DATE: February 21, 2007

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-16940

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has been arrested six times for alcohol-related incidents since 1987, including for DUI in October 2005. Alcohol consumption and criminal conduct concerns persist because he has made little change in his drinking behavior, and has violated the law by driving after his license was suspended following the latest DUI. Personal conduct concerns also exist because he married his third wife in December 1998 before he was divorced from his second wife. 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 June 7, 2005, 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 adjudicative guidelines. Applicant answered the SOR on July 6, 2005, and elected to have a hearing before an administrative judge. The case was assigned to me on March 14, 2006.

The government moved to amend the SOR to add ¶ 3.c under guideline J alleging that Applicant committed a felony violation of federal law under 18 U.S.C. § 1001 by failing to disclose on his January 20, 2004 security clearance application arrests for driving under the influence of alcohol (DUI) in November 1987 and November 1992, and for drunk in public in May 1988. On May 8, 2006, the SOR was amended as requested by the government and Applicant was given until May 23, 2006, to file a response to ¶ 3.c of the SOR as amended. On May 21, 2006, Applicant entered a denial to the new allegation.

On June 30, 2006, I scheduled the hearing for August 3, 2006.At the hearing held as scheduled , nine government exhibits (Ex. 1-9) and nine Applicant exhibits (Ex. A-I) were entered into the record,[(1)] and testimony was taken from Applicant, as reflected in a transcript (Tr.) received on August 25, 2006. Pursuant to ¶ E3.1.17 of the Directive, the SOR

was amended on the government's motion and with no objection from Applicant, adding two new allegations (¶ 1.g. under Guideline G and ¶ 3.d. under Guideline J), based on Applicant's hearing testimony.

1.g. You were arrested in October 2005 in [city and state omitted] and charged with driving under the influence. You were convicted of this charge in January 2006 following a trial. Your driver's license was suspended for a period of nine months, subject to being reinstated after 90 days, provided you satisfied certain conditions. As of August 3, 2006, you have not satisfied those conditions and your license remains suspended.

3.d. You have driven in the state of [state omitted] while your license has been suspended on several occasions, including the morning of August 3, 2006.

Also during the hearing, Applicant offered one additional exhibit (Ex. J), an unsigned electronic mail correspondence with an attached document "Motion for Contempt of Court." Proposed exhibit J was rejected on the government's hearsay objection. The record was held open until August 18, 2006, for Applicant to submit a notarized statement from his former spouse concerning the matters addressed in the electronic message and attached court record. Applicant timely submitted as Exhibit K a notarized statement from his former spouse dated August 14, 2006, in which she attests Applicant paid his child support and attorney fees and court costs.[(2)] The government was given until September 1, 2006, to respond. On August 23, 2006, Department Counsel commented as to some perceived shortcomings in proposed Exhibit K but did not object to its admission. Accordingly, Exhibit K was marked and entered into the record.

FINDINGS OF FACT

In the SOR as amended, DOHA alleged under guideline G that Applicant consumed alcohol at times to excess and to intoxication from about 1982 to at least June 2003 (¶ 1.a); was convicted of a ay 1988 drunk in public charge (¶ 1.c), DUI offenses committed in November 1988 (¶ 1.d) and October 2005 (¶ 1.g), and reckless driving amended from DUI in November 2001 (¶ 1.f); and was arrested for DUI (no disposition noted) on two more occasions in November 1987 (¶ 1.b) and November 1992 (¶ 1.e). Under guideline E, DOHA alleges that Applicant deliberately falsified his January 2004 security clearance application in disclosing only the November 1988 DUI in response to question 24 concerning any alcohol or drug offenses (¶ 2.a); that he was terminated from a job in July 2002 for failure to meet probationary standards after receiving a written reprimand for repeated tardiness and claiming overtime without prior government approval (¶ 2.b); and that he got married in December 1998 while he was still legally married to another woman (¶ 2.c). The alcohol-related arrests were cross-referenced under Guideline J (¶ 3.b). DOHA also alleges under criminal conduct that Applicant had been charged but found not guilty of August 1982 felony aggravated assault and misdemeanor sexual assault (¶ 3.a); that he committed a felony violation of 18 U.S.C. § 1001 by not fully disclosing his alcohol-related arrests on his SF 86 (¶ 3.c); and that on several occasions he operated a motor vehicle while his license was suspended, including on August 3, 2006 (¶ 3.d).

Applicant answered the SOR before the amendments alleging violation of 18 U.S.C. § 1001, his arrest and conviction of the October 2005 DUI charge, and his repeated operation of a motor vehicle while his license has been suspended, including on August 3, 2006. In his answer to the allegations that were before him on July 6, 2005, Applicant admitted that he drank alcohol to excess on the occasions of his arrests on alcohol charges, but cited marital problems and a job layoff as mitigating circumstances. Applicant denied falsifying material facts when he completed his SF 86 while acknowledging that he had "neglected to fill out the form to the detail stipulated." He averred that more than one government agent had told him it was not necessary to reiterate information that already in his file. Applicant admitted he had been terminated from a prior job in July 2002 for failure to perform as an engineer but contended it was without merit as evidenced by the statements of coworkers and a letter of appreciation from the government. Applicant admitted he was not divorced from his second wife when he married his third wife in December 1998, but he had relied on his second wife's representation that their divorce was final in August 1998. Applicant cited his acquittal of the sexual assault charges filed against him in 1982 as mitigating of any criminal conduct concern raised by the charges. Applicant contested the government's inference that he was a criminal because of the alcohol-related charges, as he did not intend to commit the acts.

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

Applicant is an electrical engineer who married his first wife in September 1976 when he was only 18. They had a son in April 1977, four months after Applicant entered on active duty in the United States Air Force. He performed well, graduating with honors from basic training school and from bomb navigation system mechanic training. In August 1978, he was given an honorable discharge into the reserves. He matriculated that same month into the state university pursuing a bachelor's degree in electrical engineering. Applicant and his first spouse divorced in February 1979, and he married his second wife that September. He and his second wife had a son in December 1981. In March 1982, he was honorably discharged from the reserves.

During the summer preceding his senior year in college, Applicant was questioned on August 30, 1982, about an aggravated assault that occurred on August 23, 1982, after an investigation revealed his truck had been parked in the vicinity of the victim's residence on the day of the assault. Based on a verbal statement by Applicant that he had been in the home where the assault took place (albeit not specific as to the date in question), on victim identification, and on his possession in his home of a pistol and glass tape of the type used in the assault, the state charged Applicant in October 1982 with felony aggravated assault and misdemeanor sexual assault. Applicant was found not guilty of both charges at a jury trial on December 14, 1984.

In about 1982, Applicant began drinking twelve beers per week, usually on the weekends. He changed his drinking behavior little over the years, despite six alcohol-related arrests and spousal complaints about his drinking, but his drinking did not negatively affect his work. In November 1987, Applicant went out drinking with his coworkers after work. He lost count of the amount of beer consumed ("failed to pay attention to consuming no more than the acceptable limits") as he was preoccupied with the problems in his marriage. He was arrested for DUI en route home but later released by the police.

In mid-May 1988, Applicant drank eight to ten beers at a local bar. He elected not to drive home, and was found by the police asleep in the driver's seat of his vehicle. The police determined Applicant was unable to exercise due care for his own safety and that of others based on signs of alcohol abuse (watery and bloodshot eyes, slurred speech, strong odor of alcohol), and arrested him for drunk in public. Applicant pleaded no contest and was fined about $100.

In November 1988, Applicant was arrested for DUI after drinking at a local establishment with friends. He was found guilty and was fined $840, placed on three years unsupervised probation, and ordered to attend 12 AA meetings.

At the time of his arrests in 1987 and 1988, Applicant held a secret-level security clearance as a member of a rapid evaluation and corrective team of engineers for a defense contractor. Applicant's work was recognized by his employer by outstanding achievement awards in January 1988 and June 1989, and by the U.S. Air Force in a May 1989 letter of appreciation. Applicant did not report his arrests to his employer. He claims he was not aware of any requirement to do so.

In Fall 1992, Applicant was laid off from his defense contractor job. Self-employed, he went out drinking with some friends in November 1992 while his wife stayed at home with their son and he knew she did not approve of his drinking. Applicant again failed to pay attention to the amount consumed and was arrested for DUI en route home. The police released him the following morning. Neither the police nor court records were made part of the record.

Applicant married his third wife in December 1998. He was no longer living with his second wife but was not yet divorced. Applicant claims to have been told by his second wife that they were divorced in August 1998, and that he was served divorce papers during a trip to Florida to see their son. Court records confirm his second wife filed for divorce in July 1999. On October 12, 1999, Applicant entered into a property settlement agreement with his second wife that was filed with the court in mid-November 1999. Applicant agreed to pay $500 per month in child support for their son until their son graduated from high school, provided their son was no more than 19 and unmarried. Applicant and his second wife were divorced on November 15, 1999. His first child support payment was due November 26, 1999. He was also ordered to pay his ex-wife's attorney's fees of $1,774 within 60 days. On May 16, 2000, Applicant's ex-wife moved to find Applicant in contempt as he was in arrears $2,500 in his child support obligation and had not paid her attorney's fees. Applicant paid the monies and the matter was dropped.[(3)]

From October 1996 to July 2000, Applicant worked for a defense contractor as an engineering specialist. He was

granted a secret-level security clearance for his duties in March 1997. In July 2000, he started a new job as a senior engineer with another defense firm. He was laid off in February 2001 when another company took over the project he was working on. Applicant collected unemployment for a couple of months until April 2001 when he started with yet another defense contractor. For several months, Applicant was a crew member on a project that required overnight stay three nights per week. On October 4, 2001, the project lead technician complained to Applicant's supervisor that the entire team was late to work because the lead technician had to wake Applicant in the mornings. Although Applicant displayed technical proficiency on the job and related well in team situations, his probationary period was extended for 90 days in mid-October 2001 because of chronic tardiness and absenteeism. On a couple of occasions, his tardiness/absenteeism was related to drinking.

On November 10, 2001, Applicant drank eight to ten beers at a casino. While en route to a friend's house to "sleep it off," Applicant was caught running a stop sign and crossing the center line. He told the police he had consumed two beers, but he failed field sobriety tests and a blood serum test showed a .27% blood alcohol content. Charged with DUI, Applicant pleaded guilty in May 2002 to a negotiated charge of reckless driving, and was fined $1,000, and ordered to attend a DUI course and victim impact panel. The DUI course he attended consisted of two sessions.

In February 2002, Applicant was divorced from his third wife. Around that same time, Applicant's employer merged with another company to form a new firm. Applicant found himself again on probation under the same supervisor. On June 10, 2002, Applicant was issued a written reprimand by his supervisor for repeated tardiness, for choosing to drive himself and a coworker assigned night testing at the customer site long distances each day in April 2002 to attend a scheduled week-long seminar rather than remain at the customer site, for claiming excessive overtime without prior government approval or knowledge since February 1, 2002, and for not listing the seminar hours on his time sheet for performing duties. Applicant was informed that if satisfactory improvement was not made, he would be terminated before the end of his probationary period. Applicant responded to the reprimand, citing family difficulties for the tardiness and mission requirements to justify his late arrival at the seminar and claiming of overtime hours, which he maintained had been authorized by the government. He attributed his failure to properly claim training on his time sheet to the lack of supervisory guidance as to the proper charge number, and challenged his supervisor's assessment of his engineering abilities. A technologist supported Applicant's on-call status during the week of the seminar so that he could drive them to the seminar, and that overtime had been approved for the time driving to and from the test site. In July 2002, Applicant was terminated from the job for performance issues, although the U.S. Air Force had issued a letter of appreciation to the range director in May 2002, commenting favorably on Applicant's "in-depth knowledge of radar system capabilities and extensive test execution experience . . . " without which the ground test team would have ben unable to fully accomplish their mission.

Applicant collected unemployment until September 2002 when he started a new job as a senior engineer with another defense contractor. He was granted a secret clearance for his duties in mid-September. On November 25, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS).[(4)] Concerning his use of intoxicants, Applicant admitted he had consumed alcohol to excess on his arrests in May 1988 for drunk in public, and in November 1987, November 1988, and November 2001 for DUI. He described his drinking history as an average of 12 beers per week since 1982, which he did not consider abusive. As for his recent termination from his previous job, Applicant attributed it to a personality conflict with his supervisor.

On June 5, 2003, Applicant was reinterviewed by the same agent concerning the reasons for his termination from employment in July 2002. While he acknowledged that coworkers had claimed to have smelled alcohol on his breath at work, Applicant denied reporting to work or ever being at work under the influence of alcohol. He admitted alcohol had contributed to his attendance/tardiness, but "on no more than two occasions" between July 2001 and July 2002. He indicated his drinking remained the same (no more than 12 beers per week).

Applicant was let go from his job at the end of his probation in June 2003, as he and the company agreed it would be best if he found another job. During his nine months at the company, he failed to attend a scheduled meeting on one occasion.

In late August 2003, Applicant married his current spouse. In November 2003, Applicant was hired by his current employer, and his secret clearance was reinstated. Informed by his former employer that the government wanted an

updated security clearance application, Applicant completed an initial electronic version of the standard form (SF 86) late in the evening on January 18, 2004. He listed his three former spouses on his application, but indicated that he had divorced his second wife in December 1998, the same month he married his third wife. Concerning his arrest record, Applicant listed the 1982 assault charge (albeit not noting its aggravated nature) in response to any felony offenses, the November 1988 DUI in answer to any alcohol/drug offenses, and the November 2001 DUI in response to other offenses in the last seven years as he had been convicted of reckless driving in that instance. He disclosed he had been fired from a job in July 2002 because of a personality conflict with his supervisor who refused to acknowledge his professional credentials.

On January 19, 2004, Applicant generated another SF 86, incorporating some minor changes with respect to the dates of his employment in 2002 and to properly identify the familial relationship with his brothers. The arrest record information remained as reported on the version he completed the previous evening. Applicant transmitted this form, signed January 20, 2004, to the government.

When questioned at his hearing about the erroneous date of his second divorce as it had not been final until November 1999, Applicant responded, "that's what I thought it was." He subsequently testified that he did not know the date of it so just indicated that he was divorced and remarried in December 1998. (Tr. 95) He later admitted that when he prepared his January 2004 SF 86, he was not confused about his divorce date. (Tr. 96) Although he testified he had divulged to the government back in 2001 that he married his third wife before his second divorce was final, he did not present the security clearance application on which he claimed to have disclosed the situation. The evidence before me permits a likely inference that Applicant acted to conceal from the government that he had married his third wife before he was divorced from his second wife. Concerning his omission from his SF 86 of the November 1987 and November 1992 drunk driving and May 1988 drunk in public arrests, Applicant indicated in his answer to the SOR:

Granted I neglected to fill out the form to the detail stipulated. However, I believe that this oversight is mitigated by the fact that under oath I signed a statement, generated by an Agent of the US Government, pertaining to these incidents. Furthermore, I had more than one Government Agent tell me that it is not necessary to reiterate information that is already in my file.

At his hearing, he presented as Exhibit A the SF 86 completed on January 18, 2004, to which was attached a one-page typewritten listing of the November 1987 DUI, the May 1988 drunk in public, the November 1988 DUI, and the November 1992 DUI in response to question 24 (alcohol or drug offenses). Applicant testified he typed the page himself because he could not enter the information into the software ("That page wouldn't have been in the software so, when I made that page, it was actually the 18th" Tr. 56), made copies, and attached a copy to both SF 86 forms. The inconsistency between this version of events and his answer was explained as he did not have his copy of the SF 86 before him when he responded to the SOR. (Tr. 144)

Notwithstanding the passage of time since he submitted the SF 86, it is difficult to believe he would have failed to recall that he had prepared and submitted a separate attachment. Furthermore, with respect to the one-page listing of the arrests, it is dated "2004/01/08," ten days before he completed his first cut of the SF 86. Even if the date was typographical error, his inclusion of the November 1988 DUI on the list raises doubts as to whether he prepared this attachment contemporaneously with his SF 86. Whereas he had listed the November 1988 DUI on the form in response to question 24, there would have been no reason for him to include it on a separate page. The more likely scenario is that Applicant listed his most recent offenses, believing it was sufficient inasmuch as he had previously discussed his criminal record with the DSS agent, and that he prepared the list in response to the government's allegation that he violated 18 U.S.C. § 1001. Irrespective of when the listing of offenses was prepared, he provided no evidence showing he had mailed, faxed, or had otherwise delivered it to the government.

In October 2005, Applicant consumed five or six beers after work with his coworkers. He was "trying to treat [his] team members for working so hard." (Tr. 130) After driving about ten miles, he pulled off to the side of the road. The police stopped and administered field sobriety tests. Applicant failed the tests and was arrested for DUI with a blood alcohol content of about .15%. He was found guilty in January 2006 and his driver's license was suspended for nine months, subject to reinstatement after 90 days on satisfactory completion of an alcohol education program. As of early August 2006, Applicant had not regained his driving privileges as he had not yet completed the course. His conviction was

pending appeal.

Applicant has operated a motor vehicle on a couple of occasions since his license was suspended in January 2006, including to get to his security clearance hearing on August 3, 2006. He felt he had no alternative.[(5)]

As of August 2006, Applicant was still drinking about a six-pack of beer per day on the weekends. Consumption after work was limited to a few beers once in a while with coworkers. He does not think he has an alcohol abuse problem, although he realizes he hasn't used good judgment. He does not intend to drink alcohol in the future on those occasions where there is a chance that he has to drive. Applicant does not consider his drunk driving behavior to be criminal ("I guess, I guess I think of a criminal thing as something super, super bad, I thought that isn't this like a misdemeanor and it's, it's not like you are a criminal to the core or whatever."). (Tr. 116)

By the end of his first year in his current job, Applicant had made a positive impact on the company's ability to successfully launch its product in production. He was awarded a merit increase of 4.2% to bring his salary to $108,368 effective April 9, 2005.

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 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, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. ¶ E2.A7.1.1. Applicant has been arrested six times for alcohol-related offenses between November 1987 and October 2005. In addition to the May 1988 drunk in public, he was convicted of drunk driving offenses committed in November 1988 and October 2005. While he was allowed to plead guilty to reckless driving in the November 2001 incident, the evidence shows his blood alcohol content was .27%. He also admits he consumed alcohol beyond acceptable limits before his arrests for DUI in November 1987 and November 1992, even though the charges were apparently not prosecuted. Disqualifying condition (DC) ¶ E2.A7.1.2.1. *Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*, is clearly implicated. ¶ E2.A7.1.2.5. *Habitual or binge consumption of alcohol to the point of impaired judgment* must be considered as well, given his high blood alcohol content in the November 2001 (.27%) and October 2005 (about .15%) incidents.

Mitigating condition (MC) ¶ E2.A7.1.3.1 *The alcohol related incidents do not indicate a pattern* does not apply in this case, given the six incidents are spread out over the 18 years. Applicant's excessive drinking was not confined to a brief period when it could reasonably be attributed to a stressful life event, such as his spouse having an extramarital affair, that no longer exists. The recency of his October 2005 DUI also precludes favorable consideration of MC ¶ E2.A7.1.3.2. *The problem occurred a number of years ago and there is no indication of a recent problem*. In the absence of a

qualifying diagnosis of alcohol abuse or alcohol dependence, Applicant need not meet the requirements of ¶ E2.A7.1.3.4 to prove mitigation.[(6)] However, Applicant has not appreciably changed the drinking pattern that has led to the six alcohol-related incidents. Since about 1982, he has consumed on average 12 beers on the weekends, usually a six-pack per night. He has not yet completed the alcohol education program required before he can regain his driver's license. Promises to refrain from driving after drinking in the future is not enough of a positive change in behavior supportive of sobriety (¶ E2.A7.1.3.3) to guarantee against recurrence of a future episode of abusive drinking. Applicant has not shown that he understands the risks to classified information presented by the off-duty abuse of alcohol.

Guideline E--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 Applicant exercised extremely poor judgment within the context of Guideline E when he married his third wife before he was divorced from his second wife. The court records show his second wife did not file for divorce until July 1999, some seven months after his marriage to his third wife. Applicant presented nothing to corroborate his claim that his second wife told him their divorce was granted in August 1998. If Applicant's second wife told him they were divorced, he then showed little regard for the law by failing to confirm his marital status before remarrying.

Applicant tried to conceal from the government that he had been involved in a bigamous relationship by misrepresenting on the SF 86 that he was divorced in December 1998. His knowing false statement is conduct contemplated within 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,* but the government did not allege the misrepresentation under Guideline E. However, his effort at concealment reflects a vulnerability that raises concerns under DC ¶ E2.A5.1.2.4. *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*.

Circumstances have changed in that he is no longer married to his third wife, who would have been directly impacted by his failure to obtain a divorce before they wed. The government is now aware of the bigamous relationship. Yet, Applicant also presented little evidence from which one could reasonably conclude that he is no longer vulnerable. For example, the record is silent as to what Applicant has shared with his present spouse about his previous marriages, if anything. MC ¶ E2.A5.1.3.5. *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*, is not met.

Applicant also falls short of meeting his burden with respect to proving that he had included all of his alcohol-related offenses on his January 2004 SF 86. The SF 86 received by the government did not include the attachment that Applicant now claims he forwarded with the form. There are unexplained problems with the list (the date, inclusion of the November 1988 DUI when it was already on the form) in addition to the absence of any proof of submission and his admission when he answered the SOR that he had neglected to include all the information on his SF 86. Nonetheless, I am not persuaded that Applicant had the requisite intent to mislead the government about his alcohol-related arrest record. He listed his November 1988 and November 2001 offenses, which at the time were his most recent. His showed no deception in listing the November 2001 charges only in response to question 26 (other offenses) given he pleaded to reckless driving and he noted that he had been charged with DUI. He had already discussed the arrests omitted (November 1992 and November 1987 DUIs that were not prosecuted and a May 1988 drunk in public) with the DSS in November 2002. While prior disclosure did not relieve him of his responsibility to list the offenses on his subsequent SF 86, it supports his denial of deliberate falsification.

Similarly, the record confirms Applicant was terminated from a previous job at the end of his probationary period in July 2002 (SOR ¶ 2.b), but the evidence falls short of proving misconduct, with the exception of some tardiness/absenteeism that Applicant does not dispute. Stated supervisory concerns over Applicant's work performance were countered by a letter of appreciation from the Air Force and a coworker's collaboration of their mission at the range and government approval of overtime. Furthermore, any concerns over Applicant's termination in July 2002 (¶

E2.A5.1.2.1. *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) are overcome by their dated nature and Applicant's contributions in his current job.

Guideline J--Criminal Conduct

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. ¶ E2.A10.1.1 Applicant was acquitted after a jury trial of serious felony aggravated assault and misdemeanor sexual assault charges filed against him in October 1982. The government is not precluded from considering allegations of criminal behavior (¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), but an information filing is not a substitute for proof. While security clearance determinations are not held to the standard of proof beyond a reasonable doubt, his acquittal is mitigating of the criminal conduct concerns (¶ E2.A10.1.3.5).

A knowing and willful false statement on a security clearance application is punishable as a felony under 18 U.S.C. §1001.[(7)] Applicant committed criminal conduct within the context of Guideline J by lying on his SF, but about the date of his divorce, which was not alleged. Applicant's omission of three dated alcohol-related offenses was without the willful intent required to find a violation of 18 U.S.C. § 1001. Accordingly, the government did not establish its case as to SOR ¶ 3.c. The government could have amended the SOR to include the false statement about his divorce and did not do so.

Applicant's drunk driving and his drunk in public offenses fall within DC ¶E2.A10.1.2 and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses,* of Guideline J. Even though he was allowed to plead to an amended charge of reckless driving in the November 2001 incident, the evidence shows he drove a vehicle about ten miles with a very high blood alcohol content. None of the mitigating conditions apply. Successful rehabilitation is not shown. Not only had he failed to comply with the course component of the sentence imposed for the October 2005 DUI, but he violated the terms of his license suspension by driving on at least a couple of occasions.

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." ¶ E2.2.1. Although Applicant deserves credit for his valuable contributions to his employer, he has shown extremely poor judgment in several aspects of his personal life off the job. His drunk driving is regarded as very serious because of its recidivism (¶ E2.2.1.3. *The frequency and recency of the conduct*). A blood alcohol content of .27%, or even the more recent .15%, presents an unacceptable security risk (¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*). The timing of his third marriage, and his failure to comply with his license suspension, reflect a troubling disrespect for the law. Taken together, Applicant presents a recent and recurring pattern of questionable judgment that is incompatible with retention of a security clearance (¶ E2.2.4).

FORMAL FINDINGS

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

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

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: For Applicant

Subparagraph 3.d: 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

1. Government exhibits 1, 4, and 8 were admitted over Applicant's objections. Applicant exhibit A was admitted over the government's objections.

2. Although Department Counsel objected only to the electronic mail message and not the court document, proposed exhibit J was rejected in its entirety as it was not clear that Applicant intended to submit the court record without the accompanying statement of his former spouse. Applicant did not include the motion for contempt with his post-hearing submission. However, the circuit court document is before me in that it was included in Ex. 9.

3. When asked at his hearing whether he had been in arrears of his child support, Applicant responded, "Well I can't, I can't answer that because I really don't remember when I paid it, but I know I paid it." (Tr. 109) Applicant's second wife confirmed on August 14, 2006, that Applicant had paid the child support and attorney and court costs, but she did not indicate when he paid them. (Ex. K) It is highly unlikely that she would have filed a motion with the circuit court if he had paid them on time. Although Applicant was never adjudged in contempt, indications are that he had been in arrears.

4. Applicant testified the investigation was for a top secret security clearance at the request of his then employer. He requires only a secret clearance for his present job.

5. The government was unaware of his October 2005 arrest before the hearing. Applicant had not informed either Department Counsel or myself that he was without a valid driver's license.

6. Under ¶ E2.A7.1.3.4, where an individual has been diagnosed with alcohol abuse or alcohol dependence, he is required to successfully complete inpatient or outpatient rehabilitation along with aftercare requirements, participate frequently in meetings of AA or similar organization, abstain from alcohol for a period of at least 12 months, and receive a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

7. 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.