DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-00811
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

10/16/2012

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant refused to submit to chemical tests after he was stopped for driving under the influence of alcohol in July 2004 and February 2009. He continues to consume alcohol irresponsibly, despite completing two outpatient alcohol treatment programs. While his goal is to stop drinking, the Alcohol Consumption concerns are not fully mitigated. Clearance denied.

Statement of the Case

On May 11, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline G, Alcohol Consumption, explaining why it could not find that it is clearly consistent with the national interest to grant Applicant security clearance eligibility. DOHA took action 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on May 17, 2012. On June 28, 2012, Applicant requested a hearing. (Tr. 58.) On September 6, 2012, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant him a security clearance. On September 11, 2012, Applicant waived his right to 15-days advance notice of the hearing. On September 12, 2012, I scheduled a hearing for September 26, 2012.

I convened the hearing as scheduled. Six Government exhibits (GEs 1-4, 6-7) were admitted into evidence without objection. Another document, marked for identification as GE 5, was withdrawn by the Government in response to Applicant's objections about its relevance. Four Applicant exhibits (AE A-D) were marked and accepted into the record without objection. Applicant also testified, as reflected in a transcript (Tr.) received by DOHA on October 3, 2012.

Summary of SOR Allegations

The SOR alleged under Guideline G that Applicant consumed alcohol at times to excess or intoxication from at least 2004 to present (SOR 1.a); pled guilty to a July 2004 chemical test refusal charge (SOR 1.b); attended an 18-week alcohol treatment program after his arrest in 2004 (SOR 1.c); pled nolo contendere to a February 2009 chemical test refusal charge (SOR 1.d); attended a second alcohol treatment program starting in February 2009 for a condition diagnosed as alcohol dependence at discharge (SOR 1.e); and drank alcohol after his discharge from the program in June 2009 and intended to continue to consume alcohol (SOR 1.f).

In his May 17, 2012 response, Applicant admitted that he had consumed alcohol at times to intoxication, was twice charged and sentenced as alleged for chemical test refusal, and attended 18-week alcohol treatment programs after the 2004 and 2009 alcohol-related incidents. Applicant indicated that he had quit drinking on May 6, 2012, and he did not intend to consume alcohol because of all the "issues" it had caused him.

Findings of Fact

Applicant's admissions to drinking alcohol at times to excess from 2004 to May 6, 2012, to being charged and sentenced for refusing chemical tests in July 2004 and February 2009, and to attending alcohol treatment programs after those incidents are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 51-year-old material service representative, who has worked for his defense contractor employer since August 2010. He previously worked for this employer from June 1987 to June 1991. From January 1992 to July 2010, Applicant worked in the civilian sector as a warehouse manager. Applicant seeks his first Department of Defense security clearance. (GE 1.)

Applicant has been married to his spouse since September 1995. (GE 1; Tr. 38.) They purchased their present residence around August 2005 with a conventional 30-year mortgage. As of late September 2012, the principal balance of their mortgage was $71,767.79. They are also making payments on a mortgage for another property purchased in 2004. That loan has a current principal balance around $91,404.12. (AE C.)

Around 1979, Applicant was pulled over for failing to maintain a safe distance between him and the police vehicle ahead of him. He was convicted of driving under the influence (DUI). (Tr. 39.) Applicant continued to consume alcohol over the years, including at times two beers an hour at softball games with teammates.[1] (Tr. 52.) At times, he drank in quantity up to six or seven beers, which was enough for him to be intoxicated. (GE 2.)

After consuming seven to eight beers and some sangria at a cookout in July 2004 (GE 2; Tr. 41), Applicant was pulled over for an equipment violation and failure to signal a lane change while out on his motorcycle. He failed a field sobriety test and was arrested for DUI, chemical test refusal, and a lane roadway violation. In traffic court on July 15, 2004, he pled guilty to chemical test refusal and was fined about $800, placed on probation, and ordered to complete 20 hours of community service. He also lost his driving privileges for three months. (GEs 1, 2, 7.) The lane violation charge was dismissed. He was not prosecuted for drunk driving. (GEs 2, 7.) Applicant attended a local outpatient alcohol program (alcohol program X) for about 18 weeks beginning in July 2004.[2] (GE 2.)

Applicant testified that he abstained from alcohol after July 2004 until 2007 or 2008, when he resumed drinking because he "just felt like having a beer." (Tr. 61.) Yet, he had indicated in January 2012 that he sometimes went as long as one year without drinking (GE 3), which calls into question whether he abstained for the entire three years. He also testified that at times between 2004 and February 2009, he operated a motor vehicle when his blood alcohol level was over the legal limit where he was not caught. (Tr. 43.)

