DATE: May 7, 1998

In Re:

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

Applicant for Security Clearance

ISCR Case No. 98-0086

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq., Department Counsel

FOR APPLICANT

William B. VanLonkhuyzen, Esq.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 3), issued a Statement of Reasons (SOR), dated January 27, 1998, 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on illegal drug involvement (criterion H) and excessive alcohol consumption (criterion G).

On February 17, 1998, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned accordingly to the undersigned on March 10, 1998, and on March 23, 1998, a hearing was scheduled for April 20, 1998. At the hearing held as scheduled, five Government and three Applicant exhibits were admitted into evidence. Testimony was taken from the Applicant and his mother. A transcript of the proceedings was received by this office on May 4, 1998.

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 39 year old senior software engineer who has worked for his employer, a defense contractor, since May 1997. He seeks a security clearance for his duties there.

Applicant was introduced to both alcoholic beverages and marijuana as a college student in 1977. Over the period 1977 to 1982, he shared approximately three marijuana cigarettes with friends at social gatherings once or twice a year and he

drank alcohol on weekends. Circa 1983/84, Applicant began to drink alcohol on a daily basis. He cut back his drinking thereafter to one beer three or four times per week.

After earning his second Masters degree, Applicant in May 1989 began working as a scientific programmer. Over the 1989/90 time frame, Applicant engaged in binge consumption of alcohol, imbibing at least six beers in a sitting a couple of times per week. With the help of Alcoholics Anonymous (AA), Applicant managed to remain completely abstinent from alcohol for about the next two years. In March 1992, he relapsed and by October 1993, he was drinking excessively. In 1994, he began missing work because of his alcohol consumption and in January 1994 he tried marijuana again. As his drinking increased, his use of marijuana became more regular and he smoked two or three marijuana cigarettes on average three times per week with occasional daily use.

By June 1994, Applicant was consuming six to eight beers per session three times a week alone at home. Concerned about the extent of his drinking, Applicant on June 13, 1994, voluntarily entered an inpatient alcohol rehabilitation program for treatment of a condition diagnosed as alcohol dependence, cannabis dependence, nicotine dependence, and alcoholic liver disease. Tense and anxious on admission, Applicant acknowledged his dependence on alcohol but did not consider his marijuana use problematic. Following a treatment regimen of individual and group therapy, AA meetings, psychoeducational seminars, steps to recovery groups and individual reading and writing assignments, Applicant was discharged on June 20, 1994, with some understanding of cross addiction. Aftercare recommendations included participating in the treatment facility's Phase III group, three to six AA or Narcotics Anonymous (NA) meetings per week with a sponsor, participation in the evening outpatient program and follow-up with his personal physician for liver tests. He was advised to stop using marijuana and alcohol.

Applicant continued in the facility's evening outpatient program from June 21, 1994 for about six weeks.[(1)] Applicant managed to maintain required abstinence, but only until October 1994 when he relapsed into marijuana. Terminated from the program on November 3, 1994, because he had completed the treatment, Applicant was referred to NA at discharge because he was using the drug. In the opinion of his clinician, the services had not been helpful because Applicant was using marijuana and needed in-house treatment. His rate of marijuana use thereafter was at least a couple times per week.

Applicant continued in AA for about six months following the treatment program at a rate on average of three times per week. He had an AA sponsor, but they did not have a close relationship. From October 1994 to January 1997, Applicant smoked marijuana on the order of three cigarettes every two to four days, purchasing a quarter ounce to an ounce of marijuana for personal consumption about twice per week at a cost of $40.00 to $50.00 per quarter ounce. By 1995 Applicant had stopped going to AA and he relapsed into alcohol use as well, drinking initially three to four beers a couple times per month increasing after six months or so to a six pack per session once a week on the weekends. In February 1995, he was laid off from his job due, at least in part, to alcohol-related absenteeism. During the September/October 1995 time frame, Applicant resided with his mother. She observed him to be intoxicated on the order of every other week or two to three times per month.

Over the 1995/96 time frame, Applicant's lifestyle was not especially stable. In addition to working in a variety of temporary positions, sometime in 1995 Applicant started dating a woman who used illegal drugs frequently. Although they resided together for five months until April 1996, Applicant did not use drugs with her with the exception of a rare use of marijuana. In December 1995, Applicant tried cocaine out of curiosity and boredom. He smoked two to four "rocks" of cocaine on two more occasions thereafter with his last use in December 1996. Applicant purchased the cocaine from friends at a cost to him of $10.00 per rock.

