DATE: October 9, 1997

In re:

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

Applicant for Security Clearance

ISCR OSD Case No. 97-0071

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR THE GOVERNMENT

Barry Sax, Esq.

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

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, as amended by Change 3, issued a Statement of Reasons (SOR) dated February 5, 1997, 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 and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

On February 24, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned to me on March 18, 1997. A notice of hearing was issued on March 24, 1997, and the case was heard on April 9, 1997. At the hearing, held as scheduled, three Government exhibits (Gov Ex) and no Applicant exhibits (App Ex) were admitted into evidence. Testimony was taken from the Applicant. A transcript of the hearing was received by this office on April 22, 1997.

FINDINGS OF FACT

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 has worked for a defense contractor for 17 years, since 1980. Applicant has held a secret security clearance since March 1988.

On October 21, 1991, Applicant was arrested and charged with battery and kidnaping. The action involved an incident with an ex-girl friend. Applicant and the woman started dating in 1989 and became very close. They cohabitated "off and on," at his apartment, between 1989 and 1991. Throughout their relationship they both dated other people. By early October 1991 the relationship had turned stormy. The woman was keeping another residence, yet spending 4 to 5 days a week at Applicant's apartment.

In October 1991, Applicant was very frustrated with the relationship and heartbroken. Applicant became upset with the woman's lying and her unwillingness to proceed or relinquish the relationship. The two agreed to meet to try to work out the problems in their relationship. They were to meet on Friday, October 18, 1991. The woman did not arrive for the meeting on Friday, Saturday or Sunday. On Sunday night/Monday morning, the night of October 20-21, 1991, Applicant did not sleep. On Monday morning, October 21, 1991, Applicant drove to the woman's place of work to talk with her. Applicant confronted the woman in the parking lot. Applicant was upset and yelling. After arguing with the woman for a few minutes he grabbed her and pulled her into his car. She was crying.

He drove the woman to his apartment so that she could remove her personal things from the apartment. During the 10 minute drive the woman asked him to stop but he continued to drive. At the apartment the argument continued. Applicant gave the woman her clothes and other personal goods, which she had kept in the apartment. During the argument Applicant squirted the woman's dress and hair with chocolate syrup. After the argument the woman took a shower while here clothes were being washed. After taking a shower the woman called her place of work. The police were at her place of work. Both the woman and Applicant talked to the police on the telephone. A few minutes later the police came by the apartment and arrested the Applicant.

Applicant pled guilty to kidnaping and, under the First Offenders Act, was fined $1,150.00, ordered to receive psychiatric counseling, and to have no contact with the woman or her family, and was sentenced to 5 years probation. He also pled guilty to simple battery for the same incident for which he was sentenced to 12 months probation. The court order states: upon fulfillment of the terms of probation the Applicant shall stand discharged of the offenses charged and shall be completely exonerated of guilt of those offenses charges. (Gov Ex 2) For the first 2 years of probation Applicant had to report to his probation officer once a month. In 1994, probation was changed to unsupervised probation. Probation will end in May 1997.

Applicant has not seen the woman since the incident. Following the incident Applicant received counseling for a year to a year and a half. Initially, he saw the counselor 2 to 3 times a month. Counseling was later reduced to once a month. Applicant's last session with the counselor was in December 1993. Applicant talked about his temper. At the time of the incident he was 32-years-old and had what he called "a short fuse." Applicant's jealousy was also instrumental in causing the incident. He lost control of his temper and himself. Applicant believes his gross error in judgment was caused by his broken heart and because he was an insecure person. The counselor also suggested he attend Adult Children of Alcoholics (ACOA) meetings. He began attending these ACOA meeting in May 1992 and continues to attend.

Since the incident, Applicant realizes he can only make himself change and cannot force others to change their ways. On July 1, 1995, Applicant married and has experienced no marital problems.

Applicant had self-employment earnings that he failed to include on his federal and state tax returns. Applicant has always included his income paid him as an employee of a defense contractor on his tax returns, but he failed to include his self-employment earnings. Applicant failed to report this income because he believed the expenses of generating the income exceeded the amount of money he made.

In 1989 Applicant had serious sinus problems[(1)] which resulted in his termination[(2)] from work with the defense contractor. The largest of all of his self-employment earnings occurred during the time he was away from his job at the defense contractor company. In 1989 he power washed 195 condominiums, for which he was paid $2,500. From the $2,500 he received, he paid an assistant $800.00 for helping him with this job. The $1,700 remaining did not cover his additional costs. In order to do the job Applicant purchased a pressure washer machine (power washer) at a cost of $1,900. [Tr 82], a ladder, brushes, work clothes, drop clothes, hoses, and other tools. Additionally, he had to purchase

200 to 300 gallons of bleach in order to wash the condominiums. Neither the income nor the expenses related to this part-time job were reported on Applicant's income tax returns for 1989.

During the period of 1989 to 1991, Applicant also did part-time work sporadically as a mechanic for a friend who owned a lube shop. During these years he was paid a total of $2,000 to $3,000, by check, for work listed as "contract labor." Applicant used this money to buy tools[(3)]. He did not report this income or expenses on his tax returns for those years.

During 1995 he was paid $350 to paint sheetrock in a house being built. In order to do the painting he purchased a $500 paint machine, brushes, tips, and other equipment, and incurred transportation costs. In 1996 he had no income from outside sources. In 1997 he had one outside job for which he was paid $20. This $20 will be reported on his 1997 income tax returns.

During the period 1989 to 1996 Applicant had purchased the power washer in 1989 for $1,900 and when that power washer wore out, he purchased another power washer in 1994 for $1,200. During the period he purchased two[(4)] power painters costing approximately $500 each. In addition to the one assistant already mentioned, he paid another assistant more that $1,000 for helping him on various part-time jobs. This amount came out of the money he was paid for the work performed.

Applicant's intents to report this income and expenses to the IRS and the state Department of Revenue. [Tr 61]

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. oreover, 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:

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.

(2) The crime was an isolated incident.

(5) There is clear evidence of successful rehabilitation.

* * *

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, then the applicant must remove that doubt with substantial evidence in explanation, mitigation, or extenuation, or refutation, 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.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that an applicant may demonstrate the same attitude toward security rules and regulations.

CONCLUSIONS

Applicant's failure to include self-employment earnings on his state and federal income tax returns for tax years 1989 through 1995 is not criminal in nature. His failure to include these earnings may[(5)] subject him to a civil penalty, but does not subject him to a criminal penalty[(6)] under the IRS code. Applicant filed federal and state income tax returns for the years in question. His income as an employee of the defense contractor was reported on those returns and tax paid on that income.

Even where a taxpayer may have fraudulently concealed income and may have done his best to cheat the government, conviction for attempted evasion of tax cannot be supported in the absence of showing that tax is actually due from the accused for the year involved. *See* Hold v. US (1965, CA9 Wash) 347 F2d 124. There has been no showing that Applicant actually owed tax in excess of the amount stated on his return. Tax evasion is, therefore, not shown in this particular case.

To prove tax evasion, fraud, or willful failure to file a return, "willfulness" must be proved. A good faith belief by the taxpayer that he is not violating the law negates willfulness, whether or not the claimed belief is objectively reasonable. *See* Cheek v. US (1991) 498 US 192, 112 LEd 617, 111 SCt 605. Applicant failed to report his self-employment earnings believing his expenses exceeded the income received. Applicant's belief negates the required element of willfulness.

In 1989 he received $2,500 to wash some condominiums. His expenses exceeded his income. He paid $1,900 for a new

power washer, $800 to an assistant, and additional amounts for, brushes, work clothes, drop clothes, hoses, a ladder, other tools, and 200 to 300 gallons of bleach. The record indicates Applicant was paid $2,000 to $3,000 as a mechanic working part-time from 1989 to 1991, money he spent on buying more tools.

During the last three years, 1995-1997, his income from self-employment sources was minimal. He made $370 during these three years[(7)].

