DATE: March 28, 2002

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In Re:

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

Applicant for Security Clearance

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ISCR Case No. 01-05593

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Marc Curry, Esq., Department Counsel

**FOR APPLICANT**

***Pro Se***

## 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), issued a Statement of Reasons (SOR), dated November 9, 2001, 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 was based on criminal conduct (guideline J) because of two disorderly conduct offenses in 1999 and on personal conduct (guideline E) related to Applicant's failure to report those two offenses on a June 2000 security clearance application.

On November 15, 2001, Applicant responded to the allegations set forth in the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on January 21, 2002. Pursuant to formal notice dated January 31, 2002, the hearing was scheduled for February 26, 2002. On February 23, 2002, Department Counsel requested a continuance of the hearing due to assigned Counsel's unavailability on February 26, 2002, due to a medical emergency. A brief continuance was granted, and on March 4, 2002, an amended notice was issued scheduling a hearing for March 12, 2002. At the hearing held as rescheduled, the Government submitted four exhibits, which were entered into the record without objection. Applicant tendered his own testimony and offered two documentary exhibits which were admitted. The transcript of the hearing was received in this office on March 20, 2002.

## 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 25-year-old systems test engineer who has been employed by a defense contractor (company A) since late July 2000. Applicant was granted an Interim Secret clearance for his duties which was subsequently withdrawn. He

seeks access to information classified to the level of Secret.

Following his graduation from high school, Applicant pursued an associate's degree at a community college. On earning that degree, Applicant matriculated in a state university in August 1997. During the spring semester of 1999, Applicant was involved in two incidents which resulted in his arrest for disorderly conduct.

On a Saturday night in February 1999, Applicant consumed five to seven beers at a soccer party. On returning to his residence early in the morning hours on that Sunday, Applicant wrestled with a friend in the front yard of the apartment complex. A report was made to the police of a fight in progress. On arrival, the responding officer observed Applicant and his friend to be "fighting" in the front yard.[(1)] Frustrated at his inability to get the officer to understand that he had been wrestling with a friend, Applicant failed to respond to repeated orders to stop yelling. He was then arrested for disorderly conduct and taken to the police station. Applicant elected to plead guilty, as the offense was minor and he wanted to put the incident behind him. On entering his plea, Applicant was sentenced to pay a $45.00 fine and he was given a one year conditional discharge. It was explained to Applicant that his criminal record would remain clear provided he adhered to the terms of his conditional discharge.

After drinking five to seven beers at a sports bar when out with college friends on a Saturday night in April 1999, Applicant got involved in a verbal confrontation outside the bar with other males who had been harassing his friend. Challenged by this group of males to a physical confrontation, Applicant did not engage in any fighting, but he continued to verbally spar with them after he had been told by responding police to leave the premises. Applicant was then arrested for disorderly conduct. At his arraignment approximately one week later, Applicant pleaded guilty, even though he did not consider his conduct to constitute the threatening behavior alleged in the complaint.[(2)] Applicant was fined $195.00 for the offense and given a one year conditional discharge.

During his last semester of college, Applicant was interviewed and offered a job by his present employer. Prior to Applicant actually starting work for company A, he was asked to complete a security clearance application (EPSQ) which he obtained electronically, having been directed to the website by human resources personnel within company A. Applicant was uncertain whether his two disorderly conduct convictions, which he regarded as minor offenses, were required to be listed in response to question 26. ["Your Police Record--Other Offenses In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than $150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."]. Applicant contacted his future section manager at company A who advised him just to fill out the security clearance application. Applicant also asked the local district attorney for advice as to whether he was required to list his two disorderly conduct offenses. Told that his offenses were the equivalent of traffic violations and that since the form didn't require him to report speeding tickets he would most likely not be required to list his disorderly conduct offenses,[(3)] Applicant responded "No" to question 26. Applicant submitted the completed form electronically on May 4, 2000.

Later that month, Applicant earned his bachelor of science degree. On June 12, 2000, Applicant signed the EPSQ, certifying that his statements on the form were "true, complete, and correct to the best of [his] knowledge and belief and [were] made in good faith." On his first day on the job for company A in late July 2000, Applicant had an Interim Secret security clearance for his duties as a systems test engineer on a program for a branch of the U.S. military.

In October 2000, Applicant was interviewed by a special agent of the Defense Security Service (DSS). At that time, Applicant was asked initially whether he felt he had listed everything on his security clearance application. Applicant responded that he felt he had, but added that there were two arrests which he had not listed for disorderly conduct. Applicant then provided details about his two arrests, telling the agent that in the February 1999 incident, he was sitting with a friend outside of his apartment when the police arrived. Applicant expressed his belief that his arrest was due to a misunderstanding, as he had not been fighting. Regarding the April 1999 incident, Applicant related he was arrested "because of [his] presence, and limited involvement." He indicated he only pled guilty to the charges in order to have them cleared up as efficiently as possible. Applicant related he was not positive of the amount of the fines, but estimated them at $50.00 for the February 1999 offense and $150.00 for the April 1999 offense. Applicant addressed his failure to

list his disorderly conduct offenses on a "condensed EPSQ (security clearance application) report, dated 7/14/00," as follows:[(4)]

I failed to indicate these 2 disorderly conduct arrests. I was unsure, at the time, if they were necessary for the report so I talked to the S.A. in [the city of his arrests]. She told me that those offenses were the equivalent of a speeding ticket and that if the report didn't require speeding tickets, it would most likely not require these instances.[(5)] This is the chief reason I did not list those 2 disorderly conduct arrests on my questionnaire. It was not my intention to be deceitful. In short, it was not intentional on my part.

In his employ as a test engineer at company A, Applicant has demonstrated he is a quick learner, able to work with little direction. He coped well with changes to the military project, demonstrating an ability to adjust to the program's needs and a willingness to work extra hours to get the job done. Due to his level of knowledge and the respect earned, Applicant was one of the two engineers out of five retained on the program following downsizing. With further downsizing, Applicant was presented with new challenges, which he met successfully. He is considered by his section manager to be a valuable employee.

## 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:

### Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged

E2.A10.1.2.2. . . . multiple lesser offenses

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.4. . . .the factors leading to the violation are not likely to recur

E2.A10.1.3.6. There is clear evidence of successful rehabilitation

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

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

E2.A5.1.3.4. 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.

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 those who testified, I conclude the following with respect to guidelines J and E:

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Applicant stands twice convicted of disorderly conduct when he was a 22-year-old college junior. While Applicant was arrested in both instances, taken to the police station and had formal charges filed against him, disorderly conduct is an offense against public order which does not rise to the level of a misdemeanor under the pertinent state's penal code.[(6)] Disqualifying conditions (DC) E2.A10.1.2.1. (allegations or admission of criminal conduct, regardless of whether the person was formally charged) and E2.A10.1.2.2. (multiple lesser offenses) under guideline J must be considered, but the

minor nature of the offenses must be taken into account in assessing the security risk.[(7)] (See E2.2.1.1.).

Even minor violations of the law are inconsistent with the good judgment and reliability which must be demanded of those granted access to the Nation's secrets. While his record of disorderly conduct is not condoned, there is little likelihood of recurrence. With two convictions, Applicant's disorderly conduct cannot be viewed as isolated. However, his misconduct was confined to a three-month period when he was a college junior. Applicant is no longer in the environment which was conducive to immature personal behavior. Since the last offense, Applicant has earned his bachelor's degree. He has relocated to another state to pursue a career in the defense sector. As confirmed by the favorable reference of his section manager, Applicant has acted responsibly on the job. Due to his value to his employer, Applicant was one of two engineers retained on a military project following downsizing. Selected over some who had more seniority, Applicant has continued to demonstrate a work ethic indicative of a committed professional. The Government presented no persuasive evidence undermining Applicant's claim that he has been a law-abiding citizen since April 1999.

Successful rehabilitation depends not only on a track record of compliance with the law, but also on acknowledgment of wrongdoing. While Applicant disputes the fighting/threatening behavior reflected in the complaint filed by the police in the April 1999 incident, he acknowledges culpability for continuing to yell after he had been ordered by the police to desist. Since Applicant did not engage in a physical altercation and alcohol may well have impacted his perception of his conduct at the time of his arrest, his denial of threatening conduct is not seen as an attempt to avoid responsibility for his actions. To his credit, Applicant realizes he should not have allowed his frustration and emotions to get the best of him on the occasions of his arrests. Subparagraphs 1.a. and 1.b. are resolved in his favor, as the factors leading to the disorderly conduct are unlikely to recur (See E2.A10.1.3.4.), and Applicant has shown sufficient reform (See E2.A10.1.3.6.) to overcome the doubts engendered by his disorderly conduct when in college.

The Government's case under guideline E is based on Applicant's failure to report his disorderly conduct offenses on a security clearance application executed in June 2000. If deliberate, the omission of relevant criminal record information from a questionnaire used to determine security clearance eligibility raises significant personal conduct concerns (see DC E2.A5.1.2.2.). Applicant acknowledges he responded "no" to whether he had been arrested in the last seven years, but he maintains he failed to appreciate that the arrests had to be listed, based on the advice provided him by the local district attorney. Applicant has consistently explained that he was uncertain about whether he should list the disorderly conduct offenses on his security clearance application, so he contacted the local district attorney. Applicant submits he understood from the district attorney that disorderly conduct constituted a minor violation akin to a speeding ticket and that if he was not required to disclose speeding violations he most likely would not be required to report his disorderly conduct.[(8)] Based on that advice, he denied any arrests.[(9)] The Government presented no evidence to rebut Applicant's claim that he contacted the district attorney. Instead, the Government challenged Applicant's decision to contact the district attorney rather than a security professional familiar with the process.

It has been made abundantly clear to Applicant as a result of the SOR being issued in this case that his reliance on the district attorney was misplaced. However, given the circumstances under which Applicant was asked to complete the security clearance application, I cannot conclude that he acted unreasonably when he contacted the district attorney for assistance. Applicant was asked to complete the questionnaire before he graduated from college. With the university in a different state from his future employer, Applicant did not have the opportunity for in-person clarification of the application. Human resource personnel at the company and his section manager were unable to answer his questions to his satisfaction. Since Applicant had no experience with the defense community at that point, it is credible that he did not know to contact company or DoD security personnel.

The omission of material facts may be mitigated where it was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided. (See E2.A5.1.3.4.). The Government submits Applicant cannot avail himself of that mitigating condition because a district attorney is not an authorized person. The Directive does not define who is an authorized person within the terms of the personal conduct guideline. It is noted that a refusal to cooperate with official requests for information is mitigated where the refusal was based on advice from legal counsel. (See MC E2.A5.1.3.6.). Acceptance of the Government's position would place the Department of Defense in the incongruous position of recognizing reliance on legal advice in cases of refusal to cooperate but denying it in cases of good faith omission of information from a security

questionnaire, which is viewed as less serious under the Directive.[(10)] While there was a delay between Applicant's EPSQ omissions and his October 2000 disclosures to the DSS agent, Applicant testified it did not occur to him to correct the record, which is consistent with his belief, albeit mistaken, that disclosure of his minor disorderly conduct offenses was not required.

As was brought out by Department Counsel in his cross-examination of the Applicant, Applicant was initially asked by the DSS agent during his subject interview whether he felt he had listed everything on the form, to which Applicant responded he felt he had. Applicant then testified that he volunteered that he had been arrested twice for disorderly conduct, and he had not been confronted with the fact of his arrests before coming forward. The Government challenges the voluntariness of disclosure based on a statement made by Applicant in response to the SOR, to wit: "Either early this year, or late last, (I don't remember specifically) I was called for an interview with a DoD representative concerning these issues." The inference the Government would have drawn from this statement is that Applicant was apprized up-front by the agent that the interview was being conducted because the Government's investigation had revealed the two arrests not disclosed on the EPSQ. After reading the aforesaid statement in context, it would be a stretch to draw the inference sought by the Government. Applicant followed up his comment about being called for an interview with this statement: "At the interview, I promptly and voluntarily gave him all the information that was related to these incidents, including why they were not present on the application." According to Applicant's testimony, which is not rebutted by any statement or report from the investigator, the agent did tell him he was there to discuss the disorderly conduct incidents, but only after Applicant volunteered the information about his arrests. A favorable finding is warranted as to subparagraph 2.a., as Applicant had no intent to conceal his disorderly conduct offenses when he completed his security clearance application and he volunteered the information when interviewed by the DSS special agent in October 2000.

## FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For 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 clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant's account of his arrest differs from that of the reporting officer. Applicant contends he and his friend were wrestling rather than fighting. In October 2000, Applicant told the DSS special agent that the police showed up outside his apartment where he was sitting with his friend. (See Ex. 2). At the hearing, Applicant testified he and his friend, tired out from wrestling, had already given up and were sitting in the yard when the police arrived. (Transcript p. 31). The responding officer indicated on his arrival that he observed Applicant and the other male fighting and he had to twice order them to "break it up." (Ex. 3). While there is no apparent motive on behalf of the officer to report other than what he observed, it is also plausible that the officer had arrived while Applicant and his friend were still wrestling, but that he did not approach Applicant or his friend until they had separated and sitting on the grass. Given the other male involved with Applicant was a good friend of his and there was no indication in the officer's report of any punches thrown by Applicant, I find it credible Applicant was wrestling his friend with no intent to harm. Wrestling by its nature

includes grappling in an effort to throw an opponent off balance--conduct which could reasonably be construed as fighting by an observer unaware of the participants' intent.

2. Although Applicant denies challenging anyone else to a physical fight, he does not dispute that he continued to yell at the group of males after he had been told by the police to leave. (Transcript p. 34).

3. Applicant testified he went down to the city hall to discuss the matter with the district attorney. (Transcript p. 27). It is not clear whether the district attorney was given a copy of the form to review for herself, whether Applicant read the question to her verbatim, or whether he just summarized the question for her.

4. The only security clearance application of record is dated June 12, 2000. It is not clear if Applicant was referring to that document or to a subsequent condensed questionnaire which he may have executed on July 14, 2000.

5. Applicant initially indicated in his sworn statement prepared during that interview that the offenses were misdemeanors. In discussing the advice provided to him by the district attorney, he equated the offenses to a speeding ticket. (Ex. 2). At the hearing, Applicant testified he had been told by the DA that they were violations, not misdemeanors and that the reference to them being misdemeanors was wrong.

6. Under the pertinent state's penal code, disorderly conduct is defined as follows:

§ 240.20 Disorderly conduct. A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or 4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or 5. He obstructs vehicular or pedestrian traffic; or 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. Disorderly conduct is a violation.

7. Accepting Applicant's testimony that he did not engage in threatening behavior, he still committed disorderly conduct under pertinent state law. He was congregated outside of a local sports bar with a group of males and continued to yell rather than comply with the lawful order of the police to disperse. Making unreasonable noise in the early hours of the morning in a public place is also disorderly under the law.

8. Under Section 10.00 of the state's penal code, "traffic infraction" means any offense defined as "traffic infraction" by section 155 of the vehicle and traffic law. "Violation" means an offense, other than a "traffic infraction" for which a sentence to a term of imprisonment in excess of 15 days cannot be imposed. Under section 155 of the vehicle and traffic law, the designation of traffic infraction is reserved for violations regulating traffic which are neither a misdemeanor nor a felony. While there is a distinction between violations and traffic infractions, neither are of the seriousness of a misdemeanor criminal offense.

9. It is noted that Applicant was fined $195.00 for the April 1999 disorderly conduct. Equating the offense with a traffic violation would not relieve him of the obligation of listing the offense on his security clearance application, as question 26. unambiguously directs the omission of "traffic fines of less than $150." Although Applicant estimated the amount of his fine at $150 when he was interviewed in October 2000, he also indicated he could not recall the exact amount.

10. Refusal to undergo or cooperate with required security processing or to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators is conduct which "will normally result in an unfavorable clearance action."