DATE: June 27, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-09896

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

When the Applicant completed his Questionnaire for National Security Positions, he failed to indicate a domestic assault and the repossession of his son's car. His attorney had advised the Applicant not to worry about the arrest, which had been placed on the Stet docket, that such domestic incidents were typical in divorce actions, and told he was not guiltily of anything other than self-defense. The Applicant failed to list the repossession because he considered it his son's repossession. Clearance is granted.

STATEMENT OF THE CASE

On December 18, 2002, 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)] it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In an undated letter the Applicant answered the SOR and requested a hearing. The case was assigned to me on March 7, 2002. A Notice of Hearing was issued on March 8, 2002, scheduling the hearing which was held on April 1, 2002. The Government's case consisted of five exhibits (Gov. Ex.). The Applicant relied on his own testimony and seven exhibits (App. Ex.). The record was held open to allow the Applicant to submit additional documents. Following the hearing a submission was received and, Department counsel having no objection to its admission, was admitted as App Ex H. A transcript (tr.) of the hearing was received on April 9, 2002.

FINDINGS OF FACT

The SOR alleges acts of falsification (Guideline E) which raise questions about the Applicant's willingness or ability to protect classified information. In his answer to the SOR, the Applicant denied he deliberately falsified material facts, but admitted he was arrested in November 1997 and admitted the car was repossessed in 1997.

The Applicant is 55 years old, has worked for a federal contractor since November 1999, and is seeking a security

clearance. The Applicant is hard working, thorough, responsive, knowledgeable, upstanding, dedicated, trustworthy, professional, and an outstanding citizen and leader. (App. Ex. A, B, C, G) He is well organized, eager to work with others, versatile, friendly, has a positive attitude, and extensive knowledge of his job. (App. Ex. E, H)

The Applicant had been married for more than thirty years when the marriage failed. The Applicant and his wife went through a contentious divorce described as an ugly, nasty divorce which strained the Applicant's relations with his sons. In February 1997, the marriage began to fail and gradually got worse. In October 1997, the Applicant sought marriage counseling, but his wife declined to attend or to discuss their marital problems. In November 1997, an altercation between the Applicant and his wife occurred which resulted in each striking the other. (Gov. Ex. 2, tr. 60) The Applicant was arrested for assault. (Gov. Ex. 3) In February 1998, the matter was moved to the stet docket.[(2)] (Gov. Ex. 4) The Applicant believes his wife planned the altercation and attempted to use it as leverage in the property settlement. Following the altercation, the Applicant continued his counseling for a year and a half. (App. Ex. D) This was the only time the Applicant has been in trouble.

In November 1999, the Applicant completed a Questionnaire for National Security Positions, Standard Form 86 (SF-86) (Item 1). In Question 26, "Your Police Record - Other Offenses," he was asked if during the prior seven years he had been charged with, or convicted of any offense(s) not listed in previous questions on the form. He answered "no" even though he had been arrested in November 1997 for assault and the matter moved to the stet docket. The Applicant thought about the question before answering it. He did not know how to respond to it because, although it was not a felony, he had been arrested but had not been found guilty nor was he convicted of crime. He saw the arrest as a domestic matter, not a crime. In the Applicant's mind everything related to the arrest had been dropped. (tr. 65) His attorney had told him[(3)] not to worry about the arrest since such incidents were typical in divorce actions (tr. 90), and he was not guilty of anything more than self-defense. (tr. 65) The Applicant acknowledges in hindsight he made a mistake by relying on his attorney's advice. (tr. 65) The Applicant stresses he did not deliberately falsify his response. (tr. 66)

In December 1996, the Applicant's oldest son purchased a car and the Applicant agreed to act as co-signer. The Applicant went to the auto dealer and signed the required forms. His son took possession of the car and registered it in his (son's) name. The son received the repayment book, and made the $320.00 monthly payments[(4)] on it until November 1999, when the son purchased another car this time in his name alone. All dealings with the finance company-- prior the repossession-- were between his son and the finance company. The son returned the car to the Applicant and told him he no longer wanted it. The Applicant told his son this would affect his son's credit at which time the son informed the Applicant the car was solely in the Applicant's name and the son's name was not on the note. This was the first the Applicant knew of this. Because of his pending divorce, the Applicant could not afford the monthly payments.

Within a week, there was a voluntary return of the car to the finance company. When the finance company sold the car a $4,344.00 remaining balance on the note. When the vehicle was surrendered, the finance company told the Applicant nothing would be reported unless an amount was owed after the vehicle was sold or if the Applicant failed to pay any deficit. In December 1999, the finance company entered a deficit debt against the Applicant. (Gov. Ex. 5) The Applicant received notification of the deficit in the Spring 2000. In May 2001, the Applicant and the finance company reached an agreement whereby the Applicant paid $2,900.00 to settle the matter--$ 2,200.00 was to release the Applicant and $700.00 to release his son. (App. Ex. F, H) The Applicant paid the amounts in May and June 2001. (App. Ex. H)

In SF-86 Question 35, "Your Financial Record - Repossessions," he was asked if in the last seven years, he had any property repossessed for any reason. He answered "no" even though his son's vehicle was repossessed. The Applicant interpreted the question to mean, "did he have anything personal of 'his' which had been repossessed." (tr. 80) Although the Applicant's name was on the note, the Applicant did not think of the repossession as "his" repossession but that of his son. (tr. 64) The car had been voluntarily returned and the finance company told the Applicant there would be no reporting unless there was a deficit. This was not an involuntary repossession of the vehicle.

