

KEYWORD: Alcohol: Personal Conduct; Criminal Conduct

DIGEST: Applicant, a 25-year-old employee of a defense contractor, was convicted of negligent driving following an arrest for operating under the influence of liquor (OUIL) in September 2005. Alcohol consumption concerns are mitigated because of the isolated nature of the offense, the limited evidence of excessive drinking, and Applicant's intent to not drive on those rare occasions where he drinks to excess. An operating after suspended license charge in 2002 is attributed to youthful irresponsibility that is countered by his stable employment in two jobs. However, personal conduct and criminal conduct concerns persist because he failed to list his then recent OUIL arrest on his security clearance application, and because of his lengthy record of minor infractions. Clearance is denied.

CASENO: 06-24800.h1

DATE: 09/12/2007

DATE: September 12, 2007

In re:

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SSN: -----

Applicant for Security Clearance

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) ISCR Case No. 06-24800  
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**DECISION OF ADMINISTRATIVE JUDGE  
ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Fahryn Hoffman, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

## **SYNOPSIS**

Applicant, a 25-year-old employee of a defense contractor, was convicted of negligent driving following an arrest for operating under the influence of liquor (OUIL) in September 2005. Alcohol consumption concerns are mitigated because of the isolated nature of the offense, the limited evidence of excessive drinking, and Applicant's intent to not drive on those rare occasions where he drinks to excess. An operating after suspended license charge in 2002 is attributed to youthful irresponsibility that is countered by his stable employment in two jobs. However, personal conduct and criminal conduct concerns persist because he failed to list his then recent OUIL arrest on his security clearance application, and because of his lengthy record of minor infractions. 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 ¶ E3.1.2, Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on February 26, 2007, detailing the basis for its decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), 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 guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on March 9, 2007, and elected a decision based on the written record without a hearing.

On April 20, 2007, the government requested a hearing before a DOHA administrative judge, and the case was assigned to me on June 14, 2007. Pursuant to notice dated July 5, 2007, I convened a hearing on August 20, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, two government exhibits (Exs. 1- 2) and 12 Applicant exhibits (Exs. A-L) were admitted, and testimony was taken from Applicant. The hearing transcript (Tr.) was received on August 29, 2007.

## **FINDINGS OF FACT**

DOHA alleged under Guideline G that Applicant consumed alcohol at times to excess and intoxication from about 1998 to at least September 2006 (SOR ¶ 1.a), and was arrested for operating under the influence of liquor (OUIL) in September 2005 but convicted of negligent driving (¶ 1.b). Under Guideline E, Applicant was alleged to have falsified his February 2006 security clearance application by denying that he had ever been charged with any offense related to alcohol or drugs (¶ 2.a). The OUIL (¶ 3.c), an October 2002 operating after license suspension charge (¶ 3.b), and a felony violation of 18 U.S.C. § 1001 (¶ 3.a) for denying any alcohol charges when he completed his clearance application, were alleged under Guideline J.

In his Answer, Applicant admitted the OUIL arrest but denied that he had consumed alcohol at times to intoxication from 1998 to September 2006, since he was not of legal age to drink until

August 2002 and did not consume alcohol "at times to excess and to the point of intoxication." Applicant acknowledged he had responded "No" on his clearance application to whether he had ever been charged or convicted of any drug or alcohol offense. He denied any intent to falsify, however, and indicated he had misunderstood the question. Applicant admitted he had been charged with OUIL and operating after suspended license, and corrected the date of the latter to March 2002 as reflected in the state's records. He admitted the alleged violation of 18 U.S.C. § 1001 while at the same time maintaining he did not intend to falsify information. Questioned about this seemingly inconsistent position at the hearing, Applicant reiterated that he did not deliberately lie on his clearance application.

After a thorough review of the pleadings, exhibits, and hearing transcript, I make the following findings of fact:

Applicant is a 25-year-old supply chain specialist employed by a defense contractor as a direct hire since February 2006. He had worked at the company as a summer intern from May 2005 and his internship was extended until he was hired as a full-time employee. Applicant held a confidential security clearance until it was withdrawn in December 2006. He seeks reinstatement of his security clearance so that he can access the production floor. Since he lost his clearance, Applicant had been managing 45 labor relations personnel and handling the paperwork (batching of kits and assemblies) for the product line to run on the production floor.

While in high school, Applicant worked part-time for a restaurant as a bus boy starting in February 1998. He took his first drink of alcohol at age 16 from his father's beer, but focused on his schoolwork, and he earned his diploma in June 2000.

