DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 12-02303
	)	
Applicant for Security Clearance	)	

Appearances

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

01/10/2013

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant continues to consume alcohol, at times to excess, despite five drunk-driving convictions, a driving while ability impaired conviction, and reckless driving and public disturbance offenses involving alcohol. Clearance denied.

Statement of the Case

On August 12, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline G, Alcohol Consumption, and explained why it was unable to find that it is clearly consistent with the national interest to grant him a security clearance. The DOD CAF took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR allegations on September 3, 2013, and he requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On November 7, 2013, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. I scheduled a hearing for December 4, 2013.

I convened the hearing as scheduled. Eight Government exhibits (GEs 1-8) were admitted into evidence without objection, and Applicant testified at the request of the Government, as reflected in a transcript (Tr.) received on December 11, 2013.

Findings of Fact

The SOR alleged under Guideline G that Applicant continues to consume alcohol (SOR 1.a); that he was convicted of drunk-driving offenses committed in May 2012 (SOR 1.b), January 2011 (SOR 1.c), August 2001 (SOR 1.d), June 1991 (SOR 1.g), and July 1985 (SOR 1.j);[1] that he was found guilty of a 1997 driving while ability impaired by alcohol charge (SOR 1.e), a November 1990 alcohol-related public disturbance charge (SOR 1.h), and an August 1997 reckless driving charge (SOR 1.k); that he was charged with operating a vehicle under the influence in November 1995 (SOR 1.f); that he was reprimanded at work for being intoxicated on the job in August 1989 (SOR 1.i) and accused by his supervisor of drinking on the job in June 2011 (SOR 1.m); and that he considers himself to be an alcoholic (SOR 1.l).

When he answered the SOR, Applicant admitted his alcohol-related arrest and conviction record as alleged in SOR 1.b-1.k and his continued consumption of alcohol while denying that this drinking history raised concerns of questionable judgment, failure to control impulses, unreliability, or untrustworthiness. Applicant denied that he considers himself to be an alcoholic (SOR 1.l) or that he was accused by his supervisor of misconduct for drinking on the job in June 2011 (SOR 1.m).

Applicant's admissions to his alcohol-related arrests and convictions and to continuing to drink are accepted and 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 divorced machinist, who began working for his current employer in August 1982, two months after he graduated from high school. (GE 1; Tr. 26.) He was granted a DOD Secret clearance in July 2001 for his duties with his defense contractor employer. (GE 1.)

[1] Applicant was alleged to have been convicted in the same state of illegal operation of a motor vehicle under the influence of alcohol (OUI), driving under the influence (DUI), and driving while intoxicated (DWI). With the repeal of the previous statute § 14-227, which made punishable driving while intoxicated, drunk driving has been punishable since 1963 under § 14-227(a), operation while under the influence of liquor or drug or while having an elevated blood alcohol content, which since 2002 is .08 % (from .10%) or higher. For commercial vehicle drivers, the elevated blood content is .04% or higher. The correct designation for the charge is OUI.

Applicant started drinking alcohol at age 16. Around August 1979, he was arrested for operating a motor vehicle under the influence of alcohol (OUI), operating without a license, reckless driving, and driving without insurance. He was driving a friend's motorcycle without a license after drinking about five beers to intoxication. Applicant was fined approximately $100 for reckless driving. (GE 4.)

By age 18, Applicant was drinking occasionally on weekends with friends an average quantity of 12 beers. Around July 1985, Applicant consumed eight beers at a bar with friends. He was stopped for a signal violation and failed field sobriety tests. He pleaded guilty to misdemeanor OUI, was fined, and ordered to complete an alcohol education program. He attended the alcohol classes as required, and the charge was dismissed after a year. (GE 4; Tr. 28.)

In 1989, Applicant was transferred to second shift at work. One night in August 1989, Applicant reported for duty in an intoxicated state after drinking schnapps and three beers. Applicant was administered a breath test, which showed his blood alcohol content was over the legal limit. He was suspended from work without pay for five days. (GEs 4, 8; Tr. 44-45.)

In November 1990, Applicant was arrested for breach of peace and criminal trespass after an incident at a local bar. He had been asked several times to leave the premises due to his intoxicated state, and he pulled a phone from the wall while being carried out of the bar by a bouncer. (GE 7.) He was fined about $100 on an amended charge of public disturbance. (GE 4.)

In June 1991, Applicant drank seven to eight beers at home before driving his vehicle to a party. He was stopped for a passing violation and was arrested for OUI after failing field sobriety tests. He pleaded guilty to OUI, was fined $500, and his driver's license was suspended for one year. (GEs 3, 4.)

In November 1995, Applicant had consumed seven to eight beers with a friend. En route home after dinner, he was stopped for driving through a red light. Applicant did not believe that he was impaired by alcohol, but the officer arrested him for OUI on the basis of field sobriety test results. Breathalyzer tests administered at least 30 minutes apart registered his blood alcohol level at .090% and .075 %. (GE 6.) Applicant pleaded guilty to a substituted charge of driving while impaired, and he was fined about $100.[2] (GEs 3, 4, 6.) Following his marriage to his now ex-wife in October 1996, Applicant temporarily reduced his drinking to no more than a six-pack, once a week or less frequently. (GE 4.)

On March 27, 2000, Applicant completed and certified a security clearance application. In response to whether he had ever been charged with an alcohol or drug

[2] The SOR alleged that Applicant was arrested in early 1997 (SOR 1.e) and in November 1995 (SOR 1.f). Although Applicant admitted both allegations when he answered the SOR, available information suggests he was arrested only once around that time, in November 1995. (*See* GE 6.) Applicant inaccurately recalled the date as 1997 when he was interviewed in October 2011. (GE 3.)

offense, Applicant disclosed only his latest arrest for OUI, which he mistakenly indicated occurred in November 1994. (GE 2.)

On February 7, 2001, Applicant was interviewed about his alcohol arrests by a special agent of the Defense Security Service. Applicant explained that he had omitted several of his arrests from his security clearance application because he thought the form had a seven-year scope. He reported drinking no more than a six-pack of beer at home while working around the house. He expressed his intent to drink in moderation and responsibly in the future. (GE 4.) Applicant was granted his Secret clearance in July 2001. (GE 1,)

In August 2001, Applicant was arrested after drinking beer at a local beach. He was stopped for a passing violation and admitted to the police that he had been drinking. After his blood alcohol level registered at .10%, he was charged with OUI. He was fined $150, his driver's license was suspended for one year, and he was required to take an alcohol safety class. (GE 3.)

Applicant's drinking caused problems in his marriage and ultimately led to his divorce in February 2003. He attended Alcoholics Anonymous (AA) meetings for about eight months after his divorce. (GE 3; Tr. 35-37.)

In January 2011, Applicant slid into a snowbank trying to stop his vehicle on an icy road. He had consumed "a lot" of liquor at home beforehand, and he was arrested for OUI with a blood alcohol level of .24%. (Tr. 32-33.) He was found guilty, fined $500, and ordered to attend a 10-week alcohol education class. (GE 3.) After his arrest, Applicant's drinking pattern became about a quart of vodka and some beer over the course of two days on the weekends at home. (Tr. 49-52.)

In June 2011, Applicant was reported by his supervisor to be unfit for duty due to drinking. Applicant disputed the accusation on the basis that he drank only at home. He had injured himself at work, and his supervisor started unfounded allegations of drinking in retaliation for him making safety recommendations. (GE 3; Tr. 47.)

On October 4, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about his OUI arrests, the June 2011 accusation that he was unfit for duty due to drinking, and his current drinking pattern. Applicant denied any merit to his supervisor's accusation that he had been drinking on the job. He reported drinking three to four beers a day at home to relax after work. He had attended two AA meetings in the past month. While he recognized that he was an alcoholic, he was not yet willing to stop drinking. (GE 3.)

Sometime in early to mid-2012, Applicant reported to his job with a defense contractor intoxicated from drinking the night before. He was suspended from work for five days. (Tr. 45-46.)

In March 2012, Applicant hit a tree while driving home after drinking liquor the previous evening at his then girlfriend's house. (Tr. 40-41.) In June 2012, he was charged with OUI for his conduct in March 2012. He pleaded guilty and was sentenced to six months in jail (suspended), placed on supervised probation for one year, fined $500, and ordered to perform 100 hours of community service. (GEs 3, 5; Tr. 39, 61.) As a condition of his probation, Applicant was required to submit to random drug and alcohol testing, which were negative for alcohol. (Tr. 62.) Applicant was also required to attend six sessions of alcohol counseling with an alcohol counselor, who advised him to stop drinking. (GE 3; Tr. 43.)

In late May 2013, Applicant told the DOD that he needed to stop drinking because alcohol had caused him "too many problems in [his] life." (GE 3.) Applicant continued to consume alcohol to at least early December 2013. In the week leading up to his security clearance hearing, he drank vodka on two days. On the Sunday before his hearing, he drank five beers to intoxication. (Tr. 37, 57-58.) Applicant has not operated a motor vehicle after drinking in over a year. He has a court-ordered interlock device on his vehicle that prevents the car from starting if his blood alcohol level registers over the legal limit. (Tr. 37-38.) The interlock device was scheduled to be removed in mid-December 2013. (Tr. 64.)

There is no evidence that Applicant has been diagnosed with alcohol dependence. Applicant does not consider himself to be an alcoholic because he does not feel compelled to drink. (Tr. 36.) Applicant has no explanation for why he continues to consume alcohol despite the problems his drinking has caused him. (Tr. 44.)

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 about 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 consumed alcohol to the point of serious impairment of his judgment and reliability when he drove a vehicle while legally intoxicated in 1985, 1991, 2001, 2011, and 2012. He was convicted of reckless driving in 1979 but had consumed five beers to intoxication before his arrest. His blood alcohol level tested around the legal limit in 1995, which was sufficient to sustain a conviction of driving while impaired in 1995. Concerning his 1990 public disturbance conviction, Applicant was so intoxicated that he was forced out of the bar. 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. 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," is also established by his record of drinking beer and vodka to intoxication.[3]

[3]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. This 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

AG ¶ 22(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," is also implicated. Applicant admits, and work records clearly show (GE 8), that he was suspended from work for five days in August 1989 for reporting to work while intoxicated. Accusations of him being unfit for duty because of alcohol impairment in June 2011 were not proven. However, Applicant admits that he received another five-day suspension from work in early to mid-2012 for reporting to work under the influence of alcohol. The recent suspension cannot provide an independent basis for disqualification because it was not alleged. However, it is relevant to assessing the extent of Applicant's abuse of alcohol and his reform.[4]

None of the mitigating conditions apply. Mitigating condition 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," is not established in light of the recency and extent of his drunk driving and his continued consumption of alcohol in amounts up to a quart of vodka and beer on the weekends.

Applicant responded affirmatively when asked by the OPM investigator in October 2011 whether he considered himself to be an alcoholic. There is no evidence that Applicant has been diagnosed as an alcoholic, and he now denies any dependency on alcohol because he does not feel compelled to drink. Applicant does recognize that alcohol has caused legal, marital, and occupational problems. He told the DOD in May 2013 that he recognized the need to stop drinking because of the problems alcohol has caused him. Applicant has not driven a vehicle while intoxicated since an interlock device was placed on his vehicle after the March 2012 OUI offense, but abstinence has remained an elusive goal. Without a formal diagnosis of alcohol dependence by a qualified medical professional or substance abuse clinician, he is not required to completely abstain from alcohol. Even so, his reform is minimal and fails to satisfy either AG ¶ 23(b), "the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser) or AG ¶ 23(d), which requires, in part, "a clear and established pattern of modified consumption." AG ¶ 23(d) provides for mitigation as follows:

> (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

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No. 3), http://www.pubs.niaaa.nih.gov/publications/Newsletter/ winter2004/NewsletterNumber3.pdf.

[4] The DOHA Appeal Board has long held that the administrative judge may consider non-alleged conduct to assess an applicant's credibility, to evaluate an applicant's evidence of extenuation, mitigation or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for a whole-person analysis under Directive Section 6.3. *See, e.g.*, ISCR Case No. 02-07218 (App. Bd. Mar. 15, 2004); ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006); ISCR Case No. 09-07219 (App. Bd. Sep. 27, 2012).

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.

Applicant's present drinking pattern of a quart of vodka and some beer over the course of two days on the weekends does not guarantee against future alcohol abuse. He drank five beers on the Sunday preceding his security clearance hearing in December 2013, a quantity which is enough for him to feel impaired to where he could not legally operate a motor vehicle. (Tr. 38.) His court-ordered counseling has not brought about the abstinence recommended by his counselor, and he is not currently in treatment or involved with AA or similar organization. Given his current drinking pattern, and the fact that the interlock device was to be removed from his vehicle in mid-December 2013, there is a significant risk of recurrence of impaired driving. The alcohol consumption concerns are not fully mitigated.

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).[5] Applicant has had an abusive relationship with alcohol for many years. The recurrence of OUI offenses and of reporting to work under the influence of alcohol since January 2011 suggests an alcohol problem more serious than he is willing to admit. His efforts to confine his drinking to the weekends is a positive step, but he has yet to demonstrate the insight and behavioral changes needed to guarantee against future incidents of alcohol abuse. Based on all the facts and circumstances, I conclude that it is not clearly consistent with the national interest to grant Applicant 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 G: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

[5]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.

Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge