



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-15281
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric Borgstrom, Esquire, Department Counsel  
For Applicant: Alan V. Edmunds, Esquire

February 27, 2009

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**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is granted.

Applicant submitted his Security Clearance Application (e-QIP), on January 9, 2007. On June 6, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines E and F. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on June 17, 2008. He answered the SOR in writing through counsel on July 2, 2008, and requested a hearing before an

administrative judge. DOHA received the request on July 3, 2008. Department Counsel was prepared to proceed on August 31, 2008, and I received the case assignment on October 21, 2008. DOHA issued a notice of hearing on October 31, 2008, and I convened the hearing as scheduled on November 18, 2008. The government offered 16 exhibits (GE) 1 through 16, which were received and admitted into evidence without objection. Applicant and one witness testified on his behalf. He submitted 15 exhibits (AE) A through O, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on November 26, 2008. I requested additional information from Applicant and held the record open until December 8, 2008, for Applicant to submit this information. On December 1, 2008, Applicant through counsel, requested an additional 25 business days to obtain the information requested. For good cause, I granted Applicant's request for an extension of time by Order dated December 2, 2008. On January 12, 2009, he timely submitted AE P, which was admitted objection. The record closed on January 14, 2009.

### **Findings of Fact**

In his Answer to the SOR, dated July 2, 2008, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, and 2.a of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant, who is 53 years old, works as software engineer and manager for a Department of Defense contractor. He started working for his current employer in May 2008. He graduated from a major university in the United States (U.S.) in 1977 with a Bachelor of Science degree in environmental resource management. He has taken course work towards a masters degree in business administration, but has not completed this degree. He married in 1978 and has two children, ages 22 and 13.<sup>1</sup>

Immediately after graduating from college in 1977, Applicant enlisted in the U.S. Navy. He served on active duty until February 1984, when he resigned his commission and took a reserve commission. He continued as an active reservist until May 2004, when he became an inactive reservist. During this time, he served in Desert Storm, the first Gulf war. He retired from the Naval reserves in September 2006 with almost 30 years of military service and at the rank of Captain (O-6).<sup>2</sup>

In December 1984, Applicant started working for the Navy as a civilian employee. Over the years, his duties and responsibilities expanded. He held a top secret clearance and later, the Navy granted him a sensitive compartmented information (SCI) clearance. During the many years Applicant held a security clearance, the Navy never alleged or charged him with any violations of security procedures nor is there any evidence that he

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<sup>1</sup>GE 6 (Applicant's security clearance application dated January 1, 2007) at 6, 12-16; Tr. 51-52, 54.

<sup>2</sup>GE 6, *supra* note 1, at 17-19; Tr. 31-32, 38-39.

violated security procedures. His references indicate that he always followed security rules.<sup>3</sup>

By 1998, Applicant was a senior scientific and technical intelligence officer with a staff of 10 to supervise. His work involved special access programs, which he called white and black programs. White programs are specific programs acknowledged as defense programs. In the late summer of 2002, through his work in a white program, he began working in black programs. Black programs are special access programs which require a SCI clearance and are programs which the Navy does not publicly acknowledge their existence. Applicant split his work time between both programs. His payment for work on the black programs came as a result of a paper trail through the white programs. At the hearing, he declined on two occasions to provide any additional information on the black programs.<sup>4</sup>

Applicant's second level supervisor had no access to black programs and his first level supervisor had access to one black program, which was different from Applicant's programs. Accountability and assignments for the black programs came through a different chain-of-command than his usual first and second level chain-of-command. As a result, Applicant's supervisors had neither knowledge nor input on his work in the black programs. Based on his understanding and belief that he could not reveal anything about his work in black programs, including when his work involved the black programs, Applicant provided no information to his supervisors about his absence from his office when his work on black programs took him out of his office to other locations on the base or off the base. His unexplained absences created concerns with his managers about his whereabouts and what work was being performed. As the record contains no evidence or even a reference to poor performance of actual duties, his managers' concern focused on whether he was actually working when his whereabouts were unknown.<sup>5</sup>

At his last Navy civilian job site, the base had four different access systems, which were not linked together. Specifically, his office building was on a system different from other buildings in which he also worked. Applicant had three cards to access his work locations on the base. One card gained him entry to the base; the second card gained him entry to his work building; and the third card gained him entrance to SCI areas outside his usual work building.<sup>6</sup>

Applicant prepared his time and attendance sheets at the end of each week, not on a daily basis, a process which was proper under the personnel regulations. He

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<sup>3</sup>GE 6, *supra* note 1, at 24-25; AE A to AE M; Tr. 34. I note, however, that the government has no burden any such violations.

<sup>4</sup>Tr. 43-44, 53-54.

<sup>5</sup>Tr. 42-43, 62-63, 74, 88-90.

<sup>6</sup>GE 16; Tr. 59, 88-89.

reported his time spent on each work project each week. He, however, did not keep an accurate daily record of his time spent on various work projects or programs. Thus, his time sheets reflected his honest belief about the actual amount of time worked on each program on any given day, rather than an accurate statement of the time worked based on good record keeping on his daily work hours. At the hearing, Applicant acknowledged that his time keeping habits were not good because he did not keep an accurate daily record of the work he performed on various projects. He also acknowledged that as a result, he submitted inaccurate time records, which may have included, as work time, time spent at the gym. He always provided documentation to his supervisors when he needed military leave. Applicant now enters his work time at the end of each workday. He programmed his computer and blackberry so that he is reminded at the end of each day to record his work hours.<sup>7</sup>

Applicant possessed a government travel credit card for his civilian job. In the past, he also had a government credit card or received advance payment for his military reserve expenses. In 1998, the Navy withdrew authorization for a separate travel card for advance payment of reserve activities expenses. Applicant used his travel card to pay for reserve duties expenses and for personal expenses when he did not have his personal credit card with him. He admits that use of the government travel card for personal purchases was against the rules. Because the government travel credit card bill came directly to him, he always paid his personal charges when he paid the bill. He denies submitting any personal expenses for payment by the government and the record contains no evidence that he did. For a long time, Applicant also paid all of his government travels expenses before receiving his reimbursement for these expenses because his base often took 90 days to reimburse him for his travel expenses. Towards the end of 2002 or at the beginning of 2003, he stopped paying his travel expenses before the government reimbursed him for his expenses.<sup>8</sup>

In November 2002, a female employee filed a sexual harassment charge against Applicant. The Navy placed him on administrative leave until March 2003. While investigating this misconduct allegation, the Navy started a second investigation, which identified problems with Applicant's time and attendance records and his use of a government credit card. Although the Navy took no action on the sexual harassment charge, on January 30, 2003, the Navy issued a proposal to remove Applicant from federal service based on misuse of the government travel card for personal expenses and inaccurate time and attendance records.<sup>9</sup>

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<sup>7</sup>Tr. 55-59, 71.

<sup>8</sup>*Id.* 40-41, 64-65; AE P.

<sup>9</sup>GE 15 (Documents related to the revocation of Applicant's SCI clearance) at 11.

Applicant timely responded to the proposal to remove and submitted documentation to be considered.<sup>10</sup> In March 2003, Applicant submitted his resignation when he recognized that the investigation into his conduct was “not going well”. The agency refused to accept and process his resignation. On March 14, 2003, the agency issued a notice of decision on proposal to remove. On March 20, 2003, Applicant and the agency entered into a settlement agreement. Under the terms of the agreement, **Applicant agreed** to resign his position effective, March 21, 2003, to comply with all checkout procedures, to reimburse the agency \$3,827.70 for time, to turn in all his government equipment, badges and decals, and to waive all his legal rights as a federal employee, including his right to appeal his job termination to the Merit System Protection Board.<sup>11</sup> Applicant did not waive his right to appeal any adjudication of his security clearance. **The agency agreed** to accept the settlement agreement as a resolution of the discipline for Applicant’s misconduct and to cancel the removal action, to implement the terms of the agreement, to notify the Department of Navy Central Adjudication Facility (DONCAF) of his resignation, to not enter either the proposal to remove or the decision to remove letters in Applicant’s Official Personnel Folder (OPF), although his OPF would reflect that he resigned after being issued a notice of adverse action for misconduct, and to pay any unpaid local and travel claims for expenses if submitted by Applicant. The parties complied with the terms of the settlement agreement.<sup>12</sup>

Subsequent to his resignation as a civilian employee, on April 18, 2003, the DONCAF issued a Letter of Intent (LOI) to revoke Applicant’s security clearance and eligibility for access to SCI and a SOR, which referenced security concerns under Guidelines E, F and I. Applicant received the LOI on May 22, 2003. He immediately requested a 45-day extension of time to reply as he needed records from the agency. He provided a letter from the agency dated August 12, 2003, advising it would process his request for information under the Freedom of Information Act (FOIA) and could not give him a time estimated for when he would receive the information. He requested four more extensions of time because the agency had not provided him with the information he had requested. The DONCAF granted three more extensions of time.<sup>13</sup> On April 22, 2004, DONCAF denied his last request for an extension of time, and issued a letter of Revocation (LOR) on the grounds he did not answer the LOI and revoked his clearance. Two days after his clearance was denied, he received a letter from the agency general

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<sup>10</sup>Neither the proposal to remove nor his response with documentation are included in this record. Applicant does not have copies of the documents sent with his response.

<sup>11</sup>When an agency removes an employee from federal service, the employee has a right to appeal the dismissal to the Merit System Protection Board (MSPB), challenging the reasons for the removal. If an employee appeals, the agency must prove all the elements of the charge it brings by a preponderance of the evidence. See *Alvarado v. Department of Air Force*, 103 M.S.P.R. 1 (2006).

<sup>12</sup>GE 15, *supra* note 9, at 37-39.

<sup>13</sup>The DONCAF letters granting Applicant’s request for an extension of time are in the record, but Applicant’s requests are not. GE 15.

counsel apologizing for the delay. Applicant believes this information was deliberately withheld by the person who conducted the investigation for the agency. He also believes that this individual wanted his job and did not conduct a full and complete investigation as information Applicant provided was not verified and persons were not contacted. The decision to remove letter indicates that the investigator only checked access to Applicant's usual office building, not other buildings. It also verified that his references for black programs provided no information on his work time.<sup>14</sup>

Applicant obtained employment with a Department of Defense contractor after he resigned from federal service. The Defense Industrial Security Clearance Office (DISCO) converted his military service clearance to a top secret clearance for his new employer. The government revoked this clearance after receiving notice that the DONCAF had revoked his clearance as a Navy reservist in April 2004. The government based the second revocation on the DONCAF's revocation and did not conduct a new investigation.<sup>15</sup>

Applicant submitted letters of recommendation from 14 individuals who worked with him and know him. All describe him as a professional and excellent leader. All opine that he would not compromise or jeopardize classified information or national security. One individual stated that he was proactive in protecting classified information and another indicated that he always followed the security rules. All praised his work skills and work ethics. Applicant testified that if a foreign agency approached him, he would not tell or give the agent anything and he would contact the Federal Bureau of Investigation immediately. Based on his general knowledge, his witness also testified to a hypothetical and to his belief that if Applicant was approached by a foreign agent, Applicant would break his arm and then turn him into authorities. This witness has no concerns about Applicant's ability to handle classified information.<sup>16</sup>

Applicant does not own property outside of the U.S. His most recent credit report indicates that his bills are paid and he does not have any unpaid debts. His budget shows he lives within his monthly income. He has money in a 401k account. Applicant suffers from depression and anxiety and has been treated for these conditions since returning from Desert Storm.<sup>17</sup>

When he completed his SF-86, Applicant provided the information concerning the loss of his job and his security clearance. He has been open and honest about the problems and his perception as to why this situation occurred. In hindsight, he acknowledged that his poor time keeping caused problems with his time and attendance records and he wrongly used his government travel credit card for personal expenses.

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<sup>14</sup>GE 15, *supra* note 9, at 1-33; GE 16.

<sup>15</sup>GE 7; GE 8; GE 9; GE 10; GE 11; GE 12; GE 13; GE 14.

<sup>16</sup>AE A to AE O; Tr. 21-27, 45-46.

<sup>17</sup>GE 16; AE O; Tr. 46-47.

He still believes that he did not misuse his government travel credit card for reserve duty expenses and his witness confirms that the criteria for use of the government travel credit card were not clear. He now carries only one personal credit card for his use.<sup>18</sup>

## Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.<sup>19</sup>

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<sup>18</sup>GE 6.

<sup>19</sup>After any decision, the losing party has a right to appeal the case to the Defense Office of Hearings and Appeals Appeal Board. The Appeal Board's review authority is limited to determining whether three tests are met:

E3.1.32.1. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge:

E# a.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive: or

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 the 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.

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 E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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E3.1.32.3. The Administrative Judge’s rulings or conclusions are arbitrary, capricious, or contrary to law.

The Appeal Board does not conduct a “*de novo* determination”, recognizing that its members have no opportunity to observe witnesses and make credibility determinations. The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase “*de novo* determination”:

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define “*de novo* proceeding” as a review that was “unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency’s] determination is supported by substantial evidence.” In *United States v. First City National Bank*, 386 U.S. 361,368 [(1967)], this Court observed that “review *de novo*” means “that the court should make an independent determination of the issues” and should “not . . . give any special weight to the [prior] determination of “the administrative agency.

(Internal footnotes omitted). See ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge’s analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White’s dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See *also* ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board’s authority to reverse hearing-level judicial decisions and recommends remanding cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008). Compliance with the Agency’s rules and regulations is required. See *United States ex. rel. Acardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Lopez v. FAA*, 318 F.3d 242, 247-248 (D.C. Cir 2003); *Nickelson v. United States*, 284 F. Supp.2d 387, 390 (E.D. Va. 2003)( explaining standard of review).



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:

(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;

(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 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:

. . .

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

In the instant case, the Applicant has not omitted any information from his security clearance application or any other document as specified in AG ¶ 16(a). Rather, he provided the negative information in his SF-86 which became the basis for the SOR. Thus, AG ¶ 16(a) is not applicable in this case.<sup>20</sup>

Applicant's use of his government travel credit card for personal expenses is a clear violation of the rules for use of this card, which he acknowledged. Applicant's agreement to reimburse the government for some of the work time previously paid, but not worked, reflects a significant misuse of the government's resources. Thus, the government has established a security concern under AG ¶¶ 16(d)(3) and 16(d)(4).

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<sup>20</sup>Department Counsel argued that I should find that Applicant intentionally and deliberately falsified his time and attendance sheets. The agency did not charged applicant with intentional falsification or fraud in regards to his time and attendance. It is beyond my authority to review and redecide the agency's decision on the charges made against Applicant for misconduct.

Under AG ¶ 17, Applicant could mitigate security concerns under the following conditions:

(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's time and attendance issues occurred between September 2002 and December 2002, more than six years ago. More importantly, this issue arose when he was working in black programs. He could not reveal the work he was doing and mistakenly believed that he could not tell his supervisors when he was actually working on black programs. Since Applicant no longer works for the Navy and will not be working in black programs, the source of his time problems has been eliminated. AG ¶ 17(c) has partial applicability to his time and attendance issue only.

Applicant has acknowledged his behavior on a number of occasions. In response to questions on the SF-86 about his past employment, Applicant clearly acknowledged his resignation after receiving an adverse action for misconduct and explained the misconduct. He also acknowledged that he lost his security clearance in 2004. He admits that his conduct resulted in his job loss and revocation of his security clearance. He changed his habits and behavior to prevent problems with his time records and credit card use in the future. His blackberry and computer remind him at the end of each day to complete his time sheet and he does. He no longer uses a business credit card and does not intend to do so in the future. By admitting his conduct, changing how he handles his time and limiting his access to credit cards, Applicant has taken positive steps to eliminate or reduce his vulnerability to exploitation, duress and coercion. Thus, AG ¶¶ 17(d) and 17(e) apply partially.

## **Guideline F, Financial Considerations**

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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 disqualifying conditions that could raise security concerns. In the instant case, the government failed to present any evidence which indicates that Applicant's has financial problems. Applicant's admissions about his use of his government credit card for personal purchases, however, raise a security concern under AG ¶ 19(d) "deceptive or illegal financial practices such as . . . and other intentional financial breaches of trust."

Applicant submitted evidence which indicates that he lives within his financial means and has paid his bills as required. He paid his personal purchases each month after receiving his bill for his government credit card. His evidence does not reflect a need to use the government credit card for purchases because he did not have resources available to him. Rather, Applicant used his government travel credit card for personal convenience. Applicant's use of the government credit card occurred over six years ago. His past conduct does not reflect on his current trustworthiness and reliability. He no longer uses a business credit card so as to ensure he will not use such a card for personal purposes. Guideline F is found in favor of Applicant.

### **Whole Person Concept**

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to 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 common sense 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 good and bad. In so doing, an administrative judge must review all the evidence of record to determine if a security concern is shown. A determination on 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.

The mitigating evidence under the whole person concept is substantial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's misconduct while holding a senior intelligence officer position is serious. His misuse of time was not intentional, but the result of carelessness, poor record keeping, and his work in black programs. The record lacks any evidence that Applicant misused government time over a long period of time. The misuse of time issue coincides with his few months of work in the highly secret black programs. He acknowledged that despite his belief that he could not reveal anything about what he was doing when working in the black program, he should have advised his supervisors when he started working in the black programs. His use of the credit card for personal expenses violated the rules and he knew it. He never sought financial payment from the government for these expenses. He always paid these charges from his own finances. The government did not incur any financial losses or other harm because of his conduct. If anyone incurred a loss, it was Applicant because, at times, he used his own money to pay his government travel expenses which resulted in a loss of use of his money.

Applicant served as an active duty service member or as a reservist in the U.S. military for nearly 30 years without any misconduct issues. By serving in Iraq during the first Gulf war, Applicant put his country before his life. For 18 years prior to 2002, he worked for the Navy as a civilian without any misconduct. He always safeguarded the government's secrets and always followed the rules for guarding these secrets. His co-workers all agree that he would never betray the government's trust by compromising classified information. He would report any approaches by a foreign agent to the proper authorities immediately. While I recognize that the Appeal Board does not view past compliance with security rules as a determinate for future compliance with security rules when questions of misconduct arise, 25 years of security rules compliance warrants some credit under the whole person concept to ensure Applicant receives a fair and impartial evaluation of all evidence in the record. Applicant's recognizes his poor behavior and has taken definitive steps to prevent a future occurrence of the same conduct.

Applicant has sufficient income to pay his bills and has a substantial 401(k) account. His credit report reflects good financial management. He did not use his government travel credit card because he did not have access to a credit card or funds, but used the card for convenience. He frequently used the card for reserve duty expenses, which he believed to be a proper use of the card. The record contains no evidence that it was illegal to use the card for reserve expenses. Applicant understands that he acted improperly on matters related to work. He, however, has never acted contrary to the government's interest in matters of security. He fully understands the need to protect classified information and has done so many times. He has taught

others to do the same. In fact, his desire to fully comply with this duty may be the reason for his time and attendance issues.<sup>21</sup>

The ultimate question is whether Applicant's past negative conduct presents a security concern about his current fitness to hold a security clearance. I find that it does not. When weighing his conduct 2002 against his long years of service to the U.S., he military service in Iraq during the first Gulf war, and his strict adherence to security rules and procedures for many years, I find that overall, Applicant past conduct does not raise concerns about his fitness to hold a security clearance.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his personal conduct. The government did not establish its case under Guideline F.

### **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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

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<sup>21</sup>The record is incomplete because it does not contain all the relevant information concerning the investigation of his misconduct, including the proposal to remove and his response with documents. The decision to remove Applicant indicates that the agency only reviewed access to his building not other buildings where he performed black program work. The decision also supports his contention that his black program work would not be verified. The lack of thoroughness in the investigation failed to confirm the paper trail for his black program time in a white program. Based on my years of experience as a federal sector employment lawyer before becoming an administrative judge, I have serious concerns about the completeness of the investigation and the ultimate determination. In any proceeding before the MSPB, the agency would be required to produce this missing evidence and to establish all the allegations in the proposal to remove.

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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MARY E. HENRY  
Administrative Judge