DATE: April 14, 1998

In Re:

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

Applicant for Security Clearance

ISCR Case No. 97-0625

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Pamela C. Benson, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On 14 October 1997, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding[(1)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 18 November 1997, Applicant answered the SOR and requested an administrative decision on the record. On 7 February 1998, Applicant responded to the Government's File of Relevant Material (FORM)--issued 30 December 1997; the record in this case closed 12 February 1998, the day the response was received at DOHA. The case was assigned to me on 17 February 1998; I received the case on 18 February 1998 to determine whether clearance should be granted, continued, denied or revoked.

FINDINGS OF FACT

Applicant denied the factual allegations of the SOR, except the allegations of subparagraph 1.b. (May 1995 DWI arrest).

Applicant--a 58-year old employee of a defense contractor--seeks to retain a security clearance.

The allegations of the SOR revolve around Applicant's alleged history of alcohol abuse, sexual behavior, and criminal conduct.

Applicant is a moderate drinker of alcohol who on one occasion has consumed alcohol to excess with adverse consequences.[(2)] On 18 May 1995, Applicant was charged with DWI; he pleaded guilty, was fined $200.00, and given probation before judgment.[(3)] He also completed an alcohol education course at the recommendation of his attorney before going to court on the charges.[(4)] On 19 April 1996, Applicant was involved in a vehicle accident, and was subsequently charged with DWI and refusal to take a breath test.[(5)] Although Applicant admits consuming alcohol before the incident, the record does not establish that he was under the influence of alcohol at the time of the accident.[(6)] In March 1997, Applicant lost his wallet. In applying for a duplicate license, Applicant discovered that there was a hold

on his license because of an alleged failure to appear related to the April 1996 incident. Applicant subsequently appeared at a hearing, where the judge removed the holds, but required Applicant to attend another alcohol education class because of the alleged failure to take the breath test in April 1996. Applicant attended five of the six required sessions in June and July 1997 (with the sixth an excused absence), and tested negative for alcohol on two urinalyses.(7) Except for the 1995 DWI, the record contains no evidence of alcohol related incidents at work or away from work, and contains no evidence of habitual or binge consumption of alcohol to the point of impaired judgment.

Applicant has two arrests for indecent exposure involving three separate instances of indecent exposure. On 23 August 1993, Applicant was arrested and charged with two separate incidents of indecent exposure.(8) He reached a plea agreement with the state, and the charges were placed on the stet docket. On 17 February 1995, Applicant was observed sitting in his truck in a third shopping center parking lot with his pants pulled down to his knees, exposing his penis. He was later observed driving his truck on a nearby road with his dome light on and his penis exposed. The victims noted the license plate of the truck, and Applicant was later identified as the registered owner of the truck. Further investigation produced the 1993 indecent exposure arrests, and a picture of Applicant. Applicant was later positively identified by the victims utilizing a photographic spread. The police applied for a statement of charges on 16 March 1995, and a bench warrant was apparently issued.(9) Applicant was not arrested on the bench warrant for this offense until he was stopped for DWI in May 1995. He pleaded guilty, was sentenced to 18 months incarceration with all but 30 days suspended (and the 30 days to be served on work release), was placed on supervised probation for three years, and ordered to complete counseling, psychiatric treatment, or a drug/alcohol program as directed by the probation officer. Applicant received counseling from March 1996 to May 1997, apparently in the nature of sex offender education/counseling.(10) Applicant's active probation runs to approximately January 1999, although Applicant's probation officer has indicated she may recommend Applicant be placed on unsupervised probation. At present, he sees his probation officer every 4 months.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc*.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

ALCOHOL CONSUMPTION (CRITERION G)

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 under the influence

Conditions that could mitigate security concerns include:

(1) the alcohol related incidents do not indicate a pattern;

(2) the problem occurred a number of years ago and there is no indication of a recent problem;

SEXUAL BEHAVIOR (CRITERION D)

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder,

subjects the individual or reflects lack of judgment or discretion.

Conditions that could raise a security concern and may be disqualifying include:

(1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(4) sexual behavior of a public nature and/or that which reflects lacks of discretion or judgment.

Conditions that could mitigate security concerns include:

(3) there is no other evidence of questionable judgment, irresponsibility, or emotional instability.