During the period 1989 to 1996 Applicant had income from part-time jobs other than his job with the defense contractor. But in addition to the expenses already mentioned during this period, Applicant had purchased another power washer in 1994 for $1,200, a second power painter costing approximately $500, and paid another assistant more that $1,000 for helping him.

Applicant did have self-employment income which he should have included on his federal and state income tax returns. Applicant's expenses incurred during this period may have resulted in business losses on his self-employment income. Still, Applicant had a duty to report his income and expenses on the proper forms. His failure to so report may subject him to a civil penalty, but not a criminal penalty.

Since Applicant's actions were not criminal, neither of the Disqualifying Factors (DF)[(8)] applies.

With respect to SOR subparagraph 1.a., Criterion J, criminal conduct, the Government has not established its case.

With respect to the kidnaping and battery the Government has established its case. The evidence establishes that Applicant was arrested and pled guilty to the charges. He was sentenced under the First Offenders Act. Upon fulfillment of the terms of probation[(9)] the Applicant shall stand discharged of the offenses charged and shall be completely exonerated of guilt of the offenses charged.

In assessing the current security significance of the battery and kidnaping, I must consider the Adjudicative Guidelines pertaining to criminal conduct. Mitigating condition (MC) 1 applies since the event is not recent. The event occurred in October 1991, some 5 ½ years before the hearing. MC 2[(10)] also applies to this case. This one hour incident is the sole manifestation of this type of conduct evidenced at the hearing. The event was precipitated by a personal relationship gone bad. Applicant's broken heart, his immaturity, the anger he experienced during the three days leading up to the event, and his lack of sleep the night prior to the incident, all were factors leading to this event. These factors combined and resulted in Applicant's pulling his ex-girlfriend into his car and taking her against her will to the apartment in which they both lived. Applicant's actions were serious and wrong.

MC 5[(11)] applies to this incident since there is evidence of rehabilitation. Following the event Applicant received counseling. He now knows he can't force another person to act the way he wants them to act. He knows he can only control how he acts. This shows a more mature attitude. Since the incident he has not seen the woman. He has married and leads his life in such a manner so control his anger and to prevent such an event from ever recurring. Applicant has met his probational requirements. Applicant's present lifestyle is an indication of successful rehabilitation. I find for the Applicant as to the SOR subparagraph 1.b.

Accordingly, I find for the Applicant under Criterion J, (Criminal Conduct).

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 J: 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 Applicant.

Claude R. Heiny

Administrative Judge

1. Applicant had a sinus infection and was unable to work. At work he would get severe headaches and his sinuses would start to bleed. Surgery was ultimately required to correct his sinus problems.

2. Applicant was away from the job for one year. He was later rehired at the company, after filing a grievance.

3. Applicant said 99% of the money he made as a mechanic was spent buying tools. [Tr.86]

4. The second machine was purchased after the first one wore out or broke.

5. Applicant is subject to civil penalty if he substantially understated the amount of tax owed, *see* 26 USC §6661. The understatement of tax is substantial if it is more than the larger of 10% of the correct tax or $5,000. Based on the amount of unreported income and expenses involved, it does not appears Applicant would be subject to a civil penalty for substantial understatement of tax.

6. Applicant would be subject to criminal prosecution if he were guilty of tax evasion, willful failure to file a return, fraud or false statements, or preparing and filing a fraudulent return. Applicant's actions in this case do not meet any of these criminal actions.

7. In 1995 he was paid $350 to paint sheetrock but spent $500 for a paint machine plus additional money for brushes, tips, other equipment, and transportation cost in order to do the work. In 1996 he had no self-employment income. In 1997 he had made $20 in self-employment income, which Applicant will be reported on his 1997 income tax returns.

8. Applicants actions were not criminal conduct (DF 1), nor were they a single serious crime or multiple lesser offenses (DF 2).

9. The period of probation was scheduled to end a month after the hearing.

10. The crime was an isolated incident.

11. There is clear evidence of successful rehabilitation.