Date: February 27, 1997

In re:

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

Applicant for Security Clearance

ISCR OSD Case No. 96-0360

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Peregrine D. Russell-Hunter, Esq.

Department Counsel

FOR THE APPLICANT

Rudolf A. Carrico, Jr., Esq .

La Plata, MD.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on September 24, 1996. (Copy attached.) The SOR detailed reasons why the Government could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.(1) The SOR consists of allegations based on Criterion J (pattern of criminal activity) paragraph 1. Applicant responded to the allegations set forth in the SOR in a written Answer, dated October 14, 1996, and chose to have a hearing. This matter was assigned to me on November 18, 1996; but I did not receive it until November 21, 1996. On December 6, 1996, this case was set for hearing on January 3, 1997, and the hearing was held that date. The Government called no witnesses, but offered 18 exhibits. (Part of one exhibit, 15A, was not admitted into evidence; but it remains in the record for review). The Applicant's counsel called six witnesses to testify, including Applicant, and offered fourteen exhibits. (Exhibits I and L were not admitted but remain in the record for review).

The record remained open for an additional ten working days, so that the Applicant's counsel could submit his legal memorandum by January 10, 1997,(2)

and Department Counsel could then have time to submit their reply by January 17, 1997. The transcript (TR) was received on January 14, 1997.

It is my role as administrative judge to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

FINDINGS OF FACT

Applicant only admitted in his Answer that he had been arrested on the dates listed in the SOR. These limited admissions are incorporated herein as 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 additional Findings of Fact:

Applicant, a 46-year old ---------- employed by a defense contractor (Company #1) from November 1993 to present, has a secret security clearance reinstated on February 3, 1994, which had been initially granted in May 1987 when he worked for another defense contractor from 1987 to 1993 (Company #2). Exhibits 1, 2, 16 & 17. He first obtained a security clearance in 1973. TR 198.

Applicant completed a National Agency Questionnaire (NAQ) on December 22, 1993, where he revealed the following:

(1) his November 28, 1983, arrest for Public Indecency and Battery[(3)] where the charges were dismissed after he voluntarily went for counseling; (TR 199)

(2) his August 1992 arrest for Malicious Destruction of Property and Battery which was indefinitely postponed and placed on the stet docket after he attended Batterer's Group Therapy;

(3) his November 6, 1993, arrest for domestic violence and battery which at that point was set to go to trial on December 23, 1993. Exhibit 2 at 3-5.

A Ph.D. psychologist reported that he voluntarily came to her for therapy related to his 1983 arrest for indecent exposure and battery on December 2, 1983, and that she met with for seven sessions to address "control of his compulsive sexual behavior as well as the breaking up of his sexual patterns of responding to stress." She did not believe the incident including battery. She determined he had a very good prognosis as he admitted his behavior. Exhibit 6, TR 251-255. In April, 1984, she summarized his treatment as consisting of sixteen counseling sessions and that he never missed an appointment. She recommended that Applicant terminate his counseling because he was accepting a position in another state. Exhibit C.

With respect to his August 1992 arrest, treatment center #1 confirmed that he was referred by the state's attorney on November 23, 1992, for domestic violence services and that he did participate in the Domestic Violence Batterer's group weekly from December 8, 1992, to January 16, 1992 (*sic.*) and successfully completed the program. TR 203-204; Exhibit D. Applicant then sought therapy at treatment center #2 on January 14, 1993, for counseling on his difficulty in managing his anger. The psychiatrist diagnosed him with 309.40 adjustment disorder; Applicant dropped out but needed further therapy. Exhibit 8. State district court records referenced two incident complaints, one in January 1992 and one in July 1992, by his estranged girlfriend that led to his arrest on August 29, 1992, for battery and property destruction. The January 1992, incident involved his girlfriend (who later became his wife) who went to her daughter's birthday at her former husband's house and staying too long which angered Applicant; she waited seven months to file charges. TR 201-202, 228-230. There was another incident in July 1992 when Applicant asked her to leave and grabbed her arm to escort her out of the house and her watchband fell off and broke. TR 203, 230-232. The records confirm his statement that the case was placed on the stet docket and continued until he completed treatment. TR 232-236; Exhibits 7-8 & A.

In June 1993 he married his girlfriend, and their daughter was born in July 1993, but their problems in the relationship continued. TR 205, 237. On October 6, 1993, he was again arrested on two charges of battery on his wife and 17 year-old step-daughter. TR 205-207, 237-238; Exhibit 10. Applicant was given 120 days jail time suspended and eighteen months probation on December 2, 1993, for the offense of battery. TR 238-239; Exhibit 11.

Although they were no longer living together, on December 20, 1994, there was another incident of battery against his wife. TR 208- 211, 239-240; Exhibits 12 & 13. The complaint describes Applicant as having "put victim in full Nelson and pushed her out door" and as having "placed her a hold described as a full Nelson, and pushed her out the door."

[(4)]

Exhibit 12. Applicant in his Statement to DIS on November 5, 1995, admitted he put his wife "in a full Nelson, which I considered a minimal force alternative, and walked her out of the front door." Exhibit 14. He was arrested in January 1995 on a charge of battery and on ay 4, 1995, was found guilty and in violation of probation on his prior charge of battery. TR 212. He was sentenced to ten days in jail for the 1994 incident and to 120 days for the violation of probation. He appealed. Exhibits 14 and 15 at pages 9, 13, 17-20. After the circuit court heard the matter on February 5, 1996, the outcome on appeal was that the battery charge was dismissed, but Applicant was found guilty of violation of probation and sentenced to sixty days, thirty in a detention center and thirty days on home detention which were to be completed on April 2, 1996, with no further probation required.

Applicant during this period remained in the employment of Company #1, performed his engineering services in support of the federal contract, and kept his supervisor and the FSO advised of the situation. Exhibit 17.

While he was arranging bail on the 1994 battery incident on May 4, 1995, he was served papers accusing him of threatening arson and communicating a threat against a state official. Exhibits 14 and 15. The arrest records indicate that the wife applied for a statement of charges on March 21, 1995, because the Applicant allegedly threatened to blow up the courthouse and allegedly said that "If that judge says that [his child] goes to a foster home, he's dead. I guarantee he'll be dead before he utters another word."[(5)] Exhibit 15 at 1-2. This disputed conversation between Applicant and his wife was taped by her without his permission. TR 214; Exhibit B.

I find Applicant credible in his consistent position that he had does not recall that disputed conversation exactly and that he did not intend a real threat. During that period he and his wife were having many conversations, some of them quite heated. TR 220, 256-259. For example, his memory that his wife called him[(6)] was supported by her divorce deposition admission. He did concede that the disputed telephone conversation involved a discussion of the custody of his daughter and whether or not the court might put her in a foster home or put her up for adoption and deny him visitation rights. He offered a reasonable explanation that his anger was not at the judicial system, but at his wife who pushed his buttons in this sensitive area. TR 220-221, 225. Indeed, Applicant has not actually listened to the tape of this conversation as a copy of the actual tape was never produced to Applicant or his lawyer. TR 213-214. [The tape was not offered in evidence.]

Further adding to my assessment of Applicant's credibility is that his October 5, 1995, Statement to DIS, was consistent with his testimony and the other evidence at the security hearing. Applicant explained that his estranged wife illegally recorded a telephone conversation in February 1995 which led to his arrest for arson and threats. Exhibit 14. Applicant told DIS that he had "no recollection of saying I was going to blow up the courthouse or shoot the judge; however, the telephone call does indicate I made such threats." He stated he was not a terrorist and would "not know how to make a bomb or blow up a building." He admitted that his "ex-wife is prone to make me angry at which time I blow up and run off at the mouth; however, I am not one to follow my comments up with action." Exhibit 14 at 1-2.

Significant contemporaneous evidence indicates that the alleged threat was not a real threat:

- While the wife allegedly taped the alleged threat in February, 1995, she did not apply for a statement of charges until March 21, 1995. Further, I find her not credible as she has admitted she was not truthful with respect to other actions that adversely affected her husband. When questioned about an adverse telephone call made to the FSO at Applicant's place of employment, his wife first said it was made by someone in her support group and latter admitted she herself had made the call and had not been truthful earlier in her testimony under oath. Exhibit A (page 92-3 of the deposition).[(7)]
  where Applicant's battery hearing was being held and "remained there until the cases was resolved" before arresting Applicant on the threats charges. Further, this investigator did not advise the master in the domestic relations case of these threats, but did advise court security officers. Exhibit 15 at 7-9. with his wife regarding his case for limited divorce, custody and visitation. While the evidence is not clear as to whether or not the domestic relations master was aware of the alleged threat, it is clear but the master had "no problem" with Applicant. TR 222. The following colloquy occurred:

  The Court . . .I'll tell you man to man. I've got no problem with you. None whatsoever.

Applicant I have no problem with you either, sir.

The Court: Never thought you did. Alright. You have a good day.

Exhibit G[(9)] at 3.

- Ultimately, Applicant's threat and arson case was placed on the stet docket on August 22, 1995. TR 222, Exhibits 14, 15 at 4. The state entered a nolle prosequi on December 12, 1996. TR 223, Exhibit H.

  Consequently, I find this alleged threat in SOR subparagraph 1.e. was not a "real threat."

  In a June 27, 1995, deposition Applicant's wife stated Applicant had had no further contact with his wife since May 4, 1995, except when he was in court on the custody dispute and has made no further attempts to contact her since that time. Exhibit 18 at 9-10.

  Applicant got a judgment of Absolute Divorce from his wife on September 26, 1996, and his wife was granted custody of their daughter. TR 223, Exhibit J. Since they have gone their separate ways, Applicant does not anticipate further difficulties with his wife. TR 248.

  Applicant is being treated by a psychiatrist who took over his treatment from another doctor on October 2, 1996; this doctor finds him stable at this time and without symptoms of any major psychiatric disorder with low probability of recurrence or exacerbation. Exhibit K.[(10)]

  A special agent the U.S. Naval Criminal Investigative Service testified that Applicant aided in a counter-intelligence investigation for two years where they relied on Applicant on a regular basis; his trustworthiness was never in question. Applicant also aided a second investigation during the 1993-94 period. The agent is also a neighbor of Applicant's and never has seen Applicant reflect any hostility towards law enforcement personnel. TR 95-99. The agent was generally aware of the recent criminal charges against Applicant from newspaper articles and to a limited extent from Applicant as he sees him every three to six weeks, but he does not know all the details. TR 100-103.

  An electronics engineer with the government knows Applicant since he supports his program. He has known Applicant for three or four years since approximately 1993 and on fifty or sixty occasions has gone on week-long business trips with him. This witness finds Applicant a hard-worker with a lot of responsibility who has never made a false statement to him and finds him to be a person of integrity. TR 105-110, 114.

  The vice president and program manger in charge of engineers services for company #1 who is Applicant's supervisor attests that he has had daily contact with Applicant since 1994, except when he is on travel. His supervisor finds him business-oriented and professional, and this opinion was not affected by the criminal charges against Applicant which have largely been dismissed. TR 119-130.

  Company #1's FSO for ten years, who has won a special award for the company security program, attests that Applicant after he was hired fully disclosed his past arrests to her even though he was not required to do so as there is a privacy section in the NAQ form to disclose this information. He subsequently continually updated her on the turmoil with his wife. After there were adverse legal developments, she filed adverse information reports on the new incidents after the Applicant informed her of them.[(11)] She found that he has complied with the requirements of the Industrial Security Manual and now the new manual, the NISPOM and believes him to be trustworthy and honest even taking into account his criminal charges as she believes that they involve extenuating circumstances. TR 131-146. She considers Applicant trustworthy as while he has had a clearance at Company #1 he has never compromised or potentially compromised any classified information. TR 154. If she had believed Applicant was a threat, she would have taken further corrective action. TR 155-156.

