



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



In the matter of:  ----- SSN: -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 09-07472
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**Appearances**

For Government: Alison O’Connell, Esquire, Department Counsel  
For Applicant: Josiah Black, Esquire

November 15, 2010

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

On June 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a June 24, 2010, response, Applicant admitted all allegations raised under Guideline H and one of the two allegations raised under Guideline E. He also requested a hearing. DOHA assigned the case to me on September 1, 2010. The parties proposed a hearing date of October 6, 2010. A notice setting that date for the hearing was issued on September 8, 2010. I convened the hearing as scheduled. Applicant gave testimony, introduced two witnesses, and presented one document, which was admitted without objection as exhibit (Ex.) A. Department Counsel offered four documents, which were admitted as exhibits (Exs.) 1-4 without objection. Applicant was given until October 13, 2010, to submit any additional documents. The transcript (Tr.) of

the proceeding was received on October 12, 2010. On October 14, 2010, Department Counsel forwarded a packet of materials related to Applicant's work performance and career. Noting no objection to its inclusion in the record, I accepted the materials as Ex. B. The record was then closed. Based on a thorough review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden of mitigating security concerns related to personal conduct. Clearance denied.

### Findings of Fact

Applicant is a 49-year-old associate staff member working for a defense contractor. He has received multiple promotions since starting with the entity in 1986. He is creative and has been granted multiple patents. Applicant has a bachelor's degree. He is amicably divorced and currently engaged. He is the devoted father of two children, ages 12 and 14.

In high school, Applicant used marijuana infrequently, usually at parties and on special occasions. He found that it relaxed him. He graduated from high school in the spring of 1980.<sup>1</sup> In college, he focused on his studies and "kind of dropped [marijuana use]."<sup>2</sup> He did not use it again until he attended his 25<sup>th</sup> high school reunion in the spring of 2005, after he was granted a security clearance.<sup>3</sup> At the time, Applicant was highly distressed about the deterioration of his marriage.<sup>4</sup> He accepted an offer to use marijuana. Remembering how it relaxed him, he asked the man who had the marijuana, who Applicant did not know, if he could have some seeds from his bag of the drug.<sup>5</sup> Being a gardener, Applicant thought, "I'll throw them in the garden and see if I can get them to grow."<sup>6</sup> At the time, he knew that possession of marijuana was illegal, but he did not think about his security clearance at that time.<sup>7</sup>

Applicant planted the marijuana seeds in his garden. Once they started to grow, he moved the marijuana plants from his property to nearby woods, where he "might have checked on them once every week or two."<sup>8</sup> By September 2005, they had grown quite large. He moved them to his basement to dry. His former wife did not approve of

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<sup>1</sup> Tr. 26.

<sup>2</sup> Tr. 25.

<sup>3</sup> Tr. 26, 35. In completing his security clearance application, Applicant "inadvertently made a mistake [and] put down 2004. . . ." Tr. 26-27. In addition, the SOR indicates that Applicant was granted a security clearance in August 2001. The evidence indicates that Applicant held some level of security clearance since 1986. See Tr. 53-54.

<sup>4</sup> Tr. 22.

<sup>5</sup> Tr. 58.

<sup>6</sup> Tr. 28.

<sup>7</sup> Tr. 28-29, 35, 53-57. Applicant admitted that he "made a serious judgmental error at the time."

<sup>8</sup> Tr. 29.

this move and his children were unaware that marijuana was in the home. In cultivating and reaping the plants, he wished to perform a “curiosity experiment.”<sup>9</sup> He planned to use the marijuana for personal consumption, but not sell it or give any of it away.<sup>10</sup>

In October 2005, Applicant’s wife returned home. She saw her garage door open and worried a robber was in the house. She summoned the police to check if her house was safe. The police entered the home to investigate. In the basement, they discovered the dried marijuana. Applicant concedes that some plants were hanging in lockers, while some were in a box.<sup>11</sup> The police report noted that marijuana was “hanging upside down drying from the ceiling,” and that dried plants were found in a postal box on the floor, hanging upside down in a blue locker, and in film canisters inside a dresser drawer.<sup>12</sup>

When Applicant arrived at his house, he saw police cruisers in the driveway. In the house, he found his children crying and his wife upset. Applicant was taken to the basement and asked about the marijuana. The police told him that they were going to charge him with marijuana possession, not cultivation.<sup>13</sup> He was also told that “it’s a six month probation, you go to court, you plead, whatever, no contest. . . . [I]t will be gone in six months. . . .”<sup>14</sup> Applicant was charged with Possession of Class D Controlled Substance. Other than a Driving While Intoxicated conviction in 1980, he had never had any problems with the law.<sup>15</sup> He pled guilty to the possession charge and was sentenced to six months probation, which he ultimately completed. Applicant has not consumed marijuana since October 2005. He now recognizes “that the Government and the Department of Defense take very seriously any drug abuse whatsoever.”<sup>16</sup>

After his probation period ended, Applicant became scared. He was not sure if he should report the incident or his conviction, which was a misdemeanor, to his employer.<sup>17</sup> Some time later, in late 2007 or 2008, he attended a security debriefing,

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<sup>9</sup> *Id.*

<sup>10</sup> Tr. 29-30. As well, Applicant noted that, at the time, he only had one acquaintance who used marijuana.

