DATE: July 29, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-26367

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's episodic abuse of alcohol has led to criminal incidents, including a January 2001 drunk driving offense. The risk of future alcohol abuse and related criminal conduct cannot be discounted, given he continues to drink on occasion in similar quantities to what he had consumed before his arrests. Applicant deliberately did not disclose his 1999 arrest for rape on his security clearance application or during his first subject interview. His intentional concealment raises serious personal conduct and criminal conduct concerns. Clearance is denied.

STATEMENT OF CASE

On September 25, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) 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. (1) 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), alcohol consumption (guideline G) and personal conduct (guideline E).

On December 3, 2002, Applicant responded to the SOR allegations and requested a decision based on the written record. (2) Sometime after the Government's File of Relevant Material was prepared, Applicant requested a hearing before a DOHA Administrative Judge, and the case was assigned to me March 14, 2003. Pursuant to formal notice dated March 27, 2003, the hearing was scheduled for, and held on, April 24, 2003. At the hearing, eight Government exhibits were admitted into the record. (3) Applicant's case consisted of his testimony, as reflected in a transcript received by DOHA on May 6, 2003.

FINDINGS OF FACT

The SOR alleges criminal conduct because of 1998 disorderly conduct and 2001 drunk driving offenses, his arrest in

1999 for a felony rape charge that was nolle prossed, and deliberate falsification of his November 2000 security clearance application (SF 86); excessive alcohol consumption with alcohol-related criminal conduct; and personal conduct because of his failure to list his arrest for felony rape on his SF 86. In his Answer, Applicant admitted the criminal charges, but denied the disorderly conduct was alcohol-related. In response to an allegation of continuing to drink both during the week and on weekends, occasionally to intoxication, Applicant indicated he now drinks only on the weekends. As for his failure to report his arrest for rape on his SF 86, Applicant acknowledged he "made a mistake on the question." After a thorough review and consideration of the evidence, I make the following findings of fact:

Applicant is a 25-year-old control center operator employed since late September 2000 in the security department of a defense contractor. He held an interim secret security clearance for his duties until it was withdrawn in about March 2003.

Applicant began to consume alcohol when he was a sophomore in high school. He continued to drink throughout high school on weekends when he could obtain alcohol. Since he was underage, liquor was hard to come by. When Applicant imbibed, it was usually to intoxication. After his graduation, Applicant became employed as a production supervisor. Over the next five years, he drank on weekends--occasionally to intoxication--when out socializing with friends. At times, he also imbibed one or two beers after work at home during the work week.

His consumption of alcohol led to adverse legal involvement on three occasions. In late February 1998, he was arrested for disorderly conduct after he refused to leave a billiards and bowling establishment when requested to do so. Applicant had an obvious odor of alcohol on his person, and he put up a physical struggle as he was taken into custody. In March 1998, sufficient facts were found, and the case was continued without a finding on payment of a $100.00 fine.

In June 1999, Applicant went to work as a laborer for a construction company. In mid-July 1999, Applicant and a male friend agreed to purchase beer for three teenage girls (then ages 15, 16, and 17),[(4)] who they met in a local record store. The girls accompanied Applicant and his friend to the liquor store, where Applicant's friend purchased a case of beer, and then to the friend's home, where all proceeded to drink. During the course of the evening, Applicant consumed about six or seven beers and had sexual intercourse with the 16-year-old, who had imbibed at least four beers. Two days later, the girl complained to the police that Applicant had raped her. When questioned by the police, Applicant indicated the girl had consented to having sex with him. Four days after the house party, Applicant was arrested and charged with felony rape and with contributing to the delinquency of a minor. Circa late September 1999, the charges were nolle prossed. In October 1999, Applicant moved to seal the record, which was granted.[(5)]

After short employments in retail and as a dispatcher, Applicant in late September 2000 secured a position as a control center operator in the security department of his present employer. In conjunction with his duties, he executed a security clearance application (SF 86) on November 3, 2000, on which he responded affirmatively to inquiries concerning a police record in the last 7 years, disclosing his 1998 disorderly conduct. Applicant answered "NO" to whether he had ever been charged with or convicted of any felony offense (question 21 thereon), deliberately concealing from the Government that he had been arrested for rape in 1999. Since the court records had been sealed, he thought no one would find out about it. Applicant was granted an interim secret clearance for his duties.

Applicant continued to drink one or two beers occasionally during the week, and on weekend nights when out with friends, at times to intoxication. After imbibing about seven beers at a Super Bowl party in late January 2001, Applicant was stopped for speeding and marked lanes violation. He failed field sobriety tests and was arrested for operating a motor vehicle under the influence of liquor (OUIL). Sufficient facts were found for OUIL, and his case was continued without a finding for one year on payment of $250.00 costs and $160.00 to victim funds, completion of an alcohol safety action program (ASAP) and loss of his operating privileges for sixty days. Applicant attended a local ASAP in June and July 2001, consisting of 14 educational sessions focusing on the dangers of drinking and driving.

After his arrest for OUIL, Applicant was careful not to drive after drinking more than three beers. On August 9, 2001, Applicant was interviewed by a special agent of the Defense Security Service (DSS). Applicant discussed his arrests for disorderly conduct and OUIL, the latter having occurred after he completed his SF 86. Applicant denied he was intoxicated on the occasion of the disorderly conduct, and indicated he had only given his friend, who had been in a fight at the lounge, a congratulatory "high five." Applicant acknowledged he had driven while intoxicated in January

2001, but he completed the ASAP in July 2001, and reported his OUIL to his supervisors. He falsely denied he had been arrested for any other reason, as he did not think the Government would be able to find out about his arrest for rape in 1999. Asked about his drinking pattern, Applicant admitted continuing to imbibe alcohol in the same pattern since high school, occasionally to intoxication, but he maintained he no longer drove a car after consuming more than two or three beers. Applicant denied that he had an alcohol problem, or that anyone had ever claimed he has an alcohol problem.

On August 22, 2001, Applicant was interviewed by the agent about his 1999 arrest for rape and failure to disclose that arrest on his SF 86. Applicant told the agent he had consumed one or two beers and that one of the girls had led him into a bedroom where they engaged in consensual sex. He expressed his belief that the charges were dropped because the girl "changed her story a number of times." Applicant admitted he intentionally did not disclose the charge on his SF 86 because he believed the information had been sealed and no one had access to it.

As of April 2003, Applicant was drinking alcohol on the weekends, about five or six beers when together with friends and not driving, three beers at most when driving. On occasion when he had a "rough day," he consumed a couple of beers at the end of the workday. Over the weekend of April 19-20, 2003, Applicant imbibed six beers during a three hour period while watching a sporting event on television with a friend. Applicant considers his drinking to be moderate.

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 J

Criminal Conduct

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

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

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

b. A single serious crime or multiple lesser offenses

Conditions that could mitigate security concerns include:

None

GUIDELINE G

Alcohol Consumption

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.

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

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.A7.1.2.1.)

Conditions that could mitigate security concerns include:

Positive changes in behavior supportive of sobriety (E2.A7.1.3.3.)

GUIDELINE E

Personal Conduct

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.

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

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.A5.1.2.2.)

Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination (E2.A5.1.2.3.)

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 J, G and E:

Applicant's February 1998 disorderly conduct and January 2001 OUIL raise security concerns under guideline J, criminal conduct (*see* disqualifying conditions a. allegations or admissions of criminal conduct and b. a single serious crime or multiple lesser offenses) and guideline G, alcohol consumption (*see* DC E2.A7.1.2.1. alcohol-related incidents away from work). Applicant denies he was intoxicated on the occasion of his arrest for disorderly conduct. The responding officer detected an "obvious" odor of alcohol on Applicant. Furthermore, Applicant displayed impaired judgment in physically resisting arrest. Clearly, Applicant was under the influence of alcohol to a significant extent, if not to the point of legal intoxication. Applicant does not dispute, and his blood alcohol content at the time of arrest confirms, that he was legally intoxicated on the occasion of the OUIL.

With regard to the 1999 rape and contributing to the delinquency of a minor, both charges were nolle prossed. The failure to prosecute does not preclude the Department of Defense from considering whether he engaged in the conduct complained of, but as conceded by Department Counsel, the evidence is insufficient to prove Applicant committed felony rape. Applicant has consistently maintained the sexual encounter was consensual. The girl admitted during the police investigation that she had hugged and kissed Applicant on the sofa before the alleged rape. Consent to sex cannot be presumed from such minor contact, but Applicant is entitled to the presumption of innocence until proven guilty beyond a reasonable doubt. Assuming Applicant did not rape the girl, he exhibited extremely poor judgment in facilitating the underage consumption of alcohol by the girls. Applicant had consumed as many as six or seven beers that evening himself, which casts further doubt as to the quality of his judgment when drinking.

Since his 2001 OUIL, Applicant has changed his drinking behavior, in that he no longer drives after consuming more than three beers. Despite this positive change supportive of sobriety (*see* mitigating condition E2.A7.1.3.3), there exists an unacceptable risk of future alcohol abuse and even alcohol-related criminal incidents. Applicant continues to consume alcohol when socializing with friends in amount similar to that imbibed on the occasion of his OUIL. When asked at his security clearance hearing about his current consumption levels, Applicant described his drinking as moderate and he denied drinking to intoxication since he attended the court-ordered ASAP in June 2001. However, in response to specific inquiry as to the greatest amount consumed in a single sitting since June 2001, Applicant responded "maybe five or six beers." Applicant then admitted drinking six beers when with a friend the weekend prior to his security clearance hearing. He testified to a pattern of drinking six beers when watching local professional teams on television unless he has to drive home. Absent a diagnosis of alcohol abuse or alcohol dependence, the Directive does not require abstention from alcohol. Yet, in light of Applicant's history of recent and repeated legal trouble after imbibing about six or seven beers, his present drinking habits present an unacceptable security risk. When one is under the influence of a mood-altering substance such as alcohol, there is a risk of inadvertent disclosure of classified information. Adverse findings are warranted as to subparagraphs 1.a., 1.b. (as to the contributing to the delinquency of a minor), 1.c., 2.a., 2.b., 2.c. and 2.d. of the SOR.

Furthermore, on his security clearance application, Applicant was required to report any felony charge filed against him, regardless of whether the records had been sealed. Applicant intentionally omitted any reference to the 1999 rape and contributing to the delinquency of a minor because he did not think anyone would have access to the information and the charge of rape made him look like "scum." By falsely certifying that his statements on his security clearance application were "true, complete and correct to the best of [his] knowledge and belief," Applicant violated Title 18,

(6)

Section 1001 of the United States Code. Under guideline J, the fact that Applicant has never been formally charged with that statute does not preclude its consideration for security purposes, as any criminal conduct is potentially security disqualifying. Applicant's lack of candor about his arrest for rape engenders serious criminal conduct (*see* DC a. allegations or admission of criminal conduct) as well as guideline E, personal conduct, concerns (*see* DC E2.A5.1.2.2. the deliberate omission of relevant and material facts from a personnel security questionnaire).

His falsification was not limited to the SF 86. Even though Applicant provided details of the disorderly conduct and OUIL criminal offenses when he was interviewed by the DSS agent on August 9, 2001, he falsely claimed that he had not been arrested for any other reason, to include alcohol related offenses. This misrepresentation to the agent is potentially security disqualifying in its own right (*see* E2.A5.1.2.3.). Under the circumstances, Applicant's subsequent admission during his August 22, 2001, interview that he had been arrested for rape, and his account of the circumstances which led to his arrest, cannot reasonably be considered a prompt or good faith effort at rectification. In response to the SOR, Applicant indicated he made a mistake on question 21, as he wanted to forget about the incident and it was "hard for [him] to go through, knowing that someone could deliberately lie about [his] character." By choosing to lie during his interview of August 8, 2001, Applicant placed his own character in doubt. Subparagraphs 1.d. and 3.a. are resolved against him, as he has failed to persuade that he can be counted on to place his obligations to the Government before his self-interest.

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: 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

Paragraph 2. Guideline G: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against 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. The SOR was issued 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).

2. Applicant initially filed an undated, unsigned response which was received by DOHA on October 7, 2002. His Answer was signed and notarized on December 3, 2002.

3. Ex. 1, Applicant's security clearance application, bears a generation date of August 27, 2002, on the first page, but incongruously a signature date of November 3, 2000.

4. Applicant admitted during his August 22, 2001, subject interview that he knew the three girls were underage, but he claimed he thought they were all 17 or 18. (Ex. 3). During the initial police investigation into a complaint of rape filed against him by the 16 year old, Applicant indicated the girl with whom he had sex was either 16 or 17. (Ex. 8).

5. At the April 2003 security clearance hearing, Department Counsel indicated the Government was not taking any position as to whether Applicant had committed the crime of rape, notwithstanding the arrest was alleged under guideline J, as "the government has no way to know if, if it was actually rape or not. He says that it was not rape. The girl, who was involved, claimed that it was rape, and, then, it was nolle prossed." (Tr. p. 76).

6. Section 1001 of the United States Code provides in pertinent part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-

(1) falsifies, conceals, or covers up by any trick scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.