DATE: July 31, 1997

In re:

SSN:

Applicant for Security Clearance

ISCR OSD Case No. 97-0299

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Francis J. Flanagan, Esq.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) dated April 21, 1997, 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 and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

On May 9, 1997, Applicant, at that time acting *pro se*, responded to the allegations set forth in the SOR and requested a hearing. The case was assigned accordingly to this Administrative Judge on June 3, 1997, and on June 11, 1997, a hearing was scheduled for June 26, 1997. At the hearing held as scheduled, thirteen Government exhibits and two Applicant exhibits were admitted into evidence. Testimony was taken from the Applicant. A transcript of the hearing was received by this office on July 7, 1997.

FINDINGS OF FACT

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge renders the following findings of fact:

Applicant is a 36 year old ---------- who has worked for his current employer (company A), a defense contractor, since September 1996. He seeks a Secret security clearance for his duties there.

Applicant began consuming alcohol in 1973, imbibing an average of one to three shots of liquor per week. Commencing

in 1979 and continuing until March 1996 with the exception of a brief sixty day period of abstinence in 1989, Applicant imbibed alcohol at the rate of a six pack of beer per week on average, on occasion drinking as much as twelve beers in a sitting. Applicant's consumption was not limited to beer as he would drink what was available, which at times included wine and/or hard liquor. Approximately twenty-four times per year between 1979 and March 1996, Applicant drank alcohol to intoxicating levels. Applicant's use of alcohol led to occupational and legal difficulties as follows:

While serving in a branch of the United States military stationed in state B in 1986, Applicant reported late to shift on three occasions because he had been drinking alcohol the evening before. He was ordered to attend a six month alcohol rehabilitation program commencing June 9, 1986. Applicant successfully completed the program, which included some exposure to Alcoholics Anonymous (AA). After a positive urinalysis, Applicant reentered the program in January 1988 which he did not complete.[(1)] Applicant abstained from alcohol for the sixty days preceding his bad conduct discharge from the service in April 1989 for the abuse of marijuana.

On May 18, 1989, Applicant was arrested in state B for driving under the influence with .10% blood alcohol content or more, driving under the influence, vehicle registration fees due, no proof of insurance and rear tires cord showing. On June 8, 1989, Applicant was sentenced to three years probation for DUI with .10 blood alcohol content or more, fined $480.00 plus assessment of $699.00 or sixteen days in jail, to serve 48 hours and $10.00 to the restitution fund. He was given a suspended fine for no proof of insurance and the remaining charges were dismissed. Applicant admits he had been out drinking prior to the incident, but that he had only two drinks.

On April 20, 1990, Applicant got into a fight with another patron outside of a local bar in state C. The fight was witnessed by local police and Applicant was arrested for disturbing the peace and disorderly person, transported to the police department where he was held overnight and released. A complaint was filed against him on April 23, 1990. Applicant pleaded not guilty in court to both offenses on May 17, 1990, and he was fined $50.00 plus $30.00 to the victim witness fund for disorderly person. On August 17, 1990, both charges were dismissed. Applicant had been drinking prior to the incident.

After consuming a pitcher of beer at a bar, Applicant was pulled over by law enforcement in state C at about 12:25 a.m. on August 26, 1991, because he did not have his headlights on. The officer detected a strong odor of alcohol on Applicant's breath and administered field sobriety tests which Applicant failed. Applicant was then arrested for operating under the influence of liquor. At the station, Applicant took a breathalyser which registered .20% blood alcohol content and refused to take a second test after being informed that his license would be suspended for 120 days for refusal. In court, he pleaded not guilty to charges of operating under the influence, operating a motor vehicle with defective equipment, and operating a motor vehicle without a license. On January 10, 1992, Applicant was adjudged to admit sufficient facts to operating a motor vehicle with defective equipment and operating without a license, for which offenses he was fined $35.00 and $100.00, respectively. He was found not guilty of operating under the influence.

Applicant hit a stopped car with his vehicle in state C on an unspecified date in September 1994. Police responding to the accident discovered an open container of beer in Applicant's automobile.[(2)] He was cited with open container in vehicle, for which he paid a fine, and failure to maintain proper clearance, which was dismissed.

Applicant proceeded to drive his vehicle after consuming two pitchers of beer over the course of the evening on February 25, 1996. Local police in state D observed Applicant drifting back and forth across the lane of travel and activated their emergency lights. Applicant pulled over into a donut shop, signaling late, and ignored the officer's warnings to remain in his vehicle. Applicant walked into the store and stood behind another police officer who was being waited on at the front counter. Applicant ignored police request to turn around and the pursuing officer grabbed him. Applicant exhibited bloodshot and watery eyes, unsteady balance and a strong odor of alcohol on his person. As the police escorted him out of the donut store, Applicant fell to the floor. The officers determined Applicant was too unsteady on his feet to perform field sobriety tests and they arrested him at 1:17 a.m. on February 26, 1996, for driving under the influence of liquor or drugs. Applicant was subsequently informed of the penalties, including immediate suspension of his driver's license, should he refuse to submit to a chemical test. Applicant refused the test and was charged with driving under the influence of liquor or drugs, refusal to submit to chemical test, lane roadway violations and registration card carried in vehicle--refusal to show. In accordance with a pre-trial agreement in district court, Applicant agreed to plead guilty to the charge of refusal to submit to chemical test in exchange for dismissal of the DWI

charge. The charge of registration card carried in vehicle--refusal to show and time of signaling turn were voided and the remaining charges referred to state administrative adjudication court. On March 12, 1996, a hearing was afforded Applicant before a judge of the administrative adjudication court on the refusal to submit to chemical test. The charge was sustained and Applicant was fined $200.00 plus $27.00 court costs, a $500.00 highway assessment and an additional assessment fee of $173.00, his driver's license was suspended for three months, he was required to participate in the Driving While Intoxicated Program and to perform ten hours of community service. Applicant was also fined $69.00 for the lane roadway violation.

After his February 26, 1996 arrest Applicant reduced his consumption of alcohol. From March 1996 to April 21, 1997, Applicant consumed one alcoholic beer a month, otherwise drinking "near beer" which has .05% alcohol content.

On September 21, 1996, Applicant was evaluated in the Driving While Intoxicated Program. Applicant did not inform the evaluator about his drunk driving offense in state B in an effort to sway the evaluator towards sending him to the movie series instead of drug abuse counseling. He told the evaluator that he attempts to drink within the legal limit. The evaluator recommended one on one counseling as Applicant demonstrated no awareness of his difficulties with alcohol.

Applicant's counseling required court approval. Due to the court evaluator's backlog, Applicant did not meet with the individual who had approval authority until April 1997. Between September 1996 and April 1997, Applicant made no effort on his own to seek counseling or to attend a support organization such as Alcoholics Anonymous (AA) as he thought that the amount that he had reduced his drinking to (one alcoholic beer a month) was going to be sufficient not to get arrested.

On May 12, 1997, Applicant began weekly counseling with a licensed psychologist for treatment of alcohol abuse,[(3)] attending five sessions by June 24, 1997, missing one session. The psychologist as of June 24, 1997, assessed Applicant's prognosis as excellent. In connection with his reserve duties as an E-4 in the National Guard of a branch of the United States military, Applicant is scheduled to serve overseas for three weeks in July 1997. On his return, Applicant's sessions with the psychologist will be reduced from once weekly to once every other week due to financial reasons. Required by the court to attend six to fifteen sessions with this psychologist, Applicant intends to continue with the counseling for a year based on documentation he had received from the Government which led him to believe that if he was abstinent and under the care of a psychologist for a year, certification would be favorable to him being granted a security clearance.[(4)]

Since May 12, 1997, Applicant has attended AA meetings three times per week. He has not yet obtained a sponsor in AA as he is waiting for somebody to ask him whether he has given anyone his phone number and then he could set up an appointment at that time. Applicant intends to continue in AA and to maintain sobriety. On June 21, 1997, Applicant's brother-in-law, who knows Applicant is no longer drinking, placed pressure on Applicant to be a drinking buddy. Applicant was successful in maintaining abstinence, which he attributes to AA. Applicant has two close friends with whom he used to drink, one of whom is supportive of his sobriety. Applicant sees the other individual quarterly when that person returns to the area from state B. Applicant indicated this person may pose a problem and that he "may have to do something about him." When asked what he will have to do, Applicant responded, "I think he needs to have counseling, basically. I don't know if he can ever realize that."

Applicant no longer intends to drink any alcohol as from his psychologist and AA, he has learned that consuming alcohol of any type is not a wise choice for him.

Applicant has not allowed alcohol to negatively impact his work at company A or his military duties with the National Guard.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, 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 seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 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.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

ALCOHOL CONSUMPTION

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:

(1) alcohol-related incidents away from work, such as driving while under the influence, fighting. . .

(3) diagnosis by a credentialed medical professional of alcohol abuse

(4) habitual or binge consumption of alcohol to the point of impaired judgment

Conditions that could mitigate security concerns include:

(3) positive changes in behavior supportive of sobriety

* * *

Under the provisions of Executive Order 10865 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the

Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the Applicant, this Judge concludes that the Government has established its case with regard to criterion G.

Applicant commenced drinking in 1973 when he was only twelve years of age. In 1979, he began a pattern of consumption which eventually led to his military command sending him to alcohol rehabilitation in 1986 and again in 1988. During the alcohol rehabilitation program, Applicant gained some exposure to AA. This program had little, if any, appreciable impact in effecting a positive change in Applicant's drinking habits. After his discharge from the service, Applicant continued until March 1996 to drink to intoxication about twenty-four times per year, with repeated drunk driving. In addition to his conviction for DUI in 1989, the evidence establishes Applicant was arrested for operating under the influence of liquor on August 26, 1991 and February 26, 1996. Although he was found not guilty in court of drunk driving in connection with the August 1991 offense, Applicant admits to having consumed a pitcher of beer at a bar, he was unable to perform field sobriety tests, and a breathalyser administered to him at the station registered .20% blood alcohol content. Similarly, with respect to the February 1996 offense, Applicant pleaded guilty to refusal to submit to chemical test in return for dismissal of the DWI charge. Applicant was clearly intoxicated on that occasion, having consumed two pitchers of beer prior to his arrest resulting in such impairment that he fell to the floor prone while the police were escorting him out of the donut shop. Given the extent and recency of Applicant's abusive use of alcohol, he bears a heavy burden to demonstrate reform.

In assessing the current security significance of Applicant's criterion G conduct, this Administrative Judge must consider the Adjudicative Guidelines pertaining to alcohol consumption set forth in Enclosure 2 to the Directive. In addition to the three drunk driving offenses, which clearly qualify as alcohol-related incidents away from work under disqualifying condition (DC) 1., Applicant after drinking got involved in a fight outside of a bar on April 20, 1990. DC 1. applies to that offense as well, even though the charges were subsequently dismissed after payment of a fine. Although Applicant was found with an open container of alcohol in his vehicle in September 1994, the Government, in contrast, did not prove that Applicant had consumed any alcohol on that occasion. Applicant is currently in treatment with a licensed clinical psychologist for alcohol abuse. Hence, DC 3. must be considered as well.[(5)] Furthermore, those times (at least twenty-four times a year) where Applicant imbibed alcohol to admitted intoxication, he is found to have engaged in binge consumption to the point of impaired judgment.[(6)]

On review of the corresponding mitigating conditions (MC), there is a sufficient pattern to his alcohol-related incidents and his problem is too recent to favorably apply MC 1. or 2., respectively. Applicant's consumption of mostly "near beer" and one alcoholic beer per month from March 1996 and April 21, 1997, represents a significant reduction from previous levels. His abstinence from all alcohol since April 21, 1997, is regarded as a positive change in behavior supportive of sobriety (*See* MC 3.). However, whereas Applicant has been diagnosed as suffering from alcohol abuse, he is required for mitigation under the Adjudicative Guidelines to successfully complete an inpatient or outpatient rehabilitation along with aftercare requirements, participate frequently in AA or similar organization, abstain from alcohol for a period of at least twelve months, and receive a favorable prognosis by a credentialed medical professional. There is some evidence that Applicant completed the six month alcohol rehabilitation program when he was in the military in 1986. That program was not successful in effecting a moderation in his drinking, as all his serious alcohol-related legal difficulties occurred after he was discharged from the service. Since ay 12, 1997, Applicant has been involved in individual alcohol counseling with a licensed credentialed professional and has attended AA three times per week. To his credit, after only five sessions with the psychologist, he has been given an excellent prognosis. However, he has not yet completed the counseling requirements established by the court for the February 1996 offense. Moreover, while he reduced his consumption following the February 1996 incident, he presents a period of abstinence from alcoholic beverages only since April 21, 1997.

Common sense may warrant a favorable outcome, notwithstanding the failure to satisfy pertinent mitigating conditions. Whether or not an applicant has reformed depends on recognition and acknowledgment of his alcohol problem, and demonstration by conduct over a measurable period of time that he is committed to his recovery. As recently as

September 21, 1996, Applicant showed little insight into his alcohol problem, as evidenced by his efforts to sway the court appointed evaluator into placing him in the film series rather than counseling. While he has gained insight into his problem through court-ordered counseling with the psychologist, his efforts in reform are too recent to overcome his very serious history of abuse. The excellent prognosis rendered by the psychologist was only after five sessions. Applicant has been involved in AA only since May 12, 1997, and while he is working the steps (Applicant testified he was on step 8), he just decided which meetings to attend. Applicant does not have a sponsor and has made no effort to find one, instead waiting for someone to approach him. Scheduled to go overseas for three weeks on reserve duty in July 1997, Applicant as of June 26, 1997, had not made any effort to determine the availability of any AA meetings. The absence of any alcohol-related incidents at company A or in his reserve duty is to his credit, but it does not mandate grant of a clearance. The responsibilities to safeguard classified information do not cease at the end of the work day. At this juncture, it is too soon to tell whether AA will provide a viable support network for him in his recovery or to conclude that his alcohol abuse is safely behind him. Accordingly, subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.g. are resolved against him. Subparagraph 1.f. is resolved in his favor as the Government did not prove that Applicant consumed any alcohol on that occasion. A favorable finding is also warranted as to subparagraph 1.h. as although Applicant consumed alcohol after his February 26, 1996 drunk driving offense, he has not consumed any alcohol since April 21, 1997.

FORMAL FINDINGS

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

Paragraph 1. Criterion G: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: 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. Applicant testified to his understanding he was treated in the program for alcoholism in 1986, although there is no medical record confirming the diagnosis was rendered by a credentialed medical professional. The only medical information of record concerning that treatment is a Report of Medical History (Govt. Ex. 12) dated June 22, 1988. In the section reporting his medical history, Applicant indicated he had been treated for alcoholism. Physician summary reflects "Entry into alcohol rehab program 1986, successfully completed, reentered Jan 88 secondary to positive UA (apparently for THC), not completed." The information supplied by the physician does not include a diagnosis.

2. Applicant submits that he had not been drinking prior to the incident and that the container belonged to his brother.

The Government presented no evidence to the contrary.

3. Applicant testified the psychologist was treating him for alcoholism or alcohol dependency. However, when asked whether he had been told by the psychologist that he was an alcoholic Applicant responded, "the bill that he sends me has got a medical item number in the big book of medical terminology, it's like a 305, and that is alcohol-something." Tr. pp. 63-64. In a letter dated June 24, 1997 (App. Ex. B), the psychologist confirmed Applicant is currently receiving "alcohol treatment" and that Applicant's prognosis is excellent given his "level of insight into the issues of *alcohol abuse* as they affect him." (emphasis added). There is no clearly stated diagnosis of alcoholism and the psychologist's reference to alcohol abuse is indication that Applicant is being treated for alcohol abuse.

4. *See* Tr. p. 48.

5. As noted in footnotes 1 and 3., the medical record evidence does not substantiate Applicant's understanding that he was treated in the military and is currently being treated for alcoholism. While the psychologist does not expressly refer to his diagnosis as such in his letter of June 24, 1997, he refers to the issues of alcohol abuse and is billing Applicant under a 305 code, which further indicates to this Administrative Judge that he has rendered a diagnosis of alcohol abuse.

6. The Directive does not define the terms habitual or binge. The predominant definition of the noun binge is "a drunken revel" and the term is commonly used in reference to drinking heavily. *See Webster's Ninth New Collegiate Dictionary* (1985).