, which were received without objection. Applicant offered Applicant Exhibits (AE) A and B, which were received without objection, and he testified on his own behalf.

I held the record open until September 1, 2010, to afford Applicant the opportunity to submit additional documents. Applicant timely submitted AE C through H, which were received without objection. DOHA received the hearing transcript (Tr.) on August 26, 2010. The record closed on September 1, 2010.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 41-year-old principle software engineer, who has been employed by a defense contractor since August 2002. (GE 1, Tr. 21.) He held a security clearance with a previous employer from 1993 to 1998. Applicant's security clearance was reinstated when he was hired by his current employer in 2002. Maintaining a security clearance is essential for Applicant to continue with his current company duties. (Tr. 37-38, 71-72.)

Applicant graduated from high school in May 1988. He attended a university from August 1988 to December 1993, and was awarded a Bachelor of Science Degree in Electrical Engineering. He married in November 1992, and has a 22-year-old son and a 17-year-old daughter. (GE 1, Tr. 101-103.)

Alcohol Consumption

Applicant has a 25-year history of episodic alcohol abuse, marked by occasional excessive alcohol consumption, and three separate driving under the influence (DUI) arrests in May 2006, April 2007, and July 2008. Applicant recalls having his first drink around age 13 and his next drink around ages 15 or 16. The amount and frequency of his drinking varied and continued until his last DUI in July 2008.

Applicant's three DUIs occurred over a three-year period. In May 2006, He was pulled over by the police for a traffic-related stop. The officer detected an odor of alcohol on Applicant's breath and required him to perform a field sobriety test, which he failed.

Applicant was taken into custody and blew a .185 BAC on a breathalyzer. He was arrested for DUI and was later convicted of reckless driving in July 2006. He was fined \$300 and ordered to attend Mother's Against Drunk Driving (MADD) class and attend one Alcoholics Anonymous (AA) meeting.

In April 2007, Applicant was pulled over by the police for a traffic-related stop. The officer detected an odor of alcohol on Applicant's breath and required him to perform a field sobriety test, which he failed. He was taken to a mobile police DUI station where he provided a blood sample and his BAC was .18. He was charged with extreme DUI and was later convicted as charged in August 2007. He was sentenced to 20 days in jail of which he served 15 days in the county jail and the remaining five days in house arrest, fined about \$5,000, and his driver's license was suspended for one year. Additionally, he was ordered to attend substance abuse classes.

In July 2008, Applicant was pulled over by the police for a traffic-related stop. The officer detected an odor of alcohol on Applicant's breath and required him to perform a field sobriety test, which he failed. He was taken to the county jail where he provided a blood sample and his BAC was .17. He was charged with aggravated DUI, a felony, because he was driving on a suspended license and because there was a child in the car. He was convicted as charged in February 2009. He was sentenced to 120 days in the county jail and was allowed to participate in a work furlough program. Under this program, he was released for 12 hours a day from Monday through Friday to allow him to work. He was also sentenced to two years probation and fined \$6,500. His driver's license remained in a revoked status and he was ordered to undergo an alcohol and drug screening to determine what services he needed. (Tr. 110.)

Applicant acknowledged his poor decisions with regard to past alcohol use and that he had a problem with alcohol. He testified that it was not until his third DUI that the severity of his problem "hit home." Following his third DUI, Applicant attended an authorized substance abuse treatment center. He has fully embraced AA and has completed the twelve-step program. Applicant has quit drinking since his third DUI arrest in July 2008. He renewed his commitment to his family. Upon successful completion of his substance abuse treatment program and good behavior, Applicant's felony conviction was designated a misdemeanor and his probation was terminated early in July 2010. (AE A(1), AE A(2), Tr. 73-82, 100-101.)

Applicant testified that he finds his job very fulfilling. He understands that having a security clearance is a privilege, not a right, and expressed sincere remorse for jeopardizing his security clearance. Applicant is an active member of his church and a member of a church-related fraternal organization. (Tr. 82-84.) He does not socialize on a regular basis with anyone who drinks. His family and friends are aware of his situation and "out of respect" for him do not drink in social situations. (Tr. 95-96.) Applicant's activities apart from work include working out at a nearby gym and his other activities that are family-centric and church-related. (Tr. 98-99.) Applicant estimates that his three DUIs cost him in excess of \$30,000. (Tr. 105-106, 108.)

Character Evidence

Three character witnesses testified on Applicant's behalf -- a senior company official, his wife, and his 22-year-old son.

The senior company official was the company official responsible for hiring the Applicant. He indicated that Applicant is an outstanding employee, who advanced quickly within the company. Applicant's annual performance evaluations were "above-expectations" based on Applicant's exceptional technical abilities and his commendable teamwork and interpersonal skills. His past problems with alcohol did not cause Applicant's work performance to suffer. Applicant is reliable, trustworthy and exercises good judgment at work. Applicant fully disclosed his alcohol problems with company officials. The senior company official who testified on Applicant's behalf was granted his first security clearance in 1983 and currently holds a top secret clearance. He had no reservation in recommending Applicant for a security clearance. Applicant is required to maintain a security clearance as a condition of remaining in his current position. (Tr. 20-38.)

Applicant's wife is a registered nurse. She and the Applicant met as "high school sweethearts" in her sophomore year and have been together 23 years. She described the Applicant as her "best friend," has a "great relationship," and is proud of her marriage. She confirmed Applicant's commitment to AA and stated that he encourages their children not to drink. Applicant has not had a drink since his July 2008 DUI arrest. She stated Applicant's third DUI arrest was a turning point in helping him realize the severity of his drinking problem. She confirmed Applicant's involvement in his family and church. Applicant's wife and her daughter intend to get involved in Al-Anon so they can provide more help to the Applicant in dealing with his problems with alcohol. (Tr. 39-61.)

Applicant's son attends college and lives at home. He is fully aware of his father's DUIs and the impact they have had on their family. Applicant's son is clearly very close to his father and fully supports his father's recovery and desire to remain sober. He stated his father has been very open with the family regarding his problems with alcohol. He added that his father's three DUIs hurt their family, however, the overall experience brought their family closer together. He stated he could always count on his father to be there for him. (Tr. 62-69.)

Applicant submitted three reference letters. The first was from a senior company official, the second was from a longtime family friend, and the third was from his pastor. The company official described Applicant's significant contributions to their company, his work ethic, honesty, and reliability. His longtime friend has known Applicant for over eight years and has been to numerous social events with Applicant. He fully supports Applicant in his decision to quit drinking and respects him for doing so. His pastor verified that Applicant and his family have been active and contributing members of the parish since June 1998. (AE B, AD E, AE E.)

Applicant submitted work performance evaluations for the years 2007 to 2009. These evaluations reflect solid and consistent performance and clearly demonstrate that Applicant is a valued and trusted employee who is making a contribution to the national defense. (AE F – AE H.)

Psychological and Substance Abuse Evaluation

Post-hearing, Applicant submitted a Psychological and Substance Abuse Evaluation prepared in August 2010. (AE C.) Briefly, the neuropsychologist's credentials consist of over 30 years of experience in alcohol and other drug abuse assessment, treatment, and research. He has designed and managed chemical dependency treatment programs, and has been a consultant to private, state, county, federal, and national chemical dependency treatment programs. He has worked with criminal offenders in three states. He holds a Ph.D. and maintains an active practice in clinical and forensic psychology and neuropsychology and substance abuse. Additionally, he is a Board Certified Forensic Examiner, a Fellow of the American College of Forensic Examiners International, and holds the APA Certificate of Proficiency in Alcohol and Other Substance Abuse Treatment. (FRE 702.)

Under Diagnostic Considerations, the neuropsychologist stated that Applicant's clinical profile reveals no marked elevations that should be considered to indicate the presence of clinical psychopathology other than alcohol-related problems. He concluded it is increasingly likely that Applicant is alcohol-dependent. Overall, the neuropsychologist concluded that his objective personality testing results in a clear set of indicators. Applicant does meet the criteria for alcohol dependence, in remission for 25 months. He does not appear to exhibit any coexisting or co-morbid disorders that would negatively affect his prognosis. He does appear to possess a number of strengths that suggest a reasonably good prognosis.

Listed under characteristics and conditions that will improve Applicant's chances for success: (1) he has had a lengthy period of abstinence (25 months), (2) he had one year of sobriety before his last use of alcohol, (3) he has a supportive family, (4) he has moved out of a peer situation with alcohol abuse norms, (5) there is no family history of substance abuse or dependence, (6) there is no family history of mental illness, (7) he has reasonably good social skills, (8) he has a track record of demonstrated success in business and academia, (9) he has alternatives for positive addictions, (10) he does not have personality disorders that would increase his risk for failure, (11) he does not have a history of antisocial behaviors or personality disorder, (12) he experiences anxiety, guilt, and remorse that can motivate positive lifestyle changes, (13) he is involved in a recovery program and is actively participating, (14) he has a sponsor who is assisting him in his recovery, (15) he has the support of his church and faith, (16) the consequences of his drinking have cost him a large amount of money, (17) sobriety has improved his relationships with his wife and children, and (18) his job requires the security clearance, and this is a highly motivating factor for maintaining sobriety. (AE C.)

