DATE: November 8, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 04-09429

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Kris E. Durmer, Esq.

SYNOPSIS

Applicant was convicted of driving while intoxicated in July 1994 and August 2004 and of resisting arrest in August 2001. He was not candid about the August 2001 charges when he completed his security clearance application in January 2002 or a signed, sworn statement in May 2003. Applicant also did not timely file federal income tax returns for tax years 2001, 2002, and 2003. 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, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on June 22, 2005, detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on July 14, 2005, and elected to have a hearing before an administrative judge. The case, previously assigned to other DOHA administrative judges, was transferred to me on January 25, 2006, Applicant having taken a job in my region of responsibility.

On March 8, 2006, counsel for Applicant entered his appearance.[(1)] On March 16, 2006, Applicant moved for discovery. On March 22, 2006, in accord with ¶ E3.1.11, I ordered the government to comply by May 12, 2006, with the Applicant's requests for the government's proposed documentary evidence, the names of proposed government witnesses and any non-privileged statements or reports on which the witnesses intend to rely at the hearing, and non-privileged exculpatory information within DOHA's knowledge and control. Department Counsel filed a response on May 11, 2006, indicating discovery had been furnished as ordered.

With the consent of the parties, I convened a hearing on June 8, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Fourteen government exhibits (Ex. 1-14) were admitted, Ex. 12 and Ex. 14 over Applicant's objections.[(2)] Five Applicant exhibits (Ex. A-E) were admitted, Ex.

B and Ex. C over the government's objections. Applicant and two witnesses testified on his behalf, as reflected in a transcript (Tr.) received on June 19, 2006.

The record was held open for Applicant to submit documentation from the Internal Revenue Service (IRS) confirming all tax returns have been filed and tax debt paid. On June 16, 2006, Applicant submitted a document from the IRS dated June 15, 2006, verifying returns for tax years ending December 1995 through December 2005 had been filed and balances satisfied. The government having no objection to its inclusion, the document was marked and admitted as Exhibit F.

FINDINGS OF FACT

DOHA alleged under Guideline J that Applicant was arrested in August 1983 for assault and battery (not guilty) and violation of abuse protection order (dismissed); was arrested on drunk driving charges in July 1994, August 1996, August 2001, and August 2004, and ultimately convicted of the July 1994 and August 2004 offenses; willfully failed to file federal income tax returns for tax years 2001, 2002, and 2003; and committed a felony violation of 18 U.S.C. ¶ 1001 by failing to disclose on his January 2002 security clearance application (SF 86) and in a May 2003 sworn statement that he had been charged with driving while intoxicated (DWI), second offense, in August 2001. In addition to cross-referencing the drunk driving arrests under Guideline G, DOHA alleged Applicant consumed alcohol at times to excess and to the point of intoxication from approximately 1980 to at least November 2004. Under Guideline E, Applicant was alleged to have deliberately falsified his January 2002 SF 86 and his May 2003 sworn statement by failing to disclose relevant and material facts concerning his arrest for DWI, second offense, in August 2001.

In his Answer, Applicant admitted his arrests as alleged in ¶¶ 1.a, 1.b. and 1.e, indicated he was acquitted of both the August 1996 DWI second offense and driving after suspension charges on appeal to the superior court (¶ 1.c), and admitted pleading guilty only to reckless operation following his arrest in August 2001 (¶ 1.d). He admitted consuming alcohol at times to excess (¶¶ 2.a, 2.b) but denied it constituted a pattern and submitted in mitigation that he had substantially reduced the amount of alcohol consumed. Applicant denied the willful failure to file his income tax returns for the tax years alleged (¶¶ 1.f, 1.g, 1.h) or the intentional falsification of his SF 86 and sworn statement (¶¶ 1.I, 3.a, 3.b). After a thorough review of the pleadings, exhibits of record, and transcript, I make the following findings of fact:

Applicant is a 51-year-old engineer who has worked for his current employer, a defense contractor, since October 2005. Employed in defense contract work since March 1985, Applicant has held a secret-level security clearance since the fall of 1985.

