DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 10-08305
	)	
Applicant for Security Clearance	)	

Appearances

For Government: William T. O'Neil, Esq., Department Counsel
For Applicant: *Pro se*

January 13, 2012

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted his security clearance application (SCA) on October 23, 2008. On August 3, 2011, the Defense Office of Hearings and Appeals (DOHA) preliminarily denied his application. DOHA set forth the basis for its preliminary decision in a Statement of Reasons (SOR), 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 August 15, 2011; answered it on August 29, 2011; and requested a determination on the record without a hearing. Department Counsel submitted the Government's written case on September 20, 2011. On

September 26, 2011, 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 September 30, 2011, and submitted a response dated November 16, 2011, which was included in the record with no objection from Department Counsel. The case was assigned to me on January 3, 2012.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.c. He did not respond to SOR ¶ 1.d. His admissions in his answer to the SOR are incorporated in my findings of fact.

Applicant is a 42-year-old geospatial scientist employed by a federal contractor since October 2008. He received an associate's degree in fish and wildlife management in May 2002, and a bachelor's degree in cartography in May 2007. He was a construction worker from August 2007 to January 2008, a state-employed wildlife technician from February to August 2008, and unemployed from August 2008 until he began his current employment. He has never married, but he has a 21-year-old son, who does not live with him. He has never held a security clearance.

Applicant comes from a well-educated family. Both his father and his brother are medical doctors. Applicant did not begin college until he was in his 30s.

When Applicant submitted his SCA, he disclosed that he was charged with driving under the influence (DUI) in October 2004, and again in November 2007. He was a college student at the time of both arrests. (Item 5 at 27-28.) In November 2009, after he submitted his SCA, he was charged with a third DUI.

Applicant began consuming alcohol when he was 18 years old. His beverage of choice was wine, but he sometimes consumed beer. He usually consumed alcohol at home and did not frequent bars. He typically consumed two or three glasses of wine with dinner about three times a month. (Item 6 at 7.)

Applicant suffers from hereditary hand tremors and migraine headaches. His medical conditions are controlled by prescription drugs that can cause nausea, drowsiness, and dizziness. (Response to FORM at 17.)

The October 2004 DUI occurred in the drive-through lane of a fast-food restaurant. Applicant was stopped by the police, failed a field sobriety test, and was jailed overnight after taking a breathalyzer test. He was released the next day on his own recognizance, and was later sentenced to a fine. (Item 5 at 28; Item 6 at 6.)

In December 2006, Applicant was found unconscious in his car at the same fast-food restaurant. He was under stress from his college exams, taking medication for chronic migraine headaches, and had consumed beer at his home with friends. He

failed a sobriety test but declined the breathalyzer, because his lawyer had advised him to refuse a breathalyzer if he had been drinking. (Item 5 at 28; Item 6 at 6.)

In November 2009, Applicant was charged with possession of drug paraphernalia (a pipe), violation of the implied consent law, and DUI. He had consumed six or seven beers at home before driving to a restaurant, where he was questioned by a police officer after he pulled into a parking space but parked askew. He was arrested after failing a field sobriety test. He refused to take a breathalyzer test. He voluntarily reported his arrest to his supervisor and facility security officer. The police report recites that he had a previous DUI conviction in January 2006, but there is no independent evidence of it in the record. (Item 7 at 5.)

The implied consent violation and drug paraphernalia charges were dismissed. Applicant denied any drug involvement and believes the pipe was left in his car by an ex-girlfriend, who was involved with drugs. He terminated his relationship with this girlfriend when he learned of her drug involvement, and there is no evidence that he has been involved with drugs.

In April or May 2010, Applicant pleaded guilty to the November 2009 DUI. He was sentenced to 60 days of inpatient treatment, fines and fees totaling $1,900, and supervised probation until all fines and fees were paid. According to his lawyer, Applicant requested the inpatient treatment. (Answer to SOR, enclosure 1.) Applicant paid all the fines and fees. His driver's license was suspended for two years, with eligibility for a restricted license after one year. (Item 6 at 8.)

The assessment report for Applicant's inpatient treatment did not find alcohol abuse or dependence, and he was rated as having low risk of future alcohol-related problems. The medical credentials of the director of the alcohol and drug center, who performed the assessment, are not reflected in the record.