Criminal Conduct

The allegation, which references Applicant's three DUI arrests, is cross-alleged under this concern. Applicable facts and discussion under Alcohol Consumption are incorporated under this concern, discussed *supra*.

Personal Observations

I found Applicant to be credible. At his hearing, Applicant promptly answered all the questions asked. He was frank, candid, forthcoming, and explained his answers without hesitation. He accepted responsibility for his actions and recognizes that his actions led to his current predicament.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing 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 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 meeting the criteria contained in the adjudicative guidelines (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 of or about potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination of or about applicant's allegiance, loyalty, or patriotism. 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 or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

Under Guideline G (alcohol consumption), the Government’s concern is that 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 ¶ 21.)

The Government established its case under Guideline G through Applicant’s admissions and the evidence presented. Applicant consumed alcohol excessively and at times to the point of intoxication from 1983 to 2008, and was arrested three times for DUI in 2006, 2007, and 2008.

A review of the evidence supports application of three alcohol consumption disqualifying conditions. AG ¶ 22(a): “alcohol-related incidents away from work, such as driving while under the influence,” 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,” and AG ¶ 22(d) “diagnosis by a duly qualified medical professional (e.g. physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence,” apply.

AG ¶ 23 indicates three conditions that could mitigate alcohol consumption 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); 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 licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

All three of these mitigating conditions apply. Although Applicant was not previously diagnosed as alcohol dependent or as an alcohol abuser, the neuropsychologist who evaluated him post-hearing concluded that Applicant is alcohol-dependent, but in remission for 25 months. Applicant has acknowledged and recognizes the deleterious effect the misuse of alcohol has had on his life. Following his third DUI, Applicant attended an authorized substance abuse center. He has embraced AA and regularly attends meetings. Applicant has received a favorable prognosis from a highly qualified medical professional post-hearing. Furthermore, Applicant has been sober for over two years, a significant period of time considering that he began drinking when he was 13 years old.

Applicant presented credible evidence of actions taken to overcome his problem, and established he has significantly modified his behavior and alcohol consumption over the last two years. He is remorseful for his behavior and has initiated changes in his lifestyle. The statement from a senior company representative shows Applicant's work behavior has not been indicative of an alcohol problem. He is viewed as a valuable employee, who is reliable, dependable, and professional. Applicant's sobriety and responsible use of alcohol is supported not only by his company vice president, but also by his wife of 23 years and his son. Furthermore, Applicant acknowledged the problems the misuse of alcohol have caused him and has adopted a steadfast commitment to a life of sobriety.

Criminal Conduct

Under Guideline J (criminal conduct), the Government's concern is that 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. (AG ¶ 30.)

The Government established its case under Guideline J through Applicant's admissions and the evidence presented. As noted, the criminal conduct allegation is cross alleged under alcohol consumption.

A review of the evidence supports application of two criminal conduct disqualifying conditions. AG ¶ 31(a) "a single serious crime or multiple lesser offenses;" and AG ¶ 31(c) "allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted."

For reasons discussed under Alcohol Consumption, *supra*, I find that criminal conduct mitigating conditions AG ¶ 32(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 AG ¶ 32(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;" apply. The record is void of any criminal involvement of any nature other than the three DUI arrests previously discussed. Applicant's most recent DUI occurred more than two years ago and he has been alcohol-free since then. He has made significant lifestyle changes consistent with a life of sobriety and consequently is making every effort to be a law-abiding member of society.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

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.

Applicant has been forthright and cooperative throughout this entire process. He voluntarily underwent a post-hearing psychological and substance abuse evaluation from a qualified medical professional. He recognizes the adverse consequences of misusing alcohol. Applicant's third DUI made a significant impact on him. He saw the potential loss of his career and the adverse impact his conduct had on his family, emotionally and financially. Applicant has been willing to do whatever is necessary to maintain sobriety. He has family support, stable employment, a strong work ethic, church involvement, and regularly attends AA. His willingness to make significant lifestyle changes enhance the likelihood of his continued success. Applicant demonstrated the correct attitude and commitment to being sober. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his returning to drinking is unlikely. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

Noteworthy is Applicant's past behavior, which serves as a reliable indicator of future behavior. In particular, he has successfully held a security clearance since he was hired by his current employer in August 2002. He also successfully held a security clearance with a previous employer from 1993 to 1998. Applicant has been cooperative throughout this process and recognizes the gravity of these proceedings. Applicant is living a different lifestyle from the person who was arrested after his third DUI in July 2008.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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:	FOR APPLICANT
Subparagraphs 1a – 1d:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT J. TUIDER
Administrative Judge