KEYWORD: Criminal Conduct; Alcohol

DIGEST: Applicant has a record of alcohol-related criminal conduct from 1981 to 1999, including five DUI convictions. He completed ten sessions of court-ordered counseling for substance abuse in 2000 and abstained for two years thereafter only to resume drinking in December 2002. While there is no evidence he has consumed alcohol to intoxication since, there is a risk of recurrence of excessive alcohol consumption and related criminal conduct. Clearance is denied.

CASENO: 04-05406.h1

DATE: 11/25/2005

DATE: November 25, 2005

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-05406

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Thomas Albin, Esq.

SYNOPSIS

Applicant has a record of alcohol-related criminal conduct from 1981 to 1999, including five DUI convictions. He completed ten sessions of court-ordered counseling for substance abuse in 2000 and abstained for two years thereafter only to resume drinking in December 2002. While there is no evidence he has consumed alcohol to intoxication since, there is a risk of recurrence of excessive alcohol consumption and related criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On January 18, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.[(1)] DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on criminal conduct (Guideline J) and alcohol consumption (Guideline G).

Applicant responded to the SOR on January 27, 2005, and requested a hearing before a DOHA administrative judge. The case was assigned to me on May 9, 2005, and pursuant to notice dated May 10, 2005, I convened a hearing on June 1, 2005. Nine government exhibits were admitted and testimony was taken from Applicant and his supervisor, as reflected in a transcript received on June 13, 2005.

FINDINGS OF FACT

The government alleged under Guideline J seven alcohol-related criminal incidents, including five drunk driving offenses, committed between November 1981 and May 1999, operating under suspension offenses in February 1994 and August 1991, and a November 1997 failure to surrender license charge. Guideline G was also alleged because of the alcohol-related offenses, Applicant's attendance at ten counseling sessions for treatment of substance abuse in 2000, and his relapse into drinking in December 2002 after abstaining since January 2000. In his answer, Applicant admitted the allegations with the exception of ¶¶ 1.d. and 1.e. He corrected ¶ 1.d. to conform to his recollection that he had been charged in November 1997 with evading responsibility not failure to surrender license, and he denied the criminal mischief alleged in ¶ 1.e. Applicant's admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings:

Applicant is a 45-year-old high school graduate who works as a first class pipefitter for a defense contractor, most recently since November 2002. Applicant had been employed by the company previously from October 1979 to 1997 when he was laid off.

On graduating from high school, Applicant went to work for his present employer as a pipefitter. At age 18, he began drinking alcohol on weekends with friends at bars, while playing billiards, out dancing, or socializing at friends' homes. On average, he consumed six beers over the course of an evening, to where he felt "a little influenced by the alcohol." Applicant did not allow alcohol to affect his work, and he never drank during, or reporting for, duty. Three and a half years after his hiring, he attained first class pipefitter status.

In the 1980s, Applicant had a reputation among his coworkers of going out to bars and taking on the largest male in the bar. In mid-November 1981, Applicant got into a physical altercation ("a shoving") with another patron in a bar. There is no evidence Applicant was intoxicated, but he had consumed alcohol. Applicant was fined $50 for public disturbance.

For about a decade starting in the late 1980s, Applicant had a problem with drunk driving that persisted despite efforts by the state to educate him about the dangers of driving under the influence and time spent in jail. After consuming about six beers at a bowling alley in February 1988, Applicant misjudged a curve on an exit ramp and struck a pole. Applicant admitted to the responding police that he had been drinking. After he failed a breathalyser test at the hospital, he was charged with driving under the influence (DUI). He was placed in a pretrial diversion program with mandatory attendance in an alcohol education program.

In late October 1990, after consuming two beers at a friend's home and five more at a bar, Applicant felt he could drive safely. He was pulled over for swerving by the police, and arrested for driving while intoxicated (DWI) after he failed field sobriety tests and a breathalyser. Applicant was found guilty in February 1991 and sentenced to six months in jail (suspended after two days served), a $500 fine, and one year probation.

In mid-April 1992, Applicant was arrested for operating under the influence, unnecessary noise, and operating an unregistered motor vehicle after an officer on patrol heard Applicant squeal his tires. Applicant had consumed six beers at a local bar and was driving to another. While he thought he was capable of driving at the time, he now realizes he "probably shouldn't have." He told the police he had consumed only a couple of beers, but his blood alcohol level tested at .287%. In September 1992, Applicant was convicted of the drunk driving charge and sentenced to six months in jail, suspended after ten days served, $500 in fines, one year probation, alcohol counseling and two years suspension of his operator's license.

Applicant used a van pool to get to and from work and obtained rides from friends when needed. On rare occasions, he drove the short distance to his girlfriend's house while his license was suspended. En route to his girlfriend's in February 1994, Applicant slid on the snow into another vehicle. He was charged with operating under suspension and evading responsibility. One week later, he was charged with breach of peace and criminal mischief following an altercation in a bar in defense of his girlfriend. After several attempts to remove him from the bar, Applicant agreed to leave but on exiting accidentally broke a window with his elbow. The charge was nolle prossed after he paid restitution. In March 1995, he was convicted of the February 1994 operating under suspension charge, and sentenced to 30 days, which was spent in a "boot camp" type of facility that had an alcohol counseling component.

In late November 1997, Applicant was charged with evading responsibility and failure to surrender license and registration. He backed his vehicle into another car accidentally, and left the scene as he felt there was no damage. A witness reported him to the police. The evading responsibility charge was dismissed, but when he went to insure a new truck in January 1998, he learned there was an unresolved failure to surrender license and registration charge on his driving record. The matter was resolved on his payment of $78.

After consuming six or seven beers at a bar in early February 1999, an amount he did not feel would affect his driving, Applicant crashed his vehicle down an embankment. He left the accident scene and walked to a local residence to call for a ride home. The occupant of the home called the police, who detected a strong odor of alcohol on Applicant's breath. After he failed field sobriety tests, Applicant was arrested for operating under the influence and failure to drive right. Approximately two hours after the accident, his blood alcohol content tested at .206%. In early March 1999, an administrative hearing was held on the issue of his license suspension. His operating privileges were restored as there was insufficient evidence the breathalyzer test was taken within two hours of vehicle operation.

In late May 1999, Applicant drank a couple of beers at a private hall and then about six more at a bar. He now admits

that when he left the bar, he was "probably under the influence," but not so much that he felt he couldn't function. The state police observed him speeding and driving erratically. Applicant failed to pull over initially when signaled to do so, which he claims was because he did not know the police were after him. Applicant had to be asked for his driver's license five times, and the police observed his eyes to be bloodshot, speech slurred, and breath smelling of alcohol. After failing field sobriety tests, Applicant was arrested for operating under the influence of alcohol or drugs, failure to drive in established lane, operating without insurance, and speeding. He was subsequently charged with refusal to submit to chemical test after he would not breathe sufficiently into the breathalyzer to obtain a valid result. In mid-June 1999, an administrative hearing was held on his refusal to submit to the chemical alcohol test. The charge was sustained and Applicant's operator's license was suspended for six months.

Applicant continued to operate a vehicle while his license was suspended. In August 1999, he was stopped for no seatbelt. When a check of his license revealed it had been suspended, Applicant was charged with operating under suspension. In September 1999, Applicant's operating privileges were restored on a restricted basis, to and from work only. His full license was restored in December 1999. Feeling that he wasn't strong enough to refrain from driving after drinking, Applicant decided it was best to abstain completely from alcohol, and he stopped drinking in January 2000.

The 1999 criminal charges were consolidated for adjudication purposes, and in mid-March 2000, Applicant was convicted of the February 1999 and May 1999 operating under the influence charges, and of the August 1999 operating under suspension. On each of the DUI offenses, he was fined $578, sentenced to six months (execution suspended after two days served), and placed on one year probation (concurrent). For the operating under suspension, he was fined $828, sentenced to 30 days in jail (execution suspended after five days served), and one year probation (concurrent).

Pursuant to court order and on referral of the probation department, Applicant was evaluated on April 19, 2000, by a state licensed addictions counselor. She recommended Applicant participate in a minimum of ten outpatient treatment sessions to address his poor judgment and drinking and driving behavior. Applicant attended ten sessions of individual counseling concerning alcohol from May 18, 2000 to August 31, 2000. At his first session, Applicant exhibited rationalization and denial of his behavior as well as an oppositional defiant attitude. He expressed his belief he should not be in counseling since it was for alcoholics. As of his seventh meeting with his counselor, he still believed he had always been in control when making the choice to drink and drive. As of August 17, 2000, he continued to exhibit some denial, but acknowledged during his next session that he knows he cannot drink and drive. He was discharged as of September 21, 2000, having successfully completed the required individual counseling in alcohol and substance abuse issues, confronted his drinking and driving, and remained alcohol as well as drug free.

While employed as a machine operator for a local cable and design company, Applicant was interviewed by a special agent of the Defense Security Service (DSS) on March 29, 2001, and on April 4, 2001, to execute a sworn statement. Applicant was candid about his alcohol-related offenses and detailed a history of drinking to be sociable since he was 18, almost exclusively on weekends, usually six beers over the course of an evening. Applicant related he had stopped drinking in January 2000, as he felt he "wasn't strong enough to keep from driving after drinking . . . was also sick of the legal problems, and the associated expenses, and afraid that [he] could jeopardize employment." He denied any intent to consume alcohol in the future.

In conjunction with his return to work at the defense contractor in November 2002, Applicant completed a security clearance application on which he disclosed his drunk driving offenses in 1988, 1990, 1992, February 1999, and May 1999, and his operating under suspension in July 1999. In response to any alcohol-related treatment, Applicant listed his counseling from May 2000 to July 2000.

On December 31, 2002, Applicant went to a New Year's Eve party. Feeling capable of limiting his consumption to no more than two beers when he knew he had to drive, Applicant had two beers. His friend bought the beer with reservations, as he knew Applicant had given up drinking. On February 26, 2004, Applicant was interviewed by DSS about his drinking since his statement of April 2001. Applicant admitted he had started drinking again, and related that he usually stops after work on Friday and buys a six-pack of beer, drinking four or five at home. He denied any consumption during the work week. Acknowledging his bad choices in the past in operating a vehicle after drinking too much, Applicant indicated he expected his drinking to not increase.

As of late May 2005, Applicant was still drinking alcohol, a couple (no more than three) beers at home after a day's work, or after working in the yard. Never married, he lives by himself in his own home where he will "just sit down on the porch like an old man and have a drink." He consumes alcohol with the neighbor down the street, whom he helps restore old cars. Applicant does not drink alcohol if he knows he has to drive home. Applicant does not see his drinking as a problem, and denies that he has ever been intoxicated to the point where he had no control.

Applicant's supervisor, who assigns Applicant his work and monitors his performance, has not seen any evidence of Applicant being under the influence of alcohol on the job. He considers Applicant to be a "fantastic" worker.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

After a thorough evaluation of the record evidence, the following adjudicative guidelines are pertinent to an evaluation of Applicant's security suitability:

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. (E2.A10.1.1.)

Alcohol Consumption. Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. (E2.A7.1.1.)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following:

Applicant's five convictions for drunk driving reflect a disregard for the law and public safety, raise serious doubts about his judgment and reliability, and call into question whether he can control his behavior. Alcohol was also involved in the 1981 breach of peace, where he got into an altercation with other patrons at a bar. The absence of any evidence of work-related impairment does not eradicate the security concerns, for those to whom classified information is entrusted must be relied on to safeguard this material, both during business and non-business hours. Drinking to intoxication is incompatible with a security clearance as it creates a risk of unauthorized disclosure due to carelessness in action or speech. Under Guideline G, disqualifying conditions E2.A7.1.2.1. *Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*, and E2.A7.1.2.5. *Habitual or binge consumption to the point of impaired judgment*, apply.[(2)] Under Guideline J, criminal conduct, disqualifying conditions E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and E2.A10.1.2.2. *A single serious crime or multiple lesser offenses* apply, not only to his alcohol-related offenses, but also to his recidivist operating under suspension. His knowing, intentional flaunting of his license suspension raises a very significant concern about whether he will abide by those security rules and regulations

that he either disagrees with or might find personally inconvenient. Indeed, the state recognized his operating under suspension as very serious. He spent more time in jail for the offense and paid a larger fine than for the DUI offenses.

In his favor, there is no evidence of any alcohol-related incident since May 1999 or of driving under suspension since July 1999. Mitigating condition E2.A7.1.3.2. applies where the problem occurred a number of years ago and there is no indication of a recent problem. In response to the government's concerns about his resuming drinking in December 2002 after abstaining since January 2000 (¶ 2.c.), Applicant submits he does not abuse alcohol, drinking usually two or three beers at home. In determining whether Applicant's ongoing consumption of alcohol presents an unacceptable security risk, it is noted that nothing in the Directive or Executive Order 10865 prohibits drinking per se. Consumption that does not lead to occupational, social, or legal impairment is not in and of itself disqualifying under Guideline G unless it follows a diagnosis of alcoholism or alcohol abuse by a credentialed medical professional or licensed clinical social worker on staff of a recognized treatment program.[(3)] In April 2001, Applicant was evaluated for possible substance abuse by a licensed professional counselor recognized as qualified by the state's probation department to render such an assessment. While there is a basis to consider this nationally certified master addictions counselor as qualified as the licensed clinical social worker with respect to diagnosing substance abuse disorders, there is no evidence Applicant was diagnosed as suffering from alcohol abuse or alcohol dependence. In her one page referral for outpatient treatment the licensed professional counselor stated, "minimum 10 session to address poor judgement + drinking and driving." (Ex. 7) Absent a clear diagnosis of alcohol abuse or alcoholism by a qualified substance abuse professional, a negative inference of ongoing abuse is not warranted solely from the fact that he is drinking. However, Applicant bears a heavy burden to overcome his serious DUI history and repeated operating under suspension.

Although Applicant successfully completed the court-ordered ten sessions of individual counseling, he shows little insight into the risks posed by alcohol beyond drunk driving. The progress note of his eighth session in 2000 reflects his failure to grasp the significance of changes which take place under the influence of alcohol. As of his ninth session, he was assessed as still in denial. The progress note of his final session reflects his acknowledgment that he could not drink and drive. Notably absent is counselor confirmation of an understanding on Applicant's part that he had a problem controlling the amount he consumed, which was a concern of the counselor in the sixth session ("Is more concerned of his past behavior, to admitting he has had a problem with controlling just how much he would consume.") and seventh session ("He has believed he has always been in control of making choice to still drive but that poor judgment is still not connected to consequence of use of alcohol." Ex. 7)

As of his February 2004 interview, Applicant was still thinking of his alcohol problem only in terms of drinking and driving ("I felt I was capable now of controlling myself by not having more than two beers when I knew I would have to drive. I usually will stop after work on Friday and buy a six-pack of beer and drink four or five at home." Ex. 9). At his hearing in May 2005, Applicant was asked on direct examination what, if anything, he learned from his counseling. Applicant answered, "That I had a problem. If I didn't stop drinking, it was felt that I was going to put myself in a hole." (Tr. 52) Yet, when asked by the government what assurances he could provide that he would not drink to the point of loss of control in terms of getting into fights in bars or driving after drinking, Applicant responded, "I've never been intoxicated to the point where I didn't have no control of myself, I'm personally thinking." (Tr. 57) Asked why he resumed drinking, Applicant testified he stopped drinking after his last arrest to prove to himself that he could ("I didn't want it to get out of control, which it didn't and then I started, I might have a couple. I know I can do it now. I don't have to binge drink or whatever, which I never did."). (Tr. 58). His blood alcohol level of .287% and .206% on the occasion of his April 1992 and February 1999 DUI, respectively, is evidence of binge drinking, and his failure to admit it belies his claim of successful rehabilitation. The absence of any drunk driving since 1999 is a positive change in behavior supportive of sobriety (*see* E2.A7.1.3.3), but it is not enough to preclude a relapse. His reported social activities involve

drinking with a neighbor whom he helps restore old cars, and his lifestyle as an unmarried male living alone has no impediments to drinking, potentially to abusive levels.

Similarly, while there is no evidence of operating under suspension since mid-August 1999, Applicant exhibited a troubling tendency to justify his behavior. In arch 2001, he told a DSS agent that before his August 1999 arrest, he had "only driven a few times since the license was suspended and [he'd] done so only to get to places close to home when [he] needed something." (Ex. 8) At his hearing, he confirmed he understood that he wasn't supposed to be driving (Tr. 40), but this acknowledgment of wrongdoing was not accompanied by any remorse. Applicant's work record weighs in his favor, but his evidence in reform is not enough to meet his burden of demonstrating that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

Formal findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: Against the Applicant

Subparagraph 1.i.: Against the Applicant

Subparagraph 1.j.: Against the Applicant

Paragraph 2.Guideline G: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).

2. There is insufficient evidence to apply E2.A7.1.2.4. *Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.* Neither the licensed professional counselor who evaluated Applicant in April 2000, nor the clinician who counseled him is a credentialed licensed clinical social worker (LCSW). The state considered the nationally certified master addictions counselor as qualified to assess Applicant for possible substance abuse problems, so there is a basis to consider at least the initial evaluator as qualified for purposes of E2.A7.1.2.4. However, there is no clear diagnosis of alcohol abuse or dependence.

3. Under guideline G, the consumption of alcohol without regard to amount imbibed or impact on judgment is security disqualifying in its own right where there is a diagnosis of alcoholism by a credentialed medical professional and it follows completion of an alcohol rehabilitation program. (*See* E2.A7.1.2.6.) There is no corresponding condition that disqualifies an applicant with alcohol abuse who drinks in moderation after completing an alcohol program. It is noted that if an individual has been diagnosed as suffering from alcohol abuse by a credentialed medical professional or licensed clinical social worker on staff of a recognized treatment program, he or she is required to abstain completely from alcohol for at least 12 months under mitigating condition E2.A7.1.3.4.