DATE: November 19, 2007

In Re:	)	
	)	
----------	)	ISCR Case No. 06-26617
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
MARY E. HENRY

APPEARANCES

FOR GOVERNMENT
James F. Duffy, Esq., Department Counsel

FOR APPLICANT
Michael B. Ware, Esq.

SYNOPSIS

Between 1999 and 2005, the police arrested Applicant six times. Three arrests related to family disputes, which the court dismissed in including two not guilty findings. Applicant's most serious arrest occurred in 2002. He entered an Alfred plea to misdemeanor charges, but still maintains he did nothing wrong. The police twice arrested him for driving under the influence (DUI). The court found him not guilty of the most recent his DUI arrest. His earlier DUI is more than three years old. He has mitigated the government's security concerns regarding his criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On March 13, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR 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 Applicant. Specifically, the SOR sets forth security concerns arising under Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005 and implemented by the Department of Defense, effective September 1, 2006. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On May 10, 2007, Applicant submitted a notarized response to the allegations. He requested a hearing.

This matter was assigned to another administrative judge on June 14, 2007, who scheduled a hearing on August 2, 2007 in Newport News, Virginia. At the beginning of the hearing, Applicant requested counsel. The administrative judge continued the hearing until September 24, 2007. Counsel entered his appearance on behalf of Applicant on September 17, 2007 and requested the hearing be continued. Upon a showing of good cause, the administrative judge issued an Order on September 18, 2007, continuing the hearing until October 15, 2007. Because of an emergency with the administrative judge, DOHA reassigned this case to me on October 10, 2007. I conducted the hearing as scheduled in Williamsburg, Virginia. The government submitted six exhibits (GE), which were marked and admitted into evidence as GE 1 through 6. Applicant submitted nine exhibits, which were marked and admitted into evidence as applicant exhibits (AE), A through I. Applicant testified. The hearing transcript (Tr.) was received on October 24, 2007.

PROCEDURAL ISSUES

During cross-examination, counsel for the government sought to develop new evidence in regards to Applicant's relationship with his ex-wife on the issue of spousal abuse and his drinking habits. Applicant's counsel objected. The government did not allege that Applicant's past or present alcohol consumption was a current security concern under Guideline G (Alcohol Consumption) nor that spousal abuse was a security concern under Guideline E. Although the government sought to develop new evidence to amend the Statement of Reasons (SOR), it failed to make a proffer of the specific evidence that it planned to illecit. Accordingly, the government did not articulate the new allegations that would be outlined in the amended SOR. Essentially, the government wanted to embark on a fishing expedition. To allow the development of new allegations would have violated Applicant's due process rights of notice and opportunity to respond to these new allegations.[1]

[1]The SOR may be amended at the hearing by an Administrative Judge on his/her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted, or for other good cause. *See* Directive ¶ E3.1.17. More importantly, an unfavorable clearance decision cannot be made unless the applicant has been provided with an SOR that is as detailed and comprehensive as the national security permits. *See* Directive ¶ E3.1.3. Here, an amended SOR would not have provided this Applicant reasonable notice that his alcohol consumption or personal relationship with his former wife would be a real issue of paramount concern in determining the outcome of his case. A SOR issued under Guideline G would have made it clear to the Applicant that the government had concerns as to whether there was a nexus between Applicant's prior alcohol related offenses and his level of alcohol consumption. ikewise, a Guideline E allegation concerning his personal conduct towards his former wife would have made it clear that

FINDINGS OF FACT

Applicant admitted the allegation in subparagraph 1.d. under Guideline J, of the SOR.[2] This admission is incorporated as a finding of fact. He denied the remaining allegations.[3] After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact.

