



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
)  
) ISCR Case No. 12-08139  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel  
For Applicant: *Pro se*

07/12/2013

**Decision**

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate security concerns arising under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Clearance is denied.

**Statement of the Case**

On January 7, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD could not find under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On February 25, 2013, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On April 2, 2013, Department

Counsel compiled the Government's File of Relevant Material (FORM) that contained documents identified as Items 1 through 11.

The Defense Office of Hearings and Appeals (DOHA) forwarded to Applicant a copy of the FORM with instructions to submit any additional information and objections within 30 days of its receipt. Applicant received the FORM on April 11, 2013. In an undated document, Applicant submitted a response to the FORM. His response contained documents that have been marked as Exhibits (Ex) A through O. Department Counsel had no objection to Applicant's response. The case was assigned to me on June 21, 2013. Items 1 through 11 and Ex A through O are entered into the record.

### **Findings of Fact**

Applicant is a 42-year-old systems engineer who works for a defense contractor. He has been working for his current employer since March 2009. His educational background is unknown. He served in the U.S. Navy from August 1988 to May 1999 and received an honorable discharge. He is married and has three children, ages 9, 11, and 14. He appears to have held a security clearance since his service in the Navy.<sup>1</sup>

The SOR alleged, under Guideline F, that Applicant had eight delinquent debts (SOR ¶¶ 1.a – 1.h) totaling \$320,581. Under Guideline E, it alleged that an agreed judgment was entered against Applicant in July 2010 for allegedly violating a state code provision (SOR ¶ 2.a); that he was found to be in violation of that agreed judgment in July 2011 for failing to make required payments (SOR 2.b); and that he was fired from a job in October 2008 for misconduct (SOR 2.c). In his Answer to the SOR, Applicant admitted the debts in SOR ¶¶ 1.g and 1.h totaling \$34,000 and denied the remaining debts. He also admitted the allegations in SOR ¶¶ 2.a and 2.b, but denied the allegation in ¶ 2.c. His admissions are incorporated as findings of fact.<sup>2</sup>

### **Personal Conduct**

A Joint Personnel Adjudication System (JPAS) entry made by Applicant's former employer on April 16, 2010 stated:

2008 10 09 – Our customer directed the removal of [Applicant] from [a U.S. intelligence] facility immediately, as there seem[s] to be serious allegations against [Applicant] with the [state court]. The customer also reported that during working hours on site, [Applicant] has been soliciting

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<sup>1</sup> Item 4.

<sup>2</sup> Items 1 and 3. Applicant admitted the allegations in SOR ¶¶ 1.g, 1.h, and 2.b and added the comment "with reason" for each of those admissions. However, he provided no reason or explanation with those admissions.

other employees for financial investments and other employee opportunities with a company he owns.<sup>3</sup>

In response to Section 13C (Employment Record) of his Electronic Questionnaire for Investigations Processing (e-QIP) dated April 12, 2010, Applicant indicated that he was “laid off” from a job in October 2008. He stated the reason for being laid off was:

The [state] has a court case against a company I worked parttime for. My name was put in the lawsuit. [My former employer] found out about this and released me from my contract.<sup>4</sup>

In response to Section 13A (Employment/Unemployment Information) of the e-QIP, Applicant indicated that, once the “prime contractor” completed an investigation, he had his “full access granted” in October 2008. However, he also listed that he was unemployed from October 2008 to March 2009. From the evidence presented, it does not appear that Applicant ever returned to that job after being released in October 2008. The basis for him stating he was granted “full access” following a prime contractor’s investigation is unknown.<sup>5</sup>

In response to Section 28 (Involvement in Non-Criminal Actions) of the e-QIP, Applicant stated that he was a party in litigation instituted by a state’s corporation commission in August 2008. He stated the litigation was brought against a company at which he worked, and he was named a party in the lawsuit. He further stated that he had a letter indicating he admitted “no guilt” and was in full cooperation with the state attorney handling the matter. He also stated, “I have to payback anything I made while employed by [the company]. I made a total of \$9,000 while working there. I have agreed to pay this sum back to all parties involved.”<sup>6</sup>

In his Answer to the SOR, Applicant admitted that he entered into an agreed judgment with the state corporation commission for an alleged violation of a state code provision. This legal action was brought against Applicant in July 2008. The specific code provision that was allegedly violated states:

It shall be unlawful for any person in the offer or sale of any securities, directly or indirectly,

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(2) To obtain money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to

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<sup>3</sup> Item 10. It is unknown why the JPAS entry was made a year and a half after the reported event.

<sup>4</sup> Item 4. See pages 26-27 of the e-QIP.

<sup>5</sup> Item 4. See pages 12-16 of the e-QIP.

<sup>6</sup> Item 4. See pages 58-59 of the e-QIP.

make the statements made, in light of the circumstances under which they were made, not misleading, or . . . .<sup>7</sup>

In a letter to a state attorney dated October 28, 2008, Applicant stated that he attended the company's seminar explaining its investment program. Under that program, "homeowners would take out loans against their house (\$50K) and [the company] would use it towards investments set to mature within 5-7 years at which time, [the company] would pay off each investor's home and [the investors would] receive 50% of their investment return." He noted that all of the seminars were held at a church, a pastor was involved in the program, and he thought it was a faith-based program. He served as a representative of the company and was involved in bringing potential investors to the seminars. He claimed that he had no involvement with the investors once they arrived at the seminars. In that letter, he stated that he brought four potential investors to the seminars. In another letter, he stated that all the people he recruited for the company were family, friends, and co-workers.<sup>8</sup>

In responding to interrogatories, Applicant provided a portion of a transcript of a state corporate commission hearing. The caption of the transcript listed Applicant as the only defendant in the proceeding. The transcript indicated Applicant entered into an Agreed Settlement Order. Under that order, he was required to "pay \$9,000 in commissions that he had received as a result of the sales of securities and to return those to 25 investors." It also noted that he was required to begin making payments to the investors of \$720 per month starting in July 2010 and to submit status reports of his payments. Applicant failed to take those actions. When state authorities later contacted him about this matter, Applicant stated that he lost his job and would provide a further explanation. The transcript indicated that he provided no further explanation.<sup>9</sup>

### Financial Considerations

SOR ¶ 1.a – collection account for \$183,000. This account was a real estate mortgage loan. Applicant denied this debt. In the FORM, Department Counsel indicated that Item 7 (a credit report) provided evidence supporting this allegation. However, Item 7 reflected that this account was being paid "as agreed" and also stated "Closed Paid; Current Account." No other documents in the FORM support this allegation. Insufficient evidence has been presented to substantiate this allegation.<sup>10</sup>

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<sup>7</sup> Items 3, 6, and 11.

<sup>8</sup> Ex M and N.

<sup>9</sup> Items 5 and 6. The case summary of this legal action indicated that this matter was disposed of through a "judgment." See Item 6.

<sup>10</sup> Items 3 and 7; Ex B and C. In the e-QIP, Applicant indicated he had a delinquent mortgage. He also provided documentation that he entered into a Loan Modification Agreement for a mortgage loan of \$826,621 with a different creditor. From the evidence presented, it appears that the e-QIP entry and Loan Modification Agreement do not pertain to the mortgage loan alleged in SOR ¶ 1.a.

SOR ¶ 1.b – collection account for \$93,000. This account was a second mortgage loan. Applicant denied this debt. Item 7 indicated that this account was “late 30 days” and had a high credit amount of \$93,000. Item 7 also indicated that the account’s balance was zero, listed no amount as being past due, and noted this account was transferred or sold. In Item 7, a different entry with a later date of last activity reflected that a mortgage loan held by another creditor with a high credit amount of \$93,000 was paid. No other documents in the FORM support this allegation. Insufficient evidence has been presented to substantiate this allegation.<sup>11</sup>

SOR ¶ 1.c – collection account for \$8,676. This was a credit card account that was placed for collection. Applicant denied this debt. Item 7 indicated the account was charged off and the date of last activity on this account was January 2005. In response to the FORM, Applicant provided a letter from this creditor indicating an account with that company had a zero balance. His two most recent credit reports do not list this account. From the information provided, I find this account is resolved.<sup>12</sup>

SOR ¶ 1.d – collection account for \$1,655. This was a medical account that was placed for collection. Applicant denied this debt. Item 7 showed that this account had a zero balance and indicated it was paid. No other documents in the FORM support this allegation. Insufficient evidence has been presented to substantiate this allegation.<sup>13</sup>

SOR ¶ 1.e – collection account for \$250. This was a cable television account that was placed for collection. Applicant denied this debt. Item 7 indicated that the date of last activity on this account was April 2004. Item 7 did not list a balance or past-due amount, but indicated the high credit was \$250. Applicant provided no proof that this debt has been resolved. This account is not listed on his two most recent credit reports.<sup>14</sup>

SOR ¶ 1.f – collection account for \$28. The original creditor on this account was a music service club. Applicant denied this debt. Item 7 indicated that this account was past-due \$28 and was placed for collection. The date of last activity on this account was in February 2010. Applicant provided no proof that this debt has been resolved. This account is not listed on his two most recent credit reports.<sup>15</sup>

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<sup>11</sup> Items 3 and 7; Ex D. Ex D is a certificate of satisfaction from the alleged creditor that indicated a mortgage had been paid. Item 7 indicated that Applicant had two mortgages from this creditor. From the information provided, it is unclear to which mortgage the certificate of satisfaction applies.

<sup>12</sup> Items 3, 7, 8, and 9; Ex E. From the information provided, it could not be confirmed the account listed on the creditor’s letter is the same account as that alleged in the SOR.

<sup>13</sup> Items 1, 3, and 5.

<sup>14</sup> Items 1, 3, 5, 7, 8 and 9.

<sup>15</sup> Items 1, 3, 5, 7, 8 and 9.

SOR ¶ 1.g – collection account for \$25,000. This was an automobile loan that was late 90 days as of April 2010. Applicant admitted this debt. In his response to the FORM, he presented a Notice of Dismissal of a lawsuit in which he agreed to pay the creditor \$7,028 plus interest and \$1,054 in attorney's fee at a rate of \$200 per month beginning in March 15, 2013. He provided no proof of payments under that agreement. This debt remains unresolved.<sup>16</sup>

SOR ¶ 1.h – collection account for \$9,000. This debt arose from Applicant's Settlement Order discussed above in the Personal Conduct section. He admitted this debt. In his response to the FORM, Applicant presented a letter dated April 23, 2013, from a senior investigator of the state corporation commission. It stated:

As part of your letter, you offer to begin making payments to [the company's] investors. According to your letter it appears that you are contemplating paying \$8 a month to each investor until you have paid at least \$9,600 total.

As you may recall you entered into a Settlement Order dated October 20, 2009 wherein you agreed to pay the investors \$9,000 within 150 days of that order. But this payment was not made.

Due to your representation of having lost your job, on June 15, 2010 the Commission agreed to amend that Order and agreed to you making monthly payments of \$720 to the investors. But these payments were not made.

Due to the foregoing, the Commission entered a Default Judgment on April 20, 2012. According to this Order, you were to have paid the investors \$9,000 and the Treasurer of [State] \$1,000 by May 30, 2013. These payments have not been made. Although the Division of Securities and Retail Franchising ("Division") encourages you to make the required payment even though the deadline has passed, please note the Division cannot change the terms of the Order, including payment amounts and dates.

The payment plan that you are proposing would be self-imposed and will not affect the Commission's ruling. As such, the Division's encouragement to make the payments should not be construed as altering the requirements of the prior Order or as acceptance of the offer in your letter.<sup>17</sup>

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<sup>16</sup> Item 5; AE F. The date that Applicant was to begin making those payment was difficult to read, but appears to be March 15, 2013.

<sup>17</sup> Ex G.

Applicant provided no proof of payments under the Settlement Order or default judgment. This debt remains unresolved.<sup>18</sup>

In October 2012, Applicant submitted a personal financial statement (PFS) that reflected his net monthly income was \$13,180, and his total actual monthly payments were \$12,021, which left him a net monthly remainder of \$1,159. Of particular note, the PFS indicated that he paid \$4,035 per month in car expenses. In September 2012, he obtained financial counseling.<sup>19</sup>

Applicant presented no character reference letters or work performance evaluations.

### **Policies**

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AGs. 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 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, to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in

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<sup>18</sup> Items 1-9.

<sup>19</sup> Items 1-9.

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), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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**

### **Guideline F, Financial Considerations**

The security concern for financial considerations is set out in AG ¶ 18 as follows:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
  
- (c) a history of not meeting financial obligations.



Applicant accumulated two debts (SOR ¶¶ 1.g and 1.h) that he was unable or unwilling to pay over an extended period. The evidence is sufficient to raise the above disqualifying conditions.

Five financial considerations 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; 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.

Insufficient evidence was presented to establish that the debts in SOR ¶¶ 1.a, 1.b, and 1.d were delinquent. The debt in SOR ¶ 1.c is resolved. The debts in SOR ¶¶ 1.e and 1.f are insignificant and raise no security concerns. I find in favor of Applicant on SOR ¶¶ 1.a through 1.f.

Applicant admitted the debts in SOR ¶¶ 1.g and 1.h. These debts are ongoing, significant, and cast doubt on Applicant's current reliability, trustworthiness, and good judgment. He failed to establish that these debts arose due to conditions beyond his control or that he acted responsibly in trying to resolve them. He presented no evidence that he has made any payments towards these debts. Although Applicant has received financial counseling, he failed to show that his financial problems are being resolved or are under control. From the evidence presented, I am unable to find that his financial problems are unlikely to recur. AG ¶ 20(c) applies partially. None of the other mitigating conditions apply to the debts in SOR ¶¶ 1.g and 1.h.

## Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available evidence information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; (2) . . . inappropriate behavior in the workplace; [and] (3) a pattern of dishonesty or rule violations.

The three Guideline E allegations are related. In October 2008, he was terminated from a job for soliciting co-workers to participate in financial investments. In July 2008, those financial investments were the subject of a state corporation commission lawsuit alleging untrue statements or misleading omissions were made in the sale of those securities. In 2009, Applicant entered into a Settlement Order in which he agreed to pay \$9,000 to 25 investors. He failed to make those payments. In April 2012, a state corporation commission entered a default judgment against him. Record evidence is sufficient to show that Applicant was involved in the sale of financial investments that were in violation of state law and his employer's policies. The above disqualifying conditions apply.

AG ¶ 17 lists three personal conduct mitigating conditions that are potentially applicable:

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

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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant failed to mitigate the security concerns arising under Guideline E. He stated that he admitted “no guilt” arising from the state lawsuit. He portrayed himself as having limited involvement in those financial investments. He told a state attorney that he only brought four potential investors to the financial seminars, but the Settlement Order required him to reimburse 25 investors. From the evidence presented, it is apparent that Applicant has not accepted responsibility for doing anything improper, although his misconduct led to him being terminated from his job and resulted in a default judgment against him. From the foregoing, I am unable to find that Applicant is unlikely to engage in such questionable conduct in the future. Questions about Applicant’s trustworthiness, reliability, and good judgment remain. AG ¶¶ 17(c), 17(d), and 17(e) do not apply.

### **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 relevant 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 which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

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

Applicant served on active duty in the U.S. Navy and received an honorable discharge. He presented no character evidence. Since he elected to have a decision on the written record, I was unable to observe him and assess his demeanor and credibility. He failed to present sufficient whole-person information to mitigate the alleged security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's suitability for a security clearance. Therefore, I conclude Applicant has not mitigated the security concerns arising under Guidelines F and E.

### **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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.f:	For Applicant
Subparagraphs 1.g – 1.h:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant

### **Decision**

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

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James F. Duffy  
Administrative Judge