



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



In the matter of: )  
)  
) ISCR Case No. 11-09245  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Christopher Morin, Esq., Department Counsel  
For Applicant: Mitchell J. Howie, Esq.

03/25/2014

**Decision**

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline E (personal conduct) and Guideline K (handling protected information). Clearance is denied.

**Statement of the Case**

On December 4, 2010, Applicant certified an Electronic Questionnaire for Investigations Processing (e-QIP). On April 17, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006. The SOR detailed security concerns under Guidelines E and K that reflected why DOD CAF could not find under the Directive that it was clearly consistent with the national interest to continue

Applicant's security clearance. On June 24, 2013, Applicant answered the SOR and requested a hearing.

This case was initially assigned to another administrative judge. On August 20, 2013, DOHA issued the Notice of Hearing scheduling the hearing for September 28, 2013. On August 29, 2013, Applicant's Counsel requested a continuance that was granted. The case was reassigned to me on September 25, 2013. On October 28, 2013, a second Notice of Hearing was issued, and the hearing was held as scheduled on November 21, 2013. At the hearing, Department Counsel submitted Government's Exhibits (GE) 1 through 4, and Applicant testified, called six witnesses, and submitted Applicant's Exhibits (AE) 1 through 55. Objections to the exhibits are discussed below.

After the hearing, the record of the proceeding was reopened twice to permit the parties to submit matters on the issue of reciprocity. In post-hearing submissions, the parties submitted documents that have been admitted into evidence as GE 5 through 8 and AE 56 through 61. No evidentiary objections were raised regarding the post-hearing submissions. DOHA received the transcript (Tr.) of the hearing on December 3, 2013. The record of the proceeding closed on February 19, 2014.

### **Procedural and Evidentiary Matters**

Prior to the hearing, Department Counsel submitted a motion that asserted the doctrine of collateral estoppel precluded admission of evidence at the hearing that challenged the findings of an Administrative Law Judge (ALJ) of the Merit Systems Protection Board (MSPB). Applicant's Counsel responded in writing to that motion. In a written ruling, I set forth my rationale for concluding that the doctrine of collateral estoppel applied to the MSPB decision, but also noted that, consistent with the requirements of due process, Applicant would be provided a full opportunity to explain his conduct and offer evidence to extenuate and mitigate such conduct. Department Counsel's motion, Applicant's response, and my ruling have been marked as Hearing Exhibit (HE) 1. At the hearing, Department Counsel objected to portions of Applicant's Answer to the SOR and to Applicant's exhibits that challenged the MSPB decision. I overruled Department Counsel's objections to permit Applicant the opportunity to present such matters in extenuation and mitigation.<sup>1</sup>

Department Counsel's and Applicant's lists of exhibits were marked as HE 2 and HE 3, respectively.<sup>2</sup>

At the start of the hearing, Department Counsel made a motion to withdraw the allegation in SOR ¶ 1.a under Guideline E. Applicant's Counsel had no objections to that motion. The motion was granted. SOR ¶ 1.a was withdrawn.<sup>3</sup>

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<sup>1</sup> Tr. at 8-9, 11-14, 24-25. No evidence offered by Applicant at the hearing was excluded from admission into evidence under the doctrine of collateral estoppel.

<sup>2</sup> Tr. at 19, 24.

At the hearing, the issue of reciprocity under Section 2-204 of the National Security Industrial Program Operating Manual (NISPOM), DOD 5220.22-M, dated February 28, 2006, was implicitly raised. As noted above, the parties provided evidence and arguments in post-hearing submissions regarding the application of reciprocity. For the reasons set forth below, I concluded that reciprocity does not apply in this case. My post-hearing email communications with the parties have been marked as HE 4.

## Findings of Fact

### Background Information

Applicant is a 44-year-old employee of a defense contractor. He began working for his current employer in September 2010. He served in the Army Reserve from November 1987 to May 1989, on active duty in the Army from May 1989 to January 2001, and in the National Guard from August 2001 to July 2011. He retired in the grade of master sergeant (E-8). He is married and has two children, ages 12 and 15. Since about 1987, he has held a security clearance, including at the time of the hearing.<sup>4</sup>

Excluding the withdrawn allegation, the SOR alleged under Guideline E that, in ██████████, Applicant was terminated from federal employment for violating security regulations that resulted in the compromise of restricted information, for misusing government equipment, and for failing to follow supervisory orders and instructions. Under Guideline K, the SOR alleged that, in about ██████████, he intentionally removed classification markings without proper authorization from a compact disc (CD) containing classified material. In his Answer to the SOR, Applicant admitted that he was terminated from federal employment as alleged under Guideline E, but denied most of the underlying conduct that was the basis of that termination. He denied the Guideline K allegation.<sup>5</sup>

### MSPB Decision<sup>6</sup>

In ██████████, Applicant began a job as a federal civilian employee. He worked as an instructor at a military training command. His position required him to maintain a security clearance. In ██████████, Applicant's security clearance was suspended during government investigations into the propriety of him selling excess government material on eBay. The reports of investigations concluded that Applicant's sale of the excess material was not illegal. The investigations, however, noted that

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<sup>3</sup> Tr. at 9-11.

<sup>4</sup> Tr. at 78-108, 164-165; GE 1; AE 3, 19, 20.

<sup>5</sup> Applicant's Answer to the SOR.

<sup>6</sup> GE 2 (MSPB ALJ's decision, dated ██████████).

Applicant utilized a government computer to track the sales transactions on eBay and that pornographic material was discovered on Applicant's government computer.

In about [REDACTED], several CDs were found at Applicant's civilian job site that contained classified information but did not bear classification markings. An officer conducted a command investigation into this security issue. The investigation included affidavits from witnesses. The investigating officer concluded that Applicant had removed the classification markings from the classified material and improperly distributed the CDs containing said material.

On [REDACTED], an official in Applicant's chain of command proposed that Applicant be removed from his position for violation of security regulations where restricted information was compromised, misuse of government equipment for other than official use, and repeated failure to follow supervisory orders and instructions. Applicant submitted a detailed written response to the agency's proposed removal notice, but did not request an opportunity to make an oral response.

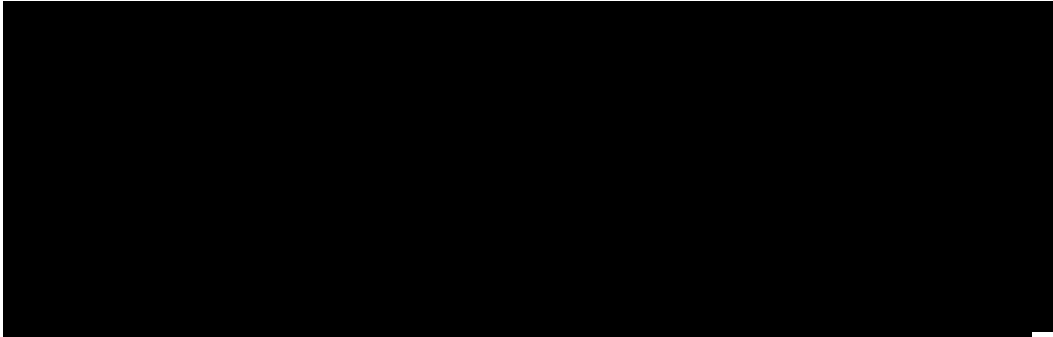
On [REDACTED], Applicant's commander issued a decision that sustained the reasons in the proposed removal notice and found that Applicant's removal was warranted to promote the efficiency of the service. Applicant was involuntarily removed from federal service. He appealed that adverse action.

An MSPB ALJ conducted a hearing into the propriety of the termination of Applicant's federal employment. Applicant was represented at that hearing. In his decision dated [REDACTED], the ALJ addressed the three reasons for Applicant's removal. The ALJ's findings and conclusions are summarized or quoted below:

1. As to the agency's first charge involving the alleged security violation, the ALJ noted the official who proposed Applicant's termination testified at the hearing that, on [REDACTED], he obtained from an enlisted member (E-7) a CD that contained classified information on [REDACTED]. An examination of the CD revealed the classification markings had been removed from material on the disc and the properties section of the CD indicated that Applicant was the author of the disc, which was created on [REDACTED]. Two other discs were subsequently discovered and witnesses identified Applicant as the original source of them.

2. In his response to the notice of proposed removal, Applicant denied he created the CDs in question and argued that he had been in another state performing National Guard duty on [REDACTED], a Saturday. He also argued the properties section of the CD can be changed and denied giving the CD to the E-7. At the hearing, Applicant called as a witness another E-7 who performed the examination of the CD. This E-7 testified that Applicant or someone using his password created the CD that he examined. He also testified that the information on the disc could only have been obtained from the vault at Applicant's command or from Applicant's National Guard unit, which would have had the same classified information.

3. As quoted below, the ALJ concluded:

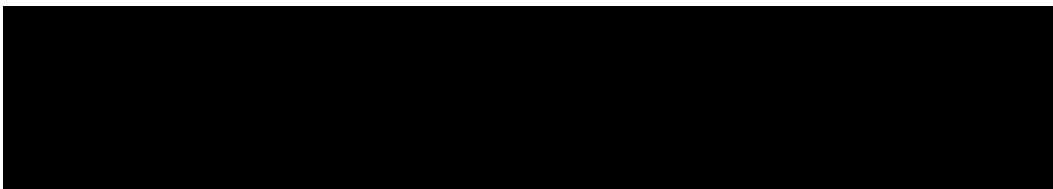


I therefore find that the agency has supported the first charge by a preponderance of the evidence and it is hereby sustained.<sup>7</sup>

4. As to the agency's second charge concerning misuse of government computers, the ALJ noted an investigative report contained detailed evidence regarding the examination of the hard drives of Applicant's government-assigned desktop and laptop computers. The investigation revealed both computers were used to track Applicant's internet sales of excessed items, although that activity occurred before and after duty hours and at lunchtime. Applicant's laptop also contained "numerous photographic images from sexually explicit adult web sites.' The pornographic material had been placed on the hard drive in the [REDACTED] timeframe."

5. Applicant claimed his use of government computers to track his internet sales was arguably permissible under agency regulations. He denied visiting pornographic websites. He opined the pornographic images may have been attached to an email or that one of several individuals whom he allowed to use his laptop to check their email may have downloaded the material without his knowledge.

6. As quoted below, the ALJ specifically found as to the second charge:



I therefore find that the second charge is sustained in its entirety.

7. As to the agency's third charge concerning Applicant's alleged repeated failure to follow supervisory orders and instructions, the official who proposed Applicant's

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<sup>7</sup> Prior to the hearing, I indicated that I was not bound by the MSPB Administrative Judge's credibility determination and would independently make my own credibility determination.

removal testified in detail about multiple instances of Applicant's failure to abide by an official's instructions regarding approval methods for requesting leave. Applicant claimed this charge was petty and provided reasons for his failure to abide by the instructions.

8. As quoted below, the ALJ specifically found for the third charge:



9. The ALJ concluded the agency's removal action was reasonable and appropriate.

Applicant appealed the ALJ's decision to the MSPB appeal board. On [REDACTED], the MSPB appeal board upheld the ALJ's decision. Applicant did not seek judicial review of the MSPB appeal board's decision in federal court.<sup>8</sup>

### Reciprocity

Section 2-204 of the NISPOM provides:

Any previously granted PCL [Personnel Security Clearance] that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency.

In ISCR Case No. 98-0320 (App. Bd. Apr. 8, 1999), the Appeal Board held that reciprocity under the NISPOM is mandatory in nature. If Section 2-204 of the NISPOM applies, an administrative judge is bound by the prior favorable clearance decision and does not have discretion to decide what weight should be given that adjudication.<sup>9</sup>

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<sup>8</sup> GE 3 (MSPB appeal board decision, dated [REDACTED]).

<sup>9</sup> In ISCR Case No. 98-0320 (App. Bd. Apr. 8, 1999), the Appeal Board held:

Nothing in the language of Section 2-203 [the predecessor to Section 2-204 of the current version of the NISPOM, which contains almost identical language] indicates or suggests that it is a discretionary provision. To the contrary, the language of Section 2-203 clearly indicates it is mandatory in nature. Accordingly, the Board rejects Department Counsel's contention that the Judge has the discretion to decide what weight, if any, should be given to the prior favorable CAF adjudication of Applicant's security eligibility.

In this case, Department Counsel offered into evidence Applicant's Joint Personnel Adjudication System (JPAS) Investigation and Adjudication History<sup>10</sup> that contained the following entry:

PSI Adjudication of SSBI Unknown, Opened, Closed 2003 05 30, determined Eligibility of SCI – DCID 6/4 on 2005 06 09

*Adjudicative Guidelines:* Personal Conduct, Security Violations and Misuse of Information Technology Systems

<b>Eligibility</b>	<b>Eligibility Date</b>	<b>EmploymentCode</b>	<b>CAF</b>
SCI - DCID 6/4	2005 06 09		Army CCF
Pending Reply to Statement of Reasons	2004 03 11		Army CCF

The JPAS entries further reflected that Applicant had a Single Scope Background Investigation - Periodic Reinvestigation (SBPR) that closed on June 30, 1996; a Single Scope Background Investigation (SSBI) that closed on May 30, 2003; and a SBPR that closed on May 14, 2011. Applicant's latest security clearance eligibility determination was June 9, 2005. Another JPAS entry indicated the personnel security investigation (PSI) adjudication based on his latest SBPR remained an open DOHA case.<sup>11</sup>

After reviewing the JPAS entries, I twice reopened the record of the proceeding after the hearing to permit the parties to present evidence and argument on the application of reciprocity to the U.S. Army Central Personnel Security Clearance Facility's (Army CCF) favorable adjudication on June 9, 2005, as well as evidence reflecting that the Transportation Security Administration (TSA) favorably adjudicated Applicant's security clearance on October 25, 2007.<sup>12</sup>

In his post-hearing submission, Department Counsel presented documents from the Army CCF's adjudication of Applicant's security clearance in June 2005.<sup>13</sup> These documents included:

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The only difference in the language between the current Section 2-204 and the previous Section 2-203 is that the first sentence of Section 2-204 contains the words "access to classified information" between the words "grant" and "to their employees", while Section 2-203 instead contained the words "security clearances (TOP SECRET, SECRET, CONFIDENTIAL, Q or L)" between those same words.

<sup>10</sup> GE 4, 6.

<sup>11</sup> Tr. at 153-163; GE 4, 5, 6.

<sup>12</sup> HE 4.

<sup>13</sup> GE 7.

1. The commander's letter, dated February 3, 2004, concurring with the investigating officer's recommendations and directing their immediate initiation, which would have included Applicant's removal from federal service.

2. The Army CCF's Letter of Intent (LOI) to Revoke Sensitive Compartmented Information (SCI) Access Eligibility and Security Clearance, dated March 11, 2004. This letter included an SOR detailing the findings of the Army Regulation 15-6 investigation that concluded Applicant created multiple copies of a computer disc containing classified material on [REDACTED], that he removed all classification markings from these discs, and that he distributed them to coworkers as unclassified material. The SOR also alleged that Applicant received nonjudicial punishment in 1997 for falsifying orders, that he disobeyed verbal orders from his supervisors, that he used a government computer during duty hours for his personal gain, and that a government computer confiscated from him contained a cache of internet pornography. The SOR noted the investigating officer recommended that Applicant be removed from federal service.

3. Applicant's rebuttal to the LOI, dated September 1, 2004. This included a five-page written rebuttal, reference letters, awards/ letters of appreciation, and other documents. In the rebuttal, Applicant admitted that he falsified orders to recover a deposit from a landlord.

4. The commander's endorsement on Applicant's rebuttal, recommending Applicant's security clearance be revoked and noting he engaged in a pattern of misconduct that showed he was untrustworthy.

5. The Army CCF's "Warning Notice" – Determination of Sensitive Compartmented Information (SCI) Access Eligibility and Security Clearance, dated June 9, 2005. This document stated in part:

We have thoroughly evaluated your response to reference 1.a [Letter of Intent]. This memorandum is notification that your security clearance has been granted **but with a warning that subsequent unfavorable information may result in the suspension of your security clearance.** [Emphasis in original.] We have made a favorable determination based on your explanation concerning the selling of military related items and computer disks over the internet . . . . We also took into consideration your explanation that you could not have created copies of disks on the [REDACTED] [REDACTED] with the classified marking removed as you were on Inactive Duty Training at [a specific location] from the [REDACTED]. Also taken into consideration were the numerous recommendations you provided along with your statement that while you tracked certain items on Ebay from your government computer, this was done before or after work hours. You state that at no time did you use a government computer to view pornography. You acknowledged that in January 1998 you received an Article 15 for falsifying orders. We grant you eligibility for



access to SCI and a Top Secret security clearance in accordance with reference 1.b [DoD 5200.2-R, *Personnel Security Program*, dated January 1987, as amended]. DA Form 873, authorizing you a Top Secret security clearance based on a Periodic Reinvestigation, completed on 30 May 2003, is being forwarded.

6. An Army CCF internal document showing that Applicant's SCI access and security clearance were reinstated on June 9, 2005.<sup>14</sup>

In his Answer to the SOR in this case, Applicant presented an email from a TSA Personnel Security Specialist, dated November 13, 2007, that stated "the TSA Personnel Security Division has favorably adjudicated your background investigation and granted you a Secret security clearance on 10/25/07." The email also stated, "This e-mail is for informational purposes only and will not be accepted as proof of security clearance. If your clearance needs to be verified or passed to another agency please contact PS Customer Services Desk at [a specific listed website] for guidance."<sup>15</sup>

Post-hearing documents reflect that the TSA issued Applicant interrogatories on July 13, 2007, requesting information about his termination from federal service in January 2005, his nonjudicial punishment in January 1998, and his security clearance suspension in [REDACTED]. Applicant submitted a response to the interrogatories on July 26, 2007. He was offered a conditional appointment to a TSA position on September 16, 2007. On October 25, 2007, Applicant signed a Classified Information Nondisclosure Agreement. On January 30, 2008, the TSA issued Applicant a Notice of Termination – Failure to Meet the Conditions of Employment. The Notice of Termination summarized Applicant's response to the interrogatories and contained excerpts from the MSPB decision. It also concluded that Applicant's actions that led to his firing from the federal service in [REDACTED] were egregious and raised serious concerns about his integrity, trustworthiness, judgment, and willingness to comply with rules, regulations, and instructions. It concluded he was unsuitable for continued TSA employment and that he should be separated from federal service. Because he was serving in a trial period, Applicant had no opportunity to appeal or grieve that termination.<sup>16</sup>

In the post-hearing submissions, Department Counsel argued that reciprocity did not apply because Applicant's security clearance was not based on a current investigation. On the other hand, Applicant's Counsel argued that the investigation was current because no significant derogatory information has come to light since the last adjudication. He also contended that the operative phase in Section 2-204 was the one that addressed "significant derogatory information" and highlighted that "there simply

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<sup>14</sup> GE 7.

<sup>15</sup> Tr. at 95-101; GE 1; AE 1, 2. Applicant disclosed his prior federal employment termination when he applied for the TSA position.

<sup>16</sup> Tr. at 95-101; GE 1, 8; AE 59-61.

has not been any significant derogatory information that has become known since the previous and current investigation.”<sup>17</sup>

Appeal Board precedent supports Department Counsel’s argument. In ISCR Case No. 03-04172 (App. Bd. Jun. 7, 2005), the Appeal Board stated:

Under Section 2-203, reciprocity is predicated on: (a) a person having an existing security clearance, (b) **based on a current investigation**, (c) of a scope that meets or exceeds that necessary for the security clearance at issue, and (d) the absence of significant derogatory information that was not previously adjudicated. **If any of the elements is missing, then Section 2-203 does not apply.** [Emphasis added.]

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Furthermore, nothing in the language of Section 2-203 or the concept of reciprocity, indicates or suggests that a federal department or agency is precluded from periodically reevaluating whether a person should continue to retain a security clearance that was previously granted by that federal department or agency. Section 2-203 does not transform a favorable security clearance decision into a vested right or entitlement to a security clearance in perpetuity.

More recently, the Appeal Board determined that reciprocity, either under Section 2-204 of the NISPOM or Executive Order 13467, did not apply when there was no current investigation or adjudication at the time the SOR was issued.<sup>18</sup>

Under Section 2-201 of the NISPOM, investigations remain current for five years. Here, Applicant’s current security clearance eligibility is based on an investigation that closed on May 30, 2003, and was not current when the SOR was issued in this case. Reciprocity does not apply to the Army CCF adjudication of June 9, 2005.<sup>19</sup>

Likewise, reciprocity also does not apply to the TSA adjudication in October 2007. The TSA security clearance was based on reciprocity. Other than an employee background check and the issuance of interrogatories, TSA conducted no independent security clearance investigation. Neither the TSA adjudication of October 2007 nor the underlying investigation on which it was based were current (*i.e.*, within five years) when the SOR was issued in this case.<sup>20</sup>

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<sup>17</sup> GE 5; AE 57; HE 4.

<sup>18</sup> See ISCR Case No. 04-12742 at 3-4 (App. Bd. Feb. 25, 2011).

<sup>19</sup> See ISCR Case No. 03-04172 at note 3 (App. Bd. Jun. 7, 2005). In this case, an SBPR closed in May 2011 that apparently disclosed no additional derogatory information. Nonetheless, the existing security clearance was not based on a current investigation.

<sup>20</sup> GE 8.

Even though the Army CCF previously adjudicated the misconduct alleged in this case and no subsequent significant derogatory information was presented, reciprocity does not apply here for the reasons stated above.<sup>21</sup>

### Applicant's Answer and Testimony

In this case, Applicant testified that, since his security clearance was reinstated in June 2005, he has continuously held a security clearance and occupied jobs requiring at least a Secret clearance. At various times, he deployed to Afghanistan for a total of approximately four years. In Afghanistan, he was involved in training U.S. Special Forces and Afghan troops. He worked there under arduous conditions and in dangerous settings and traveled at times in unarmored vehicles.<sup>22</sup>

No security issues have arisen regarding Applicant's handling of classified information since the alleged misconduct. He has received annual security training, including training on information technology and communications security. Every time he deployed overseas, he also received a special country briefing.<sup>23</sup>

Applicant has consistently denied most of the misconduct alleged in the SOR. He did not deny using a government computer to track sales on the internet, but did claim that it was not a violation of regulations. He testified that, while working as a federal employee in about 2003 or 2004, he had a disagreement with his supervisor on certain safety procedures. The disagreement led to Applicant requesting to be exempt from teaching a subject at the school due to his safety concerns. Around the same time, Applicant was also selling items on eBay that generated concerns at his command, but his conduct was later determined by various investigative agencies to not be prohibited. Both of these events strained Applicant's relationship with his supervisor.<sup>24</sup>

Regarding the alleged failure to follow supervisory orders, Applicant explained that his supervisor took issue with the manner in which he submitted leave requests in 2004. According to Applicant, the supervisor was primarily concerned about him using intermediaries to submit his leave requests. During this period Applicant was reassigned to a different department at the school and directed to not return to his department's

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<sup>21</sup> In ISCR Case No. 04-12742 at 4 (App. Bd. Feb 25, 2011), the Appeal Board stated:

We also decline to conclude that DOHA was precluded from considering past conduct in the context of a current adjudication. This is even where the past conduct was considered in a prior favorable adjudication. *See, e.g.*, ISCR Case No. 06-10859 at 4 (App. Bd. Sep. 2, 2010); ISCR Case No. 08-09163 at 405 (App. Bd. Dec 21, 2010).

<sup>22</sup> Tr. at 88-92, 100-104, 107-116; 164-166; AE 17, 18, 53.

<sup>23</sup> Tr. at 87-93, 107-116, 153; AE 7, 9, 16, 19, 20, 21, 34.

<sup>24</sup> Tr. at 116-121, 144-153; AE 8; Applicant's Answer to the SOR.

spaces. Because he was banned from those spaces, Applicant indicated the use of intermediaries to forward leave requests was a practical choice at times.<sup>25</sup>

As to the use of government computers to track the internet sales, he stated that he accessed eBay typically before or after duty hours or during lunchtime. He also denied that he ever searched the internet for pornography using a government computer. In his Answer to the SOR, he noted that fellow employees had used his government computer on occasion, but acknowledged that he remained responsible for its authorized use because it was assigned to him, but also stated, "I am not in the habit of using government computers to access prohibited websites (obviously) and do not recall if I erroneously visited an incorrect website or what exactly happened."<sup>26</sup>

Applicant also testified that, in [REDACTED], a CD was found at the school that did not have proper classified marking. Shortly thereafter, a health and welfare inspection was conducted that uncovered nine CDs without proper classified markings. At about this time, Applicant was reassigned to a different department at the school and did not know the reason for that reassignment. He stated that he did not know where the CDs were found during the inspection, but indicated none were found in his possession, desk, or personal effects. Three of the nine mismarked CDs were attributed to Applicant. The "properties" section of the three CDs identified they were created on Applicant's computer. Throughout this incident, including after his security clearance was reinstated, Applicant's requests to review the CDs were denied.<sup>27</sup>