In February 2009, Applicant consumed six beers while watching his son's band perform at a local club. He also took a prescribed narcotic for shoulder pain, which he believes "kicked in" before he reached home. Near his home, he struck a parked car. (Tr. 41-42.) Applicant failed field sobriety tests, and he was arrested for DUI and for misdemeanor chemical refusal, 2nd offense. Applicant refused to submit to a breathalyzer because of the possibility that his blood alcohol level was over the legal limit. Pursuant to a plea agreement, the DUI charge was dismissed, and he pled nolo contendere to the chemical refusal charge in district court on March 9, 2009. Applicant was placed on six months of supervised probation, assessed $1,454.50 in fines and court costs, and ordered to complete 60 hours of community service and alcohol treatment. His driver's license was

[1] When asked about the time span over which Applicant consumed six or seven beers, he responded, "After softball, I'll use that for an example, Your Honor, I would say probably two beers an hour, a half hour per beer, I would say." (Tr. 52.)

[2] The records of that treatment were not made available for review.

suspended for one year. (GEs 1-3, 6.) He paid off his fines and costs on March 2, 2010, with a final payment of $654.50. (GE 3.)

Applicant returned to alcohol program X on February 25, 2009, aware that he was likely to be ordered into treatment by the court. (Tr. 63.) He was diagnosed on admission with alcohol dependence (303.90 under the Diagnostic and Statistical Manual of Mental Disorders 4th Ed., hereafter DSM-IV). Clinical justification to substantiate the diagnosis was reported as "Had 2 DUI[s]".[3] Applicant attended six individual and ten group counseling sessions with a licensed chemical dependency professional (LCDP) where he learned about triggers and prevention. It was recommended that he stop drinking alcohol (Tr. 45), and no evidence of alcohol was detected in Applicant's urine screens. On June 11, 2009, he successfully completed the program and was discharged with a diagnosis on Axis I of adjustment disorder unspecified."[4] His counselor recommended that he follow-up with self-help meetings. (GE 3, AE D; Tr. 45.) Applicant chose not to attend Alcoholics Anonymous (AA) or meetings of similar self-help organizations because he did not see the need to do so. He felt no compulsion to drink, had abstained for as long as a year in the past, and believed he could stop on his own as his father did. (Tr. 28, 45-46.)

Due to the long hours and the pressure of being responsible for the warehouse, Applicant left his job of 18 years to work as a material service representative for his current employer starting in August 2010. (Tr. 37-38.) On August 18, 2010, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP). In response to the police record inquiries, Applicant disclosed the two "breathalyzer refusal" charges in July 2004 and in January 2009 [sic]. He indicated that for each offense, he was placed on probation, ordered to perform community service, and had his operating privileges suspended. Applicant responded "No" to 24.b, "In the last 7 years, have you been ordered, advised, or asked to seek counseling or treatment as a result of your use of alcohol?" and to 24.c, "In the last 7 years, have you received counseling or treatment as a result of your use of alcohol." Yet, he disclosed that he attended alcohol program X from March 2009 to May 2009 [sic]. (GE 1.)

On October 5, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about his two DUI-related chemical test refusal charges. (GE 1.) Applicant indicated that under his plea agreement for the 2009 incident, a DUI charge was dropped. He also told the investigator that he had previously consumed thee beers a week after playing softball. Since the 2009 DUI charge, he had switched to "a few glasses" of wine, but he was no longer driving after drinking. Applicant maintained that

[3] The diagnosis of his counselor was signed off by the program director, a state licensed chemical dependency clinical supervisor (LCDCS).

[4] The SOR alleged that Applicant was diagnosed on discharge with alcohol dependence (SOR 1.e). While Applicant responded "Yes" to the allegation, the discharge summary from the treatment facility (GE 3, AE D) reflects the presenting DSM-IV diagnosis was 303.90 "Alcohol Dep." At discharge, the DSM-IV diagnosis on Axis I was listed as "309.90." There is no diagnostic code of "309.90" under the DSM-IV, but there is a diagnostic code of "309.9" for adjustment disorder unspecified. Under the DSM-III, the code for adjustment disorder not otherwise specified was "309.90."

it took six or seven beers for him to become intoxicated. He described himself as a light social drinker and denied any problem with alcohol. (GE 2.)

