DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-06804
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Pamela Benson, Esquire, Department Counsel
For Applicant: *Pro se*

06/26/2012

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is on probation until October 2012 following his conviction for driving while intoxicated (DWI) in May 2010. His previous criminal history includes a February 1991 felony charge of terroristic threats, pled down to disorderly conduct, and a May 2004 driving under the influence (DUI) charge, reduced to careless driving. Applicant was suspended from work for a few days in August 2003 for threatening a co-worker. The Personal Conduct concerns raised by this threat are overcome by time with no recurrence, but the Criminal Conduct concerns are not fully mitigated. Clearance denied.

Statement of the Case

On February 3, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) as to why it was unable to find that it is clearly consistent with the national interest to grant him a security clearance. 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 March 5, 2012, and he requested a decision without a hearing. On April 4, 2012, the Government submitted a File of Relevant Material (FORM) consisting of 14 exhibits (Items 1-14). DOHA forwarded a copy of the FORM to Applicant,[1] and instructed him to respond within 30 days of receipt. Applicant received the FORM on April 9, 2012. He elected not to respond by the May 9, 2012 due date, and on May 30, 2012, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Findings of Fact

The SOR alleged under Guideline J that Applicant was convicted of a May 2010 3rd degree DWI (.08 alcohol concentration within two hours) (SOR 1.a); of a reduced charge of careless driving following his arrest in May 2004 for 4th degree driving under the influence (DUI) (SOR 1.b); of violating a protection order in December 2003 (SOR 1.c); of an amended charge of disorderly conduct following his arrest for felony terrorist threats in February 1991 (SOR 1.d); of disorderly conduct in September 1982 (SOR 1.f); and of aggressive criminal damage to property in March 1980 (SOR 1.g). A June 1989 charge of 5th degree assault was continued for one year with probation and then dismissed (SOR 1.e). Under Guideline E, DOHA alleged that Applicant is on probation until October 2012 for the May 2010 DWI (SOR 2.a), and that he was suspended from work for two to three days after threatening a co-worker in August 2003 (SOR 2.b).

Applicant admitted his convictions with some corrections about the sentences served for the May 2010 DWI and the May 2004 careless driving. Applicant admitted his current probationary status, adding that he reported it on his security clearance application. He also admitted the work suspension for making threats against a co-worker with whom his now ex-wife was having an affair, but he did not know beforehand that this person worked at the facility. Applicant denied that he threatened this person at work.

Applicant's admissions are incorporated as findings of fact. After considering the Government's FORM, including Applicant's Answer (Item 4), I make the following additional findings.

Applicant is a 53-year-old high school graduate with some technical training, who has been employed by a defense contractor since May 1978. He is currently a group leader in material handling, and he seeks his first security clearance. (Items 5, 6, 14.)

Applicant was arrested in late March 1980 for aggressive criminal damage to property. He was convicted in May 1980 and sentenced to one year probation, a $150 fine, and restitution (imposition stayed). In September 1982, Applicant was arrested for

[1]The FORM is dated April 4, 2012, but the letter forwarding the FORM is dated April 2, 2012. The reason for the discrepancy is not apparent in the record.

disorderly conduct. He was convicted and sentenced to a $100 fine, and ten days in jail (stayed for one year). (Item 13.) The FORM contains no details about either incident.

In 1981 or 1982, Applicant married his first wife. They had no children and were divorced after six years together. (Item 6.) In June 1989, Applicant was arrested for assault, 5th degree. His case was continued one year, to be dismissed provided that he complete supervised probation, pay $30 court costs, and commit no similar offenses (assault, breach of peace, disorderly conduct). (Item 13.)

In early February 1991, Applicant was charged with making a terror threat. (Item 13.) He had been drinking at the time and admits that he made a "real stupid figure-of-speech comment." (Item 4.) Applicant pled guilty to an amended charge of misdemeanor disorderly conduct in May 1991. In July 1991, he was sentenced to 90 days in jail, stayed for one year, and to one year of unsupervised probation. Applicant was also ordered to attend Alcoholics Anonymous (AA) meetings and domestic abuse counseling; to have no unsupervised contact with the victim; to complete aftercare and treatment, including mental health counseling, as directed by court services; to commit no alcohol violations; and to complete repairs for damages. (Items 4, 9.) Applicant satisfied the terms of his sentence, and his case was closed in July 1992. (Item 9.)

Applicant married his second wife in April 1997. They had two daughters, who were born in January 1998 and March 2000. (Item 5.) By 2003, their marriage was in trouble. They both worked for the same employer, although on different shifts. Applicant began to suspect that his spouse was having an affair when she started coming home late from work. He installed a caller ID system on his home phone without his spouse's knowledge and began noticing several calls from the same number. Around August 10, 2003, Applicant called the number and left a message threatening to assault the person if he did not stay away from his spouse. A few days later, Applicant was confronted by his supervisors about whether he had threated someone at work. Applicant denied it, not knowing that he had made the call to another employee, who worked with his spouse. Applicant was suspended from work for two to three days for threatening a co-worker. He was also required to see a counselor on his return to work. (Items 4-6.)