One week after graduating from an inner city public high school in June 1973, Applicant took advantage of a "head start program" and almost immediately started college at a renowned technological university. He was given scholarships that covered about three years, and paid for the remainder with student loans and work earnings. In June 1977, he graduated with a bachelor of science degree in physics.

Applicant continued on at the university that fall toward his doctorate in physics. While in graduate school, he got married in August 1980 to a woman who had a daughter from a previous relationship. Applicant and his spouse had a daughter of their own in June 1981, but they were incompatible, and eventually separated in March 1983. A couple of months later, he filed for divorce.

In August 1983, he was arrested for assault and battery and violation of abuse prevention act following an argument with his wife. He was found not guilty of the assault and battery and the violation of abuse prevention charge was dismissed. Applicant denies any basis to the charges and there is no evidence proving he was culpable.

Applicant left graduate school prematurely in about March 1985 due to a lack of funding, and he commenced employment in the defense sector as an assistant member of the technical staff at a federally-funded research and development laboratory. Sometime that fall, Applicant was granted a secret-level clearance for his duties involving ballistic missile defense.[(3)] Beginning in 1991, if not before, Applicant accessed classified information on a daily basis while working on a radar project for the military. He also had regular access to a closed area. Applicant handled his responsibilities appropriately.

Applicant and his ex-wife's divorce was finalized in December 1986. Under the terms of their original divorce decree, Applicant's child support obligation was 15 percent of his gross income. Over the next five years, they fought over issues of visitation and support in court, with negative impacts on his finances.[(4)] He filed for Chapter 7 bankruptcy in July 1997. Consumer credit debt of about $26,000 was subsequently discharged, his vehicle on which he owed about $19,000 was repossessed, and he lost his condominium. Applicant chronically underpaid his federal taxes beginning with tax year 1990, and his federal tax debt was not discharged in the bankruptcy. By March 2003, he owed $24,480.30 for tax years 1994 through 2000.

Applicant also allowed alcohol to negatively affect his judgment. A social drinker on weekends from his twenties, Applicant consumed alcohol to excess at a friend's birthday party in July 1994. He was stopped by the police for driving erratically after he abruptly crossed several lanes of traffic to go to a restaurant. After he took a field sobriety test, he was arrested for DWI. He failed to appear for his scheduled court date in September 1994. In late October 1994, he entered a plea of not guilty, but was convicted and sentenced to a $350 fine plus $70 penalty assessment, ninety days loss of license, and an alcohol education program. He attended group counseling sessions once or twice a week for a few weeks, consisting of sharing the experience that led to the court-ordered program, watching film and reading materials on the effects of alcohol, completing questionnaires about his and family members' alcohol histories. No further treatment was recommended.

In mid-August 1996, Applicant was arrested for DWI (second offense) and driving after suspension of registration. He was convicted of the DWI in district court and sentenced to 10 consecutive 24-hour periods in a house of correction, three years revocation of operating privileges, a fine of $500 and penalty assessment of $100. Applicant appealed his conviction, and was found not guilty after jury trial in March 1997. The driving after suspension charge was nolle prossed.

In September 1999, his daughter started college. His child support obligation increased to 20 percent of his gross income of about $60,000. In addition, he paid for her expenses incurred living off-campus, including telephone, computer, food, utility, and car costs.

Applicant accepted what amounted to a promotion from another defense contractor and relocated in July 2001. He borrowed between $3,000 and $4,000 from a former coworker (Mr. X) to cover his move. He subsequently repaid the debt under terms acceptable to Mr. X.

In early August 2001, Applicant consumed two to three glasses of wine with his girlfriend while eating appetizers at a restaurant. They left in their own vehicles with his girlfriend following him. They got separated due to traffic. After Applicant found his girlfriend, he made a U-turn in the road to head in the right direction, but stopped when he noticed that his girlfriend had been pulled over by the police. Applicant was arrested for DWI, second offense, and resisting arrest, both misdemeanors. The resisting arrest charge stemmed from Applicant forcibly pulling himself away when the police attempted to handcuff him, and then laying prone on the cruiser floor in a passive manner so as to prohibit proper transport to the police station.

On January 18, 2002, Applicant executed a security clearance application (SF 86). In response to question 24 concerning any alcohol/drug offenses, Applicant reported the August 1996 and July 1994 (listed as August 1994) drunk driving charges. He did not disclose that he had been recently arrested for DWI and resisting arrest in August 2001 in response to question 23 concerning any pending criminal charges or question 24 any charges or convictions related to alcohol or drugs. Applicant disclosed in response to question 33 that he had filed for Chapter 7 bankruptcy in the amount of $26,000 with all his debts but his federal taxes discharged. Applicant listed in response to question 38 that he had been delinquent more than 180 days in the past seven years on consumer credit cards totaling about $18,941, student loans of about $14,200, $13,000 in federal taxes, $1,514 in service charges/fees, $768 in subscription costs, and about $35,000 in loans not related to education. Only the federal income tax debt of about $13,000 was listed as currently over 90 days delinquent (question 39). Applicant responded "NO" to question 36 concerning whether any tax liens had been filed against him in the last seven years because of the unpaid taxes.

On March 1, 2002, the DWI charge was nolle prossed and he was charged with the violation of reckless driving for negotiating a U-turn without due regard for the safety of the public in August 2001. On March 15, 2002, Applicant

pleaded guilty to resisting arrest (reduced from a misdemeanor to a violation),[(5)]

and to reckless driving. He was fined $1,000 plus $200 penalty assessment for resisting arrest, and $250 fine plus $50 penalty assessment, and 60 days loss of license for the reckless driving. Applicant now denies he resisted arrest, claiming that after he was handcuffed, he was "wrestled to the ground and just kind of like roughed up some. . . ." (Tr. 93) His uncorroborated denial of culpability is not persuasive in light of his guilty plea.

Applicant filed for an extension of time to complete his 2001 federal income tax return. The IRS had notified him that he had improperly claimed his daughter as a dependent on his federal income tax return for tax year 2000, and that he would need authorization from his ex-wife, the custodial parent, to claim their daughter as a dependent on his return. Unable to get the necessary form signed by his ex-wife, he took no action to file his return for 2001 in the time allotted under the extension. He subsequently did not timely file returns for tax years 2002 and 2003 because he "had a lot of stuff going on . . . didn't make it a high enough priority to run down all the things [he] needed to do to get [his] returns done sooner." (Tr. 141-42)

On May 15, 2003, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his criminal arrest history, his use of alcohol, and adverse credit information. As reflected in a signed, sworn statement taken during that interview, Applicant told the agent he "was issued a ticket for DWI [in 1994] because [he] had a beer in the car." Applicant averred he was found not guilty of the August 1996 DWI on appeal of his conviction in the district court. Applicant denied any other adverse involvement with law enforcement except for receiving a ticket and $1,000 fine for making an illegal U-turn in August 2001. He denied being in court for any other reason, other than minor traffic violations of less than $100, and specifically denied any other alcohol or drug-related charges or convictions. Asked about his drinking, Applicant described it as social on weekends, approximately two to three beers. He expressed his belief he did not have a drinking problem and intended to continue to drink approximately weekly, about two to three beers each time. Applicant explained that his financial problems were due to "a long messy divorce," and the debts listed on his credit report were discharged in bankruptcy. Applicant indicated that he had entered into an agreement with the IRS in 2001, and was currently paying $4,000 per month to the IRS for his delinquent taxes. He added that his bills with the IRS would be finished in July 2003. Applicant provided a Personal Financial Statement in which he estimated a monthly net deficiency of $3,881 after payment of expenses and debts, including $600 per month in child support/alimony and $4,000 to the IRS.

In August 2004, Applicant was pulled over by the police after he failed to stop for a red light. He could not produce his registration, and the officer asked him what he had been drinking as the officer detected signs of intoxication (eyes watery and bloodshot, odor of alcohol). Applicant told the officer he had a few drinks. After Applicant failed field sobriety tests, he was arrested for operating under the influence of alcohol (OUI), reckless driving, no registration card, failure to observe red light, speeding (by observation), failure to maintain lane, and failure to change his driver's license to his state of residence. A breathalyzer taken at the station revealed his blood alcohol content was .18%.

On November 4, 2004, Applicant was interviewed by a DSS agent about his recent arrest for OUI, and about why he had told a DSS agent in May 2003 that he had received a ticket for making an illegal U-turn in August 2001 when he had been arrested for DWI and resisting arrest. Confronted with law enforcement reporting that he had been arrested for DWI and resisting arrest in August 2001, had pleaded guilty to both, and been convicted and fined $1,200,[(6)] Applicant denied he had pleaded guilty to either DWI or resisting arrest, and claimed he had been handcuffed without any provocation on his part. As for his recent arrest, Applicant admitted he had been arrested and charged with OUI and six related motor vehicle violations in August 2004, for which he was scheduled to appear on November 9, 2004. Applicant told the agent that he had consumed about four glasses of wine while playing video games at a restaurant and was en route to another restaurant when he was stopped. Applicant again expressed his belief that he did not have a drinking problem, and attributed his four alcohol-related arrests (1994, 1996, 2001, and 2004) to "bad luck and racial profiling." Single, and without a girlfriend, he described his drinking since May 2003 as an average of two to three glasses of house wine or beer three times weekly, usually at a sports bar five minutes from his residence. He intended to continue to drink two to three times per week, limiting his consumption to one or two drinks if he had to drive. Applicant was also asked about his federal tax debt, which he had previously indicated would be "finished in Jul 03." Applicant averred the taxes were satisfied in August 2003 through wage garnishment.

On November 9, 2004, Applicant appeared in court on the August 2004 charges. He pleaded guilty to OUI, was assessed fines, costs, and fees totaling $664 and his license was revoked for seven months. He was also required to attend 12 hours of group alcohol education. Applicant was fined $86 for continuing to operate a vehicle as a nonresident after he had become a resident of the state. The remaining charges were dismissed.

On November 16, 2004, Applicant was reinterviewed by the same DSS agent. Informed IRS records showed he had a credit on file but that he had not filed his individual tax returns for tax years 2001, 2002, or 2003, Applicant acknowledged he had been "irresponsible," and explained:

I need some time to gather information in order to file my taxes. The reason that I need some time is that my former fiancée had resided with me in 2001, 2002, and half of the year 2003. She was disabled and unable to work and she was 100% dependent on me for financial support.

Applicant expressed an intent to file his delinquent returns by January 2005 or sooner. The agent also confronted Applicant with the discrepancies in what he had indicated to her previously about the August 2004 OUI (he had consumed four glasses of wine while playing video games at a restaurant), what he told the police (he had "a few drinks" and then went shopping), and what would be a level of consumption consistent with a blood alcohol content of .18% on his arrest. Applicant offered an explanation for the high blood alcohol content, as follows:

I can't remember exactly, but it is possible that one of my friends at [the restaurant] may have bought me one or two cocktail drinks. It is possible that I may have drank [sic] a martini or whiskey on the rocks. If one of my friends were to have had a mixed drink, perhaps they may have bought me the same drink. If I had consumed four glasses of wine and one or two mixed drinks, this may account for my blood alcohol reading of .18%. (Ex. 4)

Applicant filed his delinquent tax returns for 2001 and 2002 in early 2005. He filed his return for 2003 sometime after he answered the SOR in July 2005. Applicant stopped drinking in June 2005 to show that he could control his alcohol consumption. In October 2005, he underwent a voluntary evaluation by a professor of medicine and pharmacology at a university's medical school. This medical doctor rendered his opinion in February 2006 that Applicant went into treatment following his August 2004 drunk driving, and was "doing very well with no further incidents of DUI." He recommended Applicant be granted a clearance "because of his recent behavior of not having alcohol or drug problems." (Ex. B)

