



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



In the matter of: )  
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----- ) ISCR Case No. 10-10871  
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Applicant for Security Clearance )

**Appearances**

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

December 29, 2011

**Decision**

HARVEY, Mark, Administrative Judge:

In 2003, Applicant pleaded guilty to Disturbing the Peace with Loud Music. In 2005, Applicant received treatment for acute-alcohol intoxication and was diagnosed as alcohol dependent. He continued to consume alcohol until March 19, 2011. More time is necessary without alcohol consumption to fully mitigate alcohol consumption concerns. Criminal conduct concerns are mitigated. Access to classified information is denied.

**Statement of the Case**

On May 10, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (hereinafter SF-86) (Government Exhibit (GE) 1). On April 26, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to him, alleging security concerns under Guidelines G (alcohol consumption) and J (criminal conduct) (Hearing Exhibit (HE) 2). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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) promulgated by the President on December 29, 2005. 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 him, and it recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On May 18, 2011, Applicant responded to the SOR. (HE 3) On June 13, 2011, Department Counsel was prepared to proceed. On November 1, 2011, the case was assigned to me. On November 18, 2011, DOHA issued a hearing notice setting the hearing for December 7, 2011. (Tr. 62-63; HE 1) The hearing was held as scheduled. At the hearing, Department Counsel offered four exhibits. (Transcript (Tr.) 20; GE 1-4) Applicant offered four exhibits. (Tr. 22-23; AE A-D) There were no objections, and I admitted GE 1-4 and AE A-D. (Tr. 20, 23) Additionally, I admitted the SOR, response to the SOR, and the hearing notice. (HE 1-3) On December 19, 2011, I received the hearing transcript.

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

Applicant admitted the conduct alleged in SOR ¶¶ 1.a, 1.c, and 2.a, and he provided some extenuating and mitigating information. (HE 3) His admissions are accepted 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 54-year-old employee of a defense contractor, who supervises the overhaul and maintenance of an advanced electronic system throughout the United States. (Tr. 5, 7) He has worked for the same employer for 15 years. (Tr. 7) He graduated from high school in 1975. (Tr. 6) He has held a secret security clearance for 11 years. (Tr. 7) He does not have any prior military service. (Tr. 6) He has never been married, and he does not have any children. (Tr. 6-7)

### **Alcohol Consumption and Criminal Conduct**

Applicant disclosed his alcohol-related arrest in 2003, his alcohol detoxification in 2005, and rehabilitative efforts on his May 10, 2010 SF-86. (GE 1) An alcohol-related security concern was noted in SOR ¶ 1.a because in January 2005 Applicant received treatment for acute-alcohol detoxification and was diagnosed as alcohol dependent. SOR ¶ 1.b alleges that Applicant continues to consume alcohol. SOR ¶ 1.c states that in February 2003 Applicant was arrested and charged with Inflicting Corporal Injury on Spouse or Co-habitant. SOR ¶ 2.a cross-alleged the same conduct as SOR ¶ 1.c, and indicated this conduct raised a concern under the criminal conduct guideline.

Applicant consumed alcohol from age 16 or 17 to age 53 with several lengthy periods of abstinence from alcohol consumption. (Tr. 45-46; GE 2 at 7-10) There are no

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<sup>1</sup>The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information. Unless stated otherwise, the sources for the facts in this section are Applicant's May 10, 2010 SF-86 (GE 1) or his October 18, 2010 Office of Personnel Management (OPM) investigative personal subject interview (PSI). (GE 2 at 7-10)

allegations of alcohol-related problems with the police resulting in an arrest until February 17, 2003. (GE 2 at 8-9) On that date, Applicant and his girlfriend were drinking alcohol, and an argument occurred. (Tr. 26) When he attempted to leave his residence, she blocked his path, and Applicant ran into her or bumped her. (Tr. 26) She fell. (Tr. 26) Applicant left his residence, and when he returned, the police were waiting for him. (Tr. 26) The police arrested Applicant and charged him with Inflicting Corporal Injury on Spouse or Co-habitant. Applicant pleaded guilty to Disturbing the Peace with Loud Music. (SOR response, HE 3) He was sentenced to a fine of \$200 and 16 hours of anger management classes. (GE 2 at 9)

In 2005, Applicant and his girlfriend were drinking alcohol every day for six days. Applicant was worried about suddenly stopping his alcohol consumption because his body might go into shock. (Tr. 30) He voluntarily turned himself in and received inpatient, alcohol-related detoxification treatment for about four or five days. (Tr. 30) He suffered from delirium tremens or DTs. (Tr. 46, 55-56) He received outpatient care for approximately six months. (Tr. 30) He also attended Alcoholics Anonymous (AA) meetings. (Tr. 31) In 2005, he was diagnosed by a physician, clinical psychologist, or psychiatrist as alcohol dependent. (SOR response, HE 3; GE 2 at 7) He and his girlfriend stopped consuming alcohol for two years. (Tr. 32)

In 2007, his girlfriend from 2002 to 2007, moved out of his residence. (Tr. 32; GE 2 at 9) He believed she was a major instigator of his alcohol consumption. (Tr. 32) After she moved out, he believed he could consume limited amounts of alcohol. (Tr. 32) In the year before his hearing, Applicant attended less than 10 AA meetings, with his most recent AA attendance being six weeks before his hearing. (Tr. 44-45) He does not have any contact with his former girlfriend. (Tr. 45)

Applicant ended his alcohol consumption on March 19, 2011 because he was worried about his security clearance. (Tr. 34; SOR response, HE 3) His most recent alcohol consumption, which was on March 18-19, 2011, involved consumption of five or six beers a day, while out camping. (Tr. 39-40) He recognized that he had been gradually increasing his alcohol consumption. (Tr. 55) Based on the commentary in the alcohol consumption evaluation requested by DOHA, he was also concerned that he may be returning to excessive alcohol consumption. (Tr. 34-37; GE 2 at 11-12) The DOHA-requested evaluation indicated there were lingering concerns about Applicant's ability to refrain from significant future alcohol consumption due to his failure to abstain from alcohol consumption after being diagnosed as alcohol dependent. (GE 2 at 11-12)

## **Recommendations**

Applicant's supervisor describes Applicant as a valuable member of the firm with a solid work ethic, leadership, willingness to learn and integrity. (AE A, D) His contributions to his company have been numerous and valuable. His work is always professional. He is dependable, generous, honest, trustworthy, loyal and helpful. He loves his family and his friends and respects others in the community. He was promoted to supervisor in July 2010. (Tr. 54) His credit is excellent. (Tr. 53; AE C)

## 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 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 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 meeting the criteria contained in the 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. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. 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 or her] 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 concern is under Guidelines G (alcohol consumption) and J (criminal conduct), with respect to the allegations set forth in the SOR.

#### **Alcohol Consumption**

AG ¶ 21 articulates the Government’s concern about alcohol consumption, “[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.”

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

- (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(b), 22(c), 22(e), 22(f), and 22(g) do not apply. Applicant did not have any alcohol-related incidents at work. Currently, he does not habitually consume or engage in binge-alcohol consumption to the extent of impaired judgment.<sup>2</sup> He did not fail to follow any court orders regarding alcohol education, evaluation, treatment or abstinence. There is insufficient evidence of a relapse after his diagnosis of being alcohol dependent.<sup>3</sup> Applicant did not receive an evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. He received alcohol-consumption related counseling in 2005 and he periodically attended AA meetings; however, there is insufficient evidence that there was a subsequent relapse. See n. 3, *supra*.

AG ¶ 22(a) applies. Applicant was arrested in 2003 for an alcohol-related assault and battery on his live-in girlfriend, and he subsequently pleaded guilty to disturbing the peace. AG ¶ 22(d) applies because a physician, clinical psychologist, or psychiatrist diagnosed Applicant with alcohol dependence.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) are potentially applicable:

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

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<sup>2</sup> Although the term "binge" drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the NIAAA National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism (NIAAA) Newsletter 3 (Winter 2004 No. 3), <http://www.pubs.niaaa.nih.gov/publications/Newsletter/winter2004/NewsletterNumber3.pdf>. Applicant engaged in binge alcohol drinking in 2005 before being admitted for detoxification, and he may have engaged in binge alcohol drinking as recently as March 19, 2011. There is no evidence of current binge consumption of alcohol.

<sup>3</sup> The term, "relapse" is not defined in the Directive, and Applicant's return to alcohol consumption after being diagnosed alcohol dependent does not establish a relapse. If consumption of alcohol after being diagnosed as alcohol dependent is the definition of "relapse," then AG ¶ 22(f) would apply. However, if "relapse" requires an adverse alcohol-related event after alcohol-related treatment, such as those described in AG ¶¶ 22(a) or 22(b), then AG ¶ 22(f) would not apply.