In late December 2003, Applicant was charged criminally with violating an order of protection in July 2003. Applicant's explanation is that he telephoned his daughters. In February 2004, Applicant pled guilty, and he was sentenced to one year of unsupervised probation, to pay $70 in fines and surcharges, and ordered to comply with the terms of the order. (Items 4, 10.) In June 2004, Applicant's second wife was granted a divorce. (Items 5, 6.)

A beer drinker starting in high school, Applicant reduced the frequency of his consumption from three times a week to once or twice a month on the weekends after he had children. He drank in quantity varying from two to three drinks to eight to ten drinks when out with friends at bars. (Item 6.) After consuming five or six beers at a bar in May 2004, Applicant was stopped by the police when the wheels of his pickup truck slid on a turn. His blood alcohol level tested at .11%, and he was charged with DUI .10% or greater

within two hours (4th degree misdemeanor); an amended charge of careless driving; failure to change his name and address; and a moving violation (unreasonable acceleration). In July 2006, Applicant pled guilty to careless driving, and he was sentenced to 30 days in jail (stayed for one year); one year of supervised probation; a $300 fine ($150 stayed) and $65 in surcharges; a chemical dependency evaluation; and no misdemeanor violations. (Items 6, 11.) His driver's license was also suspended for 90 days. (Item 6.) The other charges were dismissed. (Item 11.)

In late May 2010, while out riding his motorcycle, Applicant consumed three mixed drinks at a bar. En route home, he was stopped by law enforcement for failing to come to a complete stop. At the station, his blood alcohol level tested at .11%. He was charged with 3rd degree DWI–operating motor vehicle under the influence of alcohol, and with 3rd degree DWI-operating with alcohol concentration .08 within two hours, both gross misdemeanors. In late October 2010, Applicant pled guilty to DWI with alcohol concentration .08 within two hours. He was sentenced to 180 days in jail (150 days stayed for two years), with credit for two days already served and the remaining 28 days to be spent in home detention or work release, if eligible; placed on supervised probation for two years, until October 27, 2012, with conditions; and fined $1,000 ($800 stayed for two years) and $81 in fees. The conditions of his probation included a chemical dependency evaluation with follow through on any recommendations, no misdemeanor or felony violations, no driving license violations, and no drinking and driving. Applicant paid his fine and fees at sentencing. He completed community service in lieu of jail time. (Items 4, 6, 12.) He also lost his license for 180 days. (Item 5.)

Applicant consumed alcohol twice in 2010 after he pled guilty to DWI in late October 2010. In late January 2011, Applicant was evaluated by a chemical health assessor within the community corrections department's DWI unit. The evaluator preliminarily recommended that Applicant complete driving with care level II therapy treatment, abstain from alcohol/drugs/chemicals, and submit to random urinalysis or blood tests. (GE 6.)

On February 17, 2011, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) in application for his first security clearance. Applicant disclosed his convictions of the May 2010 3rd degree DWI and May 2004 alcohol-related careless driving. He added that that the results of a chemical dependency evaluation were still pending. Applicant also reported that he had been suspended from work for a couple of days in August 2003 for threatening to assault a co-worker ("I called him up and told him if I ever see him I would punch him in the face"), who was having an affair with his then wife. Applicant indicated that he had not known beforehand that this person was a co-worker, and that he had not threatened him at work. (Item 5.)

On March 7, 2011, Applicant was admitted to the 24-hour education component of the driving with care level II program. On March 11, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about the August 2003 incident that led to him being reprimanded by his employer and about his alcohol-related careless driving and DWI convictions. Applicant indicated that he was prohibited

from using alcohol while on probation, and he did not intend to violate his probation. (Item 6.)

Applicant's level II driving with care therapy program consisted of 68 hours of therapy, 24 hours of alcohol education, and 26 project hours. He completed the education portion on May 17, 2011, with fair insight into the curriculum, adequate motivation, and with a fair attitude toward the classes. He was consistent in his attendance and motivated to abstain from alcohol when driving. During his therapy sessions from May 24, 2011, to October 17, 2011, Applicant reported that he was abstaining from alcohol and other chemicals. His therapy sessions focused on conflict resolution skills and tools for change, alcohol outcomes and addiction, relapse-prevention skills, cognitive self-control, and communication and social relationship skills. Of the 24 project hours, 22 were spent on AA activities. Applicant successfully completed the level II therapy program with fair insight, adequate motivation, fair attitude toward his group therapy, and motivation toward maintaining abstinence from alcohol while driving. (Items 6, 8.)

On October 31, 2011, Applicant informed DOHA that he last consumed alcohol on December 31, 2010, when he drank two ounces of spiced rum. Applicant denied any present intent to drink alcohol again, although he could not predict the future. He indicated that he would never drink and drive again. (Item 7.)

As of March 2012, Applicant was still on probation for DWI. (Item 4.) There is no evidence that he has consumed alcohol since late December 2010.

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 J, Criminal Conduct

The security concern for Criminal Conduct is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." Applicant was placed on probation for one year for aggressive criminal damage to property in 1980. He was fined and received a suspended jail sentence for disorderly conduct in 1982. Applicant served one year of probation for a June 1989 assault. In February 1991, he made a threat that led to his conviction for disorderly conduct and another suspended jail sentence. His violation of an order of protection in July 2003 led to his conviction and yet another year on probation. In May 2004, he pled to a reduced charge of alcohol-related careless driving after he was caught driving with his blood alcohol level over the legal limit. Applicant is currently serving a two-year probation sentence for a May 2010 DWI. AG ¶ 31(a), "a single serious crime or multiple lesser offenses," AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," and AG ¶ 31(d), "individual is currently on parole or probation," apply.

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," cannot reasonably apply in mitigation, given his record of seven offenses, his repeated driving while under the influence of alcohol, and his present probationary status.

AG ¶ 32(b), "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life," is not pertinent. While marital discord was a factor in the protective order violation, Applicant admitted that he contacted his children in violation of the order. AG ¶ 32(c), "evidence that the person did not commit the offense," applies only to the extent that the charge of making a terrorist threat was not established. Little is known about the offense other than that Applicant made a "real stupid figure-of-speech comment" when he was drinking, and he pled guilty to disorderly conduct. In contrast, while he pled guilty to a reduced charge of careless driving in the May 2004 incident, drunk driving was established. He admitted that his blood alcohol content was over the legal limit.

Applicant's current probationary status does not preclude a finding of reform under 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." That being said, it is a disqualifying condition that makes mitigation more difficult. The state has yet to consider him fully rehabilitated, despite his completion of the required level II therapy program that had educational, counseling, and project (including AA) components. While this is not an alcohol consumption case, Applicant's progress in the program is relevant to the extent it may guarantee against recurrence of alcohol-related criminal conduct, such as disorderly conduct or drunk driving. After 68 program hours, Applicant showed fair insight into the curriculum and group therapy. His motivation to abstain from alcohol when driving was assessed as adequate, and he has apparently not violated his probation. Yet, despite the minor nature of some of his offenses, given his failure to conform his behavior to the law in several different aspects (assault, threats, violation of protective order, drunk driving) over 30 years, it would be premature to conclude that his criminal conduct is safely behind him when the state has not yet seen fit to release him from his sentence. The Criminal Conduct concerns are not yet fully mitigated.

Guideline E, Personal Conduct

The security concerns about Personal Conduct are set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's current probationary status does not raise Personal Conduct concerns independent of the DWI gross misdemeanor for which he was sentenced to probation, especially where he is complying with its conditions. The DWI is more appropriately addressed under Guideline J. Concerns of candor are not raised because Applicant disclosed the DWI, his probation, and his previous alcohol-related careless driving conviction on his e-QIP. Applicant's verbal threat to a co-worker in August 2003 is

actionable under Guideline E. Applicant exhibited poor judgment within AG ¶ 16(d), whether or not he knew that the person worked for the same employer and whether or not his suspicions about his spouse's extramarital affair were borne out. AG ¶ 16(d) states:

> (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:
>
> > (2) disruptive, violent, or other inappropriate behavior in the workplace.

Applicant telephoned an unknown male from his home phone and left a threatening message. His employer is unlikely to have suspended him for two or three days unless the call was made to a work number, or he made the threats at the worksite. Even a threatening call to a fellow employee can have a disruptive effect on the workplace.

AG ¶ 17(c), "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," is satisfied in that there has been no recurrence since 2003, and with his divorce in 2004, it is not likely to recur. While threats to assault are not taken lightly, the circumstance that led to the threatening call, his spouse's extramarital affair, no longer exists.

AG ¶ 17(d), "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur," applies in that Applicant met with a counselor on his return to work, and there has been no recurrence.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).[2]

[2] 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.

Applicant's criminal conduct spans some 30 years. His aggressive criminal damage to property at age 21 could be attributed to youth and immaturity were it not for his 5th degree assault in June 1989, his terrorist threat in 1991, and his 2003 threat to assault a co-worker, which all show an unacceptable tendency to act in anger or with aggression. Applicant's more recent offenses are attributable to alcohol, and he has completed counseling as required by his probation. Applicant was forthright about his drunk driving when he applied for a security clearance, and his candor is viewed favorably. Also, Applicant has abided by the terms of his current criminal sentence, including abstaining from alcohol as required of his probation. Yet, compliance under threat of incarceration (150 days of his jail term was suspended for two years) is not entitled to the same weight in reform as are voluntary efforts. Applicant's evidence in reform falls short of overcoming the security concerns raised by his repeated exercise of questionable judgment in disparate circumstances. Based on the record before me, I am unable to conclude that it is clearly consistent with the national interest to grant him 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:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For 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.

_____
Elizabeth M. Matchinski
Administrative Judge