DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
(Redacted)	)	ISCR Case No. 09-08410
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

February 28, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline G (Alcohol Consumption). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on July 31, 2009. On October 6, 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 Guideline 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 October 20, 2010; answered it on November 5, 2010; and requested a determination on the record without a hearing. DOHA received his response on November 8, 2010. Department Counsel submitted the Government's

written case on December 8, 2010. On December 15, 2010, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on December 24, 2010, and he responded and submitted additional materials on January 19, 2010. Department Counsel did not object to the additional materials. The case was assigned to me on February 1, 2011.

Findings of Fact

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

Applicant is a 53-year-old systems engineer employed by a defense contractor. He has worked for his current employer since October 1981. He married in March 1981. He and his wife have three daughters, ages 34, 29, and 16. He has held a security clearance since October 1981.

In his answer to the SOR, Applicant admitted being arrested for driving under the influence (DUI) in May 1974 and October 1977, but there is no evidence in the FORM indicating the circumstances of these arrests or of their disposition.

In March 1984, Applicant was driving and was stopped by the police for failing to use his turn signal. A breathalyzer test reflected a blood-alcohol level of 2.4. He was convicted of DUI, fined $300, and his driver's license was suspended for 120 days. (Item 8 at 4.)

In September 2007, Applicant was driving and was stopped by police for crossing the center line. He had consumed at least seven or eight beers. He was charged with driving or attempting to drive under the influence. The charges were dismissed. (Item 11.) According to Applicant, his lawyer was able to have the charges dismissed "on a technicality." (Item 8 at 3.)

In April 2009, Applicant was involved in a car accident when he crossed the center line and hit an oncoming vehicle. He refused to take a field sobriety test or breathalyzer, and was arrested for DUI. Pursuant to a plea bargain, he received probation before judgment, was placed on probation for 18 months, and was required to complete substance abuse treatment. (Item 10.) He received substance abuse treatment from June 18, 2009, to August 11, 2009, and upon discharge he was diagnosed as alcohol dependent. His prognosis was: "good provided he follows an aftercare program that includes sober support system and following a relapse prevention plan." The credentials of the counselor making the diagnosis and prognosis are listed as "CAC-ADP." Another staff member is identified as a "CSC." The supervisor is identified as "LCPC, LCADC." None of these alphabetical credentials are defined. The clinical records do not contain actual or electronic signatures in the block for "physician."

Applicant began consuming alcohol at age 16, consuming a beer about once a month. From age 18 to 21, he consumed three or four mixed drinks two or three times a week. (Item 9 at 2.) In an interview with a security investigator in August 2009, Applicant stated that before his last DUI he was consuming three or four beers in a sitting and drinking to intoxication four times a week. (Item 8 at 4.) In his answer to the SOR, Applicant stated that he drank his last beer on February 14, 2010. He has abstained from all alcoholic beverages since March 20, 2010, when he consumed two glasses of champagne at his 29th wedding anniversary. He and his wife have removed all alcoholic beverages from their home. In June 2010, after reflecting on his life and researching the subject of alcoholism, he concluded that he is an alcoholic. In August 2010, he began attending Alcoholics Anonymous (AA) meetings once or twice a week. (Item 4 at 4.)

In Applicant's response to the FORM dated January 19, 2011, he stated that he continues to attend AA meetings once a week. He successfully completed his probation on December 4, 2010. He listed numerous awards and commendation received during his 29 years of service but did not attach them to his response.

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

The SOR alleges that Applicant consumed alcohol, at times to excess and to the point of intoxication, from approximately the age of 16 to at least February 14, 2010 (SOR ¶ 1.a). It alleges that he was arrested for DUI in May 1974, October 1977, March 1984, September 2007, and April 2009, and that after his last DUI arrest he received probation before judgment and was required to complete a six-week alcohol treatment program (SOR ¶¶ 1.b-1.d.) It further alleges that in June 2009, he was diagnosed with alcohol dependency (SOR ¶ 1.e). Finally, it alleges that he continues to consume alcohol notwithstanding his treatment for alcohol dependency (SOR ¶ 1.f).

The security concern relating to Guideline G is set out in AG ¶ 21[1]: "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 relevant disqualifying conditions under this guideline are:

> AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the

[1] Depart Counsel's submission erroneously cites the Directive, Enclosure 2, Attachment 7, which was replaced by the AG on September 1, 2006. I have decided this case based on AG ¶¶ 21, 22, and 23 and the whole-person concept.

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;

Applicant's arrest record and his admissions establish AG ¶ 22(a). His admissions establish AG ¶ 22(c). AG ¶ 22(d) is not established, because there is no evidence that he was diagnosed by a "duly qualified medical professional." AG ¶ 22(e) is not established because there is no evidence that the qualifications of the counselor and clinicians during his treatment from June to August 2009 were the equivalent of a "licensed clinical social worker." AG ¶ 22(f) is not fully established, because there is no evidence that a qualified medical professional or licensed clinical social worker made the diagnosis of alcohol dependence.

I have noted that Applicant has admitted he is an alcoholic and that he admitted relapsing alcohol after completion of his treatment program in August 2009. However, based on the absence of evidence that Applicant was diagnosed by a "duly qualified medical professional," a "licensed clinical social worker," or the equivalent, I resolve SOR ¶ 1.e for Applicant.

The following mitigating conditions are relevant:

AG ¶ 23(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;

AG ¶ 23(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

> AG ¶ 23(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.

The first prong of AG ¶ 23(a) ("so much time has passed") focuses on whether the conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). I conclude that the first prong of this mitigating condition is not established. Applicant has been abstinent for less than a year after a lifetime of excessive drinking. He relapsed after completing his alcohol treatment. Although he appears to be on the right path, more time is needed for him to demonstrate that he is rehabilitated. The remaining prongs of this mitigating condition are not established because his conduct was frequent, did not occur under unusual circumstances, and casts doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 23(b) is partially established, because Applicant has acknowledged that he is an alcoholic, and he has taken actions to overcome his problem. However the third prong is not established because insufficient time has passed to establish a "pattern of abstinence."

The first prong of AG ¶ 23(d) is established by Applicant's completion of the alcohol treatment program in August 2009. The remaining prongs are not established, however, because he has not established a pattern of abstinence and there is no evidence that his favorable prognosis was made by a qualified medical professional or the equivalent of a licensed clinical social worker.

Although I have concluded that Applicant has not abstained from alcohol for long enough to establish AG ¶¶ 23(a), (b), and (d), his statements that he has abstained from alcohol since May 2010 are uncontroverted by any evidence and are sufficient to refute the allegation that he continues to consume alcohol. Thus, I resolve SOR ¶ 1.f 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 G in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature adult who has had a long and apparently successful career with his current employer. He has held a security clearance for most of his working life. He appears to have finally acknowledged his problem with alcohol and taken positive steps to overcome it. Because Applicant requested a determination without a hearing, I have had no opportunity to question him, and my ability to judge his sincerity and credibility is limited. Based on the record, I conclude that he needs more time to demonstrate rehabilitation. *See* Directive ¶¶ E3.1.37 through E3.1.41 (reconsideration authorized after one year).

After weighing the disqualifying and mitigating conditions under Guideline G, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on 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 G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraphs 1.e-1.f:	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