On October 28, 2010, the OPM investigator contacted Applicant by telephone for additional information. Applicant indicated that he had satisfied the terms of his sentences for both chemical test refusal charges. He stated that before both alcohol-related driving incidents, he drank alcohol two days per week. He described his present consumption as a couple of beers or wine once or twice a month at times, although months also passed with no drinking. Applicant reiterated that he did not drink and drive and no longer drank to intoxication. (GE 2.)

On at least one occasion in 2011, Applicant drove a motor vehicle after drinking in sufficient quantity to exceed the legal limit.[5] While driving by an establishment that he and his friend liked to frequent, he noticed his friend's vehicle in the lot. He stopped off and "stayed longer than [he] should have." Applicant believes that had he gotten caught, he would have gone to jail. (Tr. 26-27.)

On January 31, 2012, Applicant informed DOHA that he was still drinking alcohol in the amount of two or three glasses of beer or wine per month, and he intended to continue to drink. Most recently, he drank three beers on January 28, 2012. Applicant denied drinking to intoxication, consuming alcohol at work or immediately before work, or reporting for work under the influence. Applicant admitted that he was not participating in AA or similar organization to abstain from drinking. He added that he had "cut down" on his alcohol consumption, sometimes abstaining for as long as one year. While he sometimes consumed "a couple [of] drinks" at social functions, his wife drove on those occasions. (GE 3.) At his hearing, Applicant testified discrepantly that he had consumed as many as six or seven beers at a sitting on some occasions since 2010. (Tr. 53.)

In treatment, Applicant learned to identify certain situations, such as softball, which in the past were conducive to him drinking more than he should have. (Tr. 59.) He chose not to play softball in 2012 to minimize the risk of excessive drinking. He declined invitations to watch football at a friend's home. (Tr. 25-26.) On May 17, 2012, Applicant informed DOHA that he had stopped drinking on May 6, 2012, because of the trouble alcohol had caused him. (Answer; Tr. 46.)

By September 2012, Applicant had resumed drinking by choice. (Tr. 46.) Applicant does not believe that he has an alcohol problem because he can go one year or two without drinking any alcohol, and he consumes usually less than a six-pack of beer after mowing the grass, while watching television at home, or at social functions like weddings. (Tr. 24-26, 51, 58.) On about three occasions in 2012, including at a family function on September 21, 2012, Applicant drank five or six beers. He felt impaired but did not drive. (Tr. 43, 53-54.) Applicant drove a vehicle after drinking two beers the week of September 9, 2012, but his spouse drives if he drinks "a glass of wine or two glasses of wine." (Tr. 26.) Applicant has alcohol in his residence, but he sees no problem with it. (Tr. 47.)

[5] Applicant testified that if you consume one beer an hour, you are over the limit. (Tr. 44.)

Applicant's spouse, father, and 18-year-old son have told him to give up drinking. (Tr. 47, 56.) Applicant's son had a problem with alcohol before he stopped drinking in July 2011. Applicant is aware that he has not always been the best role model for his son on the issue of drinking. He has been "harder on [his son] than anybody," and recognizes that it has been hypocritical of him to continue to drink. Applicant cites his son's abstinence as the motivation for his goal to give up drinking moving forward. He does not want his drinking to contribute to his son relapsing. (Tr. 27, 48.) He has not had an answer for why he has yet to given up alcohol completely other than that he feels he is in control and "can turn it on and turn it off . . . 99 percent of the time." (Tr. 60.)

Applicant's supervisor in the material planning department has known Applicant personally for the past 20 years. Applicant has consistently demonstrated a strong work ethic, dependability, and self-motivation on the job. On a personal level, this supervisor considers Applicant to be responsible, as well as "a reliable and trustworthy friend." (AE A.) Applicant has been considerate and helpful to a neighbor since moving to his present residence in 2005. (AE B.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall 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. 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 to obtain 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 that the applicant may deliberately or inadvertently fail to 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

The security concern for alcohol consumption 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 abused alcohol to the point of negative impact on his judgment, as evidenced by his repeated driving after drinking alcohol to impairment. He refused to submit to chemical tests after drinking seven to eight beers and sangria at a cookout in July 2004 and six beers at a club in February 2009 because he suspected his blood-alcohol level was over the legal limit. Disqualifying condition 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," applies.

The evidence falls short of establishing AG ¶ 22(e), "evaluation of alcohol abuse or dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program," however. While the discharge summary of Applicant's alcohol treatment in 2009 indicates a presenting diagnosis of alcohol dependency, the diagnosis on discharge was "309.9," the diagnostic code for adjustment disorder unspecified. There is no information in the record to clarify or explain this apparent change in his diagnosis.

Under the DSM-IV, the criteria for substance dependence (including alcohol) is a maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three or more of the following seven indicators in the same 12-month period: tolerance; withdrawal; taking the substance in larger amounts or over a longer period than intended; persistent desire or unsuccessful efforts to cut down or control substance use; a great deal of time spent in activities necessary to obtain or use the substance or recover from its effects; a cessation or reduction in important social, occupational, or recreational activities because of substance use: or continuation of substance use despite knowledge of having a persistent or recurrent physical or psychological problem likely to have been caused or exacerbated because of the

substance. Applicant denies that he was a habitual user of alcohol, or that he had a physiological dependence on alcohol. Under the DSM-IV criteria, alcohol dependence is indicated by tolerance or withdrawal symptoms, although a diagnosis of alcohol dependence may be clinically established even without relevant levels of alcohol withdrawal. Yet, I cannot apply AG ¶ 22(e) without some elaboration from Applicant's former counselor beyond "Had 2 DUI[s]" to substantiate his assessment on admission of alcohol dependence (303.90), particularly in light of the discharge diagnosis of "309.90."

That being said, Applicant clearly abused alcohol beyond the two instances alleged in the SOR. He was convicted of a 1979 DUI. He operated a motor vehicle after drinking to impairment on other occasions between July 2004 and February 2009 when he was not caught. He drank two beers an hour at times with his softball teammates, consuming six or seven beers in total, an amount sufficient for him to become intoxicated by his own admission. Three times in 2012, Applicant drank five or six beers at a sitting, including on the Saturday before his security clearance hearing in September 2012. This drinking was contrary to therapeutic advice to abstain and despite entreaties from family members to give up alcohol. Even if AG ¶ 22(f), "relapse after a diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program," is not fully established, Applicant's very recent consumption of five or six beers at a sitting is irresponsible in light of his drinking history and its occurrence after two outpatient alcohol programs.

Applicant's abuse of alcohol is not mitigated under the adjudicative guidelines. 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," cannot reasonably apply. As recently as 2011, he drove a vehicle when he believed his blood alcohol level exceeded the legal limit, despite knowing that he risked jail, if caught.

Concerning AG ¶ 23(b), "the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome the problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)," Applicant successfully completed his counseling in June 2009. Yet he did not follow through with recommended AA or other self-help meetings. He resumed drinking against therapeutic advice. He stopped playing softball after the 2011 season to minimize the risk of drinking to excess. However, he stopped off at a drinking establishment in 2011, stayed longer than he should have, and then drove home impaired by alcohol. Applicant told DOHA that he "stopped drinking again" on May 6, 2012, because of the problems alcohol had caused him. As of September 2012, he saw no problem with consuming a beer or two while moving the lawn. Applicant exercised good judgment in having his spouse drive home after he drank five to six beers at the family function on September 21, 2012, but his consumption in such quantity raises doubts about the claimed control he has over his drinking. Applicant does not believe that he needs help from organizations such as AA to stop drinking because he has the support of his son. AA may not be for him. Yet, it is difficult to find that he has the support needed to guarantee that his abusive relationship with alcohol is behind him. Applicant has not taken the advice of his son, spouse, and father to stop drinking. Abstinence is a goal that has yet to be maintained for any sustained

period as of September 2012. He has not shown that he is adhering to a credible relapse prevention plan. Successful completion of his outpatient counseling is also not enough to fully satisfy 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 licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).[6] In making the overall commonsense determination required under AG ¶ 2(c), Applicant is credited with not allowing alcohol to adversely affect his work performance or his finances. He showed some reform by giving up softball after 2011 because it was a trigger for excessive alcohol consumption in the past. At the same time, he has not fully acknowledged his alcohol issues. He described himself as "a light social drinker" during his interview in October 2010. As of January 2012, he reported drinking two to three glasses of wine or beer a month, including "a couple drinks" at social occasions. In the past two years, he consumed as many as six beers at a sitting on some occasions. He still does not see his drinking as a problem. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990.). Based on the facts before me and the adjudicative guidelines that I am bound to consider, for the aforesaid reasons, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance at this time.

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:

[6]The factors under AG ¶ 2(a) are as follows:

> (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.

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant[7]
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	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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Elizabeth M. Matchinski
Administrative Judge

[7] Treatment is viewed favorably provided Applicant achieves compliance and successful completion. SOR 1.c is resolved for Applicant in the absence of any clear evidence of noncompliance. SOR 1.e is resolved against Applicant because he did not follow through with recommended aftercare.