Applicant is 47 years old. He started work for his current employer, a Department of Defense contractor, in 1978. For the last 20 years, he worked as a nuclear engineer. Since 1990, he has held a low level security clearance, as his duties require him to review security documents on a daily basis. In his 28 years of employment, he has never been disciplined for any reason at work, and there are no allegations of violation of security procedures. For the last 12 years, he has coached little league and high school fast pitch baseball. He has never been investigated or charged for any inappropriate actions as a coach.[4]

Applicant married in 1983 and divorced in April 2004. His three children from this marriage are 23, 21 and 19 years of age. He remarried in January 2006.[5]

In 1999, Applicant and his first wife got into an argument. His wife stood about six feet from him. She threw a small pan or pail at him, which he deflected with his hands. The pan or pail then hit his wife. His wife did not sustain any injuries in this incident, which did not involve alcohol. He left the house. She filed a complaint with the magistrate, who asked him to remain away from the house for two to three weeks, which he did. Applicant and his wife appeared for the hearing in this matter in Juvenile and Family Court. When the court did not call their case, they learned that they had appeared on the wrong day. They immediately walked to the police station and advised the police about the mix up on their hearing dates. Although the Federal Bureau of Investigation criminal records for Applicant indicates a contempt of court arrest in April 1999 for his failure to appear, Applicant never saw a contempt of court Order, and did not become aware of such an Order until DOHA investigator told him about it. The record contains no other information on the contempt of court issue. At his trial in May 1999, Applicant voluntarily agreed to attend the "PRIDE" program, a relationship building program. He completed the 26 week program, which he described as an enlightening and helpful course on how to interact with people. The docket sheet indicates that thereafter, the court dismissed the charges after a finding of not guilty.[6]

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the government also had concerns about his conduct towards her. Similarly, if the government intended to present evidence of additional criminal conduct, then it should have disclosed those security concerns in the SOR.

[2]Applicant's response to the SOR, dated May 10, 2007, at 1.

[3]*Id*.

[4]GE 1 (Applicant's application for a security clearance (SF-86)) at 2, 6-7, 9, 12-13; AE I (Documents from Little League); Tr. at 22-25.

[5]GE 1, *supra* note 4, at 9, 12-13; Tr. at 42-43.

[6]GE 2 (United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division) at 2. I note that the criminal records document does not list an arrest for February 1999; AE A (Court docket sheet for February 1999 arrest); Tr. at 26-27, 45-51.

In September 2002, Applicant drove to a local karaoke bar to listen to friends sing. After one and one-half hours, he left. A woman asked for a ride home. He drove her to a furniture store parking lot, next to her home. He parked his car, a mini van. While sitting in the car, he observed in his rear view mirror an individual dressed in nondescript clothing approaching his car on the left with a big chain and a gun. He thought he was being set up for a robbery and feared for his life. He started his car and drove away. He drove about 100 yards and turned left at a light. He saw police car lights and car. He stopped and got out of his car and waited for the police. The police who arrived at this time were in uniform. Before talking with him, the police threw him on the ground and began beating him, resulting in injuries and bruising. The police then arrested him and charged him with eluding a police officer and assault and battery on a police officer, both felony charges. On advice of counsel, Applicant entered an Alford plea (he voluntarily, knowingly and understandingly consented to the imposition of a prison sentence, but did not admit his actions constituted a crime) to simple assault (this offense lacked the element of assault on a police officer) and eluding a police officer, misdemeanor offenses. The court sentenced him to 12 months in jail, which it suspended, and fined him $1,078. He agreed to the Alford plea to avoid the risk of trying the case, which had a more serious potential for an adverse result from a contested trial. At the hearing, he emphatically denied striking a police officer or running from the police. He drove away to protect himself from harm.[7]

Just prior to finalizing their divorce, in January 2004, Applicant's wife filed a criminal complaint, alleging threatening and harassing phone calls. The police then arrested and charged him with two misdemeanor counts of threatening and annoying telephone calls. Applicant called his wife several times to discuss discipline of their children after his wife had allowed their teenage children to have socials in the home without adult supervision. They disagreed about this issue. He recalls speaking loudly and sharply about this issue. The court dismissed these charges in June 2004.[8]

In April 2004, Applicant drank at a celebration at work. He then left work and drove while under the influence of alcohol, which he admits was a mistake. The police arrested him and charged him with DUI, a misdemeanor offense. The court found him guilty and sentenced him to six months in jail, which was suspended, fined him $250, directed he attend a state alcohol and safety program, and pay $174 in costs. The court also restricted his driving privileges to driving to and from and to other work assignments as needed for one-year. Applicant complied with all the terms of his sentence.[9]

In 2004, Applicant purchased a car for his then 18-year-old daughter. She signed a contract, which outlined terms and conditions for her use of this car, including using the car to go to school. She also verbally agreed that if she did not comply with the terms of the contract, she could not drive the car. By November 2004, his daughter stopped going to school as agreed. To prevent her from driving the car, Applicant removed the spark plugs from the car. His daughter then filed a criminal

[7]GE 3 (Court information sheet); GE 4 (Court information sheet); Tr. at 35-39, 59-64.

[8]AE B (Court docket sheet); AE C (Court docket sheet); Tr. at 26-27, 66-68, 81-82.

[9]GE 2, *supra* note 6, at 2; GE 5 (Court case information sheet) at 1; AE F (Final report from alcohol safety program, dated January 24, 2005); Tr. at 27-28, 77.

property damage charge against him. The police arrested him in November 2004. He pled not guilty to the charge, and the court found him not guilty and dismissed this case on March 11, 2005.[10]

In January 2005, Applicant and his fiancee drove to a restaurant and bar in his van, where they met a friend of his. While at the restaurant, he drank alcohol. When they returned to his van, they could not drive the van because transmission stopped operating. His friend offered Applicant his truck to drive. Applicant's fiancee rode to his friend's house to drop off the friend and return to the restaurant parking lot with the truck, as Applicant would not drive since he had been drinking. Applicant waited in his van. Because it was cold, he turned on the engine and fell asleep. While he was sleeping in his van, the police came. The police tapped on his window, asked him to get out, put him in the police cruiser, and took him to the police station. The police charged him with DUI, first offense. In court, Applicant pled not guilty to the charge and the court found him not guilty of driving under the influence.[11]

POLICIES

The revised Adjudicative Guidelines set forth disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. An administrative judge need not view the revised adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, are intended to assist the administrative judge in reaching fair and impartial common sense decisions. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the revised AG should be followed whenever a case can be measured against this policy guidance. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive.[12]

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[13] The government has the burden of proving controverted facts.[14] The burden of proof is something less than a preponderance of the evidence.[15] Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

[10]AE E (Court docket sheet on case) at 1-2; AE F (Contract with daughter); Tr. at 29-31.

[11]AE H (Court trial order, dated October 6, 2005) at 1; Tr. at 40-42, 70-71,78-79.

[12]Directive, revised Adjudicative Guidelines (AG) ¶ 2(a)(1)-(9).

[13]ISCR Case No. 96-0277 at 2 (App. Bd., July 11, 1997).

[14]ISCR Case No. 97-0016 at 3 (App. Bd., Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

[15]*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

him.[16] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[17]

No one has a right to a security clearance,[18] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[19] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[20] Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.[21] 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.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

Criminal Conduct

Under Guideline J, criminal activity creates a doubt about a person's judgment, reliability, and trustworthiness. By its nature, criminal activity calls into question a person's ability or willingness to comply with laws, rules and regulations. (AG ¶ 30) Between 1999 and 2005, the police arrested Applicant on six occasions and charged him with felony or misdemeanor criminal offenses. Thus, DC ¶ 31 (a) a single serious crime or multiple lesser offenses and DC ¶ 31 (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted apply.

AG ¶ 32 describes conditions that could mitigate security concerns including:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, thrustworthiness, or good judgment;

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[16]ISCR Case No. 94-1075 at 3-4 (App. Bd., Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

[17]ISCR Case No. 93-1390 at 7-8 (App. Bd. Decision and Reversal Order, Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

[18]*Egan*, 484 U.S. at 531.

[19]*Id*.

[20]*Id*.; Directive, revised AG ¶ 2(b).

[21]Executive Order No. 10865 § 7.

