



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-00587

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

03/07/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline F (financial concerns). Clearance is granted.

Statement of the Case

On October 14, 2015, Applicant completed and signed a Questionnaire for National Security Position (SF-86). On May 3, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F.

On May 23, 2017, Applicant provided a response to the SOR. On June 26, 2017, Department Counsel was ready to proceed. On June 27, 2017, the case was assigned to me. On June 29, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for August 15, 2017. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered three exhibits; Applicant offered nine exhibits; all of which were admitted into evidence. (Transcript (Tr.) 10-12; Government Exhibits (GE) 1-3; Applicant Exhibits (AE) A-AE I) On August 23, 2017, DOHA received a copy of the transcript of the hearing. The record was held open until December 28, 2017, to permit Applicant to submit additional documentation. (Tr. 56; AE CC) Applicant provided 20 post-hearing exhibits, which were admitted into evidence. (AE J-AE CC)

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the new Adjudicative Guidelines (AGs), which are applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective on June 8, 2017. I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Findings of Fact²

In Applicant's SOR response, he admitted the SOR allegations in SOR ¶¶ 1.a through 1.d and 1.f. He denied the allegation in SOR ¶ 1.e. His SOR response also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is 55-years-old, and he is the president and chief executive officer (CEO) of a corporation that provides personnel and logistical support for the DOD. (Tr. 12-16) He started his company in 2008. (Tr. 25) He does not have a security clearance. (Tr. 17) His current position will be enhanced if he has a security clearance. (Tr. 17) In 1980, he graduated from high school. (Tr. 18) In 1983, he received an associate's degree in business, and in 1988, he received a bachelor of science degree in aviation management. (Tr. 18-19) In 2002, he received a master's degree in business administration. (Tr. 20) He has taken some courses towards a Ph.D. (Tr. 20)

Applicant served in the Marine Corps from 1984 to 2006. (Tr. 20-21) He honorably retired as a major. (Tr. 21-22, 58; AE R) He is receiving disability pay from the Department of Veterans Affairs (VA). (Tr. 58) He was previously married from 1985 to 1994 and from

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

² Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

1995 to 2008. (Tr. 26-28) He married his current spouse in 2013. (Tr. 29) His children are ages 20, 25 and 30. (Tr. 27, 29) His spouse is not employed outside his home. (Tr. 30)

Financial Considerations

The SOR details the following allegations, and their status is as follows:

SOR ¶ 1.a alleges a charged-off credit card in the amount of \$917. On May 9, 2017, the creditor wrote the debt was paid. (SOR response) His May 23, 2017 credit report shows a zero balance owed to this creditor. (AE H at 10)

SOR ¶ 1.b alleges a gym-related debt placed for collection for \$540. Applicant disputed his responsibility for the debt. Applicant moved away from the location of the gym, and the gym contract indicates the contract may be terminated when the customer moves to a different location. (SOR response) His May 23, 2017 credit report shows the debt is disputed. (AE H at 18)

SOR ¶ 1.c alleges a telecommunications debt placed for collection for \$357. Applicant returned the creditor's telecommunications equipment, and the creditor in SOR ¶ 1.c has a current contract with Applicant. (SOR response)

SOR ¶¶ 1.d and 1.e allege two medical debts placed for collection for \$209 and \$55. On May 23, 2017, the creditor wrote the debts were paid, and Applicant's account is in good standing. (SOR response; AE I)

SOR ¶ 1.f alleges, and Applicant admits a federal tax lien was recorded against him on March 24, 2016, in the amount of \$155,369. (Tr. 30, GE 3) Applicant's Subchapter S Corporation hired a payroll employee company (PEC) to process employee withholding for taxes. (Tr. 31, 51) In 2012 and 2013, the PEC diverted or stole his employee's withholding for state and federal taxes. (Tr. 32-34, 51) In June 2013, Applicant terminated the PEC. (Tr. 32) Another company that was the victim of PEC sued PEC; however, they were unable to recover their losses. (Tr. 33) The IRS recommended that Applicant seek legal recovery of his company's losses from PEC; however, Applicant did not have the time or money to pursue PEC. (Tr. 33) Applicant paid the state tax debt generated as a result of PEC's theft. (Tr. 43)

Applicant had three installment agreements with the IRS, which were executed in 2012, for \$112,000; in 2014, for \$151,000; and in 2015, for about \$200,000. (Tr. 35-38) The IRS debt is now \$288,000. (Tr. 39-40, 52-53) The debt increased because the IRS added interest and penalties that were previously waived, and his payments were not sufficient to reduce the debt. (Tr. 35-39) The IRS was disappointed because Applicant did not aggressively pursue legal action against PEC. (Tr. 35-39) Applicant anticipates a reduction in the debt owed to the IRS because of some pending tax credits. (Tr. 40)

On July 15, 2016, the IRS wrote Applicant and advised him \$6,256 was paid to the IRS, and the following payments were made from July 13, 2015, to July 11, 2016: (1) July 13, 2015, for \$600; September 21, 2015, for \$656; September 24, 2015, for \$500; March

1, 2016, for \$3,500; March 31, 2016, for \$500; and May 31, 2016, for \$500. (AE J) The July 15, 2016 IRS letter indicated the balance owed totaled \$288,498. (AE J)

On August 17, 2017, the IRS wrote Applicant and advised him \$6,500 was paid to the IRS from July 18, 2016, to July 17, 2017. He made 12 monthly payments ranging from \$500 to \$750. (AE S) The August 17, 2017 IRS letter indicated the balance owed totaled \$289,673. (AE J) On August 14, 2017, the IRS notified Applicant that a tax overpayment of \$515 was applied to his tax debt for tax year 2011, and the amount due is now \$38,751. (AE T) The \$38,751 debt is included in the total debt of \$289,673.

Applicant said he has been making \$500 monthly payments to the IRS in accordance with an installment plan with the IRS since 2015. (Tr. 41-42, 52) Applicant said he planned to submit in September 2017, an offer-in-compromise for approximately \$25,000 and along with additional tax credits. He suggested that theoretically this could resolve the IRS debt by December 2017. (Tr. 43-44, 54) He conceded the IRS will probably not accept the offer-in-compromise to resolve the tax debt. (Tr. 49) He is also applying for tax forgiveness from the IRS. (Tr. 53-54) Applicant is communicating with his tax attorney about resolution of his tax debt. (AE U; AE V) His company's financial situation is improving. (AE W; AE CC) On September 28, 2017, he offered to settle the federal tax debt for \$13,004. (AE X, IRS Form 433-B at 5-6) The offer was scheduled to be submitted to the IRS on October 4, 2017, and Applicant's tax attorney indicated it will take about six months for the IRS to accept or reject the offer. (AE X)

Applicant received retirement of \$3,716 monthly, and intends to pay himself a \$10,000 monthly salary from his company starting in May 2017. (Tr. 45) All of Applicant's current debts are current and in good standing. (Tr. 46) His most substantial non-tax debt is his student loan debt of \$202,777, which is current. (AE H)

Character Evidence

Applicant was awarded the following medals and decorations: Bronze Star (1); Meritorious Service Medal; Combat Action Ribbon (2); Navy and Marine Corps Commendation Medal (3); Navy and Marine Corps Achievement Medal; Sea Service Deployment Ribbon (6); Humanitarian Service Medal (2); Navy and Marine Corps Overseas Service Ribbon; Iraq Campaign Medal; Global War on Terrorism Expeditionary Medal; Global War on Terrorism Service Medal; Korean Defense Service Medal; Arctic Service Ribbon; National Defense Service Medal (2); Good Conduct Medal; Armed Forces Reserve Medal; SMCR Medal; Joint Meritorious Unit Award (3); Navy unit Commendation (2); Navy Meritorious Commendation; Certificate of Appreciation; Letter of Appreciation (7); Certificate of Commendation (3); Meritorious Mast; M16 Rifle Expert Badge (21); and .45 Cal. Pistol Badge (10). (AE M)

In 1975, Applicant was awarded an Eagle Award from the Boy Scouts of America. (AE Y) As a leading petty officer in 1978, Applicant received a Meritorious Recognition Letter for his outstanding performance of duty, including extinguishing a fire when he was a cadet. (AE Y) In 1979, Applicant received an Honor Ribbon for his role in saving the life of another person at the risk of his own. (AE Y)

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, “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 applicant’s 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 adjudicative guidelines. 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 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 “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, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 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 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure 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 or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts”; “(c) a history of not meeting financial obligations”; and “(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.” The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(a) the behavior happened so long ago,³ 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;

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;⁴

(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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

³ A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. February 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

⁴ The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant's corporation was the victim of theft, and this circumstance was partially or fully outside his control and adversely affected his finances. However, mitigation is limited because Applicant has a clear duty to ensure funds withheld from employee pay are paid to the U.S. Government. He did not establish that he acted prudently and responsibly under the circumstances. His failure to ensure withheld funds were paid to the U.S. Government was illegal and showed poor judgment.⁵

In ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance and commented as follows:

⁵ The Department of Justice recently commented:

"Employers who comply with our nation's tax laws are entitled to a level playing field," said Acting Assistant Attorney General Caroline D. Ciralo of the Justice Department's Tax Division. "Those individuals and entities that fail to withhold employment tax, or withhold and fail to pay employment taxes over to the IRS, not only steal from their employees and the U.S. Treasury, but gain an unfair competitive advantage over businesses down the street and across the country. The Department and its colleagues in the IRS have increased their efforts in this area, and are holding delinquent employers accountable."

* * *

Any individual who is responsible for ensuring that employment taxes are collected, accounted for, and paid over to the IRS, and willfully fails to do so may be subject to a civil penalty equal to the amount of the unpaid withholdings. This civil penalty, referred to as the trust fund recovery penalty, may be imposed even if the individual uses the employment tax to pay other creditors or keep the business afloat. Individuals subject to these penalties include, but are not limited to, bookkeepers, managers, treasurers, and corporate officers. The Department assists the IRS to defend challenges to trust fund recovery penalty assessments, and to ensure that such assessments are collected.

U.S. Department of Justice website, Press Release 16-497, "Justice Department Reminds Employers of Their Employment Tax Responsibilities" (Apr. 27, 2016), <https://www.justice.gov/opa/pr/justice-department-reminds-employers-their-employment-tax-responsibilities>. HE 4. There is no evidence the IRS has sought trust fund recovery penalty assessments, which is an indication he did not willfully fail to act to protect the U.S. Government interests.

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to [comply with tax laws], Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

Applicant said he did not divert the employee withholding funds from going to the federal government. Nevertheless, the IRS is holding Applicant responsible for the loss of funds. His failure to pursue legal action against PEC for stealing funds also showed poor judgment. There is no evidence that the IRS is pursuing PEC for the lost revenue.

On August 17, 2017, the IRS indicated the balance owed totaled \$289,673. For two years, Applicant has been making payments under an approved payment plan to address this debt; however, his IRS debt is increasing. His failure to make larger payments is excused due to his inability to make larger payments to the IRS, and the IRS has accepted his payments without taking more aggressive legal action to obtain greater payments. All of Applicant's other debts are either paid or in current payment plans. There is sufficient assurance his financial problems are being resolved, under control, and will continue to improve in the future. AG ¶ 20(g) is established. Under all the circumstances, he mitigated financial considerations security concerns.

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(d):

(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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 55-years-old, and he is the president and CEO of a corporation that provides personnel and logistical support for the DOD. He started his company in 2008.

In 1988, he received a bachelor of science degree in aviation management. In 2002, he received a master's degree in business administration, and he has taken some courses towards a Ph.D.

Applicant served in the Marine Corps from 1984 to 2006. He honorably retired as a major. He served in Iraq from March to August 2005. He is receiving disability pay from the VA. He received numerous awards for his Marine Corps service. He received the Eagle Award as well as other awards for contributions to his community.

All of Applicant's debts are either paid or in payment plans. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

. . . the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted). He understands what he needs to do to establish and maintain his financial responsibility. He took reasonable actions under his particular financial circumstances to address his delinquent debts. Applicant has established a "meaningful track record" of debt re-payment, and he assures he will maintain his financial responsibility.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial considerations security concerns are mitigated. It is clearly consistent with the interests of national security to grant Applicant security clearance eligibility.

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 F: FOR APPLICANT

Subparagraphs 1.a through 1.f: For Applicant

Conclusion

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert Tuider
Administrative Judge