DATE: July 22, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-14687

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Catherine M. Engstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's episodic alcohol abuse led to three drunk driving offenses, including a September 1998 driving under the influence. He has mitigated the alcohol consumption concerns by maintaining abstinence since January 2001. Personal conduct and criminal conduct concerns persist, as Applicant repeatedly violated a state law prohibiting the unlicensed resale of tickets to sporting and entertainment events, including in September 1999 after he completed his security clearance application, and he has not been candid with the Government about his criminal record. Applicant did not disclose on his security clearance application his 1972 and 1994 drunk driving offenses or his April 1999 unlicensed resale of tickets. He falsified his initial subject interview by claiming no criminal offenses beyond the 1994 and 1998 drunk driving, and did not reveal the full extent of his unlicensed resale of tickets during a March 2000 interview. Clearance is denied.

STATEMENT OF CASE

On October 3, 2002, 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 alcohol consumption (Guideline G), criminal conduct (Guideline J), and personal conduct (Guideline E).

On October 17, 2002, Applicant responded to the SOR allegations and requested a decision based on the written record in lieu of a hearing. The Government submitted an undated File of Relevant Material (FORM), which was forwarded by letter dated February 25, 2003, to Applicant with instructions to submit additional information and/or any objections within thirty days of receipt. Applicant filed a response on March 24, 2003, submitting a copy of his criminal record history in the state where most of his criminal offenses were committed. Department Counsel had no objection to the documentation, and on April 18, 2003, the case was assigned to me for a decision.

FINDINGS OF FACT

The SOR alleges alcohol consumption, at times to intoxication, from the late 1980s to December 31, 2000, with drunk driving incidents in September 1998, August 1994, October 1973, and July 1972; criminal conduct based on his arrest and/or conviction of unlicensed resale of tickets in February 1984, July 1990, April 1999, and September 1999; and personal conduct because of deliberate falsification of his July 1999 security clearance application (SF 86) and October 1999 and March 2000 signed, sworn statements. In his Answer, Applicant admitted the 1994 and 1998 drunk driving convictions, but indicated the October 1973 charge related to his appeal (which was successful) of his conviction for the July 1972 offense. Applicant also admitted his involvement in the unlicensed resale of baseball tickets. In response to the allegations of deliberate falsification, Applicant expressed regret that he "was not entirely forthcoming" about the resale of tickets. After a thorough review and consideration of the evidence, I make the following findings of fact:

Applicant is a 51-year-old tester, employed by the same defense contractor since June 1977. He seeks a secret security clearance for his duties.

In July 1972, Applicant was charged with operating under the influence of liquor (OUIL) and operating to endanger (lives and safety). He pleaded not guilty, but was fined $100.00 for OUIL. Applicant appealed his conviction to superior court, and his conviction was overturned on appeal in October 1973.

During the late 1980s, Applicant consumed alcohol every weekend and sometimes during the week, to intoxication with some frequency. Circa 1991, he made an effort to reduce his consumption. From 1994 to 1998, he imbibed on average six beers over the course of an evening during the work week (except when he was on third shift) and again on weekends. Applicant was twice convicted of drunk driving during this period. After consuming five or six beers at his brother's home in August 1994, Applicant was pulled over for swerving. The officer detected a strong odor of alcohol on Applicant's breath and he administered field sobriety tests, which Applicant failed. Arrested for OUIL, operating a motor vehicle negligently so as to endanger, and failure to keep in marked lanes, Applicant refused to submit to a breathalyzer. In court in May 1995, Applicant pleaded guilty to OUIL and his case was continued without a finding for one year with conditions consisting of an alcohol program, $50.00 costs, and 45 days loss of license. The operating vehicle negligently charge was dismissed and he was adjudged responsible for failure to stay in marked lanes. In May 1996, the OUIL charge was dismissed at the request of probation.

In late September 1998, Applicant drove his car off the roadway while en route home from his brother's house, where he had consumed six or seven beers. Responding police found the car in the woods with Applicant pinned inside and an "extreme" odor of alcohol in the vehicle. Blood tests taken at the hospital confirmed his blood alcohol level was over the legal limit. Charged with DUI, Applicant was fined approximately $700.00, his driver's license was suspended for 90 days, and he was ordered to attend an alcohol awareness education course. Applicant completed the alcohol awareness course as required.

Following his September 1998 drunk driving offense, Applicant confined his beer to weekends only, in quantity of no more than four beers per occasion. He also refrained from driving a vehicle after drinking. Sometime after consuming 15 ounces of wine in late December 2000, Applicant resolved to cease all consumption of alcohol. As of mid-October 2002, Applicant had been abstinent from alcohol for 21 months and had no intent to drink alcohol in the future.

In February 1984, Applicant was arrested for unlicensed resale of tickets, but the charge was dismissed. Applicant considered the law to be unfair, and on three subsequent occasions, he was caught attempting to resell tickets to a professional baseball game. On four occasions since 1984, Applicant has been charged with unlicensed resale of tickets to a professional baseball game:

- In mid-July 1990, Applicant was charged with unlicensed resale of tickets and occupying a public way to sell tickets without a permit (both misdemeanors), and with hawking and peddling (violation of municipal ordinance). The charges were dismissed on payment of $50.00 costs for unlicensed resale.
  to an undercover officer, he was arrested for unlicensed resale of tickets and occupying a public space without a permit. Applicant was found to be holding 100 season tickets he had just purchased that had not been exposed for sale, so he was allowed to retain custody of those tickets. The charges were dismissed in court on payment of

$150.00 costs for each offense. and occupying street for resale of tickets were continued without a finding for one year, on payment of $400.00 in costs. During that year, Applicant was on unsupervised probation. In October 2000, the charges were dismissed.

A couple of months before his September 1999 arrest, Applicant on July 26, 1999, executed a security clearance application (SF 86) in conjunction with his employer's request that he be granted a secret security clearance for his duties. In response to question 24 concerning any alcohol-related offenses or counseling, Applicant listed only his September 1998 OUIL. He responded negatively to whether he had been arrested for or charged with any other offense in the last seven years (question 26) and to whether his use of alcoholic beverages had ever resulted in alcohol related treatment or counseling (question 30).

On October 25, 1999, Applicant was interviewed by a Defense Security Service (DSS) special agent about his adverse contacts with police. Applicant discussed the 1994 and 1998 drunk driving offenses, as well as his drinking pattern. He admitted to abusing alcohol during the late 1980s, but described a "slow down" in 1991 and current drinking on weekends, usually limited to four beers with no driving after drinking. Applicant indicated he had not received any counseling for alcohol apart from the education course following his September 1998 DUI. Applicant denied any adverse contacts with police beyond the 1994 and 1998 drunk driving offenses. Applicant executed a sworn statement containing this misrepresentation.

On March 21, 2000, Applicant was reinterviewed by the agent, this time about his previously undisclosed unlicensed resale of tickets offenses. As reflected in a sworn statement taken during this interview, Applicant discussed only his arrests in April 1999 and in September 1999. Applicant claimed that on both occasions, he had an extra ticket for that particular game, but was making an effort to sell that extra ticket only on the April 1999 occasion. Applicant acknowledged he was fined for both offenses, and the convictions were set aside. Applicant maintained he had no intent to engage in this conduct in the future, as "these tend to be humiliating experiences." Applicant attributed his failure to discuss these offenses in his prior interview with DSS as they were to him "like parking tickets." Applicant denied "any other problems or adverse contacts with the police."

On October 3, 2002, DOHA issued an SOR to Applicant alleging, in part, deliberate falsification of his security clearance application for failure to list his August 1994 DUI and the July 1972 and October 1973 OUIL charges, the 1984, 1990 and April 1999 unlicensed resale of tickets charges or the alcohol counseling mandated by the court after each of the 1994 and 1998 drunk driving offenses. DOHA also alleged Applicant deliberately misrepresented his criminal record history in sworn statements provided to the DSS agent, by falsely denying in October 1999 that he had no adverse contact with police apart from the 1994 and 1998 drunk driving, and had not received any counseling apart from the educational course he was required to attend after his most recent DUI, and by falsely denying in March 2000 that he had no other problems with police and not reporting the 1990 and 1984 unlicensed resale of tickets. In his Answer dated October 17, 2002, Applicant expressed his regret at not being entirely forthcoming about the resale of tickets.

Applicant is found to have deliberately misrepresented his arrest record when he completed his July 1999 SF 86, by failing to disclose the April 1994 DUI and July 1972 OUIL in response to question 24 (alcohol/drug offenses), and the April 1999 unlicensed ticket resale in response to question 26 (other offenses). The evidence leads me to find he also intentionally concealed from the Government during his October 1999 interview that he had been criminally charged with unlicensed resale of tickets, and he misrepresented the extent of his criminal unlicensed resale when interviewed in March 2000, by falsely claiming no adverse involvement prior to 1999. The evidence is insufficient to support a finding of deliberate concealment by Applicant, either when completing his SF 86 or during his October 1999 interview, of any alcohol-related counseling or treatment. Applicant admits he attended only a one-month educational course after his September 1999 DUI, which occurred after he completed his SF 86. Citing Item 10, Department Counsel submits in the FORM that Applicant was required to attend a 14-day program following the April 1999 drunk driving incident. It is not clear that Applicant ever received counseling or treatment, as opposed to attending educational sessions designed to educate about the dangers of drinking and driving.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

GUIDELINE G

Alcohol Consumption

The Concern: 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.

Conditions that could raise a security concern and may be disqualifying include:

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 (E2.A7.1.2.1.)

Conditions that could mitigate security concerns include:

Positive changes in behavior supportive of sobriety (E2.A7.1.3.3.)

GUIDELINE J

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

Conditions that could raise a security concern and may be disqualifying include:

a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged

b. A single serious crime or multiple lesser offenses

Conditions that could mitigate security concerns include:

None

GUIDELINE E

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

The deliberate omission, concealment, or falsification of relevant and material 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 (E2.A5.1.2.2.)

Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination (E2.A5.1.2.3.)

Conditions that could mitigate security concerns include:

None

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines G, J, and E:

Applicant's August 1994 and September 1998 drunk driving offenses raise significant doubts for his security suitability.[(2)] Such irresponsible behavior reflects a disregard for the law as well as public health and safety.

Furthermore, the abuse of a mood-altering substance presents an unacceptable risk of inadvertent disclosure. Under Guideline G, alcohol consumption, disqualifying condition DC E2.A7.1.2.1. (alcohol-related incidents away from work) applies. In mitigation, Applicant has maintained complete abstinence from alcohol since late December 2000, as he realizes he cannot risk recurrence of alcohol-related legal difficulties. Before the issuance of the SOR, Applicant executed interrogatories for DOHA in which he indicated he stopped drinking, and there is no evidence to indicate otherwise. This positive change supportive of sobriety (*see* mitigating condition E2.A7.1.3.3) warrants favorable findings with respect to subparagraphs 1.a., 1.b., 1.c., 1.d. and 1.e. of the SOR.

While Applicant has similarly forsworn any future involvement in the unlicensed resale of tickets, the recency of his criminal conduct and the absence of any meaningful acknowledgment of wrongdoing preclude me from finding that he successfully rehabilitated. As of at least February 1984, the date of his first arrest, Applicant knew that resale of tickets was against the law. The fact that he considered the law unfair or that other states did not prohibit similar conduct does not justify his subsequent violations. In July 1990 he was charged with trying to sell three tickets. In April 1999, he was caught after he told an undercover policeman he had several tickets to sell. Applicant continued this criminal behavior after he completed his SF 86 in July 1999, as that September he was arrested for attempting to sell six grandstand seats to an undercover policeman. Disqualifying conditions a. allegations or admissions of criminal conduct and b. a single serious crime or multiple lesser offenses under guideline J must be considered in this case.

When interviewed by the DSS agent in March 2000, Applicant minimized the extent of his criminal conduct, claiming he had only one ticket to sell in April 1999 and in September 1999, and denying he was even trying to sell the ticket on the more recent occasion. Reform of even such minor criminal conduct requires some expression of remorse, and Applicant continues to regard the law against ticketing as unfair ("it has taken me some time to accept the unfairness of this law"). Applicant's repeated disregard for the law creates significant doubt as to whether he can be counted on to adhere to security practices and procedures which he finds personally disagreeable or inconvenient. Subparagraphs 2.a., 2.b., 2.c., and 2.d. are resolved against him.

Furthermore, on his July 1999 security clearance application, Applicant was required to report all alcohol-related charges as well as any other criminal arrests within the past seven years. Applicant disclosed only the September 1998 DUI, omitting the earlier August 1994 and July 1972 offenses, as well as his very recent April 1999 arrest for unlicensed resale of ticket. There is no evidence Applicant failed to remember any of his criminal arrests. When interviewed in October 1999 by the DSS about his criminal record, Applicant not only discussed only his 1994 and 1998 drunk driving offenses, but he also falsely denied any other adverse contacts with police. His lack of candor on his SF 86 and during his initial interview with a DSS agent raise significant concerns for his judgment, reliability, and trustworthiness (*see* DC E2.A5.1.2.2. the deliberate omission of relevant and material facts from a personnel security questionnaire and DC E2.A5.1.2.3. deliberately providing false or misleading information concerning relevant and material matters to an investigator).

The personal conduct concerns caused by his record of intentional false statements are not mitigated under the Directive's adjudicative guidelines. When provided the opportunity to correct the record, Applicant in a March 2000 interview disclosed only the April 1999 and September 1999 unlicensed resale offenses, and he was not completely candid regarding his behavior on either of those occasions. Police records included in the FORM indicate Applicant had offered multiple tickets for resale while he claimed he had only an extra ticket each time. Applicant also did not reveal his prior criminal arrests for the same charge in July 1990 and February 1984. Although Applicant now expresses regret for not being entirely forthcoming about this criminal behavior, it is too soon to conclude that his representations can be relied on. Adverse findings are warranted as to subparagraphs 3.a., 3.c., 3.d., and 3.f. of the SOR. Subparagraphs 3.b. and 3.e. are concluded in Applicant's favor, as the Government failed to prove he received the alcohol treatment he is alleged to have concealed.

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 G: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: For the Applicant

Subparagraph 3.c.: Against the Applicant

Subparagraph 3.d.: Against the Applicant

Subparagraph 3.e.: For the Applicant

Subparagraph 3.f.: 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.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued pursuant to 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. Although Applicant was also arrested and charged with OUIL in July 1972, the incident is too remote in time and the evidence of culpability too tenuous for it to have current security significance. Applicant was found not guilty of the offense on appeal and there is no evidence proving Applicant was legally intoxicated.