In August 2000, he began working at night as a mechanic for the ambulance company where his father is employed. Applicant had been cleaning ambulances for the company since he was 14. He continued to work for the ambulance company and for the restaurant while pursuing his college degree from September 2000 to May 2004. Applicant drank alcohol once or twice every two or three months at social gatherings, largely due to peer pressure. He did not drink to get drunk. During his junior year, he studied abroad for one semester, from February 2003 to July 2003. Applicant consumed alcohol to intoxication only once when he was there, and he did not operate a vehicle.

Applicant has a record of motor vehicle violations, from a failure to stop in April 1999 to speeding in May 2006. En route to his job at the ambulance company, Applicant was stopped for speeding on or about March 21, 2002. He was let go with a warning, but after a check of his license revealed it was suspended,<sup>1</sup> the police came to the ambulance company. He was told that if he paid the reinstatement fee at that time, he would be all set. Applicant paid the fee (*see* Ex. J), but in October 2002, he was charged with operating a motor vehicle with license suspended in March 2002. On December 19, 2002, the speeding charge was filed and the license suspension charge was ordered

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<sup>1</sup>Applicant explained that he had not noticed or received a renewal notice that his license had expired. (Tr. 86-87) His driving record indicates that his license had been suspended on March 5, 2002 ("SUSPENSION PAYMENT DEFAULT INDEFINITE"). He had been stopped for speeding on July 12, 2001, and November 26, 2001, and for a seat belt violation on December 19, 2001 (Ex. J), although it is not clear whether these violations led to his license suspension. Applicant denies that speeding was the cause of the license suspension. (Tr. 102)

dismissed on payment of \$200 court costs. Applicant paid the court costs on March 26, 2003, and the charge was dismissed.

In May 2004, Applicant was awarded his bachelor of science degree in psychology. He returned home to live with his mother, and he continued to work as a mechanic for the ambulance company and as a waiter at the restaurant. In April 2005, he left the employ of the restaurant because he wanted more of a social life. In May 2005, he landed a postgraduate internship as a contracts aid with his current employer. Applicant proved to be reliable, trustworthy, enthusiastic, and self-assured, and to possess good communication and analytical skills. His internship was extended in September 2005 because of the quality of his work.

In early September 2005, Applicant got together with his best friend, who had just come back from Iraq after about one year in theater. They went to another friend's home where Applicant consumed one or two beers. The three then went to a bar where Applicant drank three or four beers over 2 1/2 to 3 hours. En route home after dropping off his best friend, Applicant took his attention off his driving as he reached around in the back seat. He struck a tree, and the impact propelled his vehicle into two parked cars. Applicant was arrested at the scene and charged with OUIL and failure to stay in marked lanes. He refused to submit to field sobriety tests as he had heard it would be best to do so, knowing that his driver's license would be suspended for 180 days. Applicant pleaded not guilty to OUIL as he felt he was not intoxicated ("I can't say to be honest with you, I mean I'm sure alcohol played a minor role, but it wasn't, I mean I think that anyone knows when they have a couple of drinks, they get behind the wheel, they know if they can drive or not." Tr. 72). On November 23, 2005, the marked lanes violation was ordered dismissed on payment of \$100 costs. Applicant pleaded guilty to a charge of negligent operation of a motor vehicle and the case was continued without a finding for two years on completion of two years probation, completion of a "Brains at Risk" course, attending an eight-hour highway safety program, and payment of a \$500 fine. Applicant was timely in his probation payments and met with his probation officer once monthly or as prearranged if their schedules conflicted. His mother drove him to and from work while his operator's license was suspended.

In February 2006, Applicant became a direct employee of the defense contractor. Needing a clearance to access the production floor for his duties as a supply chain specialist in the circuit card assembly area, Applicant completed a Questionnaire for Sensitive Positions (SF 86) on February 21, 2006. He responded "NO" to police record inquiries, including questions 23 D, "ALCOHOL/DRUG CHARGE?" and 23 F "LAST 7 YRS, ADDITIONAL CHARGES?". Since his OUIL charge had been reduced to negligent operation, Applicant did not consider it as relevant to his clearance so he did not disclose it. He now understands that he made a mistake and should have reported it ("I made a mistake, I overlooked them and I didn't think it would have a bearing on whether or not I got a clearance from [company name omitted] and, as time went on and here we are, where we are right now, today, I can see that it has." Tr. 92).

Applicant's operator's license was reinstated in March 17, 2006. In May 2006, he was again stopped for speeding, but there is no evidence that alcohol was involved. About once a year since he turned 21, Applicant drank to the point where he considered himself intoxicated, after consuming about 12 beers over the course of a holiday or family gathering. The last time he drank that much was around Thanksgiving 2006 at a high school reunion and while at a friend's home afterwards. Applicant did not operate a vehicle that evening. Applicant split a six-pack with a friend while

playing golf in July 2007. He had not consumed any alcohol in about a month as of his security clearance hearing. Applicant does not consider himself to have a problem with alcohol. He has never been told that he has a problem. He does not intend to repeat any of the conduct that led to the issuance of the SOR.

Applicant continues to maintain his part-time job as a night mechanic for the ambulance company. After putting in a full day for the defense contractor, he works evenings repairing ambulances. He has been on time for his scheduled shifts and is well liked by his coworkers. Applicant has also continued to exhibit enthusiasm and reliability in his work for the defense contractor, maintaining a positive attitude despite being unable to fulfill all aspects of his job since his clearance was withdrawn. He is well regarded by his supervisors (“a top-notch team player,” *see* Ex. E). In addition to his paid jobs, Applicant has volunteered in the community, cleaning up the grounds of a church and serving food at a transitional living center in the area.

As of July 2007, Applicant had applied for a five-month work order scheduler position with his employer’s vehicle maintenance facility in a remote location. He has been notified of his selection for the duty assignment scheduled to commence in October 2007 provided he fulfills certain requirements. On August 29, 2007, Applicant plans to petition for early dismissal of his probation on the negligent driving charge so that he can pursue the temporary job opportunity. While at the remote site, he plans to apply for a position with his current employer at one of its facilities in the country where he had spent a semester abroad. When his mother first heard he wanted the position at the remote location, she told him that she did not want him to pursue it if he was going there to drink rather than to further his career. Applicant, who has been working out at a gym four to five times a week, intends to work nine-hour days six days per week at the remote site and to go to the gym there after work.

As of August 2007, Applicant was living with his mother, who purchased a condominium after her divorce from Applicant’s father in 2002. Applicant’s sister and her seven-year-old son have also been living there since November 2004. Applicant pays room and board at \$50 weekly as well as the telephone/Internet/cable bill.

## **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's arrest for OUIL in September 2005 is potentially disqualifying under ¶ 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*. Although Applicant was convicted of negligent operation, he exhibited sufficient signs of alcohol impairment for the arresting officer to ask him to submit to field sobriety tests. DC ¶ 22(a) applies.

Applicant continues to downplay the role alcohol played in the September 2005 incident ("I wasn't intoxicated, I just lost control of my vehicle, it happened. . . . I mean I'm sure alcohol played a minor role . . . I wouldn't put myself in a situation where I couldn't operate a vehicle. . . ." Tr. 71-72), but he admits he drank to intoxication once when he was studying abroad, and about once yearly since turning 21, after consuming about 12 beers at gatherings of friends and/or family. While the quantity would tend to indicate binge drinking, absent evidence of the time over which this amount was consumed, I cannot conclude that disqualifying condition ¶ 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*, applies. The last time he drank 12 beers was over the course of an entire evening, at a high school reunion and afterwards at a friend's house, in November 2006. Whether or not 12 beers qualifies as binge drinking (which is not defined in the Directive), Applicant exercised questionable judgment in drinking to an irresponsible level.

Yet his drinking to abusive levels has been so infrequent as to fall within mitigating condition (MC) ¶ 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*. The government presented no evidence to show that Applicant has an alcohol problem, or that he consumed alcohol to excess even occasionally since 1998. Evidence of driving under the influence is limited to a single occasion in September 2005, when Applicant, who had turned 23 only the month before, was out celebrating the safe return of his best friend from Iraq. His consumption of alcohol at family gatherings over the holidays is likely to continue, but occasions of excessive drinking are rare, and he did not operate a vehicle after drinking to excess. While he continues to maintain that he was not intoxicated on the occasion of his accident in September 2005, he recognizes that alcohol probably played a role that day, and that he made a mistake that he is resolved to not repeat. Given his maturation in the past two years, as evidenced by his dedication to two employers, he is not likely to allow alcohol to negatively impact his judgment and reliability in the future.

### **Guideline E—Personal Conduct**

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

cooperate with the security clearance process. (AG ¶ 15) Applicant did not list his recent OUIL arrest on his February 2006 security clearance application, either in response to question 23D–“ALCOHOL/DRUG CHARGE?” or 23F–“LAST 7 YRS, ADDITIONAL CHARGES?”. The government alleged under Guideline E SOR ¶ 2.a that Applicant falsified a more detailed question than that in evidence, but it is clear that Applicant understood that 23D, even in its abbreviated form, pertained to any alcohol charges, and that he had been recently arrested in September 2005 for OUIL. Applicant has consistently denied any intentional concealment. When he answered the SOR, Applicant indicated that he “misunderstood the question being asked in the e-QIP,” and he responded accurately and to the best of his knowledge. He did not elaborate as to the nature of his misunderstanding. At his hearing, he testified with regard to his intent:

Well, with regards to filling this out, I mean I had gone through, I didn't think that it would have a bearing on my clearance, you know. At the time, I felt that it was just because I was charged or, rather, convicted of negligent driving, that I didn't feel it was alcohol or drug related because it was negligent driving, though I was charged with operating under the influence. (Tr. 77)

In other words, since the charge had been reduced, Applicant did not consider it an alcohol-related offense. Applicant's explanation for not listing the charge in response to question 23D is plausible, given he was convicted of negligent operation before he completed his SF 86. However, since he was on probation for negligent driving at the time, he bears a heavy burden to overcome the negative inference for his credibility that arises from his failure to list then the negligent driving conviction in response to question 23F.

At his hearing, the government asked Applicant about an interview with a government investigator during which Applicant was asked about his failure to disclose the September 2005 charge on his security clearance application. While Applicant acknowledged the interview, he indicated he did not recall telling the agent that he did not disclose the charge because he “thought it was a personal matter.” (Tr. 73) The government failed to prove that Applicant made such a statement to the investigator. However, Applicant still has the burden to persuade that his omission of the charge from his security clearance application was not intentional, and he failed to do so. He testified that he was constantly checking with the registry of motor vehicles to see if he could drive (Tr. 67) and he had to report to his probation officer, so the incident was fresh in his mind as of February 2006. Rather, the more plausible explanation for the omission is that Applicant just wanted to put the incident behind him and get on with his life, and he did not want it to hinder his chances at getting a clearance (“Well, with regards to filling this out, I mean I had gone through, I didn't think that it would have a bearing on my clearance.” Tr. 76). Disqualifying condition ¶ 16(a), *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*, applies.

The government must be assured that those persons granted access can be counted on to place their fiduciary obligations ahead of their personal interests. Applicant testified that he was candid when he met with the investigator about the September 2005 arrest for OUIL (“the gentleman that was investigating me, I answered his questions honestly and forthright,” Tr. 77). This supports an inference that Applicant was frank in response to the agent's questions, but it is not enough to satisfy



mitigating condition ¶ 17(a), *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*. Absent evidence as to when the interview took place, it cannot be determined whether the correction was prompt. Furthermore, Applicant's testimony suggests that he did not volunteer the information up-front. Applicant can avail himself of the benefit of none of the mitigating conditions where is unwilling to acknowledge that he intentionally did not include the charge on his security clearance application.

## **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) Applicant stands convicted of negligent operation of a motor vehicle for an alcohol-related offense committed in September 2005, and of operating a vehicle while his license was suspended in March 2002. DC ¶ 31(a), *a single serious crime or multiple lesser offenses*, applies, even if the suspension charge was due to his failure to note that his license had expired rather than to knowing violation of the laws against operating without a license. Since his falsification of his security clearance application in February 2006 is punishable as a felony offense under 18 U.S.C. § 1001, <sup>2</sup> DC ¶ 31(c), *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*, is also implicated. Moreover, DC ¶ 31(d), *individual is currently on parole or probation*, must be considered because Applicant has not yet completed his probation for the September 2005 negligent driving.

Applicant's 2006 felonious false statement on his SF 86 and his September 2005 negligent driving are too recent to favorably consider MC ¶ 32(a), *so much times has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that is it unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*. His lack of candor on his security clearance application, committed while on probation for another offense, raises serious doubts about his judgment and reliability. Applicant has shown some reform, in that he is remorseful for the September 2005 incident, is held in high regard by his two employers, and has provided volunteer service to his church and to a local transitional living center. He has only a few months left in his probation, and he may even be discharged early at his request so that he can pursue the job at the remote location (*See MC ¶ 32(d), there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*). However, doubts persist about Applicant's rehabilitation as he yet to demonstrate that his representations can be relied on.

## **Whole Person Analysis**

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<sup>2</sup>18 U.S.C. § 1001 provides in part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowing and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

“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)) “Each security clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy.” Directive ¶ 6.3. Applicant argues in his favor that he is not the person that he was when he committed the criminal acts alleged in the SOR. Immaturity and changed circumstances are relevant factors that must be considered in reaching a determination (¶ 2(a)(4) *the individual’s age and maturity at the time of the conduct*, ¶ 2(a)(6) *the presence or absence of rehabilitation and other permanent behavioral changes*). At work, Applicant has shown reliability and dedication for two different employers that reflect a maturity beyond his years. Yet, that same level of maturity has not been consistent when it comes to his off-duty behavior. In choosing to drive after drinking four to six beers, Applicant placed himself and others at risk. While it was not alleged by the government, he has a record of speeding, including a May 2006 offense within a couple of months of regaining his license. Concerns that he may place his personal interest ahead of his fiduciary obligations preclude me from finding that it is clearly consistent with the national interest to grant him access.

### **FORMAL FINDINGS**

Paragraph 1. Guideline G:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3. Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant

## **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