

KEYWORD: Alcohol; Personal Conduct

DIGEST: Applicant is a 40-year-old employee of a defense contractor. He was arrested for driving under the influence of alcohol (DUI), and possession of cocaine in 1995, and pled guilty to DUI. He voluntarily entered an alcohol treatment program in 2002. Applicant continues to drink alcohol, but only in moderation. Applicant did not falsify his security questionnaire. Clearance is granted.

CASENO: 06-17397.h1

DATE: 04/30/2007

DATE: April 30, 2007

In re:	)	
	)	
-----	)	
SSN: -----	)	ISCR Case No. 06-17397
	)	
Applicant for Security Clearance	)	

**DECISION OF ADMINISTRATIVE JUDGE  
EDWARD W. LOUGHRAN**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco Mendez, Esq., Department Counsel

**FOR APPLICANT**

Joseph McNeil, Jr., Personal Representative

**SYNOPSIS**

Applicant is a 40-year-old employee of a defense contractor. He was arrested for driving under the influence of alcohol (DUI), and possession of cocaine in 1995, and pled guilty to DUI. He

voluntarily entered an alcohol treatment program in 2002. Applicant continues to drink alcohol, but only in moderation. Applicant did not falsify his security questionnaire. Clearance is granted.

## **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 3, 2006, DOHA issued a Statement of Reasons<sup>1</sup> (SOR) detailing the basis for its decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense for SORs issued after September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on November 7, 2006 and November 22, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on February 21, 2007. A notice of hearing was issued on March 6, 2006, scheduling the hearing for March 27, 2007. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on April 11, 2007.

## **RULINGS ON PROCEDURE AND EVIDENCE**

Applicant requested that his personal representative also testify as a witness. Department Counsel did not object. The personal representative testified before the Applicant testified.

The Government offered two exhibits that were marked as Government Exhibits (GE) 1 and 2. There was no objection to GE 1, and it was admitted. GE 2 is the report of investigation (ROI), conducted for Applicant's background investigation. Applicant was advised of his right under ¶ E3.1.20 of the Directive to object to its admission. Applicant initially objected, but then decided to waive his objection. Absent an objection, GE 2 was admitted. Applicant testified and offered nine exhibits that were marked Applicant Exhibits (AE) A through I, and admitted without objection.

## **FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 40-year-old employee of a defense contractor. He is a high school graduate. He has been divorced since 2002, and has no children.<sup>2</sup>

Applicant came from a harsh background. Members of his family were involved in drugs and criminal activity, and Applicant was abused. He started drinking and using drugs at a young age. He was introduced to marijuana and cocaine by his mother, grandmother, aunt, and cousin. Applicant

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<sup>1</sup>Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive).

<sup>2</sup>Tr. at 96; GE 1; GE 2 at 26-27, 33-34.

had disciplinary issues in high school, but after devoting himself to football and track, he had no problems for his last two years in school. Applicant's mother and half-sister have spent time in jail. Applicant has a good relationship with his younger brother, but has little dealings with his other family members.<sup>3</sup>

Applicant was arrested in 1995, for driving under the influence of alcohol (DUI), possession of cocaine, and possession of drug paraphernalia. He pled guilty to the DUI. He was ordered to pay a fine of \$600, his driver's license was suspended for one year, and he was required to complete treatment with an alcohol safety program. His driver's license was suspended for an additional six months for his possession of a controlled substance.<sup>4</sup>

Applicant continued to drink alcohol and use cocaine after his arrest. In about 1998, he stopped using cocaine, and has not used illegal drugs since. He has not been arrested since his 1995 arrest.<sup>5</sup>

Applicant attended alcohol treatment for about seven days in 2002. His girlfriend did not approve of his drinking. Applicant sought counseling at least in part because of his girlfriend. He requested his supervisor at work to help him get admitted, and was admitted as part of his Employee Assistance Plan. The treatment was four days of inpatient treatment and three days of outpatient treatment. There is indication in the record that Applicant may have been diagnosed as alcohol dependent.<sup>6</sup> Applicant was unclear if he was ever diagnosed as alcohol dependent.

DEPARTMENT COUNSEL: Do you recall Dr. [----] diagnosing you as alcohol dependent?

APPLICANT: Yes, I remember him saying that you're probably alcohol dependent.

ADMINISTRATIVE JUDGE: Wait a minute. Say that again. What did he tell you?

APPLICANT: I think he said he presumably felt that I was probably alcohol dependent. He didn't diagnostically say that I was. I can't remember off the top of my head.<sup>7</sup>

Applicant attended Alcoholics Anonymous for several months after he left treatment, but then stopped and did not return.<sup>8</sup>

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<sup>3</sup>Tr. at 46-47, 64-66, 73; GE 2 at 2.

<sup>4</sup>Tr. at 73-74; Applicant's response to SOR; GE 2 at 40.

<sup>5</sup>Tr. at 99, 103.

<sup>6</sup>Tr. at 35, 74-78; GE 2 at 6, 38-39.

<sup>7</sup>Tr. at 79.

<sup>8</sup>Tr. at 85.

Applicant's current alcohol consumption is a 12 or 22 ounce beer three or four nights a week, and occasionally one or two shots. Applicant believes he has only been drunk, or "overindulging" on possibly two occasions since he left rehabilitation.<sup>9</sup>

The supervisor that took Applicant to his treatment testified on Applicant's behalf. Applicant lived with this witness for a few months in 2004. He knows of Applicant's background, and is aware that Applicant still drinks alcohol, but he has only observed Applicant drink in moderation. He and Applicant would occasionally have a drink together, generally one or two beers, usually at the witness' house while watching a sporting event. The last occasion was about two months ago. Their lack of contact is due to their extended work schedules. He has never seen Applicant drunk. He contacted Applicant on several occasions in the middle of the night for work issues, and they met at work. He never observed any indications of alcohol impairment on any of the occasions.<sup>10</sup>

Applicant lived with his girlfriend for several years. She was interviewed by an investigator in 2006. She stated Applicant drank a beer every day, and believed he probably drank more on the weekends while watching football. She stated that Applicant had not been intoxicated since he attended treatment.<sup>11</sup>

A number of other people, including Applicant's ex-wife, neighbors, friends, and co-workers were also interviewed for Applicant's background investigation. Applicant's ex-wife was aware of Applicant's drug and alcohol history, but stated that drugs and alcohol did not lead to their break up. She had no contact with Applicant in more than four years. No one else reported any incidents of Applicant being intoxicated or drunk.<sup>12</sup>

Applicant currently works two jobs. He works full time at the defense contractor. He wakes up between 1:45 and 2:00 A.M., drives to a nearby town, and delivers newspapers. He finishes between 4:40 and 5:00 A.M., goes home and gets a couple hours sleep. He wakes up between 8:00 and 8:30 A.M., and gets ready to go to work. His shift officially starts at 10:00 A.M. He arrives at work between 9:00 and 10:00, and works until about 6:00 P.M. It takes about 30 to 45 minutes to drive home. He is usually home by 7:00 P.M. He relaxes for a while. On some nights he will have a 12 or 22-ounce beer. He falls asleep between 9:30 and 10:00 P.M.<sup>13</sup>

Applicant has worked a number of jobs over the past several years, usually working two and sometimes three jobs. He worked for a limousine service as a driver on a part-time basis from about 2002 to 2004. Applicant went to pick up his check on one occasion in 2004. He and several other drivers did not receive checks. When he asked why he did not receive a check, Applicant was told it was because of damage to one of the cars. Applicant was upset because he did not believe he damaged a car. He was working at a full time job, and one other part-time job, and did not continue

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<sup>9</sup>Tr. at 75, 83-85; Applicant's response to SOR.

<sup>10</sup>Tr. at 35-37, 40-42, 47-48, 56-59; GE 2 at 15-17.

<sup>11</sup>GE 2 at 10-12.

<sup>12</sup>GE 2.

<sup>13</sup>Tr. at 35-36, 70-71, 75.

driving for the company. The supervisor at the limousine service had positive things to say about Applicant to the background investigator. He stated that Applicant had one conflict with a dispatcher, but stated that was not an uncommon occurrence in their business. He could not recall why Applicant left, but was sure he did not leave on bad terms, and was eligible for rehire.<sup>14</sup>

In late 2004 to early 2005, Applicant obtained a temporary job through a staffing agency. Applicant was employed by the staffing agency, but worked under contract for another company. He worked for about 60 days. The company considered hiring him to a full time position. The temporary job served as the trial basis for his hiring by the company. As part of the hiring process, the company conducted a background check. The background check revealed Applicant's 1995 arrest for DUI and possession of a controlled substance, and the company decided not to hire him. His temporary contract for the company ended at that time.<sup>15</sup>

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on August 25, 2005. Section 22 asked:

Has any of the following happened to you in the last 7 years?

1. Fired from a job.
2. Quit a job after being told you'd be fired.
3. Left a job by mutual agreement following allegations of misconduct.
4. Left a job by mutual agreement following allegations of unsatisfactory performance.
5. Left a job for other reasons under unfavorable circumstances.<sup>16</sup>

Applicant answered "Yes," and listed that he "[l]eft a job by mutual agreement following allegations of misconduct," in 2002, for "misuse of email which by them it was called code of ethics."<sup>17</sup> Applicant did not list his employment with the limousine service in this section, but he did list it under Section 11, which asked for his employment activities.<sup>18</sup> He did not list his employment with the staffing agency, or the company he was contracted to by the staffing agency, under any section. Applicant listed his DUI and possession of controlled substance arrest and his alcohol treatment under other pertinent sections.<sup>19</sup>

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<sup>14</sup>Tr. at 100-102; GE 1 at 15; GE 2 at 3, 21-23.

<sup>15</sup>Tr. at 86-92; GE 2 at 4.

<sup>16</sup>GE 1 at 27.

<sup>17</sup>*Id.* at 27-28.

<sup>18</sup>*Id.* at 15.

<sup>19</sup>*Id.* at 29-30.

Applicant was interviewed for his background investigation in February 2006. At that time he fully discussed his employment with the limousine service and with his employment through the staffing agency.<sup>20</sup>

Applicant has worked for his current employer for more than two years. He is highly regarded by his employer. He has received awards, and his performance evaluations have been excellent.<sup>21</sup> Under “Absenteeism/Tardiness, one evaluation reported that he, “is always in the office early, works weekends with vendors as to not inconvenience employees, and responds back to the building for emergencies.”<sup>22</sup> Letters on his behalf describe him as hard-working, loyal, trustworthy, conscientious, and thorough.<sup>23</sup> His witness believes Applicant is a good, honest person that he would trust to take care of his family if something happened to him.<sup>24</sup> Applicant also coaches football.<sup>25</sup>

### POLICIES

“[N]o one has a ‘right’ to a security clearance.”<sup>26</sup> 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 occupy a position . . . that will give that person access to such information.”<sup>27</sup> The President 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.”<sup>28</sup> 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. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.<sup>29</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>30</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. It is merely an indication that the applicant has not

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<sup>20</sup>GE 2 at 1-8.

<sup>21</sup>AE B, C, D.

<sup>22</sup>AE C at 4.

<sup>23</sup>AE A, F.

<sup>24</sup>Tr. at 38, 61.

<sup>25</sup>Tr. at 71-72.

<sup>26</sup>*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>27</sup>*Id.* at 527.

<sup>28</sup>Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

<sup>29</sup>ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>30</sup>*Id.*; Directive, ¶ E2.2.2.

met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.<sup>31</sup>

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the adjudicative process factors listed in listed in the Directive and AG ¶ 2(a).

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions section below.

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

### **Guideline G, Alcohol Consumption**

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.

The potential Alcohol Consumption Disqualifying Conditions (AC DC) in this case are AC DC 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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent*), AC DC 22(c) (*habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent*), AC DC 22(d) (*diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence*), and AC DC 22(e) (*evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*).

AC DC 22(a) is applicable to Applicant's 1995 arrest and subsequent conviction for DUI. Applicant's currently consumes alcohol three to four days per week. This could be considered habitual. However, there is no evidence that during this regular consumption, Applicant drinks to the point of impaired judgment. I do not find AC DC 22(c).

AC DC 22(d) requires a diagnosis of alcohol dependence or abuse by a duly qualified medical professional. The evidence that Applicant was diagnosed as alcohol dependent came from an ROI of the records from Applicant's alcohol treatment. It is impossible to tell how long the actual records are, but the ROI was one and a half pages. The ROI shows:

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<sup>31</sup>Exec. Or. 10865 § 7.

DIAGNOSIS  
303.91 - ALCOHOL DEPEND[E]NCE

TREATMENT PRESCRIBED  
NOT SHOWN

TREATMENT LOCATION SAME AS ABOVE

PROGNOSIS  
NOT SHOWN

HIS PHYSICIAN AT [\*\*\*\*] WAS [----], MD.<sup>32</sup>

¶ E3.1.20 of the Directive holds an “ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence.” There was no authenticating witness, but Applicant did not object to its admission. Nonetheless there are problematic aspects of the ROI. A diagnosis was listed, but the ROI did not state who made the diagnosis. An M.D. was listed as Applicant’s physician, but the ROI did not state that this doctor made the diagnosis. The diagnosis was presumably made utilizing the Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), copyrighted 2000.<sup>33</sup> The ROI lists alcohol dependence as “303.91.” Alcohol dependence in the DSM-IV-TR is “303.90.”<sup>34</sup> The DSM-IV-TR also provides for a provisional diagnosis, which “can be used when there is a strong presumption that the full criteria will be met for a disorder, but not enough information is available to make a firm diagnosis.” The diagnostic uncertainty can be indicated by recording “(Provisional)” following the diagnosis.<sup>35</sup> I have also observed on other medical records, the use of the term, “Diagnostic Impression,” when a complete diagnosis was not made. Without the treatment records, or an authenticating witness, I am unable to ascertain with what degree of accuracy the treatment records were transcribed. The incorrect transcription, “303.91,” leads me to believe that it was transcribed wrong by the investigator, or was written in the medical records either incorrectly, or by someone not totally familiar with the DSM-IV-TR. None of these options provide me with any confidence of the accuracy of the ROI, or the diagnosis. I considered that Applicant admitted to SOR ¶¶ 1.c and 1.d, which include that he received treatment “for a condition diagnosed as Alcohol Dependent.”<sup>36</sup> I also considered that at the hearing, Applicant denied knowing if he was diagnosed as alcohol dependent. I find that the Government has not met their initial burden of proving a diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence. I also do not find an evaluation of alcohol abuse or alcohol dependence

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<sup>32</sup>GE 2 at 38.

<sup>33</sup>The previous version, the Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition (DSM-IV), was copyrighted in 1994. I take administrative notice of the DSM-IV and the DSM-IV-TR.

<sup>34</sup>DSM-IV-TR at 213. It is also 303.90 in the DSM-IV. See page 195.

<sup>35</sup>DSM-IV-TR at 3-4.

<sup>36</sup>The Appeal Board has held that an admission to the SOR does not necessarily end the discussion. See ISCR Case No. 02-21087 (App. Bd. Aug. 19, 2005).

by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. I therefore do not find AC DC 22(d), AC DC 22(e), or AC DC 22(f) applicable.

There are three potential Alcohol Consumption Mitigating Conditions (AC DC) in this case, AC DC 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 and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*), AC DC 23(b) (*the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)*), and AC DC 23(d) (*the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*).

Applicant's DUI arrest was more than 11 years ago. He has not had any alcohol related incidents since. Other than his self-referral to an alcohol treatment program, there is nothing in the record that indicates Applicant currently has a problem with alcohol. While Applicant still consumes alcohol, all evidence points to responsible use. AC DC 23(a) is applicable. Applicant has established a clear and established pattern of modified consumption and responsible use. AC DC 23(b) and AC DC 23(d) are partially applicable.

### **Guideline E, 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.

SOR ¶ 2.a alleges that Applicant falsified material facts on his e-QIP by not listing that his employment with the limousine service ended under unfavorable circumstances, and by not listing that he was terminated from the company that the staffing agency contracted him to after he failed their background check.

As discussed above, it is very questionable whether Applicant left the limousine service "under unfavorable circumstances." He simply stopped driving for the company. Applicant never actually worked for the company alleged in SOR ¶ 2.a.(2). He worked for the staffing agency. I do not find that he was terminated by the company, nor by the staffing agency. Even if it is assumed the answers were incorrect, that is not dispositive of the issue of Applicant's falsification, since the mere proof of an omission or an incorrect answer, standing alone, does not establish or prove an applicant's intent or state of mind when the omission or incorrect response occurred.<sup>37</sup>

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<sup>37</sup>See, e.g., ISCR Case No. 05-03472 at 6 (App. Bd. Mar. 11, 2007).

I observed Applicant during his testimony, and assessed his demeanor and credibility. I also considered that Applicant listed the employment with the limousine service elsewhere on the e-QIP. Applicant listed other information that was far more adverse than this information. He listed his DUI and possession of controlled substance arrest, his alcohol treatment, and his termination from a third company following allegations of misconduct. I do not find that Applicant intentionally provided inaccurate or incomplete answers on his e-QIP. It does not make sense that Applicant would attempt to hide that he was not hired by a company because he did not pass their background check, yet reveal that same criminal record on the e-QIP. No Personal Conduct Disqualifying Condition is applicable. SOR ¶ 2.a is concluded in Applicant's favor.

### **Whole Person Analysis**

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive. I have also considered every finding of fact and conclusion discussed above.

Applicant grew up in a hostile and dysfunctional family environment that included abuse, drugs, alcohol, and criminal activities. He was introduced to drugs at an early age by family members, including those who should have been authority figures such as his mother, grandmother, and aunt. He turned to drugs and alcohol resulting in his arrest for DUI and possession of a controlled substance in 1995. He has not been arrested since then, and has not used illegal drugs since at least 1998. When he thought that his drinking was becoming a problem, and upon suggestion by his girlfriend, Applicant entered an alcohol treatment program. Applicant currently drinks moderately three to four days per week. I considered not only Applicant's testimony, but also the testimony of his witness, and the interviews of people in the ROI, including Applicant's ex-girlfriend. Applicant works long hours and two jobs. There was no indication in his background investigation that there is a current alcohol problem, or that alcohol has impacted Applicant's job performance or attendance. I also considered the very favorable character evidence.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his alcohol consumption and personal conduct.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

**DECISION**

In light of all of 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 Applicant. Clearance is granted.

Edward W. Loughran  
Administrative Judge