

DATE: January 17, 2007

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-13605

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of alcohol abuse from the mid-1990s, including a May 2005 drunk driving offense after he had completed counseling for a 2004 driving under the influence. He relapsed in April 2006 while in counseling with a psychologist for diagnosed alcohol dependence and under probation for his 2005 offense. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on September 25, 2006, detailing the basis for its decision-security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on October 17, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on November 22, 2006. Applicant waived the 15-day notice requirement, and on December 11, 2006, I scheduled a hearing for December 19, 2006.

The hearing was convened as scheduled on December 19, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Four government exhibits (Ex. 1-4) were admitted. Testimony was taken from Applicant and three witnesses (a senior director at the company where Applicant works, his father, and his spouse) on Applicant's behalf, as reflected in the hearing transcript (Tr.) received on January 4, 2007.

FINDINGS OF FACT

DOHA alleged under Guideline G, Alcohol Consumption, that Applicant drank alcohol at times to excess from about the early 1990s to at least October 2005; was charged with drunk driving in November 1993, May 1996, March 2004,

and May 2005 and convicted of the 2004 and 2005 driving under the influence offenses; and received counseling for his alcohol use in 2004 and 2005. The drunk driving offenses were cross-alleged under Guideline J, Criminal Conduct. Applicant was also alleged under Guideline J to have been charged, while in the United States Marine Corps, with assault and property damage in June 1991, with reckless driving in February 1993, with indecent exposure and being in a restricted area in March 1993, and with burglary and simple assault in December 1997 after his discharge from the Marine Corps.

Applicant admitted struggling with alcohol in the past, the drunk driving incidents and counseling, but averred he was no longer drinking and had the support in place to maintain abstinence. He indicated counseling was continuing on a weekly basis voluntarily with the clinician listed in ¶ 1.f. Applicant also admitted his criminal record alleged under Guideline J, although he had no independent recollection of the events that led to the charges in ¶¶ 2.f, 2.g, and 2.h, and explained that he had contested the December 1997 charges before pleading to an amended charge of unlawful trespass. At the hearing, the government withdrew ¶ 2.f, the alleged indecent exposure and restricted area charges in March 1993, and ¶ 2.h, the alleged assault and property damage charge in June 1991. ⁽¹⁾ As to the other allegations, Applicant's admissions are incorporated as findings of fact. After a thorough review of the pleadings, exhibits, and transcript, I make the following additional findings:

Applicant is a 35-year-old deputy program manager who has been employed by a defense contractor since April 1998. He started working for his employer while still a college undergraduate and stayed on after he received his bachelor of science degree in May 2001. Applicant works in logistics support for a major Marine Corps electronic countermeasures program. He seeks a secret-level clearance, which will be necessary for his duties on the implementation of a new security classification guide for the program.

At age 19, Applicant enlisted in the United States Marine Corps. During his four years of active duty from September 1990 to 1994, Applicant started using alcohol "more than socially." ⁽²⁾ When Applicant was home on leave in 1991, he was involved in an accident after drinking. (Tr. 67) On February 23, 1993, he was charged with reckless driving (disposition not of record). On November 6, 1993, Applicant was with a companion at a local nightclub off-base when they got involved in a verbal altercation with two other Marines in the parking lot. It escalated into a physical altercation between Applicant and one of the other Marines. On complaint of the victim, Applicant was stopped shortly after his vehicle entered the main gate. Military police detected a strong odor of alcohol on Applicant's breath, and he failed field sobriety tests. Applicant and his passenger were apprehended, and Applicant was charged with driving while intoxicated (DWI), DWI (refusal) as he refused to submit to a chemical analysis of his breath, and assault. His companion was charged with provoking speech and gestures. Applicant was convicted of the DWI and assault charges. Applicant was granted an honorable discharge in 1994.

Following his discharge, Applicant moved back to his home state and started college. He transferred to the state university in September 1995. On May 16, 1996, Applicant was arrested for misdemeanor DWI. That July, he was fined \$100 on an amended charge of careless and negligent operation.

As of December 1997, Applicant was working as a bartender while attending college full-time. After his shift on December 8, Applicant and a companion entered a fraternity house where they had reason to believe a party was being held. They were confronted by residents and a fight ensued. Applicant was arrested for felony burglary and misdemeanor simple assault. He contested the charges in court but in February 1998 pleaded guilty to an amended charge of misdemeanor unlawful trespass and to misdemeanor simple assault. Applicant was given consecutive sentences of one year incarceration with probation, all but ten days suspended.

Midway through college, Applicant in April 1998 started working full-time for his present employer as an expeditor. He became a part-time student, continuing to take classes at night as well as during the day. After only a short time, he was promoted by the defense contractor to material planner. A year into that position, Applicant was brought from manufacturing into the business environment as a program planning specialist. He was promoted from there to deputy program manager. In 2002, he served as acting program manager on a Navy destroyer defense system and received a \$2,000 award for his performance. Applicant then transitioned to deputy program manager on an advanced gun system program until he became involved with the electronic countermeasures program.

While he did not allow his alcohol consumption to negatively affect his work, in about 2003, Applicant informed the director of the countermeasures program that he had a problem. On or about February 29, 2004, Applicant was arrested for driving under the influence. He was fined \$350, ordered to undergo counseling, and his license was suspended for 90 days. Applicant participated in 10 to 12 counseling with a licensed alcohol and drug counselor from June 2004 through July 2004. The counselor diagnosed him as alcohol dependent. Applicant understood that he could not safely drink as eventually he would consume to excess. Having satisfied the counseling required by the court, Applicant did not continue his sessions as he felt he could deal with his problem on his own.

Over the next year, Applicant drank on four or five occasions, primarily at family events where he felt it would be safe to drink. Applicant considered himself to be in recovery, as he was attempting to rectify his drinking problem and was not drinking as he had been before his 2004 drunk driving offense.

On May 11, 2005, Applicant was arrested for DUI, second offense, a misdemeanor. On July 6, 2005, he was sentenced to a term of incarceration of four to 12 months, all but ten days suspended, probation, to fines and costs of about \$400, 20 hours of counseling, and 18 months loss of license effective immediately. Applicant served the ten days on work release performing essentially community service.

Applicant abstained from alcohol after his May 2005 arrest. Sometime between July 6, 2005, and July 19, 2005, Applicant attended one session of alcohol counseling. He did not return due to work schedule conflicts and lack of rapport with the clinician.

In application for a secret-level security clearance, Applicant completed an electronic questionnaire of investigative processing (e-QIP) on July 19, 2005. In response to section 23 concerning his police record, Applicant listed his felony arrest for burglary in December 1997, amended to simple assault, and his 2004 and 2005 drunk driving offenses. With respect to his recent DUI, Applicant explained, "Had been seeking counseling but had a relapse. Currently attending counseling again by order of the court but also by my own chosing [sic]. Have not drank since May 11, 2005, the date of the incident." Under section 25 pertaining to any alcohol treatment, Applicant disclosed that he received counseling between May 2004 and September 2004 (estimated), and from July 2005 to present. Under a section for additional comments, he indicated:

My use of alcohol has caused me some problems in the past with the 3 charges mentioned on this form. I have acknowledged my problem, have sought counseling, and continue to seek counseling for this problem. It is my desire and my intention to completely abstain from the use of any alcohol now or in the future. (Ex. 1)

Applicant was caught driving while his license was suspended on July 31, 2005. He had sold his condominium because of transportation difficulties while his license was suspended. Given a deadline by the buyer to clean out his garage, Applicant drove over to the condominium with a trailer. En route home to his new residence, Applicant was pulled over because he had a taillight out, and he was charged with operating with a suspended license. Applicant denies that he drove on any other occasion with a suspended license, and there is no evidence of record to the contrary.

In about December 2005, Applicant began weekly counseling with a psychologist, who is also a licensed alcohol and drug counselor. Applicant was referred to this therapist by a friend. She diagnosed him as alcohol dependent. Despite his counseling sessions, which he found to be constructive, Applicant had a relapse in about April 2006. After three weeks on temporary duty at a training site, Applicant had a couple of gin drinks on the plane en route home. Within hours of his arrival home, Applicant reported to a work crew assignment as part of his probation for the May 2005 offense. Applicant was given a random breathalyzer, which tested positive for alcohol. Because of the violation of his probation, Applicant elected to serve the four days remaining of his work crew requirement in a correctional facility.

Applicant last saw the psychologist in September 2006. He had been having transportation issues and expressed his intent to resume their sessions once he regained his driver's license, as he found them constructive. Although he regained his operator's license in mid-November 2006, he had not been back to see the psychologist as of mid-December 2006.

In September 2006, Applicant got married to a citizen of the United Kingdom. They became acquainted via the Internet in November 2005, and got engaged in January 2006. She joined Applicant in the U.S. in July 2006. From a military

background herself, Applicant's spouse was due to go into the U.K. military as a weapons systems officer on a 18-year commission before she met Applicant. She intends to enlist in the U.S. Army National Guard and has been offered a position in an informational operations unit once her residency is established. She leads a healthy, active lifestyle and does not drink alcohol. She has made it clear to Applicant that any drinking by him will not be tolerated ("I have zero tolerance for any kind of damaging addiction that--that becomes a problem in our relationship." Tr. 82).

In November 2006, Applicant and his spouse began joint counseling sessions with a certified drug and alcohol counselor to help her understand some of the issues that led him to drink in the past. Under significant stress at work, Applicant also began attending Alcoholics Anonymous (AA) once weekly as he did not want the stress to impact his sobriety. His spouse had printed out a schedule of local AA meetings and it was a couple of weeks before he went. He attended about three meetings as of his December 19 security clearance hearing. Applicant has found them to be "inspirational." He had not considered attending AA in the past as he viewed an affiliation with AA as stigmatizing and felt ashamed of his drinking problem. (Tr. 39, 73) Applicant's goal is to attend four AA meetings per week. He does not intend to drink alcohol in the future. His spouse attends Al-Anon meetings to help her understanding of his alcohol problem.

Applicant's father, who served 20 years in the U.S. Navy, retired in January 2006 as vice president of the defense contractor firm employing Applicant. He held a secret-level clearance for most of his career. He first noticed Applicant had a drinking problem after his son was discharged from the Marines. He has no hesitation in recommending Applicant for a clearance as Applicant recognizes his alcohol problem and is making "a very valiant effort" to deal with it.

The senior director of the countermeasures department at work has not seen any evidence of alcohol negatively impacting Applicant's performance at work. Applicant has proven very dedicated to the Marine Corps program he is working on and has exhibited undeniable patriotism. Applicant is the employee to go to for logistics activities at the facility. This director does not believe Applicant is at risk of a relapse. He considers Applicant to have "turned a major corner" as far as his drinking issues.

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 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). 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 (App. Bd. Dec. 19, 2002).

The revised Adjudicative Guidelines set forth potentially 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline G--Alcohol Consumption

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 (AG ¶ 21). Applicant has allowed alcohol to negatively affect his judgment since he was in the Marine Corps in the early 1990s. Although not alleged, he admitted he had been involved in an accident after drinking when he was home on leave in 1991 (Tr. 67). He was convicted of drunk driving offenses committed in November 1993, late February/early March 2004, and May 2005, and was fined for alcohol-related careless and negligent operation in 1996. Disqualifying condition (DC) ¶ 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, is implicated. While Applicant admits drinking "more than socially" starting from his days in the Marines, the frequency and amount of Applicant's drinking is not detailed in the record. Reasonable inferences of excessive consumption falling within DC ¶ 22(c) *habitual or binge consumption of alcohol to the point of impaired judgment*, are thus limited to those occasions where he operated his vehicle while legally intoxicated.

Consideration of DC 22(d) *diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*, is warranted because Applicant was counseled for diagnosed alcohol dependence (see Tr. 57) from about December 2005 to September 2006 by a psychologist licensed by the state to provide alcohol and drug counseling. However, the government failed to make its case for application of ¶ 22(f) *relapse after diagnosis of abuse or dependence and completion of an alcohol rehabilitation program*. He relapsed on five to six occasions after he completed his court-ordered counseling for his 2004 DUI, but the record does not support that he had completed an alcohol rehabilitation program as of his relapses. The record is silent as to the nature of his treatment in 2004, and Applicant was still in active therapy with the psychologist as of his April 2006 relapse. Yet, that latest relapse raises DC 22(g) *failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence*. As confirmed by his father (Tr. 95-98), Applicant was still on probation for his 2005 DUI when he drank on the plane. When Applicant showed up to perform his work release assignment, he tested positive for alcohol when he had been required to abstain.

Applicant considers himself to be in recovery from alcohol since his 2004 DUI offense as he no longer drank in previous patterns, knew he had a problem, and was addressing it. (Tr. 53) Yet, he also testified he felt the counselor he saw in 2004 "was checking a box, as was [he] at that time." (T. 55) Given his subsequent drinking at family events where he felt it would be safe to consume alcohol, his recovery was half-hearted at best. Although he managed to remain abstinent after his May 2005 DUI, his failure to pursue court-ordered counseling (save the one session in July 2005) until December 2005 shows a lack of active commitment to his recovery during that time.

Applicant now recognizes that he cannot safely drink. He also deserves credit for his weekly counseling from December 2005 to September 2006 with the psychologist (see ¶ 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)*). Yet, his relapse in April 2006 and his failure to return to his sessions after he regained his operator's license in November 2006 raise questions about his recovery. Applicant testified the psychologist gave him a favorable prognosis, but when asked what this meant, he responded, "she understood that [he] was truly working on--on recovery" (Tr. 57). The record contains no professional assessment of his progress. During October 2006, when work was particularly stressful, he was not involved in any counseling or AA to assist him in his recovery. Joint counseling with his spouse with a licensed alcohol and drug counselor and involvement with AA once weekly since mid-November 2006 are too recent to enable an affirmative finding at this time that his alcohol abuse is safely in the past, although Applicant appears sincere in his commitment.

Guideline J--Criminal Conduct

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 (AG ¶ 30). Culpability was not proven with respect to the February 1993 reckless driving charge (¶ 2.g), but Applicant committed criminal conduct when he assaulted a member of a fraternity during a scuffle in December 1997 (¶ 2.e), when he operated a vehicle while intoxicated (¶¶ 2.a, 2.b, 2.d), and when he drove carelessly and negligently in May 1996 (¶ 2.c). Security concerns are raised under DC 31(a) *a single crime or multiple lesser offenses*, and DC 31(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*. Furthermore, although not alleged, Applicant operated a motor vehicle while his license was suspended in July 2005, and he violated his probation for his May 2005 DUI by drinking in April 2006. DC ¶ 31(e) *violation of parole or probation or failure to complete a court-mandated rehabilitation program*, is also implicated.

The unlawful trespass and simple assault were confined to the college environment where Applicant was looking to party. Recurrence is unlikely given the stability of his present lifestyle, with his career and marriage. Applicant's

undisputed dedication to his work is evidence of rehabilitation under MC ¶ 32(d) *there is evidence of successful rehabilitation; including 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.* Yet, reform of his alcohol-related criminal conduct depends largely on the success he has had in dealing with his alcohol problem. Less than a year has passed since his relapse in April 2006. While the adjudicative guidelines pertinent to criminal conduct do not specify the time an applicant must be free of criminal behavior, his drinking in violation of his probation raises recent concerns for his judgment and reliability.

Whole Person Analysis

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." AG ¶ 2(a). The security risks presented by Applicant's off-duty abuse of alcohol to as recently as April 2006 (¶ 2(a)(1) *the nature, extent, and seriousness of the conduct*; ¶ 2(a)(3) *the frequency and recency of the conduct*) must be evaluated in the context of the "whole person." Applicant's dedication to the Marines and the countermeasures project in particular are unquestioned. He has not allowed his alcohol problem to negatively affect his work. Yet, the government must be assured that those individuals granted fiduciary responsibilities do not present a risk off-duty as well. The evidence of rehabilitation includes counseling beyond what has been ordered by the court, and he has made pertinent behavioral changes, such as avoiding those situations conducive to drinking (¶ 2(a)(6) *the presence or absence of rehabilitation and other permanent behavioral changes*). However, those changes, late in coming, are not enough to overcome his consumption of alcohol in April 2006, when he knew he had been diagnosed as alcohol dependent and advised to abstain, he would be violating his probation for the DUI, and his suitability for classified access was being investigated by the Department of Defense.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G: 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

Subparagraph 1.h: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: (Withdrawn)

Subparagraph 2.g: For Applicant

Subparagraph 2.h: (Withdrawn)

DECISION

In light of all of the circumstances 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 military's incident report of the November 1993 DWI offense (Ex. 4) reflects the June 1991 assault and March 1993 indecent exposure charges were on the record of the Marine who had been arrested with Applicant in November 1993.

2. Applicant testified that events during his military service contributed to his drinking, but he was not specific about the circumstances:

I have a lot of history that--that I didn't bring up in this courtroom that I feel may have contributed. I try not to fall back on those as excuses, but there are some things that happened while I was in the Marine Corps that were very trying on me and that I think had a--had an impact on timewise when I started using alcohol more than socially. . . ." (Tr. 59)