DATE: September 29, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 04-09423

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of April 1979 felony possession of cocaine with intent to sell and June 1981 felony breaking and entering offenses. 10 U.S.C. § 986 as amended applies where Applicant was incarcerated for more than one year for the breaking and entering. He was arrested for drunk driving in November 1983, January 1985, and July 1988, and for disorderly conduct in November 1989. After ten years of sobriety, he resumed drinking and committed domestic assault in March 2004. His pattern of criminal activity raises serious doubts about his judgment and reliability. Furthermore, he is statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

On October 8, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.[(1)] DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on criminal conduct (Guideline J), including statutory disqualification under 10 U.S.C. § 986.

Applicant responded to the SOR on October 18, 2005, and requested a hearing before an administrative judge. The case was assigned to me on March 9, 2006. On April 26, 2006, I convened a hearing pursuant to notice dated March 24, 2006. Fourteen government exhibits (Ex.) were admitted, Ex. 10 over Applicant's objection. Federal statute 10 U.S.C. § 986, marked for identification as Ex. 15, was accepted for administrative notice. Applicant testified on his behalf as reflected in a transcript received May 8, 2006.

The record was held open until May 17, 2006, for Applicant to document the length of his prison stay for the offense in SOR ¶ 1.b. On May 15, 2006, Applicant submitted three documents concerning his incarceration and one character reference letter from a supervisor. The government filed no objections in a response dated May 25, 2006. Accordingly,

Applicant exhibits A, B, C, and D, were admitted.

On May 31, 2006, the government forwarded to me and Applicant a redacted copy of the DOHA Appeal Board decision in ISCR 03-02181, issued May 24, 2006, to assist me in resolving whether the 70 days Applicant spent in custody pending trial for the felony breaking and entering offense counts in determining the length of his incarceration.

FINDINGS OF FACT

DOHA alleged under Guideline J, criminal conduct, that Applicant had been convicted and sentenced to three years in jail (all but six months suspended) for an April 1979 felony possession of cocaine with intent to sell; convicted and sentenced to 18 months to three years (about 18 months served) with fines and restitution for June 1981 felony breaking and entering and larceny; convicted of aggravated driving while intoxicated (DWI) in November 1983; arrested for speeding and operating under the influence (OUI) in January 1985 for which he was ordered to attend an alcohol awareness program; fined and again ordered to an alcohol awareness program for DWI, second offense in July 1988; and arrested for disorderly conduct in November 1989. DOHA also alleged Applicant was statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986, as amended.

Applicant admitted the criminal arrests and convictions as alleged, but contested the application of 10 U.S.C. § 986 on the basis he spent 364 days in the custody of the state corrections department, inclusive of work release and 70 days pre-trial incarceration. After a thorough review of the record, I make the following findings of fact:

Applicant is a 48-year-old senior logistics analyst who has been employed by a defense contractor since September 1985. He has held a security clearance throughout his employ, including a secret clearance since at least July 1992. He seeks to retain that level of classified access.

Applicant began drinking beer late in high school, in quantity of three to four beers two to three times a week with friends. Applicant enlisted in the U.S. Air Force after high school, entering on active duty in December 1976. In March 1978, Applicant married his first wife. In fall 1978, he began to abuse cocaine and marijuana two to three times weekly. In early 1979, he began selling illegal drugs for extra money, obtaining two to three grams of cocaine from someone on the military base and selling it off-base in state X. In mid-April 1979, Applicant told $30 worth of cocaine to an undercover agent. He was arrested one week later and charged with possession of controlled substance (cocaine) with intent to sell and deliver, and with sale and delivery of cocaine, both felonies. In June 1979, he pleaded guilty to the felony possession charge and was sentenced to three years in the custody of state X's department of corrections, six months to be served in the county jail, with the remainder (2 1/2 years) on probation. The sale and delivery charge was dismissed. In November 1979, Applicant was discharged from the U.S. Air Force under other than honorable conditions for misconduct, *i.e.,* his criminal conviction and confinement. Applicant petitioned unsuccessfully for a change in the nature/type of his military discharge in 1981.

On his release from jail, Applicant went home to state Y where he resided with his parents.[(2)] He found employment at a local mill but did not adapt, and returned to state X. While working odd jobs, Applicant began to drink whiskey in addition to beer. After drinking to intoxication one night in June 1981, Applicant broke into the apartment of someone who owed him money. He was arrested for felony breaking and entering and larceny, and spent 70 days in jail before his father bailed him out. On November 16, 1981, he pleaded guilty to the breaking and entering charge. His probation for the April 1979 felony cocaine possession was terminated, and he was sentenced on the breaking and entering to a prison term of from 18 to 36 months, with credit for 70 days already served in custody prior to the entry of judgment. He was also ordered to pay $400 in court fees, and $300 restitution to the victim. Applicant was given one week to arrange his affairs in state Y. From November 23, 1981 to November 15, 1982, he was incarcerated in a medium security correctional facility in state X. He served from August 21, 1982 to November 15, 1982, on work release where he was employed at a fish market during the day and returned to the prison at night. Applicant earned 37 days of merit time and 57 days of gain time, and he was released from the custody of the department of corrections on November 15, 1982.

Divorced from his first wife, Applicant returned to state Y on his release from prison. He enrolled in a school for his FAA airframe and power plant license while working in local restaurants where alcohol was readily available. He began drinking beer and whiskey every day, frequently to intoxication.

In November 1983, Applicant was arrested in state Y for aggravated driving while intoxicated (blood alcohol content .20% or more) and speeding. He was convicted of the aggravated DWI in January 1984 and sentenced to a $350.35 fine, one year license revocation, and an alcohol awareness program. Applicant moved to a neighboring state (state Z) where he obtained a driver's license so that he could get to work.

In January 1985, Applicant was arrested for operating under the influence (OUI), speeding, and operating left of way in state Z. He had consumed beer and shots of whiskey with friends. After failing field sobriety tests, he was taken to the police station where he was held until the next morning. His case was continued without a finding for one year pending his completion of one year probation and an alcohol awareness program. Applicant attended six weeks of alcohol classes, and abstained from alcohol for about a year and a half at the insistence of his girlfriend.

In about September 1985, Applicant began his employment with the defense contractor. Shortly thereafter, he was issued a company-granted confidential security clearance. Seeking a DoD secret-level clearance for his duties as a logistics analyst, Applicant disclosed on a June 1987 Personnel Security Questionnaire his 1979 felony cocaine possession and 1981 felony breaking and entering convictions, for which he was incarcerated. He also listed his two drunk driving offenses, although erroneously reported them as occurring in 1982 and 1983.

On October 13, 1987, Applicant was interviewed by a special agent of the Defense Investigative Service (DIS) about his arrest record and alcohol consumption. Applicant acknowledged he had resumed drinking beer, in quantity of three or four beers on the weekends after "about one and one-half years" of abstinence. He denied any intent to abuse alcohol or to use any illegal drugs in the future, as he was in a stable common law relationship with a woman and they had a three-year-old daughter. Sometime after this interview, Applicant and his girlfriend went their separate ways due to incompatibility.

Applicant continued to drink beer, up to a six-pack on the weekends, and a couple of beers on the weekdays. On rare occasion he consumed mixed drinks. In mid-July 1988, Applicant drank at least six beers and a 16-ounce whiskey and cola while visiting a friend. He was stopped in state Y for speeding (clocked at 58 mph in 30 mph zone). He exhibited signs of intoxication (odor of alcohol, bloodshot eyes), and was arrested for DWI (second offense) and operating after suspension, after he failed field sobriety tests. Results of a breathalyzer confirmed a blood alcohol content of .15%. In October 1988, he was convicted and sentenced on the DWI to a $500 fine, three years revocation of license, 37 days in jail (30 suspended) and an alcohol program. He was fined $100 for operating after suspension.

Before his court appearance for the July 1988 DWI, he admitted himself in August 1988 to a 30-day inpatient alcohol rehabilitation program. While in the program, he attended Alcoholics Anonymous (AA) meetings daily. He met his second wife while at the facility. After his discharge they cohabitated, and married in November 1988. They subsequently had two children, who were born in March 1993 and April 1997, respectively.

Applicant resumed drinking in early 1989 despite continuing to attend AA one to four times weekly. He consumed about six beers per month, no more than two per occasion. He stopped attending AA in fall 1989 because he felt he no longer needed to attend. In November 1989, Applicant and his spouse were involved in a car accident when she was driving. She had consumed alcohol before the accident. There is contradictory evidence as to whether Applicant had been drinking on that day, although he was not making an effort to abstain.[(3)] Applicant made a derogatory remark to the officer who arrested his spouse for DWI, and he was not cooperative in remaining settled in a vehicle while waiting for a tow truck to arrive. The officer arrested him for disorderly conduct. Applicant pleaded not guilty in April 1990, and the case was continued without a finding for one year. It was later dismissed.

Sometime before August 1990, Applicant had moved to another state for his job. On August 3, 1990, Applicant was interviewed in his new locale by a DIS agent about his 1988 DWI, his substance abuse treatment in August 1988, his attendance at AA, and his 1989 disorderly conduct. No longer involved in AA, he acknowledged that he felt he had an alcohol problem after the 1988 DWI, but "did not feel [he] was dependent or addicted to alcohol." He described his consumption since early 1989 as social, about six beers per month, no more than two beers at once. He averred he had nothing to drink on the occasion of his arrest for disorderly conduct, and denied being intoxicated since summer 1988. He expressed his intent to drink alcohol in moderation in the future as he had responsibilities to his family and job.

Sometime after his DIS interview, Applicant completed a 30-day inpatient alcohol rehabilitation program,[(4)] and he became involved in AA. In July 1992, the DoD granted Applicant a secret-level security clearance.[(5)] In or before July 1995, Applicant moved back to state Y where he has since resided.

Applicant remained sober for about ten years with the help of AA. For about 14 months from 2002 into 2003, Applicant was out of work on disability. He did not attend AA during this time. He began drinking with his spouse on a daily basis in late 2002. For at least six months in 2003, he drank to get drunk on a daily basis. On occasion, he drove a vehicle after drinking "too much." He and his spouse began to experience marital difficulties, and in March 2004, he got involved in a physical altercation with her when they had both been drinking. Two weeks later, she had him arrested after he telephoned her in violation of a restraining order. He had been drinking at the time, and he continued to consume alcohol after his arrest until his son's birthday in April 2004.

In May 2004, Applicant was sentenced on the restraining order violation to complete a domestic violence program and to attend AA. Applicant completed the 40 weeks of classes, and resumed an affiliation with AA. His spouse had the restraining order rescinded that summer. For eight or nine months in 2004, he also had individual therapy sessions twice monthly to help him deal with the dissolution of his marriage. He and his spouse divorced in November 2004. She was given physical custody of their two children. In December 2005, Applicant obtained a restraining order against his ex-wife after she shoved him at a local restaurant when out to dinner with her and the children.

As of April 2006, Applicant was going to three AA meetings per week. He had not made any effort to obtain a sponsor since returning to AA in about May 2004, but had a home group. Applicant maintains he has had no urge to drink since he stopped drinking in April 2004.

Applicant has been in his current assignment at work since about September 2005. Applicant's section manager considers him to be a valued member of the team.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, Safeguarding Classified Information within Industry § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Considering the evidence as a whole, the following adjudicative guideline is most pertinent to an evaluation of Applicant's security suitability:

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

CONCLUSIONS

Applicant has a long record of criminal offenses: felony cocaine possession with intent to sell in April 1979; felony

breaking and entering in June 1981; drunk driving in November 1983, January 1985, and July 1988; disorderly conduct in November 1989; and unalleged domestic violence and violation of a domestic restraining order incidents in March 2004. Concerning the charges that were continued without a finding or held on file for one year, the evidence showed Applicant was drunk when he was arrested for OUI in January 1985, and interfered with the officer in November 1989. Disqualifying conditions ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct*, and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*, are clearly pertinent to an evaluation of Applicant's security worthiness.

The government also argues for the applicability of 10 U.S.C. § 986.[(6)] Should that statute as amended October 28, 2004, apply, Applicant is barred from having a clearance granted or renewed absent a meritorious waiver if he served not less than one year in jail. Applicant was sentenced on November 16, 1981, to a term of from 18 to 36 months imprisonment, with 70 days of jail credit for time served, for the 1981 felony breaking and entering. In the custody of state X's department of corrections from sentencing on November 16, 1981, he was incarcerated in a medium security correctional facility from November 23, 1981 to November 15, 1982. He earned 37 days of merit time and 57 days of gain time on work release from August 21, 1982 through November 15, 1982, and was released from custody on November 15, 1982. Applicant contends 10 U.S.C. § 986 is inapplicable, as he spent less than one year incarcerated.

Post-conviction, Applicant spent 364 days in the custody of the state department of corrections, including the seven days he was apparently given to arrange his affairs in state Y before he was incarcerated in state X's medium security facility. Applicant's time on work release is properly considered imprisonment in calculating the length of incarceration.[(7)] He had to report back to the prison each evening after work. During the week preceding his imprisonment in the medium security facility, he was certainly subject to arrest had he failed to report for his prison term, but there is no evidence his movements were restricted during that time. Institutional confinement, even for part of a day such as in work release programs, has been the determinant in courts finding incarceration or denying procedural protections, although even federal courts have split on the issue.

The government's case for application of 10 U.S.C. § 986 is nonetheless established. Since Applicant at sentencing was given credit for 70 days already served, that period of confinement is part of his prison term and must be included. In ISCR Case No. 03-02181, App. Bd. May 24, 2006, the DOHA Appeal Board was directly confronted with the issue of whether pre-trial confinement is part of an applicant's sentence where the applicant is credited at sentencing for time already served. The applicant in that case had spent three months in a county jail awaiting trial on a burglary charge. On her conviction, she was sentenced to five years in a state penitentiary with credit for the three months served. She served ten months in prison before being paroled. The Appeal Board found the administrative judge had correctly concluded that the applicant had served a sentence of not less than one year for the offense. As applied to Applicant's case, the 70 days of pre-trial confinement, when added to the time spent in the medium security prison, brings his incarceration within the prohibitions of 10 U.S.C. § 986 (c)(1), *The person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year*.

