



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



In the matter of: )  
)  
) ISCR Case No. 14-03734  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Rhett Petcher, Esquire, Department Counsel  
For Applicant: Sawn Hrotic, Esquire

11/24/2015

**Decision**

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

**Statement of the Case**

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on October 12, 2011. He signed the e-QIP on October 18, 2011. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on December 9, 2014, detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on January 8, 2015, and he answered it on January 10, 2015. A hearing was requested before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on June 19, 2015, and I received the case assignment on August 25, 2015. DOHA issued a Notice of Hearing on September 2, 2015, and I convened the hearing as scheduled on September 25, 2015. The Government offered exhibits (GE) marked as GE 1 through GE 8, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) marked as AE A through AE G, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on October 5, 2015. I held the record open until October 9, 2015, for Applicant to submit additional matters. Applicant timely submitted AE H, which was received and admitted without objection. The record closed on October 9, 2015.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.d, 2.a, and 2.b of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶ 2.c of the SOR.<sup>1</sup> He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 56 years old, works as a program manager and systems engineer for a DOD contractor. He began working for his employer in 1984. In 1985, Applicant worked for another federal contractor. In 1986, he returned to working for his current employer. His supervisor described him as a gentleman of strong character, who has earned his trust and respect. Applicant is a reliable and dependable employee. Applicant's facility security officer (FSO) wrote a letter of recommendation.<sup>2</sup> He has great respect for Applicant and believes him to be a great asset to any organization. Applicant has a high level work ethic, works well with others, and exudes a positive attitude. He considers Applicant reliable and professional. Another co-worker and government branch head wrote that Applicant's expertise, character and work ethic were the reasons his company placed him in charge of a specific contract. Applicant has not been disciplined at work. Applicant's church pastor also described Applicant as dependable and trustworthy and a trusted member of their leadership team. The letters

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<sup>1</sup>When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

<sup>2</sup>This facility security officer is not the same facility security officer who filed the 2012 incident report. GE 2; AE C.

of recommendation praise Applicant and show respect for him. None discuss the issues raised in the SOR.<sup>3</sup>

Applicant graduated from high school in 1977. He served in the military on active duty from August 1977 until May 1984. He received a medical discharge under honorable conditions following an injury while on active duty. Applicant attended college, but he did not graduate. He and his wife married in October 1979. They have a 29-year-old son, a 26-year-old daughter, and one grandchild.<sup>4</sup>

In 2005, Applicant sustained serious injuries in a motorcycle accident. His injuries included traumatic brain injury, two herniated discs in his neck, shoulder injury, ankle injury, and knee injury. He underwent surgery on his neck, which is bolted together, and on his shoulder, knee and ankle. As a result of his injuries, he endures constant pain and has short-term memory issues. He carries a notebook with him to help with his memory.<sup>5</sup>

Applicant tried to use prescription pain killers (narcotics) to manage his pain. Because of his traumatic brain injury, the prescription pain killers prevented him from sleeping. His physician verified the negative impact of the narcotics on him. Applicant's physician referred him to a pain clinic around 2006 to help him manage his pain. During his meetings at the clinic, Applicant came to understand that his pain would be managed with narcotics and declined to use the narcotics. Medical marijuana was suggested to him, but he also declined a prescription for it.<sup>6</sup>

Shortly after his evaluation at the pain clinic, a friend offered Applicant marijuana. He decided to try a small amount to sleep. Applicant began to use minimal amounts of marijuana on a regular basis at night to help him sleep and to ease his pain. The marijuana helped with both as verified by his family physician. He stopped using marijuana in 2012. Now, Applicant goes to bed early and tries to obtain five hours of sleep a night. He usually sleeps two and one-half to three hours before his pain wakes him up. Eventually, he is able to sleep additional hours many nights.<sup>7</sup>

When he decided to smoke marijuana to relieve his pain and help with his sleep, Applicant understood that marijuana was an illegal drug. He obtained the marijuana through a friend. In 2007, he was unable to obtain marijuana, so he decided to grow it. He was unsuccessful in his efforts to grow marijuana. Over the six years of his use,

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<sup>3</sup>AE A - AE D; Tr. 22, 25-26.

<sup>4</sup>GE 1; Tr. 20-22.

<sup>5</sup>Tr. 24-25, 37.

<sup>6</sup>AE H ; Tr. 37-38, 42-43.

<sup>7</sup>AE F; Tr. 27, 38-44.

