DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 11-15191
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

01/08/2013

Decision

Harvey, Mark, Administrative Judge:

Applicant had alcohol-related arrests in 2001, 2003, 2009, and 2011. He said he ended his alcohol consumption on October 4, 2011. He will be on probation until October 4, 2013. More time without alcohol-related problems is necessary before alcohol consumption concerns will be mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 30, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On October 17, 2012, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guideline G (alcohol consumption). (Hearing Exhibit (HE) 2) The SOR further informed Applicant that, based on information available to the Government, DOD adjudicators could not make the preliminary

affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked.

On October 30, 2012, Applicant responded to the SOR and requested a hearing. On November 14, 2012, Department Counsel indicated he was ready to proceed on Applicant's case. On November 19, 2012, Applicant's case was assigned to me. On November 27, 2012, the DOD Hearings and Appeals Office issued a hearing notice, setting the hearing for December 19, 2012. Applicant's hearing was held as scheduled. Department Counsel offered five exhibits, and Applicant offered three exhibits. (Tr. 15-19, 34-36; GE 1-5; AE A-C) There were no objections, and I admitted GE 1-5 and AE A-C. (Tr. 17, 19) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. On January 2, 2013, I received the transcript.

Findings of Fact[1]

Applicant admitted the conduct alleged in SOR ¶¶ 1.a to 1.d, and he provided some extenuating and mitigating information. His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 32-year-old engineer employed by a major defense contractor for the last eight and a half years. (Tr. 6, 36) In 1999, he graduated from high school, and in 2004, he earned a bachelor's of science degree in electrical engineering. (Tr. 6, 36; AE B, C) In 2011, he was awarded a master's degree in business administration. (Tr. 6-7, 36; AE B, C) He has never served in the military. (Tr. 7) He has held a secret or interim secret clearance for eight-and- a-half years. (Tr. 7, 36-37) He has never been married, and he does not have any children. (Tr. 37)

Alcohol consumption

Applicant partially disclosed his alcohol-related arrests on his SF 86 and during his Office of Personnel Management (OPM) personal subject interviews (PSI). (GE 1, 2)[2]

[1]To protect Applicant and his family's privacy, the facts in this decision do not specifically describe employment, names of witnesses or locations. The cited sources contain more specific information.

[2]In his August 19, 2011 SF 86, he disclosed his July 2011 DWI arrest, his 2010 driving under the influence of Xanax arrest, and his 2009 trespassing arrest; however, he did not disclose his 2003 DUI or his 2001 arrest for underage possession of alcohol. (GE 1) The only alcohol-related counseling disclosed on his August 19, 2011 SF 86 was from March to May 2011. (GE 1) In his November 9, 2011 OPM PSI, he said he had two alcohol-related incidents, and he provided a detailed description of his 2003 DUI and his 2011 DWI; however, he did not disclose his 2001 arrest for underage possession of alcohol or that his 2009 trespassing arrest was alcohol related. (GE 2 at 6)

In May 2001, Applicant possessed a six-pack of beer when stopped by the police. (GE 4, December 4, 2006 OPM PSI) It was three months before his 21st birthday. Applicant was arrested for minor in possession of alcohol. (SOR response to SOR ¶ 1.b)

In November 2003, Applicant was arrested and charged with driving under the influence of alcohol (DUI). (SOR response to SOR ¶ 1.c) The court found him guilty and ordered him to attend alcohol education classes, to pay a find, and to pay court costs. He attended a one day, ten hour class on alcohol consumption.[3] (Tr. 45)

In February 2009, Applicant entered a hotel room as the occupants were leaving. (Tr. 45) Applicant was intoxicated, and he fell asleep on the hotel room bed. (Tr. 45-46) Applicant was arrested for trespassing. (GE 1 at 25) The case was dismissed. (GE 1 at 25) He did not remember how much alcohol he had to drink. (Tr. 46)

On July 30, 2011, Applicant drank five beers and a couple of mixed drinks at a wedding reception. (Tr. 37) He walked to his hotel room. (Tr. 37-38) His girlfriend called and asked him to come and get her. (Tr. 37-38) On his way to the reception, the police stopped him for not having his headlights on. (Tr. 38) He refused a breathalyzer. (November 9, 2011 OPM PSI) He was arrested for driving while intoxicated (DWI) with prior offense; driving without a valid driver's license,[4] and for having an expired automobile insurance card. (Tr. 38; SOR response to SOR ¶ 1.d) He subsequently showed he had automobile insurance, and the expired automobile insurance charge was dismissed. (GE 2, November 9, 2011 OPM PSI)

