DATE: March 13, 1998

In Re:

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

Applicant for Security Clearance

ISCR Case No. 97-0477

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On July 15, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.06 "*Defense Industrial Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons whey DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

Applicant responded to the SOR in writing on writing on August 7, 1997. In his response, he requested a hearing before a DOHA Administrative Judge. After being assigned to another Administrative Judge on November 5, 1997, the case was reassigned to this Administrative Judge on November 14, 1997, because of caseload considerations. On December 11, 1997, a hearing was convened for the purpose of considering whether it was clearly consistent with the national interest to continue Applicant's security clearance. The government's case consisted of 13 exhibits; Applicant relied on eight exhibits and on the testimony of six witnesses in addition to himself. A transcript (Tr.) of the hearing was received on January 5, 1998.

FINDINGS OF FACT

In his answer Applicant admitted--with lengthy explanations-- all factual allegations set forth in the SOR. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following findings of fact:

Applicant is 41 years old and has been employed by a defense contractor since August 1995. He was granted the secret clearance which he currently holds in April 1995. Previously, he had been granted a secret clearance as a member of the State National Guard in 1979, and later as an employee of Company A--another defense contractor and his employer from June 1990 to April 1992. A question has arisen about his security suitability because of alcohol consumption.

Applicant first tasted alcohol when he was 12 years old; he began to consume alcohol regularly when he was 16. His best estimate of his alcohol consumption over the past 25 years is 3-4 drinks, 2 to 3 times a weeks (Tr. 164-166, Gov. Exhs. 10 & 12). He denies that he is an alcoholic and steadfastly maintains that he has been "inebriated" less than five times in his life (Tr. 106). Applicant has been married four times; he was divorced from his fourth wife in November 1996.

Notwithstanding Applicant's consistent claim of moderate alcohol consumption, he has been arrested seven times for alcohol-related misconduct since January 1983. He was first arrested for alcohol-related misconduct in January 1983. He had just gotten married to Ms. M in early January and because he was unable to afford a honeymoon, his cousin had taken him and his bride out to a club as a wedding present. Two hours after they arrived at the club, Applicant realized that his bride had taken up with one of the bartenders and he decided it was time to leave. Because his bride did not want to leave the club, she "started pitching a fit"[(1)] and one of the bartenders called the police. Applicant was arrested for public drunkenness; he denies that he was intoxicated. Applicant filed for divorce from Ms. M one month after their wedding. No police report has been submitted and Applicant's blood alcohol level at the time of the arrest is not known.

Applicant's next arrest occurred in July 1983 when he was arrested and charged with driving under the influence (DUI) and driving with a revoked licence. He was given a six months suspended sentence for the DUI--after spending 48 hours in jail, fined $250.00 plus court costs, and ordered to complete 10 hours of community service. He was fined $10.00 plus costs for count 2. Applicant denies that he was intoxicated; he claims that the arresting officer's actions were motivated by the fact that Applicant had previously dated his girlfriend. No police report has been submitted and Applicant's blood alcohol level at the time of the arrest is not known.

In December 1983, Applicant was arrested again and charged with DUI and driving with a revoked license. Although he had consumed alcohol before the arrest, the DUI charge was dismissed. Applicant paid a $10.00 fine for driving with a revoked license. Prior to the arrest, Applicant had been out dancing with his girlfriend where (according to him) she had drunk too much and they got into an argument. After they left the dance, he was trying to drive and talk with his girlfriend as she walked along the side of the road in the rain. Applicant claims that the police officer who had arrested him had been trying to date his girlfriend for six months prior to the arrest. No police report has been submitted and Applicant's blood alcohol level at the time of the arrest is not known.

Applicant was next arrested for alcohol-related misconduct in October 1986 after he had been involved in a single car accident. He pleaded guilty to the charge of DUI and was sentenced to serve 11 months and 29 days in the county jail--suspended except for 48 hours. The sentence also included a one-year suspension of his driver's licence, a fine of $250.00 (plus costs), and a requirement that he attend the Alcohol Safety Program. Applicant's admits that he had been drinking prior to the accident--and that he had a six-pack of beer with him at the time--but blames the accident on the fact that he was run off the road by another car. No police report has been submitted and Applicant's blood alcohol level at the time of the arrest is not known.

Six years later, Applicant was arrested in another state. He was charged with operating under the influence and for an unlawful blood alcohol level. He was found guilty of operating while impaired and sentenced to pay a fine of $700.00. He was also ordered to serve three months of non-reporting probation. According to the police report, Applicant had a blood alcohol level of .15 at the time of arrest. Although Applicant denies that he was intoxicated or that the .15 blood alcohol level was accurate, he has not proffered any evidence--except his self-serving testimony--to prove that the blood alcohol tests[(2)] administered by the arresting police were inaccurate.

In July 1993, Applicant was arrested for public intoxication while vacationing with Ms. N (his fourth wife) in another state. They had been out eating, drinking, and listening to a band. When they were driving back to their condominium at about 11:30 P.M., his wife jumped out of his pickup truck--while it was moving. He claims that she jumped out of the moving vehicle because she did not want to miss an appointment with a drug dealer (See Answer to SOR); she has stated that she jumped out of the vehicle because he had had too much to drink and was driving recklessly (See Government Exhibit 9, Affidavit dated January 24, 1996). When the police arrived, his wife was bruised and bleeding. Applicant was arrested and charged with public intoxication. He pleaded guilty and was fined $114.00. No police report has been submitted and Applicant's blood alcohol level at the time of the arrest is not known.

Applicant was most recently arrested in October 1996. His wife, Ms. N, had moved out of their home in December of 1995 and obtained a restraining order against him. Applicant believed that she had moved in with her parents (Tr. 172). Unknown to Applicant, she was actually spending most of her time living with Mr. X, the man who would become her next husband. On the day in question, Applicant had consumed a six-pack of beer early in the evening (around 6 P.M.), after having consumed another six-pack earlier in the day (Tr. 300). When Applicant went to bed, he began receiving telephone calls--but no one would be on the line when he answered. These calls continued about once every hour until about 2:30 A.M. when he received a call from Mr. X; Mr. X taunted Applicant about being with his wife and threatened to "blow him away" the next time he (Applicant) came down his street (Tr. 300-301). Applicant testified that he had not known until these calls that his wife was had been cheating on him.[(3)] After this telephone call, Applicant became very upset, he got out his shotgun loaded it--without putting a round in the chamber, drank a quantity of scotch, got into his pickup truck,[(4)] and drove over to the house occupied by Mr. X and Ms. N (Tr. 303-304). Upon arriving, he walked around the house with the shotgun, banging on the doors and windows (Gov. Exh. 3). Mr. X called the police who came and arrested Applicant just as was preparing to leave the area in his pickup truck. Applicant has claimed that he was "set up" (Gov. Exh 12).

Applicant was charged with DUI, unlawful possession of a weapon, and aggravated assault. He pleaded guilty to DUI and was sentenced to pay a fine of $350.00 and costs, to serve 11 months and 29 days in jail--suspended except for 48 hours, to serve community service, and to have his driver's licence suspended for one year. Applicant was also ordered to attend ten weeks Level III DUI School, to attend AA meeting and to undergo drug testing. Applicant pleaded guilty to unlawful possession of a weapon and was sentenced to 11 months and 29 days in jail--all suspended. The aggravated assault charge was reduce to simple assault --to which Applicant pleaded guilty and was sentenced to 11 months and 29 days in jail--suspended after serving 28 days--and to pay a fine of $50.00. Although Applicant denies that he was intoxicated when he drove over to Mr. X's house (Tr. 177), the blood alcohol test administered incident to his arrest disclosed a blood alcohol level of .16 (Gov. Exh.3). He attributes his behavior to being "terribly distressed over the separation" (Tr. 106).

Applicant's accounts of the events surrounding his seven arrests for alcohol-related misconduct reveal a pattern of denial. While he has admitted his involvement in each incident alleged in the SOR, he has denied that his abuse of alcohol or his behavior caused the arrest. With respect to each arrest, Applicant offers an exculpatory, though implausible explanation of the events which lead up to the arrest: he was the victim of police officers who were jealous of him because they wanted to date the woman he was dating; he was arrested because he just happened to be there when the police were called to quiet a disturbance or investigate someone else's misconduct;[(5)] he was run off the road by a hit and run driver; he was the victim of police who did not know how to administer a blood alcohol test; and he was set up by an unfaithful wife and her ill-mannered lover (Gov. Exh. 12). In each case where he pleaded guilty, Applicant has explained that he pleaded guilty because of his attorney's advice--not because he believed he was guilty. Not once, with respect to any arrest, has Applicant ever admitted that he drank too much and/or behaved improperly. His testimony denying or minimizing his responsibility for the misconduct which preceded the arrests is not corroborated and not credible, given the other evidence in the record.

As stated above, Applicant denies that he currently abuses alcohol. He has admitted that he may have had a problem with alcohol prior to 1986 (Gov. Exh. 10). He now believes that he is able to control his drinking and thus does not intend to reduce his alcohol consumption in the future (Tr. 163, 166-167, 287, Gov. Exh. 12). Applicant's belief that he can control his alcohol consumption is contradicted by the record.

Applicant called six character witnesses and testified on his own behalf. His character witnesses included his mother, his mother's next-door neighbor, the woman he is currently dating, and the father of his most recent ex-wife. All of the witnesses testified that Applicant is reliable and trustworthy, and that he is a caring and kind person who consistently goes out of his way to help other people. None had known Applicant to abuse alcohol, and most did not know that he had been arrested seven times for alcohol-related misconduct.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable

consistency that are clearly consistent with the interest of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of the factors set forth in section F.3 of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness..

The following Adjudicative Guidelines are deemed applicable in the instant matter.

ALCOHOL CONSUMPTION

(Criterion G)

Excessive alcohol consumption often lead to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosures 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, child or spouse abuse, or other criminal incidents related to alcohol use.

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

Conditions that could mitigate security concerns include:

None Applicable

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that 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 Defense v. Egan*, 484 U.S. 518 (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 an Applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criterion G. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with adjudicative process, both in the Directive.

Applicant has been arrested seven times for alcohol-related misconduct in the 15 years preceding his administrative hearing. These arrests--the most recent occurring in late October 1996--are sufficient evidence of excessive alcohol consumption to raise a security concern. Applicant has been involved in alcohol-related incidents away from work (DF 1) and has consumed alcohol to the point of impaired judgment (DF 4).

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.

In mitigation Applicant has proffered testimony from his mother and from life-long friends and acquaintances who have attested to the character traits which have made a good son, neighbor and friend. None of his friends and neighbors have known him to abuse alcohol. Of course, most of them knew only of his most recent arrest. Applicant himself admits only to consuming moderate quantities of alcohol: a six-pack of beer and 3 or 4 mixed drinks per month. In his entire life, he claims that he has been intoxicated fewer times than five times. He denies that he was intoxicated on either occasion when he was arrested with blood alcohol levels at .15 or above. Applicant offers explanations, but no apologies, for the seven times he has been arrested in alcohol-related misconduct. He believes that he was the victim of circumstances on each occasion and has provided a version of the events which substantiates that belief. He does not admit that he has abused alcohol at any time in the past 10 years, and thus feels no need to reduce his rate of alcohol consumption.

Applicant's claim of moderate alcohol consumption is challenged by his seven arrests for alcohol-related misconduct in a period of 14 years. Because he was 26 years old at the time of his first alcohol-related arrest, none of his alcohol-related misconduct can be attributed to youthful exuberance and indiscretion. And because Applicant has obviously minimized and misrepresented his alcohol consumption on those two occasions where there is persuasive evidence that he had consumed more alcohol than he has admitted, an inference can be drawn that he has minimized and misrepresented his alcohol consumption on other occasions. An inference follows that he consumed more alcohol than he has previously acknowledged prior to his five other arrests for alcohol-related misconduct--for which there is no police report and no blood alcohol test. If Applicant's alcohol consumption has been as moderate and as easy to control as he claims, common sense suggests that he would have begun controlling it after the second or third arrest. It is inconceivable that Applicant would continue to expose himself to additional arrests for alcohol-related misconduct if he were in control of his alcohol consumption and the circumstances of consumption to the extent that he has claimed. Either Applicant has consumed more than moderate amounts of alcohol, or the moderate amounts that he has consumed are more than his system can tolerate.

While Applicant denies that he was intoxicated in October 1996, or that alcohol played a significant, contributing role to the behavior which resulted in his most recent and most serious alcohol-related misconduct, the facts speak for themselves. During the day preceding the arrest, Applicant had consumed two six-packs of beer--the first during the day, and a second during the early evening hours. After receiving the harassing and obscene phone calls from Mr. X and learning for the first time--according to his testimony--that his wife had been cheating on him for five years, Applicant got out his shotgun and drank some scotch. Before taking his shotgun with him in his pickup truck, he drank some more scotch. He then drove over to Mr. X's house and began beating on the doors and windows, all the while carrying a shotgun with a loaded magazine. The police arrived and arrested Applicant just as he was getting back into his pickup truck and preparing to leave. His blood alcohol level at the time of arrest was .16.

It should be emphasized that Applicant knew or should have known that his marriage was in trouble before Mr. X's insulting phone calls; his wife had moved out of his house ten months earlier and had obtained a restraining order against him. Her divorce from him would become final within a month of the incident. He now admits that he had seen a car like his parked in front of Mr. X's house on many occasions--prior to their separation--without realizing that it was actually his car. Yet Applicant attributes his behavior on this occasion to being "terribly distressed over the separation," rather than to his abuse of alcohol. Applicant is entitled to interpret the events leading up to his most recent arrest in whatever manner he chooses. This Administrative Judge prefers to interpret the evidence in the light of common sense and experience. Criterion G is concluded against Applicant.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. The whole person concept requires consideration of Applicant's age and maturity, the seriousness and circumstances of the conduct, the voluntariness of his participation, his motivation, and the presence or absence of rehabilitation. An examination of Applicant's life discloses that he was 40 years old when he was arrested in October 1996 for alcohol-related misconduct. This was the seventh time in 14 years that he had been arrested for alcohol-related misconduct. He believes that circumstances--other than his behavior--were the reason that he was arrested in October 1996, and on each prior occasion. He has testified that he has consumed alcohol in moderate amounts in the past and does not intend to change his pattern of alcohol consumption in the future. Thus, there is no evidence of his rehabilitation prior to the administrative hearing, and Applicant has expressed no future intention to modify the behavior that had caused the arrests. Given these facts and circumstances, Applicant does not inspire

confidence that his behavior in the future will be any different that his behavior in the past.

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. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. See Applicant's answer to the Statement of Reasons. Subparagraph 1.d. alleges that this arrest occurred at an unspecified date in 1984 or 1985; Applicant states that it occurred in January 1983. There are no police records to corroborate his recollection of the date.

2. Applicant was administered two tests; the first test administered at 3:19 A.M. disclosed a .15 blood alcohol level; the second test administered at 3:30 A.M. disclosed a .14 blood alcohol level. See Government Exhibit 7.

3. Applicant admitted that he had previously seen vehicles like the ones he owned parked in front of Mr. X's house (Tr. 33-36) , but never made the connection until Mr. X's telephone call.

4. There were two additional guns in Applicant's pickup truck when he left his home early that morning.

5. Applicant testified that public drunkenness charges are used a "a lot of time in -- around this area and enough places I know, as a tool to stop something from happening"(Tr. 296).