CRIMINAL CONDUCT (CRITERION J)

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:

(1) any criminal conduct, regardless of whether the person was formally charged;

(2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

(1) the criminal behavior was not recent;

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

CONCLUSIONS

The Government has established its case under criterion G. because it has established one alcohol-related incident, the 1995 DWI offense. That offense raises the prospect that Applicant has a problem with alcohol. However, I find the alcohol abuse mitigated. The incident is isolated, does not indicate a pattern, and occurred nearly three years ago without repeat offenses. Indeed, there is no evidence of alcohol abuse, either before or after this incident. On balance, I find the remaining allegations under alcohol abuse not supported by the record. The two beers consumed by Applicant before his indecent exposure incident in February 1995 do not establish that this incident was alcohol-related in the absence of other evidence to suggest that Applicant was under the influence of alcohol at the time or that his consumption of alcohol somehow contributed to his conduct on that day. The disposition of his case--requiring Applicant to undertake drug or alcohol counseling if directed by the probation officer (a requirement accomplished by checking off a pre-printed block on the sentencing form--does not persuade me that the court viewed this incident as alcohol-related. The record does not establish that the March 1996-May 1997 counseling was for alcohol abuse. No records of this counseling are in the record and Applicant's statement disputes the conclusions asserted by the Government, and cannot be read to prove the Government's allegations. The April 1996 DWI arrest is not established as an alcohol-related incident by either police report or court disposition. Applicant's statement establishes only that he had

consumed alcohol some unspecified time before the accident. His statement does not establish that he was under the influence of alcohol at the time, and the mere fact of the accident is insufficient, standing alone, to persuade me that Applicant was under the influence of alcohol. Similarly, the June-July 1997 alcohol education records are too incomplete and vague to persuade me that Applicant was assessed as having a serious alcohol problem in July 1997.

The Government has established its case under Criterion D. Applicant was involved in three instances of indecent exposure, two in August 1993, one in February 1995; however, I conclude that the conduct is mitigated. Although the conduct was criminal, it appears to have lacked any specific sexual intent. The specific conduct charged, and Applicant's plea arrangements, are not inconsistent with his explanations of the event, all of which lack sexual motivation.(11) The fact that the explanations are bizarre or distasteful does not render them unbelievable--although they do establish poor judgment by Applicant on those occasions. There is no reliable diagnosis of any sexual or psychological disfunction triggering Applicant's conduct on these two occasions. Applicant does not appear to be vulnerable to coercion based on this conduct. The most recent incident is more than three years old, and there has been no evidence of subsequent conduct of a similar nature. Further, there is no other evidence of questionable judgment, irresponsibility, or emotional instability. I find Criterion D. for Applicant.

The Government has established its case under Criterion J, but I find the conduct mitigated. The criminal conduct is not recent, three and nearly five years ago respectively, and I consider the conduct isolated in the context of Applicant's entire record. I find Criterion J. for Applicant.

FORMAL FINDINGS

Paragraph 1. Criterion G: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Paragraph 2. Criterion D: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Paragraph 3. Criterion J: FOR THE APPLICANT

Subparagraph a: 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).

2. Applicant' sworn statement (Item 6) describes his alcohol consumption: " I do not feel I have a drinking problem. I do [not?] like the taste of some liquors so for the last 30 years I have consistently stayed away from all types of liquor and have only drank beer with the exception of the April 1996 incident as described above. Over the years I drank on the average 2 to 3 12-ounce cans of beer every 2 to 3 months. I drank these 2 to 3 cans at one setting. Particularly the last 5 years. When I desire the taste of a beer at gatherings with other people or when I am alone I have a beer. I have been to many parties and picnics where there was plenty of alcohol and didn't drink any. Other than the afore mentioned incident I do not tend to drink in the morning. During my lifetime I have drank to excess only about 4 times to where my wife or friend has driven me home. I have occasionally gone 2 to 3 years without any alcohol drink at all." Applicant's alcohol consumption--eight to eighteen beers a year--is consistent with the consumption (2-4 beers 3-4 times a year=6-16 beers) he reported during his June 1995 alcohol evaluation undertaken as a result of his May 1995 DWI.

3. Applicant drank three beers within ten minutes on a hot summer day, and then went riding on his motorcycle. He was stopped for driving erratically and registered a .10 B.A.C. on the breath test.

4. Applicant was evaluated 8 June 1995 as a social drinker who did not meet the diagnostic criteria for alcohol dependence or abuse (Item 6). However, the record fails to establish the qualifications of the evaluator to make such a diagnosis under the terms of the Directive. Applicant completed the six alcohol education sessions between 13 June 1995 and 18 July 1995. He was discharged as having successfully completed the education program.

5. Applicant asserts that he was never offered a breath test, and that he submitted a blood sample at the local hospital where he was taken after the accident. Applicant also asserts that he went to court three times and the case was continued because the government had not provided the lab results to Applicant's attorney; the fourth time Applicant went to court, the charges were dismissed for want of prosecution. Item 9 confirms that the DWI was dismissed for want of prosecution on 25 September 1996; no specific disposition is shown for the charge of refusal to take a breath test.

6. Applicant stated (Item 5) that he consumed approximately two ounces of rum offered by a hitchhiker he picked up on the way to work that morning. He took the hitchhiker to her mother's house, where he waited some time while she picked up some things. After leaving the house, Applicant was talking and ran into the back of a car stopped at a traffic light.

7. The Government alleges--and Applicant denies--that he was assessed as having a very serious drinking problem and/or alcoholic tendencies. The Government invites me to rely on Item 10 to support its conclusion. I decline to do so. Item 10 are the records of the 1997 alcohol education program attended by Applicant at the same organization reflected in Item 6. Like Item 6, Item 10 establishes none of the qualifications of the evaluators to make a diagnosis within the meaning of the Directive. And indeed, Item 10 contains no document purporting to render a diagnosis (in comparison to Item 6 which at least stated that Applicant did not meet the diagnostic criteria). Further, Item 10, unlike Item 6, contains no evaluative material of Applicant's condition. Item 10 contains a scored MAST test, in which Applicant was scored a 9 based in large part on awarding a score of 5 for having previously attended an Alcoholics Anonymous meeting. The Government relies on this score, plus boiler plate interpretative language attached to the MAST, for its conclusion that Applicant was assessed as having a serious drinking problem. The records are clearly incomplete, and without some analysis of the test results and the results of the intake interviews, and some actual evaluation of Applicant's condition, I give Item 10 little weight.

8. At 1420 hours, Applicant was observed riding a motorcycle in a shopping center parking lot with his penis exposed from his unbuttoned pants. At 1900 hours that same day, Applicant was observed riding his motorcycle in a mall parking lot with his penis exposed. Applicant was stopped by mall security, who called local police. Applicant acknowledged to the local police that his pants were unbuttoned, his zipper down, and he was not wearing any underwear. However, he did not realize he was exposed until mall security stopped him (Item 13). The shopping center and mall were located in the same county. Applicant pleaded guilty, spent five days in jail, and the charges were placed on the stet docket. Applicant's sworn statement (Item 5) admits the 1900 incident, but denies the 1420 incident. His description of the 1900 incident is consistent with the police report: "I was stopped by the security personnel and was

informed that I had been observed by someone that I was indecently exposing myself while on my motor cycle. The police were called and I was released pending review by the state attorney. A few weeks later I was charged with indecent exposure. It was a warm sunny day and I was to meet my wife at the mall after work. I rode my motor cycle to the mall. At the time I weighed 220 pounds and my pants were tight at the waist. I unfastened the button of my pants to relieve some squeezing. At the mall I rode around the parking lot trying to locate my wifes car. I had no idea that my pants were completely unzipped and that I was exposed during my ride." His denial of the 1420 incident is inconsistent with his plea and the court records; I find the court records more reliable on this point, and conclude that Applicant was involved in the second incident of indecent exposure on 4 August.

9. Applicant's version of this event--although disgusting--is consistent with the events recorded by the police: "On my way home (about 6:00 PM) from work . . . I had an upset stomach. I stopped in [a town] and drank two cans of beer hoping it would help my stomach ache. Traveling north on [the road] south of the [shopping center] I messed my clothing thinking I was passing gas. I pulled into the shopping center parking lot where there were no other cars. I proceeded to clean my self in side of my vehicle when a truck with small children parked close to where I was parked. I moved my vehicle between two other vehicles that I was sure were vacant and continued to clean myself inside my vehicle. . . I also left the parking lot and proceed north on [the road]. At that time I had trouble with the glare from the oncoming lights from automobiles and heard that leaving the cabin light on in the vehicle would help alleviate the strain in the eye so I turned on my cabin light for that purpose."

10. The Government alleges--and Applicant denies--that this counseling was for alcohol abuse and exhibitionism; the Government also alleges--and Applicant denies--that this instance of indecent exposure is also evidence of alcohol abuse. The Government cites Applicant's sworn statement (Item 5) in support of its counseling allegations, but Applicant's statement does not establish that the counseling was for either alcohol abuse or exhibitionism. Indeed, the statement disputes any diagnosis of exhibitionism (and further asserts that the counselor was unable to demonstrate how Applicant's conduct supported any diagnosis) and states that the only discussion of alcohol involved Applicant taking urinalyses at the beginning of some sessions. The FORM contains no records of the counseling organization alleged to have provided the counseling in subparagraphs 1.d. and 2.c. Although Applicant consumed two beers before the incident, the evidence of record fails to establish that Applicant was under the influence of alcohol at the time of the incident.

11. Relevant to disqualifying factor two: compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder.