DATE: _October 3, 1997

In re:

Applicant for Security Clearance

ISCR OSD Case No.97-0354

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

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 May 19, 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 June 26, 1997, Applicant responded to the allegations set forth in the SOR and requested that his case be determined on the written record in lieu of a hearing. The Government submitted its File of Relevant Material on July 9, 1997, a copy of which was forwarded to Applicant with instructions to submit material in explanation, extenuation or mitigation within thirty days of receipt. Applicant elected not to file a response and the case was assigned for resolution to Administrative Judge Kathryn Braeman on September 5, 1997. On September 25, 1997, the case was transferred to the undersigned due to workload considerations.

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 38 year old mini cams technician who has worked for his current employer, a defense contractor, since May 1995. He seeks a security clearance for his duties there.

A consumer of alcoholic beverages since at least 1974,[(1)] his drinking began to cause him legal difficulties in 1978. On

September 29, 1978, Applicant was charged with disorderly conduct and assault after be became verbally abusive to the police who had stopped him for proceeding the wrong direction on a one-way street. Applicant had been drinking prior to the incident. The charges were placed on the stet docket on or about November 22, 1978. Applicant was arrested on another occasion in 1978 for driving under the influence (DUI). While the charge was dismissed, Applicant admits he was under the influence of alcohol at the time of the offense.

In November 1980, Applicant entered military service. Stationed overseas, Applicant and a companion on October 6, 1981, were apprehended by local foreign authorities after they stole two bicycles. Applicant and his companion were intoxicated at the time of the incident. On November 6, 1981, Applicant had non-judicial punishment imposed on him for the offenses of drunk in public and larceny of private property stemming from this incident. He was ordered to forfeit $150.00, reduced in grade from PFC to PV2, required to perform extra duty for fourteen days, and ordered to receive counseling in an alcohol safety action program.

After being transferred back to the United States, Applicant continued to drink with adverse consequences. On July 5, 1982, military police stopped Applicant for operating a motor vehicle in an erratic manner. Detecting a strong odor of alcohol on Applicant's breath, the military police had Applicant perform some simple physical maneuvers which he was unable to complete. On July 23, 1982, Applicant had non-judicial punishment (field grade) imposed on him for the offense of drunk driving. He was ordered to forfeit $200.00 for two months, reduced in grade from E 3 to E 1 and required to perform extra duty for thirty days.

Shortly after he had been apprehended for drunk driving, Applicant on July 13, 1982, entered an alcohol and drug abuse prevention and control program offered at the base. His rehabilitation there included individual and group counseling. He completed the Track II program on or about January 25, 1983, and his rehabilitative effort was deemed a success.[(2)]

On April 6, 1983, Applicant was arrested off base for DUI. He was released after posting $400.00 bond. The charge was subsequently dismissed. Applicant was under the influence of alcohol at the time of the incident.[(3)]

On January 31, 1984, Applicant was stopped by military police. After he failed simple physical maneuvers, Applicant was administered a blood test which registered .19% blood alcohol content. On March 6, 1984, he was awarded non-judicial punishment for the offense of drunk driving for which he was sentenced to forfeit $300.00 for two months (suspended for three months), to a reduction in rank from E-4 to E-2, and to perform extra duty for 45 days.

On February 16, 1984, Applicant's collateral (Secret) security clearance was suspended and he was barred from re-enlistment due to the alcohol-related offenses committed while he was in the service: the October 6, 1991 drunk in public/larceny of private property and DUIs on July 5, 1982, April 6, 1983 and January 31, 1984.[(4)] On March 17, 1984, Applicant was arrested off base and charged with Driving under the Influence, careless driving and driving with excessive alcohol content (.204% bac). On May 2, 1984, Applicant was given a General Discharge under Honorable Conditions. Shortly thereafter, on May 13, 1984, he appeared in court to answer the March 17, 1984 charges. At that time, all the charges against him were dismissed. Applicant was under the influence of alcohol at the time of his arrest.

After his discharge, Applicant relocated back to the jurisdiction where he lived prior to entering the military. His drinking continued to cause him legal difficulties. On December 13, 1984, he was arrested in the parking lot of a local bar where he had been drinking earlier that evening and charged with assault and battery and trespassing when he did not leave the property when requested to do so by police. Convicted of battery on the officer, Applicant on May 18, 1986, was awarded probation before judgment. He was placed on probation for one year, fined $200.00 plus $92.00 costs, and ordered to complete 150 hours of community service at the local veteran's hospital.

On January 24, 1987, Applicant was arrested for DWI. He refused to take a chemical test and his driver's license was restricted for six months. The charge was subsequently dismissed due to a technicality. Applicant was under the influence of alcohol at the time of his arrest.[(5)]

On August 7, 1987, Applicant was arrested for DUI and negligent driving. Applicant refused to submit to a chemical test, and an administrative hearing was scheduled for second refusal. On August 28, 1987, a restriction was placed on his license where he was permitted to operate for employment and educational purposes only. On February 26, 1988, his

license was suspended for twelve months. Applicant pleaded not guilty in court to DUI and negligent driving. On June 10, 1988, he was found guilty, imposition of sentence was suspended and he was placed on probation for eighteen months to expire on December 10, 1989, ordered to pay a $150.00 fine and court costs of $122.00, and to complete the alcohol program at the Veterans Administration (VA) Medical Center. Applicant completed the VA program on October 6, 1988, and his case was closed by probation on December 10, 1989.

Applicant continued to imbibe alcohol following the August 1987 drunk driving offense. For several years preceding his last consumption, which was on or about October 10, 1995, Applicant on average drank six to twelve beers two to three times weekly. More times than not he drank to intoxication. After sharing six pitchers of beer with three league bowling companions over a three hour period on or about October 10, 1995, Applicant en route home was stopped by the state police for speeding (85 mph in a 55 mph zone). Detecting an odor of alcohol about his person, the officer requested Applicant submit to a breathalyser which he refused. Applicant was arrested and charged with driving while intoxicated (DWI), driving on a suspended license, negligent driving and speeding. The last two counts were merged with the DWI and driving on a suspended license. On April 8, 1996, Applicant was sentenced on the DWI to 540 days confinement (500 suspended), to pay a $1,000.00 fine ($700.00 suspended) plus $20.00 costs, placed on supervised probation to April 8, 1999, ordered to attend a victim impact program and shock trauma tour, DWI conditions were imposed including DWI monitor, house arrest, three year license restriction, and total abstention from alcohol, and he was referred to the health department for treatment. On the driving on a suspended license charge, he was fined $150.00 and $50.00 costs. Applicant served his forty days on work release and home detention. For his refusal to submit to a breathalyser, the state took administrative action, after a hearing on May 31, 1996, suspending his operator's license for one year.

Prior to his court appearance for the October 1995 DWI, at the suggestion of his attorney, Applicant sought treatment in the twenty-six week addictions outpatient program at the local VA medical center. At an intake evaluation on December 22, 1995, Applicant acknowledged drinking significantly around his family. Although he did not consider himself as an alcoholic, he recognized the connection between several problems in his life and alcohol use and he resolved to abstain. Clinical impression, approved by a clinical licensed professional, was abuse/problem drinker. It was felt Applicant would benefit from the standard 26 week treatment program for DWI offenders to deal with "issues suggesting early stage alcoholism." Commencing on January 22, 1996, Applicant attended the thirteen week Level I program which was primarily educational, where he was consistent in his attendance and attentive in group. A random urine screen on August 8, 1996, was negative for alcohol/drugs. Because of his "outspoken commitment to abstinence," Applicant was referred to Level II group therapy. On June 3, 1996, he began the group counseling component (Level III). As of July 25, 1996, in the opinion of one of his group counselors (registered nurse A), Applicant was minimizing his alcohol use. Admittedly keeping alcohol at his residence for guests, Applicant did not consider it a problem for his recovery. Not receptive to his group, Applicant demonstrated lack of insight and negativity to where he was given a poor prognosis for maintaining sobriety. Another counselor, an addictions therapist, opined on July 31, 1996, that Applicant was just attending to meet the court obligation. After another month in the program, Applicant was attentive but continued to display anger that he was required to attend court-ordered Alcoholics Anonymous (AA) meetings. Applicant was "counting down" the number of groups he was court-ordered to attend. Lacking insight into the importance of dealing with anger issues, he was given a guarded prognosis by registered nurse A. On September 9, 1996, Applicant completed all the requirements of the VA medical center's addictions treatment program.

Applicant reports he has been abstinent from alcohol since October 10, 1995, and that he has been attending AA on a regular basis.[(6)] As of April 7, 1997, the frequency of his attendance at AA was on the order of twice per week. Since October 10, 1995, Applicant has been in social settings where alcohol was available and he has refrained from any alcohol use. He no longer frequents establishments where liquor is served and has made it known to his family and friends that he no longer consumes alcohol. He considers himself to be an alcoholic and intends to maintain abstinence in the future.

Applicant continued to operate a motor vehicle to sometime in the spring of 1997, after his license had been suspended by the state department of motor vehicles. When interviewed initially by a Special Agent of the Defense Investigative Service (DIS) concerning his abusive use of alcohol and related incidents,[(7)] Applicant indicated he thought he was allowed to drive to and from work and on federal property. Applicant had driven himself to the DIS interview. Reluctant to admit he had been driving in violation of the law and his probation, Applicant told the Special Agent that a friend had

told him that since he had a commercial driver's license, he would be allowed to drive to and from work and on federal property where state motor vehicle laws do not apply. Applicant did not inquire of officials whether he could drive as he knew "deep down inside" he was not legally authorized to operate a motor vehicle. On April 2, 1997, Applicant was reinterviewed by the same DIS agent for the purpose of reviewing, amending and signing a statement prepared from the prior interview. Applicant had his spouse drive him to the interview as he did not want to jeopardize his probation.

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. oreover, 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. . .or other criminal incidents related to alcohol use

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

(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

(4) following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional.

* * *

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, this Judge concludes that the Government has established its case with regard to criterion G.

Applicant commenced drinking in about 1974. Over the period 1978 to October 1995, Applicant committed eleven alcohol-related offenses,[(8)]

ranging from drunk in public/disorderly conduct to the more serious drunk driving. Less than one year into his military career, Applicant received non-judicial punishment for the offenses of drunk in public and larceny of private property committed on October 6, 1981. The ASAP which he was required to attend following this incident had little, if any, appreciable effect on Applicant's drinking behavior, as evidenced by his subsequent drunk driving on July 5, 1982. Again ordered to receive alcohol counseling, Applicant on July 13, 1982, entered an alcohol and drug abuse prevention and control program offered on the base. Notwithstanding that the rehabilitative effort was deemed a success, Applicant was arrested off-base for DUI on April 6, 1983, less than three months after he completed the Track II program. On January 31, 1984, he was stopped by military police and determined to be under the influence, as his .019% bac on that occasion attests. Less than two weeks after his non-judicial punishment for that drunk driving incident, Applicant was apprehended off-base for DUI (.204% bac). Following his discharge from the service on May 2, 1984, for reasons related, at least in part, to his abusive use of alcohol, Applicant did not significantly moderate his behavior. After drinking on or about December 13, 1984, he committed assault and battery on a police officer who had requested that he leave the premises of a local bar. Although Applicant continued to consume alcohol thereafter, the next two years (1985 and 1986) were free of any alcohol-related incident. In 1987, he was involved in two drunk driving incidents. Following his conviction on June 10, 1988, of the DUI committed on August 7, 1987, Applicant was court-ordered to attend an alcohol program at the VA. While he completed the program on October 6, 1988 and his probation closed successfully a year later, Applicant for several years prior to October 1995, drank alcohol in such quantity two to three times per week to where, by his own admission, he was intoxicated "more times than not." Most recently, Applicant on October 10, 1995, operated his automobile after drinking to intoxication during league bowling. As a result of this drunk driving offense, his eighth,[(9)] Applicant is on supervised probation until April 8, 1999. Given the longstanding nature and extent of his alcohol problem, Applicant 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. His eleven alcohol-related incidents clearly fall within disqualifying condition (DC) 1. With respect to DC 3., it is also pertinent based on the diagnosis rendered by his Level I treatment provider and approved by a physician that Applicant suffers from abuse/problem drinker (as opposed to addicted).[(10)] On those occasions where Applicant imbibed alcohol

to admitted intoxication (as much as twelve beers on occasion), he is found to have engaged in binge consumption to the point of impaired judgment[(11)] so as to warrant consideration also of DC 4.

On review of the corresponding mitigating conditions (MC), there is sufficient pattern to his alcohol-related incidents to preclude favorable consideration of MC 1., despite the eight year time span between his two most recent drunk driving offenses (August 1987 and October 1995). While most of his alcohol-related offenses occurred during the 1980's, his October 1995 DUI manifests the ongoing nature and recency of his abusive drinking. MC 2. (no indication of a recent problem) is therefore not applicable. Since his last DUI, Applicant submits he has maintained an alcohol-free lifestyle, and the Government presented no evidence to the contrary. In addition to completing the program offered by the VA, Applicant has attended AA since approximately October 1995. He intends not to drink in the future. MC 3. applies favorably due to these positive changes in behavior supportive of sobriety. Nonetheless, whereas Applicant has been diagnosed as suffering from alcohol abuse by a credentialed medical professional, he is required for mitigation under MC 4. 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. As of September 9, 1996, Applicant had completed the requirements for treatment in the twenty-six week addictions outpatient program. Applicant submits he participates frequently in AA and has maintained abstinence. However, he lacks the favorable prognosis by a credentialed medical professional. The letter documenting his completion of the VA outpatient program, dated December 6, 1996, and signed by his Level I counselor, does not indicate a discharge diagnosis. Applicant participated "adequately" in group discussions during Level I, but progress notes of his Level III group therapy sessions are not positive. Applicant was not receptive to group members concerns about the fact he was keeping alcohol in his residence for guests. In the opinion of two different group counselors, Applicant was attending just to satisfy his court obligation and counting down the number of required sessions. In light of his lack of insight and negativity, Applicant was given a poor prognosis by one counselor and a guarded prognosis by the other. It cannot be said that the outpatient program was a successful rehabilitation effort based on the record evidence.

These negative prognoses can be overcome by compelling evidence of subsequent reform, as under F.3. of the Directive and the Adjudicative Guidelines, the decision as to an individual's security worthiness is to be based on the whole person and includes examination of rehabilitation and other pertinent behavioral changes. Applicant submits that he has recognized the fact of his "alcoholism" and taken positive steps to live with his disease (Item 3), to wit: the twenty-six week treatment program at the VA and regular AA meetings. With the record evidence essentially impeaching his claim of success as to the VA program, the quality and nature of Applicant's AA participation must be carefully scrutinized. Applicant was reportedly attending AA on the order of twice per week at the time he had his intake assessment at the VA medical center on December 22, 1995. As of April 2, 1997, Applicant indicated he was going to regular AA meetings. In his Answer dated June 10, 1997, Applicant stated he has been attending AA on a regular basis. It is unclear as to how often is "regular." With respect to the extent of his AA involvement, Applicant reports that he chaired a few meetings at a local hospital. While his continued abstinence and chairing meetings are consistent with the AA program, the record is otherwise silent as to the quality of his AA participation. It cannot be determined from the record whether AA serves as an adequate deterrent against future abuse.

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 recovery. By his own admission, Applicant for almost twenty years was unwilling to admit that alcohol caused him a problem. As of August 31, 1996, he continued to display poor insight. Applicant has only recently come to accept that alcohol was the catalyst in many of his past shortcomings. This recognition of his abusive past, whether due to AA or the recent birth of a baby girl, or both, is to his credit and a major step in his recovery.[(12)]êíê

1. The record in this case contains little detail regarding the frequency and quantity of Applicant's consumption over the years. The finding as to Applicant drinking from 1974 is based on his admission (which is binding on him) to SOR subparagraph 1.a. and by his admission to treating personnel at the VA that he first drank at age 15.

2. Citing his successful completion of the program, it was recommended on July 6, 1983, that Applicant be granted a probationary six month security clearance. Applicant was granted a Secret security clearance which was suspended on February 16, 1984, after he was involved in additional alcohol related incidents. (Item 12).

3. In a signed, sworn statement dated April 2, 1997 (Item 10), Applicant indicated that he was fined $200.00 after being found guilty of DWI. Military records (Item 12 pp. 16-17) reflect Applicant was scheduled to appear in county court on May 9, 1983, and that at his appearance, the charge was dismissed.

4. On the suspension action, the January 31, 1984 DUI is mistakenly reported as having occurred on February 1, 1984.

5. It is likely that SOR subparagraphs 1.l. and 1.m. refer to the same incident. The records of the motor vehicle administration reflect a hearing scheduled for Applicant's refusal to submit to a chemical test on January 24, 1987. There is no direct evidence as to the circumstances which led to Applicant's refusal to submit to the chemical test apart from Applicant's admission in his signed, sworn statement of April 2, 1997, that he had been arrested twice in the same county in 1987 for DUI. At the time of the DUI on August 7, 1987, it was Applicant's second refusal of a chemical test. In all likelihood, the first refusal was in connection with his arrest earlier in the year for DUI.

6. The frequency of his participation at AA since April 2, 1997, cannot be determined. In his response to the SOR, Applicant indicated he has been attending AA "on a regular basis." (Item 3).

7. The date of this first interview is not clear in the record. Applicant was reinterviewed on April 2, 1997, to provide him an opportunity to read, amend and sign his written statement drafted from information obtained in the initial interview. During this second interview, Applicant was questioned why his spouse drove him to this interview when he had been observed driving himself to his first interview.

8. In its FORM, the Government argues Applicant has been involved in approximately twelve alcohol-related incidents. However, there is no evidence to indicate that Applicant was involved in three such incidents in 1987. As noted in footnote 5, Applicant admits to only two arrests for drunk driving that year. In all likelihood, SOR subparagraphs 1.l. and 1.m. refer to the same drunk driving offense.

9. Convicted only twice of DUI/DWI by civilian authorities (the August 1987 and October 1995 DUIs), Applicant admits he was "definitely" under the influence each time he was arrested. (Item 10).

10. Notwithstanding Applicant considers himself an alcoholic and he was recommended for the twenty-six week program to "increase awareness of issues suggesting early stage alcoholism," (Item 9) there is no clear diagnosis of alcoholism in this case. While the clinical impression of abuse/problem drinker was rendered on intake and based on incomplete information in that Applicant (by record account) appears to have been less than candid about his alcohol problems, characterizing his drinking as "moderate or average social drinker" and not revealing those drunk driving incidents in the military which led to non-judicial punishment, there is no evidence of a change in the diagnosis. The record does not contain a discharge summary.

11. 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).