After he broke up with his girlfriend, Applicant moved back in with his mother in May 1996 and resided with her for the summer. He then returned to the same geographic area he had left a few months before. His ex-girlfriend thereafter contacted him on five or six occasions for a ride to a home wherein he suspected illegal drug activity was being conducted. Applicant drove her to this location on an least one occasion in January 1997, where unbeknownst to Applicant, she purchased some crack cocaine for their consumption. As she was re-entering the automobile, local police, who had the house under surveillance, detained them for suspected illegal drug activity. Three rocks of cocaine and one blue packet containing a substance believed to be heroin were found in the automobile. Applicant was not aware his companion also had heroin in her possession. Applicant and his ex-girlfriend were arrested and taken to the

station. During a routine booking search, the police found marijuana in Applicant's front pocket. In February 1997, Applicant appeared in court to face charges of possession of class A controlled substance (heroin), possession of a class B controlled substance (crack cocaine), possession of class D controlled substance (marijuana), and conspiracy to violate controlled substances act, a felony offense. The possession of heroin and conspiracy charges were dismissed and the case was continued without a finding for one year on the cocaine and marijuana counts, with Applicant placed on supervised probation for one year, ordered to pay $60.00 to the victim witness fund and to perform community service. In June 1997, he was found in violation of his probation by agreement and restored to probation with terms. Applicant was released from his probation in mid February 1998.

Over the next three months, Applicant continued to use marijuana, on average once a week during February and March 1997 and somewhat less in April 1997.

While en route home after drinking five or six beers on an occasion in mid March 1997, Applicant was pulled over by the state police for speeding. He was administered a breathalyser which registered at .12% blood alcohol content and arrested for driving under the influence of liquor (DUI). He pleaded nolo contendere to the charge and in early April 1997 was sentenced to one year supervised probation, to pay a $100.00 fine and assessments of $767.50, to perform ten hours of community service, to attend an alcohol education program if recommended by his probation officer and to three months suspension of his driver's license. His probation was joined with that awarded for the January 1997 drug charges. He continued to consume alcohol, with his last drinking in excessive quantity occurring in April 1997.

Concerned about his recent drug and alcohol-related arrests, Applicant sought out the assistance of his employer's employee assistance program (EAP). Applicant met with a certified addiction specialist/licensed clinical social worker on three occasions in June 1997, once in July 1997, and once in December 1997. This counselor diagnosed Applicant as suffering from alcohol dependency and recommended to him that he abstain completely from alcohol and illegal drugs and maintain active and regular participation in AA. Applicant appeared motivated to maintain sobriety as well as active involvement in AA. The counseling was terminated mutually without any follow-up recommended. In the opinion of this counselor, Applicant does not suffer from any condition that may cause defect to his judgment or reliability, particularly in the context of safeguarding classified information.

Applicant returned to AA in about June 1997, attending meetings almost daily for the first month and then three times per week until August 1997 when his attendance declined to once per week on average. Applicant has continued in AA at that rate since, occasionally going to two meetings weekly. Applicant had a temporary AA sponsor until five months ago. He does not currently have a sponsor in AA.

After three plus months of abstinence from alcohol, Applicant in August 1997, imbibed one rum and coke drink alone at a restaurant and in August or September 1997, he drank one or two bottles of beer at his residence which he had purchased.[(2)] He continues to have desires to drink on infrequent occasions. Applicant does not intend to consume alcohol or use illegal drugs, to include marijuana, in the future. He no longer associates with individuals who use drugs.

In January 1998, Applicant received an overall performance rating of fully competent for his work with his present employer.

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:

DRUG INVOLVEMENT

Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Drugs are defined as mood and behavior altering:

(a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and

(b) inhalants and other similar substances

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

(1) any drug abuse

(2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution

Conditions that could mitigate security concerns include:

(2) the drug involvement was an isolated or infrequent event

(3) a demonstrated intent not to abuse any drugs in the future

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:

(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 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the 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 of those who testified, this Judge concludes the following with respect to criteria H and G:

Applicant presents a history of infrequent marijuana use as a high school student from 1977 to 1982, regular, at times daily, marijuana use from 1994 to April 1997, and abuse of crack cocaine on three occasions between December 1995 and late December 1996. In addition, Applicant engaged in the excessive abuse of alcohol in the 1983/84 time frame, in 1989/90, from March 1992 to June 1994 and from 1995 to April 1997. The abuse of mood-altering substances, whether on or off duty, is incompatible with retention of a security clearance due to the obvious potential for impairment when one is under the influence.

