DATE: December 6, 2000

In Re:

SSN: ---------

Applicant for Security Clearance

ISCR Case No. 00-0055

DECISION UPON REMAND ORDER OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On February 10, 2000, 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, issued a Statement of Reasons (SOR) 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 determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on March 6, 2000, and Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on March 21, 2000. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on an unspecified date, and Applicant's reply was received on July 5, 2000. The case was received by the undersigned for resolution on July 17, 2000, and an unfavorable Decision was issued on July 21, 2000. The Applicant appealed this adverse Decision, alleging "a failure of the Administrative Judge to consider or understand the statements made by his former spouse about the matters covered by SOR 1.a." (Appeal Board Decision and Remand Order (ABD&RO) at page 2). In fact, the undersigned did not consider any "statements made by his former spouse," as no such statements were offered into evidence.

On November 7, 2000, the Appeal Board issued a Decision and Remand Order with specific guidance :

. . . to reopen the record to receive from both parties information to determine the following: (1) whether Applicant's former spouse gave written statements to DSS [Defense Security Service]; (2) if Applicant's former spouse gave written statements to DSS, were copies of them provided to DOHA; (3) if copies of such written statements were provided to DOHA by DSS, did DSS or Department Counsel provide Applicant with copies of them; (4) did Applicant have copies of such written statements because his former spouse gave him such copies; (5) if Applicant had copies of such written statements by his former spouse, did he have them when he answered the SOR or responded to the FORM; (6) whether, given all the circumstances, Applicant has a right to offer such written statements as evidence on his behalf; and (7) if

so, whether Applicant wishes to exercise that right on remand (ABD&RO at page 4).

On November 13, 2000, Department Counsel forwarded to the undersigned "a complete copy of the Applicant's investigative file as provided to DOHA by DSS." Department Counsel also responded to questions (2) and (3) posited above by averring, "Our review of this case file discloses no references in the Report of Investigation to DSS interviews of the Applicant's wife, nor are copies of any written statements made by Applicant's wife to DSS included as attachments."

On November 16, 2000, the undersigned issued an Order Based Upon Remand Order, ordering Department Counsel to further answer question (1), and for the Applicant to answer questions (4) and (5). On November 20, 2000, Department Counsel responded to question (1), averring, in sum, that Applicant's former spouse gave no written statements to DSS. On November 22, 2000, the Applicant responded to my Order Based Upon Remand Order, asking that I consider six attachments. As Attachments 4 and 5 are already in evidence as Item 1 and as page 4 to Item 3 of the Government's File of Relevant Material, I will not admit them into evidence a second time. Attachment 6 is a September 1, 2000, letter from his former spouse. This letter post dates my original Decision, was also submitted to the Appeal Board, and, as the Appeal Board notes in its ABD&RO, "is new evidence, which . . . cannot [be] considered" (ABD&RO at page 2).

Attachments 1~3 are from the files of the National Security Agency (NSA), and are dated December 13, 1999; April 1, 1999; and April 6, 1999; respectively. As they predate the issuance of the SOR, are relevant and material, and Department Counsel has no objection to their admission into evidence, Attachments 1~3 are admitted into evidence as Applicant's Exhibits (AppXs) A~C. The case is now ready for a Decision based upon the Remand Order.

The issues raised here are whether the Applicant's criminal conduct and related personal conduct militate against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the File of Relevant Material, Applicant's Response, and AppXs A~C. The Applicant is 39 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline J - Criminal Conduct & Guideline E - Personal Conduct

1.a., 1.b. and 2.a. The Applicant was arrested in January of 1997, and subsequently pled guilty to Assault - Second Degree (Item 5 at pages 2~3, and Item 7). The incident involved domestic violence with his spouse, who required medical attention for fractured ribs and a punctured lung (Item 5 at pages 2~3). As part of his sentence, he was required to complete an Anger Management Counseling Program (Item 5 at pages 2~3, and Item 7). In her statement to the police, his now former spouse averred the following:

. . . that there has been **a history of abuse** but this was the first time that she was hospitalized. . . . [She] advised that she is usually struck or thrown down on the ground or bed **about once every 2 to 3 months** and that she normally receives bruises on her legs (Item 6 at page 2, emphasis supplied).

In an April 6, 1999, sworn statement to the NSA, she averred, in part, the following:

In late 1995, after learning of a likely miscarriage, we were arguing in the kitchen. I do not know the sequence of events, but recall being **pushed** and sliding 3-4 feet on the floor and hoping that I had already had the miscarriage so that this **fall** would not cause any defects. I do not in any way believe this incident caused the miscarriage (AppX C at pages 3~4, emphasis supplied).

She also swore to the following incident:

I do not know when, but I remember sitting with . . . [the Applicant] in a chair. At some point **he pushed me out of the chair by pushing me by the jaw**. He was very concerned and apologetic for the pain I was in. At the time, I was thinking there was a fracture in my jaw. As the pain lessened over the next hour or so, I was relieved it was not broken

(AppX C at page 4, emphasis supplied).

In his March 6, 2000 answer to the SOR, the Applicant admits only to the following:

. . . that on the **three** occasions of alleged abuse my wife would become angry with me and would slap me. I would push her away. The last time it happened she caught her foot and fell over a chair. This does not take away my part of the blame (Item 3 at page 1, emphasis supplied).

In a signed sworn statement, executed by the Applicant on August 25, 1998, the Applicant swore "that other than the Dec 96 incident, I have never physical(*sic*) abused my spouse. I feel that this was an isolated incident, and out of character for me. I am not a violent person, and I regret my actions" (Item 5 at page 3). This sworn statement is contrary to his wife's statement to the police, her statement to NSA, and his own admission as to three occasions of domestic violence. I find that he knowingly and wilfully falsified his August 25, 1998 sworn statement, and thus violated 18 U.S.C. Section 1001.

Mitigation

The Applicant offers little in the way of mitigation.

Considering all of the evidence, and in light of the fact that the Applicant was less than candid with the Government, the Applicant bears a heavy burden of persuasion in demonstrating his suitability for security clearance access.

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither 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 clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Criminal Conduct

Conditions that could raise a security concern:

1. Allegations or admission of 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:

None.

Personal Conduct

Condition that could raise a security concern:

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination;

Conditions that could mitigate security concerns:

None.

As set forth in the Directive,"[e]ach clearance decision must be a fair and impartial common sense determination based

upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

a. Nature and seriousness of the conduct and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.

e. Absence or presence of rehabilitation.

f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, 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 that are speculative or conjectural in nature.

The Government must make out a case under Guideline E (personal conduct), and J (criminal conduct); 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, with respect to sufficiency of proof of a rational connection, 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 be repeated, and that the Applicant presently qualifies for a security clearance.

Personal conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; and criminal conduct also creates doubt about a person's judgment, reliability and trustworthiness. 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, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant was less than candid with the Government as to his past physical abuse of his ex-spouse in his August 1998 sworn statement. This wilful falsification is a violation of 18 U.S.C. Section 1001. The spousal abuse and the falsification demonstrate a fairly recent pattern of criminal conduct on Appellant's part. In 1996 he battered his wife and was convicted for this transgression, and in 1998 he was less than candid with the Government about his past abuse of his former spouse, thereby violating a federal statute. Both guidelines are therefore found against the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his personal and criminal conduct. The Applicant has thus not met the mitigating conditions of Guidelines E and J, and of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines E and J.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

a. Against the Applicant.

b. Against the Applicant.

Paragraph 2: AGAINST THE APPLICANT

a. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of 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 the Applicant.

Richard A. Cefola

Administrative Judge