DATE: October 8, 2003

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In Re:

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

Applicant for Security Clearance

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ISCR Case No. 02-23632

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

## APPEARANCES

**FOR GOVERNMENT**

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

**FOR APPLICANT**

Matthew E. Auger, Esq.

## SYNOPSIS

In Fall 2000 and January 2002, Applicant was arrested on misdemeanor domestic violence charges for physically assaulting family members when he was under the influence of alcohol. Following court-mandated anger management sessions and Alcoholics Anonymous (AA) meetings, Applicant has changed his drinking behaviors, leading to a significant improvement in his relationship with his spouse. There is little risk of a recurrence of his criminal conduct. Applicant listed his January 2002 arrest for disorderly conduct on his security clearance application (SF 86), but omitted his arrest for assault in 2000 as the case had been dismissed. Personal conduct concerns are mitigated as the omission was due to good-faith reliance on the advice of legal counsel that he need not report the offense and he volunteered the information when interviewed by the Defense Security Service. Clearance is granted.

## STATEMENT OF CASE

On March 14, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to 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) and personal conduct (Guideline E).

On March 28, 2003, Applicant responded to the SOR allegations and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on May 7, 2003, and a formal notice was issued on May 12, 2003, scheduling the hearing for June 4, 2003. At the hearing held as scheduled, four Government exhibits were admitted into evidence. Ten Applicant exhibits were entered into the record and six witnesses testified on Applicant's behalf (Applicant, his spouse, his father, a personal friend, two coworkers). A transcript of the hearing was received by DOHA on June 13, 2003. At the Government's request, administrative notice was also taken of pertinent state statutes regarding the offenses of disorderly conduct, a class C misdemeanor, and assault in the third degree, a class A misdemeanor.

## FINDINGS OF FACT

DOHA alleges in the SOR criminal conduct and personal conduct concerns related to two domestic assaults by Applicant between Fall 2001 and January 2002, and personal conduct because of his failure to disclose on his March 2002 security clearance application that he had been arrested in Fall 2001 for assault, third degree. In his Answer, Applicant acknowledged his arrest record, but indicated the first incident occurred in Fall 2000. He denied any intentional omission of the Fall 2000 arrest for assault from his SF 86, as the charge had been dismissed and he had acted on the advice of legal counsel that he need not disclose the arrest on any future job, financial, or security applications. Applicant's admissions are accepted and incorporated as findings of fact. After a thorough review of the evidence, and on due consideration of the same, I make the following additional findings of fact:

Applicant is a 36-year-old married father of a young son. Since about March 2002, he has been employed as an outside machinist first class for a defense contractor. Applicant previously worked for the company as an outside machinist from January 1986 to June 1997 when he was laid off. He seeks a security clearance for his present duties.

Following his marriage in May 2000, Applicant did little to change his social activities or friendships from when he was single.[(2)] His drinking beer with his friends once or twice per week, including with others on his adult softball team after games, was a source of marital discord.

After Applicant consumed a few beers with his friends at a high school football game in Fall 2000, Applicant and his spouse argued about his failure to stay at home with her. When his spouse blocked the door in an effort to prevent him from leaving, Applicant grabbed her and pushed her out of the way. He got in his truck but returned to the residence when she came outside, and they continued to argue until his spouse contacted the police. Applicant was arrested for assault, third degree, a class A misdemeanor. On completion of 18 hours of anger management classes in July/August 2001, the charge was dismissed and erased from his record. Applicant understood from the judge that the dismissal had the legal effect of nullifying the offense (*i.e.*, making it as if it never happened).[(3)]

In early January 2002, Applicant had surgery for a herniated lumbar disc. Three days later, Applicant elected to drink alcohol to intoxication rather than take his pain medication, as the latter were having no effect. Applicant and his spouse had a verbal altercation where she again would not allow him to leave the premises. Applicant recognized from his anger management sessions he had to do something to prevent its escalation, so he asked his father to come over the house to mediate the dispute. Applicant's father arrived to find his son intoxicated. When his father told him he had a problem, Applicant reacted by grabbing his spouse by her neck and shoulders. A physical altercation then ensued between Applicant and his father, which led Applicant's spouse to call the police. When the police arrived, Applicant was arrested for disorderly conduct (domestic violence), a class C misdemeanor. Before adjudication of his case, Applicant began attending once weekly AA meetings as ordered by a court counselor. In May 2002, he was found guilty of creating a public disturbance (an infraction) and he sentenced to forfeiture of an $88.00 bond. He continued to attend AA until August 2002, abstaining completely from alcohol during the seven months he went to AA.

In conjunction with his return to work as an outside machinist for the defense contractor, Applicant was required to complete a security clearance application (SF 86). Since his spouse is employed as a paralegal, Applicant asked her whether he should list his 2000 arrest for assault on his security clearance application. She told him she did not think he was required to disclose it since it had been dismissed, but she offered to check with an attorney with whom she had worked. Informed Applicant was completing his paperwork in conjunction with his return to work for the defense contractor, the lawyer advised Applicant's spouse of the state's erasure statute and indicated Applicant was not required to disclose the arrest; that it is as if he had never been arrested and he could even swear to that under oath. Based on that advice, Applicant did not list Fall 2000 assault arrest on his SF 86 executed on March 21, 2002. In response to any pending criminal charges (question 23) Applicant listed his arrest for disorderly conduct in January 2002, and indicated it was to be dismissed.

On May 16, 2002, Applicant was interviewed by a DSS special agent about his listed offense. Applicant volunteered during that interview that he had been arrested before January 2002, and he provided his version of the events of Fall 2000, which he mistakenly indicated had occurred in Fall 2001. Applicant described a verbal altercation with his spouse during which he had grabbed her after she blocked his exit. He indicated he returned to the home as he feared she would

leave their young son unattended, and the argument continued until "someone" called the police. He volunteered he completed required anger control classes and the charge was dismissed. With respect to the January 2002 argument, Applicant admitted to having had verbal altercations with his spouse and father. He claimed his spouse called the police "just to be spiteful." At his court appearance the day before his DSS interview, the criminal charge had been reduced to creating a public disturbance, an infraction, for which he paid an $88.00 fine. Asked about his failure to list the earlier assault charge on his SF 86, Applicant denied any intent to conceal:

I did not list the Assault charge from 2001 [sic] on my security questionnaire because a lawyer with whom my wife works said that if the charge was dismissed there would not be a record of it. When I answered the question about arrests on the security questionnaire, I believed that it did not have to be listed because it had been dropped and on what the lawyer said about it. I was not trying to hide it. I did not think it went along with what was asked, but I was darn sure to put down the one that was pending when I completed the security questionnaire. (Ex. 2).

On June 25, 2002, Applicant was interviewed by the DSS agent about his drinking, which Applicant admitted was involved in the criminal charges filed against him. Applicant described a past pattern of drinking beer with his friends once or twice per week, which usually caused his spouse to argue that he should stay home. Applicant denied ever abusing alcohol, but acknowledged that through court-ordered AA, he came to realize that if he did not drink as before with his friends, "things would be easier at home." Applicant maintained his present consumption of "no more than four or five beers weekly" had not posed any problems at home.

Applicant has matured since early 2002, controlling his anger, moderating his alcohol consumption levels, and devoting his primary attention to his family, especially his son. Neither Applicant's spouse nor his father has any concern that the criminal incidents of 2000 and 2002 will recur.

Applicant has never allowed alcohol or domestic difficulties to negatively affect his work for the defense contractor. A hard worker, Applicant is considered by his supervisor and coworkers to be very reliable and trustworthy. One foreman has suggested to Applicant that he apply for a supervisory position, as he is "a cut above" the other outside machinists. Several coworkers, who attest to awareness of the allegations regarding Applicant's security clearance, recommend he be granted security clearance.

## 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, Sections 6.3 and 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, the following adjudicative guidelines are most relevant 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:

f. There is clear evidence of successful rehabilitation

**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:

None applicable

* * *

Under 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 SOR. 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* Directive, Enclosure 2, 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 and E:

Applicant was arrested in Fall 2000 for assault, third degree, after he grabbed his spouse during a domestic dispute. The

charge was subsequently dismissed following his completion of 18 hours of anger management classes, and erased from his record under state law. The security significance of criminal behavior does not turn on its legal disposition, and it remains relevant in determining Applicant's suitability for access. In January 2002, Applicant was arrested for domestic violence-related disorderly conduct following another altercation, this time with his father as well as his spouse. Although he was found guilty of a reduced charge of creating a public disturbance, an infraction under state law, the evidence is clear that he had a physical altercation with his father. A history or pattern of criminal activity raises doubts for an individual's judgment, reliability and trustworthiness. Consideration is warranted of disqualifying conditions a. (allegations of criminal conduct) and b. (multiple lesser offenses) under the criminal conduct guideline.

Although Applicant's criminal conduct is regarded as too recent to apply mitigating condition a. (criminal conduct is not recent), there is sufficient evidence of rehabilitation to conclude there is little risk, if any, of recurrence (*see* mitigating condition f.). The victims of Applicant's abusive behavior--his spouse and his father--testified credibly to a considerable improvement in his marital relationship, in Applicant's drinking habits, and in his ability to control his anger. A friend with whom he has a close relationship testified to seeing a moderation in Applicant's drinking at softball games and to increased devotion to his family. While the anger management sessions did not preclude the January 2002 incident, Applicant showed he had learned something in the classes when he called his father to serve as a mediator on that occasion. His loss of control is largely attributable to his intoxication and agitated state following surgery for a herniated lumbar disc. Applicant has not allowed alcohol to negatively affect his judgment since that incident in January 2002. Favorable findings are warranted as to subparagraphs 1.a., 1.b., and 2.a. of the SOR as Applicant has exhibited good judgment in changing those behaviors and attitudes which led to the domestic incidents.

The Government has alleged additional doubts for Applicant's security suitability because of his failure to include on his March 2002 SF 86 his arrest for assault in Fall 2000. The omission, concealment, or falsification of relevant and material facts from a personnel security questionnaire raises serious personal conduct concerns (E2.A5.1.2.2.), but only if deliberate. Applicant denies any intentional falsification, citing his good faith reliance on advice of an attorney friend of his spouse's that the dismissal operated as a nullification of the charge. The attorney informed Applicant through his spouse that under state law, Applicant could even swear under oath that he had not been arrested for any charge erased in accordance with the statute. The Government contends that because of federal supremacy, Applicant is obligated to report any offense expunged under state law. Indeed, the language of question 26 is unambiguous in its direction to report offenses that have been expunged or where the records had been sealed. Applicant apparently realized when he completed the SF 86 that the advice he received from legal counsel was contrary to what was asked ("I did not think it went along with what was asked."). While the proper course of action for Applicant when faced with this contradiction would have been to seek the advice of security personnel at his place of employment, I am persuaded Applicant did not intend the omission as an act of concealment. At the time the charge was dismissed, Applicant was informed by the judge the dismissal meant it was as if he had never been charged. Especially where the attorney's recent advice was consistent with his understanding from the judge, it was reasonable for the Applicant, an outside machinist with no legal training, to rely on the lawyer's advice.[(4)] Subparagraph 2.b. is resolved in Applicant's favor as there was no knowing and willful falsification of the security clearance application.

## FORMAL FINDINGS

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

Paragraph 1.Guideline J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2. Guideline E: 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 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 under 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 and his spouse were together for about two years before their marriage. Their son was born in September 1999.

3. The pertinent state has an erasure statute in cases where the charges have been dismissed or the defendant is found not guilty of the charge. "Whenever in any criminal case, on or after October 1, 1969, the accused, by a final judgment, is found not guilty of the charge or the charge is dismissed, all police and court records and records of any state's attorney pertaining to such charge shall be erased upon the expiration of the time to file a writ of error or take an appeal, if an appeal is not taken, or upon final determination of the appeal sustaining a finding of not guilty or a dismissal, if an appeal is taken." Conn. Gen. Stat. § 54-142a. Any person whose record has been erased is by statute "deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath."

4. Citing DOHA Appeal Board's decision in ISCR 01-05593, decided August 5, 2002, Department Counsel submits mitigating condition E2.A5.1.3.4. (omission was caused or significantly contributed to by improper or inadequate advice of authorized personnel) is not applicable as a private attorney not acting as an authorized agent or employee of either of the Executive Branch of the federal government or its defense contractors with responsibility for protecting and safeguarding classified information is not qualified to render advice about responding to questions pertaining to a security clearance investigation or adjudication. The Government having failed to prove the falsification was deliberate, there is no need to address the issue of mitigation.