In assessing the current security significance of Applicant's involvement with illegal substances and his excessive consumption of alcohol, this Administrative Judge must consider the pertinent adjudicative guidelines set forth in Enclosure 2 to the Directive. Disqualifying conditions (DC) 1. and 2. of the drug involvement guidelines are applicable in this case, by virtue of Applicant's abuse and purchases of marijuana and crack cocaine. Under the Directive, the illegal abuse of drugs is potentially mitigated if the drug involvement was not recent (MC 1), was isolated or infrequent (MC 2), there is demonstrated intent not to abuse any drugs in the future (MC 3) or successful completion of a drug treatment program prescribed by a credentialed medical professional. Applicant's abuse of cocaine is regarded as serious because of the addictive propensities of cocaine in the form of crack and the recency of his last use. However, there is no evidence that he was ever addicted to the substance and whereas it was limited to only three occasions, it was sufficiently infrequent to qualify for mitigation under mitigating condition (MC) 2. Favorable findings are therefore warranted with respect to subparagraphs 1.c. and 1.d. of the SOR.

Applicant's abuse of marijuana, in contrast, clearly went beyond what could reasonably be termed as experimental. Although an infrequent user in high school, Applicant became a three to four times per week abuser (with times of daily use) during the first half of 1994. As reflected in the medical records of his rehabilitation treatment in 1994, Applicant on admission did not recognize the seriousness of his marijuana abuse. While he submits he was able to refrain from marijuana use while in the outpatient portion of the program, by October 1994 he had relapsed into use every two to four days. At the time of his formal discharge from the program in early November 1994, Applicant's counselor recommended in-house treatment because of his continued abuse of the drug. Applicant's post-treatment involvement with both marijuana and cocaine precludes favorable application of mitigating condition (MC) 4. MC 3. must be considered in light of his recently stated intent to forego any future drug involvement. To his credit, Applicant has been abstinent from marijuana for just about twelve months. While this is some proof of his ability to abide by his stated resolve, this Administrative Judge cannot conclude with a reasonable degree of certainty that Applicant's marijuana abuse is safely of the past. It is noted that Applicant returned to marijuana use in 1994 when he was of mature age and no longer in an environment susceptible to peer pressure. His abuse of marijuana for the first six months of 1994 was on the order of on average three times per week with occasional daily use. Notwithstanding completion of an alcohol and

drug rehabilitation program, with six months of attendance at AA, Applicant went back to marijuana use in October 1994 every two to four days. His marijuana use continued even after he was placed on supervised probation for drug-related charges stemming from his actions to facilitate his ex-girlfriend's drug procurement in January 1997. At his security clearance hearing, he could not provide any rationale for his continued abuse of marijuana during the spring of 1997. His inability to articulate the reasons behind his marijuana use raises questions as to the benefit to him of his EAP counseling. His disassociation with individuals known by him to use illicit substances is favorable, but it is not compelling in reform where he smoked marijuana alone for the most part. His efforts in reform are not sufficient to overcome the security concerns engendered by his very serious marijuana abuse. Accordingly, the allegations of marijuana use and purchase (SOR subparagraphs 1.a. and 1.b., respectively) are resolved against him. An adverse finding is also warranted as to the drug-related incident in subparagraph 1.e. even though Applicant did not use drugs on that occasion as he had marijuana on his person. While rehabilitation treatment is viewed favorably, especially where it is voluntary as in this case, Applicant's relapse into marijuana abuse following the treatment alleged in subparagraph 1.f. undermines the value of that program. SOR subparagraph 1.f. is thus also concluded against him.

With respect to criterion E, although Applicant consumed alcohol from about 1977, there is no evidence it was to abusive levels until 1989/90. Nothing in the Directive nor in Executive Order 10865 as amended prohibits drinking per se. Rather, it is only the "excessive" consumption which is actionable. Guidance for determining what is excessive is found in the disqualifying factors, to wit: drinking which leads to alcohol-related incidents such as DUI, fighting, spousal or child abuse, or other criminal acts (DC 1); reporting to work in an intoxicated or impaired state or drinking on the job (DC 2); drinking to the point of an alcohol abuse or dependence problem (DC 3); drinking habitually or in binges to the point of impaired judgment (DC 4); or drinking after being diagnosed with alcoholism and following completion of an alcohol rehabilitation program (DC 5). By his own admission, Applicant began imbibing in abusive quantities in about 1989/90 when he engaged in binge drinking of at least six beers per sitting a couple times a week. This pattern falls within DC 4. of the adjudicative guidelines pertaining to alcohol consumption. After two years of abstinence he relapsed and by October 1993 he was again drinking excessively. By June 1994, he was sufficiently concerned about his drinking to seek out treatment. The medical records of the facility where Applicant was treated both on an inpatient and then outpatient basis reflect a diagnosis of both alcohol and cannabis dependence. DC 3. or 5. are apposite only if the diagnosis of alcoholism has been made by a credentialed medical professional, which is defined under the Directive as limited to a licensed physician, licensed clinical psychologist or board certified psychiatrist. The facility's treatment records submitted by the Government bear the signatures of a licensed clinical social worker (who is also a certified addictions specialist), of a therapist of unknown credentials, and of a masters degreed chemical dependency counselor. Applicant may well have been diagnosed as alcohol dependent by a credentialed medical professional affiliated with the program, but it is not established in the record. While DC 3. and 5. thus cannot properly be considered in this case, Applicant testified credibly that he was advised not to consume alcohol by treating personnel who clearly have some experience in dealing with those suffering from alcohol problems. Contrary to the advice of these counselors and of the tenets of the AA program with which he had been involved for at least six months, Applicant relapsed into drinking in 1995. By fall 1995, he was drinking a six pack of beer per session at least once a week and was observed to be intoxicated approximately every other week. This pattern of habitual binge drinking culminated in a serious DUI offense in March 1997.[(3)] Although concerned by the arrest, Applicant continued to consume alcohol to admitted excess to sometime in April 1997. Given the extent and recency of his abusive drinking, he bears a heavy, although not insurmountable burden, to demonstrate reform.

Applicant proffers in mitigation his recent counseling with an EAP licensed clinical social worker as well as his ongoing participation in AA. In the opinion of this EAP counselor, who is also a certified addictions specialist, Applicant appeared motivated to maintain complete abstinence and sobriety from alcohol and drugs, including active and regular participation in AA meetings. The EAP counselor does not feel Applicant, who he diagnosed as suffering from alcohol dependency, has any condition that may cause a defect in judgment or reliability, particularly in the context of handling sensitive (to include classified) materials. This counselor's assessment is not controlling, but must be weighed in light of his professional qualifications and the extent to which he has knowledge of Applicant's abuse history. The ameliorative impact of the EAP counselor's favorable opinion is undermined by the fact he had only five sessions with Applicant and especially by his apparent lack of any knowledge of Applicant's consumption of alcohol in approximately August 1997.[(4)] Applicant's drinking, albeit in moderate amount, on the two reported occasions during the August/September 1997 time frame was against professional advice to maintain complete abstinence. Furthermore, it casts doubt on the

rehabilitative value of the EAP sessions as well as AA. Prior to his most recent alcohol consumption, Applicant had attended four of his five EAP sessions and a minimum of three AA meetings per week.

While Applicant has been alcohol-free for seven to eight months now and been going to AA during that period, it is simply too soon to tell whether his abusive use of alcohol will not recur. He has relapsed in the past following significant periods of abstinence, in March 1992 after two years and in 1995 after about six months. While he has continued to attend AA meetings since June 1997, he does not have a sponsor even though he acknowledged he should get one. The frequency of his participation in AA since August 1997 has been on the order of once per week, which is a decline from the daily to three times per week attendance prior to his most recent use of alcohol. On balance the level of his present commitment to AA is not enough to overcome his history of significant alcohol abuse. Subparagraphs 2.a., 2.b., 2.c. and 2.d. are found against Applicant.

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 H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Paragraph 2. Criterion G: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: 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 grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant testified the program consisted of only six weeks, two hours a night four nights per week. (Transcript p. 25). The records of the outpatient program (Govt. Ex. 5) reflect Applicant was terminated from the program with referral to NA on November 3, 1994. In the opinion of the clinician, Applicant needed in house treatment as he was still using "weed."

2. Applicant testified that the last time he consumed alcohol it was a "one drink deal" in August 1997 when he drank a rum and coke while by himself in a restaurant. (Transcript pp. 43, 52). However, Applicant's mother testified that in

about August or September 1997, she observed him drink one or two bottles of beer at their residence on one or two occasions and that she recalled him telling her that he felt sick from it. (Transcript pp. 67-68).

3. Under the policy pertaining to alcohol consumption, disqualifying condition (DC) 1. is not applicable despite the March 1997 DUI being the type of incident contemplated under DC 1. There is only alcohol-related incident of record and the disqualifying condition on its face refers to multiple incidents. However, there is sufficient evidence of consumption to impairment on the occasion in March 1997 (a .12% bac) to where DC 4., habitual or binge consumption to the point of impaired judgment, must be considered

4. Applicant's last session with the EAP counselor was on December 15, 1997, which post-dates Applicant's last consumption of alcohol. In his letter dated April 17, 1998, the counselor indicates that to his knowledge, Applicant had not wavered from his commitment to maintain complete abstinence and regular and active participation in AA. (See App. Ex. B).