



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



In the matter of: )  
)  
) ISCR Case No. 17-01472  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Robert B. Blazewick, Esq., Department Counsel  
For Applicant: *Pro se*

04/12/2018  
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**Decision**  
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MURPHY, Braden M., Administrative Judge:

Applicant was arrested for assault and battery of his wife in 2006. He was arrested for assault and battery and other offenses against his wife in February 2016. While the other offenses from 2016 were nolle prossed, he pleaded “no contest” to the domestic assault and battery charge, and adjudication was deferred until June 2018. Given the recency of the 2016 charges, I conclude that Applicant provided insufficient evidence to mitigate the criminal conduct and personal conduct security concerns. Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on October 25, 2015, in connection with his employment in the defense industry. (GE 1) On June 28, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. The action was taken under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), effective June 8, 2017.

Applicant answered the SOR on July 17, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on September 22, 2017. On October 25, 2017, DOHA issued a Notice of Hearing scheduling the case for November 13, 2017. The hearing convened as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through GE 5, which were admitted without objection. Applicant testified and submitted Applicant's Exhibit (AE) A. I left the record open to enable Applicant to submit additional documentation. He subsequently submitted documents that were marked as AE B through AE E and admitted without objection. The record closed on January 3, 2018. DOHA received the transcript on November 22, 2017.

### **Findings of Fact**

Applicant admitted SOR ¶ 1.a, though with an explanation that I construe as a denial. He largely denied SOR ¶ 1.b, while admitting certain conduct. He did not answer SOR ¶ 2.a, but since it is a cross-allegation, I consider it admitted in part, and denied in part, incorporating his answers to SOR ¶ 1. Applicant's admissions and other statements are incorporated into the findings of fact. After a thorough and careful review of the pleadings, the exhibits submitted, and the hearing testimony, I make the following additional findings of fact.

Applicant is 58 years old. He has worked in the information technology field for 35 years. He has worked in the defense industry since at least 1997, and has worked for his current employer since October 2015. He currently holds a security clearance, most recently granted in 2010. (Tr. 14, 28, 57, 59; GE 1, GE 2)

Applicant married his second wife in 1994.<sup>1</sup> They have lived separately since February 2016. When the record closed, their divorce proceeding was pending final resolution. They have three sons, ages 19, 21, and 22. (Tr. 28-29, 43; GE 1; AE E)

In February 2006, Applicant was arrested and charged with assault and battery of a family member after the police were called to his home. (SOR ¶ 1.a) Applicant explained in his Answer that he and his wife had been experiencing marital difficulties. They had an argument one morning before he left for work, when he said he wanted a divorce. When he came out to the driveway, his wife followed and attacked him. "I pushed her off of me and called the police," he said. The police came and arrested both Applicant and his wife for misdemeanor assault and battery. (Tr. 31-33; Answer)

In his Answer, Applicant stated, "I admit that I acted in defense of myself and in doing so we both had scratches on our face." The responding officer noted in court that both Applicant and his wife had injuries. (GE 2) Appellant pleaded not guilty to the

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<sup>1</sup> Applicant was previously married from 1985-1990. (GE 1)

charge. Both parties declined to testify and the case was dismissed. (GE 2)<sup>2</sup> Applicant and his wife went to counseling for a period thereafter. Applicant disclosed the 2006 arrest on his April 2010 SCA. (Answer; GE 3 at 36)

Applicant testified that the 2006 assault charge led him to realize that it could potentially impact his clearance. He testified that “I vowed never to put my hands on her again, in any way, shape or form in any violent manner. And so, if she got belligerent with me, or the boys, from that point forward, I would leave, and the boys would leave, too.” (Tr. 38-39)

Applicant explained that his marriage had “ups and downs”, but at some point began to deteriorate. Beginning in about 2008, his wife began drinking heavily and abusing prescription drugs. She told him she had been diagnosed as being bipolar, and would often stop taking her medication “cold turkey.” When he was away on business trips, his wife often called the police, allegedly because of issues with their sons. He called the police for a welfare check on Mother’s Day 2014, because of his wife’s behavior. (Tr. 34-39) Applicant did not offer corroborating evidence about either his wife’s behavior or her medical condition.

Applicant told his wife in early January 2016 that he wanted a divorce. He said the timing of his decision was due to the fact that their youngest son would be graduating from high school that spring. In late January 2016, Applicant received a call at work from one of his sons because his mother would not give him the car keys, which his son needed to go to work. When Applicant arrived home, his wife and son were in an argument. Applicant and his son then departed. (Tr. 39-40; Answer)

Applicant spent the weekend at a hotel, because he had a time-sensitive work project and needed to be away from home to concentrate on it. His sons were to spend the night with friends. One of his sons came home to get clothes for the night, but his wife had locked him out of his room. Applicant said that his wife called the police, and that the police escorted his son inside to get his clothes. (Tr. 39-40; Answer)

Applicant stated in his answer that his wife called and left him numerous “ugly voicemails.” He received a phone call from the police, informing him that his wife had taken out a restraining order against him and was claiming that he had assaulted her that morning. Applicant moved in with his sister when he learned that the restraining order had been extended. (Tr. 39-40; Answer)

In the aftermath of this incident, Applicant’s wife filed several criminal complaints against him, supported by statements from her detailing the allegations. She was the alleged victim for each offense. (GE 4)

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<sup>2</sup> The same court document also has a box checked indicating that Appellant was “tried and found not guilty.” However, a signed court order reflects that the case was dismissed because the parties declined to testify. (GE 2; Tr. 33-34)

On February 17, 2016, Applicant was arrested on the following charges: (1) felony rape by sexual intercourse through use of the victim's mental incapacity or physical helplessness, on or about January 1, 2014; (2) assault and battery of a family member, between May 1 and July 1, 2015; (3) assault and battery of a family member, on or about January 28, 2016; and (4) violation of a protective order, on or about February 4-5, 2016. (SOR ¶ 1.b) (GE 4; GE 5) Applicant was subject to electronic monitoring, and ordered to stay away from the marital home. (GE 4)

As to the rape charge, Applicant's wife alleged in a statement to police that he showed her a videotape of him having sex with her while she was "medicated and barely conscious and which I had no memory of." (GE 4) As to the 2015 assault charge, Applicant's wife alleged in a statement to police that she woke up in bed to find Applicant relieving himself on her. (GE 4)

As to the January 2016 assault and battery charge, Applicant's wife alleged in a statement to police that Applicant pulled an electrical cord out of the wall behind the television and whipped her with it. His wife said when she tried to plug the cord back in, "he grabbed the back of my hair and pulled me to the ground. I got up and started to leave [the] room when he threw [the] cord at me." (GE 4)

Applicant denied the allegation of felony rape and the two allegations of misdemeanor assault. He also denied engaging in the underlying conduct, and testified that his wife fabricated the allegations. And, he believed, "ultimately they were not pursued because there was no evidence, because it didn't happen." (Tr. 65-66; Answer)

As to the protection order, Applicant stated in his answer that he learned from his bank around February 5, 2016, that his wife had taken \$93,000 out of an equity line of credit in their home. He admitted that he texted his sons and "suggested someone talk to her and get her to put it back," because the money was to be used for their sons' college education. (AE B; Answer) He later "realized this might be a violation (I was not sure) so I texted them back and said not to do anything, delete texts, and leave it alone." He was charged with violating the protective order by attempting to contact his wife through a third party. (Tr. 42-43; GE 4 at 3-5; Answer)

The rape charge and the 2015 assault and battery charge, were nolle prossed on June 8, 2016. Applicant testified that "those were the charges that I completely denied, those never happened." (Tr. 41) The charge of violating the protection order was also nolle prossed.

As to the 2016 assault charge, which Applicant also denied, he testified:

[T]here was one charge that they would not nolle prossed [sic], and my lawyer said we can either – it was a misdemeanor assault charge. He said we can either fight it or if you plead no contest, they will dismiss it in June of next year, on June 6<sup>th</sup> of next year [2018]. So, ultimately, the incident that occurred in 2016, the charged were not processed [sic], and the one

that was, that they agreed to dismiss, they said that if I went to a spousal . . . domestic intervention class, they would dismiss the charge.<sup>3</sup>

Applicant pled no contest (*nolo contendere*) to the January 2016 assault charge. Adjudication of that charge was deferred until June 2018. (Tr. 41-42; GE 4) There is no record evidence of the court's order deferring adjudication of that charge. The most recent entry in the Joint Personnel Adjudication System (JPAS) Incident Report is based on a letter from Applicant's attorney detailing the status of the case as of December 2016. (GE 5)

Applicant was ordered to attend a 24-week domestic violence course, which he completed in December 2016. He underwent group counseling and said he learned about resolving conflict and removing himself from violent situations. (Tr. 54, 62-63; AE C) Applicant reported the 2016 charges to his employer's facility security office, and kept them informed as his criminal case progressed. (Tr. 56; GE 5) Applicant testified that he has had no subsequent arrests. (Tr. 67)

Applicant's wife filed for divorce against him the same day she brought charges against him, in February 2016. (GE 4; GE 5) Applicant moved out of the home that month. He and his wife have not lived together since then. He and his two oldest sons moved in with his sister. Applicant's youngest son moved in with them during summer 2016, after a dispute with his mother. In April 2017, Applicant moved into an apartment. He now lives there with his three sons. (Tr. 43-45) They provided a joint letter supporting their father, and stated that Applicant "would never have committed the acts our mother has accused him of." They regard him as a "good, honest man" and said he has always been supportive. (AE D)

Applicant testified that his wife continued to reside in their marital home, and that he pays \$1,500 a month in spousal support, which includes the mortgage payment. (Tr. 52) In December 2017, his divorce attorney provided a letter stating that Applicant and his wife had signed a property settlement agreement in late November 2017. The only issues left to be resolved in the divorce case were spousal support and attorney's fees. Applicant and his wife have lived apart for more than one year, as required under state law. His divorce attorney expects that a "no fault" divorce will be granted. (AE E)

Applicant submitted several recommendation letters from personal and professional references. They praised him as being a hardworking, knowledgeable and competent professional. They regard him as having a calm and thoughtful demeanor. He is regarded as considerate, attentive, trustworthy and honest. (AE A)

## **Policies**

It is well established that no one has a right to a security clearance. As the Supreme Court noted in *Department of the Navy v. Egan*, "the clearly consistent

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<sup>3</sup> Tr. 41-42.

standard indicates that security determinations should err, if they must, on the side of denials.”<sup>4</sup>

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. (AG) In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

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<sup>4</sup> *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

## Analysis

### Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
- (c) [the] individual is currently on parole or probation.

Applicant was charged with criminal offenses against his wife in 2006 and February 2016. Applicant admitted the 2006 assault and battery charge, though it was dismissed after they both declined to testify.

The 2016 charges that were nolle prossed include an allegation of felony rape in January 2014 and a misdemeanor assault and battery charge from mid-2015. Those allegations are based solely on his wife's statements to the police. Nevertheless, the police regarded her allegations as sufficiently credible to warrant criminal charges. Applicant also admitted violating a protection order in February 2016 by attempting to contact his wife by texting his sons. That charge was also nolle prossed.

Applicant pleaded no contest (*nolo contendere*) to the 2016 assault and battery charge. Under the law of his home state,

Whenever, in any civil action, it is contended that any party thereto pled guilty or *nolo contendere* or suffered a forfeiture in a prosecution for a criminal offense or traffic infraction which arose out of the same occurrence upon which the civil action is based, evidence of said plea as shown by the records of the criminal court shall be admissible. Where the records of the court in which the prosecution was had are silent or ambiguous as to whether or not such plea was made or forfeiture occurred

the court hearing the civil case shall admit such evidence on the question of such plea or forfeiture as may be relevant, and the question of whether such plea was made or forfeiture suffered shall be a question for the court to determine.<sup>5</sup>

The record evidence does not include documentation from the state criminal court to verify Applicant's no contest plea. Nor does the JPAS entry reference a "no contest" plea. Applicant testified that the prosecution declined to dismiss the 2016 assault and battery charge. His testimony referenced "the incident that occurred in 2016," and he testified that he was advised to plead no contest and to attend a spousal intervention program, which he did.

As the DOHA Appeal Board has noted,

DOHA administrative proceedings, which are inherently executive determinations by the U.S. government as to whether an individual should have access to classified information, are not really analogous to collateral civil court lawsuits for monetary damages or injunctive relief growing out of criminal incidents. Moreover, the Board has previously noted that compliance with state law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. See U.S. Constitution, Art. VI, Cl. 2 (Supremacy Clause). See, e.g., *ISCR Case No. 00-0423* at 3 (App. Bd. Jun. 8, 2001).<sup>6</sup>

Nevertheless, under applicable state law, a no contest (*nolo contendere*) plea is the same as a guilty plea, and such a plea may be used against the defendant as an admission in a civil suit based upon or growing out of the act upon which the prosecution was based.<sup>7</sup> That is, a *nolo contendere* plea constitutes an admission to every element of the offense.<sup>8</sup> Notwithstanding Applicant's denials, he also pleaded no contest to the 2016 assault and battery charge. AG ¶¶ 31(a) and 31(b) apply to that offense, and to the other allegations.

As a result of his no contest plea, Applicant remains within the jurisdiction of the criminal justice system until June 2018. However, there is no evidence indicating that he is on parole or probation. Thus, AG ¶ 31(c) does not apply.

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<sup>5</sup> Va. Code Ann. § 8.01-418.

<sup>6</sup> *ISCR Case No. 03-11708* at 3, fn. 5 (App. Bd. Jun. 9, 2006) (concerning the consideration of *nolo contendere* pleas in DOHA cases).

<sup>7</sup> See *id.*

<sup>8</sup> *ISCR Case No. 03-17708* at 2 (App. Bd. Jun. 9, 2006).



The following mitigating conditions for criminal conduct are potentially applicable, under AG ¶ 32:

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

(c) no reliable evidence that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has been arrested twice, in 2006 and in February 2016, for criminal offenses against his wife. She did not testify, so I cannot weigh her credibility. The only statements in the record from her are the statements she made to the police in GE 4. However, Applicant presented no evidence, documentary or otherwise, to corroborate his claims about his wife's condition or her behavior -- evidence that might have undercut the veracity of her statements in the record. Such evidence was Applicant's burden to present.

This is not to say I find that Applicant engaged in all of the conduct his wife alleged. He denied the allegation of felony rape in January 2014 and the allegation of assault and battery in 2015. These allegations are supported only by his wife's statements, and the charges were nolle prossed. AG ¶ 32(c) applies to them.

Applicant acknowledged texting his sons, which led to the charge of violating the protection order. AG ¶ 32(c) does not apply to that charge. However, that allegation is mitigated because Applicant did not appear to realize that his actions were in violation of the protection order. That charge was an isolated incident that is unlikely to recur. AG ¶ 32(a) applies to it.

However, while Applicant also denied the 2016 assault and battery allegation, he also pleaded no contest to the charge in court. This makes this offense difficult to mitigate, particularly since he did not acknowledge his conduct in this proceeding. At the close of the record, that charge was still in deferred adjudication status, and will remain so until June 2018. Thus, even though Applicant is not technically on parole or probation, he remains under the criminal court's jurisdiction. Even if that were not the case, this charge is quite recent, as it is less than two years old. The 2016 assault and battery charge is also not isolated, as Applicant was also arrested for assault and battery against his wife in 2006.

Applicant has lived apart from his wife since the time of his most recent arrest, and finalization of their divorce is expected soon. He completed the required domestic violence program, and remains in compliance with the requirements of deferred adjudication. Applicant also has an excellent employment record, and remains closely involved with his sons' lives. Nevertheless, insufficient time has passed since the offense for me to conclude that AG ¶¶ 32(a) and 32(d) should apply.

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

AG ¶ 15 expresses the security concern for personal conduct:

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 or sensitive information. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other single guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes but is not limited to, consideration of: . . . (2) any disruptive, violent, or other inappropriate behavior; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

SOR ¶ 2.a is a cross-allegation of the criminal conduct allegations in SOR ¶ 1. The security concerns associated with that conduct are largely addressed under Guideline J above. Nevertheless, AG ¶ 16(d)(2) also applies. Applicant's arrests might affect his personal, professional, or community standing. AG ¶ 16(e)(1) therefore applies.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant disclosed his 2006 arrest on his 2010 SCA. He informed his employer's security office about his arrests and about the status of his 2016 case. This reduces or eliminates any ongoing vulnerability to exploitation, manipulation or duress stemming from his circumstances. AG ¶ 17(e) applies.

However, AG ¶¶ 17(c) and 17(d) do not apply for the same reasons as AG ¶¶ 32(a) and 32(d) do not apply under Guideline J, above. Similarly, AG ¶ 17(f) does not apply for the same reasons that AG ¶ 32(c) does not apply under Guideline J.

### **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(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), 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and E in my whole-person analysis. The record evidence

established criminal charges against Applicant 10 years apart, and as recently as 2016. On balance, and in consideration of the evidence as a whole, I conclude that Applicant provided insufficient evidence to mitigate the security concerns. Overall, the record evidence leaves me with questions and doubts as to Applicant's continued eligibility for access to classified information.

### **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 J:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2: Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

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Braden M. Murphy  
Administrative Judge