<sup>11</sup> Tr. 64.

<sup>12</sup> Ex. 4 (Police Dep’t Record, dated Oct. 12, 2005, printed, Aug. 4, 2010).

<sup>13</sup> Applicant also noted that he did not know there was a distinction between marijuana possession and its cultivation. He stated, “if I had known that one was more severe than the other. . . I certainly would have. . . rather taken the easier path and just bought some off somebody, rather than trying to grow it.” Tr. 67-68.

<sup>14</sup> Tr. 33.

<sup>15</sup> Tr. 34.

<sup>16</sup> Tr. 34-35. Applicant, who was granted a security clearance in August 2001, stated that at the time, he was unaware that his conduct was inconsistent with his obligations as a holder of a security clearance. Tr. 36-37.

<sup>17</sup> Tr. 37-38, 71-72.

where it was mentioned that “adverse incidents need to be reported.”<sup>18</sup> The next day he reported the facts to security personnel. In October 2008, he was interviewed about the incident.<sup>19</sup> The investigator took notes, but did not ask Applicant to review or verify them.<sup>20</sup> He later read the investigator’s report and said “99.9 percent of it is true, but I object to one sentence in here.”<sup>21</sup> He objected to a sentence that read: “Subject’s marijuana use has been part of a pattern throughout his life.”<sup>22</sup> That sentence is found in a paragraph after the comment that “Subject did not use marijuana from the time he graduated high school until approximately 2004. Exact dates not recalled.”<sup>23</sup> Applicant credibly testified that the 2004 date is incorrect, noting that any reference to 2004, not 2005, was mistaken or inadvertent.<sup>24</sup>

On August 8, 2008, Applicant certified a completed security clearance application (SCA). On that form, in response to “Section 24. Your Illegal Use of Illegal Drugs and Drug Activity,” Applicant noted that he used marijuana in September 2005, that he had then used it “approx. dozen times,” and referenced a previous answer disclosing his conviction for marijuana possession.<sup>25</sup> Applicant was never addicted to marijuana, nor was he ever referred for drug treatment or counseling. He has no intention of using marijuana in the future. He has signed a letter stating that should he ever again use marijuana or any other illegal substance, DOD may automatically revoke his security clearance, and he agrees he will not be eligible for a security clearance again.<sup>26</sup>

Applicant was divorced in June 2008. He subsequently met his fiancée, who was highly credible and very supportive at the hearing. They were engaged in 2009. She finds him to be highly honest, trustworthy, and contrite about the marijuana incidents. Personally opposed to illegal drug use, she confirmed that he has not used marijuana since she has known him. His fiancée is adamantly opposed to his using drugs or

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<sup>18</sup> Tr. 38.

<sup>19</sup> Tr. 40-41; Ex. 2 (Interrogatories, Subject Interview, dated Oct. 22, 2008-Oct. 28, 2008).

<sup>20</sup> Tr. 41-42.

<sup>21</sup> Tr. 42.

<sup>22</sup> Ex. 2, *supra*, note 19, at 6.

<sup>23</sup> *Id.*

<sup>24</sup> Tr. 49-50. Applicant demonstrated a poor memory for dates throughout the hearing. See, e.g., Tr. 20 (regarding date of marriage), Tr. 39-41 (regarding chronology between drug possession conviction, disclosure, and interview), Tr. 51, 64 (regarding high school graduation year and year of starting college), Tr. 106-109 (regarding high school graduation year), and note 3, *supra*.

<sup>25</sup> Ex. 1 (SCA, dated Aug. 8, 2008).

<sup>26</sup> Tr. 45-46; Ex. A (Letter of Intent, dated Oct. 5, 2010).

immoderately using alcohol, making their continued relationship contingent on respecting her concerns.<sup>27</sup>

At work, Applicant is a trusted and well-regarded employee.<sup>28</sup> Having held a secret clearance in the past, he had previously only received security training about once every decade.<sup>29</sup> Applicant's employer has an anti-drug policy.<sup>30</sup>

## Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . ." <sup>31</sup> The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.<sup>32</sup>

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

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<sup>27</sup> Tr. 89-91.

<sup>28</sup> Tr. 76-78; Ex B (Work-related appraisals and honors).

<sup>29</sup> Tr. 56-57, 83-84. It is noted that Applicant's level of clearance does not generally require the rigorous security refresher-training required of some of Applicant's peers. See, e.g., Tr. 82-84.

<sup>30</sup> Tr. 57-58. There is no evidence Applicant ever received or signed a drug policy statement of any form.

<sup>31</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>32</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>33</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>34</sup>

Based upon consideration of the evidence, Guideline H (Drug Involvement) and Guideline E (Personal Conduct) are the most pertinent to this case. Conditions pertaining to these AGs that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

## Analysis

### Guideline H - 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.<sup>35</sup> “Drugs” are defined as mood and behavior altering substances, and include 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 inhalants and other substances.<sup>36</sup> “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.<sup>37</sup>

Applicant admitted he used marijuana, a controlled substance, at his Spring 2005 reunion and about a dozen more times before his cache was found in his basement in October 2005. He also admitted that he solicited marijuana seeds that

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> AG ¶ 24.

<sup>36</sup> *Id.* at ¶ 24(a)(1-2).

<sup>37</sup> *Id.* at ¶ 24(b).

Spring, planted them successfully in his garden, hid the plants in the woods, then again moved them at some point before his crop was discovered drying in his basement in October 2005. All these actions occurred after Applicant was granted the privilege of a security clearance. Such facts are sufficient to raise Drug Involvement Disqualifying Condition AG ¶ 25 (a) (any drug abuse); AG ¶ 25 (25 (g) (any illegal drug use after being granted a security clearance) and AG ¶ 25 (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia). With disqualifying conditions raised, the burden shifts to Applicant to mitigate related security concerns.

The above-cited incidents occurred in 2005. His probation ended in early 2006. His drug use was limited to about a dozen incidents. He has been drug-free since that time. Since 2007 or 2008, he has been forthcoming about his drug use and drug cultivation. Such facts obviate application of Drug Involvement Mitigating Condition AG ¶ 26 (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).

Applicant's drug use was mostly non-social. At the time of his arrest, apart from those former high school peers he encountered at the 2005 reunion, he had only one acquaintance who used marijuana. He still does not know the man who gave him the marijuana and seeds at the reunion. There is no evidence Applicant currently associates with drug abusers and he has not used marijuana since October 2005. AG ¶ 26 (b)(1) (disassociation from drug-using associates and contacts), AG ¶ 26 (b)(2) (changing or avoiding the environment where drugs were used) and AG ¶ 16 (b) (3) (an appropriate period of abstinence) apply. Further, he expressed his intent not to use illegal drugs in the future and signed a statement of intent sufficient to raise AG ¶ 26 (b) (4) (a signed statement of intent with automatic revocation of clearance for any violation). Applicant's marijuana use and cultivation occurred over five years ago. Since then, he has not used or been involved with illegal drugs. Applicant understands his continued abstinence is a condition of his relationship with his fiancée and his continued employment. He is committed to remaining drug free. Drug Involvement security concerns are mitigated.

## **Guideline E – Personal Conduct**

Security concerns arise from matters of personal conduct because “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.”<sup>38</sup> In addition, “any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.<sup>39</sup> Here, two categories of facts raised personal conduct security concerns. First, Applicant was maintaining a security clearance when he used and cultivated marijuana, and when he

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<sup>38</sup> AG ¶ 15.

<sup>39</sup> *Id.*

pled guilty of possession of a controlled substance (SOR allegations ¶ 1.a and ¶ 1.c). Second, he did not note marijuana use in 2004 on his SCA (SOR allegation ¶ 1.b).

As a preliminary matter, there is insufficient evidence to demonstrate that Applicant deliberately intended to mislead or falsify facts when he limited his SCA comments to marijuana use in 2005 (SOR allegation ¶ 2.b). First, as noted at footnote 24, *supra*, Applicant is poor with dates. Second, the basis of the allegation that his marijuana use started in 2004, rather than 2005, is suspect. The investigator's report comments that, "Subject's marijuana use has been part of a pattern throughout his life." It then incongruously states, "Subject did not use marijuana from the time he graduated high school until approximately 2004. Exact dates not recalled." Intermittent marijuana use in high school that was briefly resumed 25 years later does not demonstrate a lifelong pattern of marijuana use. Third, the investigator clearly noted that Applicant's teenage marijuana use ceased until "approximately 2004. Exact dates not recalled." Such language does not set 2004 as a specific time frame. Fourth, Applicant was not given the opportunity to review the investigator's notes or to sign them as an accurate summary. Consequently, he was unable to contemporaneously confirm or object to the notes' accuracy. In sum, the record has multiple inaccuracies with regard to dates. Applicant has credibly and consistently explained that any reference to 2004, if one was made, was in error. The facts reveal no other evidence that he used marijuana as an adult before his 2005 reunion. In light of these considerations, I find no Personal Conduct Disqualifying Condition (PC DC) applies for SOR allegation ¶ 2.b.<sup>40</sup>

Applicant has admitted, however, the facts alleged regarding his drug involvement (SOR allegation ¶ 2.a). He admits that he maintained a security clearance during his period of adult marijuana use and cultivation.<sup>41</sup> Such facts are sufficient to raise PC DC AG ¶ 16(c) (credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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). With a PC DC raised, the burden shifts to Applicant to mitigate the security concerns.

While maintaining a security clearance, Applicant used, planted, cultivated, and harvested marijuana, a controlled substance, from about April 2005 until October 2005. This constitutes a serious breach of the trust bestowed on one granted a security clearance. While Applicant did not think about his security clearance responsibilities at the time, a factor that independently raises grave issues regarding his judgment and reliability, he knew that marijuana use and possession were proscribed. After his

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<sup>40</sup> Had a PC DC applied, there is strong evidence to raise PC Mitigating Condition AG ¶ 17(f) (the information was unsubstantiated or from a source of questionable reliability).

<sup>41</sup> At the time, Applicant's employer had an anti-drug policy, but there is no evidence that he signed a written or recorded document committing to that policy as a condition of employment. Consequently, PC DC AG ¶ 16(f) (violation of a written or recorded commitment made by the individual to the employer as a condition of employment) does not apply.



activities were discovered, he pled guilty to the charge of possession of a controlled substance and completed his probationary period. He then tarried in reporting the incidents to security personnel. At least two years passed before the facts and circumstances, which were neither highly technical nor unique, were disclosed. Applicant's rationalization that he was unsure if he should disclose them, until after he was reminded of his obligation to report adverse incidents during a security debriefing, is self-serving and fails to demonstrate the requisite judgment and reliability expected of one maintaining a security clearance. Appropriate judgment, if not common sense, should have dictated that if he thought he had an issue worth reporting, that issue should have been reported. As a result, the incidents were not discussed with investigators until late October 2008. Applicant's actions, their active concealment, and the poor judgment displayed obviate application of PC Mitigating Condition (PC MC) AG ¶ 17(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).

At least two years after Applicant entered his guilty plea for his illegal acts, he reported the incidents to security personnel. Although his delay and his reasons for delay are highly questionable, that fact gives only some limited applicability to AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress). None of the other PC MCs apply. Under this guideline, and as discussed further under the whole-person analysis below, such facts leave personal conduct security concerns related to SOR allegation ¶ 2.a unmitigated.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2 (a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a mature, talented, and creative man who excels in his profession. He is a devoted father who is committed to his fiancée. He has many talents and has progressed up the ranks at work through merit. At the same time, he knowingly chose to use marijuana in 2005 after he was granted a security clearance, then failed to inform appropriate contacts about his lapse for at least two years. He similarly chose to solicit the acquisition of seeds to grow a controlled substance, concealed his nurturing of the marijuana plants, and reaped his harvest a few months later. But for his ex-wife's concerns of a thief in their domicile, which they shared with two small children, his illegal efforts may never have come to light.

Had Applicant simply attended his reunion in 2005, used marijuana, and, on reflection, reported his lapse, security concerns could well be mitigated under AG ¶ 26 (a)-(b) and AG ¶ 17(c). Instead, he used the illegal drug, obtained seeds to grow marijuana, planted them in his garden, cared for them, transplanted the plants into the woods, harvested them, concealed them in his basement, dried them for consumption, and prepared them for personal use, despite his ex-wife's objections and despite the dictates of common sense. Then, he failed to report his activities to security personnel for two to three years. Such is not the conduct expected of one granted a security clearance. Despite his present contrition, his behavior, at best, portrays questionable judgment; at worst, it reflects a lack of candor, trustworthiness, reliability, an unwillingness to comply with rules and regulations, and poor judgment.

Moreover, Applicant's explanation that he failed to remember or appreciate that his illegal activities would be of concern to security personnel is unpersuasive. He knew from the beginning that marijuana was a controlled substance and its possession proscribed. Good judgment should have led him to conclude that using, acquiring, cultivating, reaping, and being sentenced for possession of the illegal drug would be of significant interest to his employer, security personnel, the DOD, and the government that had entrusted him with a security clearance. Despite his contrition and the passage of five years, the significantly protracted cover-up of his offense still remains a significant issue. Also of concern are his attempts to minimize his actions and to perpetuate a rationale incompatible with the record evidence, which strongly portrays Applicant to be an insightful and intelligent adult.

While Applicant's inaccuracy with dates mitigates personal conduct security concerns about the duration of his drug use, it does not mitigate personal conduct security concerns related to his 2005 drug activity or his delay in disclosing his actions. Given the circumstances, the significant concerns remaining under Guideline E and the whole-person analysis, personal conduct security concerns are unmitigated. Clearance is denied.

### **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 H:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance denied.

ARTHUR E. MARSHALL, JR.  
Administrative Judge