On October 4, 2011, Applicant pleaded guilty to DWI. (GE 2, November 9, 2011 OPM PSI) The court ordered probation for two years, and he served 10 days of shock jail time. (Tr. 41, 43, 49) The court suspended ninety days of jail and his fine. (Tr. 49-50) His driver's license was revoked. (Tr. 42) He is not permitted to possess or consume alcohol. (Tr. 43) He most recently consumed alcohol "about a year ago;" however, he clarified that he had not violated his court-ordered, alcohol-consumption restrictions. (Tr. 43; GE 2, November 9, 2011 OPM PSI at 6) From March to May 2011, he attended Substance Abuse Traffic Offender Program (SATOP), which includes attendance at one Alcoholics Anonymous (AA) meeting each week for six weeks. (Tr. 44) After he completes an additional SATOP, and his driver's license is reinstated, he will have a breath interlock device placed on his vehicle for two years. (Tr. 51)

[3]During his December 4, 2006 OPM PSI, Applicant said he attended three weekends of 10-hour sessions for the 2003 Substance Abuse Traffic Offender Program (SATOP). (GE 4)

[4]In 2010, Applicant had a prescription to take one Xanax when he is feeling anxiety. (Tr. 39, 47) He took four or five Xanax and then drove his car. (Tr. 40, 47) He hit four cars and a flag pole or light pole. (November 9, 2011 OPM PSI) Applicant's vehicle was immobilized due to extensive damage. (November 9, 2011 PSI) He was arrested for driving under the influence of a prescription drug. (Tr. 39-40; GE 1) His driver's license was restricted to driving to school, work, and the hospital. (Tr. 40) He said the case was resolved without a conviction. (GE 1 at 25; November 9, 2011 OPM PSI) He had completed his probation for the Xanax-related offense by the time he was arrested for the 2011 DWI; however, the driver's license restrictions were still in place. (Tr. 50-51)

Dr. W, a clinical psychologist, has been counseling Applicant for about 30 months, usually once a week for a 45-minute session. (Tr. 27, 29) Dr. W described Applicant as believing that because of his talents he should be allowed to play hard.[5] (Tr. 27) Applicant has changed; he complies with the law; he no longer has an alcohol problem; and he will comply with security requirements. (Tr. 31, 33) Applicant did not meet the diagnostic criteria for alcohol abuse or dependence under *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR Fourth Edition* (Text Revision). (Tr. 32) He recommended reinstatement of Applicant's security clearance because he will make more contributions to national security. (Tr. 33)

Applicant said he has never been diagnosed with alcohol abuse or dependence. (Tr. 48) No one has told him he has a drinking problem. (Tr. 48) If he were not on probation, he would "probably not" resume his consumption of alcohol. (Tr. 48)

Recommendation

Applicant's former department manager, who has worked for Applicant's employer for 32 years, and has known Applicant since Applicant was in high school, described Applicant as a valuable member of the firm with a solid work ethic. (Tr. 21-24) Applicant received an exemplary evaluation, which is the company's highest rating for an engineer. (Tr. 22) In 2010, Applicant was promoted, and he continued to receive excellent evaluations.[6] (Tr. 22; AE A) He is professional, dependable, honest, and trustworthy. (Tr. 22)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's

[5]Applicant explained that he used to believe that if he worked hard and received promotions he had "free reign to do whatever I want." (Tr. 55) He no longer believes this to be true. (Tr. 55) He has changed and matured.

[6]Applicant is "an administrator of over a hundred people's tools," and he expects to receive an exemplary rating in his current position, which only two percent of the employees receive. (Tr. 56)

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 consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or 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. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Nothing in this decision should be construed to suggest that I based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "[e]xcessive 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."

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

> (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;
>
> (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> (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;
>
> (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
>
> (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;
>
> (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and
>
> (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(b) to 22(g) do not apply. Applicant did not have any alcohol-related incidents at work, did not violate any court orders concerning alcohol consumption, and did not have a diagnosis of alcohol abuse or dependence. Applicant did not habitually consume and engage in binge alcohol consumption to the extent of impaired judgment.[7] He did not suffer a relapse after treatment.[8]

[7]Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. *See* U.S. Dept. of Health and Human Services, NIAAA Newsletter 3 (Winter 2004 No. 3), http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf. Applicant did not describe the rate of his alcohol consumption.