Applicant completed an alcohol and drug safety course in January 2010, and a second course that included a victim impact panel in June 2010. (Response to FORM at 10 and 11.) He attributes his excessive alcohol consumption in November 2009 to worry about his elderly parents, whose home had been heavily damaged by a flood, and the breakup of his relationship with his girlfriend. He believes that he has learned other ways of dealing with stress. In his response to the FORM, he submitted a notarized "letter of intent," stating that he "agree[s] that any further violations regarding alcohol will result in the automatic revocation of [his] security clearance with the U.S. Department of Defense." This letter parallels the "statement of intent" described in AG ¶ 26(b) for cases under Guideline G (Drug Involvement). (Response to FORM at 6.)

Applicant's brother, a medical doctor and his only sibling, submitted a statement reflecting his belief that Applicant is committed to abstaining from alcohol and making healthy changes in his life. Applicant's brother stated that Applicant has strong support from his family. A friend and coworker for the past three years described Applicant as sincere, reliable, trustworthy, and dependable. Another coworker, who has been a close

friend for four years and is a former roommate, stated that Applicant has disassociated himself from alcohol abusers, has not been observed consuming alcohol since November 2009, and is well respected at work. Applicant's performance review for calendar year 2010 rated him as "meeting expectations." (Response to FORM at 12, 13, and 19.)

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, an administrative judge applies these guidelines 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 G (Alcohol Consumption)

The SOR alleges that Applicant consumed alcohol, at times to excess and to the point of intoxication, from approximately 1988 to at least December 2009 (SOR ¶ 1.a); that he was arrested in November 2009 for possession of drug paraphernalia, violation of an implied consent law, and DUI, and that he pleaded guilty to DUI; (SOR ¶ 1.b); that he was arrested in December 2006 for DUI and pleaded guilty (SOR ¶ 1.c); and that he was arrested in November 2005 for DUI and was convicted (SOR ¶ 1.d).

The concern under this guideline is set out in AG ¶ 21: "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." Applicant admitted SOR ¶¶ 1.a-1.c, and his admissions are sufficient to establish these allegations. He did not admit or deny SOR ¶ 1.d, and there is no evidence of a November 2005 DUI in the record. Thus, I conclude that there is insufficient evidence to establish SOR ¶ 1.d

The conduct alleged in SOR ¶¶ 1.a-1.c raises two disqualifying conditions under this guideline:

> 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; and
>
> 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.

No other enumerated disqualifying conditions under this guideline are 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). The first prong of this mitigating condition ("so much time has passed") focuses on whether the criminal 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).

Applicant has abstained from alcohol for more than two years, which is a "significant period of time." There is no evidence of any alcohol-related incidents after his November 2009 DUI. He requested that his sentence for his November 2009 DUI include inpatient treatment, and he appears to have gained some insight into his behavior as a result of that treatment. Thus, I conclude that the first prong of this mitigating condition is established. His multiple DUI arrests did not occur under unusual circumstances. He attributes his latest DUI to the emotional stress of his elderly parents being displaced from their home and the termination of a romantic relationship, neither of which are "unusual circumstances" within the meaning of this mitigating condition. However, he has acted responsibly since his latest DUI. Although his "letter of intent" does not fit squarely into any of the enumerated mitigating conditions under this guideline, it demonstrates the depth and seriousness of his commitment to avoid further alcohol-related incidents. Based on all these factors, I conclude that AG ¶ 23(a) is 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). Applicant acknowledged his excessive alcohol consumption, completed an alcohol education program, and has abstained from alcohol for more than two years. I conclude that this mitigating condition is established.

Security concerns under this guideline also may be mitigated 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." AG ¶ 23(c). This mitigating condition is not applicable because there is no evidence that Applicant is currently participating in a counseling or treatment program.

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 completed a 60-day inpatient program and has demonstrated a clear pattern of abstinence. There is no evidence, however, that he has participated in Alcoholics Anonymous or a similar organization. Although he received a favorable prognosis from the director of the alcohol and treatment center, there is no evidence of the director's medical credentials. Thus, I conclude that Applicant receives some credit under this mitigating condition, but it is not fully established.

Whole-Person Concept

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. In applying 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 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.

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.

The record contains sparse information about Applicant's background. Although he began consuming alcohol at age 18, there is no evidence of alcohol-related incidents until his first DUI in October 2004, when he was 35 years old and attending college. He has not been diagnosed as an alcohol abuser or alcohol dependent. He appears to be close to his family. His DUI while his security clearance application was pending demonstrated bad judgment. However, he has been candid throughout the security clearance process, and he has demonstrated his commitment to sobriety by submitting his "letter of intent."

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 mitigated the security concerns about his alcohol consumption. Accordingly, I conclude

he has carried his burden of showing that it is clearly consistent with the national interest to grant him 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):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge