DATE: April 23, 2002

In Re:

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

Applicant for Security Clearance

CR Case No. 01-22403

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Although Applicant had been arrested six times for alcohol-related incidents in a 20-year time frame, only one of these arrests (October 1998) had occurred in the past 10 years. Since this arrest, Applicant has participated in and completed a four month counseling program and considerably reduced his alcohol consumption. Because Applicant had disclosed his most recent (October 1998) DUI arrest and other recent adverse information, his failure to disclose two earlier felony charges on his January 2001 *Security Clearance Application* was found to be the result of carelessness and inattention, rather than a deliberate intent to deceive; he received six months probation and a $25.00 fine for the 1975 charge, and the 1997 charge was nolle prosequi. Clearance is granted.

STATEMENT OF THE CASE

On October 30, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended referral to an Administrative Judge to determine whether he should be granted a security clearance.

Applicant answered the SOR in writing on December 18, 2001. The case was assigned to this Administrative Judge on January 30, 2002. On February 21, 2002, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of 11 exhibits. Applicant relied on his own testimony and 4 exhibits. Transcripts (Tr.) of the proceeding were received on arch 1, 2002 and April 11, 2002.

RULING ON

DEPARTMENT COUNSEL'S

REQUEST FOR CONTINUANCE

At the hearing convened on February 21, 2002, Applicant objected to the authenticity of Government Exhibit 11. His objection was sustained. Department Counsel requested a continuance in order to call an authenticating witness. The hearing was continued and reconvened on April 3, 2002. The authenticating witness was called and Exhibit 11 was admitted into evidence.

FINDINGS OF FACT

The Statement of Reasons (SOR) alleged Applicant had consumed alcohol at time to excess and to the point of intoxication from 1972 to at least June 2001 and had been involved in six incidents of alcohol-related misconduct spanning more than 20 years, beginning with a felony arrest for carrying a concealed weapon in October 1975, and culminating with an arrest for driving under the influence in October 1998. The SOR further alleged Applicant had falsified his SF 86 (*Security Clearance Application)* in January 2001 by not listing all of his arrests. Applicant denied consuming alcohol at times to excess and to the point of intoxication up until June 2001[(1)], but admitted with explanation, all other allegations set forth in the SOR. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 44 years old and has been employed by a DoD contractor since January 2001. Although he had served in the U.S. military from 1975 to 1978, he was not aware of previously applying for, or being granted a security clearance.

Applicant's alcohol-related encounters with the law began in October 1975 when at age 18, he was arrested for carrying a concealed weapon (felony), malicious injury (felony), and possession of stolen property (felony) after having consumed alcohol. For these infractions, he was ordered to pay $25.00 in court costs, adjudication was withheld, and he was given six months probation.

In May 1976, Applicant was arrested and charged with disorderly intoxication for which he pleaded no contest and was fined $36.00. He was arrested for disorderly conduct again in August 1982 for behavior which occurred after he had consumed alcohol. He was found guilty, sentenced to two days in jail and fined $167.50. Less than one year later, in May 1983, Applicant was arrested and charged with "trespass after warning" after he entered a drinking establishment from which he had earlier been barred. This charge against Applicant was later withdrawn.

Applicant married in 1985, and his youthful exuberance began to wane. He did not have any alcohol-induced encounters with authorities until 1989 when he was arrested and charged with boating under the influence. He failed a breathalyzer test, was ordered to perform community service, and participate in Alcoholics Anonymous. Applicant's final and most recent alcohol-related misconduct occurred in October 1998 when he was arrested and charged with driving under the influence. He was found guilty; his license was suspended for six months; he was given six months probation, fined a total of $543.50, ordered to perform 50 hours of community service, and attend an alcohol counseling program and a Victim's Awareness Program.

The alcohol consumption which contributed to Applicant's six arrests began in 1973 when he began consuming alcohol monthly at age 15. He consumed alcohol at that rate until joining the military in 1975 at age 18. Although he than drank only on weekends, he would consume a case on a weekend, occasionally drinking to the point of intoxication. After he married in 1985, he reduced his alcohol consumption to drinking beer on weekends. He would drink "hard liquor" monthly, but rarely drank to the point of intoxication. After his divorce in 1996, Applicant began "going out" and drinking 3 or 4 beers every night. This rate of alcohol consumption continued until his October 1998 arrest for DUI. Immediately prior to this arrest was one of the rare occasions when Applicant consumed mixed drinks instead of beer. After the arrest, he reduced his alcohol consumption; he did not consume any alcohol during the 4 months he was attending alcohol counseling (March - July 1999 (Tr. 70). He was evaluated incident to his October 1998 DUI arrest and attendance of alcohol counseling at which time he was diagnosed with "Alcohol Dependence (in remission).[(2)]

Applicant currently consumes a six-pack of beer a weekend in the company of his boating friends--rarely if ever

drinking to the point of intoxication (Tr. 39, 64, 89, 90-91). He did not crave alcohol during the time he was attending the 4 month counseling program (Tr. 88). Applicant testified he has never consumed alcohol before going to work; he has never experienced blackouts, and he has never missed work because of a hangover (Tr. 71-72).

Not alleged as an alcohol-related incident was Applicant's June 1997 felony arrest for assault and battery. The charges resulting from this arrest were subsequently reduced to a misdemeanor and were later nolle prosequi. This arrest was not alleged as criminal conduct under Guideline J.

When Applicant completed his SF 86 (*Security Clearance Application)* in January 2000, he certified:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

Not all of Applicant's answers to the questions posed on the SF were truthful. In response to question 21 which asked him if he had ever been charged with or convicted of a felony offense, Applicant answered "no". In response to question 26 which asked him if, in the last 7 years, he had been arrested for, charged with, or convicted of any offense not listed in response to the previous five questions, Applicant answered "no," even though information of his June 1997 arrest was clearly responsive to this question.

Applicant disclosed the details of his numerous arrests--including the arrests not listed on his SF 86--in a signed, sworn statement to the Defense Security Service (DSS) in June 2001. He explained he did not list all of his arrests on the SF 86 because he did not realize the questions pertaining to alcohol use required him to list arrests going back to "forever"(Govt. Exh. 2). He did not list the 1997 felony assault and battery arrest because he "totally forgot about it" and "the charges were dropped." While there is no allegation or evidence he had consumed alcohol on the job, Applicant admitted he was fired from his job as a result of his October 1998 DUI arrest.

At his administrative hearing, Applicant testified he had not listed his felony arrests in 1975 and 1997 in response to question 21 (on the SF 86) because he did not realize he had been arrested for felonies. Prior to completing the SF 86, Applicant had obtained an extract of his arrest record from the County Clerk (Tr. 37, Applicant Exh. B). The 1997 arrest (referenced above) was listed on this record. His explanations for omitting the 1997 arrest from his SF 86 were that he "totally misunderstood the question" (Tr. 32), he "forgot" about it (Tr. 48), he "just missed it," and he had "no excuse" (Tr. 73). Applicant denied he had omitted his arrests because he was concerned with the impact they would have on his being granted a security clearance. Several of his friends had told him "to be honest and put everything down" (Tr. 76).

Applicant's duty performance is not documented in the record.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decision with reasonable consistency that are clearly consistent with the national interest. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section 6.3 of the Direction. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

ALCOHOL CONSUMPTION

(Guidelines G)

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

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.A.7.1.2.4. Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Conditions that could mitigate security concerns include:

E2.A7.1.3.1. The alcohol related incidents do not indicate a pattern;

E2..A7.1.3.3. Positive changes in behavior supportive of sobriety;

PERSONAL CONDUCT

(Guideline E)

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

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

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.

Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government established its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. When the facts proven by the Government raise doubt about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate 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 security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSION

Having considered the record evidence in accordance with appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guidelines G and E. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerate in Section 6.3, as well as those referred to in Section E2.2. dealing with adjudicative process, both in the Directive

A security concern is raised by Applicant's six arrests for alcohol-related misconduct between 1975 and 1998. Excessive alcohol consumption often lead to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Mitigating Applicant's six arrests for alcohol-related misconduct is their dispersal over a 23-year-time frame according to no set pattern The first four arrests occurred in an eight-year time frame--between 1975 and 1983--the last arrest occurring just after his 25th birthday. His two arrests for operating a motor vehicle after consuming alcohol (boating in 1989, an automobile in October 1988) occurred under dissimilar circumstances 9 years apart. The common thread linking these and Applicant's other arrests is the obvious enjoyment/pleasure he derives from drinking beer with his friends. While there are more constructive pastimes, drinking beer with friends is neither illegal or unusual.

Also considered is the disposition of the charges prior to Applicant's October 1998 arrest for arrest for driving under the influence. The total amount of the fines and costs levied for his five other arrests was $228.50. The disposition of the charges arising from the first four arrests suggest they were viewed as mischievous incidents, the consequence of a little alcohol and too much youthful exuberance. While his 1975 arrest for carrying a concealed weapon and malicious injury resulted in felony charges, the ultimate disposition--a $25.00 fine and six months probation--indicates Applicant's misconduct was less serious than the charges suggest.

Of course, the disposition of the charges would not be a consideration if there was persuasive evidence of alcohol abuse or alcohol dependence. Government Exhibit 11 establishes that Applicant was evaluated by a social worker and "diagnosed" as alcohol dependent. While this evaluation is important information, it does not raise the threshold of the evidence Applicant must present in mitigation to the same level as when this diagnosis has been made by a credentialed medical professional. In this case, Applicant's testimony that he has reduced his alcohol consumption to a six-pack of beer per week and no longer drinks to the point of intoxication is evidence of a positive change in support of sobriety. Guideline G is concluded for Applicant.

A security concern is also raised by Applicant's failure to truthfully answer questions 21 and 26 on the SF 86 he completed in January 2001. Information about Applicant's felony arrests in 1975 and 1997 was responsive to the above questions and should have been provided by Applicant. However, the inquiry does not stop with a determination that Appellant's "no" answers to questions 21 and 26 were incorrect. In order for Applicant's omission, concealment, falsification to be disqualifying, it must have been deliberate, and the facts deliberately omitted, concealed, or falsified must have been relevant and material to Applicant's security suitability. The "no' answers and the omitted information do not satisfy either test.

The evidence suggests Applicant's omissions resulted from carelessness and inattention, rather than from a deliberate intent to conceal adverse information. He disclosed his most recent and most serious arrest--in terms of the fine or sentence imposed--and he disclosed a 1977 arrest for "firearm possession." He also disclosed that he had been fired from his job in 1998 after he lost his driver's license. To assure he did not omit information about arrests from the SF 86, he obtained an extracted copy of his arrests from the country clerk. This is not the action of an individual who had decided his interests were best served by concealing information of his arrests. And in response to a question about whether he withheld information of his arrests because he feared the consequences if he told the truth, he testified he had been told by his friends to tell the truth. Considering the information omitted, the information disclosed, and Applicant's testimony explaining his omissions, his incorrect answers and omissions are more indicative of carelessness than of an intent to deliberately conceal adverse information from the U.S. Government.

Finally, omitting or concealing information is disqualifying only if the information omitted or concealed is relevant and material to an applicant's security suitability. Here, Applicant's "no" answers to questions 21 and 26, and his concealing an arrest occurring in 1975--which resulted in a $25.00 fine and six months probation--and his concealing another arrest occurring in 1997--which was nolle prosequi--did not conceal information about criminal conduct that was relevant and material to a determination of Applicant's judgment, trustworthiness and reliability. One arrest was 26 years old, and the charges resulting from the other arrest were reduced to a misdemeanor and then nolle prosequi. The Government's claim that the criminal conduct for which Applicant was arrested in 1975 and 1997 is relevant and material to Applicant's security suitability is undermined by its failure to even allege this criminal conduct as disqualifying under Guideline J. Guideline E is concluded for Applicant.

FORMAL FINDINGS

Formal findings as required by Section 3, Paragraph 7, of enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Guideline G) FOR THE APPLICANT

Paragraph 1.a. For the Applicant

Paragraph 1.b. For the Applicant

Paragraph 1.c. For the Applicant

Paragraph 1.d. For the Applicant

Paragraph 1.e. For the Applicant

Paragraph 1.f. For the Applicant

Paragraph 1.g. For the Applicant

Paragraph 1.h. For the Applicant

Paragraph 1.i. For the Applicant

Paragraph 2 (Guideline E) FOR THE APPLICANT

Paragraph 2.a. For the Applicant

Paragraph 2.b. 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant admitted he had "in the past" but not until June 2001.

2. Government Exhibit 11 and the testimony of the Government witness does not establish this diagnosis was made by a "credentialed medical professional" as that term is defined in paragraph E2.A7.1.2.3. (Guideline G) of the Directive. Applicant testified he was not aware of this diagnosis. When he admitted subparagraph 1.h., he intended to admit only that he had attended Level II Counseling for 4 months (Tr. 44-45).