



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



In the matter of:

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ISCR Case No. 17-02230

Applicant for Security Clearance

**Appearances**

For Government: Nicholas Temple, Esq., Department Counsel

For Applicant: John V. Berry, Esq.

08/15/2018

**Decision**

LYNCH, Noreen A., Administrative Judge:

Personal conduct security concerns and drug involvement and substance misuse security concerns are not mitigated. Applicant repeatedly used marijuana while holding a security clearance. He has signed letters of intent several times that he would not use any illegal drug in the future. Eligibility for access to classified information is denied.

**Statement of the Case**

On April 3, 2016, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Government Exhibit (GE) 1. On August 23, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs). Hearing Exhibit (HE) 2.

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 Guidelines H (drug involvement and substance misuse) and E (personal conduct).

On September 15, 2017, Applicant provided a response to the SOR and requested a hearing. HE 3. On March 15, 2018, the case was assigned to me. On April 11, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 12, 2018. HE 1. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered five exhibits; Applicant offered seven exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Transcript (Tr.) 9-13; GE 1-5; AE A-G. On July 19, 2018, DOHA received a copy of the hearing transcript.

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

Applicant's SOR response admitted all of the SOR allegations. HE 3. He also provided mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 55-year-old executive for an entity providing services, and his current employer has employed him for about 30 years. Tr. 15. In 1981, he graduated from high school. He attended college for two years, and he received a diploma from a technical institute in 1985. He has been married for 30 years, and he has adult children and grandchildren. He has held a security clearance since 1998.

### **Drug Involvement and Substance Misuse**

Applicant's SOR alleges, and he admitted, that he used marijuana, with varying frequency, from approximately July 1999 to approximately September 2000, while holding a security clearance, and from approximately January 2008 to 2010, while holding a top secret security clearance. In 2001, in a signed sworn statement, Applicant averred that he had no intention of using any illegal substance in the future. During a 2010 investigative interview, Applicant stated that he had no intention of using marijuana in the future. Applicant continued using marijuana in at least December 2012, while holding a top secret security clearance. Finally, the SOR alleges that during a December 12, 2016 investigative interview, Applicant stated that he was aware that marijuana was an illegal drug and he was prohibited from using it while holding a clearance.

In Section 23 of Applicant's April 2016 SCA, **Illegal Use of Drugs or Drug Activity**, he disclosed "[smoked marijuana roughly 5 years ago at a neighborhood party use of marijuana (once over the past 7 years)]" GE 1. He said, "I do not have an addictive personality and am not dependent on any drugs or alcohol." Tr.18.

With respect to the SOR allegations, SOR 1.b, 1.d, and 1.f, which are discussed in detail below, are not allegations of a disqualifying conduct, but rather allege evidence of conduct. Therefore, SOR 1.b, 1.d, and 1.f are resolved for Applicant.

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<sup>1</sup> Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

As to SOR 1.a, Applicant used marijuana from July 1999 to September 2000, while holding a security clearance. He described it as minor usage. In his answer to the SOR, he stated that he used it only once in a social setting. At the hearing, he stated that it was about two to four times over a period of four or five years or maybe longer than that in terms of the period of time. Tr. 18. He stated that it did not have an impact or role in his daily life, and he admits that it was wrong to use marijuana in any capacity. In September 2001, in a signed sworn statement, Applicant stated that he had no intention of using any illegal substance in the future. (SOR 1.b) In that sworn statement, he stated that he smoked marijuana on three occasions at the homes of friends during that time period. GE 5.

As to SOR 1.c, Applicant continued to use marijuana from January 2008 to approximately September 2010, while holding a top secret security clearance. In his answer to the SOR, Applicant stated that he used marijuana only one time in a social setting. At the hearing, when questioned, Applicant stated that over the entire time span from 1999 to today, he believed it was two to four times. But there may have been a fifth time. He emphasized that was over a 20-year period. Tr. 20 However, in his 2010 SCA, he stated that he used marijuana four to five times in the period from 2008 to 2010. GE 3. In the 2010 investigative interview, Applicant stated that he had no intention of using marijuana in the future. GE 4. He stated that it was used at neighborhood parties. (SOR 1.d)

As to SOR 1.e, Applicant admitted that he used marijuana in December 2012, while holding a security clearance. He stated that it was on the New Year's holiday in his answer to the SOR. He stated that was the last time that he used marijuana and had no intention to do so in the future.

As to SOR 1.f, in 2016 Applicant told the investigative agent that he was aware that marijuana was an illegal drug and that he was prohibited from using it while holding a clearance. In that same 2016 interview, he stated his intent to never use an illegal drug. He mentioned further that he had never used illegal drugs at any other time while holding a security clearance. GE2

Applicant admitted that he made a series of poor choices from 2008 to 2012, during which he used marijuana on two to four occasions. He noted that it was foolhardy and immature. He is remorseful and takes full responsibility for his past mistakes. He spends his time with family and is living a family-focused life style. He asks that the whole-person concept be used as a considerable mitigation in his case. He has excellent work references and has received great reviews. He submitted five character letters. AE C-G. He presented three witnesses who praised his dedication and achievements during the past 25 years. He was instrumental in helping to restructure, when the Pentagon was attacked in 2001. Applicant was described as a good family man who also took care of his parents and his father-in-law. A personal and professional friend who has known Applicant for ten years considers him a man of integrity. Each witness attested to Applicant's trustworthiness. Tr.44-62.

