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

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| In the matter of: | ) | |
| | ) | |
| | ) | ISCR Case No. 10-09689 |
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| Applicant for Security Clearance | ) | |

## Appearances

For Government: David Hayes, Esquire, Department Counsel
For Applicant: Christopher Graham, Esq.

03/09/2012

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## Decision

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ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the transcript, pleadings, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under the criminal conduct and personal conduct adjudicative guidelines. His eligibility for a security clearance is denied.

## Statement of the Case

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on May 13, 2010. On July 23, 2010, Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM). On September 20, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. DOHA acted 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On October 14, 2011, Applicant answered the SOR in writing and requested a hearing before an administrative judge. The case was assigned to me on November 29, 2011. I convened a hearing on January 18, 2012, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through Ex. 6 and entered in the record without objection. Applicant testified and called no witnesses. He introduced four exhibits, which were identified and marked as Applicant's Ex. A through Ex. D. All of Applicant's exhibits were entered in the record without objection. DOHA received the transcript (Tr.) of the hearing on January 26, 2012.

## Findings of Fact

The SOR contains three allegations of disqualifying conduct under AG J, Criminal Conduct (SOR ¶¶ 1.a., 1.b., and 1.c.) and two allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 2.a. and 2.b.). In his Answer to the amended SOR, Applicant admitted all allegations under AG J and he denied the two allegations under AG E. Applicant's admissions are admitted as findings of fact.

Applicant is 29 years old and employed as a military equipment inspector by a government contractor. He married in May 2011. He is the father of a seven-year-old daughter and a two-month old son. (Ex. 1; Tr. 22-23, 34-35.)

In 2001, Applicant graduated from high school and received a diploma. Thereafter, he held a variety of short-term jobs. In 2006, after accumulating debts of over $13,000, he declared bankruptcy. In 2007, he enlisted in the U.S. Army, but was medically released after four months because he suffered from asthma. He has worked for his present employer for approximately eight months. He has held an interim security clearance for two years, granted when he worked for a previous government contractor. (Ex. 1; Tr. 23, 34.)

In July 2001, when he was 18 years old, Applicant was arrested and charged with possession of marijuana and possession of drug paraphernalia. Applicant appeared in court, entered a no contest plea, and the case was placed on the stet docket.[1] Applicant was sentenced to one year of unsupervised probation. Applicant served the probation, paid the fines and fees, and was not charged with any other offenses during his year of probation. Applicant reported that he was told by the judge and his public defender attorney that the matter was then dismissed. He also reported

[1] I take administrative notice that a stet docket is an inactive docket maintained by a prosecutor. Usually, a defendant whose case is placed on the stet docket receives a deferred sentence and, barring any further criminal behavior by the defendant, the prosecutor will eventually dismiss the charge.

that he was told by his attorney that the charge would be expunged from his record and he had no further obligation to disclose it. (Ex. 1; Ex. 2; Tr. 24-25, 40-42.)

In his personal subject interview, Applicant told the authorized investigator that he used cocaine one time in 2001 or 2002. On his e-QIP, he denied all drug use. He told the OPM investigator that his failure to list his cocaine use was an oversight. At his hearing, he stated that he did not disclose the frequency of his marijuana and cocaine drug use to his Army recruiter. (Ex. 1; Ex. 2; Tr. 42-44.)

In August 2003, Applicant, who was alone, fell asleep while driving, and the car flipped over. He was taken to a local hospital emergency room for treatment. While in the hospital, he was questioned by a deputy sheriff about cocaine that had been found in his car. In his personal subject interview, he told the investigator that, in response to the deputy's questions, he denied that the cocaine was his. At his hearing, Applicant stated: "I fell asleep while driving my vehicle when. . .[the cocaine] was found inside my vehicle. I was experimenting with cocaine and it was found, and I got that charge, and I have not used it since then." (Ex. 2; Tr. 44-45.)

Applicant stated that he had purchased the cocaine, which weighed about .234 grams, from a friend. He reported that he was arrested and charged with (1) possession of cocaine, a felony, and (2) reckless driving. Applicant pled "no contest" to the felony charge. He was assessed $605 in court costs and sentenced to a year of supervised probation. He was found guilty of the reckless driving charge and was ordered to pay a $100 fine and $186 in court costs. After Applicant served a year of supervised probation, the felony charge was dismissed. Applicant stated that his attorney told him that the felony charge had been expunged from his record and he had no obligation to disclose it on an employment application. When he filed his Army recruitment application, Applicant did not initially disclose his marijuana and cocaine arrests and charges. However, the information came to light when the Army carried out a criminal background check on Applicant, and he was then questioned about it. (Ex. 2; Ex. 4; Ex. 6; Tr. 45-48.)