The co-founder and chairman of the board of directors of Company #1 attests that Applicant has been an employee for a little over three years and his contacts with him have been varied. Initially, Applicant worked on a technology transfer issue of interest to the chairman so he saw Applicant frequently. More recently he sees Applicant only on a periodic basis, a few times a month. The chairman finds Applicant to be professional in the workplace and easy to deal with. TR 159-173. At the time of the DIS interview the chairman had concerns about the reported threats Applicant had made. TR 178-184. But the chairman is now willing to endorse Applicant for a security clearance as Applicant is no longer under the stress that was there during the time of his divorce. TR 189-190.

A co-worker who has known Applicant since April 1994 professionally and socially attests Applicant has supported government clients with extreme consideration and loyalty and has always conducted himself in a professional manner. She finds he has shown himself to be both trustworthy and reliable while working on classified projects. Exhibit M.

A supervisor from company #2 who knew of his remarriage found that Applicant's wife would call Applicant numerous times a day which adversely affected his performance review. However, Applicant always maintained his professionalism, worked hard, and never lost his temper. He judges that any abusive behavior that Applicant was charged with was not "in character." He did not believe that Applicant would make threats against law enforcement personnel except in hyperbole in an emotional argument. This former supervisor has complete trust in Applicant and would be proud to have him work for him again. The supervisor has 21 years experience as an active duty and reserve officer and ten years as a manger of a service corporation. He would trust Applicant to comply with the laws and security regulations required and be loyal to the United States of America. Exhibit N.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

Criterion J - Criminal Conduct

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:

(3) the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

(4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

(5) there is clear evidence of successful rehabilitation.

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not

clearly consistent with the national interest to grant or continue access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criterion J - Criminal Conduct

Having considered the evidence of record in light of the appropriate legal precepts and facts, I conclude that the Government established its case with regard to criminal conduct, Criterion J, with respect to SOR allegations 1.a through 1. d. as Applicant's conduct involved a history or pattern of criminal activity which creates doubt about his judgment, reliability and trustworthiness. By his criminal acts, he falls within conditions that could raise a security concern and may be disqualifying. In his case they include 1 and 2.

While SOR allegation 1.a. (the November 23, 1983, incident which involved him masturbating before a 16-year-old girl) is dated, it retains its security significance as his battery continued as part of a pattern. While these 1983 charges were nolled after treatment, he has subsequently been again charged with battery against his girlfriend, who later became his wife, in 1992 (SOR 1.b), 1993 (SOR 1.c), and 1995 (SOR 1.d). Again in 1992 these battery charges were placed on the stet docket after he completed treatment in a Domestic Violence Batterer's weekly group in January 1993. In June 1993 he married his girlfriend and their daughter was born in July 1993. Yet in October, 1993, he was again arrested on two charges of battery against his wife and 17 year-old-step daughter. On December 2, 1993, he was given eighteen months of probation and his 120 days of jail time was suspended. But one year later in December 1994 he again was charged with battery when he put his wife in a "full Nelson." While this 1994 charge was ultimately dismissed, he was found guilty of violation of probation and was sentenced to sixty days to be completed on April 2, 1996, with no further probation required.

While these arrests were all misdemeanors, since he was last arrested in 1995, he does not meet the strict mitigation standards of (1) the criminal behavior was not recent or (2) the crime was an isolated incident. On the other hand, during this 1996 period of sixty days "detention," Applicant continued to work in support of his company's federal contact and the company FSO did not think him a threat to national security despite the adverse legal developments as she attributed his problems to his turmoil with his wife whom he was in the process of divorcing in 1995 and from whom he ultimately was divorced in September 1996. The FSO did file adverse information reports as required. This FSO for ten years has won an award for the quality of her security program. Thus, I give credence to her assessment that extenuating circumstances with his wife led to this repeated unlawful conduct.