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

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

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

AG ¶ 23(a) applies in part because Applicant had only one documented alcohol-related incident in 2003 and one such incident in 2005 that had an adverse effect on his life. He was convicted of disturbing the peace in 2003, and he needed inpatient detoxification for excessive alcohol consumption in 2005. These two events considered in isolation are somewhat infrequent or isolated, and not recent. He ended his alcohol consumption on March 19, 2011, and his excessive alcohol consumption was caused to a significant extent by his toxic relationship with his live-in girlfriend. Accordingly, he receives some credit because, "it happened under such unusual circumstances" and recurrence is less likely. However, AG ¶ 23(a) cannot be fully applied because he resumed his alcohol consumption after two years of abstinence, and he continued to consume alcohol up until March 19, 2011. There is still a significant possibility that alcohol-related problems are likely to recur, and it continues to cast doubt on Applicant's "current reliability, trustworthiness, or good judgment."

AG ¶¶ 23(b) to 23(d) do not fully apply. Although he completed an alcohol abuse treatment program in 2005, he attended less than 10 AA meetings in the last year, and he does not currently attend any other alcohol treatment program. He stopped consuming alcohol on March 19, 2011, about nine months before his hearing. He did not fully recognize that his alcohol problem raises security concerns until too recently to receive full mitigating credit.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of more substantial alcohol abuse than Applicant's that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd.

Aug. 2, 2007) the Appeal Board reversed the administrative judge's grant of a clearance and noted, "That Applicant continued to drink even after his second alcohol related arrest vitiates the Judge's application of MC 3."

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge's grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and capricious. *See also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (involving case with most recent alcohol-related incident three years before hearing, and reversing administrative judge's grant of a clearance).

After careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude his continued alcohol consumption up until March 19, 2011 is simply too recent to fully mitigate all alcohol consumption security concerns.

### **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 two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), "a single serious crime," and ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." Applicant was convicted of disturbing the peace in 2003. This is not a serious crime, and AG ¶ 31(a) is not established. He admitted that he engaged in an altercation with his girlfriend, which resulted in his conviction of a misdemeanor-level criminal offense of disturbing the peace. His criminal conduct of disturbing the peace and AG ¶ 31(c) are established. Consideration of potential mitigating conditions is required.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(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; and



(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.

AG ¶¶ 32(a) and 32(d) are established. The criminal offense was related to his toxic relationship with his girlfriend, who is no longer in his life. He paid his fines and attended court-ordered anger management classes. This misdemeanor-level offense was eight years ago. There are some positive signs of rehabilitation. Applicant ended his alcohol consumption on March 19, 2011. He admitted his misconduct and has no other criminal convictions. He has performed well at his employment and has been promoted to supervisor. He demonstrated his remorse and has been substantially reformed. The criminal conduct concern is fully mitigated.

### **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. My comments under Guidelines G and J are incorporated into my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is considerable evidence supporting approval of his clearance. Applicant revealed his alcohol-related offenses on his May 10, 2010 security clearance application, to an OPM Investigator, in his responses to DOHA interrogatories, and at his hearing. About four years ago, he ended a toxic relationship with his alcohol-abusing girlfriend, which significantly contributed to his own alcohol abuse. He has avoided alcohol-related criminal offenses for eight years. He completed an alcohol treatment program in 2005, and he received the benefit of outpatient treatment and AA sessions. Applicant is a valued employee with excellent potential. There is no evidence at his current employment of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His good work performance over the

last 15 years shows some responsibility, rehabilitation and mitigation. His supervisor supports approval of his clearance. I am satisfied that his current judgment, reliability, trustworthiness, and his current ability or willingness to comply with laws, rules and regulations shows future potential for reinstatement of his access to classified information.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a serious problem with alcohol dependence in 2005. He has one alcohol-related involvement with law enforcement resulting in a criminal conviction for disturbing the peace. After receiving inpatient treatment in 2005, he abstained from alcohol consumption for two years. Then he resumed his alcohol consumption until March 19, 2011. His decision to return to alcohol consumption was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Excessive alcohol consumption shows a lack of judgment and/or impulse control. His problems with alcohol cannot be fully mitigated at this time. Such conduct raises a serious security concern, and a security clearance is not warranted at this time. However, if Applicant can continue to abstain from alcohol consumption for another year, he will have shown sufficient judgment and self-control to warrant favorable consideration for access to classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has mitigated the security concerns pertaining to criminal conduct; however, alcohol consumption concerns are not fully mitigated at this time.

### **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 G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b and 1.c:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge