



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



In the matter of: )  
 )  
----- ) ISCR Case No. 09-03812  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: James F. Duffy, Esquire, Department Counsel  
For Applicant: *Pro Se*

March 11, 2010

**Decision**

HARVEY, Mark, Administrative Judge:

A transportation company employed Applicant from 1999 to February 2007. Applicant provided wine to a 20-year-old passenger and made comments of a sexual nature to her. Applicant denied that he made the inappropriate comments to his company and to an Office of Personnel Management (OPM) investigator. Shortly after lying to the OPM investigator, Applicant admitted he made the inappropriate comments to the 20-year-old passenger. He failed to fully mitigate security concerns under Guideline E. Access to classified information is denied.

**Statement of the Case**

On December 15, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On October 15, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as

amended and modified; and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges security concerns under Guideline E (personal conduct) (Hearing Exhibit (HE) 2). 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 Applicant's clearance should be granted, continued, denied, or revoked.

On November 2, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge (HE 3). On December 10, 2009, Department Counsel announced he was ready to proceed on Applicant's case. On December 16, 2009, DOHA assigned Applicant's case to me. On January 11, 2010, DOHA issued a hearing notice (HE 1). On February 4, 2010, Applicant's hearing was held. At the hearing, Applicant and his spouse made statements. Department Counsel offered three exhibits (GE 1-3) (Tr. 18-22), and Applicant offered five exhibits (Tr. 23-26; AE A-E). Applicant clarified the date of one of his drug-related arrests as being incorrect in his personal subject interview (GE 2). His clarification is accepted with respect to his personal subject interview as fact (GE 2). There were no other objections or clarifications, and I admitted GE 1-3 (Tr. 22), and AE A-E (Tr. 23-26). Additionally, I admitted the hearing notice, SOR, and response to the SOR (HE 1-3). On February 12, 2010, I received the transcript.

### **Findings of Fact<sup>1</sup>**

In Applicant's response to the SOR, he admitted the conduct alleged in SOR ¶¶ 1.a, 1.b, and 1.d (HE 3). He also provided clarifications and explanations about why he believes the security concerns are mitigated (HE 3). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 45-year-old employee of a defense contractor (Tr. 6, 54). In 1982, he graduated from high school (Tr. 6). He has not attended college (Tr. 6). In 2003, he married, and his children are ages five and ten (Tr. 6-7, 54). He has never served in the military and has never held a security clearance (Tr. 7, 55-56). He has maintained air conditioning equipment for a defense contractor since 2007 (Tr. 55).

### **Termination from employment with a transportation company**

Applicant worked for a transportation company from March 1999 to February 2007 (GE 1). In December 2006 or January 2007, Applicant provided wine to a 20-year-old female passenger (Tr. 57, 60). She told Applicant that she was old enough to drink alcohol; however, he did not ask her for identification to verify her age (Tr. 60). He also

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<sup>1</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

played cards with her for 90 to 120 minutes (Tr. 58, 63). During the card games, Applicant said the prize was a massage (Tr. 59). She responded she was not interested in a massage (Tr. 59). He said she had pretty eyes, and joking said she should join a club similar to the “mile-high club” (Tr. 59). He was indicating that people sometimes have sex on transportation vehicles such as an aircraft while in flight (Tr. 6). Applicant passed her a note suggesting that she meet with him if she was lonely (Tr. 58, 65). She drank half of a 750 milliliter bottle of wine while they were playing cards, and took the half-full bottle of wine with her when she left the card game (Tr. 61). He did not charge her for the wine because it is company policy to give out complementary wine (Tr. 61-62). Applicant did not drink any alcohol while on duty that day (Tr. 62). He never touched her (Tr. 60). He admitted that he was indirectly “hitting on” her (Tr. 60). The passenger informed her parents about Applicant’s conduct, and her parents wrote a letter about Applicant’s conduct to Applicant’s employer (Tr. 39).

### **Applicant’s statements about his inappropriate conduct with the passenger**

About two weeks after the incident with the passenger, Applicant’s company suspended him from his employment for inappropriate conduct with a passenger (Tr. 66). Applicant’s company gave him a hearing to contest the allegation, and Applicant made a statement at his hearing (Tr. 69). His company generated a transcript of the hearing (Tr. 69). At his hearing, Applicant falsely denied making the comments to the 20-year-old passenger about the massage, and the mile-high club (Tr. 69). He admitted giving her the note about meeting her later. He was unsure whether his statement at the hearing was under oath or not (Tr. 70). On February 7, 2007, Applicant was fired from his employment at the transportation company for inappropriate conduct (Tr. 63, 70).

When Applicant completed his security clearance application on December 15, 2008, he disclosed he was fired from a job, and he explained in Section 22:

A guest wrote a damaging letter alleging misconduct by me [on the transportation company’s vehicle] stating I was trying to pick her up. A hearing was held based on her allegations. The company chose to believe the guest despite no proof of her allegations and I was fired. The guest was looking to get a free travel voucher as she travels frequently.<sup>2</sup>

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<sup>2</sup>The SOR did not allege that Applicant provided false information on his security clearance application, or that he lied at his termination hearing held by the transportation company. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)).

On January 15, 2009, an OPM investigator interviewed Applicant (Tr. 73). He told the OPM investigator, "the Charge that the subject was hitting on the passenger was untrue. Subject believes that the passenger was looking to get free rides from [the transportation company] by making the complaint" (Tr. 74; GE 2 at 6). He also told the OPM investigator he "has never deliberately concealed or falsified relevant information on any form used to conduct investigations or to determine security clearance eligibility" (GE 2 at 10).

At his hearing, Applicant said that he lied when he falsely denied making the flirtatious comments because he was worried about damaging his marriage and losing his family (Tr. 75, 80). Applicant recognized that he made a false statement to the OPM investigator, and consulted with his church and his NA sponsor (Tr. 74-75). He called the OPM investigator six days later on January 21, 2009, and told the investigator the truth (Tr. 75-78; GE 2 at 10). He also told his spouse the truth about providing wine, playing cards, writing a note, and making the flirtatious comments to the 20-year-old passenger (Tr. 78-80).

### **Illegal drug use**

From about age 18 to about age 30, Applicant used cocaine one to three times per week (Tr. 85; GE 3; SOR ¶ 1.d). He used hashish, marijuana, ecstasy, methylenedioxyamphetamine (MDA), valium, and barbiturates at least weekly (Tr. 85; GE 3; SOR ¶ 1.d). From about age 30 to about age 37, he used cocaine or crack cocaine two to three times per week (Tr. 85; GE 3; SOR ¶ 1.d).

Applicant was arrested for three drug-related offenses in the 1980s, and one drug-related offense in the 1990s. He has not had any drug-related arrests in more than ten years (GE 2, 3).

In 1997, Applicant began attending Narcotics Anonymous (NA) meetings (Tr. 86). He stopped using illegal drugs on December 14, 1998 (Tr. 86). He did not use illegal drugs for 30 months (Tr. 86). He stopped attending NA meetings (Tr. 86-87). In May 2001, he used illegal drugs for one month (Tr. 86-87). From July 1, 2001, to July 22, 2001, Applicant attended in-patient drug treatment (Tr. 85; AE B). He successfully completed the program on July 22, 2001 (AE B). He currently attends two to three NA meetings each week (Tr. 88). He has an eight-year medallion from NA for not using illegal drugs for eight years (Tr. 89). It will be nine years without illegal drug use on June 22, 2010 (Tr. 89). He has sponsored 12 drug addicts at NA (Tr. 90-91).

Applicant provided a statement indicating if he had a urine sample that tested positive for the presence of any illegal drug that his clearance would be automatically revoked (Tr. 92; AE A). His urine was tested on November 1, 2007, March 3, 2009, and January 5, 2010, and no illegal substances were detected (AE C-E).

## Character evidence

Applicant's spouse has known him for 11 years (Tr. 29). When she met him, he was attending NA meetings (Tr. 34). He has attended NA meetings for years and sponsored other persons at NA (Tr. 36-37). She has never observed Applicant possessing or using illegal drugs (Tr. 29-30). She was aware that he used drugs, and received drug rehabilitation in 2001 (Tr. 35). She worked for the same transportation company as Applicant for 15 years, and Applicant had an excellent reputation as a reliable, dedicated, and hard-working employee (Tr. 49-51). She opined that he was trustworthy and honest (Tr. 28). She believed his firing from the transportation company could not be used to pressure or extort Applicant for access to classified or sensitive information (Tr. 53-54). She recommended that Applicant receive a security clearance (Tr. 28).

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or

patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline E (personal conduct).

### **Personal Conduct**

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶¶ 16(b) and 16(d) describe two conditions that could raise a security concern and may be disqualifying in this case:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;<sup>3</sup> and,

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<sup>3</sup>The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

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

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

Applicant engaged in a lengthy pattern of drug abuse. From about age 18 to about age 30, Applicant used cocaine, hashish, marijuana, ecstasy, MDA, valium, and barbiturates on numerous occasions. From about age 30 to about age 37, he used cocaine or crack cocaine two to three times per week.

In February 2007, Applicant was terminated from employment with a transportation company for making inappropriate comments of a sexual nature to a 20-year-old passenger. Applicant was 43 years old when he made the inappropriate comments. He provided wine to her without verifying that she was 21 years old. His behavior in the work place was inappropriate, unreliable and showed poor judgment. He falsely denied to his company that he made the inappropriate oral comments of a sexual nature to the passenger.

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(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

On January 15, 2009, Applicant told an OPM investigator that the allegations the passenger made against him were not true. He claimed her motive for fabricating the allegations against him was to obtain free rides from the transportation company. He lied when he falsely denied making the flirtatious comments because he was worried about damaging his marriage and losing his family.

AG ¶¶ 16(b), 16(d)(1), 16(d)(2), and 16(d)(3) apply. Further inquiry concerning the potential applicability of mitigating conditions is required. AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and
- (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions outlined in AG ¶ 17 fully apply to all of the SOR allegations. Applicant's false statement to the OPM investigator cannot be mitigated at this time because it is too serious and too recent. From early 2007, until January 21, 2008, Applicant falsely denied making the sexual comments to the 20-year-old passenger. He repeatedly accused her of lying when he knew she was telling the truth about his inappropriate comments. AG ¶ 17(a) cannot be fully applied because



Applicant was confronted with the facts at his employment termination hearing in 2007. Also his disclosure of the truth was not prompt because he lied in February 2007 at his employment termination hearing and on January 15, 2009, to an OPM investigator about what really happened in regard to the 20-year-old passenger.<sup>4</sup> He deserves substantial credit for telling the truth on January 21, 2009, and at his hearing; however, it is too soon to fully mitigate the conduct in SOR ¶¶ 1.a and 1.b.

Applicant has fully disclosed his inappropriate conduct to his spouse. AG ¶ 17(e) mitigates the allegation that he did not disclose his misconduct to his spouse in order to protect his marriage and preserve his family (SOR ¶ 1.c).

Applicant's illegal drug use is mitigated. He has not used illegal drugs in almost nine years. He has attended thousands of NA sessions and sponsored 12 drug addicts through NA counseling. AG ¶¶ 17(c), 17(d), 17(e), and 17(g) all apply and mitigate his illegal drug possession and use (SOR ¶ 1.d).

### **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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guideline E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

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<sup>4</sup>Applicant's false descriptions of his inappropriate oral statements to the 20-year-old passenger at his employment termination hearing and on his security clearance application are used solely to evaluate the applicability of AG ¶¶ 17(a) and 17(c) and in the whole person concept as discussed in n. 2, *supra*. See also ISCR Case No. 04-12548 at 2 (App. Bd. Sep. 18, 2006) (indicating no abuse of discretion for Judge to find disclosures not prompt when Applicant provided false, misleading, or incomplete information on his security clearance application and in his first interview with a government investigation); ISCR Case No. 05-10921 at 4 (App. Bd. Apr. 19, 2007) (discussing when a disclosure at an investigative interview is "prompt").

There is some evidence supporting approval of Applicant's access to classified information. He has not possessed or used any illegal drugs for almost nine years. Applicant provided eight years of diligent, loyal service to the transportation company until February 2007. In November 2007, Applicant began employment with a defense contractor and has contributed to the national defense through his current employment. Aside from the incident that resulted in his termination from employment with the transportation company, there is no evidence of any disciplinary problems at work. There is no evidence of disloyalty. There is no evidence that he would intentionally violate national security, or that he would deliberately fail to safeguard sensitive or classified information. Applicant provided truthful information to the OPM investigator on January 21, 2008, six days after lying to the OPM investigator. He told his spouse the truth about making sexual comments to a 20-year-old passenger. He was credible at his security clearance hearing. His character and good work performance show substantial responsibility, rehabilitation, and mitigation.

The evidence against approval of Applicant's clearance is more substantial at this time. The importance to the integrity of the security clearance process of providing accurate information on a security clearance application and to an OPM investigator is manifest. Applicant also provided false information to the transportation company when he denied making oral sexual comments to a 20-year-old passenger at his employment termination hearing. His failure to be truthful and candid when he denied or omitted potentially disqualifying information from his security clearance application and to an OPM investigator on January 15, 2009, at his initial interview outweighs his subsequent disclosure of the truth on January 21, 2009. Ultimately, he took full responsibility for providing false information to the transportation company and to an OPM investigator.

Applicant's false statements cannot be fully mitigated at this time because they were knowledgeable, voluntary, and intentional. He was 43 years old when he made his most recent false statement and sufficiently mature to be fully responsible for his conduct. His false statements show lack of judgment and a failure to abide by the law. Such conduct establishes a serious security concern, and access to classified information is not warranted at this time. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude he has not fully mitigated the security concerns pertaining to personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>5</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

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<sup>5</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

## **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:

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|----------------------------|-------------------|
| Paragraph 1, Guideline E:  | AGAINST APPLICANT |
| Subparagraphs 1.a and 1.b: | Against Applicant |
| Subparagraphs 1.c and 1.d: | For Applicant     |

## **Conclusion**

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

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MARK HARVEY  
Administrative Judge