Applicant denied committing the security violation. He claimed that his command over time developed different theories of how he created the CDs. When he discredited one theory, he stated the command created another. He indicated that his command's original theory was that he created the CDs on his government desktop computer. He was able to establish, however, that he was serving out of the area on National Guard duty on the Saturday the CDs were created. He claimed their next theory was that he remotely accessed the command's computer system to create the CDs. He pointed out that the command did not have a classified internet connection in its vault. Consequently, he could not remotely access classified information in that computer. Finally, he claimed their next theory was that he created the discs at his National Guard site. He stated that he first heard of this third theory at the MSPB hearing and was not ready to defend against it. He later provided statements of National Guard members noting that he did not have access to the unit's safe where classified information was stored during the [REDACTED] drill weekend. Furthermore, the classified CD that was copied did not appear on the National Guard unit's sensitive item inventory until [REDACTED]

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<sup>25</sup> Tr. at 121-130; AE 8; Applicant's Answer to the SOR.

<sup>26</sup> Tr. at 130-133; Applicant's Answer to the SOR.

<sup>27</sup> Tr. at 132-139; Applicant's Answer to the SOR.

█. Applicant also claimed that his assigned government laptop did not have the capability of creating CDs.<sup>28</sup>

Applicant also testified that, in about 2004, his command's training department had distributed a 20-CD set of unclassified training material. Before becoming aware that he was the target of an investigation into the alleged security violations, he had discovered two CDs in that 20-CD set contained classified information and turned those improperly-marked CDs into the command's security manager.<sup>29</sup>

### Character Evidence

Since his termination from the federal government in █, Applicant has been promoted twice in the National Guard. He was promoted to E-7 in June 2006 and to E-8 in March 2008. At one point, he was not only the first sergeant of his National Guard unit, but also served as commander of that unit. In those roles, he guided the unit in preparing for a deployment.<sup>30</sup>

A former commander of a joint task force (JTF) in Afghanistan testified that Applicant served there on his personal security detail for about five months. They had extensive daily contact during that period. Time permitting, Applicant also served then as an instructor in a NATO school that trained Afghan forces. The former JTF commander indicated that Applicant always erred on the side of caution in handling classified information, which would have included when he served as a courier of classified information. In his testimony, the JTF commander described an incident in which Applicant took steps to protect him when they came under fire. He stated that he trusted Applicant with his life.<sup>31</sup>

Applicant's current manager, a retired Navy senior chief petty officer, testified that he has known Applicant for a little over three years. He described Applicant as "one of his best guys" and as someone who always followed orders, displayed a positive attitude in discharging his security responsibilities, and safeguarded classified information or sensitive items. In Applicant's 2011 performance appraisal, the manager rated Applicant as either a "4" or "5" in each performance category on a scale of 1-5 with "5" being the preeminent category.<sup>32</sup>

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<sup>28</sup> Tr. at 132-144, 163-164; AE 10, 11; Applicant's Answer to the SOR.

<sup>29</sup> Tr. at 132-137; Applicant's Answer to the SOR.

<sup>30</sup> Tr. at 107-116; AE 4, 19, 20, 21, 34.

<sup>31</sup> Tr. at 28-51, 107-116; AE 7, 12, 16, 53.

<sup>32</sup> Tr. at 80-84, 191-200; AE 3, 48.

Another of Applicant's current supervisors, a retired Marine, testified that he has known Applicant for about three years. Applicant is part of this supervisor's team that trains U.S. troops deploying to Afghanistan. The supervisor stated that Applicant adheres to security standards and protects the company's proprietary information. He indicated that Applicant is reliable and trustworthy and described him as his "right-hand man" and as the first person he goes to when he needs something done. The supervisor specifically requested that Applicant become a member of his team.<sup>33</sup>

Applicant's pastor testified that he has known Applicant for about eight to ten years. He indicated that Applicant has volunteered on occasion at a food distribution center for the needy, participated in a youth organization's camping trips, and believed he assisted in a hurricane relief effort. The pastor considered Applicant to be reliable and trustworthy.<sup>34</sup>

A sergeant first class in the National Guard testified that he has known Applicant for approximately 11 years. They served together in the same National Guard unit. He described Applicant as the best in his field of expertise and as someone who was reliable and trustworthy.<sup>35</sup>

Applicant also submitted numerous reference letters attesting to his dedication, loyalty, professional skills, and integrity. Throughout his military and civilian careers, he has received many certificates of appreciation and awards. His military awards include: three Army Reserve Component Achievement Medals, four Army Achievement Medals, two Army Commendation Medals, and the Meritorious Service Medal.<sup>36</sup>

## Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense 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. 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).

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<sup>33</sup> Tr. at 169-180; AE 3.

<sup>34</sup> Tr. at 183-189.

<sup>35</sup> Tr. at 55-64; AE 38; Applicant's Answer to the SOR. See also, Tr. at 67-77.