In 2005 and 2006, Applicant was employed as a tow truck driver. In his personal subject interview, he told the investigator that he was routinely assigned to handle overnight calls for towing assistance. He then reported that one night, while he was assigned to overnight duty, two calls came in to the towing business. One call requested towing through reimbursement from a travel card and the other requested towing assistance to be paid in cash. The travel card customer cancelled his towing request. Applicant assisted the cash customer, who paid Applicant $45 for the towing service. When he completed his paperwork at the end of his shift, Applicant reported, in error, that he had provided towing services to the travel card client. He also indicated that the cash client had cancelled his request for towing. When he reported for work the next morning, he did not include with his paperwork the $45 he had been paid for the cash call and a copy of the receipt he had given to the customer. Applicant's omission became known to the owner of the towing business when the cash client called the owner of the towing company to check on the status of his vehicle. (Ex. 2; Tr. 58-62.)

In the past, Applicant had failed one or two times to provide his employer with cash receipts he had acquired for towing customers at night. This time, however, Applicant's employer called him to his office, and in the presence of a deputy sheriff, accused Applicant of embezzling the $45. Applicant told his employer and the sheriff that he had inadvertently left the money and the receipt on his dresser at home. The employer then fired Applicant and took Applicant's keys to the towing business. The sheriff told the employer that he had 12 months to charge Applicant with embezzlement. Applicant drove home, collected the $45 and the receipt, and returned them to the employer. The employer gave him his final paycheck. Applicant was never charged with an offense. (Ex. 2; Tr. 63-67.)

When Applicant reported on his e-QIP that he had been fired from his job as a tow truck driver, he provided the following information:

> [The tow truck company owner] said I stole one whole day's cash receipts from my route. It was a misunderstanding. There was no one in the shop when I got back and I took the money home for the night. [The owner] again said I stole the money even when I brought it all into work the next morning. (Ex. 2 at 37.)

Applicant also reported that he had left another tow truck company in early 2005 after his employer gave him notice of unsatisfactory performance. The employer cited Applicant for failing, on several occasions, to set the emergency brake on the tow truck he was assigned to drive. (Ex. 1.)

In March 2010, Applicant was arrested and charged with Driving Under the Influence (DUI), First Offense. Applicant acknowledged that, before the arrest, he had consumed five mixed drinks in about two hours at a bar. He failed a field sobriety test. He stated that his blood alcohol level was either .132 or .15. (Ex. 5; Tr. 50-53.)

The charge was reduced to reckless driving. Applicant was sentenced to 90 days in jail, all jail time suspended, and placed on one year of unsupervised probation. He paid a $500 fine, $159 in court costs, and his driver's license was suspended for 15 days. An interlock device to monitor his alcohol consumption was installed on his vehicle for three months. He also completed a six-week substance education course. (Ex. 5; Ex. C; Ex. D; Tr. 27-29, 53.)

At his hearing, Applicant testified that he stopped drinking alcohol in March 2010. He stated that one exception to his abstinence occurred when he drank champagne at his wedding in May 2011. He further stated that he has no intention of consuming alcohol in the future. (Tr. 29, 35.)

In June 2011, a special federal agent met with Applicant at a military base where he was working as a civilian, presented him with a copy of his July 2010 personal subject interview, and asked him to review it and make any necessary corrections and revisions. Applicant made several notations and changes to the summary prepared by

an OPM investigator in July 2010. The following day, Applicant met again with the special agent and provided him with his corrected personal subject interview, which he then signed and certified, under penalty of perjury, as a true and accurate summary of the information he had provided to the OPM agent in July 2010. (Ex. 2; Tr. 55-57.)

On the June 16, 2011, statement which Applicant signed, edited, and certified, the following paragraph appears:

> The subject has never been charged with an alcohol offense before. The subject no longer drinks and drives. The subject drinks once a month and drinks 7 to 8 mixed drinks in one evening. The subject does feel that he is intoxicated.[2] The subject no longer drinks and drives. (Ex. 2.)

Applicant asserted under cross-examination that the request to review his July 2010 personal subject interview "caught him off guard." He stated that he no longer consumes alcohol. (Tr. 55-58.)

Section 22c on the e-QIP Applicant completed on May 13, 2010, reads: "Have you EVER been charged with any felony offense? (Include those under Uniform Code of Military Justice.)" (Emphasis in original.) Applicant responded "No" to Section 22c. He did not report his arrest and charge of cocaine possession, a felony, in August 2003. At his hearing, Applicant explained that he didn't think he had been charged with a felony because the charge had been dismissed after his year of probation. He acknowledged that he later understood that he had been charged. However, he also remembered that his counsel had told him he did not need to disclose an offense that had been dismissed from his record. He also stated that, before responding to Section 22c, he did not seek clarification from his facility security officer, and he did not seek clarification from the attorney who represented him when he was charged with cocaine possession. He acknowledged that he needed a security clearance to do the job he was applying for. (Ex. 1; Tr. 68-73.)

Applicant provided two letters of character reference. The first letter, from his former employer, praised Applicant's "judgment, honesty, integrity, and ability to follow rules and regulations" and concluded that he is a very trustworthy and reliable employee. The second letter of character reference, from Applicant's current team lead, states that Applicant "has proven himself to be a remarkable responsible and confident young man," who "is trusted with sensitive information daily." (Ex. A; Ex. B.)

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security,

[2] This sentence originally read: "The subject does not feel that he is intoxicated." In his June 2011 review of his statement, Applicant deleted the word "not." (Ex. 2.)

emphasizing that "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 applicants 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.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). 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, the administrative judge applies these guidelines 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.

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. . . ." The applicant has the ultimate burden of persuasion in seeking to obtain 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 that 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.

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 J, Criminal Conduct

Under the Guideline J, "[c]riminal 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 ¶30.

In July 2001, Applicant was arrested and charged with marijuana possession and possession of drug paraphernalia. In August 2003, Applicant was arrested and charged with cocaine possession, a felony. In March 2010, when he was 27 years old, Applicant was arrested and charged with DUI, First Offense. These facts are sufficient to raise a security concern under AG ¶¶ 31(a) and 31(c). AG ¶ 31(a) reads: "a single serious crime or multiple lesser offenses." AG ¶ 31(c) reads: "allegation or admission or criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

Three criminal conduct mitigating conditions might apply to Applicant's case. If "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," AG ¶ 32(a) might apply. If there was "evidence that the person did not commit the offense," then AG ¶ 32(c) might apply. If "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 involvement," then AG ¶ 32(d) might apply.

Applicant's criminal conduct occurred between the ages of 18 and 27, a period of nine years. All of Applicant's criminal conduct dealt with substance abuse. His most recent criminal conduct, a DUI, occurred less than two years ago. At his hearing, Applicant emphasized that his criminal charges were dismissed after he served probation, suggesting that they were of lesser importance and no longer mattered in assessing his character and reliability.

However, the nature of Applicant's criminal conduct is not easily set aside, minimized, or ameliorated. His criminal conduct occurred over a period of nine years, during his young adulthood, suggesting a pattern of behavior. Only two years have elapsed since Applicant's most recent episode of criminal behavior. Insufficient time has passed to establish that Applicant's criminal conduct will not recur and impact his reliability, trustworthiness, or good judgment in the future. While Applicant presented

two favorable letters of character reference, he did not provide evidence that established successful rehabilitation. I conclude that none of the Guideline J mitigating conditions fully applies to the facts of Applicant's case.

**Guideline E, Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern:

> 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.

The Guideline E allegations in the SOR raise a security concern under AG ¶¶ 16(a) and 16(d). AG ¶ 16(a) reads: "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." AG ¶ 16(d) reads, in pertinent part: "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations. . . ."

Applicant denied SOR ¶¶ 2.a. and 2.b. SOR ¶ 2.a. alleged that Applicant was terminated from his position at the towing company in June 2006 due to allegations that he stole cash receipts. SOR ¶ 2.b. alleged that Applicant deliberately falsified his response to Section 22c on the e-QIP he signed and certified on May 13, 2010, when he answered "No" when asked if he had ever been charged with any felony offenses.