[8]The term, "relapse" is not defined in the Directive. He received some group counseling and attended some classes; however, those positive benefits do not rise to the level of alcohol-related treatment. Dr. W did not state that he provided alcohol treatment to Applicant.

AG ¶ 22(a) applies. The allegations in SOR ¶¶ 1.b to 1.d are established. Applicant was arrested for minor in possession of alcohol in 2001, for DUI in 2003, and for DWI in 2011.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) are potentially applicable:

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);
>
> (c) 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; and
>
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 23(a), 23(b), and 23(d) apply in part because Applicant stopped consuming alcohol after October 4, 2011, in compliance with his court-ordered probation. He also receives some credit because, "it happened under such unusual circumstances," as he has somewhat matured. Dr. W, a clinical psychologist, described his increased maturity, and recognition that good job performance does not negate the requirement to comply with the law. Dr. W provided a positive prognosis. Alcohol consumption concerns are not fully mitigated because of his history of alcohol consumption, and not enough time has elapsed without alcohol-related problems to establish his alcohol consumption is under control. He had alcohol-related arrests in 2001, 2003, 2009,[9] and 2011. He

[9]Applicant's SOR does not allege that Applicant was arrested in 2009, for his alcohol-related trespass, in 2010, for his Xanax-related driving, or that he is currently on probation for his 2011 DWI. The SOR does not allege that he omitted information from his August 30, 2011 SF 86 or during his November 9, 2011 OPM PSI. *See* n. 2, *supra*. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of

violated driving restrictions imposed after his 2010 Xanax-related arrest. He is currently on probation for his 2011 DWI. There is still a significant possibility that alcohol-related problems will recur, and those offenses continue to cast doubt on Applicant's "current reliability, trustworthiness, or good judgment."

AG ¶¶ 23(c) does not fully apply. Although he completed a substance abuse counseling program or classes in 2003 and 2010 or 2011, he does not currently attend any alcohol treatment or counseling program.

After careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude Applicant's multiple instances of alcohol-related arrests, the absence of any ongoing alcohol-specific counseling or therapy, and primarily, the passage of insufficient time after his most recent DWI, cause lingering doubts about Applicant's alcohol-consumption security concerns.

Whole Person Concept

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

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) 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. My comments under Guideline G are incorporated into my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is considerable evidence supporting reinstatement of Applicant's access to classified information. He did not commit alcohol-related criminal offenses after July 30,

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> the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). Consideration of the three non-SOR allegations (his 2009 alcohol-related trespass arrest, his 2010 Xanax-related driving arrest, and his probation until October 4, 2013) is strictly limited in this case to these five circumstances. Applicant's omissions from his August 30, 2011 SF 86 and during his November 9, 2011 OPM PSI are not considered for any purpose.

2011. He completed an alcohol and substance abuse counseling program or classes in 2003 and 2010 or 2011. He is a valued employee with a supportive character witness. He has been in therapy (unrelated to alcohol abuse) for 30 months and his clinical psychologist provided a favorable prognosis. Over his eight-and-a-half years working for a defense contractor, he has received promotions, increased responsibilities, and outstanding ratings. There is no evidence at his current employment of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His psychologist, character witness, employment history, and evaluations support reinstatement of his clearance.

The evidence against reinstatement of Applicant's clearance is more substantial than the evidence supporting reinstatement. Applicant had alcohol-related arrests in 2001, 2003, 2009, and 2011. In 2010, he drove his vehicle after consuming an excessive amount of Xanax, resulting in damage to five vehicles (including his own) and a flag or light pole. The state court has deemed probation for his 2011 DWI to be necessary until October 4, 2013. His offenses in 2009, 2010, and 2011 are fairly recent. Excessive alcohol consumption and alcohol-related criminal offenses show a lack of judgment, rehabilitation, and impulse control. His problems with alcohol cannot be fully mitigated at this time. Such conduct raises a serious security concern, and a security clearance is not warranted at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude alcohol consumption concerns are not fully mitigated 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 G:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b to 1.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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MARK HARVEY
Administrative Judge