DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 19-03329
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: *Pro se*

09/20/2021

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Decision

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct and Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On February 13, 2020, the Defense Counterintelligence and Security Agency (DCSA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct and Guideline F, financial considerations. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on March 26, 2020, and requested a hearing before an administrative judge. The case was assigned to me on July 2, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 26, 2021,

scheduling the hearing by the Defense Collaboration Services on August 17, 2021. I convened the hearing as scheduled. The Government offered exhibits (GE) 1 through 6. Applicant objected to the relevance of GE 3. The objection was overruled and GE 1 through 6 were admitted into evidence. Applicant testified and offered Applicant Exhibits (AE) A through K. These exhibits were admitted into evidence without objection. The record was held open until August 31, 2021, to permit Applicant to submit additional exhibits. He did not submit additional exhibits, and the record closed. DOHA received the hearing transcript on August 24, 2021.

Procedural Issues

Department Counsel moved to withdraw SOR ¶¶ 2.a, 2.b, and 2.d. There were no objections and the motion was granted.

Findings of Fact

Applicant admitted the allegations in the SOR ¶¶ 1.a through 1.d, 2.c, and 2.e. He denied the allegations in SOR ¶¶ 1.e and 2.f. As noted above SOR ¶¶ 2.a, 2.b, and 2.d were withdrawn. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 45 years old. He married in 2002 and divorced in 2009. He has two children from the marriage, ages 18 and 15. He remarried in 2015 and divorced in 2018. There are no children from the marriage. He is a high school graduate and has earned some college credits. In 1997, he enlisted in the military and served until his retirement in the paygrade E-6 in 2017 with an honorable discharge. Applicant was unemployed from February 2017 to April 2017 and from August 2017 until March 2018. He has been employed by a federal contractor since March 2018. (Tr. 24-28; GE 1)

While in the military, Applicant served in the medical field and supervised other airmen. In 2016, he was the subject of a criminal investigation based on accusations by female patients that he unlawfully touched one patient's breast; unlawfully touched another patient's buttocks, inner thighs, and pelvic area with his hands; and unlawfully touched a third patient's breast and legs with his hands, violations of Article 128 of the Uniform Code of Uniform Justice (UCMJ)-assault and battery. He was also investigated for violations of Article 92 on divers occasions in 2015 for: knowing dereliction of duty for willfully failing to use a chaperone during the exposure and examination of sensitive areas of the body of female patients, which was his duty to do; willfully failing to document medical procedures, which was his duty to do; willfully failing to refrain from exceeding his authorized roles and privileges, by accessing Electronic Protected Health Information (EPHI), in violation of DoD Instructions, as it was his duty to do; and willingly failing to wear disposable nonsterile gloves during physical contact as was his duty to do. (Tr. 54GE 4)

After completion of the investigation, in August 2016, Applicant was advised in writing by his commander that he was considering whether Applicant should be punished

at an UCMJ Article 15 nonjudicial punishment proceeding. Applicant was afforded a right to consult with a lawyer before making a decision and have the lawyer assist him throughout the proceeding, and he was provided an appointment to meet with a lawyer. In writing, Applicant acknowledged he consulted with a lawyer; waived his right to a court-martial and accepted nonjudicial punishment; attached a written presentation; and requested a personal appearance. As part of the written presentation, Applicant stated he was accepting the Article 15, but was not admitting guilt. He was charged with three specifications of violation of Article 128, assault and battery, and four specifications of violation of Article 92, dereliction of duty, as detailed in the above paragraph. The commander's findings noted that after considering all of the evidence, including any matters Applicant presented, he found Applicant did not commit the Article 128 offenses, but violated all the Article 92 offenses, except the failure to wear disposable gloves. The commander imposed forfeitures of $1,860 pay per month for two months, suspended until December 2016, at which time it would be remitted; 20 days extra duty; and a reprimand. (Tr. 98-102 GE 4; AE A)

The written reprimand noted that, as a noncommissioned officer, Applicant's blatant disregard for failing to document outpatient evaluations and treatment and accessing EPHI without authorization was in violation of written instructions, which was unacceptable. He further stated that Applicant was responsible for those appointed under his supervision to follow all written instructions, and he cannot be trusted to ensure others are following written instructions when he did not follow them. Applicant's actions seriously affected the trust placed in him by his supervisors and his unit. Applicant chose not to appeal the commander's decision. The Article 15 was reviewed through the appropriate legal requirements. Applicant signed the document acknowledging he had been informed that the Article 15 would be filed in his service Unfavorable Information File. (GE 4)

Applicant completed a Questionnaire for National Security Positions (SF 86) in July 2018. Section 15-Military History asked, "In the last 7 years, have you been subject to court-martial or other disciplinary procedure under the UCMJ, such as Article 15, Captain's mast, Article 135 Court of Inquiry, etc.?" Applicant responded "No." (GE 1)

In Applicant's answer to the SOR, he stated that his failure to disclose his Article 15 was due to an administrative oversight. He stated he was told by his attorney that:

> I had won my case on the Article 15 but to the items I pleaded guilty to (subparagraphs a-c), I would be reprimanded by the command. In about August 2016, I was called in to the (sic) see commander and he reprimanded me and gave me the additional duty as punishment. It was my understanding that this was not a part of the Article 15 proceeding since I was told that I won my case by my attorney, but rather a command directed Letter of Reprimand. Soon after my duties were complete, I retired in February 2017. I never questioned the fact that the offenses were absorbed in the Article 15 until I was questioned by OPM investigator for not answering correctly. Since I thought I was not punished under Article 15, I

answered "no" to the statement in Section 15-Military History. (Answer to SOR)

Applicant told the government investigator that he did not disclose his Article 15 on his SCA because he did not think he was required to do so, because he never received any article or forfeitures of pay because the investigation closed with no incident. (GE 2)

Applicant reiterated his explanation at his hearing when he testified that he failed to disclose his Article 15 due to ignorance. He stated that after his hearing his lawyer congratulated him on winning the case. His first sergeant reminded him that he was still being punished for the Article 92 violations. Applicant testified that he did not see the nonjudicial punishment forms and never saw the Article 92 offenses. Documents show Applicant signed the forms and that all of the charges were detailed in the forms. The Article 128 specifications were crossed out as was the one Article 92 specification. The remaining three Article 92 specifications were not crossed out and were the offenses for which he was punished for committing. The reprimand by the commander also addressed his violations of Article 92. Applicant testified that he completed his 20 days of extra duty, but the forfeitures were not imposed. His commander suspended the forfeitures. (Tr. 38-44; GE 4)

Applicant testified that he did not disclose his Article 15 on his SF 86 because he was told by his commander that it would not remain on his record. Applicant believed it was to last for two years, or be vacated, if separated, retired, or he changed permanent duty stations. His assumption was that because he was retired it would not be part of his record. He did not think the Article 15 existed anymore. He testified he marked "no" because he did not realize that the Article 92 was in the Article 15." He further testified his lawyer told him that he would still receive a reprimanded. He testified, he assumed he was being reprimanded for the other things that he did, but he didn't realize that was still part of the Article 15 paperwork. When asked what he thought he received 20 days of extra duties for, he stated for the Article 92 violations, but he did not think that was part of his Article 15 because he believed he won the case. (Tr. 36-44, 106-109; GE 4)

SF 86 Section 13A-Employment Activities requires applicants to chronologically disclose their past employment. After each employment period, it asks: "For this employment, in the last seven (7) years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy." Applicant answered "no" to every period of employment, including his active duty service. He did not disclose his 2016 reprimand or disciplinary action from his Article 15. (GE 1) (Applicant's failure to disclose this information under Section 13A was not alleged in the SOR and will not be considered for disqualifying purposes. It may be considered when analyzing Applicant's credibility, in the application of mitigating conditions, and in a whole-person analysis.) (GE 1)

Applicant testified that he answered "no" in this section because he believed there was nothing on his military record. He stated he did not think it still existed, and it was shredded. This was the same reason he failed to disclose the Article 15 under the military

history section of his SF 86 because he did not believe it was still part of his record. Applicant testified that he was not trying to hide anything when he failed to disclose his Article 15. I did not find Applicant's testimony credible. He had been in the Air Force for 19 years and in a supervisory position. He was under investigation for months. He was afforded the right to refuse Article 15 and have the charges prosecuted at a court-martial. In writing, he accepted Article 15 rather than face possible charges at a court-martial. Although, he may have "won" on the more serious charges of assault, he was reminded by his first sergeant that he was still being punished for the remaining Article 92 violations. He received punishment of extra duties, forfeitures that were suspended, and a reprimand. His testimony and explanations are disingenuous and not credible. I find he intentionally failed to disclose his Article 15 on his SF 86 (Tr. 106-109; GE 2, 3, 4)

Applicant testified regarding the Article 92 violations that he should have had a female chaperone present when he was with female patients, which was required by command protocol. (SOR ¶ 1.a) He said there were often not enough female staff. He believed the reason for the protocol that required a female chaperone to be present was to protect the provider, not the patient. He said he accepted his failure to do so and learned from it. He pleaded guilty to this offense at his Article 15. (Tr. 30, 65-96; GE 2, 4)

Applicant pleaded guilty to the offense alleged in SOR ¶ 1.b that he willfully failed to document medical procedures. He explained this charge was vague, but he pleaded guilty because he figured he missed documenting something, but was never provided anything specific. He stated many times there are things said between a doctor and a medical technician that are not documented. He stated that he was taught to tell the doctor what he may have done, so they do not duplicate things. He admitted he failed to document certain things. (TR. 30-32; GE 4)

Applicant pleaded guilty to accessing EPHI for himself, his wife, and his son against regulations. He testified this was a common practice among medical personnel and it was just easier than having to go through the process to request the records. He concurred he should not have done this, and it was against regulations. He failed to follow the correct procedures. (Tr. 32-35, 96-98; GE 4)

Applicant attributed his financial problems to periods of unemployment. He stated that none of his delinquent debts were impacting him because they were old debts. The SOR alleged three delinquent debts that are corroborated by Applicant's admissions and credit reports from November 2019 and October 2018. The delinquent debt in SOR ¶ 1.c ($4,221) was for a military credit card and is in collection. Applicant's retirement pay is being garnished to pay this debt. The current balance is approximately $1,645. (Tr. 44-46, 109-111; AE I)

The debt to a cable communications company in SOR ¶ 2.e was for failure to return equipment. Applicant testified that he ex-wife returned the equipment and the debt is satisfied. It is no longer on his credit reports. (Tr. 46-47; AE F, G, H)

The delinquent debt owed in SOR ¶ 2.f is for a loan. In Applicant's March 2020 answer to the SOR, he stated the account would be mediated and paid in full once he paid the debt in SOR ¶ 1.c. He disputed the amount he owed. Applicant testified that he settled the debt in court and the creditor agreed to accept $150 a month and it was resolved in November 2019. He stated that he made payments beginning in 2015 and for four years and received a letter telling him the debt was settled in full. Documents support that the creditor filed a lawsuit against Applicant in September 2015 and a judgment was entered in favor of the creditor in October 2017. Applicant did not provide proof he had a settlement agreement, or made monthly payments, or that the debt is resolved. The record was held open to allow him to provide supporting documents. He did not. The debt is not resolved. (Tr. 47-53 111-116; Answer to SOR)

Applicant provided a copy of a budget made through an online credit counselling service that he attended. He provided copies of enlisted performance evaluations where he was consistently graded as above average or truly among the best. He provided a list of his medals from his military service. He provided character letters from 2016 that describe him as professional, dedicated, a role model, a leader, honorable, a person of integrity, hard-working, respected, dedicated to duty, trustworthy, loyal, honest, confident, competent, efficient, compassionate, responsible, friendly, and courteous. (Tr. 120; AE C, D, E, K)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

> (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

I have considered all of the evidence and conclude that Applicant deliberately failed to disclose on his SCA that he had a UCMJ Article 15 proceeding while on active duty. At his Article 15 proceeding he was found guilty of dereliction of duty on divers occasions for willfully failing to use a chaperone during the exposure and examination of sensitive areas of female patients; willfully failing to document medical procedures and willfully failing to refrain from exceeding his authorized role and privileges, by accessing EPHI in violation of DoD regulations. The above disqualifying conditions apply.

The following mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on the facts:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant repeatedly violated regulations for medical personnel required to protect both the provider and the patient. His response that it was common practice does not excuse him from abiding by rules and regulations. His explanation that frequently female chaperones were unavailable, also does not bode well for failing to comply. Obviously regulations are in place for a reason and personnel that choose to abide by those that they choose and ignore others that are inconvenient is seriously misguided and such

flouting defeats the purpose of having rules and regulations. Applicant was a senior experienced medical technician who was cavalier in his attitude. Accessing medical records, regardless of who they belong to is a serious violation. Although, it is unlikely that Applicant would make the same mistakes regarding complying with the specific regulations that are the basis of the allegations, I am not convinced that his behavior is unlikely to recur regarding other regulations that may be inconvenient. None of the mitigating conditions apply to Applicant's dereliction of duty violations.

Applicant was an experienced medical technician with 19 years of service who had worked in supervisory roles. He was aware that he was being punished for violations of the UCMJ after a lengthy investigation. He was given extra duties, a reprimand, and forfeitures that were suspended. It is disingenuous to believe that he did not realize this was part of his Article 15. The documents support he was aware his conduct was being punished under this Article. In addition, his defense counsel may have told him that the most serious offenses had been dismissed, so it was a "win," but the other violations remained. Applicant testified that he did not believe the Article 15 was part of his record, so it was unlikely to be discovered. He also did not disclose that he had received a reprimand and disciplinary action in his SCA, which was not alleged, but corroborates that he did not plan on disclosing the information because he did not believe there was a record. Looking for ways to circumvent disclosure requirements raises serious questions. There is no evidence that he sought legal advice about whether this information should be disclosed in his SCA. I find none of the above mitigating conditions apply.

Guideline F: Financial Considerations

The security concern relating to the guideline for financial considerations is set out in AG ¶ 18:

> Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides conditions that could raise security concerns. The following are potentially applicable:

(a) inability to satisfy debts;

(c) a history of not meeting financial obligations.

Applicant has three delinquent debts that began accumulating in approximately 2015. There is sufficient evidence to support the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

> (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
>
> (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and
>
> (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant attributed his financial problems to periods of unemployment. His retirement pay is being garnished to repay the military credit card account (SOR ¶ 2.c). In his answer to the SOR, he stated he would address the debt in SOR ¶ 2.f for a delinquent loan when he completed paying the military credit card. At his hearing, he testified that he had made payments for four years and paid the loan in SOR ¶ 2.f, which went to judgment in 2017. These are contradictory statements. He was afforded an opportunity to provide some proof the debt is resolved. He did not submit any. Paying a debt through an involuntary garnishment does not constitute a good-faith effort to repay a creditor. Therefore, his debts are recent and ongoing. AG ¶¶ 20(a) and 20(d) do not apply.

Applicant's unemployment was beyond his control. For the full application of AG ¶ 20(b), Applicant must have acted responsibly. It has been three years since his unemployment. He failed to show he resolved his largest debt, and garnishment does not constitute acting responsibly. I have given Applicant the benefit of the doubt, regarding the debt in SOR ¶ 2.e and find in his favor on this debt. AG ¶ 20(b) has minimal application.

Applicant provided a document from a credit counseling service that shows he has a budget and completed an online course. AG ¶ 20(c) has minimal application because there is insufficient evidence that he has resolved his largest debt and that his financial problems are under control.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E and Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 45-year-old veteran. Following rules and regulations while holding a security clearance is critical. The government must be confident that those holding security clearances comply with rules and regulations, even when they are inconvenient, tedious, or when no one is watching. Being able to rely on those with security clearances to use good judgment and be honest is the cornerstone of the process. Applicant has not met his burden of persuasion. At this juncture, he has an unreliable financial track record. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline E, personal conduct, and Guideline F, financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a-e:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a-1.b:	Withdrawn
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Withdrawn
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Carol G. Ricciardello
Administrative Judge