<sup>36</sup> Tr. at 112-116; GE 7; AE 4, 9, 13-55; Applicant's Answer to the SOR.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AGs. 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 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, to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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**

### **Guideline K, Handling Protected Information**

Since Guideline K raises the more serious security concern, it is discussed first. AG ¶ 33 sets forth the security concern for the handling of protected information:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or unwillingness and ability to safeguard such information, and is a serious security concern.

I have considered all of the handling of protected information disqualifying conditions under AG ¶ 34 and the following are potentially applicable:

- (a) deliberate or negligent disclosure of classified information or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings, or conferences;
- (b) collecting or storing classified or protected information at home or in any other unauthorized location;
- (c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, "palm" or pocket device or other adjunct equipment;
- (e) copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings; and
- (g) any failure to comply with rules for the protection of classified or other sensitive information.

A command investigation and MSPB proceedings found that, in ██████████, Applicant created CDs containing classified information in which applicable classified markings had been removed and that he distributed the CDs as unclassified material. Those CDs were later discovered at Applicant's command. Although the ALJ found that restricted information was compromised during this security violation, no evidence was presented to show that an actual compromise occurred. Nonetheless, compromise was a distinct possibility. In ██████████, Applicant was terminated from federal employment, in part, because of that security violation. AG ¶ 34(a) is not applicable, but AG ¶¶ 34(b), 34(c), 34(e), and 34(g) are applicable.

I have considered all of the handling of protected information mitigating conditions under AG ¶ 35 and the following are potentially applicable:

- (a) so much time has elapsed since the behavior, or it happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and



(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

Sufficient evidence was presented to establish that Applicant committed an intentional security violation. Regarding security violations, the Appeal Board has stated:

Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. ISCR Case No. 97-0435 at 3-4 (App. Bd. July 14, 1998). Once it is established that Applicant has committed a security violation, he has "a very heavy burden of demonstrating that [he] should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an Administrative Judge must give any claims of reform and rehabilitation strict scrutiny." ISCR Case No. 00-0030 at 7 (App. Bd. Sept. 20, 2001). In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g., alcohol abuse, delinquent debts or drug use). Here the issue is not merely an indicator, rather the Judge found Applicant disregarded in-place security procedures in violation of the NISPOM.<sup>37</sup>

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<sup>37</sup> ISCR Case No. 04-04264 at 3-4 (App. Bd. Sep 8, 2006). *See also* ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998) that stated:

Persons granted access to classified information are in a fiduciary relationship with the federal government and have strict obligations to properly handle and safeguard classified information entrusted to them. *See, e.g.*, DISCR Case No. 90-1546 (February 6, 1992) at p. 4; DISCR Case No. 89-0062 (October 30, 1991) at p. 7; DISCR Case No. 88-2577 (February 22, 1991) at p. 13. An applicant who deliberately commits security violations has breached his or her fiduciary obligations to the federal government and failed to demonstrate the high degree of trustworthiness and reliability that must be expected of persons entrusted with handling classified information. Furthermore, security violations strike at the heart of the industrial security program, which has the objective of ensuring that classified information is properly handled and safeguarded. An applicant who deliberately engages in security violations demonstrates a disregard for, or indifference to, national security interests and undermines the integrity and effectiveness of the industrial security program. *See, e.g.*, DISCR Case No. 86-3753 (February 28, 1990) at p. 11 n.4 ("Conduct that shortcircuits or evades basic principles and practices associated with physical security or personnel security or both thwarts the basic purpose of the industrial security program, undermines its integrity, and jeopardizes the security of classified information."). Accordingly, security violations raise very serious questions about an applicant's suitability for access to classified information. *See, e.g.*, DISCR Case No. 88-2576 (November 15, 1990) at p. 9 ("Evidence that an applicant has failed to properly handle or safeguard classified information entrusted to him raises serious questions as to his security suitability.").

This case presents unusual facts. Applicant's former command, the MSPB, and the TSA have examined the alleged security violation and concluded that it, as well as the other alleged misconduct, warranted Applicant's termination of federal employment. The TSA specifically stated that his misconduct was egregious and raised serious concerns about his integrity, trustworthiness, and judgment. On the other hand, the Army CCF reviewed the same misconduct and reinstated Applicant's security clearance with a warning in July 2005. In its security determination, the Army CCF noted that it considered Applicant's explanation that he could not have created copies of CDs on [REDACTED], with the classified marking removed as he was on Inactive Duty Training at a distant location from [REDACTED] through [REDACTED]. It appears that the Army CCF may have been persuaded by Applicant's explanation about his whereabouts when the CDs were created, while his former command and the MSPB were not swayed by that explanation. It merits noting that the Army CCF's favorable adjudication occurred after Applicant's federal employment termination in [REDACTED], but before the MSPB proceedings. During the MSPB hearing, the ALJ had the advantage of receiving in-person testimony of witnesses, which the Army CCF did not have the benefit of considering. Because of the in-person testimony, the ALJ may have considered facts and circumstances that were not considered by the Army CCF. The receipt of in-person testimony also tends to enhance the weight of the MSPB decision in comparison to the Army CCF's favorable adjudication.

In the current proceeding, Applicant presented impressive whole-person and mitigation evidence. Since reinstatement of his security clearance about nine years ago, he has maintained a security clearance without any security violations. During that period, he has been promoted twice in the National Guard, served as his unit's first sergeant and temporarily as its commander, and later retired in pay grade E-8. He served with distinction as a contractor in Afghanistan under arduous and dangerous circumstances. He has received annual security training and special country briefs before deploying overseas. His former JTF commander in Afghanistan testified about his security consciousness in handling classified information. His former JTF commander and a number of his current supervisors, coworkers, and acquaintances attested to his reliability, trustworthiness and good judgment.

Despite the mitigating evidence presented, Applicant has not met his "very heavy burden of demonstrating that he should be entrusted with classified information." Applicant has continued to deny that he removed the classification marking from the classified information on the CDs or produced those CDs in [REDACTED]. It is unknown why he committed such a security violation. Not knowing what his motivations were for engaging in that conduct makes it difficult to assess whether such an incident is unlikely to recur. His failure to accept responsibility for that security violation also undercuts a determination that he has reformed and rehabilitated himself.<sup>38</sup> Furthermore, his denial of the alleged misconduct, as well as his nonjudicial punishment in January 1998 for

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<sup>38</sup> The Appeal Board has held that a failure to accept responsibility is evidence that detracts from a finding of reform and rehabilitation. See ISCR Case No. 96-0360 at 3-4 (App. Bd. Sep. 25, 1997).

falsifying orders, raises credibility concerns.<sup>39</sup> In applying the strict scrutiny standard, I cannot find that he has rehabilitated himself. Notwithstanding that Applicant has held a security clearance for over the past nine years without engaging in any further misconduct, I find that his security violation in █████ continues to cast doubt on his current reliability, trustworthiness, and good judgment.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue 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; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available evidence 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

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<sup>39</sup> Applicant's nonjudicial punishment for falsifying order was not alleged in the current SOR. In ISCR Case No. 03-20327 (App. Bd. Oct 26, 2006), the Appeal Board stated:

Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3. *Id.*; ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003).

the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources.

Section 2-301 of DOD 5500.7-R (Joint Ethics Regulation (JER)) generally authorizes DOD personnel to conduct brief internet searches of a personal nature. Section 2-301.a.2(d), however, specifically prohibits the use of government communication systems (e.g., government computers) to view pornography or conduct unofficial selling or soliciting. The MSPB ALJ determined that Applicant violated "the regulation cited by the agency" by using government computers to track his internet sales. The ALJ's decision, however, did not identify the regulation cited. The decision noted that Applicant's internet tracking occurred before or after duty hours and during lunchtime. No evidence reflected that a government computer was used to conduct any sales or solicitations. Applicant's claim that his tracking of the sales on the government computer was not prohibited is understandable and reasonable. Although collateral estoppel applies to the ALJ's findings, I give no weight to the ALJ's finding that Applicant violated an unspecified regulation by tracking eBay sales on a government computer during off-duty hours and conclude that finding has no security significance.

The ALJ's findings concerning Applicant's security violation in [REDACTED], the pornography found on his government computer, and his failure to follow supervisory orders and instructions raise security concerns under AG ¶¶ 16(c) and 16(d). The security violation is explicitly covered under Guideline K, but also warrants consideration under Guideline E in examining Applicant's willingness to comply with rules and regulations and in assessing his overall conduct. Therefore, the discussion of the Guideline K disqualifying conditions applies equally here and is incorporated under this guideline.

AG ¶ 17 lists three personal conduct mitigating conditions that are potentially applicable:

(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; and

(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.

The discussion of the Guideline K mitigating conditions also applies equally here and is incorporated under this guideline. The MSPB ALJ concluded that Applicant's failure to follow supervisory orders and instructions was "much less serious" than the other conduct examined during that proceeding. I concur with ALJ's assessment; nevertheless, those failures continue to warrant consideration here in evaluating Applicant's overall conduct. For the reasons discussed under Guideline K, I find that the alleged misconduct continues to cast doubt on Applicant's reliability, trustworthiness, and good judgment. None of the Guideline E mitigating conditions adequately diminish the security concerns arising from Applicant's alleged personal conduct.

### **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 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines K and E in my whole-person analysis. As noted earlier, Applicant presented impressive whole-person evidence. Nevertheless, such evidence does not eliminate the very serious security concerns arising from Applicant's security violation in [REDACTED]. A cleared individual who removes classification markings from classified material and places that material in unclassified channels commits an egregious security violation and breaches his fiduciary duty to the government. As the Appeal Board has stated, such a security violation strikes at the very heart of the industrial security program. Despite the mitigating evidence presented, Applicant's [REDACTED] security violation continues to cast doubt on his current reliability, trustworthiness, and good judgment.

Overall, the record evidence leaves me with questions and doubts about Applicant's suitability for a security clearance. Therefore, I conclude that Applicant has

not met his very heavy burden in this case and that he has failed to mitigate the security concerns arising under Guidelines K and E.

### **Formal Findings**

Formal findings 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:	Withdrawn
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline K:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Decision**

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

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James F. Duffy  
Administrative Judge