



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 12-06673  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Caroline H. Jeffreys, Esquire, Department Counsel  
For Applicant: *Pro se*

11/26/2013

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons alleged 13 delinquent, collection, or charged-off debts, totaling \$473,956.<sup>1</sup> He failed to mitigate six delinquent SOR debts, totaling \$471,414. He failed to provide sufficient documentation of progress resolving his financial problems. Financial considerations concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On February 14, 2012, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 5) On July 23, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

<sup>1</sup>The SOR did not include the dollar amount of his first mortgage account in SOR ¶ 1.e that went to foreclosure of \$398,588 with \$45,572 past due. (Item 6 at 27) Applicant’s charged off second mortgage account of \$67,181 in SOR ¶ 1.d was listed in the SOR.

The SOR alleged security concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On August 12, 2013, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated August 27, 2013, was provided to him on September 4, 2013.<sup>2</sup> Applicant did not respond to the FORM. The case was assigned to me on November 21, 2013.

### **Findings of Fact<sup>3</sup>**

Applicant admitted the allegations in SOR ¶¶ 1.a to 1.h and 1.j to 1.l. (Item 4) He denied the allegations in SOR ¶¶ 1.i and 1.m. (Item 4) He did not provide any corroborating documentation from creditors as part of his SOR response. Applicant's admissions are accepted as findings of fact.

Applicant is 42 years old, and he has been employed as an administrative assistant for a government contractor since November 2011. In 2001, he married, and he has four children, who were born in 1993, 1996, 2000, and 2007. He served on active duty in the Marine Corps from May 1991 to May 2011 and honorably retired. He earned some college credits over the years; however, he has not received a bachelor's degree. There is no evidence of criminal arrests or convictions or use of illegal drugs or alcohol abuse in more than 20 years.

Applicant's attributes his financial problems to three circumstances. First, the interest rate on his adjustable rate mortgage (ARM) increased from 6% (\$1,817) to 8.95% (\$3,089). Second, in 2008, his spouse's pay was reduced from \$81,000 to \$62,000 per year. Third, Applicant was unemployed after retiring from the Marine Corps from June 2011 to October 2011. On his February 14, 2012 SF 86, he disclosed his delinquent first mortgage account and a delinquent car loan; however, he stated the first mortgage was resolved in January 2009 (estimated) through a short sale, and his car loan was brought to current status in November 2011. He acknowledged in response to DOHA interrogatories that his mortgage debt was not resolved through a short sale, and that it went into foreclosure. (Item 6) He said he was not aware of his other delinquent debts because he traveled often and his spouse was responsible for paying the family's bills.

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<sup>2</sup>The DOHA transmittal letter is dated August 26, 2013, and Applicant's receipt is dated September 4, 2013. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

<sup>3</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Unless stated otherwise, Applicant's February 14, 2012 SF 86 and/or his March 12, 2012 Office of Personnel Management (OPM) personal subject interview (PSI) are the sources for the facts in the Statement of Facts. (Items 5, 6)

Applicant's SOR includes six medical delinquent, collection, or charged off debts: (1) ¶ 1.a (\$245); (2) ¶ 1.c (\$790); (3) ¶ 1.f (\$241); (4) ¶ 1.g (\$653); (5) ¶ 1.h (\$236); and (6) ¶ 1.m (\$177). Applicant said his son was in an accident, and TRICARE should have paid for the care. Applicant's spouse complied with TRICARE's direction that she submit their medical bills to their private medical insurance company first. As of March 2012, he had not received any follow-up requests for payment.

Applicant's SOR lists seven non-medical delinquent, collection, or charged off debts: (1) communications account ¶ 1.b (\$210); (2) second mortgage account ¶ 1.d (\$67,181); (3) first mortgage account ¶ 1.e (unspecified amount); (4) telecommunications account ¶ 1.i (\$200); (5) bank account ¶ 1.j (\$3,882); (6) collection account ¶ 1.k (\$213); and (7) school debt ¶ 1.l (\$1,340). Applicant denied responsibility for the telecommunications debt in SOR ¶ 1.i (\$200) because he said he returned the telecommunications equipment to the telecommunications company. (Items 4, 6)

In 2005, Applicant obtained a first mortgage on his residence for 80% of the purchase price and a second mortgage for 20% of the purchase price. The credit report Applicant provided showed that on January 2009, he owed a balance on his first mortgage of \$398,588 with \$45,572 past due. (Item 6 at 27) He also owed \$67,181 on his second mortgage with \$15,841 past due as of October 2010. (Item 6 at 29) In December 2008, Applicant moved out of his residence. (Item 5) He believes their house was foreclosed by the lender, and both mortgage debts were resolved through a foreclosure. He did not receive notice that he was being sued for a deficiency. Applicant lived in a non-recourse state, and the lenders cannot obtain a deficiency as a matter of law on purchase money mortgages. See note 8, *infra*.

Applicant's debt in SOR ¶ 1.j (\$3,882) resulted from a loan to purchase an all-terrain vehicle (ATV). Applicant claimed the debt was paid, and his other SOR debts were resolved. No proof of any payments to any SOR creditors was included in the file.

Applicant's July 2013 personal financial statement (PFS) shows he and his spouse's monthly gross salary is \$9,908; their monthly net salary is \$8,905; and their monthly net remainder after subtracting expenses is \$1,761.<sup>4</sup> The four debt payments shown on their PFS are for two vehicle loans and two credit card accounts. No payments to SOR creditors are indicated on his PFS.

Applicant's FORM noted the absence of mitigating information and explained that Applicant "shall have 30 days from the receipt of [the FORM] in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate." (FORM at 4-5) No additional information was submitted in response to the FORM.

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<sup>4</sup>Applicant's personal financial statement is the source for the facts in this paragraph. (Item 6 at 11)

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only 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 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 Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 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 mitigating 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

### Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his credit reports, OPM PSI, responses to DOHA interrogatories, and SOR response. Applicant file documents 13 delinquent, collection, or charged off accounts, totaling \$473,956 (includes his first and second mortgages on his foreclosed residence). The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;<sup>5</sup> and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

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<sup>5</sup>The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the good-faith mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant's conduct in resolving his delinquent debt does not warrant full application of any mitigating conditions to all SOR debts; however, he provided some mitigating information. Applicant's unemployment, spouse's reduction in income, and the decrease in property values are all financial conditions largely beyond his control; however, he did not act responsibly under the circumstances. The increase in interest rate on his ARM from 6% to 8.95% is not a circumstance beyond his control because this increase was in his contract with the creditor when he purchased his residence. He did not describe any unemployment or changes in his income after he received his current employment in October 2011. He did not establish that he could not have done more to pay his creditors and provide documentation of such efforts to DOHA.

Applicant disputes his responsibility for the six delinquent, collection, or charged off medical debts in the following SOR paragraphs: ¶ 1.a (\$245); ¶ 1.c (\$790); ¶ 1.f (\$241); ¶ 1.g (\$653); ¶ 1.h (\$236); and ¶ 1.m (\$177). I have credited Applicant with mitigating these six medical debts as they are likely the responsibility of his private medical insurance or TRICARE or both, although Applicant may owe some copays on these medical bills. I have also credited Applicant with mitigating the telecommunications debt in SOR ¶ 1.i (\$200) because he said he returned the telecommunications equipment to the telecommunications company, and he denied that he owed this debt. Applicant receives some mitigation from his PFS, which shows a reasonable budget and an ample monthly remainder of \$1,761. He also established some mitigation under AG ¶ 20(d) because he showed some good faith in the resolution of his SOR debts by admitting responsibility for 11 of his SOR debts.

Applicant's two mortgages and his foreclosure are more problematic. The two mortgages in SOR ¶¶ 1.d and 1.e are not collectable under California law.<sup>6</sup> His first

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<sup>6</sup>Under California law, there is a provision called the Anti-Deficiency Statute, Cal. Code Civ. Proc. § 580(b), which states in relevant part:

No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Under this section, generally if there is a foreclosure on a dwelling and there is a deficiency, the lender has no recourse regarding "purchase money loans," also called "non-recourse loans," the amounts set forth in both the 1st and the 2nd mortgages used to finance the dwelling purchase. The collateral or dwelling is considered full satisfaction. See, e.g., ISCR Case No. 08-09662 at 9 (AJ Feb. 26, 2009) (quoting same provision to mitigate substantial mortgage debts—it is noted hearing-level decisions are persuasive but non-precedential); ISCR Case No. 08-03024 at 10-12 (AJ Apr. 28, 2009) (same result—different state). Under California law, mortgage lenders to home owners have significant legal hurdles to surmount before a deficiency judgment may be obtained. See also Kalin, *Deficiency Judgments and California Law*; and *California Association of Realtors and Bank of America v. Graves*, 51 Cal. App. 4<sup>th</sup> 607, 59 Cal. Rptr. 2<sup>nd</sup> 288 (1996). For example under some circumstances, "to obtain a deficiency judgment, a lender must apply to the court for a deficiency judgment within three months of the judicial foreclosure sale." Kalin at 3. "No deficiency judgment is allowed following a trustee's sale." *Id.* at 4. However, "a borrower who takes out a construction loan for improvements or repairs, but not to finance a

mortgage was \$398,588, and his second mortgage was \$67,181. Applicant said in his OPM PSI that he did not have sufficient financial resources to keep his home out of foreclosure, and he said he made some partial payments. Yet, his credit report shows on January 2009, he owed a balance on his first mortgage of \$398,588 with \$45,572 past due, and he owed \$67,181 on his second mortgage with \$15,841 past due as of October 2010. It would have been particularly valuable in an assessment of his financial responsibility and good faith to know how much he paid the mortgage companies while he continued to occupy the residence. He did not provide any documentation from his bank or the creditors showing any payments on the two mortgages or correspondence to or from his creditors showing he maintained contact with his creditors and attempted to work with them to resolve the mortgages.

In sum, Applicant did not provide any documentation, such as checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the following six SOR creditors: (1) communications account ¶ 1.b (\$210); (2) second mortgage account ¶ 1.d (\$67,181); (3) first mortgage account ¶ 1.e (\$398,588); (4) bank account ¶ 1.j (\$3,882); (5) collection account ¶ 1.k (\$213); and (6) school debt ¶ 1.l (\$1,340). There is no financial documentation relating to these six SOR creditors as follows: financial counseling; maintenance of contact with creditors;<sup>7</sup> correspondence to or from these creditors; credible debt disputes in light of his acceptance of responsibility in his SOR response; attempts to negotiate payment plans; or other evidence of progress or resolution of these six SOR debts, totaling \$398,588. There is insufficient evidence that his financial problems are being resolved, are under control, and will not occur in the future.

### **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(a):

- (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

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personal residence, is subject to a deficiency judgment." *Id.* at 5 (citation omitted), *see also id.* (discussing availability of deficiency as remedy for junior lien holders). In *California Association of Realtors and Bank of America v. Graves*, the court described several scenarios where junior lien holders lost or retained their legal right to obtain a deficiency judgment.

<sup>7</sup>"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.



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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant's finances were adversely affected when he became unemployed after retiring from active duty, his spouse's income was reduced, and property values decreased in his state. These are all financial conditions largely beyond his control. He is credited with mitigating the six SOR medical debts in ¶¶ 1.a, 1.c, 1.f to 1.h, and 1.m as well as one telecommunications debt in SOR ¶ 1.i. He has a reasonable budget and an ample monthly remainder of \$1,761. He admitted responsibility for 11 of his SOR debts. He has been employed by the same defense contractor since October 2011, and for the last two years he had stable employment. There is no evidence of criminal conduct or abuse of alcohol or drugs in more than 20 years. He honorably served for 20 years in the Marine Corps. He contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. He fell behind on his mortgages in 2009 or 2010, and several other debts became delinquent more than a year ago. His PFS showed a remainder of \$1,761, and he did not prove that he made any payments to the following six SOR creditors after obtaining his current employment: ¶ 1.b (\$210); ¶ 1.d (\$67,181); ¶ 1.e (\$398,588); ¶ 1.j (\$3,882); ¶ 1.k (\$213); and ¶ 1.l (\$1,340). As a minimum, he could have resolved the three smallest debts. He could have made greater progress resolving and documenting resolution of his delinquent SOR debts. He failed to mitigate six SOR debts, totaling \$471,414. He did not provide documentary proof that he attempted to settle these six delinquent debts despite claiming efforts to resolve them. His failure to establish his financial responsibility shows lack of judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 19. More documented financial progress is necessary to mitigate security concerns.

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. Financial considerations concerns are not mitigated. For the reasons stated, I conclude Applicant is not eligible for access to classified information at this time.

## 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 F:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d and 1.e:	Against Applicant
Subparagraphs 1.f to 1.i:	For Applicant
Subparagraphs 1.j to 1.l:	Against Applicant
Subparagraph 1.m:	For Applicant

## Conclusion

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

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Mark Harvey  
Administrative Judge