DATE: December 6, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-14990

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

As a college student from 1993 to 1997, Applicant consumed alcohol three to four days per week, usually to intoxication. In April 1996, he was arrested for drunk driving and underage drinking with a breathalyzer testing over the legal limit. The case was continued without a finding on the condition he complete one year unsupervised probation, pay fines and costs, and attend an alcohol awareness program. Concerns about excessive alcohol consumption are mitigated by his moderation of his drinking habits since going to work for the defense contractor. Personal conduct concerns persist because Applicant did not list his alcohol-related offenses on a July 2000 security clearance application, raising doubts as to whether his representations can be relied on. Clearance is denied.

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 May 31, 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 was based on personal conduct (guideline E) because of Applicant's failure to report on his July 2000 security clearance application April 1996 operating under the influence (OUIL) and underage drinking offenses or his completion of a required alcohol program following the OUIL, and on alcohol consumption (guideline G) due to drinking to intoxication at times from 1993 to at least April 2002, including on the occasion of his OUIL.

On June 12, 2002, Applicant responded to the allegations set forth in the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on August 14, 2002, and pursuant to formal notice dated August 23, 2002, the hearing was scheduled for September 12, 2002. At the hearing held as scheduled, the Government submitted four documentary exhibits. Applicant presented the testimony of his supervisor in addition to his own testimony. With

the receipt on September 23, 2002, of the transcript of the hearing, 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 26-year-old analyst with a master's degree in business administration (M.B.A.), who has been employed by a defense contractor (company A) since July 2000. Granted a Secret security clearance for his duties, Applicant seeks to retain that level of access.[(1)]

Following his graduation from high school, Applicant pursued a bachelor's degree. As a college student from September 1993 to May 1997, Applicant consumed alcohol three to four days per week in quantity of ten to fifteen beers per occasion. He usually became intoxicated after drinking at that level, suffering from alcohol-related blackouts once or twice and passing out on numerous occasions.

After imbibing alcohol from 3:00 p.m. on a Friday afternoon to 2:00 a.m. on a Saturday morning in early April 1996, Applicant was stopped by local police for traveling 80 mph in a 45 mph zone. Arrested for operating under the influence of liquor, underage drinking and speeding, Applicant submitted to a breathalyzer at the station, which registered a blood alcohol level over the legal limit. His case was continued without a finding on the OUIL charge to April 1997, and he was placed on one year unsupervised probation with conditions that he complete an alcohol awareness program and pay a $500.00 fine and $500.00 costs. Applicant's operator's license was also suspended for nine months. The speeding and underage charges were dismissed.

Pursuant to court order, Applicant attended a drinking and driving program on a weekly basis for four months in summer 1996. In addition to the weekly sessions where he was educated about the effects and possible consequences of excessive drinking, Applicant attended two Alcoholics Anonymous meetings. In April 1997, after he met all requirements, the OUIL charge was dismissed without a formal finding. Applicant understood from his lawyer that this meant he did not have to report the offense on future job applications.

In May 1997, Applicant was awarded his bachelor's degree. That September, he commenced graduate studies in business administration while working initially as a manager at a fitness gym and then as an analyst for his father's real estate company. Applicant continued to socialize with his college friends with whom he consumed alcohol. With work responsibilities and graduate school, his drinking declined to three or four drinks per occasion on average, usually on the weekends. Approximately once every other month, Applicant consumed eight to ten beers to intoxication. Aware of the dangers of drinking and driving since his OUIL, Applicant did not operate a motor vehicle after drinking to intoxication. In May 2000, he earned his M.B.A. degree.

During the May/June 2000 time frame, Applicant was interviewed and offered a position as analyst by his present employer. About a week prior to Applicant actually starting to work for company A, he completed a security clearance application (SF 86) on July 3, 2000. Applicant responded "No" to question 24 regarding any alcohol or drug offenses ["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."]. Applicant did not disclose his arrest for OUIL and underage drinking as he viewed the dismissal of the case against him as a non charge and felt he had a right not to report his arrest. Applicant also answered "No" to inquiry (question 30 on the form) as to whether his alcohol use had resulted in any alcohol-related treatment or counseling, as he did not he did not think the alcohol awareness classes he attended in 1996 qualified as treatment. With regard to foreign connections, Applicant reported the dual citizenship (Greece and United States) of his parents and the Greek residency of his father and sister. Yet, in response to any foreign travel in the last seven years (question 16), Applicant did not list his travels to Greece in 1994, 1995, summer 1998, and spring 1999, reporting only pleasure trips to Mexico in 1996 and 1997. Despite these trips abroad, Applicant denied holding currently or in the past a United States passport.[(2)] An electronic version of Applicant's SF 86 was generated on July 10, 2000. On July 16, 2000, Applicant's employer generated another SF 86 (unsigned by the Applicant), containing the same information provided by Applicant previously. Applicant was

thereafter granted his secret security clearance.

On March 12, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his foreign connections and foreign travel. Applicant explained his birth in the United States and subsequent move to Greece in 1978 when his father's job was transferred. Applicant denied any dual citizenship. After coming to the United States in 1993 to attend college, Applicant related he traveled to Greece to see family members at least annually, with the exception of 1996 and 1997 when he went to Mexico for pleasure. Applicant acknowledged he had not reported his travel to Greece on his SF 86, but he denied any intentional omission.

On April 11, 2002, Applicant was reinterviewed by the same DSS agent, this time about his alcohol consumption and OUIL offense, and his failure to disclose his OUIL on his SF 86. Applicant admitted he was intoxicated on the occasion of his arrest for drunk driving in April 1996. Applicant indicated his case was continued without a finding, and no further action taken against him after completion of court-imposed requirements, including attendance at a drinking and driving program. As for the omission of the OUIL and the alcohol classes from his SF 86, Applicant stated:

The reason I did not list this charge on my security clearance application was because the end result was a non charge. Because I was not convicted, I had the right not to list the initial charge. I did not disclose the alcohol program I attended because the program involved classes, not personal counseling. I have attended no other such classes or counseling.

(Ex. 3). Applicant related he had consumed alcohol three to four days per week as a college student, ten to fifteen beers per occasion, which did not impact his studies. He added that since college, his consumption has been mainly on weekends, in quantity of three or four drinks on average. Approximately every other month, he drinks eight to ten beers, resulting in intoxication. He denied having a drinking problem or anyone ever suggesting that he had a drinking problem. Applicant indicated he does not drink and drive, and he expressed his intent to continue drinking at current levels.[(3)]

At his cousin's wedding in May 2002, Applicant became intoxicated after consuming eight beers and two drinks of hard liquor. Applicant did not operate a motor vehicle on that occasion.

On May 31, 2002, DOHA issued an SOR to Applicant based on excessive alcohol consumption on occasion from approximately 1993 to at least April 2002, including the OUIL and his failure to report the offense as well as his alcohol classes on his July 2000 SF 86. On receipt of the SOR Applicant informed his manager that he "may have incorrectly answered" his SF 86 by responding "no" to a question asking whether he was arrested or convicted. Applicant did not give his manager any details as to the nature of the offense for which he was arrested in college.[(4)]

In response to the SOR, Applicant on June 12, 2002, indicated he had been given professional advice that he was able to answer "No" when asked if he had ever been convicted. Applicant conceded that on a recent reading of his SF 86, it was clear to him the question referred to charges and convictions and that discussions with a DoD security officer and legal professionals indicated a charge and conviction are two separate issues. Applicant apologized for the incorrect answer, but again denied any intentional concealment of his alcohol offense. With regard to his failure to list his alcohol classes, Applicant explained he did not consider the alcohol education classes to be counseling. After thinking the issue over, he indicated the classes may well be considered a form of counseling. As for his alcohol consumption, Applicant acknowledged he drank excessively in college, but maintained his consumption level has decreased dramatically as his life responsibilities have increased. He indicated his consumption of alcohol is always in control and responsible.

Over the Fourth of July 2002 holiday, Applicant rented a house with his friends in a resort area. Applicant consumed about ten beers to intoxication at a nearby bar. As of September 2002, Applicant's drinking was largely confined to weekends, as he was spending twelve-hour days at work during the week. When socializing with friends, including his girlfriend, Applicant drinks three to four beers on average, more (up to eight to ten beers) on special occasions. Applicant considers his drinking to be in control, and he intends to continue his present pattern.[(5)] While he may be legally intoxicated after drinking as many as eight to ten beers, Applicant does not consider that impairment significant enough to impact his ability to protect classified information.

In his two years at company A, Applicant has proven he can be trusted with business sensitive information. His work responsibilities have increased as a result. As of September 2002, Applicant had a stand-alone assignment requiring a significant level of trust, auditing proposals and purchase orders at various United States and even overseas sites. On one reformation project, Applicant worked directly for company A's vice president. Applicant's manager considers Applicant one of his best employees, who has a tremendous future with the company.

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:

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.

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 . . .

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:

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

E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem

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

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 E and G:

The Government's case under guideline E is based on Applicant's failure to report on his July 2000 SF 86 his April 1996 OUIL offense and his attendance at court-mandated alcohol classes. The deliberate omission of relevant information reflective of alcohol abuse raises significant personal conduct concerns (see DC E2.A5.1.2.2.). Applicant acknowledges the omission, but submits he had no intent to conceal his OUIL, as he understood from his lawyer in 1996 that he was not required to report the offense as the case had been continued without a finding. During his April 2002 interview with a DSS agent, Applicant indicated that because the disposition of his case was a "non charge," he had "the right" not to list it (*see* Ex. 3). In response to the SOR, Applicant cited professional advice to accept a "continued without a finding verdict" in 1996 so that he would be able to answer "No" when asked if he had been convicted. He also claimed not to understand in July 2000 that a charge and conviction were two separate issues. With respect to the omission of his counseling, Applicant provided two explanations: the court-mandated alcohol awareness classes need not be disclosed because they were court-imposed for an OUIL offense not subject to report, and he did not think his court-mandated alcohol awareness classes qualified as treatment or counseling.

As a college educated business analyst, Applicant can reasonably be held to have had no difficulty reading question 24 on the SF 86, which asks whether he had ever been charged with **or** convicted of any offense related to alcohol or drugs. Moreover, the applicant for a security clearance is directed to report the information, regardless of whether the record in his case has been stricken from the court record. Had Applicant held a good faith belief the OUIL need not be reported on any employment or related applications, the SF 86 requirement to report any alcohol-related charge, irrespective of

disposition, would have given him reason to question his understanding. Applicant made no effort to contact legal counsel or company A security for advice to determine whether the SF 86 presented an exception to non disclosure. After considering all the evidence, Applicant has exhibited an unacceptable tendency to place his personal interests ahead of his obligation of full and frank disclosure. His omission of the OUIL and underage drinking charges from his SF 86 is found to have been deliberate.

Question 30 on the SF 86 unambiguously asks whether the use of alcohol within the last seven years has resulted in alcohol related treatment **or** counseling. As a result of the OUIL, Applicant attended an alcohol awareness class for sixteen weeks at a local hospital during the summer of 1996. While these classes should have been listed in response to question 24 in connection with the disposition of the OUIL, there is insufficient information about these classes to conclude that they qualify as alcohol treatment or counseling which would have required their reporting in response to question 30 on the SF 86. The only evidence about these classes comes from the Applicant, who testified they were educational in nature. Subparagraph 1.b. is thus resolved for Applicant.

The concerns for Applicant's judgment, reliability and trustworthiness engendered by his failure to disclose his alcohol-related offenses and awareness program in response to question 24 on the SF 86 may be overcome if the falsification was isolated, not recent and corrected voluntarily (E2.A5.1.3.2.); the individual made prompt, good faith efforts to correct the falsification before being confronted (E2.A5.1.3.3.); or omission of material facts was caused or significantly contributed to by the improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (E2.A5.1.3.4.). None of the mitigating conditions apply in this case. Having falsified his SF 86 in July 2000, Applicant was interviewed by a DSS agent in arch 2002. The Government did not allege any misrepresentation by Applicant during that interview, and indeed, there is no evidence Applicant was asked about his alcohol abuse at that time. However, there is also nothing in the record which indicates he availed himself of the opportunity at that time to correct the record regarding any alcohol offenses. While Applicant readily discussed his OUIL and alcohol abuse history during a subsequent interview, it was not established that he volunteered the OUIL up-front, before being confronted. Applicant in April 2002 and at the hearing admitted he drank to excess on the occasion of his OUIL and on a regular basis in college. His candor on these issues is undermined by his continued denial of any intent to conceal his OUIL. Applicant testified with regard to his omission of the OUIL offense:

In looking back, I am sure that the other potential employers did not ask me if I had ever been convicted. It just asked me if I'd ever been charged. So neither here nor there, without intent, I answered the question incorrectly. What was going through my mind I don't know. I was applying to ten different jobs at that time. I was filling out the applications. I absolutely had no intent to hide this issue . . . I think that's my mistake in filling out the application and is a factor for me not having security clearance. I don't think that's a strong point. I believe my proven work ethic is. (Tr. p. 41).

Applicant has earned his employer's trust through his appropriate treatment of sensitive business information. His failure to extend the same seriousness and dedication to his application for security clearance raises significant doubt as to whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Subparagraph 1.a. is resolved against him.

As a college student, Applicant consumed large quantities of alcohol (ten to fifteen beers) regularly to intoxication. On several occasions, he passed out after drinking. Applicant drank to an alcohol-related blackout at least a couple of times. After imbibing to significant impairment on a weekend in April 1996, he was arrested for OUIL. While his case was continued without a finding, Applicant's blood alcohol level was over the legal limit. The excessive consumption of alcohol raises security concerns, as abusive drinking often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure due to carelessness. Disqualifying conditions E2.A7.1.2.1. (alcohol-related incidents away from work) and E2.A7.1.2.5. (habitual or binge consumption of alcohol to the point of impaired judgment) must be considered in evaluating Applicant's current security eligibility.

Since his graduation from college, Applicant's drinking levels have decreased to on average three or four drinks when he does indulge, usually on the weekends. As recently as April 2002, Applicant was continuing to consume eight to ten beers once every other month, resulting in a degree of impairment, significant enough to take a cab home rather than drive. While the risk of inadvertent disclosure of classified information is increased when a person is intoxicated, Applicant testified to (and the absence of any alcohol-related incidents confirm) a current pattern of controlled drinking

which has not led to any adverse consequences legally, socially or occupationally. On the two occasions where he consumed as many as ten alcoholic drinks since April 2002, these were special occasions (a cousin's wedding and renting a place over a holiday). Applicant did not operate a motor vehicle after drinking at either of these events. There is no recent drunk driving or any alcohol-related incidents at work which would indicate a lack of control over his consumption. To the contrary, Applicant's manager testified to Applicant's dedication at work and value to his employer. The favorable changes Applicant has made in his drinking habits since college (*see* E2.A7.1.3.3.) warrant a favorable outcome as to subparagraphs 2.a. and 2.b.[(6)] under guideline G.

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 E: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2. Guideline G: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: 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. It is not clear whether Applicant was granted his secret clearance on an interim basis. Applicant's supervisor testified Applicant was "visibly shaken when he found out his clearance was being pulled." (Tr. p. 35).

2. The Government did not allege under guideline E Applicant's failure to disclose his foreign travel. Born in the United States, Applicant was educated through the high school level in Greece. Applicant denied ever holding any dual citizenship. It is presumed his trips to Greece were on a United States passport, although the issue was not explored.

3. Applicant testified when he drinks with friends, all young professionals, it is in two major metropolitan areas located about two hours from his current residence. (Tr. p. 61). It is not clear whether his friends reside in the two cities or travel with him to those locales.

4. Applicant's manager testified, "That he wrote down for the question on the application and it was 'arrested' or 'convicted' and he wrote no. He said he was actually arrested but not convicted. We did not really get into whether he was trying to cover something or not." Tr. p. 36.

5. Applicant testified, "All of my friends are young professionals. When we go out on a Saturday, we'll drink. If it's a special occasion, we'll drink a little bit more. That's what my lifestyle is about." (Tr. p. 49).

6. There is no subparagraph 1.a.(2) in the Directive. It is not clear whether the Government meant to refer to subparagraph 1.b.(1).