DATE: December 17, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-10334

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a record of alcohol-related domestic abuse and drunk driving offenses. While there is no evidence his drinking has led to adverse social, occupational, or legal consequences since his last driving while intoxicated offense in August 1992, he continues to consume alcohol in quantities which present an unacceptable risk. After drinking seven or eight beers in May 2003, he had his spouse drive him home. Although Applicant disclosed only his most recent drunk driving offense on his security clearance application, it was due to a good faith mistake rather than to an intent to conceal. Personal conduct concerns are mitigated by his candor about his alcohol consumption and alcohol-related criminal incidents. Alcohol consumption concerns persist where Applicant cannot be counted on to drink only in moderation. Clearance is denied.

STATEMENT OF THE CASE

On May 15, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to 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 alcohol consumption (Guideline G) and on personal conduct (Guideline E).

On June 9, 2003, Applicant filed an answer to the SOR and requested a hearing before a DOHA administrative judge. The case was assigned to me on July 30, 2003, and a formal notice was issued on August 8, 2003, scheduling the hearing for August 20, 2003. At the hearing held as scheduled, six Government exhibits and one Applicant exhibit were entered into the record and testimony was taken from the Applicant, as reflected in a transcript received by DOHA September 2, 2003.

FINDINGS OF FACT

DOHA alleged in the SOR alcohol consumption concerns because of alcohol-related domestic assault incidents in October 1984, June 1990, February 1991, and January 1992; drunk driving offenses committed in about 1979 and August 1992; and his continued consumption of alcohol. Personal conduct was also alleged as Applicant disclosed only his August 1992 driving while intoxicated (DWI) on his May 1999 security clearance application (SF 86). Applicant admitted the Guideline G allegations, but denied the intentional falsification of his SF 86. His admissions are accepted and incorporated as findings of fact. After a thorough review of the evidence, and on due consideration of the same, I make the following additional findings of fact:

Applicant is a 51-year-old associate logistician employed by a defense contractor since May 1999, with the exception of a three-month layoff two years ago. He requires a Secret security clearance for his duties in the company's warehouse.

Applicant entered on active duty in the U.S. military in June 1971. He started to drink alcohol while in the service. After being arrested and fined for driving while intoxicated (DWI) in about 1979, Applicant was ordered by the military to attend a thirty-day inpatient counseling program. In the opinion of his counselor, Applicant was drinking too much. Advised to abstain completely from alcohol, Applicant continued to drink intoxicants.

In December 1979, Applicant married his first wife. After Applicant achieved the rank of chief petty officer in September 1984, he began to frequent the chief's club on Friday nights. As his drinking increased, the marital relationship deteriorated. Following a night of drinking at the club in October 1984, Applicant got into an argument at home with his spouse about his consumption. Their verbal altercation escalated into physical abuse, and Applicant's spouse told him to leave. He initially refused and she called the base police who found Applicant in a volatile state. Applicant's spouse complained to the police that Applicant had been drinking all day, and she feared for her and their children's safety. No charges were filed. Applicant and this spouse divorced two years later.

By 1989, Applicant was drinking five or six beers per day. On a night in June 1990 when he and his second wife had both been drinking, they got into an argument.[(2)] The verbal abuse escalated to physical abuse, and Applicant was arrested for domestic assault. He was sentenced to probation for one year and required to attend anger management counseling. Applicant attended an anger management program for about eight weeks in summer 1990 where the effects of alcohol and controlling temper were discussed. Applicant maintained complete abstinence from alcohol during the program and for a month or two afterward.

He returned to previous patterns of drinking (five or six beers daily) and was again arrested for domestic abuse of his second wife in mid-February 1991. Applicant pleaded nolo contendere to the charge in April 1991, but was sentenced to one year probation with counseling.

After drinking in celebration of New Year's 1992, Applicant and his second wife had an argument during which Applicant struck her in the head with a sneaker, choked her and slapped her. She reported the domestic abuse and the responding police noticed several scratches (one scratch reportedly inflicted during an argument the week before) and red marks on her face and swelling in her lip. Applicant was arrested and charged with simple assault and domestic assault. In court in January 1992, the charge was dismissed as his spouse refused to testify.

En route home after imbibing six or seven beers at a retirement party for a navy chief in August 1992, Applicant was hit broadside by another motor vehicle as he was turning left. Police responding to the accident scene observed Applicant to have a staggered gait, blood shot and watery eyes, slurred speech and breath smelling of alcohol. Applicant was arrested and charged with driving while intoxicated (DWI) after he failed field sobriety tests. He refused to take a chemical test at the station. Applicant pleaded nolo contendere and accepted state sanctions--ten hours community service, $831.50 fine, three months loss of license, and DWI school. Applicant complied with the sanctions, including refraining from operating a motor vehicle for three months.

In late December 1992, Applicant retired from the military at the rank of master chief machinist mate (E-9). From March 1993 to April 1999, Applicant was employed as a bar manager at a local sports tavern. Prohibited from drinking on duty and involved with a woman (his third wife) who taught him there were other things he could do besides drink all the time, Applicant reduced his alcohol consumption from previous levels, at least during the work week.

In May 1999, Applicant went to work as an acquisitions specialist for his present employer. Needing a Secret security clearance for his duties, Applicant executed a security clearance application (SF 86) on May 6, 1999. Applicant responded "Yes" to question 24 ["Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"], listing only the 1992 DWI offense. He did not disclose his other offenses because he mistakenly thought he had to report only those offenses which occurred within the seven years preceding his application. Circa July 1999, Applicant was granted an interim clearance, which he held until it was revoked on issuance of the SOR.

On January 30, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his alcohol consumption, adverse contacts with law enforcement, and failure to report all his alcohol-related offenses on his security clearance application. Applicant admitted he had imbibed six or seven 12-ounce beers before his last DWI, and that he had not felt too intoxicated to drive safely. Applicant attributed his three domestic assault offenses in 1990, 1991 and 1992 to his and his ex-spouse being under the influence of alcohol on those occasions. As for why he did not reveal all his arrests, Applicant explained he believed he was required to report "anything that occurred in the last 7 years only." Applicant admitted to the current consumption of alcohol, although not to abuse. He described his typical consumption as a beer with dinner and maybe a beer or two in the evening two or three days during the week. On weekends but not every weekend, he consumed up to six to eight cans of beer at a sitting when socializing with friends. He admitted to drinking eight beers to intoxication just a few days before the interview. Applicant questioned his ex-wife's characterization of him as an alcoholic, as no family members or friends had ever suggested his use of alcohol was a problem.

While working at a steak fry in May 2003, Applicant imbibed seven or eight beers over a seven-hour time span. Aware he was under the influence of alcohol, he had his spouse drive him home. On the four or five occasions in the last two years where he has operated a motor vehicle after drinking, he drank no more than one or two beers. As of August 2003, Applicant was drinking two or three times a week, usually no more than three beers at a sitting. He estimated that over the first twenty days of the month, he had consumed twelve beers. He does not keep alcohol in his home unless he is expecting company. Applicant admits he had a problem with alcohol from 1988/89 to 1992 but he denies any current problem.

Applicant has met his employer's expectations since coming to work for the defense firm. His dependability, hard work, willingness to take on any task, and ability to get along with peers and clients alike have made him an asset to the company.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Sections 6.3 and E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

GUIDELINE G

Alcohol Consumption

The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Conditions that could raise a security concern and may be disqualifying include:

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 (E2.A7.1.2.1.);

Habitual or binge consumption of alcohol to the point of impaired judgment (E2.A7.1.2.5.).

Conditions that could mitigate security concerns include:

The problem occurred a number of years ago and there is no indication of a recent problem (E2.A7.1.3.2.);

Positive changes in behavior supportive of sobriety (E2.A7.1.3.3.).

GUIDELINE E

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

None applicable.

* * *

Under Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the SOR. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Directive, Enclosure 2, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines G and E:

Nothing in Executive Order 10865, as amended, or Department of Defense Directive 5220.6 prohibits drinking per se. Rather, alcohol consumption raises security concerns under Guideline G when it is to excess. As evidenced by Applicant's two DWI offenses (1979 and 1992) and his domestic assaults of his former spouses (October 1984 involving his first wife; June 1990, February 1991, and late December 1991 his second wife), Applicant abused alcohol on several occasions. All but the first offense occurred after he had received alcohol counseling in a thirty-day inpatient program in the military. Following his 1992 DWI, he reduced his drinking during the week, but continued to imbibe up to six or eight beers in a sitting on some weekends. He admitted consuming eight beers to intoxication about a week before his DSS interview in January 2002. Although there is no evidence Applicant has ever allowed alcohol to negatively influence his work performance or attendance, those to whom classified information is entrusted must be relied on to safeguard this material both during business and non-business hours. The ingestion of alcohol to intoxication is incompatible with this duty due to the obvious potential for intentional or inadvertent disclosure when one is under the influence. Disqualifying conditions (DC) E2.A7.1.2.1. (alcohol-related incident away from work) and E2.A7.1.2.5. (habitual or binge consumption of alcohol to the point of impaired judgment)[(3)] are pertinent to an evaluation of Applicant's security suitability.

Absent a clear diagnosis of alcohol abuse or alcohol dependence, Applicant is not required for mitigation to satisfy the stringent requirements of E2.A7.1.3.4. (successful completion of inpatient or outpatient rehabilitation with aftercare, frequent Alcoholics Anonymous meetings, abstention for at least 12 months, and a favorable prognosis).[(4)] Yet, given Applicant's pattern of overindulgence in alcohol with repeated alcohol-related incidents outside of work, he bears a particularly heavy burden to demonstrate that he can be counted on to drink responsibly in the future. When interviewed by the DSS agent in January 2002, Applicant was continuing to drink to intoxication, although not on a regular basis. He related an episode of intoxication the Sunday before his interview, and another seven months before that. While he apparently had slowed his drinking down (he was no longer drinking five to six beers a day), he admitted to typical consumption of six to eight beers on a Saturday or Sunday, albeit not every week.

Applicant submits his "inexcusable extremely poor behavior" was of the past and resulted from two marriages where both adults were under the influence of alcohol. When questioned at his hearing about his current drinking patterns, Applicant testified to consuming two beers during a round of golf the day before with nothing over the previous weekend as he had been working. As for his level of consumption per week, Applicant responded, "I would say less than fourteen cans of beer" over the course of a week with some weeks where it might be less. (Tr. 48-49). Applicant indicated he might drink three beers in three hours while watching a ball game. (Tr. 49). Whereas recent history includes consumption of up to seven or eight beers on a single occasion, his case for favorable application of E2.A7.1.3. (the problem occurred a number of years ago and there is no indication of a recent problem) is not well taken. In May 2003, Applicant had his spouse drive him home after he imbibed seven or eight beers at a steak fry. While he testified he drank the beers over the course of seven hours that day, he felt sufficiently impaired to have his spouse drive him home. The absence of any alcohol-related arrests or incidents since August 1992 is some indication of positive changes supportive of sobriety (see E2.A7.1.3.3.), but doubts persist as to whether he can be counted on to drink only in moderate amounts in the future. Subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., and 1.g. are resolved against Applicant.

Personal Conduct concerns are generated when an applicant has deliberately omitted relevant and material information from a security clearance application or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities (E2.A5.1.2.2.). When Applicant completed his SF 86 in May 1999, he disclosed only his most recent DWI offense in response to question 24. The Government's case under Guideline E is based on Applicant's failure to list his prior offenses (the 1979 DWI and the domestic assault arrests).[(5)] Applicant has consistently denied any intentional concealment, attributing the omission to his mistaken belief that he was required to list only those incidents which occurred within the seven years preceding the execution of the security form. Applicant's explanation is credible. Although question 24 is unambiguous in its language ["Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"], the questions which follow include inquiries into misdemeanors (question 26) and alcohol-related treatment (question 30). Both have a seven-year scope. It stands to reason that if Applicant was acting to

conceal his alcohol-related problems from the Government, he would not have listed his most recent and most serious offense. Furthermore, when the DSS agent pointed out to him that question 24 was not limited in time to the past seven years, Applicant candidly admitted his prior offenses and his counseling in the military. Since the omission was not intentional and he corrected the record when apprised of his error, a favorable finding is warranted as to subparagraph 2.a. of the SOR.

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 G: 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

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: For 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.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under 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. Applicant indicates he and his wife were both drinking that evening and their argument escalated into mutual pushing. (Ex.2). There is some question as to whether Applicant was married to his second wife at that point. On his SF 86, he indicated they wed in June 1991 and divorced in November 1993. (Ex. 1).

3. Binge drinking is not defined in the Directive. The U.S. Department of Health and Human Services and SAMHSA's National Clearinghouse for Alcohol and Drug Information defines binge drinking as the consumption of five or more drinks in a row on at least one occasion. *See* http://www.health.org/govpubs/phd627/binge.aspx. Applicant's consumption of six or seven beers to intoxication at the retirement party in August 1992 clearly qualifies as binge drinking under this definition. Evidence shows Applicant continued to consume as many as eight beers at a sitting on occasion after his last DWI.

4. Applicant testified his counselor in the thirty-day inpatient program in the 1970s told him he had an alcohol problem and he should abstain from alcohol. However, Applicant also testified he didn't start drinking to intoxication until 1984/85. While the DWI and the counselor's assessment suggest an earlier start to his problem drinking, absent a clear

diagnosis of alcohol abuse or alcohol dependence by a licensed credentialed medical professional or licensed clinical social worker on staff of a recognized alcohol treatment program, the fact that he continues to drink alcohol is not *per se* disqualifying. In the absence of any medical records of record reflecting a diagnosis or the qualifications of the counselor, drinking in moderation engenders little security concern.

5. In addition to the June 1990, February 1991, and October 1992 formal charges of domestic assault, the Government also alleged Applicant failed to disclose the October 1984 incident where the military police intervened in a family dispute between Applicant and his first wife. There is no evidence that Applicant was ever charged or arrested in connection with that incident. Question 24 on the SF 86 requires only the listing of charges and convictions, so Applicant was not required to disclose that incident on his SF 86.