Applicant was evaluated on June 1, 2006, by a licensed alcohol and drug counselor (LADC) nationally certified as a Level II addictions counselor. Applicant told the LADC that he had completed a 12-hour DWI program since his August 2004, and that because of his DWI history and implications for his clearance, he has abstained since July 2005. Noting that a .18% blood alcohol content indicates "relatively high tolerance," the LADC found evidence of prior periodic alcohol abuse but no chemical dependency. Based on his assessment that Applicant as well motivated and insightful, he opined the risk of recidivism was "relatively low." (Ex. C)

Applicant does not intend to consume alcohol in the future. He does not want to experience any further alcohol-related problems.

Applicant's work performance for his current employer is not of record. Two former coworkers (including Mr. X), who worked with him from about 1986 to 2001, testified to his ability to handle classified information appropriately on the job. Mr. X, who worked with him closely on a radar system, attested to Applicant being a "crucial member" of their team. His contacts with Applicant since 2001 have been limited to the occasional electronic mail similar to correspondence of friends at a distance. Before being asked to testify, Mr. X only knew Applicant had been arrested once, but had successfully appealed his conviction.

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). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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).

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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline J--Criminal Conduct

Applicant's arrest in 1983 for assault and battery, and violating the abuse prevention act (¶ 1.a) falls within criminal conduct disqualifying condition (DC) ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*. His acquittal (¶ E2.A10.1.3.5) of the assault, and the dismissal of the violation of abuse protection act charge, do not necessarily exclude them from consideration, but there is nothing in the record that indicates Applicant engaged in the criminal behavior. However, significant security concerns are raised by Applicant's repeated drunk driving and related motor vehicle violations, by his willful failure to file federal income tax returns, and by his knowing and material false statements to the government.

Applicant has two drunk driving convictions (July 1994 ¶ 1.b and August 2004 ¶ 1.e). His acquittal of the August 1996 DWI after a jury trial warrants a conclusion that he did not engage in drunk driving on that occasion. Similarly, although Applicant consumed two to three glasses of wine before his arrest in August 2001, there is not enough evidence to conclude that he was driving while intoxicated on that occasion. However, he pleaded guilty to resisting arrest and reckless driving, and was fined a total of about $1,500. Applicant contends his July 1994 DWI and August 2001 resisting arrest were violations of state law and hence not criminal. Under § 265.82-b, DWI (not aggravated) is a class B misdemeanor,[(7)] although the criminal complaint (Ex. 5) indicates Applicant was convicted of a violation for the July 1994 drunk driving offense. The criminal complaint of the resisting arrest shows he was charged with a class A misdemeanor,[(8)] but the charge was downgraded to a violation in March 2002 (Ex. 8).[(9)] The underlying conduct was criminal under state law. The government is not bound by the disposition in assessing the security significance of the conduct.

Moreover, Applicant committed misdemeanor violations of federal law under 26 U.S.C. § 7203[(10)] when he failed to timely file his federal income tax returns for tax years 2001, 2002, and 2003 (¶¶ 1.f, 1.g, 1.h). There is no evidence Applicant sought to evade payment of his income taxes. Applicant had monies withheld from his employer, but it does not excuse his failure to file timely returns. In explanation of his failure to file, Applicant told a DSS agent in November 2004 that he needed to research the issue of whether he could claim as a dependent his former fiancée, who lived with him in 2001, 2002 and half of 2003, and was "100% dependent on [him] for financial support" due to her disability. (Ex. 4) At his hearing, he initially testified he had been hoping to convince his ex-wife to sign an IRS form that would allow him as the noncustodial parent to claim their daughter as a dependent on his return ("I could never get that." Tr. 102-03). In response to my question as to the delay in filing, Applicant testified, "Again, you just get busy with other things, I had a lot of stuff going on, and you know, I didn't make it a high enough priority to run down all the things I needed to do to get my returns done sooner." (Tr. 142) Clearly, he knew he had an obligation to file (Tr. 136) and did not do so until after his third DSS interview.

