DATE: August 19, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-00062

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The personal conduct concerns raised by Applicant's alcohol-related offenses, including driving while intoxicated in September 1998 and December 1998, are mitigated by his change to an alcohol-free lifestyle since completing a court-mandated intensive outpatient program. Doubts persist for his judgment, reliability and trustworthiness because of his deliberate failure to disclose on a March 2000 security clearance application security significant criminal record and financial record information. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to 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 and the implementation of 10 U.S.C. §986), issued a Statement of Reasons (SOR), dated February 20, 2002, 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR alleged personal conduct (guideline E) related to his June 1984, September 1998 and December 1998 driving while intoxicated offenses, an August 1984 drinking in public, and the omission from his security clearance application of the 1984 and September 1998 alcohol-related offenses, a 1996 destruction of property charge, and a March 1996 motor vehicle repossession.

On March 14, 2002, Applicant responded to the allegations set forth in the SOR and requested that his case be determined on the written record in lieu of a hearing. The Government submitted its File of Relevant Material (FORM) on April 22, 2002, a copy of which was forwarded to Applicant with instructions to submit additional information and/or any objections within thirty days of receipt. Applicant elected not to respond, and on August 2, 2002, the case was assigned to me for a decision.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 48-year-old student who seeks a security clearance for his duties with a defense contractor. Applicant has a history of abusive use of alcohol to early 1999, which led to his arrest on at least five separate occasions for alcohol-related offenses.[(1)] At age eighteen, he drank to intoxication monthly. While serving in the United States military between December 1974 and February 1976, he drank to intoxication when his ship was in port. Following his discharge, Applicant's drinking escalated. While he was working for the post office from 1979 to 1988, he drank almost daily with coworkers after work, becoming inebriated two to three times per week. In June 1984, Applicant was arrested for driving while intoxicated (DWI) after drinking beer at a friend's house. He pleaded guilty to the charge and was fined, ordered to enroll in and complete an alcohol program, and his operating privileges were suspended for six months. In August 1984, Applicant was fined about $25.00 for drinking beer in public with friends. Applicant reduced his consumption of alcohol somewhat after he left his post office employ, but he continued to imbibe beer and sometimes hard liquor to the point of intoxication twice weekly. This pattern of drinking persisted for ten years.

From 1992 to August 1994, Applicant worked for the federal government in a temporary status as a helper in a public works department. When another less senior employee was offered a permanent position over him, Applicant filed a complaint of discrimination with his manager. Applicant negotiated a settlement with regard to his separation which entitled him to unemployment compensation.

Applicant was unemployed for more than three years thereafter. During this time, Applicant fell behind in his automobile payment, and his vehicle was repossessed in March 1996 with a balance owed on his loan of $5,589.09. In November 1996, he was arrested for destruction of property.[(2)]

In March 1998, he found work as a laborer for a construction company. After drinking at a friend's house on an occasion in mid-September 1998, Applicant was pulled over for driving too slow. Applicant failed sobriety tests administered, and he was arrested for DWI. In mid-January 1999, he was found guilty and sentenced to ninety days in jail with thirty days suspended, fined $300.00, and placed on two years probation.

Following his initial appearance in court for the September 1998 DWI but prior to his judgment date, Applicant was arrested in early December 1998 for yet another DWI. In mid-December 1998, Applicant appeared in court and pleaded guilty. He continued to consume alcohol thereafter to early January 1999, primarily on weekends. Jailed from March 1999 to May 1999 for the September 1998 DWI, Applicant in early May 1999 was found guilty of the December DWI and sentenced to ninety days confinement (suspended), fined $250.00 plus a $100.00 assessment, which he paid in full, and two years probation.

In April 1999, Applicant was evaluated pursuant to court order. Diagnosed as suffering from alcohol abuse (in remission since January 1999), Applicant was referred to an outpatient alcohol program. From mid-April 1999 to mid-August 1999, Applicant received intensive outpatient services. Urinalysis and breathalyzer tests administered to him during the program were negative. At discharge from his phase I treatment in August 1999, Applicant declined aftercare.

Unemployed since April 1999 with the exception of a brief period in July/August 1999 where he worked as a construction laborer, Applicant in October 1999 went to work as a security guard for a defense contractor. While an investigation was being conducted into his background for a security clearance, Applicant terminated his employ.

In early March 2000, Applicant went to work for his present employer.[(3)] On March 6, 2000, Applicant executed a Questionnaire for National Security Positions (SF 86). In response to inquiries concerning his police record, Applicant answered question 23 d ["Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"] in the affirmative, and listed a December 1998 DWI charge to which he indicated he pleaded guilty. In answer to question 25 regarding any alcohol-related treatment or counseling, Applicant disclosed treatment from February 1999 to August 1999. Applicant also responded "Yes" to questions posed regarding financial delinquencies, reporting a $290.00 outstanding debt to a local hospital.

An electronic (EPSQ) version of the security clearance application was prepared on March 15, 2000. Applicant's December 1998 DWI was listed in response to alcohol/drug offenses (question 24 on the EPSQ), with a fine indicated as punishment. His alcohol-related counseling from February 1999 to August 1999 was reported in answer to question 30 regarding any alcohol-related treatment or counseling in the last 7 years. No financial delinquencies or repossessions were disclosed on the EPSQ version. His employment with the federal government, which had been listed on the earlier handwritten SF 86, was omitted from the EPSQ version.

In late August 2000, Applicant began serving his two years of supervised probation for the December 1998 DWI.

On September 11, 2000, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his arrest record, the reasons for his termination from his federal employment, and some outstanding financial obligations. Applicant detailed the circumstances of his 1998 DWI offenses, his arrest in August 1984 for drinking in public, and his June 1984 DWI. Applicant related he had completed his probation for the September 1998 DWI but still had one year to serve on his probation for the December 1998 DWI. As for the circumstances of his termination from his federal public works job, Applicant maintained he was hired as a temporary worker for one year, and he was terminated at the end of his second year due to the position being contracted out. Applicant indicated he did not list the information about the federal job on his security clearance form because he thought it would hurt his chances of obtaining a security clearance. (4)

On June 18, 2001, Applicant was interviewed by a DSS agent about his federal employment from March 1992 to August 1994, his history of alcohol use as well as his failure to list his 1984 alcohol-related offenses or his September 1998 DWI on his security clearance application. Applicant denied any intentional omission of his alcohol-related offenses, stating:

I did not list my 1984 alcohol related arrests on my security application, because I couldn't remember exactly when they occurred, and I didn't want to put inaccurate information on the application. I did not list my Sep 98 DWI arrest, on my security clearance application, because I knew that the Defense Security Service would discover that arrest when they checked into my listed Dec 98 DWI arrest. The two arrests were combined into one court case, following the Dec 98 arrest.

Applicant related his history of abusive drinking, which he indicated continued to December 1998. Applicant denied any alcohol consumption since he completed four months of alcohol rehabilitation, and he expressed an intent to remain alcohol free. As for his temporary employment with the federal government, Applicant explained he felt he had been the victim of employment discrimination when someone with less seniority was offered a permanent position. While Applicant quit his job, he was allowed to file for unemployment as the agency agreed to say his position was abolished. Applicant volunteered that since he was not certain of the legality of this arrangement, he did not disclose on his security clearance application the circumstances under which he left federal employ as he feared it might affect his ability to acquire a security clearance.

On February 20, 2002, DOHA issued an SOR to Applicant, alleging personal conduct concerns due to Applicant's alcohol-related offenses (three DWIs and a drinking in public) and the omission from his March 6, 2000 security clearance application of his September 1998 and June 1984 DWIs, the August 1984 drinking in public, a November 1996 destruction of property, and the March 1996 vehicle repossession. Applicant filed a response to the allegations on March 14, 2002, admitting his criminal record as well as the deliberate falsification of his SF 86 when he answered "No" to question 27 b regarding any repossession of his property in the last seven years. Applicant denied the deliberate omission from his SF 86 of the September 1998 and June 1984 DWI offenses or the August 1984 drinking in public, and stated, "I misunderstood the information that they wanted from me in this section." He also denied any intentional concealment of the 1996 destruction of property charge, maintaining that he had been told the case would be dismissed on payment of fifty dollars for the damage. His claim of misunderstanding is inconsistent with those explanations given in June 2001 to a DSS agent. Applicant is found to have intentionally omitted relevant and material police record information from his SF 86.

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, Section 6.3 and Enclosure 2, Section 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, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct

E2.A5.1.1. The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

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 clearance eligibility or trustworthiness, or award fiduciary responsibilities.

E2.A5.1.2.5. A pattern of dishonesty or rule violations

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

Under the provisions of 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 Statement of Reasons. 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 Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to guideline E:

Applicant has engaged in a pattern of personal conduct inconsistent with the good judgment and reliability which must be demanded of those allowed access to classified information. His three drunk driving offenses in particular reflect a serious disregard for the law and for the public health and safety. Moreover, Applicant did not report security significant criminal record information on his SF 86 executed on March 6, 2000. While he disclosed his most recent DWI, the June 1984 and September 1998 DWIs, an August 1984 drinking in public and a November 1996 destruction of property were not listed on the form. If deliberate, the omission of relevant and material information from a security clearance application raises security significant guideline E concerns (*see* E2.A5.1.2.2.). In denying any intentional omission of the alcohol-related offenses, Applicant claims to have failed to understand what was wanted from him. Yet, in his June 2001 interview with a DSS agent, he expressed no confusion as to whether he was required to report these offenses on his SF 86. Rather, he told the agent he had been uncertain as to the dates of the 1984 incidents, and he did not want to report inaccurate information on his security form. Applicant indicated he did not list the September 1998 DWI because he knew the DSS would discover that arrest when they checked into the listed December 1998 DWI, as both counts were combined into one court case. This excuse is not supported by the superior court records, which reflect different case numbers and judgment dates months apart in 1999 for the two DWIs. His explanations are not persuasive, especially in light of the unambiguous language on the SF 86.