Applicant signed a letter of intent not to use any illegal substance in 2001 and 2010. However after he signed the letters of intent, Applicant continued to use marijuana

on a varying basis. He submitted a 2017 letter of intent at the hearing. AE B. In October 2010, he told the investigator that he would never use the illegal drug again. And yet, in 2012 Applicant once again used marijuana. These marijuana uses were during a time that Applicant possessed a security clearance. At the hearing, he noted that one of the times he used marijuana was at his home. Tr. 39 Also, he noted that he still sees some of the people that he smoked marijuana with, but infrequently since he has moved. Tr. 40. Applicant's testimony revealed that he used marijuana about three or four times between 1999 and 2012. During his earlier SCA and interviews he noted a greater number of times. Tr. 43. Applicant disclosed the use of marijuana on his SCA applications, but there is no evidence that he informed his FSO.

## **Personal Conduct**

SOR ¶ 2.a cross-alleges that Applicant engaged in the same conduct under the personal conduct guideline as alleged under the drug involvement and substance misuse guideline in SOR ¶¶ 1.a through 1.f.

Applicant describes himself as an honest and trustworthy person. AE A He has never been charged with a crime. He provided many character references and witnesses on his behalf.

## **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 the Director of National Intelligence (DNI) 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 [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**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 articulates the security concern for drug involvement and substance misuse:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

AG ¶ 25 provides three conditions that could raise a security concern and may be disqualifying in this case: “(a) any substance misuse (see above definition),” “(c) illegal possession of a controlled substance . . .,” and “(f) any illegal drug use while granted

access to classified information or holding a sensitive position.” Applicant possessed and used marijuana.<sup>2</sup> His illegal drug possession and use occurred when he possessed a security clearance. He was in his 40s and 50s. AG ¶¶ 25(a), 25(c), and 25(f) are established.

AG ¶ 26 details conditions that could mitigate security concerns:

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

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

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

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<sup>2</sup> Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. *See* Drug Enforcement Administration listing at [http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308\\_11.htm](http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm). *See also e.g., Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

*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).

None of the mitigating conditions fully apply. From approximately 1998 to 2012, Applicant used marijuana on a varying basis. It is not clear exactly how many times he actually smoked marijuana. He used marijuana in his home. His illegal marijuana possession and use occurred while he held a security clearance, although he did not divulge that information to his FSO. He even stated in the investigative interview that there was only the one period of time that he used marijuana. On several occasions he signed a letter of intent, but still used marijuana after that time. That speaks to his judgment and reliability. He sometimes still sees the people with whom he smoked marijuana.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”<sup>3</sup>

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<sup>3</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge’s decision to revoke an applicant’s security clearance after considering the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

In his SOR response, Applicant provided a clear resolution not to use marijuana in the future. He recognized the adverse impact of drug abuse in connection with access to a security clearance. However, he has signed letters of intent or told investigators at least twice that he would refrain from future drug use in 2001, 2010 and 2016. He also understands that possession of marijuana is illegal. It is not unreasonable to expect Applicant to demonstrate his ability to adhere to his expressed intent to refrain from drugs for the period of time beginning with 2017 and not 2012, when he last used marijuana. I have doubts about Applicant's statement that he intends to abstain from illegal drug possession and use as truthful. AG ¶ 26(a) partially applies to his possession and use of illegal drugs.<sup>4</sup>

AG ¶¶ 26(b), 26(c), and 26(d) are not fully applicable. AG ¶ 26(b) does not fully apply. He provided "a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility." However, he has signed a similar letter in 2001 and 2010. Applicant somewhat minimized the seriousness of his illegal marijuana possession and use, equating it to a mistake that he deeply regrets. Applicant has made promises before with regard to not using illegal drugs. I have doubts about his judgment.

### **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes four conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(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

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<sup>4</sup> In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse. In ISCR Case No. 14-00775 (App. Bd. July 2, 2015), the Appeal Board sustained the revocation of a security clearance for an Applicant, who did not hold a security clearance that used marijuana 20 months before the administrative judge decided the case.



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;

(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 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: (1) untrustworthy or unreliable behavior . . . ; (3) a pattern of . . . rule violations; and

(e) personal 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.

All of Applicant's conduct causing a security concern in SOR ¶ 2.a is explicitly covered under Guideline H, and that conduct is sufficient to warrant revocation of his security clearance under Guideline H. AG ¶¶ 16(c) and 16(d) do not apply. Applicant's involvement with illegal drugs affects his professional and community standing. However, this conduct does not create a vulnerability to exploitation, manipulation, or duress because security officials are aware of it. AG ¶ 16(e) is not established. Guidelines H and E address identical issues involving judgment, trustworthiness, and reliability. Guideline E concerns constitute a duplication of the concerns under Guideline H, and accordingly, personal conduct security concerns in SOR ¶ 2.a are found against Applicant.

### **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 Guidelines H and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 55-year-old executive for an entity providing services, and his current employer has employed him since 2002. He has held a security clearance for many years. He is married and has three adult children and grandchildren. He has excellent recommendations and letters of reference.

The evidence against granting Applicant access to classified information is more substantial. His illegal drug use was over a 20-year period of time. He would use socially with friends, sometimes in his home. He reported different numbers of times that he actually smoked marijuana. More importantly, Applicant was not a student. He was a mature man. He had a family. He was holding a security clearance. It is troubling that he signed two letters of intent and another one at the hearing. He breached a great trust that he has with the government. His illegal marijuana possession and use occurred while he held a security clearance. His illegal drug possession and use raise unresolved “questions about [his] reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about [his] ability or willingness to comply with laws, rules, and regulations.” See AG ¶ 24.

It is well settled that once a concern arises regarding an applicant’s security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated drug involvement and substance misuse concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With continued abstention from illegal drug possession and use, and a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns and drug involvement and substance misuse security concerns are not mitigated.

### **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 H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant

Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

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Noreen A. Lynch  
Administrative Judge