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

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| In the matter of: | ) | |
| | ) | |
| [Redacted] | ) | ISCR Case No. 11-10629 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Kathryn D. MacKinnon, Esq., Department Counsel
For Applicant: *Pro se*

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## Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

## Statement of the Case

Applicant submitted a security clearance application on April 19, 2011. On October 3, 2012, the Defense of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on October 12, 2012, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on November 26, 2012, and the case was assigned to me on November 29, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 4, 2012, scheduling it for January 10, 2013. I convened the hearing as

scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through K, which were admitted without objection. I kept the record open until January 25, 2013, to enable both sides to submit additional documentary evidence.

After the hearing, Applicant timely submitted AX L through Q, which were admitted without objection. Department Counsel's comments regarding AX L through Q are attached to the record as Hearing Exhibit I. Department Counsel submitted GX 5 through 10, which were admitted without objection. DOHA received the transcript (Tr.) on January 23, 2013.

## Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a and 1.f. He denied SOR ¶¶ 1.b-1.e and 1.g-1.n. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old engineer employed by a defense contractor since August 2000. Before his current employment, he served on active duty in the U.S. Navy and retired as a first class petty officer after 20 years of service. He held a security clearance in the Navy and retained it when he began his current employment. (Tr. 9.)

Applicant married in September 1991. He and his wife have two children, ages 18 and 20, both of whom are full-time college students. (Tr. 111, 132.)

Applicant and his wife built a home in 2005 and lived in it while they built a second home. They financed 80% of the purchase price with a first mortgage loan of about $336,800 and a second mortgage loan of about $60,000. The monthly mortgage payments on this home were about $1,600 per month. After the second home was completed, they moved into it and rented out the first home. They financed 100% of the purchase price of the second home with a first mortgage loan of about $556,000 and a second mortgage loan of about $139,000. (Tr. 60-61.) The second home increased their total monthly mortgage payments to about $3,500. In addition, they accumulated about $50,000 in credit card debt for lighting, fixtures, and furniture that were not included in the home mortgages. (Tr. 101.)

Applicant and his wife had previous experience in purchasing and financing real estate. They had paid off a $244,000 home mortgage in December 2003, a $65,000 mortgage in May 2004, and a $335,000 mortgage in December 2004. (GX 3 at 2; Tr. 82-83.)

Applicant's tax records reflect that his adjusted gross income was $75,860 for tax year 2004; $68,090 in 2005; $79,299 in 2006; $62,467 in 2007; and $67,848 in 2008. (AX K.) Applicant and his wife had about $2,000 in savings, and they anticipated that Applicant's spouse would generate additional income as a real estate agent. (Tr. 70-72.)

Applicant's wife started working as a real estate agent in 2005. (Tr. 130.) Her income fell short of her expectations a result of the downturn in the real estate market. In 2007, she expected to earn about $74,000 in commissions, but she actually earned about $24,000. (AX A at 5; Tr. 73.) In 2008, she expected to earn about $36,000 but actually earned about $16,000 (AX A at 4; Tr. 74.) She earned about $10,000 in 2009 and $20,000 in 2010. (AX A at 2-3.)

In January 2006, the renters moved out of the first home without notice, and Applicant and his wife were unable to continue making the mortgage payments on the first home. (Tr. 59-60, 68.) They incurred additional expenses repairing damage caused by their renter. (Tr. 130.) They considered moving back into the first home, but the mortgage lender initiated foreclosure and refused to allow Applicant and his wife to live in it unless they resolved the delinquent mortgage payments. They offered to add the amount of the delinquent payments to the amount of the loan and increase their monthly payments on the first home from $1,600 per month to $1,800 per month, but the lender refused to modify the loan. (Tr. 84-85.) They tried to rent both homes, without success. They tried to sell both homes, but the real estate market had dramatically declined. The mortgages on both homes were foreclosed.

In October 2007, Applicant and his wife sent letters to all their creditors, explaining why they were unable to pay the full amounts of their scheduled payments. (GX 2 at 185.[1]) Their creditors were not willing to modify the payment schedules. (Tr. 122.)

Applicant and his wife filed a Chapter 13 bankruptcy petition in March 2008. The petition listed the mortgages on both homes and all the other debts alleged in the SOR. The unsecured debts listed in the petition totaled about $72,472. (GX 8 at 17-18, 20-22; AX B.)

The bankruptcy court records also reflect that the Chapter 13 plan provided for the first and second mortgages on both homes to be paid by Applicant and his wife, with the arrearages on the mortgages on the second home to be paid by the bankruptcy trustee over a period of 49 months. The plan reflected that there was no arrearage on the loans for the first home. (GX 6 at 3.)

Applicant and his wife were required by the bankruptcy court to undergo financial counseling, and they complied with the court requirement. (GX 5 at 1-2; GX 8 at 4-7.) Applicant testified that they made payments to the bankruptcy trustee for about six months, and then the bankruptcy petition was dismissed. (Tr. 46-47.) In Applicant's post-hearing submission, he stated that he made six payments totaling $10,056, and he submitted copies of cancelled checks for three payments. (AX L; AX O.)

[1] The page numbering on GX 2 begins with page 159.

The evidence is somewhat inconsistent regarding the basis for dismissing the bankruptcy petition. Applicant testified that his wife told him that the bankruptcy trustee said that the petition should have been filed under Chapter 7 because they had more than $1 million in assets and liabilities. (Tr. 48-49.) According to Applicant's wife, their bankruptcy attorney told them that their only choice was a Chapter 13 bankruptcy, because they earned too much money to file a Chapter 7 petition. (Tr. 153.) Applicant testified that after the bankruptcy was dismissed, their bankruptcy lawyer told him, "[E]verything's dismissed, you don't need to worry about nothing no more. Your credit's just bad, and that's the way it's going to be for five to seven, ten years." (Tr. 29.) Applicant also testified that their bankruptcy lawyer's assistant told them: "Since it's been dismissed, we don't need to file . . . . Since it's already been – the creditors already closed on our accounts and everything from previous actions, that there was no need for us to file, pay another 15- to 3000, which we didn't have, to him, to refile for one piece of paper . . . ." (Tr. 50.)

Applicant's wife was the principal point of contact with the bankruptcy lawyer, because Applicant travels frequently. (Tr. 152.) She testified that the bankruptcy lawyer told her that he intended to dismiss the petition and refile it because he was unable to submit some documentation by the filing deadline. She agreed to the dismissal, but the lawyer did not tell her about the cost of refiling. She testified that they did not refile because they could not afford the $3,000 that the lawyer wanted. (Tr. 131-34.) She also testified that they believed the debts listed in the bankruptcy petition were resolved, because they were not contacted by any of the creditors or collection agents. (Tr. 137-38.)

Applicant testified that he had no further conversations with the bankruptcy lawyer after the case was dismissed. (Tr. 54.) However, he later testified that in October 2012 (after the SOR was sent to him and his pay was garnished for the unsatisfied second mortgage on the first house), he contacted the bankruptcy attorney, who advised him that they could pay him to file another bankruptcy or they could do it themselves. He also testified that the bankruptcy attorney advised him that collection of the debts in the bankruptcy petition was barred by the statute of limitations. (Tr. 95, 120.)

The bankruptcy court records reflect that the holder of the first mortgage on the first home objected to the Chapter 13 payment plan, and that the objections were sustained on July 30, 2008. (GX 5 at 4.) The record does not reflect the basis for the objections. Confirmation was denied, and the bankruptcy case was dismissed on September 4, 2008. (GX 7; GX 9.) The bankruptcy court ordered, "The trustee need not file a final report in this case unless property or money was administered." (GX 9.) Payments to the trustee were ordered to be discontinued on September 5, 2008. (GX 10.) There is no evidence that a final report was filed. Both Applicant and his wife testified that they did not know what happened to the money they sent to the trustee. There is no evidence that the payments to the trustee were applied to the debts alleged in the SOR.

An Internal Revenue Service Form 1099-A reflects that the first home was sold in February 2009, for more than the amount due on the first mortgage. (AX M.) Applicant reported the sale in his 2009 federal income tax return. (AX N.) The lender for the second mortgage obtained a garnishment of Applicant's pay in October 2012. (AX E; Tr. 88.) Applicant is waiting for a court hearing on his request that the garnishment be reduced from $1,000 per month to $500 per month. (AX J; Tr. 86-87.) He was unable to produce any evidence pertaining to the foreclosure of the two mortgages on the second home. (AX J at 1-2.)

Applicant and his wife moved into a rental home after the foreclosure action was initiated. In July 2012, they were required to move again when their landlord became delinquent on his mortgage payments and the rental home was foreclosed. (AX G.) They both testified that their experience has left them with no inclination to deal with real estate again. (Tr. 145-46.)

Applicant and his wife have not taken any action to resolve the delinquent credit card debts and installment contracts alleged in SOR ¶¶ 1.d-1.f and 1.h-1.n. Applicant testified that they relied on their lawyer's advice that the debts are not collectible because of the statute of limitations. (Tr. 94-95.) He was not able to produce any documentation of the lawyer's advice. (AX P.) Applicant's wife did not mention the statute of limitations in her testimony.

When Applicant was questioned by a security investigator about his debts in June 2011, he told the investigator that all the debts were included in his bankruptcy. He could not give the investigator any detailed information about the debts, explaining that they were being handled by his bankruptcy attorney. He did not mention the statute of limitations. (GX 2 at 162-64.)

Applicant carefully tracks the family's income and expenses. (AX C.) He testified that he and his wife usually have a monthly remainder of $900 to $1,000, which they set aside for their children's college expenses. (Tr. 111.) Their monthly income is about the same as it was when they bought their two homes, but their disposable income is reduced by the $1,000 garnishment. Applicant estimated that he has around $10,000 in his current employer's retirement plan, but his wife has no retirement funds. (Tr. 77-78.) They have no personal credit cards, and they have not incurred any additional delinquent debts since they filed their bankruptcy petition. Applicant drives a 20-year-old van, and they have not taken a vacation since they filed their bankruptcy petition. (Tr. 118-19.) They are current on their federal and state income taxes. (Tr. 125.)

In October 2012, Applicant received a pay raise because of his outstanding performance. (AX H.) Character reference letters were submitted by 23 of Applicant's coworkers and supervisors. His supervisor for the past 10 years, who is a program manager, regards him as trustworthy and honest. He "strives for excellence" and consistently meets performance standards. (AX I at 2.) Another program manager, who has known him for more than 10 years, regards him as a team player who takes his responsibilities seriously. (AX I at 1.) Applicant's deputy program manager for the past

17 months regards him as a team player, a skillful employee, and a man of integrity. (AX I at 3.) A coworker for nine years describes him as "lawful by default" in his adherence to rules. (AX I at 4.) His coworkers and associates consistently describe him as trustworthy, honest, dedicated, proactive, a person of high integrity, and a coworker who does not hesitate to go beyond the call of duty. (AX I at 5-23; AX R.)

## Policies

"[N]o 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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. Thus, a decision to deny a security clearance 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 (4th 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[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 F, Financial Considerations

The SOR alleges the two delinquent mortgage loans on the first house (SOR ¶¶ 1.f and 1.g) and the two delinquent mortgage loans on the second house (SOR ¶ 1.b and 1.c). It alleges the Chapter 13 bankruptcy petition that was filed in March 2008 and dismissed in September 2008 (SOR ¶ 1.a). Finally, it alleges a deficiency of $13,604 after an auto repossession (SOR ¶ 1.k) and eight delinquent credit card and installment accounts totaling about $56,116 (SOR ¶¶ 1.d, 1.e, 1.h-1.j, and 1.l-1.n).

The concern under this guideline is set out in AG ¶ 18:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money. It encompasses concerns about an applicant's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. *See* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant admitted the allegations in SOR ¶¶ 1.a and 1.f. His admissions in his answer to the SOR, the testimony and the documentary evidence presented at the hearing, and the post-hearing documentary evidence establish the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(e): consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

Security concerns based on financial considerations may be mitigated by any of the following conditions:

AG ¶ 20(a): the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control (*e.g*., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

AG ¶ 20(e): the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; or

AG ¶ 20(f): the affluence resulted from a legal source of income.

AG ¶ 20(a) is partially established. The defaulted mortgages and other delinquent debts related to the real estate investments arose under circumstances making them unlikely to recur, because Applicant and his wife have no interest in future real estate investments. However, the debts are numerous and ongoing, and the circumstances surrounding them cast doubt on Applicant's current reliability, trustworthiness, and good judgment. His purchase of the two homes was highly leveraged. He committed himself to mortgage payments totaling about $3,500 per month, even though his adjusted gross income was only about $68,090 in 2005; $79,299 in 2006; and $62,467 in 2007. He relied on rental income to pay the mortgage on the first home, with no realistic contingency plan for dealing with any interruption of

the rental income. He relied on his wife's future real estate sales commissions even though she had no earnings track record.

When Applicant fell behind on his mortgage payments and was facing foreclosure, he initially acted responsibly. He kept in contact with the lenders, tried to rent or sell the properties, and sought a modification of the loan on the first home. He kept in contact with his other creditors, but was unable to modify the payments on his credit card debt and automobile loan. He prudently sought a Chapter 13 payment plan. However, in his bankruptcy petition he agreed to continue making payments on all four mortgages, apparently in an effort to keep at least one of the properties. When the bankruptcy court denied confirmation of the payment plan and dismissed the case, Applicant took no further action to resolve any of his debts.

In June 2011, Applicant told a security investigator that all the debts were included in his bankruptcy and were being handled by his bankruptcy attorney. At the hearing, he claimed that he relied on his bankruptcy lawyer's advice that collection of his debts is barred by the statute of limitations. Assuming that such advice was given, he did not receive it until October 2012. He has not explained why he took no action to resolve any of his debts between September 2008 and October 2012. He also has not explained why he did not assert the statute of limitations to contest the garnishment action by the holder of the second mortgage on his first home.

Applicant was on notice in June 2011 that his unresolved delinquent debts raised security concerns. Nevertheless, at the hearing more than 18 months later, he still had not determined the status of the delinquent mortgages.

To his credit, Applicant has incurred no further delinquent debts since his bankruptcy. He lives frugally and carefully monitors his income and expenses. However, his lack of effort after September 2008 to resolve his delinquent debts leaves me with doubts about his reliability, trustworthiness, and good judgment. Thus, I conclude that AG ¶ 20(a) is not fully established.

The first prong of AG ¶ 20(b) (conditions beyond his control) is established. His renter's unexpected departure, the damage to his rental property, and the downturn in the real estate market were conditions beyond his control. However, the second prong (responsible conduct) is not established, for the reasons set out in the above discussion of AG ¶ 20(a).

The first prong of AG ¶ 20(c) (counseling) is established by Applicant's completion of the court-mandated counseling in connection with his bankruptcy. However, the second prong is not established, because Applicant's financial problems are not under control.

"Good faith" within the meaning of AG ¶ 20(d) means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201 (App. Bd. Oct. 12, 1999). Applicant demonstrated "good faith" during the

period preceding dismissal of his bankruptcy, but he has not demonstrated good faith since September 2008. His payments to the holder of the second mortgage on his first home are by involuntary garnishment, which "is not the same as, or similar to, a good-faith initiation of repayment by the debtor." ISCR Case No. 09-5700 (App. Bd. Feb. 24, 2011), citing ISCR Case No. 08-06058 (App. Bd. Sep. 21, 2009). Reliance on a statute of limitations "is not normally a substitute for good-faith efforts to pay off debt." ISCR Case No. 07-16427 (App. Bd. Feb. 4, 2010.) (Internal citations omitted.) Even if Applicant's delinquent debts are legally unenforceable, the facts and circumstances surrounding his conduct in incurring and failing to satisfy them are relevant to his suitability for a security clearance. *See* ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). I conclude that AG ¶ 20(d) is established for the first mortgage on the first home, which was satisfied by the foreclosure sale in February 2009 and alleged in SOR ¶ 1.g, but it is not established for the other debts alleged in the SOR.

AG ¶ 20(d) is not established. Applicant has claimed that the debts are unenforceable, but he has not disputed the legitimacy of any of the debts, provided documentation of the basis for any disputes, or provided evidence of actions to resolve any disputes. AG ¶ 20(f) is not relevant, because unexplained affluence is not an issue in this case.

**Whole-Person Concept**

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. In applying 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. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has served his country and held a security clearance for many years, in uniform and as a civilian contractor. Like many people, he was caught up in the irrational exuberance of the real estate market in 2005 and 2006. He appears to have

learned from his financial mistakes and now lives frugally and manages his finances carefully.

On the other hand, a security clearance adjudication is aimed at evaluating an individual's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Applicant has not demonstrated the sense of duty and obligation toward his creditors that is expected of those entrusted with a security clearance. He has demonstrated concern about his job, his clearance, and his family, but not about his duty to repay creditors. While any animosity he feels toward predatory mortgage lenders might be understandable, it does not explain his failure to address his other debts.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

## Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

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|---|---|
| Subparagraphs 1.a-1.f: | Against Applicant |
| Subparagraph 1.g: | For Applicant |
| Subparagraphs 1.h-1.n: | Against Applicant |

## Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge