DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-02553
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert Coacher, Esquire, Department Counsel
For Applicant: Michael F. Fasanaro, Jr., Esquire

March 16, 2009

Decision

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 denied.

Applicant submitted his Security Clearance Application (SF 86), on August 20, 2007. On July 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J. 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 July 22, 2008. He answered the SOR in writing through counsel on August 22, 2008, and requested a hearing before an

administrative judge. DOHA received the request on August 28, 2008. On October 20, 2008, DOHA amended the SOR to add additional security concerns under Guideline G. Applicant answered the amended SOR through counsel on November 4, 2008. Department Counsel was prepared to proceed on November 20, 2008, and I received the case assignment on November 24, 2008. DOHA issued a notice of hearing on December 15, 2008, and I convened the hearing as scheduled on January 13, 2009. The government offered four exhibits (GE) 1 through 4, which were received and admitted into evidence without objection. Applicant and four witnesses testified on his behalf. He submitted two exhibits (AE) A and B, which were received and admitted into evidence without objection. The record closed on January 13, 2009. DOHA received the transcript of the hearing (Tr.) on January 26, 2009.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on December 31, 2008. (Tr. 10.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. After consulting with counsel, Applicant affirmatively waived his right to 15 days notice. (Tr. 10.)

Findings of Fact

In his Answer to the SOR, dated August 22, 2008, Applicant admitted the factual allegations in ¶¶ 1.a through 1.m of the SOR, with explanations. He admitted the factual allegations in ¶¶ 2.a through 2.e of the Amended SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant, who is 40 years old, works as senior field technician for a Department of Defense contractor. He began his job two years ago and his employer promoted him in August 2008 to the position of installation coordinator. Applicant, a mechanical person, installs information technology and communication networks. His current employer describes his work performance as consistently excellent. His supervisor rated him outstanding in August 2008. His work attendance is very good. Former co-workers also describe him as an excellent worker and some one who came to work every day.[1]

Applicant married his first wife in 1992. They divorced in 1996. They have a daughter who is now 16 years old. Subsequent to his divorce, Applicant met a woman with whom he lived between 1997 until 2000. He married his second wife a few days before the hearing. They lived together for five years prior to their marriage.[2]

[1]GE 1; AE A; AE B; Tr. 20-22, 59-76.

[2]GE 1; Tr. 20, 44, 78.

In October 1994, the police arrested and charged Applicant with domestic assault and battery after he pushed his first wife out of bed. Applicant denies that alcohol was involved in this incident. The court found him guilty. The record contains no evidence which indicates the sentence imposed by the court.[3]

On January 29, 1995, the police charged Applicant with driving under the influence (DUI) and hit and run. Following a trial before a judge, the court found Applicant guilty of DUI, fined him $250 and assessed $68 in costs, which Applicant paid. The court, however, dismissed the hit and run charge.[4]

In 1995, Applicant and his wife separated. They argued over custody of their daughter on the phone one evening. The argument led to Applicant's arrest in April 1995 for threatening, profane and abusive language over the telephone. Emotions, not alcohol, controlled this situation. The court found Applicant guilty of this offense, sentenced him to 30 days in jail, suspended, and fined him $250. Appellant had no other incidents with his first wife.[5]

Applicant started dating a woman (P) in 1997. They moved in together, but did not marry. They often drank then argued with each other. Their arguing escalated into mutual physical combat and to police calls. Several arrests occurred because of these fights. In January 1998, the police arrested Applicant for the first time for felonious assault. The court dismissed this charge a few weeks later. In a February 1998 argument, P threw a brick through Applicant's car window and hit him over the head with a golf club. Applicant broke the golf club then hit P with it. The police arrested and charged Applicant with assault and battery on a family member after this fight. He declined to file charges against P. The court found him guilty, fined him and sentenced him to 12 months in jail, which was suspended except for 10 days. Applicant served his sentence through a weekend work release program, doing community service. The police arrested and charged him with violation of probation in May 1998. The court dismissed this charge in September 1998. The record contains little information on these 1998 incidents between Applicant and P.[6]

In October 1999, the police again arrested and charged Applicant with assault and battery on a family member, P. Applicant does not remember the October 1999 arrest, but acknowledges that it is listed on his arrest report. This arrest case was *nol prossed* at court. In February 2000, the police again arrested and charged Applicant with felony assault and battery on a family member following yet another fight with P.

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[3]Tr. 37-38.

[4]GE 3.

[5]GE 3; Tr. 38.

[6]GE 2; GE 4; Tr. 39-40.

The court record indicates that the incident occurred on January 22, 2000.[7] I find that the February 8, 2008 arrest and the listed January 22, 2000 arrest are for the same incident based on the court record. In August 2000, Applicant pled guilty to the felony assault charge. The court sentenced him to three years in jail and suspended the sentence. Applicant paid court costs of $348. Following his arrest in February 2000, Applicant and P ended their relationship. He described this arrest as a "wake up call" for him. Applicant did not seek counseling in 2000 because "he was too stubborn to believe he needed it for himself". He thought P needed counseling. He also did not believe he had an alcohol problem.[8]

In August 2000, the police charged Applicant with threatening calls to P, a misdemeanor. Applicant appeared in court in November 2000 with tapes of the telephone conversation. After hearing the tapes, the court dismissed the charges. Applicant has not been involved with P since 2000. He has not been arrested for assault and battery since February 2000.[9]

Applicant joined a local Moose lodge in 2003. On April 17, 2003, the Moose Lodge held its initiation ceremony. During the ceremony, Applicant drank four drinks in two hours. The drinks were stronger than he realized. He decided to drive home. The police stopped him because he had not turned on his car headlights. The police conducted a field sobriety test and administered a breathalyzer test. As a result, the police arrested and charged him with DUI, a misdemeanor. The court found him guilty of DUI, sentenced him to 20 days in jail, three years good behavior, three years unsupervised probation, restricted his driving privileges, and directed him to attend a state alcohol and substance abuse program. He served his jail sentence on weekends, paid a fine, and completed the alcohol program.[10]

Because his second DUI occurred less than three years after his sentence in August 2000 for assault and battery, the State filed a felony violation of probation charge against Applicant in August 2003 and the court issued a warrant for his arrest. When he learned that the arrest warrant existed, Applicant presented himself to the police on June 17, 2004, where he was arrested. Applicant pled guilty to the violation of probation charge. The court placed him on good behavior for three years, ordered him into an alcohol treatment program, assigned a probation officer, and ordered him to attend domestic violence and anger management counseling. He completed the required alcohol treatment and domestic violence and anger management counseling. He recalls that his counselor prepared a final report, but he does not know the contents

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[7]Applicant believed that the October 1999 arrest and the January 2000 arrest were the same incident. The court record indicates that his February 8, 2000 arrest is for an incident on January 22, 2000. GE 3 at 5.

[8]GE 2; GE 3, GE 4; Tr. 40-44.

[9]GE 2; GE 3; GE 4; Tr. 44.

[10]GE 2; GE 3; Tr. 44-46.

nor does he know what type of diagnosis, if any, was made. The record does not contain this report.[11]

Applicant began living with his current wife in 2003. In June 2006, they argued. When she asked him to leave the house, he refused. Although no physical violence was involved, she felt threatened and called the police. The police arrested him and charged him with disorderly conduct and disturbing the peace, a misdemeanor. He spent five days in jail. His wife later dropped the charges and the court dismissed the case. After his arrest and detention, he called his employer and advised his employer that he was in jail. His employer discharged him from his job when learning of his arrest. He acknowledges that alcohol was involved in this incident.[12]

Applicant began drinking occasionally at age 12 and seriously at age 21, when he joined the United States Navy. He drank to excess and often. He acknowledges that he is an alcoholic, but denies he is alcohol dependent. During his alcohol treatment program in 2005, he did not drink. He describes this treatment program as "effective". He returned to drinking after he completed treatment, but consumed alcohol at much lower levels than in the past. Applicant drank four beers on October 31, 2008 and one beer on November 2, 2008 while watching a football game. He has not consumed alcohol since this date and does not plan to drink alcohol in the future. He believes it is in his best interest not to drink. His wife rarely drinks and confirms his abstinence. She also stated that he no longer associates with his drinking buddies and was never physically violent with her. He plans on contacting his counselor again. His co-workers stated that he never observed any problems with his work performance and attendance. His wife describes a 100% improvement in him since 2006. He has a better outlook on life and his values have changed.[13]

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

[11]GE 2; GE 3; Tr. 47-49.

[12]GE 1; GE 4; Tr. 49-50.

[13]Tr. 24-27, 34-35, 54-57, 61, 65, 72, 80-85.

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.[14]

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[14]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:
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> E#.a.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive: or
>
> 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. Bannercraft 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

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

Criminal Conduct

Paragraph 30 of the new adjudicative guidelines sets out the security concern relating to criminal conduct: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

Under AG ¶ 31, the following conditions could raise a security concern and may be disqualifying:

> 31(a) provides that "a single serious crime or multiple lesser offenses" may be disqualifying;
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> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
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> (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

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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 recommending remand of 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).

Appellant admits the police charged him with assault and battery on a family member five times, twice with alcohol-related driving offenses, twice with threatening conduct, once for disorderly conduct and twice for violation of probation. These offenses are either misdemeanor or felony crimes. The evidence establishes the above disqualifying condition.

The adjudicative guidelines also set out some potentially mitigating conditions. Under ¶ 32, an Applicant may mitigate the security concerns by

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (c) evidence that the person did not commit the offense;
>
> (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement;

Applicant's criminal record reflects 11 years of conduct which resulted in numerous arrests. His first assault and battery arrest occurred when he was married to his first wife. They divorced in 1996. Thereafter, he entered into a relationship with P, which can best be described as toxic. They drank alcohol, argued, and engaged in physical combat with each other. Their arguments led to four arrests for assault and battery on a family member and two convictions, the last in August 2000. Applicant ended this relationship in 2000 when he recognized how detrimental the problems were to him. He has not been arrested for assault and battery since 2000. The police twice arrested and charged him with abusive and threatening telephone calls, the last in August 2000. The court convicted him of this conduct in 1995, but based on his evidence, dismissed the charges in 2000. He has not been arrested for threatening telephone calls since 2000. Given the length of time since his abusive physical conduct last occurred and the fact that he ended his relationship with P, there is little likelihood this type of conduct will occur in the future.

Applicant's last DUI arrest occurred in 2003. This arrest resulted in a 2004 finding by the court that he violated his probation for his 2000 assault and battery conviction. Since 2004, he has not been convicted of another crime, although he was arrested once for disorderly conduct in 2006. Applicant's criminal conduct and behavior leading to his arrests has changed significantly in the last five years. Several of the offenses for which he was arrested were dismissed by the court after hearing. I infer from the court findings that evidence showed that Applicant either did not commit the offense for which he was charged or there was insufficient evidence to show he committed these offenses.

Because alcohol played a significant role in most of Applicant's criminal conduct and he only recently stopped drinking, I find that it is too soon to conclude that his conduct has been successfully and fully rehabilitated even though his physical violence ended in 2000. Applicant has established mitigation of his criminal conduct under AG ¶¶ 32 (a) and (c).

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption, "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying:

> (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

Applicant began drinking at age 12 and seriously drinking at age 21. He drank to excess frequently. As a result, the court twice convicted him of DUI and assault and battery on a family member. His second DUI arrest also resulted in a felony charge and conviction for violation of probation. The police arrested him on numerous occasions for conduct related to drinking between 1998 and 2006. Thus, these disqualifying conditions apply in this case.

AG ¶ 23 provides conditions that could mitigate security concerns:

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and,

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant acknowledges that he is an alcoholic. He stopped drinking two months before his hearing, a fact confirmed by his new wife. However, because he stopped drinking in 2005 then returned to drinking, this short time of no alcohol consumption is insufficient to establish a pattern of abstinence. There is no evidence of record that he has been diagnosed as alcohol dependent or an alcohol abuser by a professional. He did enter and complete a court ordered alcohol treatment program in 2005. Whatever diagnosis the counselor may have made at that time is not of record. What is known is that he returned to drinking. The evidence of record is insufficient to establish mitigation under AG ¶ 23.

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, not a single item in isolation, to determine if a security concern is shown. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's arrests and court convictions are directly related to his excessive alcohol consumption. He recognized the negative impact his relationship with P was having on him and terminated the relationship. Since ending this relationship, he has not been arrested for assault and battery. He, however, declined to acknowledge the role alcohol played in the problems with this woman until very recently. Applicant continued to drink from 2000 until two months ago. His drinking resulted in a second DUI and a finding that he violated his probation. He enrolled in court ordered treatment for alcohol, domestic violence, and anger, which he completed. Although he stopped drinking while in the program, which he considers effective, he returned to drinking at a lower volume. In 2006, he had his last arrest for an alcohol related incident, which is significant given his long history of alcohol related criminal arrests. His new wife does not tolerate abuse from him and credibly presented a picture of a change man. However, his decision to stop drinking two months ago is too recent for him to show a track record of abstinence. Given that he acknowledges he is an alcoholic, his decision to not drink in the future is admirable as well as difficult to honor. Had he abstained from drinking after his treatment in 2005, he would have mitigated any security concerns about his alcohol consumption. Because of the serious problems his alcohol consumption has caused, Applicant needs to show that he can refrain from alcohol consumption over time to mitigate security concerns under Guideline G.

Overall, the record evidence leaves me with 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 criminal conduct, but he has not mitigated security concerns arising from his alcohol consumption.

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 APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant

Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	For Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	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 access to classified information is denied.

MARY E. HENRY
Administrative Judge