DATE: October 2, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-16030

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant pleaded nolo contendere to drinking alcohol on a public beach in 1995 and to a 1997 charge of domestic assault. There is little risk of recurrence of similar misconduct, given his stable lifestyle and the moderation of his alcohol consumption. Applicant did not report these two offenses or court-mandated family violence intervention sessions on his December 2000 security clearance application because the court had issued an expungement order and he thought expunged offenses were exempt from disclosure. Candid about the incidents during his interview with the Defense Security Service, Applicant did not deliberately conceal them from the Department of Defense. While he has delinquent financial obligations totaling $7,360.00 to three creditors, he is working with a collection agency to resolve most of this debt. Clearance is granted.

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 April 16, 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 as security disqualifying: 1) criminal conduct (guideline J) because of an August 1995 drinking alcohol on a public beach, for which Applicant was fined $93.50 and an October 1997 domestic assault incident involving his current spouse with court-ordered family violence intervention counseling; 2) financial considerations (guideline F) due to unresolved indebtedness to three creditors totaling in the aggregate $6,360.00 and the issuance of an insufficient funds check in December 1995 to pay his fine for the alcohol violation; and 3) personal conduct (guideline E) related to his failure to disclose on his December 2000 SF 86 his criminal record or court-ordered family violence intervention counseling.

On April 25, 2002, Applicant answered the SOR, admitting the criminal offenses and financial delinquencies while denying any intentional falsification of his security clearance application. Applicant also requested a hearing before a DOHA Administrative Judge. The case was assigned to me on July 1, 2002, and pursuant to formal notice dated July 12, 2002, a hearing was scheduled for August 1, 2002.

At the hearing held as scheduled, the Government submitted six exhibits and Applicant one exhibit, all of which were entered without any objection. Testimony was taken on Applicant's behalf from Applicant, his spouse, his supervisor and a close friend. With the receipt on August 12, 2002, of the transcript of the proceedings, this case is ripe 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 44-year-old UNIX systems administrator, who has been employed by a defense contractor (company A) since October 1984. He seeks to retain a Secret security clearance which he has held throughout that employ.

Following his divorce from his first wife, Applicant was ordered in about 1990 to pay child support for his daughter in the amount of $475.00 per month. Timely in his child support payments, Applicant in August 1994 financed the purchase of a 1987 model year bass fishing boat, by taking out an installment loan of about $6,000.00 with a credit union. Terms of repayment were $150.00 per month. With no raises at work, and an increase in 1994 in his child support obligation to $675.00 per month, Applicant began to fall behind in some of his financial obligations, especially after he married his second wife in late November 1996. With his new spouse staying at home to take care of her daughter, they had only Applicant's salary to pay their financial obligations,[(1)] including credit card debt each brought into the marriage. Applicant became 150 days delinquent on several accounts-four department store credit cards, a vehicle lease taken out in June 1995, a VISA card account opened in April 1998, and his installment loan for the bass boat.[(2)] Another VISA credit card account was at one point 120 days past due.

In addition to these financial difficulties, Applicant had legal problems in the latter half of the 1990s. On an occasion in August 1995, Applicant went to the beach where he met up with some friends. After consuming a gin and tonic while socializing with them at an outside bar, Applicant went down to the seawall, glass in hand. His actions were noticed by a local policeman, who charged him with consumption of alcohol on a public beach, a violation of a municipal ordinance. Fined $100.00 plus costs in municipal court after pleading not guilty, Applicant appealed his conviction to the superior court. In early December 1995, at a pre-trial hearing, Applicant, through legal counsel, entered a plea of nolo contendere, and the case was filed for one year on payment of voluntary contribution of $50.00 and court costs of $43.50. On that date, Applicant presented the court with a check for $93.50, which was returned for insufficient funds. Notified by the court that the check had bounced, Applicant paid the amount in cash in late December 1995. As Applicant understood it, the charge was then dropped against him.[(3)]

Applicant drank "more than he should" on occasion in the 1997 time frame, primarily when socializing with a neighbor who abused alcohol. After drinking at a party at this neighbor's house in October 1997, Applicant and his spouse had an argument during which he struck her in the mouth, and she grabbed him. Applicant retaliated by pushing her against the bed, and she sustained a large laceration to her head. Responding officers noted a strong odor of alcohol on Applicant's breath. Applicant's spouse indicated to the police that the assault was uncharacteristic of Applicant, who had not struck her before, but she believed he had a drinking problem. Arrested and charged with domestic assault, Applicant pleaded nolo contendere and the charge was filed for one year provided he attend a domestic abuse program. Pursuant to court-order, from December 2, 1997 and May 26, 1998, Applicant attended twenty-two sessions of family violence intervention counseling. Applicant was an active participant in the program, which was led by a social worker, and no further counseling was recommended. Following his successful completion, Applicant in 1999 had his attorney file for expungement of this charge as well as the 1995 alcohol violation, as he did not want a criminal record. To Applicant's understanding, both offenses were expunged from his record in 2000.[(4)]

In late 1999, Applicant's child support obligation was reduced from $675.00 to $475.00 per month as his ex-wife had returned to work and his daughter no longer needed daycare.

In conjunction with a security clearance periodic reinvestigation, Applicant completed a security clearance application (SF 86) on October 30, 2000. Confused about whether he was required to list his 1995 drinking on a public beach and the 1997 domestic assault since he understood from his lawyer that those offenses were no longer of record,[(5)] Applicant asked a close friend what he should do. While this friend indicated he could not advise him, he added, "If your lawyer says it's been erased, then it's erased."[(6)] With no direct guidance from his employer as to whom he should contact if he needed assistance in completing the form, Applicant responded "NO" to inquiries into any police record, including questions 24 ["Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the 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."] and 26 ["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 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."]. Since the family violence intervention counseling had been court-ordered in conjunction with an offense which he understood had been expunged, Applicant also answered "NO" to any mental health treatment in the last seven years (question 19). Regarding any financial delinquencies, Applicant was aware that he was seriously delinquent on his installment loan for the bass boat, although his spouse was handling the finances. He responded "NO" to inquiries into any financial delinquencies ["38. In the last 7 years, have you been over 180 days delinquent on any debt(s)?" and "39. Are you currently over 90 days delinquent on any debt(s)?"]. Applicant signed this SF 86 on December 5, 2000, without making any changes to his responses.

During the course of its investigation into Applicant's background, the Defense Security Service (DSS) ran a credit check on November 17, 2000, which revealed Applicant had brought current several of the accounts which had been as many as 150 days late in the past, but he had three outstanding delinquent accounts which had been charged off-his installment loan for the boat and two retail credit card accounts.

On April 10, 2001, Applicant was interviewed by a DSS special agent about his arrest record, his court-ordered family violence intervention sessions, his financial delinquencies, and his failure to disclose these matters on his security clearance application. Applicant detailed the circumstances and dispositions of the charges of drinking alcohol on a public beach in 1995[(7)] and domestic assault in 1997, and he volunteered both offenses had been expunged "during 2000." Applicant denied he had an alcohol abuse problem, and described his consumption as three or four beers on a weekend night, with a mixed drink on rare occasions. With respect to financial delinquencies, Applicant indicated he overextended himself on credit during the 1994 to 1996 time frame where he found it difficult to pay his bills. He admitted he still owed the credit union about $5,000.00 on his installment loan.[(8)] While he could afford monthly payments, he expressed his intent to negotiate a lower payoff balance with the creditor. Other accounts were reported by him to be up to date. Applicant executed a sworn statement in which he explained the omission from his SF 86 of his two offenses, court-ordered family violence intervention sessions and financial delinquencies, as follows:

I began filling out the Security Clearance Application (SCA), during May 00, but then went on travel for two weeks. I finished filling out the SCA during Sep 00, therefore I made some errors. I did not list court-ordered domestic abuse counseling on the SCA. I did not list two arrests on my SCA because I had them expunged and did not think that I was required to list them. I did not list numerous accounts that were more than 150 days delinquent, some charged off.[(9)] Although I work with computers at [company A], I had difficulty filling out the SCA. I must have misunderstood questions pertaining to arrests, mental health counseling and personal finances. I am sorry for not listing this pertinent information. I am embarrassed about that information and wanted to put that part of my life behind me.

In about summer 2001, Applicant's spouse began working with the agency assigned to collect on Applicant's delinquent installment loan for the bass boat. For about six months, they made $50.00 payments on a debt which had reached $6,100.00. When the creditor failed to send them a payment coupon, neither Applicant nor his spouse followed-up, and a few months went by without any payments being made.

On April 16, 2002, DOHA issued an SOR to Applicant alleging criminal conduct concerns because of the 1995 drinking alcohol on a public beach and 1997 domestic assault charges; financial considerations because of the three charged off debts (alleged as unpaid retail balances of $880.00 and $480.00 and $5,000.00 on the installment loan with the credit union)[(10)] and his initial payment of his fine for the 1995 offense with a check returned for insufficient funds; and personal conduct because of his failure to disclose on his SF 86 his alcohol violation and domestic assault offense or his court-ordered family violence intervention counseling.

On April 25, 2002, Applicant filed a response to the SOR in which he admitted the criminal conduct and financial considerations allegations. He denied any intentional falsification of his security clearance application, indicating he thought he had answered the questions correctly since an expungement order had been issued with respect to both charges.

Circa July 2002, the agency assigned to collect on the delinquent installment loan for the bass fishing boat contacted Applicant at work about the debt. The creditor agreed to settle for $6,100.00, with payments to be made at $100.00 per month. As of August 1, 2002, Applicant had not made his first payment. He has not pursued any repayment of the $880.00 retail store debt as the creditor is no longer in business, and he has not looked into the debt on which he owes $380.00. In or after November 2000, Applicant opened a MasterCard credit card account on which he was extended credit of $500.00. He did not make timely payments, and collection efforts commenced with notice to Applicant. He subsequently made payments on a $1,300.00 balance and the debt was scheduled to be paid off as of early August 2002.

Applicant no longer has any credit cards. His spouse has three active credit cards with a $300.00 limit on each. With his annual salary of $57,700.00 per year and her earnings of roughly $20,000.00 from her job as a hairdresser on commission, they have the financial means to pay their expenses, including his child support, as well as the $100.00 monthly payments on the installment loan debt for the bass boat. Applicant has the bass boat up for sale as he wants to buy a pop-up camper which the family can use for vacations.

A self-motivated worker, Applicant has exhibited very good work habits at company A. He has demonstrated knowledge of security requirements, handling classified information with no adverse incidents. He enjoys the respect of his supervisor and other team members. Twice in recent years, Applicant has received "On the Spot" monetary awards of $100.00 from his employer for performance beyond expectations.

Applicant no longer associates with the neighbor with whom he drank on occasion to excess in the 1996/97 time frame. His spouse is not concerned about his current consumption levels. Applicant has given her no reason to think he might become violent with her in the future as the domestic assault incident of 1997 has not been repeated.

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:

GUIDELINE J

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. A single serious crime or multiple lesser offenses

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

E2.A10.1.3.1. The criminal behavior was not recent

E2.A10.1.3.2. The crime was an isolated incident

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

GUIDELINE F

Financial Considerations

E2.A6.1.1. The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

E2.A6.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A6.1.2.1. A history of not meeting financial obligations

E2.A6.1.3. Conditions that could mitigate security concerns include:

E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)

E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts

GUIDELINE E

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[(11)]

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

None applicable

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, F and E:

With respect to the Government's allegations under guideline J, criminal conduct, Applicant does not dispute that he was charged with drinking alcohol on a public beach, a violation of a municipal ordinance to which he entered a nolo plea on appeal in superior court in December 1995. Yet, he contests the validity of the charge, maintaining he had already consumed his drink when he went down to the beach. Applicant entered a nolo plea in court, and the Government presented no evidence to rebut Applicant's account of the incident. Assuming Applicant had some alcohol in his glass, a distinction is merited between this violation of a municipal ordinance and conduct in violation of the pertinent state's penal code. The August 1995 incident raises little security concern, especially where there is no established pattern of violations.

The October 1997 domestic assault falls squarely within the ambit of guideline J. Although Applicant contends he did not strike his spouse and he pleaded nolo contendere to the charge, he does not dispute that he pushed her after she grabbed him. Moreover, there is sufficient evidence to find that Applicant struck his spouse in the mouth sometime before he pushed her on the bed. His conduct is no less criminal because he was under the influence of alcohol at the time of the offense. Under guideline J, 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. (a single serious crime or multiple lesser offenses) must be considered in evaluation of Applicant's security worthiness.

Applicant presents a credible case for mitigation under E2.A10.1.3.1. (the criminal behavior was not recent), E2.A10.1.3.2. (the crime was an isolated incident), and E2.A10.1.3.6. (there is clear evidence of successful rehabilitation). As confirmed by his spouse's testimony and the absence of any subsequent criminal record, the domestic violence appears to have been an aberration. There is no evidence of any assaultive behavior by Applicant prior to or since October 1997. Given the passage of more than four and a half years of time without recurrence, his conduct is also

viewed as not recent. To his credit, Applicant completed the court-ordered family violence intervention program with good participation. For a finding of successful rehabilitation, there must be an acknowledgment of wrongdoing with appropriate expression of remorse accompanied by concrete actions in reform maintained long enough to persuade there is little, if any, risk of recurrence. Applicant has not admitted striking his spouse, but he does not deny pushing her during their argument. Given Applicant was under the influence of alcohol at the time of the incident-to such a point that the officers detected a strong odor of alcohol on his breath- his recollection of what occurred may well be flawed. Since alcohol was involved in this incident, a finding of successful reform of his criminal conduct depends, in part, on whether he has made favorable changes in his drinking habits. Applicant's spouse informed the police at the time of the incident that she thought Applicant had a drinking problem. Applicant acknowledged he drank more than he should have on occasion back in the 1996/97 time frame when he was socializing with a neighbor who had an alcohol problem. His spouse confirmed that once she expressed her concerns to Applicant about his drinking, he moderated his consumption to where he drinks a beer at occasional family functions, but not to excess. She no longer thinks he has a problem with alcohol. After considering all the evidence, there is little likelihood of a recurrence of the conduct alleged in subparagraphs 1.a. and 1.b. of the SOR.

The Government has established, as alleged in subparagraphs 2.a., 2.b. and 2.c., that Applicant has three delinquent financial obligations. The sum total of the outstanding indebtedness as of early August 2000 is about $7,360.00, $6,100.00 of which is owed to a credit union on an installment loan for the purchase of a bass fishing boat in 1994. Circa the 1995/1996 time frame, Applicant began to have financial difficulties, caused by the lack of any raises at work, a monthly child support obligation of $675.00, and the taking on in late 1996 of his new spouse's debt. The extent of his financial problems is evident in the nonpayment due to insufficient funds of the check written to the court in December 1995. With a reduction in his child support to $475.00 per month in 1999, and stopping his 401K account at work, Applicant managed over the next year to satisfy several accounts which had fallen delinquent at one point as many as 150 days, while managing to remain current on other accounts. Yet, as reflected in his credit report of November 2000, Applicant did nothing to address two retail credit card debts or his installment loan for the boat. Applicant testified he was unaware of the two charged off retail credit card obligations. Given his spouse handled the family's finances, Applicant may not have known of those debts, but he admitted he was knew he owed on the delinquent installment loan for the bass boat. When he was interviewed in April 2001, Applicant related he was saving enough money to pay off the balance of the installment loan with the credit union, which was then about $5,000.00. Applicant bears direct responsibility for the accrual of the debt to more than the initial amount of the loan. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. DC E2.A6.1.2.1., a history of not meeting financial obligations, is clearly pertinent to an evaluation of Applicant's security suitability.

