DATE: July 12, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-26115

ECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Thomas Anderson, Esq.

SYNOPSIS

Applicant is 58 years old, divorced with four children, and is employed by a defense contractor. Applicant has two driving under the influence of alcohol (DUI) convictions in two states, failed to file federal and state tax returns and pay taxes for several tax years between 1989 and 2002, and failed to disclose his most recent DUI arrest on his security clearance application a month after it occurred. Applicant did not mitigate the criminal conduct, personal conduct, alcohol consumption, and financial considerations security concerns. 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. On January 31, 2005, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline G (Alcohol Consumption) of the Directive. Applicant answered the SOR in writing on March 18, 2005 and elected to have a hearing before an administrative judge. DOHA amended the SOR on July 7, 2005, alleging Guideline F (Financial Considerations) as an additional basis for its denial. Applicant answered the Amended SOR on September 18, 2005.

The case was originally assigned to me on July 8, 2005. It was reassigned to another administrative judge on September 23, 2005. The original hearing notice of November 1, 2005, set a hearing date of November 22, 2005. Applicant moved for a continuance because he hired an attorney. The continuance was granted on November 8, 2005. The case was reassigned to me on November 28, 2005. The notice of hearing for the rescheduled hearing is dated February 6, 2006. On February 22, 2006, Applicant requested another continuance. For the reasons stated in the record, I denied the continuance and convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on March 3, 2006.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 58 years old, divorced in 1998, has four children from that marriage, the youngest of whom is nine years old. He pays $936 monthly in child support. He has a bachelor's degree in electrical engineering, and works for a defense contractor. He takes continuing education programs through his employer, and expressed a desire to enroll in a graduate program to obtain his masters and doctorate degrees in electrical engineering someday. Meanwhile, he reads books on scientific subjects that he keeps in his personal library even after they are overdue at the local public library, alleging some agreement with that library that allows him to keep the books until someone wants them. (Tr. 61, 80-85, 96, 162 ; Exhibits 1, B and C)

Applicant was steadily employed until about 1991, when he experienced several job layoffs, apparently due to his employers' downsizing. He consulted and had a series of part-time or temporary jobs until 1996, when he became employed full-time again. In 2001 he took his present job, moving to the current state of his residence and work then. When he was not working steadily he did not file federal and state income tax returns. But he also did not file them when he was working in full-time positions, such as from 1989 to 1992, and 1997 to 2000 for the federal income tax, and tax years 1996 to 2001 for his former state of residence. He owed about $74,000 originally to the federal tax authorities, the Internal Revenue Service (IRS), and has paid $8,957 as of July 2005. He owed about $23,100 to the state tax authorities, and claims to owe less than $5,000 presently, but lacks current documentation to support his assertion.

In 1995 the IRS filed a tax lien against Applicant for $41,036. Another lien was filed in 1997 for $736, and a third in 2002 for $19,195. The state filed tax liens in 2001 for $5,985, in 2003 for $2,156, and in 2004 for $6,453. In 1996 Applicant decided he should try to pay his back taxes. He hired a tax service, paying them $3,500 to prepare and file his tax returns, and make arrangements with the IRS and state authorities to compromise the debt or enter an installment payment agreement. Apparently that tax service did nothing, and Applicant later hired two more tax services in succession, paying them $2,000 and $500 respectively, with some returns filed and a compromise petition filed. He later withdrew that petition, and negotiated an installment payment agreement himself in 2004. The installment payment agreement with the IRS requires Applicant to pay $900 monthly until his debt is repaid. He wants to seek abatement of penalties and interest from the IRS at some future time. He also has an installment payment agreement with the state tax authorities, requiring him originally to pay about $500 monthly. Now, Applicant claims he pays $1,170 monthly to the IRS and state authorities for all back tax debts. None of the liens were paid directly in full, remain in effect, and when Applicant pays the tax debts according to the installment payment plans they will be released. In May 2006, Applicant hired another tax representative to handle his tax problems with the IRS and state authorities. His taxes since 2002 for the federal and state taxes were filed and paid. (Tr. 62-71, 117-146, 174; Exhibits 2, 6, 7, E-I, L-P)

While underemployed in 1994, Applicant and his wife (now divorced) got into a domestic altercation and he was arrested and charged with battery. That charge was dismissed. In 1999 the local police arrested Applicant for driving under the influence of alcohol (DUI). The blood test showed .08% blood alcohol content (BAC). Applicant refused the breathalyser test. He told the arresting officer he had not been drinking, then admitted he had one beer. Applicant drove in between the arresting officer and Applicant's friend whom the officer suspected was DUI, so Applicant was also apprehended at the same time. He pled guilty to one of two charges arising out of the incident, and the other one was dismissed. His court sentence was five days in jail, to complete a drinking driver program and any recommended alcohol treatment program, pay $1,852 in fines, fees, and costs, have his driving privileges restricted for 90 days, and to serve 36 months probation. (Tr. 57, 74, 75, 98-100; Exhibits 2-4)

Applicant was arrested for DUI again on October 7, 2002, when he was celebrating his birthday with friends. His actual birthday was September 22. His friends left him at the bar, and he did not have taxi money because they said they would pay for everything, so he drove himself home.

The arresting officer noticed Applicant was driving at 60 miles per hour in a 45 mile per hour zone, and was weaving across the center road marking. He told the arresting officer he had nothing to drink, but now estimates he had two beers and two shots. He consented at the time to the breath test, but in four tries could not blow into the machine according to the instructions the officer gave him. Finally, the test showed a BAC of .19%. Applicant pled guilty to driving with a

BAC of more than .10% with the other charge of driving while intoxicated dismissed, sentenced to one year in jail which was stayed for a year, fined $300, one year unsupervised probation, take an alcohol assessment, and complete a two day alcohol program. He completed these requirements. (Tr. 100-106; Exhibits 2, 5)

Applicant did not inform the alcohol assessment program in 2002 of his 1999 DUI arrest and conviction. The assessment was based on only one offense. Applicant had an alcohol assessment done in 2006, and it does not record the 1999 DUI conviction on it. That assessment finds Applicant has no current problem with chemical dependency. Applicant claims he informed the chemical health evaluator, but she did not want to put the 1999 DUI conviction information on the report because the 2002 evaluation did not have it and she did not want to get Applicant into any trouble. Applicant also claimed his defense attorney advised him not to disclose his prior criminal history unless asked directly. The 2006 evaluation was done for the purposes of the security clearance process. (Tr. 106-108, 154; Exhibits A, J, K)

Applicant did not disclose on his November 13, 2002, security clearance application (SCA) in answer to Question 24 (Police Record - Have you ever been charged with or convicted of any offense related to alcohol or drugs?) his October 2002 DUI arrest. He did disclose his 1999 DUI arrest and conviction. Applicant offered five reasons he did not disclose the October 2002 arrest. His first explanation was he did not understand the difference between "charged" and "convicted". The next explanation was that he was confused because it "was still ongoing." The third reason was he was innocent until proven guilty. The fourth explanation, given to the government investigator in September 2003, was that his employer lost his first SCA and the 2002 arrest occurred after he completed it and before they submitted it. Lastly, he claimed he filled out two SCA forms but did not list the arrest on the second form. Applicant also did not list it in response to Question 23 that asked about pending charges or Question 26 that asked about any arrest, charges, or convictions in the past seven years not otherwise listed in answer to other questions. Furthermore, Applicant did not list his 1998 garnishment for taxes in answer to Question 34, nor his tax liens in answer to Question 36. (Tr. 66, 86, 89, 111-116, 146-148; Exhibit 1)

Applicant consumed alcohol to excess before his 1999 and 2002 DUI arrests. At the time of his arrests he drank weekly at happy hour and on weekends, at least. Applicant does not believe he has an alcohol problem, but two DUI arrests in three years indicates an alcohol problem. Applicant minimizes his alcohol consumption, and has not fully disclosed to two evaluation programs both of his DUI arrests. Applicant attributes his two DUI arrests to poor judgment. (Tr. 74-79, 102, 105-108, 136; Exhibits 2, A, J)

Applicant has a good work history and tries to learn more about his job and electrical engineering. He is chairman of the building committee for his church, and is very involved in church activities. (Tr. 24-49)

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 the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with 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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

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. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 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 condition 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 other behavior specified in the Guidelines.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1*

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. E2.A5.1.1*

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. E2.A7.1.1*

Guideline F: Financial Considerations: *The Concern*: *An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. E2.A6.1.1*

CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR concerning criminal conduct, personal conduct, alcohol consumption issues, and financial consideration concerns. Applicant's two DUI offenses in three years, wilful failure to file and/or pay federal and state income taxes over a period of 11 years, and his inconsistent and unpersuasive explanations for his failure to fully answer questions put to him on his SCA, all cause security concerns based on Applicant's untrustworthiness and lack of credibility. His testimony at the hearing was not persuasive to resolve these concerns in his favor.

Regarding the criminal conduct security concern, the Disqualifying Conditions (DC) applicable are DC 1 (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2). Applicant admitted his 1994 battery arrest and two DUI arrests. He deliberately failed to disclose his 2002 DUI arrest on his SCA completed a month after his arrest. That knowing and willful failure to disclose is a felony under 18 U.S.C. §1001.

The Mitigating Condition (MC) that applies is MC 1 (The criminal behavior is not recent. E2.A10.1.3.1) to the 1994 offense. However, the two DUI offenses are too recent for this MC to apply to them. There are no other MC applicable, nor does MC 1 apply to the other allegations in Paragraph 1. I conclude this security concern against Applicant.

Regarding the personal conduct security concern and his failure to disclose his 2002 DUI offense on his SCA, DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness. E2.A5.1.2.2) applies. Applicant had several questions on the SCA in which he could have provided the disclosure requested about his 2002 DUI arrest. He failed to provide that information. His five explanations for not disclosing the arrest that occurred the month previous to the completion of the SCA are not persuasive, are mutually contradictory, and not credible.

These falsifications are part of a pattern of non-disclosures regarding his alcohol use and DUI arrests and convictions. He failed to provide information in a court-ordered alcohol assessment, and he failed to provide the same information to the alcohol evaluator he hired to prepare an evaluation for his security clearance hearing. He also failed to disclose his state and federal tax liens and his garnishment on the SCA. Applicant failed to disclose unfavorable information . Therefore, no MC apply under this security guideline. Applicant interposes a defense that his criminal attorney told him not to disclose anything unless he was asked directly about any past criminal arrests or convictions. He was directly asked in Question 24 about his alcohol-related arrests or convictions, and still he deliberately failed to disclose them. That attorney's advice as expressed in Exhibit K has no date as to when the advice was given in relationship to the SCA completion. I do not give it any weight in this matter. I conclude this security concern against Applicant.

The excessive alcohol consumption security concern arises from Applicant's two DUI offenses and convictions, consumption of alcohol causing these offenses in the 1999 to 2003 period, and his failure to disclose his 1999 DUI arrest to the alcohol assessor in 2003. He minimizes his alcohol intake, and hides his multiple offenses from those needing that information to evaluate his true alcohol relationship. Thereby, he eliminates his credibility and undermines any evaluation that finds he has no alcohol problem. DC 1 (Alcohol-related incidents away from work, such as DUI incidents. E2.A7.1.2.1) and DC 5 (Habitual consumption of alcohol to the point of impaired judgment. E2.A7.1.2.5) apply. Applicant has the two DUI arrests and convictions, and he admitted his two arrests resulted from poor judgment, resulting from his alcohol consumption.

No MC apply to this security concern. With his 2006 alcohol evaluation based on incomplete information to the evaluator, I do not find it persuasive. I do not believe Applicant when he testified that he told the evaluator about his 1999 DUI conviction but the evaluator chose not to consider or record it. Even if that story were true, it still undermines the conclusions in the evaluation especially prepared for this hearing. Therefore, I conclude this security concern against Applicant.

The financial considerations security concern arises from Applicant's repeated and deliberate failures to file federal and state tax returns from 1989 to 1992 and 1996 to 2001. The federal and state taxing authorities filed six tax liens against Applicant, none of which he disclosed directly on his SCA. DC 1 (A history of not meeting financial obligations E2.A6.1.2.1), DC 2 (Deceptive or illegal financial practices such as income tax evasion E2.A6.1.2.2), and DC 3 (Inability or unwillingness to satisfy debts E2.A6.1.2.3) apply. Applicant failed to file his tax returns and pay income taxes for 1989 to 1992 and 1996 to 2001 to the federal and state governments.

Applicant took eight years to arrange an installment payment agreement (1996 to 2004) with the federal government and state government of his former residence. He had no persuasive or credible reason for not filing tax returns and paying his taxes for eight years. He hired four tax services, the latest in May 2006, to file his returns and help him out of his tax problems. While he is paying $1,170 monthly for back taxes, he took a long time to effectuate that payment plan. It is not a good-faith effort to delay eight years or more on paying back taxes. No MC apply here. I conclude this security

concern against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3. Guideline G: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Paragraph 4: Guideline F: AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

Subparagraph 4.b: Against Applicant

Subparagraph 4.c: Against Applicant

Subparagraph 4.d: Against Applicant

Subparagraph 4.e: Against Applicant

Subparagraph 4.f: Against Applicant

DECISION

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).