Her positive views on his trustworthiness were echoed by a special agent of the U.S. Naval Criminal Investigative Service who found him trustworthy and reliable in two counter-intelligence investigations and is also his neighbor, by a federal engineer who has found him to be a person of integrity in the four years Applicant has supported his program, by his supervisor who has found Applicant business-oriented and professional, by a co-worker who has known him since 1994, and by the contractor's co-founder and chairman of the board of directors who now endorses Applicant for a security clearance as Applicant is no longer under the stress that was there during the time of his divorce. These five character references testified and were subject to cross-examination by the Government yet remained firm in their assessment of Applicant's current trustworthiness and suitability for access to classified material. At the work place Applicant demonstrated none of the problems that he had at home as he was a hard-working responsible

and reliable professional who has never compromised classified information. A previous supervisor also has complete trust in Applicant who always maintained his professionalism, worked hard and never lost his temper.

Thus, in the light of this positive character evidence, I weigh whether or not Applicant's criminal conduct can be mitigated under the standards of (3), (4), and/or (5). While clearly Applicant's wife did not "coerce" him into battery, the mitigation guideline also allows mitigation for a person was was "pressured" into committing illegal acts when those pressures are no longer present in that person's life. Evidence shows that he did react adversely to the pressures of that relationship as all battery charges in the 1990's involved her and her stepdaughter. Since his separation in 1995 and his 1996 divorce, he has had no further criminal charges brought against him. Thus, I conclude that with no further criminal charges that "those pressures are no longer present in that person's life" and that he falls within the terms of mitigation guideline (3). Similarly, under (4) while he did voluntarily commit the criminal acts of battery, the factors leading to these violation are not likely to recur. The "and/or" connector in guideline (4) makes clear that Applicant need meet only one prong of that test, and I find that he does so as since his separation and divorce the factors leading to these violation are not likely to recur.

Under standard (5) there must be clear evidence of successful rehabilitation, but this mitigation standard does not detail for how long a period a time a person must have demonstrated "successful rehabilitation." Applicant has documented that he remains in treatment with a psychiatrist who views him as now stable and without symptom of any major psychiatric disorder with low probability of recurrence or exacerbation. While this doctor's assessment was submitted in a document and his views were not tested under cross-examination, his assessment is a strong indicator of successful rehabilitation as Applicant's uncontrollable anger with his wife led to his repeated charges of battery. His last criminal conduct *vis a vis* his wife was in December 1994 (though legal challenges led to his detention in 1996). Applicant's character references are uniform in their praise of him, his professionalism, and his trustworthiness. Thus, looking at conditions that could mitigate security concerns, I conclude that Applicant now falls within (3), that under (4) that the factors leading to his criminal violations are not likely to recur, and that there is clear evidence under (5) of successful rehabilitation. Thus, after also considering the Adjudicative Process factors, I find for the Applicant under Paragraph 1 and subparagraphs 1.a. through 1.d.

With respect to subparagraph l.e., the Government only established that Applicant was charged with (1) Arson Threat Explode, a felony, and (2) Threats -- State Officials and arrested. The allegation acknowledges that the charges were placed on the stet docket. However, this allegation further asserts that Applicant "made threats against police officers and a county judge and had threatened to blow up the County Court House" which Applicant has denied -- in his answer, in his testimony, and on cross-examination. At most Applicat admitted that his "ex-wife is prone to make me angry at which time I blow up and run off at the mouth; however, I am not one to follow my comments up with action."

While for security clearance purposes, I may consider any criminal conduct even if a person was not formally charged (of course, here he was charged), clearly the ultimate disposition of a matter sheds light on the seriousness with which it is viewed by the criminal justice system and can inform the assessment of the seriousness with which such conduct should be viewed in a security clearance context. Viewing all of the facts in the record, I do not find that the Government established its case with respect to SOR allegation 1.e. While the government has argued in its legal memorandum that they have established their case by the admissions of Applicant's counsel, as I discuss fully in my Findings of Facts, I do not conclude that his remarks in his opening and in arguments over admissibility of exhibits meet the standard of a clear and unambiguous admission of fact made in an opening statement or argument sufficient to eliminate the Government's need for further proof.

While the statements in the Charging Document are serious and inflammatory, Applicant consistently has denied making a real threat and did not remember making the precise statements alleged by his wife in the charging document both to DIS, in his Answer,[(12)] and on direct and during vigorous cross-examination. While Applicant did concede that the disputed telephone conversation involved a discussion of the custody

of his daughter and whether or not the court might put her in a foster home or put her up for adoption and deny him visitation rights, I conclude that he offered a reasonable explanation that his anger was not at the judicial system, but at his wife who pushed his buttons in this sensitive area. Indeed, Applicant has not actually listened to the tape of this conversation as a copy of the actual tape was never produced to Applicant or his lawyer.

Further adding to my assessment of Applicant's credibility is that his October 5, 1995, Statement to DIS, was consistent with his testimony and the other evidence at the security hearing. Applicant explained that his estranged wife illegally recorded a telephone conversation in February 1995 which led to his arrest for arson and threats. Applicant told DIS that he had "no recollection of saying I was going to blow up the courthouse or shoot the judge; however, the telephone call does indicate I made such threats." He stated he was not a terrorist and would "not know how to make a bomb or blow up a building." Further, significant contemporaneous evidence indicates that the alleged threat was not a real threat:

- While the wife taped the alleged threat in February, 1995, she did not apply for a statement of charges until March 21, 1995. Further, I find her not credible as she has admitted she was not truthful with respect to other actions that adversely affected her husband.

- The local investigator's report documents no action to arrest Applicant until May 4, 1995, when he went to the court where Applicant's battery hearing was being held and "remained there until the cases was resolved" before arresting Applicant.
  with his wife regarding his case for limited divorce, custody and visitation, the master had "no problem" with Applicant. [As detailed in my Findings, I do not accept Department Counsel's argument that this colloquy proves 1.e.]

  Further, after reviewing all of the evidence on this matter and the state and federal law, I conclude that this alleged threat in SOR subparagraph 1.e. was not a "real threat" which is the legal standard in the state where Applicant was charged. Indeed, a charging document standing alone does not establish that Applicant committed criminal conduct. Clearly, the state fully evaluated thei evidince before Applicant's threat and arson case was placed on the stet docket on August 22, 1995; and ultimately, the state entered a nolle prosequi on December 12, 1996.

  Further, on December 30, 1996, the prosecution and court records on this matter were ordered to be expunged. Consequently, while the government argues that one may take adverse personnel actions based on proven criminal conduct even if the person is acquitted or the charges are dropped or dismissed, in this case we do not have proven criminal conduct. A mere charge and arrest, when the conduct is denied by the Applicant and not established by independent evidence, is not a basis for concluding that he engaged in criminal conduct: 1.e was not proven by Applicant's DIS statement or testimony as he never admitted making the statements alleged in the charging document. The fact that records may be expunged is not irrelevant in industrial security procedures, as governemnt counsel aruges, when, as here, that expungement occurs after the state has entered a nolle prosequi and no evidence has been offered to prove that Applicant engaged in the disputed criminal conduct.

  Consequently, I find for the Applicant under Paragraph 1 and subparagraph 1.e.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1.Criterion J: FOR APPLICANT

Subparagraph 1.a. For Applicant

Subparagraph 1.b. For Applicant

Subparagraph 1.c. For Applicant

Subparagraph 1.d. For Applicant

Subparagraph 1.e. For 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.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), and as amended by Change 3 dated February 16, 1996.

2. The Government argues in their response that while the Applicant's counsel memorandum of law was dated January 9, 1997, they did not receive their copy until January 13, 1997, and that therefore it should not be considered as the counsel should have sent it by facsimile machine. However, the Government does not assert they were disadvantaged in their response by having less time to respond, nor did they come to me and seek additional time to respond. While the transcript does contain my suggestion that the Applicant's submission be sent by facsimile, I did not order that method of submission. Thus, I conclude that Applicant's counsel acted in good faith to meet his obligation in a timely manner by timely mailing it on January 9, 1997, especially as at the time of his submission, he would not yet have had access to the transcript. TR 295-296. The fact that he had a facsimile machine does not require him to use it.

3. This 1983 arrest was also detailed in his May 21, 1984 Personnel Security Questionnaire (PSQ) which showed the disposition as Charges Dismissed on May 2, 1984. Exhibit 1. While his DIS Statement of August 24, 1984, made no adverse admissions (Exhibit 3), his DIS Statement of September 7, 1984, did admit that while he was in the car with the girl, he did masturbate on impulse. Exhibit 4. The police department categorized the incident as "indecent exposure." Exhibit 5.

4. Applicant disputes that the incident involved a "full Nelson" (TR 210-211, 240-244), but I find this DIS Statement admission which echoed the language of the charging document more credible; however on appeal this battery charge was dismissed on February 5, 1996.

5. I do not accept Department Counsel's assertion that Exhibit 15 proves SOR allegation 1.e. as the charging document does not establish criminal conduct. Nor do I accept the government's assertion that 1.e. was proved merely by Applicant's attorney's opening statement that "statements, I believe, . . . were made by [Applicant], but they were not real threats. He doesn't know how to blow up anything and they were just threats made out of frustration or anger." TR 23-24. These comments in opening statement are general, not specific; indeed, this attorney while admitting Applicant made some statements, denied that his client made "real threats." This opening comment was preceded by his noting that "they had a child in July of' '93" and that the wife had stated that "the judge would put this child in foster care." Thus I find this attorney's subsequent comment unclear: "these statements [not further identified] were not real threats, but the statements [not further identified], I believe, if you get to that point were made by [Applicant]." These vague opening assertions I do not consider as

sufficient evidence or as attorney admissions that prove the 1.e. allegation that Applicant "made threats against police officers and a county judge and had threatened to blow up the County Court House" when Applicant consistently denied making a real threat.

6. She admitted in a divorce deposition that she called him, not that he had called her as she told the law enforcement officer at the time. TR 225. His wife admitted that she taped a telephone conversation with her husband without his consent on February 21 or 22, 1995. Exhibit B (pages 112-114.of the deposition).

7. While the Government argued against the relevance of Exhibit A, I found it relevant as her credibility is an underlying issue in SOR 1.e. since the actual taped conversation is not in evidence. While in argument over the admissibility of Exhibit A, Applicant's counsel again said that Applicant made "the statements" (TR 68), I do not find this comment meets the legal standard of a clear and unambiguous admission of fact binding on his client which eliminates the need for further proof.

8. Government's objection that this document was not relevant was overruled and it was admitted into evidence. TR 83-84.

9. Government objected to the admission of Exhibit G as there was no mention of any threat in this exchange of conversation which could have taken place with regards to anything. This objection was overruled and the document was admitted. TR 81-82. In Department Counsel's Response to Applicant's emorandum of law, Department Counsel argues that "Even if one accepts that the official was discussing the threat with Applicant, this only serves to prove that Applicant in fact made the statements alleged." Since Applicant never admitted making the statements alleged in the charging document (Exhibit 15 at 1-2) despite vigorous cross-examination and since Department Counsel did not produce the audio tape to support allegation 1.e., I do not find that Exhibit G proves 1.e.

10. Government objected to this document on the grounds of relevance, but the objection was overruled and the document admitted. TR 88.

11. Company #1 did file an Adverse Information report on May 15, 1995, regarding his battery conviction and warrant for threat and arson and linked these events to his "messy divorce" on which Applicant had briefed the Facility Security Officer (FSO) and his supervisor. Exhibit 16. The FSO testified that "He told me he threatened to blow up the courthouse or something to that effect." TR 147.

12. The Government was put on notice of his denial by this Answer but did not produce the audio tape, police or court officials, or his former wife to support allegation 1.e.