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

In 1999, Applicant and his wife got into an argument. She threw a pan or pail at him which he deflected, causing it to hit his wife. Although she sustained no injury, she filed a domestic violence charge against Applicant, which the family court, not the criminal court, adjudicated. The court resolved this case, by asking Applicant to participate in PRIDE, a relationship building course. Once applicant completed this informative and helpful course, the family court dismissed the charges against him. No further incidences of this type have occurred between Applicant and his now former wife. Applicant has mitigated the government's concerns regarding this arrest under MC ¶ 32 (a) because this incident took place more than eight years ago and is unlikely to reoccur as he and his wife have divorced, which has minimized the chances for fighting. Given Applicant's denial of any knowledge of a criminal contempt Order and the lack of documentary evidence showing the issuance of an Order by the court, Applicant has mitigated this allegation under MC ¶ 32 (c).

Applicant has also mitigated his criminal conduct and guilty finding for the 2002 incident under MC ¶ 32 (a). I decline to apply collateral estoppel in regard to his misdemeanor conviction. The Appeal Board articulated a four-part test for applying collateral estoppel in such cases:

> First, the party against whom the earlier decision is asserted must have been afforded a "full and fair opportunity" to litigate that issue in the earlier case. Second, the issues presented for collateral estoppel must be the same as those resolved against the opposing party in the first trial. Collateral estoppel extends only to questions "distinctly put in issue and directly determined" in the criminal prosecution. Third, the application of collateral estoppel in the second hearing must not result in unfairness. Federal courts decline to apply collateral estoppel where the circumstances indicate a lack of incentive to litigate the original matter. "Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate the first trial, especially in comparison to the stakes of the second trial." The arguments for not giving preclusive effect to misdemeanor convictions are that an individual may not have the incentive to fully litigate a misdemeanor offense because there is so much less at stake, or that plea bargains create an actual disincentive to litigate these particular issues. ISCR Case No. 04-05712 at 8 (App. Bd. Oct. 31, 2006). (Citations and parentheticals omitted)

In this case, following a offer to plea to a reduced charge and no jail time by use of an Alford plea, Applicant lacked incentive to fully litigate the issues of his innocence of the felony charges against him. Applicant credibly testified that he drove away when an unidentified individual approached his parked car with a gun drawn and he feared for his life. Unbeknownst to him, the individual was a plain clothes police officer. The state agreed to allow him to enter an Alford plea

to misdemeanor charges, which raises questions about the strength of the state's felony case. Because the state allowed him to plea to simple assault without any reference to assaulting a police office, his plea provides credibility to his version of events. To avoid the risks connected with a trial, Applicant followed his counsel's recommendation and entered an Alford plea. By so doing, he ended the stress and trauma connected with a trial and continued to maintain his innocence. It would be unfair to apply collateral estoppel to Applicant based on these facts.

The facts surrounding this arrest are unique and not likely to occur again. Applicant's decision to flee the parking lot under the circumstances described does not cause doubt on his reliability, trustworthiness, or good judgment. He made a split-second decision to protect his life in a situation he perceived as very dangerous. His actions are not criminal conduct or even misconduct. As such, the 2002 incident does not cause a security concern.

The police arrested Applicant twice for DUI. The court found him guilty of the first DUI and not guilty of the second DUI. In light of the not guilty finding in 2005, as well as his credible statement that he was not driving and only using the vehicle's heater, establish he has mitigated the government's concern about this DUI under 32 ¶ (c). After his first DUI in 2004, Applicant chose not to drink and drive, a decision he made because of the information he learned while in the alcohol safety program. He has had no other convictions for DUI and only one subsequent arrest. At the time of his second DUI arrest, he was waiting for his fiancee to come and drive him home because he had been drinking. There is little likelihood that Applicant will be arrested for DUI in the future. It has been over three years since his DUI conviction after drinking. He has mitigated the government's concerns under MC ¶¶ 32 (a) and 32 (d).

The police arrested him twice as a result of disputes with family members over discipline. Applicant became concerned when his wife allowed their teenage children to have social gatherings in their home with their friends and without adult supervision. He and his former wife argued about her decision. She did not like his position and apparent criticism of her. As a get even tactic, she filed a complaint alleging harassing and annoying telephone calls by Applicant. Applicant's description of his relationship with his former wife is credible. The court's dismissal of these charges is one indication that he did not commit the alleged criminal conduct. As to the criminal property damage charge, the court found him not guilty of any crime in the disciplining of his daughter. He did not use physical force in either of these incidents. Rather, both incidents resulted from displeasure or disagreement with his approach to issues. Applicant has mitigated the government's concerns regarding these arrests under MC ¶ 32 (c). I find that Applicant has mitigated the government's concerns about his criminal conduct under Guideline J.

Whole Person Analysis

Protection of our national security is of paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the adjudicative process is the fair-minded, common sense assessment of a person's trustworthiness and fitness for access to classified information. Thus, in reaching this decision, I must consider the whole person concept in evaluating Appellant's risk and vulnerability in protecting our national interests. Under the whole-person concept, I must consider the following factors listed in the Directive: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct to include knowledgeable participation; (3) the frequency and recency of

the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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. AG ¶ 2 (a)(1)-(9).

Applicant has worked for his present employer for 28 years. He has never been disciplined at work nor has he ever violated security procedures. The SOR lists six arrests for Applicant over a six-year period of time, thus, raising a question of whether Applicant has a pattern of criminal conduct. His first arrest was resolved in family court, not criminal court, because family court has developed expertise in helping resolve family issues before the issues develop into serious criminal problems. In Applicant's case, the court offered him an opportunity to participate in PRIDE, a relationship building course, and he did. As a result of this program, Applicant developed new skills for managing family situations. The arrests in January and November 2004 occurred not because Applicant committed a crime, but because he and family members disagreed over discipline and adult supervision of teenagers.

Applicant's 2002 arrest occurred under a very unique set of circumstances. He drove away from an armed individual approaching him as he feared for his life. He later found out this individual was a police officer. Although he stopped and waited for the police a short distance away from where he had been parked, the police manhandled him before talking with him, then arrested and charged him with two felonies, eluding the police and assaulting a police officer. The police interpreted his actions as a sign of criminal conduct and reacted accordingly. He vehemently denies any wrongdoing, including assaulting a police officer, despite his decision to enter an Alford plea, not to felony charges but to misdemeanor charges of eluding a police officer and simple assault. He chose the Alford plea after much discussion with his counsel, instead of proceeding forward with an expensive, emotional, and stressful trial, with an uncertain outcome.

Applicant has acknowledged that he drank and drove in 2004, and he should not have done so. He credibly testified that after attending the alcohol safety program, he no longer drinks and drives. His testimony is supported by the fact that in 2005, after drinking, he decided that his fiancee should go with his friend to obtain transportation and he would wait at his disabled van for her to return with the transportation. His DUI arrest in 2004 is his only DUI arrest, as the court found him not guilty of the second DUI charge.

Although he has been arrested six times, Applicant does not have a pattern of criminal conduct because three of his arrests arose from family disputes, which were resolved in family court or dismissed by the courts without any finding of criminal conduct. His most recent arrest resulted in a not guilty finding by the court. While it may be argued that his two remaining convictions are enough to show a pattern, his 2002 case involved a rather unique set of facts, which are not likely to occur again. His only DUI conviction occurred more than three years ago. He learned about the dangers of drinking and driving from his alcohol education program and has applied the values from this program to his everyday life. He no longer drinks and drives.

Applicant has demonstrated that he is not vulnerable to coercion, exploitation, pressure or duress because these arrests. He has learned from his mistakes and will not repeat this conduct in the future. He is a hard working employee with a good record. He is happily married to his second wife. Having weighed all the evidence of record and used a common sense evaluation of the entire facts

in this case, I find that he has mitigated the government's security concerns. Accordingly, I find in favor of Applicant under Guideline J.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

SOR ¶ 1-Guideline J :	FOR APPLICANT
Subparagraphs a-f:	For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is granted.

Mary E. Henry
Administrative Judge