The Applicant also answered "no" to question 39 which asked if he was currently 90 days delinquent on any debt. The Applicant knew during the approximately three years his son had made payments, his son had been late a couple of times. The record does not establish how late, if at all, the payments were when the car was returned to the finance company.

The Defense Security Service (DSS) special agent who interviewed the Applicant testified, at the hearing, she believed the Applicant provided forthright and accurate information and was not evasive in his answers to her questions. When asked about any problems with the police the Applicant was forthcoming with respect to his divorce and the domestic dispute. When questioned as to why it had not been listed on the SF-86, the Applicant told the DSS special agent it was because it was a domestic matter, it had been put on the stet docket, and he did not think he had to list it. (tr. 53) When asked about any financial problems, the Applicant was forthcoming and explained co-signing on a car loan for his son and his son returning the vehicle. When questioned as to why the car had not been listed on the SF-86, the Applicant told the DSS special agent it was his son's car and his son's debt. (tr. 56)

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 that are clearly consistent with the interests of national security. In making 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 factors set forth in section E 2.2.1. 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 the facts proven have a nexus to an Applicant's lack of security worthiness.

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. 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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct (Guideline E) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

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

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Conditions that could mitigate security concerns include:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)

4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided. (E2.A5.1.3.4.)

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 that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline 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

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security.

Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. Thus, a falsification must be deliberate, and the falsified information must be material. It is deliberate if it is done knowingly and willfully. An omission concerning an arrest is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, or misunderstood the question.

In November 1997, two years before the Applicant completed his SF-86, he was arrested for domestic assault following an altercation with his wife and in February 1998. The matter was moved to the stet docket. In November 1999, when the Applicant answered "no" to question 26 which asked about "other offenses." The Applicant thought about the question before answering it and did not know how to respond to it because he had been arrested, but there was no conviction. The Applicant, not knowing how to answer the question, relied on his attorney who had told him not to worry about the charge because the incident was typical in divorce actions and he was guilty of no more than self defense. The omission concerning his arrest was caused, in part, by his attorney's improper or inadequate advice. Although his attorney was not a security specialist, it was appropriate for the Applicant to seek legal clarification from someone with legal expertise in attempting to answer his question. Therefore, Mitigating Condition (MC) 4[(5)] applies. MC 2[(6)] also applies because the falsification appeared on a single questionnaire, the November 1999 falsification is not recent. I find for the Applicant as to SOR subparagraph 1.a.

In the Fall of 1999, the Applicant knew his son had turned the vehicle over to him and said he would no longer make the payments. The Applicant immediately surrendered the car to the finance company. The month after the SF 86 had been completed, a deficit balance was entered against the Applicant. SF-86 Question 35 asked the Applicant if in the last 7 years he had any property repossessed for any reason. The Applicant interpreted the question as asking if any of his property had been repossessed. Even though he held the note on the vehicle, the Applicant considered the repossession his son's repossession. The Applicant considered vehicle to be his son's because: his son took possession of the vehicle; the car was registered in his son's name; his son received the payment book; all dealing with the finance company-- prior to the repossession-- were between his son and the finance company; and his son made the monthly payments on it until he bought a new car. Only when the repossession was imminent did the Applicant discover his name alone was on the note.

The voluntary surrender of the vehicle occurred just before the Applicant completed the SF-86 in November 1999. In surrendering the vehicle the Applicant was told nothing would be reported unless there was a deficit balance following the resale of the vehicle. In December 1999, after the SF 86 had been completed, the resale of the vehicle occurred and the deficit balance entered against the Applicant, a balance the Applicant did not know about until the Spring 2000. When he completed the form, all he knew was the finance company had picked up the car. The finance company had taken no other action and all other proceedings related to the car occurred after the SF-86 had been completed.

The Applicant did not willfully falsify his response to question 35. However, even if it was a willful falsification, MC 2 applies since the falsification was an isolated incident on a single questionnaire completed in November 1999, which is approximately two and a half years ago and therefore not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)

At the time the SF-86 was completed, there is no evidence the car loan was 90 days delinquent. At most, the Applicant knew his son had been late on a couple of payments between December 1996 and November 1999. I find for the Applicant as to SOR subparagraph 1. b.

In reaching my conclusions I also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: 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 the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.

2. The State's Attorney may ask the court to indefinitely postpone trial of a charge by marking the charge "stet" on the docket. A stetted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown.

3. The record is unclear if this advice was given at the time the divorce occurred or when the SF-86 was completed.

4. The Applicant knew the payments had been delinquent a couple of times.

5. MC 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.

6. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.