DATE: December 19, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-24013

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant abused alcohol in the mid-1990s with drunk driving incidents in 1992, April 1993, and May 1996. Despite two weeks of inpatient substance abuse treatment in 1995, he assaulted a female cohabitant while drunk in May 1996, and was subsequently convicted of assault in the third degree as well as driving under the influence (DUI). Applicant has moderated his alcohol consumption and he reported his most recent DUI on his March 2001 security clearance application, but did not disclose his 1992 or 1993 drunk driving offenses, his 1996 assault or his 1995 substance abuse treatment. He failed to mitigate the personal conduct and criminal conduct concerns engendered by his deliberate falsifications. Clearance is denied.

STATEMENT OF THE CASE

On February 15, 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 personal conduct (guideline E) and criminal conduct (Guideline J).

Applicant responded to the SOR on February 25, 2005, and requested a hearing before a DOHA administrative judge. The case was assigned to me on July 18, 2005, and on July 19, 2005, I scheduled a hearing for August 5, 2005. At the hearing, eight government exhibits were admitted, Ex. 5 in part.(2) Applicant testified, as reflected in a transcript received on August 22, 2005.

FINDINGS OF FACT

The government alleges under Guideline E, personal conduct, that Applicant deliberately falsified his March 2001 security clearance application (SF 86) by failing to disclose his 1992 and 1993 driving under the influence of alcohol

offenses, his substance abuse treatment in 1995, and his May 1996 third degree assault on a female cohabitant. The drunk driving and criminal assault, including two arrests for domestic violence prior to May 1996, were also alleged under Guideline J, criminal conduct. Applicant admitted the driving under the influence and assaults, but denied any deliberate falsification of his SF 86. Concerning his substance abuse treatment, Applicant indicated he was not drinking at the time of admission but went into treatment "to get away from a bad relationship with the girl." 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 47-year-old painter supervisor who has been employed by the same defense contractor since March 1981, with the exception of a brief six-month layoff from June 1996 to January 1997. Applicant has held a secret-level security clearance since October 2000, upgraded from a confidential security clearance he possessed since at least August 1990.

Applicant married his spouse in October 1985, and they divorced in February 1992. He has four children, who were born in June 1981, December 1985, August 1987, and June 1989. Due to the stress of the divorce, Applicant consumed alcohol on occasion to excess. Sometime in 1992, he was arrested for operating an automobile under the influence of alcohol (DUI). A first time offender, he was placed in a diversion program where he attended alcohol education classes. Applicant assumed that after completion of the program, the offense was eliminated from his record.

In April 1993, Applicant was stopped for driving erratically and speeding. The officer detected signs of alcohol on Applicant (breath smelled of alcohol, speech was slurred) and administered field sobriety tests, which Applicant failed. He was arrested and charged with DUI with a blood alcohol content of .198% (second test .176%). In January 1994, he pleaded guilty and was sentenced to six months in jail, all but 48 hours suspended, a $500 fine, and one year probation.

In about late 1994 or early 1995, Applicant began a cohabitant relationship with a female. He was arrested three times thereafter on domestic violence charges, including in May 1996. In June 1995, he admitted himself to a substance abuse treatment program where he received counseling and attended Alcoholics Anonymous (AA) meetings at night.[(3)]

His primary motivation was to get away from her ("I went in there to get away from the bad relationship. That was the only reason I went in there, and they said they were going to refuse me because my alcohol levels in my system was not nowhere enough for them to admit me. But they did because of the job, they paid for it." Tr. 35), but he also thought at the time that he might have a problem with alcohol. (Ex. 7) He concluded after two weeks that his drinking was not a problem and was clinically discharged, apparently at his request. (*See* Exs. 7 and 8)

In mid-May 1996, Applicant and the female cohabitant got into a verbal altercation. Applicant was intoxicated at the time, and it escalated to physical assault where Applicant threw her against the wall. Applicant left the premises, and she called the police who observed him operating his vehicle. Applicant failed field sobriety tests and was arrested for criminal attempt to commit sexual assault in a cohabiting relationship, assault in the third degree, and DUI. His blood alcohol content tested at .228% initially and then .208%. He was found guilty of assault in the third degree, a class A misdemeanor, and was sentenced to one year in jail (suspended), two years probation, and completion of an alcohol evaluation. Applicant pleaded guilty to the DUI, and was sentenced on that charge to one year in jail, suspended after 120 days served, and completion of substance abuse treatment. He was also required to make a $1,000 donation to Mother's Against Drunk Driving. Applicant took a voluntary layoff from work when he could not report due to his incarceration.

Applicant moderated his consumption of alcohol after his last arrest in May 1996 to a couple (up to two or three) beers or drinks usually at home on occasional weekends, no more than a six-pack a month. Concerned about keeping his job, he has not been arrested for any subsequent alcohol-related incidents or other criminal activity. He has been engaged for about a year to a woman he met four years ago. She does not consume alcohol excessively.

In January 1997, Applicant returned to work as a painter for the defense contractor. In October 2000, he was granted a secret-level security clearance for his duties. On March 8, 2001, Applicant executed a security clearance application (SF 86). In response to inquiry into any alcohol/drug offenses (question 24), he disclosed only his latest DUI, mistakenly dating it as January 1995. He answered "No" to any felony charges (question 21), even though he had been charged with

attempt to commit sexual assault in a cohabiting relationship in May 1996,[(4)] and did not list in response to other offenses in the last seven years (question 26) his conviction of the lesser misdemeanor assault in the third degree for his conduct on that occasion. Nor did he disclose his substance abuse treatment in 1995 in answer to whether his use of alcoholic beverages in the last 7 years had resulted in any alcohol-related treatment or counseling for alcohol abuse or alcoholism (question 30).

On May 30, 2003, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his drunk driving offenses, his drinking habits since May 1996, and his failure to report all his offenses and his substance abuse treatment on his SF 86. Applicant stated with respect to the omissions from his SF 86:

I do not know why I only listed the one DUI, instead of the three DUIs with which I was charged. I also answered no to the question concerning felony arrests as I was not aware that the original charge in 1996 was a felony until my interview with DSS. I did not list the Assault arrest elsewhere as I thought it had not been prosecuted. I did no [sic] think I had to list it as it was not prosecuted. I did not purposely fail to list this information on my security questionnaire in order to hide it from anyone. I completed the security questionnaire to the best of my ability. I did not list my stay at (name omitted) as it was voluntary and not ordered by a court. I also thought that the reason I admitted myself was more to get away from a bad relationship than any substance abuse problem.

Applicant did not deny the DUI offenses, but claimed to have no recall of assaulting his female cohabitant "in any way," on the occasion of his May 1996 arrest for criminal assault. (Ex. 7)

The police, with no apparent motive to misrepresent, reported the following admissions by Applicant following his arrest:

[Applicant] stated that he did attempt to have sexual intercourse with [the victim] but stated that he did not try to force her into it. [Applicant] stated he and [the victim] were kissing and touching each other and then [the victim] decided that she wanted to stop. [Applicant] stated that [the victim] always sexually teases him and that he was tired of being teased so he got mad and threw [the victim] into the living room wall. [Applicant] stated that [the victim] then hit him in the head with a piece of the broken dresser. (Ex. 5)

At his hearing, Applicant testified with respect to his failure to disclose his 1992 and 1993 DUI offenses on his SF 86 that he believed they were "out of the realm," *i.e.*, beyond the date where they were required to be listed. (Tr. 37) He later added that he thought the 1992 offense was earlier and he believed that after ten years, the offense was wiped off his record. (Tr. 47) As for his second DUI, which would have been within the ten years, Applicant testified he "misjudged that one completely." (Tr. 47-48) Applicant acknowledged knowing an assault charge had been filed against him in addition to the DUI, but he believed it was "nullied" since the victim did not show in court. (Tr. 40, 46) He also admitted he had to follow the alcohol treatment program in 1995, which included mandatory AA meetings, but continued to maintain that the focus was "domestic relationship issues." (Tr. 43)

In response to the SOR, Applicant reiterated his denials of any intentional falsification, citing his error in dates of the DUIs, his failure to know he had been convicted of assault following the May 1996 incident, and the fact that he entered the treatment facility in 1995 to get away from a bad relationship with the female with whom he was cohabiting. After considering all the facts and circumstances, I conclude Applicant did not deliberately falsify question 21 of the SF 86 by failing to list the felony charge of attempt to commit sexual assault. The government did not prove that Applicant knew he had been charged with a felony offense, and did not allege falsification of that question. However, Applicant was aware that an assault charge had been filed against him, as the prosecutor advised him of that fact. His explanation for omitting that offense from question 26, he thought the charge had been not prosecuted so therefore was not required to be reported, is rejected as not credible. The court abstract of record reflects a sentence of a $1,000 fine, one year in jail (120 days served) and two years probation for the DUI and one year in jail and two years probation for third degree assault (apparently to run concurrent with the term for the DUI). (Ex. 5) Even if Applicant had mistakenly assumed the assault had been nolle prossed, question 26 pertains not only to convictions but also to arrests and charges, and unambiguously requires the reporting of even information that has been sealed or stricken from one's record.

As for Applicant's failure to list his 1992 and 1993 DUIs in response to question 24 (any alcohol/drug offenses), even

assuming Applicant lacks accurate recollection as to dates generally and the 1996 DUI in particular, question 24 does not have a seven or even a ten-year time frame. Applicant's denial of any intentional omission as to those offenses is likewise not credible. It is noted that even with respect to the 1996 DUI that he listed, he indicated as to action taken "LOSS OF LICENSE ONE YEAR PAID DONATION $1,000 to MADD." His failure to disclose that he served 120 days incarceration for the offense undermines his credibility.

Applicant has provided two explanations for his omission of his alcohol treatment from his SF 86: it was voluntary and not required by any court, and he admitted himself to get away from his female cohabitant at the time. When interviewed by the DSS agent in May 2003, Applicant admitted that while he entered treatment to avoid his domestic situation, he also thought at the time that he might have had an alcohol problem. Despite his claim that the treatment focused on domestic abuse, he admits he had to follow the program while in the facility, which included AA and alcohol counseling. Had Applicant no concerns about his drinking, it is difficult to believe he would have entered a substance abuse treatment program. Nothing in question 30 limits its applicability to only court-ordered treatment.

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:

Personal Conduct. 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. (¶ E2.A5.1.1.)

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

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, including those set forth in ¶ E2.2.1. of the Directive, and having assessed the credibility of the Applicant, I conclude the government established its case with respect to Guideline E, personal conduct, and Guideline J, criminal conduct. Applicant has three DUI convictions and a third degree criminal assault conviction, which fall within Guideline J, disqualifying conditions (DC) ¶ E2.A10.1.2.1. *Allegations or admissions 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*.

There is no evidence of any alcohol or assault-related criminal conduct by Applicant since 1996 (*see* ¶ E2.A10.1.3.1. *The criminal behavior was not recent*). However, his criminal conduct cannot be regarded as remote in time, given his intentional misrepresentations of material facts to the government--behavior that raises personal conduct as well as

criminal conduct concerns. Under Guideline E, DC ¶ E2.A5.1.2.2. *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*, applies. Applicant deliberately omitted from his SF 86 his 1992 and 1993 DUI offenses, his 1996 criminal assault, and his alcohol-related treatment in 1995. Furthermore, he was not completely candid about his sentence for the 1996 DUI. By knowingly falsifying his SF 86, Applicant violated Title 18, Section 1001 of the United States Code, which provides:

(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, knowingly 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.

In mitigation of his drunk driving and assault, Applicant has moderated his alcohol-consumption since his last DUI and is involved in a stable relationship with a woman who does not drink excessively. The risk of recurrence of the alcohol-related criminal conduct or the assaultive behavior is regarded as unlikely (*see* C ¶ E2.A10.1.3.4. *The factors leading to the violation are not likely to recur* and MC ¶ E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*), and favorable findings are returned as to SOR ¶ 2.a. (as to the underlying criminal acts) and ¶ 2.b. (the record is silent other than that Applicant was arrested for domestic violence as alleged). Similar reform is not found with respect to his materially false statements to the government, however.

The government must be assured that those granted access can be counted on to fulfill their obligations of full candor. Applicant did not deny the DUI offenses when he was interviewed by a DSS agent in May 2003, but claimed to have no recall of assaulting his female cohabitant "in any way," on the occasion of his ay 1996 arrest for criminal assault. Yet, he had admitted to the police, who had no apparent motive to misrepresent, that he had thrown the victim into the living room wall.

He also denied to the agent that he had intentionally falsified his SF 86, as noted above. He continues to deny any deliberate omission of his arrest record or alcohol treatment from his SF 86. None of the mitigating conditions under personal conduct or criminal conduct apply to his knowing and willful concealment of information about his criminal record history and his substance abuse treatment. Accordingly, SOR ¶¶ 1.a., 1.b., 1.c., and 2.c. are resolved against him.

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 E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For 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. In accord with Section 4 of Executive Order 10865, I sustained Applicant's objection to the victim's statement of complaint.

3. The government presented only one document from the treatment facility, which states in relevant part: "[Applicant] was admitted to (name omitted) for the treatment of substance abuse on June 12, 1995 and was clinically discharged on June 27, 1995." (Ex. 8) The available record contains no diagnosis, no course of treatment apart from Applicant's general testimony, and no prognosis.

4. Sexual assault in a spousal or cohabiting relationship is a class B felony under pertinent state law. Conn. Gen. Stat. § 53a-70b. In that same jurisdiction, attempt and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or is an object of the conspiracy, except that an attempt or conspiracy to commit a class A felony is a class B felony. Conn. Gen. Stat. § 53a-51.