None of the mitigating conditions apply. 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, 2003, 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. The felony offenses Applicant committed as a young adult cannot be viewed in isolation from the repeated drunk driving. Although his last DWI arrest was in 1988, it is too soon to conclude that he is successfully rehabilitated. After about ten years of sobriety, Applicant relapsed into abusive drinking. For at least six months in 2003, he drank to get drunk daily. There were occasions between 2003 and April 2004 when he operated a vehicle after drinking to excess. In March 2004, he allowed alcohol to get the better of his judgment and was involved in a physical altercation with his now ex-wife. He subsequently violated a restraining order by telephoning her and she had him arrested. While he abstained completely from alcohol since mid-April 2004, has completed a court-ordered domestic violence program, and is involved in AA, his recent criminal conduct is incompatible with the good judgment that must be demanded of those with access.

Furthermore, Applicant is statutorily disqualified from having a security clearance granted or renewed under 10 U.S.C. § 986. His felonious breaking and entering, which was punished by incarceration in excess of one year, cannot be mitigated absent meritorious circumstances. Applicant has had considerable success as a logistics analyst for a defense contractor since September 1985, but it is not enough to overcome his long history of criminal conduct.

FORMAL FINDINGS

Formal findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).

2. It is not clear whether Applicant and his first wife were still together. He told a DIS agent in October 1987 that he and his first wife separated after his arrest in June1981 for breaking and entering. (Ex. 4) However, he indicated on his SF 86 that they were divorced on June 1, 1981. (Ex. 2)

3. Applicant told a DIS agent in August 1990 that he "had had nothing to drink." (Ex. 5) When first asked by me at his hearing whether alcohol had been involved in the disorderly conduct, he responded, "No." Yet, when asked specifically whether he had been drinking, he responded "Yes." (Tr. 80-81) Even if he had not consumed alcohol on that day, he was an active abuser of alcohol. He admitted himself to a 30-day program thereafter. (Tr. 81)

4. Applicant testified he spent 30 days in an hospital "right after the 1989 offense," and he became very active in AA. (Tr. 81-82) The sworn statement taken during his August 1990 DIS interview does not mention this treatment or any current involvement in AA. Either he was not completely forthcoming with the agent or the treatment and renewal of his affiliation with AA occurred after his August 1990 interview.

5. During his DIS interview in August 1990, Applicant was asked about his failure to list the 1988 and 1989 arrests on his PSQ. Applicant indicated he had received advice from DOHA Arlington (then known as DISCR) to "answer the statement of reasons of denial from DISCR." (Ex. 5) There is no evidence that Applicant's clearance had been previously adjudicated by DOHA.

6. As of the issuance of the SOR, Section 986 provided in pertinent part:

§ 986. Security clearances: limitations

(a) Prohibition.--After October 30, 2000, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons disqualified from being granted security clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year.

(d) Waiver Authority--In a meritorious case, an exception to the prohibition in subsection (a) may be authorized for a person described in paragraph (1) or (4) of subsection (c) if there are mitigating factors. Any such waiver authority may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.

7. Boot camp and work release have both been considered incarceration for purposes of the federal sentencing guidelines. In *U.S. v. Brooks*, 166 F.3d 723 (5th Cir.1999), the U.S. Court of Appeals held that a boot camp was properly a sentence of imprisonment since there was physical confinement, and distinguishable from types of sentences not requiring "twenty-four hours a day physical confinement, such as 'probation, fines, and residency in a halfway house.'" The determinant in that case was the appellant being not free to leave the boot camp. In *U.S. v. Ruffin*, 40 F.3d 1296 (D.C. Cir. 1994), the appellant had been committed to the custody of the Attorney General for imprisonment for one year with work release. The Appeals Court held it was a sentence of incarceration, noting that the appellant was imprisoned on weekends from 6:00 p.m. to 6:00 a.m. daily. His work release was part of a term of imprisonment. The Appeals Court for the Seventh Circuit held in *U.S. v. Timbrook*, 290 F.3d 957 (7th Cir. 2002), that a sentence of work release in a county jail was a sentence of imprisonment for purposes of § 4A.1.1.(b) of the U.S. Sentencing Guidelines Manual where the appellant had been sentenced to probation with a condition work release with incarceration in the county jail when he was not at work. The court contrasted his incarceration in a "secure jail facility" from community treatment centers or halfway houses, which the court did not consider to be incarceration.