DATE: January 9, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-17418

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, 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 August 22, 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 excessive alcohol consumption (guideline G) with a diagnosis of alcohol dependence and alcohol-related criminal incidents, and on personal conduct (guideline E) related to deliberate falsification of a July 1999 security clearance application.

On September 5, 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 accordingly on October 10, 2001, and pursuant to formal notice dated October 11, 2001, a hearing was held on October 24, 2001. At the hearing, the Government submitted eleven documentary exhibits, ten of which were admitted into the record, and called Applicant as a witness since he initially elected not to testify. Applicant then offered limited testimony on his behalf. With the receipt on November 5, 2001, of the transcript of the hearing, the 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 42-year-old designer with a history of alcohol abuse. He has been employed by a defense contractor since November 1990 and seeks a Confidential security clearance for his present duties.

Circa 1972, when he was thirteen years of age, Applicant began to smoke marijuana and to consume alcohol. A daily user of marijuana initially, his use eventually decreased over time to once to twice monthly.

In 1979, Applicant got married to his first wife and he enlisted in the United States military where he served as a forklift and crane operator. He continued to use marijuana on occasion while on active duty. In May 1981, Applicant and a companion were stopped by base military police who observed a marijuana joint in the ashtray of their vehicle. At the time, Applicant had a marijuana cigarette in his hand. Charged with wrongful possession of marijuana, Applicant received non-judicial punishment in January 1982, and was sentenced to correctional custody for thirty days, demoted in rank from E-4 to E-1, fined $250.00 in pay for two months, and ordered into a treatment program.

By 1982, Applicant was drinking about three to four days per week, in quantity of fifteen to twenty beers with occasional shots of whiskey.

In late April 1983, Applicant was stopped for an expired post registration. Detecting a strong odor of alcohol about Applicant, military police administered roadside maneuvers which Applicant failed. Applicant was then taken into custody and subjected to blood alcohol testing which registered .096% blood alcohol content. Charged with drunk driving, Applicant was found guilty of the offense and sentenced to forfeit $150.00 in pay for one month. Circa August 1983, Applicant was given a general discharge under honorable conditions from the service.

Applicant's alcohol abuse caused him marital difficulties, and in about 1984, Applicant and his first wife divorced, with his ex-spouse getting physical custody of the two children born of their marriage.

In November 1984, Applicant was caught driving on a suspended license. He pleaded nolo contendere to the charge in court in December 1984, and was sentenced to six months probation plus costs.

Applicant continued to drink in the same pattern (fifteen to twenty beers three to four days per week), and to smoke marijuana once to twice per month. In mid-November 1985, he was arrested for driving while intoxicated (DWI) and driving with a suspended license.[(1)] Applicant did not appear for a scheduled court date because he was trying to save money, and a charge of failure to appear was added. In early March 1986, Applicant pleaded guilty to DWI and he was fined $350.00 plus $24.50 costs and ordered to perform community service. On the charge of suspended license, he pleaded nolo contendere and was placed on one year supervised probation and assessed $24.50 costs. Adjudged guilty of failure to appear for a summons, Applicant was fined $50.00 for that offense.

Applicant did not moderate his drinking habits following this DWI. After consuming about twenty beers over a time span of eight to ten hours at different bars on an occasion in January 1989, Applicant was stopped for weaving. Arrested for DWI, driving on a suspended license, and failure to appear, he was found guilty of the DWI and driving with a suspended licence while the failure to appear charge was dismissed. He was sentenced on the DWI to ten days in the adult correctional institute and fined $734.50. For the driving with a suspended license, he was ordered to serve ten days (to run concurrent with the term for the DWI) and to pay fines and costs totaling $604.50. Applicant had not paid the fines by December 1999.

In June 1990, Applicant married his second wife. In mid-January 1992, Applicant and his brother-in-law were pulled over by the police. Observed throwing a homemade marijuana pipe out his passenger side window, Applicant was charged with possession of marijuana. Adjudged guilty of the offense, he was fined $283.50 and placed on one year probation.[(2)]

While Applicant had stopped using marijuana by 1993,[(3)] he continued to consume alcohol in quantity of fifteen to twenty beers on a regular basis. This drinking led to marital discord with his second wife and to domestic-related criminal incidents. In late December 1993, Applicant went out drinking and imbibed twenty beers. After he returned home, he got into a loud argument with his spouse and the police were called to their residence. Arrested for disorderly conduct (domestic), Applicant pleaded nolo contendere to the charge. He was found guilty, fined $108.50, placed on probation and ordered to undergo counseling.

For about six months from March 1994 to September 1994, Applicant participated in court-ordered counseling for alcohol abuse and marital problems. With the aid of his sessions with the therapist, Applicant managed to reduce his alcohol consumption, although he continued to drink to intoxication on occasion.[(4)]

After imbibing twenty beers to the point of intoxication on an occasion in mid-January 1996, Applicant got angry with his spouse when she came in late from drinking with her friends. In addition to pushing his spouse around, he slammed the back door, breaking the glass. Applicant's spouse called the police who noted Applicant and his spouse both appeared to be under the influence. Applicant was arrested for disorderly conduct (domestic) and domestic assault. Applicant pleaded nolo contendere to both counts. In early February 1996, he was sentenced on the disorderly charge to one year in the adult correctional institute, suspended, and placed on supervised probation for one year with counseling plus costs. For domestic assault, he received a six months suspended sentence in favor of probation with counseling plus costs.

After drinking eight beers over the course of a weekend in late February/early March 1996, Applicant in early March 1996 began court-ordered counseling. Diagnosed by a licensed clinical social worker as suffering from alcohol dependence and adjustment disorder with disturbance of conduct, Applicant admitted drinking heavily for ten to fifteen years. With a treatment goal of abstinence, Applicant attended counseling sessions twice per month for six months and satisfactorily completed all required sessions.

Circa September 1998, Applicant and his second wife divorced, their relationship difficulties being related at least in part to their drinking of alcohol. The two daughters born during that marriage reside with Applicant's ex-spouse, although he has physical custody of them every other weekend.

In conjunction with his employer's request that he be granted a Confidential security clearance for his duties as a designer, Applicant executed a security clearance application (SF 86) on July 13, 1999. In response to inquiry concerning any alcohol/drug related offenses (question 24), Applicant reported only his last drunk driving offense, which he listed as having been committed in 1988 (vice 1989). Regarding whether his use of alcohol in the last seven years had resulted in any treatment or counseling, Applicant in answer to question 30 listed his counseling from January 1, 1995 to January 1, 1996.

Interviewed by a special agent of the Defense Security Service (DSS) on December 9, 1999, Applicant discussed his alcohol consumption and counseling, and his arrests for possession of marijuana twice,[(5)] on drunk driving related charges three times, and for alcohol-related domestic assault charges twice. He volunteered he had also been charged in 1979 or 1980 for theft of a welding machine and steam cleaner from a former employer in 1979/80, but the charge had been dropped in court. Admitting he had listed only his most recent drunk driving offense on his SF 86, Applicant claimed to have misunderstood the question on the security clearance application. Regarding his failure to list on his SF 86 his counseling in 1994, he indicated he had forgotten it. Asked about his current drinking habits, Applicant admitted having continued drinking once or twice per week on Friday and/or Saturday evenings in quantities of five or ten cocktails (mostly whiskey and ginger ale). Applicant claimed consumption in that amount did not have much affect on him, although he submitted he made a concerted effort to refrain from driving after drinking. Applicant related an intent to "keep [his] alcohol consumption to the current level."

Five days later, Applicant was reinterviewed by the special agent as some of the dates he had provided for his arrests did not correspond to the information reflected in official records. Applicant admitted he had been mistaken about some of the dates. He denied any knowledge of a 1980 breach of peace offense. He related that his arrest in March 1996 stemmed from his failure to appear for his court hearing for the November 1995 DWI. Applicant also acknowledged charges related to driving on a suspended license, and that his license had not yet been reinstated.

Following his December 1999 interviews with the special agent, Applicant resolved to give up hard liquor. From January 2000 to at least October 2001, he continued to drink on the weekends in quantity up to a six-pack to seven beers or Smirnoff Ices (malt beer with lemon). On at least a couple of occasions, he imbibed as many as six beers in a sitting. Applicant regards his drinking habits as "nothing really at all." As of October 2001, Applicant had no intent to abstain from alcohol. He does not consider himself to be alcohol dependent on the bases he does not need alcohol to function and does not drink continuously throughout the day.

In August 2000, Applicant got married to a woman with whom he has been friends for a long time.

At his hearing in October 2001, Applicant attributed his failure to list all his criminal arrests on his SF 86 to his

understanding that all but his last drunk driving offense fell outside a specified time frame. When asked about what he understood the time frame to be, Applicant testified he could not recall. Applicant later testified he did not remember his arrest in 1992 for illegal possession of marijuana when he filled out the form ("A lot of these things here didn't come to my mind."). Several of the questions on the SF 86 refer to the seven-year time frame preceding the date of the application, including those inquiries of illegal drug use and alcohol-related treatment. Assuming Applicant did not carefully read the questions and thought all inquiries had a seven-year time frame, it would be inconsistent with his listing then of the 1989 DWI, which was outside the time frame, and his failure to list the domestic alcohol-related incidents, which were within the seven-year time frame. Applicant is found to have intentionally omitted from his SF 86 the April 1983 and November 1985 DWI offenses well as his arrests in 1993 and 1996 for disorderly conduct (domestic). Moreover, given the recency of his 1992 possession of marijuana, and his ability to recall when questioned by the DSS agent not only this offense but also his apprehension in May 1981 for illegal possession of marijuana, I am not persuaded that his omission of the drug offenses was inadvertent. Applicant's failure to report his treatment sessions with the therapist in 1994 is regarded as not deliberate, as he had lumped his sessions with the psychologist with those court-ordered for the 1996 domestic assault.

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, I find the following adjudicative guidelines to be most pertinent to this case:

GUIDELINE G

Alcohol Consumption

E2.A7.1.1. The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

E2.A7.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A7.1.2.1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use

E2.A7.1.2.4. Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program

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

E2.A7.1.3. Conditions that could mitigate security concerns include:

None.

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.

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, I conclude the following with respect to guidelines G and E:

Applicant has a significant history of involvement with alcohol from age thirteen. From 1982 to 1994/95, Applicant imbibed beer in excessive quantity (fifteen to twenty beers) on a regular basis. By 1990, Applicant had three drunk driving convictions on his record. While there is no evidence his alcohol consumption negatively impacted his work

performance, it played a part in the dissolution of two marriages. Convicted of disorderly conduct (domestic) following an alcohol-related incident with his second wife in late December 1993, Applicant was ordered into counseling. After six months of sessions with a therapist in 1994, Applicant managed to reduce his consumption of alcohol. Yet, occasionally he imbibed to intoxication thereafter, including on a date in mid-January 1996 when he pushed his spouse during an argument. From early March 1996 to approximately September 1996, Applicant attended court-ordered counseling where he was evaluated by a licensed clinical social worker and assessed as suffering from alcohol dependence. Applicant satisfactorily completed all required sessions, but he did not achieve his goal of abstinence. As of December 1999, Applicant was consuming five or ten cocktails (mostly whiskey and ginger ale) once or twice per week on the weekends. While he ceased his consumption of hard liquor in 2000, he was drinking as of October 2001 in quantity of up to six beers or malt beverages (Smirnoff and Ices). On review of the adjudicative guidelines pertinent to alcohol consumption, disqualifying conditions E2.A7.1.2.1. (alcohol related incidents away from work), E2.A7.1.2.4. (evaluation by a licensed clinical social worker of alcohol dependence),[(6)] and E2.A7.1.2.5. (habitual or binge consumption to the point of impaired judgment) are applicable in this case.

None of the corresponding mitigating conditions apply in this case. In the opinion of a licensed clinical social worker affiliated with a program recognized by the state, Applicant suffers from alcohol dependence. Although Applicant has moderated his alcohol consumption from previous levels and he is no longer drinking hard liquor, he continues to imbibe beer or malts in quantity of up to six on occasion. Given his very serious history of abusive drinking, his current consumption levels are regarded as excessive and as posing a real risk of future alcohol-related security significant problems. He has not made any appreciable effort to attain the treatment goal of abstinence and there is no evidence of any recognition on his part that he has an alcohol problem. While he completed the treatment program required by the court in 1996, the value of that rehabilitative effort is called into question. Due to the absence of significant reform, adverse findings are warranted with respect to subparagraphs 1.a., 1.b., 1.c. (and 1.d. as it references the same incident as 1.c.), 1.e., 1.f., 1.g., 1.h.,1.i. and 1.j. of the SOR.

The Government's case under personal conduct (guideline E) is based on Applicant's failure to fully disclose on his July 1999 SF 86 his alcohol and drug-related criminal offenses as well as his alcohol-related counseling. Applicant disclosed only his most recent DWI and his court-mandated alcohol treatment on his application. Applicant does not dispute that he failed to list his April 1983 and November 1985 drunk driving offenses, his non-judicial punishment for wrongful possession of marijuana in 1981, his conviction for illegal possession of marijuana in 1992, or his more recent disorderly and domestic assault charges, but he denies the omissions were intentional. Applicant having not disclosed security significant information on his clearance application, he bears the burden of proving the omissions were inadvertent or due to good faith mistake--a burden which is not met by inconsistent explanations. Applicant having been found to have knowingly misrepresented the extent of his alcohol and drug-related arrest history, disqualifying condition E2.A5.1.2.2. (deliberate omission of relevant and material facts from any personnel security questionnaire) must be considered in evaluating his security worthiness. In contradistinction, the record supports his claim that he lumped his treatment together in his mind when he reported on his SF 86 a year of alcohol-related treatment from January 1995 to January 1996.

To Applicant's credit, he detailed his alcohol use and alcohol-related arrest history when he was interviewed by a DSS special agent on December 9, 1999. The DOHA Appeal Board reaffirmed in ISCR 01-06166 (decided on October 25, 2001), that where a case involves disclosures by an applicant that are corrections of an earlier falsification, MC E2.A5.1.3.3. (individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts) rather than MC E2.A5.1.3.2. (falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily) is proper for consideration. MC E2.A5.1.3.3. requires that the disclosures be prompt as well as before confrontation. There is no evidence Applicant made any effort to correct the record before he was interviewed in December 1999. Yet, five months is not so remote to where it could be considered prompt, provided full and frank disclosure. While Applicant's admissions to his heavy involvement with alcohol reflect favorably, he was not completely candid during that interview about whether he had used marijuana on the occasions of his arrests. With respect to the 1981 incident for which he was given non-judicial punishment, Applicant claimed during his December 9, 1999, interview that the marijuana found in the ashtray belonged to his friend ("It was his marijuana and not mine, but I was young and did not know any better so I admitted to my own use of marijuana." Ex. 2). He also claimed to have accepted responsibility for the marijuana pipe which belonged to his brother-in-law in 1992. At his hearing, he testified with respect to the 1981 charge, he happened to be in the vehicle where the marijuana was. When

confronted by Department Counsel as to whether he had been holding a hand rolled cigarette containing suspected marijuana, Applicant responded, "Yet, in fact, you know what, I was." (Transcript p. 66). Applicant was also found guilty of possession of marijuana with respect to the 1992 incident, and it stretches credulity that he would admit to a criminal offense if he was completely blameless. His lack of complete candor about his drug involvement during his interview precludes a finding of timely rectification.

Furthermore, doubts persist as to whether Applicant's representations can be relied on. As discussed above, he initially lied at the hearing about whether he had possession of marijuana on the occasion of his arrest in 1981. With respect to the extent of his marijuana use, he testified he stopped using marijuana in the early 1980s. He had already admitted to the agent in December 1999 that he continued to use marijuana to the late 1980s or early 1990s. Applicant's denials of any intentional omission of his arrest record likewise cast substantial doubt as to whether he possesses the requisite degree of good judgment, reliability and trustworthiness which must be demanded of those granted access. Adverse findings are returned as to subparagraphs 2.a.(1),[(7)] 2.a.(2), 2.a.(3), and 2.b.(1). Subparagraph 2.c.(1) is resolved in Applicant's favor for the reasons noted above.

FORMAL FINDINGS

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

Paragraph 1. Guideline G: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: Against the Applicant

Subparagraph 1.i.: Against the Applicant

Subparagraph 1.j.: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.(1): Against the Applicant

Subparagraph 2.a(2): Against the Applicant

Subparagraph 2.a(3): Against the Applicant

Subparagraph 2.b.(1): Against the Applicant

Subparagraph 2.c.(1): For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest

to grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. Subparagraphs 1.c. and 1.d. of the SOR reference the same incident. From a review of the court and law enforcement records in evidence, it appears Applicant was arrested for the DWI in November 1985 and sentenced in early March 1986.

2. Applicant maintains he had stopped using marijuana by the date of this arrest and that he took the blame to protect his brother-in-law who had asked him to throw the pipe out the window. It is difficult to believe Applicant would plead guilty to an offense he did not commit.

3. Applicant testified he did not smoke any marijuana after the early 1980's. (Transcript p. 72). His testimony is at variance with his sworn statement taken during a December 9, 1999 interview where he stated, "I had reduced to only about once to twice monthly and then finally stopped due to lost interest about the late 1980's or early 1990's." (Ex. 2).

4. Applicant testified he sought counseling before he was court-directed to do so. (Transcript pp. 49-50). It is not clearly established in the record that Applicant began his counseling before he was sentenced. The FBI and the local arresting agency reflect the arrest and disposition to be on the same day in late December 1993.

5. Although Applicant admitted his arrests, he claimed he was not in possession in either instance.

6. Under E2.A7.1.2.4. of the Directive, the licensed clinical social worker must be a staff member of a recognized alcohol treatment program. Given the treatment at the facility was pursuant to court-order, it is clear the state recognized the center as providing viable treatment for alcohol problems.

7. Again, subparagraph 1.b. and 1.c. refer to the same incident so it is not viewed as a separate offense concealed.