KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: In February 2001, on two separate occasions one week apart, Applicant, then a decorated Staff Sergeant on active duty with the U.S. Air Force, was directed by his commander to report to the immunization clinic to receive his anthrax vaccination as part of his reassignment process. He acknowledged receiving and understanding both orders, reported to the clinic as ordered, but refused to receive the vaccinations. Nonjudicial punishment under Article 15, UCMJ, was subsequently imposed upon Applicant on two separate occasions, each for one specification for disobeying a lawful order, in violation of Article 92, UCMJ, for which he received reductions in grade. In May 2001, based solely on those two incidents, he was administratively discharged with an Under Honorable Conditions (General) discharge. He is now considered fully rehabilitated. The questions and doubts as to his security eligibility and suitability have been satisfied. Clearance is granted.

CASENO: 03-14747.h1

DATE: 12/09/2005

DATE: December 9, 2005

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-14747

DECISION OF CHIEF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In February 2001, on two separate occasions one week apart, Applicant, then a decorated Staff Sergeant on active duty with the U.S. Air Force, was directed by his commander to report to the immunization clinic to receive his anthrax vaccination as part of his reassignment process. He acknowledged receiving and understanding both orders, reported to the clinic as ordered, but refused to receive the vaccinations. Nonjudicial punishment under Article 15, UCMJ, was subsequently imposed upon Applicant on two separate occasions, each for one specification for disobeying a lawful order, in violation of Article 92, UCMJ, for which he received reductions in grade. In May 2001, based solely on those two incidents, he was administratively discharged with an Under Honorable Conditions (General) discharge. He is now considered fully rehabilitated. The questions and doubts as to his security eligibility and suitability have been satisfied. Clearance is granted.

STATEMENT OF THE CASE

On September 23, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated October 15, 2004, Applicant responded to the allegations set forth in the SOR, and

requested a hearing. The case was assigned to me on March 10, 2005. A notice of hearing was issued that same day, scheduling the hearing for March 31, 2005, and the hearing was held as scheduled. Four government exhibits, 46 Applicant exhibits, and Applicant's testimony were received without controversy. The transcript (Tr.) was received on April 11, 2005.

RULINGS ON PROCEDURE

Applicant had affixed four tabs of attachments to his answer to the SOR.[(1)] At the commencement of the hearing, Department Counsel objected to Applicant's Tab E and the 26 attachments which comprised the tab, citing, in part, the doctrine of *collateral estoppel*.[(2)] As a result, the tabs were separated from the answer and handled separately. As there was no objection to Tabs A through D, they were admitted as Applicant exhibits.[(3)] One additional attachment was added to Tab D (attachment 14), an it too was admitted without objection.[(4)] Department Counsel also objected to a new Tab F (current status documents) consisting of three individual documents on the basis of relevancy.[(5)]

As to the government's position regarding *collateral estoppel*, while Department Counsel addressed the well-settled rule that an individual is generally estopped from challenging a *criminal conviction* in a subsequent civil action or federal administrative proceeding to preclude re-litigation of *criminal convictions*,[(6)] the government chose not to address the application of the rule to nonjudicial proceedings such as those under Article 15, Uniform Code of Military Justice (UCMJ).[(7)] Under these circumstances, two issues were raised negating the application of the rule in this particular instance, both of which require comment. First, the *criminal convictions* upon which the government has based the SOR, are not *criminal convictions* as contemplated for the rule to apply. Nonjudicial punishment, by its very nature, is a disciplinary measure which is less serious than trial by court-martial,[(8)] where punishment may be imposed for acts or omissions that are minor offenses.[(9)] It does not rise to the level of being a *criminal conviction* involving a misdemeanor offense.[(10)] Second, Applicant is not attempting to re-litigate the prior nonjudicial punishment, but rather merely seeking to furnish evidence as to motivation for the actions that resulted in that punishment.[(11)] Accordingly, the government's objections to Tabs E and F were overruled and the exhibits were admitted.[(12)]

FINDINGS OF FACT

Applicant has admitted both of the factual allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.a. and 1.b.) as well as the sole factual allegation pertaining to personal conduct under Guideline E (subparagraph 2.a.). Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 35-year-old employee of a defense contractor, and he is seeking to obtain a SECRET security clearance. He had previously been granted a TOP SECRET security clearance with access to sensitive compartmented information (SCI) in 1989 in connection with his active military service.[(13)]

Applicant entered active duty with the U.S. Air Force in February 1989,[(14)] and eventually rose to the grade of staff sergeant, the grade he held as of February 22, 2001.[(15)] During that period of superb and honorable service, he was awarded the following decorations, awards, and ribbons: Air Force Commendation Medal, Air Force Achievement Medal, National Defense Service Medal, Air Force Good Conduct Medal with 2 devices, Air Force Longevity Service Award with 2 devices, Air Force Training Ribbon, Air Force Overseas Long Tour Ribbon, NCO Professional Military Education Ribbon, Air Force Outstanding Unit Award with 3 devices, and Air Force Organizational Excellence Award. [(16)]

His last six performance reports, covering the period April 1, 1995 thru September 20, 2000, are generally categorized as "firewall" appraisals recommending him for immediate promotion.[(17)] His lowest comments were: "highly effective," regarding his ability to supervise or lead, "consistently able to organize and express ideas clearly and concisely," regarding his ability to communicate, and "excellent performer. . . consistently produces high quality work," regarding the performance of his assigned duties.[(18)]

On December 6, 2000, an event occurred which altered Applicant's relationship with the U.S. Air Force and eventually led to a review of his security clearance review by DOHA, for on that date Applicant received a notification that he had been selected for reassignment--a permanent change of station--from an assignment in the U.S. to an overseas (European) location.[(19)] The appropriate paperwork was completed and Applicant's departure date was approved for July 1, 2001.[(20)] However, in late January 2001, Applicant was also selected for a sanctioned contingency temporary deployment to Kuwait with a projected departure date of March 1, 2001.[(21)]

As part of the entire reassignment process, Applicant was required to participate in the Department of Defense (DOD) Anthrax Vaccination Immunization Program (AVIP) and undergo a series of Anthrax vaccinations.[(22)] On February 7, 2001, Applicant stated his intention to not participate in AVIP:[(23)] "[I]f given a direct order to take the vaccine, I cannot in good conscience, comply."[(24)] He was directed to consult with the local Area Defense Counsel the following day.[(25)] On February 16, 2001, Applicant was directed by his Squadron Section Commander to report to the immunization clinic that same morning to receive his first anthrax shot.[(26)] He acknowledged receiving and understanding the order,[(27)] reported to the clinic as ordered, but refused to receive the vaccination.[(28)] One week later, on February 23, 2001, the

scenario was repeated. He was again directed by his Squadron Section Commander to report to the immunization clinic that same afternoon to receive his first anthrax shot.[(29)] He acknowledged receiving and understanding the order,[(30)] reported to the clinic as ordered, but again refused to receive the vaccination.[(31)]

On February 23, 2001, nonjudicial punishment under Article 15, UCMJ, was imposed upon Applicant for one specification for disobeying a lawful order, in violation of Article 92, UCMJ, for which he received a reduction to the grade of senior airman and a reprimand.[(32)] One week later, on March 2, 2001, nonjudicial punishment under Article 15, UCMJ, was again imposed upon Applicant for one specification for disobeying a lawful order, in violation of Article 92, UCMJ, for which he received a reduction to the grade of airman first class and a reprimand.[(33)] On April 5, 2001, Applicant was notified by his Headquarters Squadron Commander that he was being recommended for discharge for Minor Disciplinary Infractions, based solely on his two failures to obey a written order regarding the Anthrax vaccinations.[(34)] During a pre-board hearing, Applicant sought to submit a package of approximately 25 documents upon which he relied in making his decision to refuse the Anthrax vaccinations, but the evidence was rejected by the legal advisor.[(35)] Because of the rulings during the pre-board hearing, Applicant felt he could not get a fair hearing absent his evidence, and on May 8, 2001, he submitted a conditional waiver of his right to a discharge board hearing contingent upon his receiving no less than an Under Honorable Conditions (General) discharge.[(36)] That discharge was approved by the Wing Commander,[(37)] and he was discharged on May 21, 2001.[(38)]

On October 27, 2004, the United States District Court for the District of Columbia, for the second time, issued an injunction against the current operation of AVIP.[(39)] The court commented:[(40)]

By refusing to give the American public an opportunity to submit meaningful comments on the anthrax vaccine's classification, the [FDA] violated the Administrative Procedure Act. . . . Congress has prohibited the administration of investigational drugs to service members without their consent. This Court will not permit the government to circumvent this requirement. The men and women of our armed forces deserve the assurance that the vaccines our government compels them to take into their bodies have been tested by the greatest scrutiny of all - public scrutiny. This is the process the FDA in its expert judgment has outlined, and this is the course this Court shall compel FDA to follow.

That same day, the Secretary of Defense issued a memorandum acknowledging an AVIP pause, but added that "DoD remains convinced that the AVIP complies with all legal requirements and that anthrax vaccine is safe and effective."[(41)] Two days later, by routine message, the U.S. Air Force directed an immediate pause directing that, until further notice, all anthrax vaccinations to all military and civilian personnel, including family members and contractor personnel, be stopped.[(42)] An exception to the pause was granted by the court in February 2005, wherein DOD was permitted to administer the vaccination on a voluntary basis.[(43)] As of the date the record herein closed, the AVIP was still in a pause status.

Applicant has been employed by the same government contractor since May 29, 2001, where he is now a System

Administrator.[(44)] While former supervisors and coworkers were very supportive of his efforts to obtain an honorable discharge during his difficulties while being processed for discharge, there has been no characterization of his current work performance.

Applicant was married in 1989, and he and his wife have three children, born in 1993, 1994, and 1997, respectively.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Criminal Conduct-Guideline J: A history or pattern of criminal activity creates doubt about a person's

judgment, reliability and trustworthiness.

Personal Conduct-Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to each of the adjudicative guidelines are set forth and discussed in the Conclusions section below**..**

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security,"[(45)] or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive 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.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of witness credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline J. On February 16, 2001, Applicant was directed by his Squadron Section Commander to report to the immunization clinic that same morning to receive his first anthrax shot. He acknowledged receiving and understanding the order, reported to the clinic as ordered, but refused to receive the vaccination. One week later, on February 23, 2001, the scenario was repeated. He was again directed by his Squadron Section Commander to report to the immunization clinic that same afternoon to receive his first anthrax shot. He acknowledged receiving and understanding the order, reported to the clinic as ordered, but again refused to receive the vaccination. Applicant's disobedience of both of those lawful orders, justified by him as jeopardizing his health, was contrary to good order and discipline and violations of the UCMJ.

Accordingly, on February 23, 2001, nonjudicial punishment under Article 15, UCMJ, was imposed upon Applicant for one specification for disobeying a lawful order, in violation of Article 92, UCMJ, for which he received a reduction to the grade of senior airman and a reprimand. One week later, on March 2, 2001, nonjudicial punishment under Article 15, UCMJ, was again imposed upon Applicant for one specification for disobeying a lawful order, in violation of Article 92, UCMJ, for which he received a reduction to the grade of airman first class and a reprimand. Applicant's criminal conduct, consisting solely of those two incidents, one week apart, clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*).

As noted above, Applicant justified, in his own mind, his disobedience of both orders due to concerns over the safety of the anthrax vaccination. It appears that AVIP has been reduced, suspended, resumed, and paused on several occasions since it was instituted in 1997, and it was seemingly suspended from July 2000 to June 2002--including the period during which Applicant's disobedience occurred.[(46)] It currently remains in a pause status with the exception of voluntary acceptance of the vaccination which was permitted commencing earlier this year. While the orders to participate in AVIP were apparently lawful, they may not have been wise and seemingly followed a series of similar historical instances involving what were officially considered safe programs: Agent Orange, swine flu vaccine, Gulf War Syndrome, and the Hepatitis C virus exposure. Nevertheless, as the U.S. Air Force Court of Criminal Appeals had previously noted in a similar case: [(47)]

Military personnel are inoculated to protect them personally, and as part of a fighting unit, so they can perform the mission under adverse conditions. The [Applicant's] refusal to be inoculated is a direct flouting of military authority and detracted from the ability of his unit to perform its mission. A military accused cannot justify his disobedience of a lawful order by asserting that his health would be jeopardized. Putting one's life on the line for the sake of the mission is the very essence of military duty.

A person should not be held forever accountable for actions from the past if there is a clear indication of subsequent reform, remorse, or rehabilitation. In this instance, Applicant's two incidents of disobedience of a lawful order while in the military occurred within one week of each other in February 2001--over four years before the DOHA hearing. The incidents of misconduct were preceded and succeeded by no other criminal conduct. An otherwise superb military career was terminated by the two incidents, his nonjudicial punishment for them, and his subsequent Under Honorable Conditions (General) discharge. Furthermore, the unquestioned obligations that a military member has regarding a lawful order are not

the same as the obligation of a civilian contractor. A civilian contractor, the status Applicant currently occupies, can refuse to comply with the order of a superior to take an Anthrax vaccination and not be charged with a violation of criminal law as the UCMJ does not apply to him.

These circumstances raise Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*), CC MC E2.A10.1.3.2. (*the crime was an isolated incident*), CC MC E2.A10.1.3.3. (*the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*), and CC MC E2.A10.1.3.4. (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*). In terms of pressure or voluntariness, I am not suggesting individuals directed or forced Applicant to do what he has been accused of doing. Instead, I believe the obligations to participate in AVIP, a program which continues in a pause status because of serious concerns over the safety of the program, no longer apply to Applicant and his actions are not likely to recur as none of those pressures, factors, conditions, or obligations are now present. Furthermore, Applicant's unblemished record since the incidents, his stable lifestyle, and continuing affiliation with his employer, raise the application of CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). Also, while I cannot condone the refusal to comply with the orders of his superior, some consideration must be extended to factor E2.2.1.7. (*the motivation for the conduct*) described under the adjudicative process "whole person concept." Consequently, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government`s case with respect to Guideline J. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded in favor of Applicant.

The government has generally established its case under Guideline E. Applicant's two incidents of criminal conduct--characterized by the U.S. Air Force as inor Disciplinary Infractions--resulted in his Under Honorable Conditions (General) discharge in May 2001. His Squadron Section Commander did not believe Applicant's actions, as unacceptable as they were to military authorities, justified an Under Other Than Honorable Conditions (UOTHC) discharge, and higher authorities agreed with him. Examination of Applicant's military record justified the General, or higher form of discharge, which "is appropriate when an airman's service has been honest and faithful, but 'significant negative aspects of the airman's conduct or performance of duty outweigh positive aspects of the airman's military record.'"[(48)] Applicant's administrative discharge and the underlying criminal conduct which served as the basis for it, reveals conduct possibly involving questionable judgment which raises Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1. (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*), as well as PC DC E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*).

Applicant's unblemished record since the administrative discharge, his stable lifestyle, and continuing affiliation as a civilian employee with his employer, a government contractor, raise the application Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.5. (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*).

Essentially for the same reasons noted for the behavior under Guideline J, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government`s case with respect to Guideline E. Accordingly, allegation 2.a. of the SOR is concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

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 J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2., Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

DECISION

In light of all 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.

Robert Robinson Gales

Chief Administrative Judge

1. Tab A consisted of 6 individual attachments (character statements); Tab B consisted of 10 individual attachments (performance reports and feedback); Tab C consisted of 16 individual attachments (appreciation items); Tab D consisted of 13 individual attachments (non-judicial punishment and discharge); and Tab E consisted of 26 individual attachments (material read by Applicant contributing to his refusal to comply with orders).

2. Tr. 12.

3. Tr. 28.

4. Tr. 31-32.

5. Tr.34-35.

6. *Citing* ISCR Case No. 99-0116 (May 1, 2000) at 2.

7. Tr. 16.

8. UCMJ § 815 (b). Art. 15; MCM, 2002 (Revised ed.), part. V, ¶ 1.b.

9. *Id*. MCM, ¶ 1.e.

10. ISCR Case No. 96-0525 at 3, n.2 (App. Bd. Jun 17, 1997).

11. Tr. 27.

12. Tr. 38.

13. Government Exhibit 1 (Security Clearance Application (SF 86), dated October 25, 2002), at 10.

14. Government Exhibit 3 (Certificate of Release or Discharge from Active Duty (DD Form 214), undated.

15. Government Exhibit 4 (Administrative Discharge file - Recommendation for Discharge, undated, at 1).

16. Government Exhibit 3, *supra* note 14.

17. Government Exhibit 4, *supra* note 15, at 1; Applicant Exhibits B1 - B6 (Enlisted Performance Reports (AF Form 910), covering periods April 1, 1995 - September 20, 2000).

18. *Id.* Applicant Exhibits B4, at 1, and B6, at 1.

19. Applicant Exhibit D2 (Notification of Selection for Reassignment, undated).

20. *Id*., at 5.

21. Applicant Exhibit D3 (Individual Augmentation Billet Notification Memorandum, dated January 22, 2001).

22. The AVIP is a multi-service vaccination program for active duty, Reserve and National Guard service members which was instituted in 1997. It was the object of substantial negative commentary from a variety of sources, including the U.S. General Accounting Office (GAO), members of congress, state authorities, and the news media. For manufacturing-related reasons, the program was reduced and later suspended beginning in July 2000. It was formally resumed by DOD in June 2002. *See, Doe v. Rumsfeld*, Civ. Act. 03-707 (D.D.C. Oct 27, 2004), n. 1 (mem.); *see also*, Applicant Exhibit E18 (GAO-01-21, *State Department: Serious Problems in the Anthrax Vaccine Immunization Program*, dated December 13, 2000).

23. Applicant Exhibit D1 (Applicant's Letter, subj: Anthrax Vaccine Intent, dated February 7, 2001), at 1.

24. *Id*.

25. Applicant Exhibit D5 (Memorandum from Squadron Section Commander, subj: Mandatory Appointment with Area Defense Counsel, dated February 15, 2001).

26. Applicant Exhibit D6 (Memorandum from Squadron Section Commander, subj: Order to Receive First Anthrax Shot

in the Vaccination Series, dated February 16, 2001).

27. *Id.*

28. Applicant Exhibit D7 (Memorandum from Immunization Services, subj: [Applicant's] Refusal to start Anthrax Series, dated February 16, 2001.

29. Applicant Exhibit D8 (Memorandum from Squadron Section Commander, subj: Order to Receive First Anthrax Shot in the Vaccination Series, dated February 23, 2001).

30. *Id.*

31. Applicant Exhibit D9 (Memorandum from NCOIC, Allergy/Immunization Services, subj: [Applicant's] Refusal to Initiate Anthrax Series, dated February 23, 2001.

32. Government Exhibit 4, *supra* note 15, at 1.

33. *Id.*

34. Government Exhibit 4 (Administrative Discharge file - Notification Letter - Board Hearing, dated April 5, 2001, at 1).

35. Government Exhibit 4 (Administrative Discharge file - Legal Review of AFI 36-3208 Separation Action, undated), at 3.

36. *Id.*

37. Government Exhibit 4 (Administrative Discharge file - Memorandum from Wing Commander, subj: Administrative Discharge, undated).

38. Government Exhibit 3, *supra* note 14.

39. *Doe v. Rumsfeld*, *supra* note 22, at 2

40. *Id*., at 40.

41. Applicant Exhibit F2 (Secretary of Defense Memorandum, subj: Anthrax Vaccine Immunization Program Pause, dated October 27, 2004).

42. Applicant Exhibit F1 (HQ USAF Message 292012Z Oct 04, subj: Temporarily Stop Giving Anthrax Immunizations to All DOD Personnel, dated October 29, 2004), at 1.

43. *Doe v. Rumsfeld*, Civ. Act. 03-707 (D.D.C. Feb. 6, 2005) (Or.) (available at 2005 WL 774857).

44. Government Exhibit 1, *supra* note 13, at 3.

45. Exec. Or. 12968, *"Access to Classified Information;"* as implemented by Department of Defense Regulation 5200.2-R, *"Personnel Security Program,"* dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.).

46. If, as the Court in *Doe v. Rumsfeld* noted, AVIP had been suspended from July 2000 to June 2002, it might be argued the orders were not, in fact, lawful, but Applicant did not raise the issue during his nonjudicial punishment process or administrative discharge process, nor during this hearing. Instead, he viewed the orders as unsafe and immoral. *See*, Applicant Exhibit D10 (Memorandum to Squadron Section Commander, dated February 23, 2001), at 1. Accordingly, although the lawfulness of an order might be questioned if it is considered immoral, in this instance, and under these circumstances, the issue will not be further explored.

47. *U.S. v.Washington*, 54 M.J. 936, 940 (2001).

48. Government Exhibit 4, *supra* note 35, at 2.