DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 21-01838
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Melissa L. Watkins, Esq.

09/08/2023

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Decision

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MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

On September 7, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F. The CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

On September 17, 2021, Applicant responded to the SOR (Answer) and requested a decision based on the written record in lieu of a hearing. On December 17, 2021, Applicant requested that this matter be converted to a hearing before an administrative judge. The case was assigned to me on August 22, 2022. On September 8, 2022 and September 12, 2022, the Defense Office of Hearings and Appeals (DOHA) notified the

parties that the hearing was scheduled for October 5, 2022. The hearing, initially to be held via video teleconference, was convened in person, at Applicant's request, on the scheduled date.

At the hearing, I admitted Government Exhibits (GE) 1 and 2 and Applicant Exhibits (AE) A through M, without objection. AE M was previously attached to the Answer. Applicant and two witnesses testified. I appended to the record Applicant's exhibit list as HE I. At Applicant's request, I left the record open until November 4, 2022, to allow him the opportunity to submit additional information. He timely provided additional documents that I admitted as AE N through V, without objection. DOHA received the transcript (Tr.) on October 19, 2022. On June 20, 2023, for good cause and without objection from the Government, I reopened the record, at Applicant's request, to receive additional documents that I admitted as AE W and X, without objection. I appended to the record Applicant's two post-hearing exhibit lists, including accompanying explanations, as HE II and III.

Findings of Fact

Applicant, age 43, married his wife in 2008. They have two minor children. He attended a U.S. military college from June 1999 through March 2004, without obtaining a degree. He received his bachelor's degree from another college in September 2004. He was employed by the same defense contractor from June 2006 until November 2018, when he began working for his current employer. He has maintained a security clearance since 2004. (GE 1; AE I; Tr. at 28, 29, 57, 68)

Background

Applicant was separated from the U.S. military college for misconduct involving alcohol. He received a general discharge under honorable conditions in April 2005. The sole debt alleged in the SOR involves the recoupment of his U.S. military college expenses. In December 2020, the debt was reported in collection status, with a balance of $203,260, as alleged in SOR ¶ 1.a. Applicant admitted he was obliged to repay the debt. However, he disputed the alleged balance on the basis that it did not reflect the payments he has made toward the debt. (GE 1, 2; AE A)

Debts owed to the DOD are collected by the Defense Finance and Accounting Service (DFAS). The Debt Collection Improvement Act of 1996 authorizes the accrual of interest, administrative fees, and penalties on unpaid debts over 30 days old, and referral to the Internal Revenue Service (IRS) for federal income tax refund offset. After initial collection efforts are exhausted by DFAS, the delinquent account is transferred to the U.S. Department of the Treasury (Treasury) for more aggressive collection efforts, including an administrative wage garnishment (AWG). Upon transfer, the Treasury is authorized to collect a processing fee, which is 30% of the unpaid balance, in addition to the accrued interest. (AE S at 298-299)

In May 2005, the U.S. military college notified Applicant of his obligation to repay the debt, with a balance of $193,986. In August 2006, DFAS notified Applicant of his

repayment options and informed him that the debt would continue to accrue interest if it was not paid within 30 days. Sometime thereafter, Applicant negotiated a hardship repayment plan with DFAS to repay the debt, which was renewed on either an annual or semi-annual basis. In July 2015, DFAS found him in default of the repayment plan and transferred the debt, with a balance of $203,261, to the Treasury. Upon transfer, the balance of the debt increased to $264,239 after the Treasury assessed its 30% fee. (AE A at 4; AE S at 292, 300; Tr. at 30-31, 53-54, 57-59)

DFAS History

Applicant maintained that he never defaulted on the repayment plan and consistently made timely monthly payments via written checks to DFAS, totaling approximately $18,000. The payment amounts, which ranged from $25 to $325 per month, were determined by DFAS based upon financial information he provided in hardship packets that he mailed to DFAS "every six months or every year." He never lied or misled DFAS about his income or expenses. (AE C; Tr. at 30-31, 54-55, 57-63, 76-77)

Given the scant records available to Applicant (due, in part, to his own record keeping, and, in part, to the sparse responses he received to requests for records) and the passage of time, he was unable to proffer the specific details of his DFAS repayment plan and payment history. He recalled, generally, that DFAS initially set the monthly payment amount at $25, then increased it to $50, and to $100, until settling at $325. Following its approval of each hardship packet, DFAS notified him of the new payment amounts in statements sent by mail. (AE O, W, X; Tr. at 30-31, 47, 59-63)

Applicant recalled that he started making payments to DFAS in about 2005; and that, after he stopped receiving statements sometime in 2014, he continued to send $325 checks to DFAS for a "couple of years." The record indicates that his payments likely began sometime after he received the August 2006 notice from DFAS and continued until about July 2015, when the debt fell into default status. (Tr. at 30-31, 77)

Applicant denied having knowledge of the default status of the debt until he received the July 2015 notice. He later learned that DFAS revoked his hardship status in about August 2013, which resulted in the debt falling into default status. At the time, he thought "everything was fine," because DFAS continued to cash the $325 checks he sent, even after he stopped receiving statements from DFAS. In hindsight, he attributes the revocation of his hardship status to not being aware that the process for submitting his hardship packets had changed to an online platform in about 2012 or 2013. (GE 1 at 38; AE C at 20; Tr. at 30-31, 46-47)

Applicant proffered documents corroborating that he paid a total of $16,984 to DFAS before the debt was transferred to the Treasury. Those documents also corroborated some other details of his DFAS payment history, including: 1) a hardship plan approving monthly payments of $100 effective April 2008 through October 2008, 2) a hardship plan approving monthly payments of $325 effective as of January 2013; 3) $325 payments he made in January 2013, November 2014, and December 2015; 4) two $325 payments he made in October 2015; 5) a $500 payment he made in December

2015; and 6) federal income tax refund offsets in May 2015 ($1,399), April 2017 ($439), and May 2019 ($833). (AE A at 8; AE O at 256; AE Q at 272, 273; AE R at 281, 290, 291; AE S at 300)

Treasury History

Applicant contacted the Treasury immediately upon receiving notice of the transfer from DFAS in July 2015. The Treasury advised him of the following four options: 1) pay the debt in full; 2) pay the debt via a three-year repayment plan with monthly payments of about $7,000 (which was the maximum period offered); 3) proceed with collections actions to include an AWG, or 4) get the debt recalled to DFAS. In November 2015, a private collection agency notified Applicant that it was collecting the debt, with a balance of $263,491, on behalf of the Treasury. In January 2016, the private collection agency notified Applicant that it planned to issue an AWG to collect the debt, with a balance of $262,666, which decreased due to an unexplained reduction in interest and fees. (AE S at 293-294; Tr. at 31-33, 47-48, 63-65, 94)

On the basis that Applicant could not afford to either pay the debt in full or the monthly payment required by the three-year repayment plan, he continued his efforts to contest the default status of the debt and the AWG, and get the debt recalled to DFAS. He argued that he was not notified of the default or the transfer, and that the transfer created hardship, largely due to the Treasury's 30% fee. He wrote letters to DFAS and his U.S. senator, negotiated with the Treasury's private collection agency, and requested an administrative determination to contest the AWG before a DFAS hearing officer. He hired a law firm to assist him with these efforts. (AE C at 22-24; AE S at 295-296; AE U; Tr. at 31-33, 47-48, 63-65, 102)

None of Applicant's efforts were successful. He was unable to negotiate a reasonable repayment plan with the Treasury's private collection agency, which suggested that he "max out" his credit cards to pay the debt in full. Although it accepted a good-faith $500 payment, the private collection agency only credited his account with $250. He presumed that they took the other half for their fee. After a thorough review of the matter, in January 2016, his senator concluded that DFAS had worked diligently with Applicant regarding the matter. In April 2016, the DFAS hearing officer validated the debt and its default status. The DFAS hearing officer concluded that the balance of $262,666 (including the Treasury's 30% fee) was correct, and that the AWG should proceed in an amount not to exceed 15% of Applicant's disposable pay. Since then, the debt has remained in collection status with the Treasury, which requires that he repay the debt via the AWG. The Treasury has not offered an alternative voluntary repayment arrangement. (AE C at 28; AE S at 300; AE X at 355; Tr. at 31-33, 47-48, 64-65, 94, 102)

The DFAS hearing officer's decision included the following relevant findings of fact: 1) Applicant made $16,984 in direct payments to DFAS before the default; 2) he had ample opportunity to repay the debt at a more reasonable rate, but failed to adhere to the terms and conditions of the repayment plan; 3) the repayment plan was cancelled because he became delinquent with his payments; 4) he was provided more than the allowable time to make arrangements to repay the debt; 5) he provided no evidence that

warranted a new repayment plan; and 6) the appropriate collection actions and fee accruals were taken in accordance with applicable law. (AE S at 297-301)

The DFAS hearing officer advised Applicant of various other options for relief, including filing a request for reconsideration of financial hardship through the Treasury Department; petitioning the Board of Correction of Military Records (BCMR) if he disagreed with the information reported on his military record; or petitioning for a waiver of indebtedness if he felt that an injustice had occurred. The record did not indicate whether Applicant availed himself of any of these options. (AE S at 301)

In May 2016, the Treasury issued the AWG to collect a balance of $262,666. The AWG amount is calculated by the employer based on a formula provided by the Treasury. Applicant's former employer calculated the monthly AWG amount as $1,495, with which it complied from May 2016 through November 2018. The AWG was not in place between December 2018 and December 2022, due to Applicant's change in employment and not to any inaction on his part. He timely notified the Treasury of his employment change, and his current employer of the AWG. The Treasury advised him that the AWG would automatically transfer to his current employer, and that the transfer process could take up to one year. The Treasury did not require him to make direct payments during the period when the AWG was not in place. (AE D at 29-33; AE E, N, O; AE Q at 268-269, 271-273; Tr. at 33, 35-36, 66, 68-70, 97-98, 100-101, 125-126)

In October 2019, the Treasury effected the AWG transfer to Applicant's current employer. However, it immediately suspended the AWG because Applicant disputed the balance of $218,319, arguing that payment records showed he was entitled to a credit of $2,821. In December 2021, upon advice of counsel in connection with this security clearance proceeding, Applicant made a one-time direct payment of $1,495 to the Treasury, to demonstrate his good-faith intention to repay the debt. In January 2022, when the Treasury issued its response to Applicant's dispute, the AWG immediately resumed through his current employer. His current employer calculated the bi-weekly AWG amounts as: $811 from January 2022 through February 2022; $806 from February 2022 through mid-May 2022; and $842 beginning in mid-May 2022. He proffered documents corroborating his current employer's compliance with the AWG through November 2022. (AE H, M; AE Q at 275-278; Tr. at 48, 70-71, 93-95, 97, 99-100)

The record did not indicate the reason for the Treasury's delayed response to Applicant's dispute between October 2019 and January 2022. However, it can reasonably be attributed to either the COVID-19 pandemic or some other circumstance beyond Applicant's control. During that period, he called the Treasury "six or seven times" to check on the status. In its response, the Treasury informed Applicant that his dispute was construed as a request for a new AWG hearing to which he was not entitled. The Treasury did not otherwise address the credit, which Applicant does not expect to receive. (AE Q at 275-278; Tr. at 103-105)

Applicant explained why he has not made, nor intends to make, additional direct payments to the Treasury (besides the one made in December 2021) to help reduce the balance of the debt. First, direct payments will not change the collection status of the debt.

Second, until recently, he had not been able to pay more. Third, he has no obligation to pay more than the income-driven amount of the AWG. Finally, he has not been offered any option to resolve the debt besides by paying it in full. To that end, he is working to save enough money to pay the debt in full "in the next few years." In the meantime, he intends to continue reducing the balance of the debt through the AWG. He estimated that, at the current bi-weekly AWG amount, the debt will be fully resolved through the AWG in about seven years. (Tr. at 32, 37, 38-39, 52, 66-67, 70, 75, 78, 79-81, 88-89, 107-108)

Income and Expense History

Applicant has only experienced delinquent debt one other time. Sometime in 2012, he fell behind in his payments on the first and second mortgage loans on a rental property he owned. He lost a renter and exhausted his savings trying to stay current on his mortgage payments. After unsuccessfully attempting to refinance the loan or sell the property, he fully resolved both loans in 2013 via a short sale to which both lenders agreed. He has owned his current home since October 2010. (AE X at 354; Tr. at 71-73)

In a July 2012 financial statement submitted to DFAS, Applicant reported a $10,389 monthly income, including $8,889 wages and $1,500 rental income, and monthly expenses totaling $10,078. In a February 2016 financial statement submitted to DFAS, he reported a $13,218 monthly income, consisting solely of his wages, monthly expenses totaling $12,820, two savings account balances totaling $25, and non-delinquent credit-card debt totaling $33,069. (AE R at 282-289; AE S at 302-305)

In May 2016, Applicant took out a $41,000 hardship loan from his 401(k) retirement account to pay non-delinquent debt and other expenses so that he had sufficient funds for the AWG amounts taken from his paycheck. At the time, he had about $40,000 of non-delinquent credit-card accounts and car loans. During a July 2017 security clearance interview, he reported a $7,488 monthly net income, after payment of the $1,484 Treasury AWG, and a $598 net remainder. In November 2018, he began repaying his 401(k) loan via monthly payments of $753. As of the hearing, the 401(k) loan was fully paid. He estimated that he paid about $47,000 or $48,000 in total to repay the 401(k) loan. (AE V; AE X at 356; Tr. at 39, 66-67, 74-75, 85-86)

Applicant's annual salary has steadily increased from about $50,000, when he first applied for the hardship repayment plan with DFAS (date unclear from the record), to $180,000, as of February 2021. He attributed his improved financial situation over the last several years to the variable commission he received in addition to his salary. He used his commissions of about $22,000 in 2019, about $40,000 in 2020, and $100,000 in 2021 to decrease his reliance on credit; eliminate non-delinquent credit-card debt and two car loans; and to increase contributions to his retirement and savings accounts. He took these measures to ensure that he is able to fully resolve the debt and maintain an overall "good financial status." In his April 2022 monthly budget, Applicant reported a no credit-card debt, a gross salary of $7,837, a net remainder of $2,135, a $1,684 payment for the Treasury AWG, a $470 retirement account contribution, and a savings account balance of $50,000. No delinquent debts appeared on his September 20, 2022 credit bureau report. (AE F, G; AE J at 95; Tr. at 41-45, 73, 79, 84-85, 89-91)

Whole-Person Concept

Applicant has not had any performance issues at work. Numerous individuals who wrote letters on his behalf, and the two witnesses who testified, lauded his character and work performance. By all accounts, he is highly respected for his "impeccable" work ethic and trustworthiness. Applicant is "incredibly involved" with the community, including youth football. He previously served on the board of directors of a youth football league for whom he continues to coach, despite not having any children playing football for the league. He also volunteers his time to help with his local high school's football program and his local fair. His employer recognized his exceptional work performance in 2019 and 2020. He received a $2,000 cash award from his employer in January 2021. (AE C at 26-27; AE J at 96-102; AE K, L; Tr. at 8-21, 48-51)

Policies

"[N]o one has a 'right' to a security clearance." (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). 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." (*Egan* at 527). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (EO 10865 § 2)

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (EO 10865 § 7). Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. (*Egan* 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 (4th 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. (ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016)). 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

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)). "[S]ecurity clearance determinations should err, if they must, on the side of denials." (*Egan* at 531; AG ¶ 2(b))

Analysis

Guideline F: Financial Considerations

The concern under this guideline 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 . . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. (ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012))

The record evidence and Applicant's admissions establish the following disqualifying conditions under this guideline: AG ¶ 19(a) (inability to satisfy debts) and AG ¶ 19(c) (a history of not meeting financial obligations).

I considered each of the factors set forth in AG ¶ 20 that could mitigate the concern under this guideline and find the following warrant discussion:

(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; and

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

The fact that Applicant has not fully resolved a substantial federal debt that he has been obliged to pay since 2005 is not alone disqualifying. The AGs do not require an applicant to immediately resolve or pay each debt alleged in the SOR, or to be debt free; nor is there a requirement that the debts alleged in an SOR be resolved first. The focus of security clearance adjudications is to evaluate an applicant's judgment, reliability, and trustworthiness. In this case, the key issue is whether Applicant has responsibly managed the repayment of the debt and his finances.

Applicant demonstrated responsible action during the period when he was making direct payments to DFAS. Although he failed to fully corroborate each of his direct payments, the record otherwise established that he complied with his repayment obligation through July 2015, when DFAS determined that he defaulted on the debt. Despite Applicant's protestations to the contrary, the record established that he did, in fact, default on his DFAS repayment plan, which resulted in the debt being appropriately transferred to the Treasury for collection. The fact he has only made one direct payment to the Treasury since July 2015 requires further examination.

The balance of the debt has largely been reduced by the AWG and federal income tax refund offsets. The AWG was issued following Applicant's unsuccessful efforts to either negotiate a voluntary repayment plan with the Treasury, to dispute the default status and the AWG, or to have the debt recalled to DFAS. The AWG was in effect with Applicant's former employer from May 2016 through November 2018; and has been in effect with his current employer since January 2022. He was involved in good-faith negotiation and dispute efforts during the period when payments were not made from July 2015 through April 2016. The suspension of the AWG from December 2018 through December 2022 was not due to inaction on Applicant's part. He may have been better served by making additional voluntary direct payments to the Treasury or by paying more than the hardship plan and AWG amounts calculated by DFAS and the Treasury. However, the record did not establish that he was either required to do so, or that his actions were unreasonable or motivated by a willful violation of his obligation to repay the debt. The record indicates that payments are reasonably expected to continue until the debt is paid in full, whether through the AWG or by Applicant directly.

Applicant has actively worked to resolve the debt within his means since he was first notified about the debt. His plan to continue complying with the AWG to reduce the balance of debt, until such time as he has amassed sufficient funds to pay the debt in full, is reasonable. In the meantime, he has fully resolved non-delinquent debts, accumulated savings, and managed his finances responsibly. While payments made through the AWG cannot be considered voluntary, the Treasury has required him to pay the debt via the AWG and has not offered an alternative voluntary repayment option.

I found Applicant's testimony sincere and credible. He demonstrated good-faith efforts to responsibly manage the repayment of the debt. He made meaningful progress, over an extended period, in resolving the debt. His track record of payments and responsible actions lead me to conclude that he will follow through with his plan to fully resolve the debt. I have no lingering doubts about Applicant's reliability, trustworthiness, or good judgment. AG ¶¶ 20(a) and 20(d) are established to mitigate the Guideline F concerns alleged in the SOR.

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall commonsense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F and evaluating all the evidence in the context of the whole person, I conclude that Applicant has mitigated the security concerns raised by the debt alleged in the SOR. Accordingly, Applicant has carried his burden of showing that it is clearly consistent with the interests of national security to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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 F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Clearance is granted.

Gina L. Marine
Administrative Judge