



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 21-00297  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew Henderson, Esq., Department Counsel  
For Applicant: Ryan Coward, Esq.

04/15/2022

**Decision**

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and hearing testimony, Applicant mitigated alcohol consumption and personal conduct concerns. Eligibility for access to classified information or to hold a sensitive position is granted.

**Statement of the Case**

On July 6, 2021, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the alcohol consumption and personal guidelines the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Upon retaining counsel in July 2021, Applicant sought an extension to respond to the SOR allegations. Department Counsel issued its ready to proceed notice on November 24, 2021. The exhibit file does not document any response to Applicant's extension request, or a filed response to the SOR. The case was assigned to me on January 4, 2022.

A hearing was scheduled for March 3, 2022, and heard on the same date. At the hearing, the Government's case consisted of five exhibits. (GEs 1-5) Applicant relied on six exhibits (AEs A-F) and five witnesses (including himself). The transcript was received on March 10, 2022.

### **Procedural Issues**

Prior to the opening of the hearing, the Government filed a motion *in limine* to restrict Applicant's substance abuse counselor from testifying on matters exceeding the scope of her stated expertise. (HE 1) After evaluating Applicant's hearing exhibit (AE D), and hearing argument from the parties, the Government's motion was granted tentatively, subject to further assessments of weight to assign the counselor's report once the report was offered in evidence by Applicant and the Government had opportunity to respond and offer objections. (Tr. 15-17)

Before the closing of the hearing, the parties were afforded opportunities to supplement their oral closings with written closings. Written closings were not filed by either party.

### **Summary of Pleadings**

Under Guideline G, Applicant allegedly: (a) was arrested and charged in June 2017 with battery resulting in bodily injury in which alcohol was involved; (b) was arrested in September 2014 and charged with disorderly conduct-fighting in which alcohol was involved, and was found guilty; (c) was arrested in December 2011 and charged with driving under the influence (DUI), driving while ability impaired, DUI per se, and speeding; (d) arrested in July 2006 and charged with DUI and sodomy solicitation/solicitation under 17 years of age; and (e) received non-judicial punishment (NJP) in March 2002, under Article 15 of the Uniform Code of Military Justice (UCMJ) for the offense of disobeying a lawful order in which alcohol was involved

Under Guideline E, Applicant allegedly (a) was arrested in about August 2006 and charged with driving on a license suspended or revoked and (b) was arrested in August 2006 and charged with driving on a suspended or revoked license, for which he pled no contest and received 12 months of probation and \$812 in fines. Cross-alleged under Guideline E are the allegations contained in SOR ¶¶ 1.a-1.c and 1.f -1.g.

In his response to the SOR, Applicant admitted each of the allegations of the SOR with explanations and clarifications. He attached supporting endorsements and alcohol assessments to his response.

## **Findings of Fact**

Applicant is a 41-year-old civilian employee of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

### **Background**

Applicant married in January 2010 and divorced in August 2014 (GEs 1-2; Tr. 157-158) He has one child from this marriage (a daughter, age 10). Applicant earned college credits between October 2004 and 2005. (GE 1)

Applicant enlisted in the Army in January 2000 and served 20 years of active duty before his honorable discharge in 2019. (GE 1) He retired as a Green Beret with the rank of sergeant first class. (GEs 1-2; Tr. 111) Throughout his Army enlistment, he held a security clearance. (GEs 1-2) As an Army contract employee, his security clearance was suspended in August 2021. (Tr. 175) With so many years of combat experience to his credit, he has always been willing to put his own life on the line in the service of his country and has always protected classified information. (Tr. 179-185)

Since September 2019, Applicant has been employed by his current employer as a senior instructor and advisor by his current employer. (GE 1 and AE A) In his instructor's role, he trains active-duty combat military members on how to handle equipment and react to enemy aggression. (AE A; Tr. 116) Previously, he was employed by other employers. (GE 1)

### **Applicant's alcohol consumption and arrest-history**

As a young boy growing up, Applicant "was very active as a boy scout, skiing, and snowboarding." (Tr. 112) He comes from a long line of family members with military service. (Tr. 112) Applicant was introduced to alcohol at age 15. (GE 2) He typically drank to the point of intoxication twice a month, a practice that he followed intermittently over the course of the ensuing ten years. (GE 2) As a member of his special forces regiment in Iraq, Applicant faced heavy stress as a part of the "first generation of the global war on terror." (Tr. 119-120, 123-126-127)

Between March 2002 and June 2017, Applicant was involved in five alcohol-related incidents, none of which resulted in DUI convictions. (GEs 1-4; Tr. 149) In March 2002, he received non-judicial punishment, under Article 15 of the UCMJ for the reported offense of disobeying a lawful order in which alcohol was involved. (GEs 1-3; Tr. 119-120) He received no further disciplinary action from his unit command during his tour of military service. (GE 2)

Records document that Applicant was arrested in July 2006 and charged with DUI and sodomy solicitation/solicitation of a minor under 17 years of age. (GEs 1-3; Tr. 127) He was acquitted of both charges. (GEs 2-3; Tr. 127) The following month (in August 2006), he was arrested and charged with a misdemeanor offense of driving on a

suspended or revoked license. (GEs 1-3; Tr. 129-130) For this non-alcohol-related offense, he was fined \$812 and placed on 12 months of probation. (GE 3)

In December 2011, Applicant was arrested and charged with DUI, driving while impaired, DUI per se, and speeding. (GEs 2-3) At the time, he was experiencing a good deal of stress attributable to his being in Army training and away from his wife and young daughter. (Tr. 146-147)

Appearing in court on the 2011 charges, Applicant pled guilty to a lesser charge of driving while intoxicated. (Tr. 147-148) He was, in turn, court-ordered to attend alcohol education classes, complete 40 hours of community service, have an interlock device installed in his car, serve one year of unsupervised probation, and pay a fine. (GEs 1-3) Following his 2011 DUI, Applicant reduced his drinking and limited his alcohol intake to one beer a night while he had his daughter with him on weekends and holidays. (GE 2)

Applicant was arrested and charged in September 2014 with disorderly conduct-fighting, in which alcohol was involved. In court, he was found guilty as charged. (GEs 2-3) Prior to his arrest, he stopped at a restaurant for lunch (with his nephew) and consumed five beers during lunch. (GEs 2-3) While in the restaurant, Applicant engaged in sarcastic and sometimes rude exchanges with another customer that escalated into an argument and an eventual physical fight outside of the restaurant. (GEs 2-4; Tr. 159-160)

Responding to the 2014 charges in court, Applicant pled guilty to the charges over the phone with the judge and was fined \$348. (GE 2; Tr. 160-161) He paid the imposed \$348 fine over the phone in the same phone call with the judge. (GE 2)

In June 2017, Applicant was arrested by police who answered a telephone request for assistance. The arresting police charged Applicant with battery resulting in bodily injury in which alcohol was involved. (GEs 1-4; Tr. 167-168, 171-72) Preceding his arrest, Applicant engaged in a verbal argument over politics in a restaurant attended by a young man and his girlfriend (reportedly part of a wedding party). (AEs 2-3) Feeling threatened, Applicant punched the boyfriend in the mouth with his fist, drawing blood and breaking a tooth. (GE 2; Tr. 166-170) Responding to Applicant's punch, the guest's girlfriend pushed Applicant several times before he departed the restaurant with the aid of the bartender. (GE 2)

In court, Applicant pleaded no contest to the 2017 charges and received deferred judgment with imposed probation for one year. (GEs 2-4; Tr.171-172) Probation conditions included restitution for medical and dental bills incurred by the boyfriend in the restaurant. (GEs 2-3) Upon Applicant's documented receipt of successful completion of his probation conditions, his case was dismissed. (GEs 2-4; Tr. 171-172)

Following his 2017 alcohol-related battery incident, Applicant retained a licensed mental health counselor who he had previously consulted with in connection with the family-related stresses he was experiencing in 2013-2014 over his divorce, and later (in

2018) in connection with the strained relationship he was enduring with his mother. (AE C; Tr. 172-174) Applicant's one-on-one counseling sessions did not require diagnosis sessions with his counselor and consisted of working on coping strategies and skill building. Applicant was credited with satisfactory progress during both episodes of counseling. (AE C)

In September 2021, Applicant retained the counseling services of a licensed substance abuse counseling group. (AE D) In his one-on-one counseling session with the lead counselor of the group (Ms. A), Applicant was credited with providing relevant and truthful background information about his prior arrests and charges. Upon obtaining background information from Applicant, Ms. A supplemented Applicant's furnished alcohol history with her administering of standardized tests, relying principally on the Michigan Alcohol Screening Test (MAST), the Alcohol Use Disorders Test (AUDIT), the Eleven Point Criteria for Alcohol Use Disorder covered in the Diagnostic Statistical Manual-5 (DSM-5), and a comprehensive biopsychosocial process. (AE D)

Additionally, Ms. A reviewed the Government's SOR. Following her review of the SOR allegation, her evaluations of Applicant's supplied background information, her results of her administered tests, and Applicant's responses to her questions about lessons learned, Ms. A found no evidence of an alcohol use disorder. (AE D) Her findings are weakened somewhat, however, by her reliance on an ICD-10-CM Code F10.929, which is a billing code for alcohol use disorder, and is not DSM-V-based criterion for ruling out an alcohol use disorder.

While Ms. A's credentials were not questioned by the Government, her assessments and opinions were challenged by Department Counsel on multiple grounds. (Tr. 30) Cited reasons for assigning no weight to her assessments and opinions were as follows: Her opinions exceeded her reported expertise and invaded "the province of the factfinder;" and her misrepresentations and misstatements about Applicant's diagnoses were based in part on a mistaken understanding and reliance on the DSM-V criteria for identifying alcohol abuse disorders. (Tr. 30) Over the Government's objections, Ms. A's substance abuse evaluation was admitted for the weight warranted after a full consideration of her credentials and the furnished information she relied on in assigning a no alcohol abuse diagnosis and safe prognosis for avoiding any future alcohol abuse. (AE D)

Summarized, while Ms. A's no alcohol use disorder diagnosis is entitled to some weight, limitations are placed on her assessment based on her misapplication of the criteria used in the DSM-V for making an overall assessment and treatment prognosis. (AE D) The substance abuse counselor's use of the disqualifying and mitigating conditions in the Directive to reinforce her professional assessments of Applicant's risks of recurrence address ultimate questions of security clearance eligibility and perforce exceed the scope of her developed expertise. While Ms. A certainly retained the professional qualifications and authority (both as to academic training and experience) to make ultimate assessments of Applicant's recurrence risks based on her overall evaluation of Applicant's alcohol history, testing results, and her own professional training and experience, she was not qualified to make ultimate judgments as to

Applicant's security clearance eligibility. For these reasons, some discounting of weight to be assigned to Ms. A's ultimate alcohol risk assessments is warranted.

### **Endorsements and awards**

Applicant is highly regarded by his direct supervisor, colleagues, friends, and Government officials he interfaces with on a regular basis. (Tr. 46-57, 64-65, 74-78, 86-87, and 98-99) All of his references who know him (both professionally and socially) are generally aware of his most recent alcohol-related incidents, but continue to view him as a valuable and trustworthy person. (AE B; Tr. 53-54, 66-69, 74-75, 89-91, and 98-100)

None of Applicant's references have seen him abuse alcohol, either at work or in non-work situations. (Tr. 54-55, 77-79, 86-89, and 102-104) Uniformly, they credited him with an exceptional work ethic, trustworthiness, and reliability in the performance of his work responsibilities.

Applicant is credited by his direct supervisor with being a "consummate professional trainer" (Tr. 66), who has received regular military service promotions in recognition of his exceptional contributions, and demonstrated strong work ethic. All of Applicant's supervisors, colleagues, past and present, and friends believe that Applicant possesses the level of honesty, trustworthiness, reliability, and judgment requisite for holding a position of trust.

Applicant earned many awards recognizing his contributions during his Army career. (AE F; Tr. 134-136) His awards include an earned Bronze Star Medal recognizing his exceptionally valorous achievement during Operation Iraqi Freedom. (AE F) Other awards earned by Applicant include Good Conduct Medals, Army Commendation Medals, Army Achievement Medals, Ranger Course Completion diplomas, Armed Forces Expeditionary Medal, and certificates associated with Special Forces training and qualifications courses. (AE F)

Applicant's performance evaluation reports credit him with exceeds course standards. (AE F; Tr. 74-75) His direct supervisor, who evaluated his work performance for the past two years, confirmed that from the feedback he has received from DoD's primary official responsible for interfacing with Applicant, the Government is very pleased with Applicant's performance. (Tr. 77)

### **Policies**

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, "the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. Eligibility for access to classified information may only be granted "upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable. The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

### **Alcohol Consumption**

*The Concern:* Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.  
AG ¶ 21.

## **Personal Conduct**

*The Concern:* 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security or adjudicative processes. . . . AG ¶ 15.

## **Burdens of Proof**

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a disqualifying condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

Security concerns are raised over Applicant's multiple alcohol-related incidents between 2011 and 2017 (three in all). All of his DUIs arrests were followed by Applicant's guilty pleas and imposed sentences that did not include DUI convictions



On the strength of the evidence documented in the record, two disqualifying conditions (DCs) of the alcohol consumption guideline apply. DCs ¶¶ 22(a), “alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual’s alcohol use or whether the individual has been diagnosed with alcohol use disorder,” and 22(c), “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol abuse disorder,” are applicable to the facts of record in Applicant’s case.

Evaluation by Applicant’s retained psychologist in 2013-2014, and again in 2018, produced no diagnostic alcohol assessment, but credited Applicant with progress in his addressing the stresses in his life. So, too, his retained substance abuse counselor (Ms. A) in 2021 found no evidence of alcohol abuse disorder after considering his alcohol-related arrests and testing results, and exercising her training and experience. By all reported accounts, Applicant has fulfilled the promise and expectations his counselors have placed in him and has maintained a practice of non-abusive drinking since his last alcohol-related arrest in 2017.

While alcohol abuse disorder has been held by the Appeal Board to pose a risk that a person under the influence of alcohol could mishandle or fail to properly safeguard classified information (see ISCR Case No. 95-0731 at 3 (App. Bd. Sept. 1996); ISCR Case No. 94-1081 at 5 (App. Bd. August 1995), Applicant has recognized his mistakes implicit in the DUI incidents he was involved in, and has taken important corrective remedial steps to avoid any future recurrences. His corrective actions include counseling, exhibited increased maturity, and reduction in the amount of alcohol he consumes.

Based on the demonstrated corrective actions, Applicant has taken since his last alcohol-related incident in 2017, he is entitled to the mitigating benefits of two mitigating conditions (MCs) of the alcohol consumption guideline. MCs ¶¶ 23(a), “so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or judgment,” and 23(b), “the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations,” apply to Applicant’s situation.

Cross-alleged under Guideline E are Applicant’s alcohol-related incidents. Added misdemeanor traffic-related offenses under this Guideline that do not include an alcohol component are Applicant’s two incidents in 2006 involving driving with a suspended or revoked driver’s license. These two incidents by themselves raise security concerns over Applicant’s driving habits. When considered together with Applicant’s five alcohol-related incidents covered by Guideline G, the two traffic-related incidents, while condensed over a brief two-month period in 2017, share a common thread of security concerns over questionable exercises in judgment. These collective errors in judgment,

when stitched together contextually, reflect an overall pattern of poor judgment, unreliability, and untrustworthiness under Guideline E.

In the past, the Appeal Board has addressed traffic-related offenses stitched together to raise security concerns over an applicant's overall judgment, trustworthiness, and reliability. In ISCR Case No. 03-08475 at 5-8 (App. Bd. Sept. 14, 2007), the applicant accumulated seven traffic-related offenses and one DUI offense. Similar to the array of offenses cited in this case, the traffic-related offenses considered in ISCR Case No. 03-08475 were comprised of speeding, license plate offenses, disobeying road signs, driving with a suspended license, and a DUI.

Like the traffic-related instances cited in ISCR Case No. 03-08475, the two cited traffic-related incidents cited in Applicant's case individually could be expected to fall into minor categories if assessed individually. Because they are intertwined with Applicant's alcohol-related offenses, they must be considered contextually as a part of an overall pattern of judgment lapses.

Mitigating conditions have applicability to the facts of this case. In recognition of his improved understanding of the importance of adhering to safe driving rules and the use of prudent restraints in driving and social situations, Applicant's recognition of his need to find counseling assistance to help him overcome the stressors associated with his divorce and his unstable relationship with his mother, and his evidenced maturity in his current employment practices and relationships, application of MC ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," is fully available to Applicant.

### **Whole-person assessment**

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his history of alcohol-related arrests, mixed with two traffic-related misdemeanor offenses and convictions are incompatible with his holding a security clearance. Considering his civilian contributions to the defense industry and the corrective steps he has taken to avoid future recurrences of misjudgments (implicit in his alcohol-related and traffic offenses) Applicant is able to surmount his judgment lapses of the past and restore his eligibility to hold a security clearance.

Applicant's defense contributions, weighed together with his mitigation efforts, are enough to overcome his alcohol abuse history. I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude alcohol consumption and personal conduct concerns are mitigated. Eligibility for access to classified information is granted.

### **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:

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Subparagraphs 1.a-1-g: For Applicant

GUIDELINE G (ALCOHOL CONSUMPTION): FOR APPLICANT

Subparagraphs 2.a-2.c, 2.f-2.g:  
(incorporated in Guideline E) For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Roger C. Wesley  
Administrative Judge