Applicant estimated that he spent between \$500 and \$1,000 on marijuana for medical use.<sup>8</sup>

Applicant vaguely recalls signing a document many years ago from his employer whereby he agreed to an urinalysis test upon request. His employer has never tested him for drug use. He assumes that his employer has a drug policy and that use of illegal drugs, including marijuana, is against company policy. He admits that he knew his use of marijuana was likely against company policy. He also knew that he could not use any illegal drugs, including marijuana, while holding a security clearance.<sup>9</sup>

In June 2012, while driving his car, a police officer stopped Applicant for an inoperative tag light and brake light. After Applicant rolled down his car window, the police officer noticed the smell of marijuana and asked to search Applicant's car. The police officer found two marijuana smoking devices. The police report indicates that Applicant admitted smoking marijuana earlier with friends, and at the time, he was stopped. The police arrested and charged him with possession of marijuana and possession of drug paraphernalia. Applicant immediately report his arrest to his FSO. Applicant appeared in court on October 16, 2012. He pled guilty to possession of drug paraphernalia, and the possession of marijuana charge was nolle processed. The court fined him \$500, plus \$22 in court costs and \$35 in other fees. The court entered a finding of probation before judgment with an end date of October 16, 2013. On June, 30, 2015, the court granted Applicant's early request to expunge his court record related to this arrest.<sup>10</sup>

After his arrest, Applicant decided to stop using marijuana for medical purposes. In October 2012, he sought help with this goal through a clinic. The clinic regularly tested him for marijuana use. The first seven tests results were positive for marijuana, but, with each test, the level of marijuana found decreased. One night he could not sleep, and he used marijuana. His use caused an increase in the marijuana level shown on his next drug test. Applicant then checked himself into an inpatient treatment program, which he completed. He successfully stopped using marijuana. He is not currently in a treatment program. He provided a report for a September 2015 drug test. The results are negative for illegal drugs. With the OPM investigator and at the hearing, Applicant stated that he had no intent to use marijuana or other illegal drugs in the future and that he would sign a statement of intent not to use illegal drugs with the understanding that if he did, his security clearance would automatically be revoked. He has not signed an intent. Applicant no longer uses marijuana, and his friends understand his decision.<sup>11</sup>

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<sup>8</sup>Tr. 43-44.

<sup>9</sup>Tr. 30-32, 43.

<sup>10</sup>GE 2; GE 6; GE 7; AE G; Tr. 46-47.

<sup>11</sup>GE 3; AE E; Tr. 27, 44-45.

While serving in the military, Applicant was charged with possession of hashish. In 1978,<sup>12</sup> another sailor asked Applicant to give a box to a sailor in Applicant's berth area. Applicant denies any initial knowledge of the box contents. As soon as he walked through the door into his berth area, he was stopped by two sergeants-at-arms, who asked to see the contents of the box. They found hashish. Applicant was given nonjudicial punishment (NJP), reduced in rank, fined, assigned extra duty, and restricted to his ship for a period of time. This is the only disciplinary incident for Applicant during his years of military service.<sup>13</sup>

The SOR alleges that Applicant intentionally falsified his 2011 e-QIP when he answered "no" to the following questions:

Section 22 - Police Record - Police Record (EVER)

Other than those offenses already listed, have you ever had the following happen to you? . . . Have you **EVER** been charged with any offense involving alcohol or drugs?

Section 23 - Illegal use of Drugs or Drug activity - While Possessing a Security Clearance

Have you **EVER** illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?

Applicant acknowledged that he intentionally falsified his answer about using illegal drugs while holding a security clearance because he was afraid he would lose his job. He denies intentionally falsifying the question about his police record, as he did not consider his nonjudicial punishment a police record. This incident occurred many years ago. The incident was discussed in a 2003 personal subject interview.<sup>14</sup>

The SOR also alleges that Applicant falsified material facts during his August 1, 2012 interview with a DOD authorized investigator when he stated that he did not use marijuana before the incident [undefined] leading to his arrest in June 2012, stating that he only used marijuana at home to help him sleep. The police report contains conflicting statements about what Applicant told the police officer. The report indicates that the police officer asked if Applicant had smoked marijuana in this car earlier and Applicant answered that "earlier with friends I smoked a joint while working on my car." The report indicates that after he was arrested, Applicant admitted "yea, I was smoking 'it' when you stopped me." The police report does not reflect that marijuana was found in

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<sup>12</sup>GE 8 shows the date of this incident as May 30, 1980. Except for GE 8, all other documents state that the incident took place in 1978. Applicant does not deny that this incident occurred.

<sup>13</sup>GE 3; GE 4; GE 5; GE 8.

<sup>14</sup>GE 5; Tr. 33-36.

Applicant's car, only the paraphernalia with possible marijuana residue was found. At the hearing, Applicant denied smoking marijuana in his car, but admitted he had smoked it in the driveway with friends before he drove home.<sup>15</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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<sup>15</sup>GE 2; GE 6; Tr. 48.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional; and

(g) any illegal drug use after being granted a security clearance.

Applicant smoked small amounts of marijuana for medical purposes on a regular basis for six years. Under federal law, marijuana, even that used for medical purposes, is illegal, making such use a security concern.<sup>16</sup> To smoke marijuana, Applicant had to possess it. He tried to grow marijuana in 2007, but failed. During the time of his use of marijuana, Applicant held a security clearance. The Government has established a security concern under AG ¶¶ 24, 25(a), 25(c), and 25(g). At the hearing, Applicant stated that he voluntarily sought medical help to cease his marijuana use in 2012. The record lacks any evidence showing a diagnosis of drug abuse or drug dependency. The Government has not established a security concern under AG ¶¶ 25(d), 25(e) and 25(f).

AG ¶ 26 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(b) a demonstrated intent not to abuse any drugs in the future, such as:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used;
- (3) an appropriate period of abstinence; and,
- (4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant expressed an intent not to use marijuana for medical purposes to the OPM investigator and at the hearing. He stopped using marijuana in 2012 after his arrest, and he voluntarily sought inpatient treatment to assure the end of his marijuana use. He has not used marijuana in two years. Applicant continues to experience significant pain from his motorcycle accident, which impacts his sleep. I have weighed the evidence and considered Applicant's testimony. I conclude that Applicant does not intend to use marijuana in the future. He has mitigated any security concern about his

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<sup>16</sup>ES 2014-00674, Memorandum from the Director of National Intelligence regarding Adherence to Federal Laws Prohibiting Marijuana Use (October 25, 2014); February 13, 2013 Memorandum from the Office of the Assistant Secretary of Defense on Prohibition on the Use of Marijuana by Military Service Members and Department of Defense Civilian Employees; Department of Defense Instruction No. 1010.09 DOD Civilian Employee Drug-Free Workplace program (June 22, 2012).



future use of marijuana to manage his chronic pain and sleeplessness. The security concerns raised in SOR allegations 1.b - 1.d are mitigated.

Applicant used marijuana while holding a security clearance. He knew that marijuana was an illegal drug, and he knew that he could not use it while holding a security clearance. He, however, chose to do so for six years. In doing so, he exercised poor judgment and betrayed the Government's trust. He has not mitigated the security concerns raised in SOR allegation 1.a.

## **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

For AG ¶¶ 16(a) and 16(b) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his December 2011 e-QIP, when he failed to acknowledge his use of marijuana for medical reasons and to list his NJP while in the military. In his response to the SOR and at the hearing, Applicant acknowledged that he intentionally lied on his e-QIP about his use of marijuana for

medical reasons.<sup>17</sup> With this admission, the Government has established a security concern under AG ¶ 16(a) as to SOR allegations 2.b.

Concerning SOR allegation 2.a, Applicant denies intentionally failing to list his long ago NJP for possession of hashish. He is not sure of the reason for not listing it, but he did not consider his NJP a police incident. The record reflects that the information about the NJP was provided to the Government in his 2003 personal subject interview, making the Government fully aware of it. The Government has not established that Applicant intentionally falsified his answer in Section 22 of the SOR. Allegation 2.a is found in favor of Applicant.

When he met with the OPM investigator, he again denied that he had used marijuana before his arrest in 2012. He knew this information was incorrect. The Government has established a security concern under AG ¶ 16(b) as to SOR allegation 2.c.

The personal conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

- (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 is given partial mitigation credit under AG ¶ 17(d) because he finally acknowledged his use of marijuana at the hearing and he candidly acknowledged that he lied about his past use of marijuana. He is not given full credit because he only revealed the information after the issuance of the SOR. Because Applicant intentionally lied, no other mitigating condition applies under the facts of this case.

### **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 an 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

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<sup>17</sup> See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is well-respected at his workplace where he has worked for nearly 30 years without incident. He has been married for many years and raised a family. In 2005, he sustained serious injuries in a motorcycle accident. As a result, he endures constant pain and will likely continue to experience pain for the rest of his life. He could not use prescribed pain medication because the medications contain narcotics and narcotics directly impacted his ability to sleep because of the injury to his brain in the accident. He discovered that small amounts of marijuana relieved his pain and allowed him to sleep. For six years, he used marijuana on a regular basis for this purpose. He knew that marijuana was illegal under any circumstances and that his use was prohibited by law and by company policy. He decided to use the marijuana anyway. Applicant made a serious error in judgment when he decided to use marijuana, an illegal drug, while holding a security clearance and to lie about his use. His decision to lie on his e-QIP and to the OPM investigator reflects a serious lack of judgment made in an effort to hide his drug use. He acknowledged his drug use to his FSO only after he was arrested in 2012. His frankness at the hearing does not weigh fully in his favor. I find that Applicant has not fully mitigated the security concerns raised about his marijuana use while holding a security clearance and his subsequent intentional lies about his marijuana use. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guidelines H and E.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug use and personal conduct under Guidelines H and E.

## 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 H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

## Conclusion

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

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MARY E. HENRY  
Administrative Judge