



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



In the matter of: )  
)  
) ISCR Case No. 09-05904  
SSN: )  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Pro se*

August 17, 2010

**Decision**

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HENRY, Mary E., Administrative Judge:

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

Applicant signed his Electronic Questionnaire for Investigations Processing (e-QIP) on April 28, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on March 15, 2010 detailing security concerns under Guidelines E (Personal Conduct), H (Drug Involvement), and J (Criminal Conduct) that provided the basis for its preliminary decision to deny him a security clearance. 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 adjudicative guidelines (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on March 23, 2010. He submitted a notarized, written response to the SOR allegations dated April 7, 2010, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on May 25, 2010. Applicant received the FORM on June 8, 2010. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response to the FORM. DOHA assigned this case to me on August 4, 2010. The Government submitted eight exhibits, which have been marked as Item 1-10 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 3, and the SOR has been marked as Item 1.

### **Findings of Fact**

In his Answer, Applicant admitted the factual allegations in SOR ¶¶ 1.a(1), 1.b(1), 1.b(2), 2.a, and 2.b. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1.a(2), 1.b, and 1.b(3) of the SOR. His response to SOR ¶ 3.a is a partial admission.<sup>1</sup> He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 25 years old, works as a contracts negotiations associate for a Department of Defense contractor. He began this job in April 2009 after moving more than 1500 miles from his college and home.<sup>2</sup>

Applicant attended college more than 1000 miles from where he attended high school. He graduated from college in May 2008 with a bachelor's degree. He worked as a contractor following graduation until he was laid-off in October 2008. He was unemployed from October 2008 until April 2009. He is single.<sup>3</sup>

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

<sup>2</sup>Item 4, p. 6, 27.

<sup>3</sup>*Id.* at 22-23, 27-28, 45.

Applicant began smoking marijuana<sup>4</sup> in the summer of 2002, between his junior and senior year of high school. Over the next year, he would smoke marijuana about two times a week for a while, then quit smoking marijuana for months at a time. He smoked marijuana in the summer of 2003, but did not smoke it in his first semester of college. He began smoking marijuana in his second semester of college and continued to smoke marijuana until July 2007. He stopped smoking marijuana until January 2008, when he resumed smoking marijuana. He smoked marijuana sometimes every other day and sometimes not for weeks at a time. He used marijuana in college to relax as he was anxious about tests. He could not quantify his use of marijuana as he did not smoke marijuana daily; rather he smoked it at various times and in varying amounts. He last smoked marijuana in January 2009, stopping because he realized his marijuana use could impact his future career opportunities, if he was required to take a drug test.<sup>5</sup>

Applicant purchased the marijuana he smoked. He purchased marijuana for friends when he purchased it for his own use. He also provided marijuana to friends. However, he never purchased marijuana for the purpose of reselling it for a profit. He told the investigator that he has no intent to use marijuana in the future, but has not signed a statement of intent with automatic revocation of his security clearance if he does.<sup>6</sup>

Applicant denies abusing Adderol, a prescription drug. He acknowledges that he used this drug in college to keep him focused on studying, which he states is a legitimate use of the drug. He did not submit any evidence to support this statement. He also admits that he did not have a prescription for this drug. Doctors recently diagnosed him with attention deficit disorder. He has not shown a connection between his diagnosis and Adderol.<sup>7</sup>

In September 2003, the local police observed Applicant and his friends digging a hole to hide a large, decorated rock belonging to a rival high school. The police gave

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AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana and ecstasy or 3,4 methylenedioxymethamphetamine are Schedule (Sch.) I controlled substances. See Sch. I(c)(9) and I(c)(10), respectively. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8<sup>th</sup> Cir. 2006) (ecstasy). Cocaine is a Sch. II Controlled Substance. See Sch. II(a)(4) (cocaine).

<sup>5</sup>Item 3; Item 5.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

Applicant a citation for disturbing the peace. He paid a fine. He did not list this incident as a criminal matter on his e-QIP as the police did not arrest, detain, or handcuff him.<sup>8</sup>

In December 2003, the police again cited Applicant for trespassing with a motor vehicle after he drove his car through a private yard. The record does not contain a police report, indicating that Applicant was actually arrested. He paid a fine, but does not recall the amount of the fine.<sup>9</sup>

In August or September 2006, Applicant and his friends drank alcohol to excess at the first home football game for his college. He acknowledged that he harassed team members of the opposing team, a rival school. People complained to the police that he was drunk and obnoxious. The police escorted him from the stadium, then cited him for disorderly conduct. Applicant hired a lawyer to represent him in this matter. His lawyer could not find any court charges against him. He never appeared in court on this matter.<sup>10</sup>

When he completed his e-QIP, Applicant answered “no” to the following questions in Section 22: Your Police Record:

- a. Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you: are you on trial or awaiting a trial on criminal charges: or are you currently awaiting sentencing for a criminal offense?

Applicant did not list his two disorderly conduct citations and his trespass with a motor vehicle citation as he did not believe these citations were criminal matters. He never appeared in court on these citations nor does he indicate that he was required to do so. Court papers were never filed in the disorderly conduct incident at the football game in 2006.<sup>11</sup>

Applicant answered “yes” to question a in Section 23: Your Use of Illegal Drugs and Drug Activity. He indicated he used marijuana from July 2002 to August 2008 with an average use of six times a year. He did not list his unauthorized use of Adderol, a prescription drug. Applicant acknowledges that he lied when he understated the frequency of his marijuana use. He discussed this question with family and friends, who recommended that he not provide any information. His brother suggested he reveal the

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<sup>8</sup>*Id.* The record does not contain a copy of a police report or arrest record for this incident.

<sup>9</sup>Item 3; Item 5.

<sup>10</sup>*Id.*

<sup>11</sup>Item 3; Item 4; Item 5.

full extent of his use, but because he had signed a lease and he feared losing his job, he chose to reveal only part of his marijuana use.<sup>12</sup>

## Policies

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

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

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

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

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<sup>12</sup>Item 4; Item 5.

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:

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 in this case, the following condition 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.

For AG DC ¶ 16(a) to apply, Applicant's omission, concealment or falsification in his answer must be deliberate. The Government established that Applicant omitted material facts from his e-QIP when he answered “no” to Question a in Section 22, which asked if in the last seven years: “. . . he had ever been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you; are you on trial or awaiting a trial on criminal charges; or are you currently awaiting sentencing for a criminal offense?” He did not list his three charges for disorderly conduct or the trespass with a motor vehicle. The Government also established that he omitted material facts about the frequency of his past use of marijuana in his answer to Question a in Section 23 and failed to acknowledge his use of Adderol. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response to the SOR and at the hearing, Applicant denied, however, that he had an intent to hide information about his Adderol use and charges for disorderly conduct and trespass with a motor vehicle from the Government. He admitted that he lied about the extent of his marijuana use when he completed his e-QIP. When a falsification allegation is controverted, the Government has the burden of proving the omission was deliberate. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or

circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.<sup>13</sup>

Given Applicant's admission about his failure to list the frequency and extent of his marijuana use, the Government has established a *prima facie* case under AG ¶ 16(a) as to allegation 1.a(1) of the SOR. Applicant also admitted that he used Adderol without a prescription, but denied using it improperly. Since he failed to provide information about the proper use of Adderol and used it without a prescription, the Government has established a *prima facie* case under AG ¶ 16(a) as to allegation 1.a(2) of the SOR.

Applicant did not list his citation for disorderly conduct and his citation for trespass by motor vehicle in 2003 because the police never arrested, detained, or handcuffed him and he did not appear in court for either incident. He received a citation which required him to pay a fine and he did. Concerning the 2006 disorderly conduct incident, the police again did not arrest, charge, or detain Applicant and his lawyer could not locate any court records regarding the incident. Question a in Section 23 specifically focuses on the requirement to appear in court on a criminal charge. The Government has not provided evidence which shows that Applicant was to appear in court on a criminal charge in these incidents and Applicant denies that he was required to appear in court. The third incident did not result in any arrest or charges filed, although he recalls receiving a citation. Because he received citations in these incidents and was not required to appear in court, he did not consider these incidents criminal matters. His belief, correct or not, does not show a deliberate intent to hide this information from the Government. The Government has not established its case as to SOR allegations 1.b(1), 1.b(2), and 1.b(3). These allegations are found in Applicant's favor.

AG ¶ 17 provides conditions that could mitigate security concerns:

(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;

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<sup>13</sup>See ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining the holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

(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.

Applicant has not mitigated the security concerns raised by his deliberate falsification of information about the extent of his use of marijuana and his Adderol use. Applicant acknowledges he knew he was providing false information to conceal the extent of his drug use. His fear of losing his job is an insufficient reason to mitigate security concerns, as he understood the need to provide this information and chose not to do so.

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

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

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

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

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

(2) inhalants and other similar substances;

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

The following conditions described in AG ¶ 25 could raise a security concern in this case and may be disqualifying:



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

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

Applicant smoked marijuana occasionally in high school and on a regular basis in college. He also used Adderol<sup>14</sup> without a prescription while in college. Applicant's use of marijuana and Adderol in college is sufficient to establish the Government's *prima facie* case under Guideline H. See AG ¶¶ 24(a), 24(b), 25 (a) and 25(c).

AG ¶ 26 provides conditions that could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

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

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation;

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

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

Applicant has never been in a drug treatment program. Thus, AG ¶ 26(d) is not applicable. Applicant stopped his use of marijuana about 19 months ago, which is not in the distant past. He smoked marijuana regularly up until January 2009 by his own choice. Mitigation is not established under AG ¶ 26(a). He used Adderol without a prescription to help him stay focused. He did not submit any information from a physician authorizing his use of Adderol; thus, he has not mitigated the Government's security concerns under AG ¶ 26(c).

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<sup>14</sup>Adderol, or Adderall, is a Schedule II controlled substance containing amphetamine. See *U.S. v. Cocilova*, F. Supp.2d 885, 890 (W.D. Tex. 2008).

Applicant no longer associates with his college friends with whom he smoked marijuana. He moved more than 1500 miles from his college on his own to accept his current position. He has not smoked marijuana in 19 months and has not used Adderol in over two years, a sufficient period of abstinence. He verbally expressed an intent not to use marijuana or illegal drugs in the future. Applicant has mitigated the Government's security concerns about his drug use under AG ¶¶ 26(b)(1), 26(b)(2), and 26 (b)(3).

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining 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.

AG ¶ 31 describes conditions that could raise a security concern and the following may be disqualifying in this case:

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant admitted that he deliberately understated his illegal drug use on his security clearance application, as described previously. By lying on his e-QIP, Applicant violated 18 U.S.C. § 1001, a federal statute. Thus, the Government has established a *prima facie* case under AG ¶ 31(c).

Under AG ¶ 32, an applicant could mitigate security concerns through one of the following conditions:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(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; and

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries

of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

I have reviewed the mitigating conditions and find that none apply in this case. The allegations under Guideline J are found against 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 an applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of denying a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of a grant of a security clearance. 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 problems first began while he was in college. He started smoking marijuana on a regular basis as a college freshman and continued smoking marijuana on and off until nine months after his graduation. He did decide to stop his marijuana use because he realized that he could hinder his future career development. His decision to stop smoking marijuana showed good judgment. However, his conscious decision to lie about the level of his marijuana usage in college on his e-QIP showed poor judgment and raises a security concern about his honesty and truthfulness. He has

acknowledged he lied, which is a step in the right direction. Applicant's written statements failed to convince me that he fully understands the need to be forthright when completing his security clearance application. Because honesty and trustworthiness are the cornerstones of holding a security clearance and he has not clearly convinced me that he has mitigated the Government's security concerns, Applicant's clearance is denied.

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 has not mitigated the security concerns arising from his falsification of his e-QIP under Guidelines E and J.

### **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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	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.

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MARY E. HENRY  
Administrative Judge