DATE: December 10, 2001

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-02060

DECISION OF ADMINISTRATIVE JUDGE

WILLIAM R. KEARNEY

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Department Counsel

FOR APPLICANT

John C. Murphy

SYNOPSIS

When completing his Security Clearance Application**,** the Applicant indicated that he was never arrested, charged or convicted of a crime. In essence, he was not arrested, or convicted of a criminal offense, however, he was charged with a minor criminal offense, and was placed on Pre-trial Diversion. The applicant was of the opinion that all matters were then dropped and were null and void.

STATEMENT OF THE CASE

On June 14, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated July 19, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing

The undersigned Administrative Judge received the case assignment on September 10, 2001, and the original notice of hearing was issued on September 6, 2001, by another Administrative Judge. Thereafter, an Amended notice of hearing was issued on September 25, 2001, and the undersigned held a hearing on October 2, 2001. The Department Counsel presented 7 exhibits, but no witnesses. The Applicant's case consisted of his testimony and that of another witness. The record in this case closed on October 2, 2001, and the undersigned received the transcript ("Tr") of the hearing on October 11, 2001.

SOR AMENDMENT

On the motion of the Department Counsel the SOR was amended to conform to the evidence, just prior to closing arguments of counsel. Paragraphs 1.a. and 1.b. were amended by deleting the words "charged" by substituting the words

"arrested" and by deleting the words "with" by substituting the words "for". Paragraph 1.c. was amended by deleting the word "charged" by substituting the word "detained" and by deleting the word "with" by substituting the words "for suspicion of". Paragraph 1.d. was amended by deleting the date "January 18," by substituting the date "May 19,". Paragraph 2.a was amended by deleting the date "August 22, 1987," by substituting the date of "August 22, 1997". The Applicant had no objections to the these amendments. (Tr 74-77).

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two guidelines: paragraph 1, Guideline J (Criminal Conduct); and paragraph 2, Guideline E (Personal Conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence of record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 44 year old technician employed by a U.S. Government contractor; he has held a security clearance for the past 22 years. (Tr 21). The Applicant seeks to retain his personnel security clearance and his employment. During the period 1980 through 1984, the Applicant served in the United States Air Force, and he also attended the University of Colorado and received a degree. The Applicant was divorced in December 1988. (Tr 21-23).

The Amended Statement of Reasons under Guideline J, Criminal Conduct, alleges that since 1992 the Applicant was involved in four incidents. The first incident, paragraph 1.a, alleges that on March 19, 2000, the Applicant was arrested for Battery, a misdemeanor. The facts reveal that the Applicant while at his home wanted to go to bed, and he requested his ex-girlfriend to leave and go to her own home. She became very upset as she wanted to stay the night, and an emotional argument began. Thereafter, the police arrived and arrested the Applicant for Battery. He advised the police that they were not married, nor did she live with him. The Applicant called a friend to go to his home to protect it, and the friend arrived and attempted to stop the girlfriend from removing property from the Applicant's home. The friend was advised by the police to leave the Applicant's house or be arrested for interfering with a police investigation. At the time the case came to Court, the State Attorney advised the parties that they will not be charging the Applicant with a crime based upon the accusations contained in the complaint, and on May 24. 2000, the criminal case was closed as a "Notice of No Information" was filed with the Court. (Exhibit 6).

Paragraph 1.b, of the Amended SOR alleges that the Applicant was arrested on August 14, 1999, for Battery, a misdemeanor. The facts in this incident reveal that the Applicant went out with some of his friends, and Applicant's ex-girlfriend, the same woman as in the March 19, 2000, incident, was invited to go along and be the designated driver. After the party, and while at the Appellant's house, the s same ex-girlfriend was requested to leave and hand over the Applicant's car keys, as he wanted to go to another friends home to sleep. Applicant ended up sleeping on his couch in his house as the same ex-girlfriend would not leave nor would she give him his car keys. The police were called by a neighbor and when they arrived they woke the Applicant who was asleep on his couch. He was arrested and taken to jail for Battery. When the case came to Court, the State Attorney informed the parties that they will not charge the Applicant with a crime on the facts available. On September 20, 1999, the case was closed as a "Notice of No Information" was filed with the Court. (Exhibit 5).

Paragraph 1.c, of the Amended SOR, alleges that the Applicant was detained on November 5, 1995, while at Vandenberg Air Force Base, California. The Applicant was stopped by the Air Force security police, thereafter, he was turned over to the local Sheriff's Department, taken to their headquarters and given a Breathalyser test. The Applicant passed the Breathalyser test and was released. Thereafter, the Sheriff drove him home. There was no arrest nor were any criminal or driving charges placed against him.

Paragraph 1.d, of the Amended SOR, alleges that the Applicant on May 19, 1992, was arrested for Battery, a misdemeanor. The facts of that incident reveal that the Applicant went to his ex-wife home to pick up his children as he usually does on Wednesday night. When he asked their mother where the children were, she stated that they were out in the neighborhood playing. He asked the mother to look for them, and she refused. A verbal argument started between them which lasted for a few minutes, and then the two children showed up. When he went home that night, he called the police and advised them of what happened, and the police told him that his ex-wife had already called and that no arrest was going to be made, however, a report would be filed against him for Battery. Applicants hired a lawyer who handled

this matter. The Applicant was place on Pre-trial Diversion, wherein he paid a monthly supervision fee, attended an Anger Management class, and completed 32 hours of community service. His lawyer advised him that the Pre-trial Diversion program would make the incident null and void, and be nonexistent. (Tr 27-28). Although the Applicant knew that he was charged with the offense of Battery, his Attorney handled the settlement of this matter and advised him that the proceedings were null and void and dismissed. Applicant gave a written statement to the security investigator on September 5, 2000, concerning the various incidents he had with the local police, and he also indicated that he knew that he was charged with Battery in May 1992, and was of the opinion that it was null and void, so he did not mention it at the time he answered the subject questionnaire.

Paragraph 2.a, Guideline E, Personal Conduct, the Amended SOR alleges that the Applicant falsified his answers on SF-86, to question 23, subparagraph (d) and (f), when he answered them in the negative on August 22, 1997. Subparagraph (d) states "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" The record herein clearly reveals that the Applicant has never been charged with any offense related to alcohol or drugs. Therefore, his negative answer to that question was correct.

On Standard Form 86, (Exhibit 1), Question 23, subparagraph (f) states "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than $150 unless the violation was alcohol or drug related.)" To which the Applicant answered in the negative. This was an incorrect answer, as he should have answered in the affirmative, as in May 19, 1992, he was not arrested, but charged with Battery. However, his answer to this multiple part question, question 23 (f) was not done with the intention to conceal or deceive the Government or falsify his answer. He did know that he was charged with a crime in May 1992, but was of the opinion that this matter was null and void, after he successfully completed the Pre-trial Diversion program. The prosecution of this Battery charge was deferred for approximately 6 months, provided the Applicant abided with the conditions of the Pre-trial Diversion program. After the Applicant complied with the said conditions during the period of deferred prosecution, the criminal prosecution concerning the Battery charge was terminated or dismissed. (Exhibit 4). Applicants' lawyer also advised him that "there was no previous record of anything, this would be null and void, be nonexistent." (Tr 27).

POLICIES

Enclosure 2 of the Directive (32 C.F.R. Part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE J - CRIMINAL CONDUCT

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent;

b. the crime was an isolated incident;

e. Acquittal;

f. There is clear evidence of successful rehabilitation.

GUIDELINE E - PERSONAL CONDUCT

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

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

[2nd] 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;

Conditions that could mitigate security concerns include:

[2nd] The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

[4th] 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;

The Directive also requires the undersigned to consider, as appropriate, the factors

enumerated Section 6.3:

a. Nature and seriousness of the conduct and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age of the applicant.

d. Motivation of the applicant, and the extent to which the conduct

was negligent, willful, voluntary, or undertaken with knowledge of

the consequences involved.

e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur

in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following

factors:

The nature, extent, and seriousness of the conduct.

The circumstances surrounding the conduct, to include knowledgeable

participation.

The frequency and recency of the conduct.

The individual's age and maturity at the time of the conduct.

The voluntariness of participation.

The presence or absence of rehabilitation and other pertinent

behavioral changes.

The motivation for the conduct.

The potential for pressure, coercion, exploitation, or duress.

The likelihood of continuation or recurrence.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security 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 may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of providing controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-

clearance determinations under a preponderance of the evidence

standard without departing from the 'clearly consistent with the

Interest of the national security' test. The clearly consistent standard

Indicates that security-clearance determinations should err, if they

must, on the side of denials. Placing the burden on the Government

to support the denial {of a security clearance} by a preponderance of

the evidence would inevitably shift the emphasis and involve the

Board in second-guessing the agency's national security determinations."

Dept. Of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less that a preponderance of the evidence-rather than as an indication of the Court's tolerance for error below.[(1)]

The burden of going forward with the evidence then shifts to the Applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the case or through evidence of an affirmative defenses. Assuming, the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the Applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a

security clearance.[(2)]

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witnesses that testified, the undersigned concludes that the Applicant has rebutted and overcome the Government's case in regards to Guidelines J and E.

All the allegations in the Amended SOR, relating to Guideline J, Criminal Conduct, in paragraph 1. a, b and d, are all very minor criminal offenses, and the Applicant has not been convicted of any of these charges. As to paragraph 1.c, of the Amended SOR, it does not allege a crime nor a conviction. It only alleges that the Applicant was detained by USAF police for suspected DWI, and was subsequently turned over to the local police authority. Being detained by a police officer is not the equivalent to being arrested. Therefore, I conclude that the Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case with respect to his alleged criminal conduct under Guideline J, therefore, the allegations contained in Paragraph 1, and all its subparagraphs of the Amended SOR are found in favor of the Applicant.

With respect to Paragraph 2 of the Amended SOR, Guideline E, Personal Conduct, I also find in favor of the Applicant. The gravamen of a falsification case is whether an Applicant has been less than truthful and candid with the Government, not whether the Government was ultimately misled or deceived. In response to question 23 (f) on Applicant's Questionnaire For National Security Position, SF-86, the Applicant stated "No" to ". . . have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above?" At the time he answered this question he did know that he was charged with the crime of Battery, however, his lawyer handled all the negotiations with the State Attorney concerning this minor criminal offense, and as a result, had the Applicant placed in the Court's Pre-trial Diversion program. After the Applicant successfully completed the program, the subject minor criminal charge was dismissed. Also, his lawyer advised him that there was no record of this incident and that it was null and void. He was not arrested or convicted of any crime at the time he answered the subject questions on his SF-86. It does not appear that his failure to indicate that he was charged with the minor crime of Battery in ay 1992, was a deliberate omission, concealment, or falsification on his part. He was of the opinion that this particular offense was null and void and dismissed, therefore, I consider his answer to question 23 (f) to be a mere mistake on the Applicant's part.

As to the allegations alleged in the Amended SOR, paragraphs 1.a, and b, these incidents had not occurred at the time the Applicant executed his SF-86, questionnaire on August 27, 1997. Paragraph 1.c, states "You were detained on November 5, 1995, on Vandenberg AFB, California for suspicion of Driving While Intoxicated." Being detained is not tantamount to being arrested. The Applicant passed a Breathalyser test when given by the local Sheriff, and was released, as he was not driving an automobile while intoxicated.

I conclude Applicant has, through evidence of extenuation, and explanation, successfully mitigated and overcome the government's case with respect to his personal conduct, under Guideline E, and, therefore, make a favorable finding for the Applicant.

Each clearance decision is required to take into consideration pertinent facts set forth in Section 6.3 of the Directive and in the adjudicative process discussed at enclosure 2 of the Directive. These factors are identified on pages 6-7 *supra*.

FORMAL FINDINGS

Paragraph 1, Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant.

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

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

William R. Kearney

Administrative Judge

1. . The rule has been restated as requiring "that security clearance should be revoked [sic] if doing so is consistent with the national interest;" Doe v. Schachter, 804 F. Supp. 53, 62 (N.D. Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact re supported by such

relevant evidence as a reasonable mind might accept as adequate to support

a conclusion in light of all the contrary evidence in the same record. In

making this review, the [DOHA] Appeal Board shall give deference to the

credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. Sec 556(d).

2. While the Government has the burden of providing controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 of the Directive).