Criminal conduct concerns under DC ¶ E2.A10.1.1 and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*, also arise because of Applicant's lack of candor on his SF 86 and in his May 2003 signed, sworn statement about his then very recent arrest for DWI, second offense. In response to question 24 (any alcohol or drug-related

charges or convictions) on his January 2002 SF 86, Applicant listed only his 1994 and 1996 DWI charges, indicating that he had not been convicted of the 1996 charge. Applicant claims he misread the query to require only the reporting of convictions, and included the 1996 charge (conviction vacated on appeal) because he was not certain "how the '96 one could be counted." (Tr. 97, 125) Had Applicant no intent to conceal the August 2001 charges, it stands to reason he would have reported them then in response to question 23 concerning any pending charges. At the time Applicant completed his SF 86, he had two Class A misdemeanor charges pending against him (DWI second offense and resisting arrest). He listed neither and responded "NO" to any pending charges. Applicant offers in explanation, "I was probably trying to fill the form out too quickly, I, like I said, I don't really have any explanation for that, it was a, that it was a mistake." (Tr. 141). Applicant had previously testified on cross-examination that it took "a long while," about two hours to fill it out (Tr. 123). It is more likely that he lied to conceal that he had been arrested within the preceding five months than he acted in haste. Applicant, who held a clearance for several years, knew of the importance of the form and its accuracy.

Moreover, Applicant's failure to candidly disclose the charges at the first available opportunity in May 2003 belies his claim of an inadvertent mistake:

Other than above [where he discussed the 1994 and 1996 charges] I have been held, detained, cited, arrested, charged, or otherwise involved in an adverse manner with a law enforcement agency on the following occasions. In Aug 2001, I received a ticket for making an illegal turn, I was fined $1,000.

I have never been arrested for anything else.

(Ex. 2) When asked to explain what amounts to another falsification, Applicant averred he just summarized the outcome of all that he had been through ("I assumed that, since he had the reports there and the paperwork on what had happened, that he knew what I was initially arrested for and I thought this question was about the final disposition of those charges." Tr. 99) It is untenable for Applicant to maintain that he thought he had been fined $1,000 for the traffic violation of making an illegal U-turn. His unequivocal denial in his sworn statement of any alcohol-related charges or convictions other than the 1994 and 1996 shows he did not act in good faith. Applicant's knowingly false statements on his SF 86 and in his May 2003 sworn statement constitute felony violations of 18 U.S.C. § 1001.[(11)]

Mitigating condition (MC) ¶ E2.A10.1.3.5 applies to the 1983 assault and battery and the August 1996 DWI since Applicant was found not guilty of those charges. As for the proven drunk driving, and willful failure to file tax returns on time, Applicant has made some effort to address the security concerns by belatedly filing his delinquent tax returns and maintaining abstinence from alcohol since July 2005. However, it is too soon to conclude that he is successfully rehabilitated of a pattern of criminal behavior committed while he held a security clearance. Reform of criminal conduct depends in large part on acknowledgment of wrongdoing. As recently as November 4, 2004, he attributed his alcohol arrests to bad luck in part. (*See* Ex. 3) While he has not denied that he was intoxicated when he was arrested in August 2004, and admits he was intoxicated when he was arrested for DWI with a blood alcohol content of .18% in August 2004, he exhibited little remorse for his repeated drunk driving. It is noted that his decision to stop drinking was primarily to comply with what he thought was required by the DoD ("I figure if I don't drink, then there shouldn't be any questions about how much I'm drinking." Tr. 107). A similar failure to recognize his manifest poor judgment is seen in his ongoing denial of any falsification of his January 2002 SF 86 and May 2003 sworn statement.

Guideline G--Alcohol Consumption

The evidence shows Applicant had consumed alcohol before his arrests for drunk driving in July 1994, August 1996, August 2001, and August 2004. Nothing in the Directive prohibits drinking per se. Rather, it is the excessive consumption of alcohol that 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 was shown to have consumed alcohol to legal intoxication in the July 1994 and August 2004 incidents. 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*, and ¶ E2.A7.1.2.5. *Habitual or binge consumption of alcohol to the point of impaired judgment*, are raised because of these drunk driving convictions. While he told the LADC in June 2006 that the July 1994 incident involved having an empty beer can in his car and that he pleaded guilty

since he did not have a lawyer (see Ex. C), the court records reflect he was convicted after pleading not guilty. Merely having an empty beer can in an automobile is not sufficient in and of itself to sustain a conviction of drunk driving. Furthermore, his blood alcohol content of .18% on the occasion of his arrest for OUI in August 2004 is consistent with binge drinking.[(12)]

With the ten years between drunk driving convictions, there is a basis to apply MC ¶ E2.A7.1.3.1. *The alcohol related incidents do not indicate a pattern.* Yet, his abstinence from alcohol since July 2005 (¶ E2.A7.1.3.3. *Positive changes in behavior supportive of sobriety*), and the favorable assessment from a licensed alcohol and drug counselor ("Currently [Applicant] appears well-motivated and insightful and thus relatively low risk for recidivism." Ex. C), are not enough to overcome the security concerns presented by his drunk driving history. The August 2004 OUI is especially troubling because of its recency, and his .18% blood alcohol content. As the LADC indicates in his evaluation of June 2006, a .18% blood alcohol content shows "relatively high tolerance." Furthermore, while the LADC has the credentials and experience to assess alcohol problems, his professional assessment that Applicant presents a "relatively low" risk appears to be based, at least in part, on an understanding from Applicant that the July 1994 DUI was due to him having an empty beer in his vehicle. Applicant's ongoing tendency to downplay the seriousness of his drunk driving undermines his case for successful rehabilitation.

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. As addressed under Guideline J, above, Applicant concealed his August 2001 arrest for DWI and resisting arrest when he completed his security clearance application in January 2002. When initially questioned about his arrest history by the DSS in May 2003, Applicant falsely denied any alcohol-related arrests other than the 1994 and 1996 incidents, and claimed that he received only a ticket for making an illegal U-turn in August 2001. Personal conduct concerns are raised under 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 eligibility or trustworthiness, or award fiduciary responsibilities*, and DC ¶ E2.A5.1.2.3. *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*.

None of the Guideline E mitigating conditions (MC) apply. One of the purposes of the DSS interview of November 4, 2004, was to confront Applicant with discrepancies between his May 2003 claim that he received a ticket and was fined $1,000 for making an illegal turn in August 2001 and state and police records showing his arrest was for DWI and resisting arrest. There was no prompt rectification before confrontation, which is required for consideration of DC ¶ E2.A5.1.3.3. *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*.

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. The security risks presented by Applicant's drunk driving, his years of disregard of his obligation to timely file federal income tax returns, and his deliberate false statements concerning his arrest record (*see* ¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*), must be evaluated in the context of the "whole person." Applicant deserves credit for his academic achievements, and contributions to the defense effort. Applicant's former coworkers attest to him being a productive, trustworthy, even crucial employee during the about 15 years of his employ at the federally-funded research and development laboratory. Ongoing disputes with his ex-wife over support and custody did not adversely affect his work or his ability to safeguard classified information. However, the conduct of the greatest security concern (2004 OUI, failure to timely file returns for tax years 2001, 2002, 2003, falsification of January 2002 SF 86 and May 2003 statement) occurred after Applicant left that job, relocated to a new area, and was no longer battling his ex-wife in court.

Although likely prompted by concerns for his job (*see* ¶ E2.2.1.7. *The motivation for the conduct*), Applicant's filing of

his delinquent returns and his abstinence from alcohol are recent efforts to resolve the issues of security concern (*see* ¶ E2.2.1.6. *The presence or absence of rehabilitation and other pertinent behavioral changes*). Countering that favorable evidence, however, is the persistent concern about his candor and his tendency to externalize blame or justify his own misconduct (*e.g.*, he couldn't get his ex-wife to sign the IRS forms to allow him to claim his daughter as a deduction on his taxes (Tr. 103); after asking him some questions the police officer decided to arrest him, he was handcuffed, and then roughed up in August 2001 (Tr. 93); he told the agent in May 2003 he had gotten a ticket for an illegal U-turn in August 2001 because he assumed that since the agent had the records of the August 2001 incident, the agent knew what the charges were (Tr. 99).

The DOHA Appeal Board has consistently held that an applicant's conduct and circumstances are not to be evaluated in a piecemeal fashion. *See, e.g.*, ISCR Case No. 00-0628 (Feb. 24, 2000, citing ISCR Case No. 99-0601 Jan. 30, 2001, at p. 8 ("Under the whole person concept, an Administrative Judge must assess the totality of an applicant's conduct and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner."). Under ¶ E2.2.4. of the Directive, even if adverse information pertaining to any given guideline is not sufficient to warrant an adverse security clearance decision, an applicant may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. In the past four years, Applicant has repeatedly exercised poor judgment in several different aspects. Based on the totality of the evidence, I am unable to conclude that it is clearly consistent with the national interest to continue his clearance.

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: For Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.I: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant[(13)]

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: 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. Counsel previously retained by Applicant in his former locale formally withdrew his appearance on March 21, 2006.

2. Page 7 of Exhibit 12 was excluded, and Exhibit 14 was admitted for a limited purpose.

3. The date of the clearance grant is not of record. Applicant responded "NO" on his January 2002 SF 86 to question 31 ["Has the United States Government ever investigated your background and/or granted you a security clearance?"]. A former coworker testified they handled classified information on a daily basis starting in probably 1991 ("I mean everything we touched we touched was secret . . . ." Tr. 64).Applicant testified he received his secret clearance about nine or ten months after he started work for the research lab. (Tr. 84)

4. Applicant's last court hearing on matters related to the divorce was in spring 2001. (Tr. 83)

5. The pertinent state statute (N.H. Rev. Stat. Ann. § 625:9) provides in part:

I. The provisions of this section govern the classification of every offense, whether defined within this code or by any other statute.

II. Every offense is either a felony, misdemeanor or violation.

(a) Felonies and misdemeanors are crimes.

(b) A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

6. The available court records reflect the DWI was "nol pros" but he was convicted of resisting arrest as well as reckless driving. (Ex. 7)

7. *See* N.H. Rev. Stat. §§ 265:82-a and 265:82-b.

8. N.H. Rev. Stat. § 642.2 pertinent to resisting arrest or detention provides:

A person is guilty of a misdemeanor when the person knowingly or purposely physically interferes with a person recognized to be a law enforcement official, including a probation or parole officer, seeking to effect an arrest or detention of the person or another regardless of whether there is a legal basis for the arrest. Verbal protestations alone shall not constitute resisting arrest or detention.

9. N.H. Rev. Stat. § 625:9 provides that prior to or at the time of arraignment, the state may, in its discretion, charge any offense designated as a misdemeanor as a violation.

10. Pursuant to Title 26, Section 7203 of the United States Code, "Any person required under this title. . .to make a return, keep any records, or supply any information, who willfully fails to make such return. . .at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000. . .or imprisoned not more than 1 year, or both, together with the costs of prosecution. . ." While this section merely provides the sanctions for failure to file and does not establish the predicate requirement to file, Applicant admitted at his hearing that he was aware of his obligation to file. (Tr. 136)

11. 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, 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.

12. The Directive does not define binge drinking. When first questioned by the DSS agent about his August 2004 arrest, Applicant indicated he had consumed four glasses of wine while playing video games (Ex. 3). After being confronted with the breathalyzer results showing a .18% blood alcohol content, Applicant admitted it was possible that he might have consumed one or two mixed drinks (martini or whiskey on the rocks) as well (Ex. 4). The U.S. Department of Health and Human Services Substance Abuse & Mental Health Services Administration (SAMHSA) defines binge drinking as five or more drinks on the same occasion at least once in the past 30 days.

13. Applicant admitted ¶ 2.a, although it is noted there is no independent evidence of abusive drinking other than the incidents alleged in ¶ 2.b.