DATE: June 30, 1997

In RE:

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

Applicant for security clearance

ISCR OSD Case No. 96-0843

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Michael H. Leonard, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On December 2, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and amended by Change 3, February 13, 1996, issued a Statement of Reasons (SOR) to 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on January 14, 1997.

The case was received by the undersigned on March 12, 1997. A notice of hearing was issued on April 16, 1997, and the case was heard on May 7, 1997. The Government submitted documentary evidence (which shall be marked as GE). Testimony was taken from Applicant and 2 witnesses. The transcript was received on May 21, 1997.

FINDINGS OF FACT

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges criminal conduct (Criterion J), predicated on Applicant's misconduct directed at his children. in addition to the child neglect incident, Applicant used excessive force on two occasions to discipline his children. Applicant admitted subparagraph 1a.[(1)] He essentially admitted the remaining factual allegations but denied he was arrested or prosecuted for child neglect or any other criminal offense on April 19, 1994 (Subparagraph 1b). Rather, he was simply interrogated about leaving his 23 month old child alone at home, and no further action was taken by the military police. However, subparagraph 1b is found against Applicant because he left his house without first making certain his child was properly attended by an

adult. (TR 16) The fact that the babysitter did not follow her usual practice of arriving early to sit the child, does not excuse Applicant and his wife from their responsibility of properly taking care of the child at all times. In addition, even if many children were left unattended on the installation for the same reason Applicant's child was left unattended, Applicant is not relieved of his non-stop obligation to ensure the child is properly cared for. On August 28, 1995, Applicant assaulted his eight and seven year old daughters as alleged under subparagraph 1c.(2) The sentence and fine alleged in subparagraph 1d represents: (1) Applicant's guilty plea for the assault charge in 1c; (2) the revocation of his probation in 1a because of the commission of a subsequent crime (1c) while on probation; and, (3) re-imposition of a combined sentence for 1a and 1c.

Applicant and his wife voluntarily attended parenting classes in 1994 as a result of the assault and child neglect charges.(3) The parenting classes took place on the installation. See, Joint Exhibit (JE 1a). Applicant also voluntarily attended three or four sessions of one-on-one counseling for about a month (TR 22-24), and learned different avenues in on how to discipline children.(4) As a result of the counseling, Applicant disciplines his children by punishing them through restriction or taking away privileges. Striking one of his children occurs only as a last resort. (TR 24) Applicant continues to raise his children according to the Bible and believes whipping his children is alright if the whipping does not leave bruises.

Applicant also consulted his minister for assistance in changing the way he disciplines his children. Applicant is a ------- and has prayed regularly for understanding and help in not repeating the inappropriate conduct he exhibited toward his children.

One corrective measure Applicant has instituted to avoid the situation set forth in subparagraph 1b has been to take his youngest child to the babysitter rather than having the baby sitter come to his house.

JE 1a confirms Applicant's testimony of participation in parenting classes. The exhibit reflects Applicant attended approximately 12 classes on a weekly basis between March 30 and June 8 , 1995. However, Applicant attended individual counseling on two of four occasions in October 1995 and December 1995. Applicant's case therapy for the August 1995 assault (1c) was unresolved because of inadequate participation.

Applicant's first daughter testified Applicant has been her stepfather since she was two years old. On the day Applicant abused her in February 1994 (1a), she had skipped school. (TR 35) Applicant apologized. Presently, Applicant punishes her by sending her to her room or by reducing the amount of television she is allowed to watch. Applicant has always been supportive of her in school and in developing her self-esteem. (TR 36)

Applicant's second daughter testified that the punishment she receives from Applicant now is primarily confinement in her room, or consultations with her. When he whips her, the whipping is not as hard as it used to be. Since he was released from jail in January 1996, she could not remember when Applicant used his hand or belt to punish her. (TR 42)

Applicant demonstrated on several occasions during the early part of the hearing that he was still suffering from residual denial concerning the seriousness of his abusive conduct toward his children. He repeatedly quibbled over the procedural background of each charge of child abuse or neglect, or provided rationalizations for his illegal behavior. (TR 10-11, 16, 18) I find he did not really understand the egregious nature of his conduct until after the hearing was reconvened at page 19 of the transcript.(5) The favorable testimony from his two daughters describing Applicant's alternative methods of punishment without force, and Applicant's participation in parenting and counseling in 1995, demonstrates that Applicant has made substantial progress in understanding the type of punishment he routinely received from his father (TR 32; GE #2), is not automatically the type of punishment he can impose on his children to achieve the desired level of discipline.(6)

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and

circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criminal Conduct (Criterion J)

Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was formally charged.

Factors for Clearance:

1. the criminal conduct was not recent.

4. there is clear evidence of successful rehabilitation.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under criminal conduct (Criterion J) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

The Government has definitely established a case of criminal conduct under Criterion H. Before leaving his 23 month old child unattended in April 1994, Applicant assaulted one of his daughters in February 1994. Applicant repeated his shocking behavior in August 1995 when he assaulted two of his other daughters. Even though there is no supporting evidence of the assault in August 1995, there is sufficient evidence that the force he used on his child in February 1994 clearly exceeded the bounds of normalcy, as is documented by the injuries on her back, shoulders and legs.

Although the last assault occurred less than two years ago and must be considered part of a course conduct sharing identical characteristics to the February 1994 behavior, I find clear evidence of successful rehabilitation. First, Applicant

completed parenting classes in 1995. While he did not complete all the individual counseling sessions, he continued therapy with his minister and on his own. Although denial continued to show during the early phase of the hearing, I am confidently convinced Applicant now understands the magnitude of his misconduct and shall continue his commendable efforts in the future to employ the appropriate methods of punishment.

With the positve evidence from his children about the positive, emotional support he provides them, and Applicant's documented rehabilitative efforts, Applicant has satisfactorily met his ultimate burden of persuasion under Criterion J.

FORMAL FINDINGS

Having weighed the specific and general policy factors outlined above in POLICIES, the following Formal Findings are found:

Paragraph 1(Criterion J): FOR THE APPLICANT.

a. For the Applicant.

b. For the Applicant.

c. For the Applicant.

d. For the Applicant.

Factual reasons for the foregoing findings are found in FINDINGS OF FACT and CONCLUSIONS above.

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.

Paul J. Mason

Administrative Judge

1. Military arrest records reflect the victim had been struck with a belt and the injuries covered her entire back, shoulders and legs. Applicant was arrested and admitted he inflicted the injuries on his child. (GE #3)

2. He was questioned by the local family services agency and the military investigation division and informed he would be notified whether he had to appear in court. When he was notified, he was out of town and a warrant was issued. On January 17, 1996, he was arrested for the assault (in subparagraph 1c) and for violation of the conditions of his probation under subparagraph 1a. He pled guilty to the assault charge (1c), and his probation under 1a was revoked; he was resentenced to 30 days in jail, to run consecutive with the jail term assessed for the conviction under 1c, and also fined $500.

3. After the first assault in February 1994, Applicant promised himself he would not whip his children for a year. (TR 24-25)

4. While the anger factor was addressed in counseling, Applicant was not aware of the amount of force he was using in whipping is children. (TR 25) Applicant did not complete counseling with the agency because of the difficulty in scheduling appointments. However, he continued counseling with his minister. (TR 28)

5. (Applicant): Your Honor, all these charges that I was charged with -- I assaulted my 8-year-old, my 7-year-old. The charges are true. I was fined; I was sentenced, had a jail sentence. And that is correct.

But since then -- I guess the reason why I'm here is my credibility -- I guess my trustworthiness concerning a security clearance -- since these charges here and I was jailed and I was fined, I have took a parenting class, I have become a

better father.

And I hope that, you know -- well, I'm going to say people change. I made mistakes in the past, but, you know, since then like I said, I took parenting classes. I've learned how to discipline my children without wounding therm or leaving bruises, as referring back to the parenting classes.

That's all.

6. There is little doubt the two daughters have a definite bias or interest at the hearing, however, their demeanor and conduct make them very credible witnesses.