On his e-QIP, Applicant reported that his employer at the tow truck company accused him of stealing one day's cash receipts. Applicant reported that no one was in the tow truck office when he returned at the end of the day, and he took the money home for safe keeping for the night. He further stated that he brought the money with him to work the next day, but even so the owner accused him of theft.

When he spoke with the authorized investigator, Applicant told a different story. He stated that he worked a night shift and took two calls, one from a travel card holder and one from a cash customer. The travel card customer cancelled his call for a tow. Applicant provided tow services to the cash customer and received a payment of $45. When he filed his work report the next day to his employer, Applicant did not turn in the

cash or the receipt from the cash customer. He said he inadvertently left these items at home.

Applicant's differing stories change the details surrounding his employer's accusation of theft. They do not, however, deny that he was accused of theft. The differing stories, when considered as a whole, suggest a pattern of dishonesty or rule violations, raise concerns under AG ¶ 16(d)(3), and support a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, and unwillingness to comply with rules and regulations, further indicating that Applicant may not properly safeguard protected information.

When Applicant completed his e-QIP and responded to Section 22c, he answered "No" when asked if he had ever been charged with a felony offense. SOR ¶ 2.b. alleges that Applicant deliberately falsified his answer by failing to disclose his 2003 arrest for possession of cocaine, a felony. Applicant defended his "No" answer and claimed that his attorney told him the charge was expunged from his record after he served a year of probation with no other charges. Applicant did not consult the attorney or his security manager before responding to Section 22c.

DOHA's Appeal Board has cogently explained the process for analyzing falsification cases:

> (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)).

Several Guideline mitigating conditions might apply to the facts of this case. Applicant's disqualifying personal conduct might be mitigated under AG ¶ 17(a) if "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." If "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 process" and "[u]pon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and completely," then AG ¶ 17(b) might apply. If "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," then AG ¶ 17(c) might apply. AG 17(d) might apply if "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 occur."

Applicant was fired by an employer in 2006 for allegedly stealing the company's money. Applicant himself reported this on his 2010 e-QIP. He failed to provide evidence that the stressors, circumstances, or factors that caused this untrustworthy behavior were unlikely to recur.

Applicant completed a security clearance application when he enlisted in the Army in 2007. On that application, he did not report his arrest for possession of cocaine. Later, when the Army investigated his record, the criminal charge appeared, and Applicant was asked about it, thereby giving Applicant notice that the matter was of consequence. Applicant's attempt to justify his denial of this same charge on his 2010 e-QIP by stating that his attorney had assured him that he need not report the charge after he served probation was not persuasive. He knew that a felony charge was a serious matter and failure to report it on his e-QIP might be considered a security concern. For these reasons, he had good reason not to report it. Moreover, he did not seek legal advice on the issue of whether or not to report a felony charge, even if dismissed after serving a probationary period, on a security clearance application. I thoroughly reviewed the documentary evidence in this case. I conclude that AG ¶¶ 17(a), 17(b), 17(c), and 17(d) do not apply in mitigation to this case.

**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 the 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.

Applicant is 29 years old. He recently married. His former employer and his current team leader praise him as mature and reliable. These facts are positive in his favor. However, Applicant also has a criminal record. His most recent criminal arrest and charge occurred in 2010. Insufficient time has passed to conclude that his criminal conduct will not recur. Applicant falsified his e-QIP by deliberately failing to report that he had been arrested and charged with a felony offense.

Applicant provided two different stories to explain why his employer fired him for theft in 2006. When he enlisted in the Army in 2007, he did not tell his recruiter about his drug use. When he completed his e-QIP, he denied all drug use and an arrest for cocaine possession, a felony. When he was confronted in the hospital and told that a law officer had found cocaine in his automobile, Applicant denied that it was his. At his hearing, he acknowledged that the cocaine found in his automobile was his, and he admitted using cocaine. The record evidence suggests that Applicant has difficulty in telling the truth and his factual statements are not credible.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate security concerns under the criminal conduct and personal conduct adjudicative guidelines.

## 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 J: | AGAINST APPLICANT |
| Subparagraphs 1.a. - 1.c.: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 2.a. - 2.b.: | 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 allow Applicant access to classified information. Applicant's request for a security clearance is denied.

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Joan Caton Anthony
Administrative Judge