With regard to his failure to disclose the 1996 destruction of property, Applicant indicated in response to the SOR he had been told the charge would be dismissed on payment of $50.00. It is expressly stated on the SF 86 that police record information is to be reported "regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record." Even assuming Applicant had a good faith belief that the offense had been stricken from his record, it would not excuse his failure to disclose it on his security clearance application. Applicant's lack of candor extended as well to relevant and material financial information, as he falsely denied any property had been repossessed in the last seven years. On review of the pertinent personal conduct adjudicative guideline, disqualifying condition E.2.A5.1.2.2. (the deliberate omission, concealment or falsification of relevant and material facts from any personnel security questionnaire) must be considered in evaluating Applicant's security worthiness. E2.A5.1.2.5. (a pattern of dishonesty or rule violations) also applies to the extent that his drinking offenses were in violation of local laws and his falsifications reflect a pattern of dishonesty.

In Applicant's favor, there has been no recurrence of drunk driving or drinking in public since the December 1998 DWI. Given the fourteen-year time span between Applicant's first and second DWI offenses (of record), the absence of an alcohol-related criminal incident is not especially persuasive in reform. However, with the insight gained through a court-ordered four month intensive outpatient alcohol rehabilitation program, Applicant has managed to remain abstinent from alcohol since January 1999 and he has no intent to resume use of alcohol.[(5)] His change to an alcohol-free lifestyle leads me to conclude there is little risk of any alcohol-related offenses in the future. Accordingly, favorable findings are returned with respect to subparagraphs 1.a., 1.b., 1.c., and 1.d., of the SOR.

The concerns for his judgment, reliability and trustworthiness engendered by his intentional false statements may be overcome if the falsification was isolated, not recent and corrected voluntarily (E2.A5.1.3.2.); the individual made prompt, good faith efforts to correct the falsification before being confronted (E2.A5.1.3.3.); or omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (E2.A5.1.3.4.). None of the mitigating conditions apply to Applicant's benefit. While the SF 86 falsifications were in March 2000, and Applicant candidly discussed his involvement in the alcohol incidents when he was interviewed in September 2000, doubts persist as to whether his

representations can be relied on. Applicant continues to deny any intentional omission from his security clearance application of several alcohol-related offenses which should have been listed. Reform depends in large measure on an acknowledgment of error with an appropriate expression of remorse. Moreover, his inconsistent explanations for the omissions, given during the investigation and adjudication of his security clearance, reflect a lack of appreciation for his obligation to be completely candid with the Government, regardless of personal inconvenience or cost. Subparagraphs 1.e., 1.f., and 1.g. are resolved against him.

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 E: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For 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.

Elizabeth M. Matchinski

Administrative Judge

1. The Government alleged three DWI offenses and one drinking in public. There is evidence of record which indicates Applicant may well have been arrested five times for DWI alone and twice for less serious alcohol-related offenses. Clinical diagnostic impression on intake into an alcohol counseling program in 1999 was "Alcohol Abuse 305.01 (Remission since Jan 99) DWI charges x5." On an intake questionnaire, Applicant was asked how many times he had been charged with "Disorderly conduct, vagrancy, public intoxication" and "Driving while intoxicated." His responses were 2 and 5, respectively.

2. In his Answer, Applicant indicated he had been told if he paid $50.00 for the property damage, his case would be dismissed. There is no other evidence confirming that Applicant was in fact arrested for destruction of property as alleged.

3. The security clearance applications of record indicate Applicant is a student. The nature of Applicant's work for the defense contractor is not of record.

4. It is noted that Applicant listed this federal job on the SF 86 signed by him on March 6, 2000. This employment does not appear on the unsigned EPSQ version generated on March 15, 2000.

5. Department Counsel correctly notes that Applicant provided no corroboration for his claim of abstinence. While Applicant's credibility is undermined by his record of false statements, there is sufficient documentation from the alcohol treatment program indicating Applicant was motivated to change his drinking habits. Reported by staff to be

involved in his group and compliant with the requirements, Applicant tested negative (no dirty urines).