To the extent that Applicant's ability to repay his financial obligations was compromised by an increase in his child support obligation, E2.A6.1.3.3. (the conditions that resulted in the behavior were largely beyond the person's control) applies to him falling behind in his payments on his credit accounts. However it does not adequately address his inattention to his installment loan debt, especially after his child support obligation was reduced in 1999.[(12)] There is no evidence Applicant was making any payments on his installment loan debt as of April 2001. However, sometime in the summer of 2001, Applicant's spouse began working with a collection agency to repay the debt. After about six months of $50.00 payments, the collection agency failed to send them a repayment coupon. Neither Applicant nor his spouse made any effort to contact the collection agency, and a few months went by with no payment being made. Following a recent offer by the creditor to settle for $6,100.00, Applicant agreed to make payments of $100.00 per month.

As of the hearing, Applicant had not yet made his first payment on the agreement. In light of the $50.00 payments made by Applicant's spouse toward the debt over the latter half of 2001, it is likely the payments will be made as promised. Since the creditor to whom Applicant owes the $880.00 is no longer in business, his inaction on that debt is understandable. As for the remaining $380.00 debt to another retailer, Applicant testified he still has no idea as to the nature of the debt. Applicant's inaction on that debt raises some concern, but not enough to warrant revocation of his security clearance on that basis. He has resolved a number of accounts which were late in the past and is currently working with a collection agency to resolve the installment loan debt. There is a credible basis to apply E2.A6.1.3.6 in his favor. Although Applicant fell behind on a credit card debt in recent months, his spouse testified, under advisement of Title 18, Section 1001 of the United States Code, the debt would be satisfied in early August 2002. Applicant no longer has any credit cards, and his spouse has only three accounts which have minimal ($300.00) limits. With somewhere between $67,700.00 and $77,700.00 in joint earnings, they have the present financial means to meet their

obligations. There has been no evidence of any bounced checks issued by Applicant since December 1995. Subparagraphs 2.a., 2.b., 2.c., and 2.d. are concluded for Applicant.

The Government's case under guideline E is based on Applicant's failure to report on his December 2000 SF 86 the 1995 drinking alcohol on a public beach violation and the 1997 domestic assault charge in response to inquiries into his police record, including any alcohol-related offenses, as well as on his non disclosure of the court-ordered family violence intervention counseling in response to inquiry into any mental health counseling. If deliberate, the omission of material information from a questionnaire used to determine security clearance eligibility raises significant personal conduct concerns (see DC E2.A5.1.2.2.). As confirmed by the testimony of his witnesses, Applicant was confused as to whether he had to list his offenses or the related family violence counseling as he understood from his attorney that the offenses were expunged by the court. Not given any direction from his employer when he was provided the form, Applicant contacted his attorney who suggested Applicant could respond negatively to the inquiries since the offenses had been expunged, although this attorney indicated he did not understand the question that well either. Applicant also asked his close friend what he should do. Told the decision was his to make, this friend also indicated to him that if the offense had been expunged, then it was no longer a matter of record. Given the language of both questions 24 and 26, which provide for a limited exemption from disclosure for offenses subject to an expungement order, and the opinion of his attorney, Applicant indicates he believed reporting of his expunged offenses or court-ordered counseling was not required. Applicant's credibility on this issue is bolstered by the testimony of his supervisor, who related Applicant is not known for making excuses or for giving other than an honest assessment. Although the lawyer consulted by Applicant is not an authorized person within the scope of mitigating condition E2.A5.1.3.4.,[(13)] it was reasonable on Applicant's part to seek the advice of the lawyer who filed for the expungement.

The Government alleged as a separate falsification Applicant's failure to disclose his court-ordered family violence intervention counseling in response to question 19 ["In the last 7 years, have you consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition."]. Applicant denied any intentional omission, indicating that he thought he need not report the sessions because they had been mandated by the court in connection with an expunged offense. Unlike questions 24 and 26, there is no expressed exemption for counseling received in connection with an expunged offense. However, it is also clear that Applicant considered this group counseling as educational in nature, giving him and the other participants insights into behavior control, anger management, and concepts such as male privilege. Question 19 is limited in scope to counseling with a mental health professional for a mental health related condition. The record is silent as to the qualifications of the social worker who led the sessions. Based on this record, I am unable to conclude that Applicant's family violence intervention sessions constituted counseling from a mental health professional or consultation with another health care provider about a mental health related condition. Subparagraphs 3.a., 3.b., and 3.c. are resolved in Applicant's favor as his omissions were not deliberate, but rather due to his failure to understand that his expunged offenses (and court-ordered family violence intervention sessions) did not fall within the limited exemption delineated in the specific statutes cited on the SF 86.

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 F: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: For the Applicant

Paragraph 3. Guideline E: FOR THE APPLICANT

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: For the Applicant

Subparagraph 3.c.: 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 spouse testified that she and Applicant both came into the marriage with credit card obligations, which they attempted to satisfy on his income alone. (Transcript p. 142).

2. Applicant testified he had the loan down to $4,100.00. With accrued interest, the balance eventually exceeded the amount of the original loan. (Transcript pp. 110-11).

3. Applicant testified he did not appear before the judge except to hear the judge tell him to pay a $50.00 fine to a local police fund. Based on the representations of his lawyer, Applicant thought that the municipality dropped the case against him. (Transcript pp. 54,78).

4. Applicant testified he contacted the attorney who handled his domestic assault, and paid $500.00 to have the offense expunged in a timely fashion. According to Applicant, his lawyer told him all the paperwork had been filed and that he need not appear in court. (Transcript p. 82).

5. Applicant's spouse testified Applicant sought advice from the attorney who had handled the expungement as to whether he had to list the offenses; that this attorney suggested Applicant could respond no to the inquiries since the offenses had been expunged. (Transcript p. 144). According to Applicant's spouse, the attorney expressed some confusion about the questions as well, which led Applicant to discuss the matter with his supervisor. While Applicant's supervisor testified to having discussed with Applicant the omission of police record information only after the SOR had been issued, Applicant told him during their discussion that he had omitted the offenses because of the expungement. This supervisor testified he did not doubt Applicant's statements. (Transcript p. 125).

6. *See* Transcript p. 157.

7. In a signed, sworn statement prepared during that interview, Applicant indicated he was arrested for consumption of alcohol on a beach. The criminal face sheet indicates Applicant was charged with a violation of a municipal ordinance in a municipal court. (See Ex. 4). The matter was eventually disposed of in superior court only because Applicant appealed the municipal court's decision.

8. Applicant testified credibly he had been unaware of the two retail credit card debts until apprised of them by the DSS agent.

9. By the time Applicant signed his SF 86, most of his late accounts had been brought current.

10. While the Government alleged Applicant owes $480.00 to a retailer on an account charged off as a bad debt, the credit report indicates the charge off balance was $380.00. While Applicant admitted the allegation, he also indicated he

had no knowledge of the delinquency until his interview by the DSS agent. There is insufficient evidence to find Applicant owes that creditor $480.00 as opposed to $380.00.

11. This factor was considered but found not to apply as the omission of relevant and material information was due to misunderstanding of what was required rather than to deliberate falsification.

12. Asked about his efforts to repay the installment loan debt prior to his recent efforts to settle with the creditor, Applicant testified he could not recall when he made his last payment. He admitted receiving phone calls and claimed he and his spouse made payments (Transcript pp. 104-05). Yet, at some point he just stopped paying ("I tried to get on the schedule a few times with them and actually did. But there were just a couple of occasions that I could not pay, and it got to the point that-my wife can answer that question a lot easier than I could, because she's the one who dealt with them.). While Applicant could delegate to his spouse the duties of dealing with the creditor, he cannot abrogate his responsibility to ensure the debt was repaid.

13. Pursuant to a recent DOHA Appeal Board decision (see ISCR Case No. 01-05593, issued August 5, 2002), a local attorney is not an agent of the Executive Branch of the federal government, and is therefore not an authorized person within the scope of mitigating condition E.2.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). Yet, the presence or absence of a given adjudicative factor is not necessarily dispositive.