

Applicant submitted a security clearance application on June 30, 2011. On June 25, 2013, the Department of Defense (DOD) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline E. 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 received the SOR on July 3, 2013; answered it on July 17, 2013; and

requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 30, 2013, and the case was assigned to me on August 20, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 28, 2013, scheduling the hearing for November 14, 2013. Because of the large volume of documentary evidence, counsel for both sides suggested that the documentary evidence be submitted to me in advance of the hearing. I approved their suggestion. Applicant's counsel submitted a written opening statement on October 25, 2013, which is attached to the record as Hearing Exhibit (HX I). Counsel for both sides submitted their documentary evidence between October 25, 2013 and November 8, 2013.

I convened the hearing as scheduled. Government Exhibits (GX) 1 through 35 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through DO, which were admitted without objection. DOHA received the transcript (Tr.) on November 22, 2013. I kept the record open until December 6, 2013, to enable the parties to submit additional documentary evidence, written closing statements, and responses to closing statements. Applicant timely submitted AX BB-28 and EE through JJ, which were admitted without objection. Department Counsel's comments regarding AX BB-28 and EE through JJ are attached to the record as HX IV. Applicant's counsel and Department Counsel timely submitted written closing statements, which are attached to the record as HX II, III, and V.

Evidentiary Issue

Applicant's written closing statement argued that the report submitted by the Inspector General (IG) of another government agency (AGA), on which the SOR was based, should be struck from the record, because IG investigators attempted to coerce witnesses to change testimony, attempted to coerce witnesses to testify to rumors and speculation as fact, and "engaged in blatant misrepresentation of witness statements and statistical evidence" in their final report. (HX II at 2-3.) Applicant cited *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995), *reversed on other grounds*, 547 U.S. 250 (2006); *United States v. Struckman*, 611 F.3d 560 (9th Cir. 2010); *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008); and *United States v. Williams*, 547 F.3d 1187 (9th Cir. 2008).

After reviewing all the evidence and the legal authorities cited by Applicant, I have declined to strike the IG report from the record. I have noted that the authorities cited by Applicant involve litigation in federal district courts, not administrative investigations. I have made my own independent findings of fact based on the

documentary evidence and testimony in the record. I have reviewed the transcripts of the witnesses interviewed by IG investigators and the depositions taken in connection with proceedings at the Merit Systems Protection Board (MSPB) involving Applicant, and evaluated whether the testimony was affected by threats or intimidation. I have applied the procedural guidance in Enclosure 3 to the Directive, including ~ E3.1.19, which allows the technical rules to evidence to be relaxed "to permit the development of a full and complete record."

Findings of Fact

The SOR alleged that the IG of another government agency (AGA) found that Applicant, while serving as a senior official of the AGA, had misused her position, abused her authority, engaged in prohibited personnel practices, failed to provide proper contract oversight, and did not properly fulfill her duties as a COTR. The source and content of the information that triggered the IG investigation is not reflected in the record.² Applicant admitted that the IG made the findings that were alleged, but she denied engaging in the conduct that was the basis of the adverse findings. I have treated her response to the SOR as a denial of the allegations against her.

Applicant is a 57-year-old senior manager employed by a federal contractor since January 2011. Her father was a graduate of the U.S. Coast Guard Academy and a career Coast Guard officer. She has a bachelor's degree in history and geography and a master's degree in computer science applications. She married in June 1999. She and her spouse have a 13-year-old daughter. Her husband has a 37-year-old daughter from a previous marriage. (GX 1 at 18, 21,22; GX 2 at 22.)

Applicant worked for federal agencies as a computer programmer and computer specialist from October 1979 to October 1982. She worked in the private sector from October 1982 to September 1993. She worked as a GS-15 supervisory computer specialist and a telecommunications supervisor for federal agencies from September 1993 to November 1999. In December 1999, she was hired to be the chief information officer of a subordinate element of the AGA, and she became a member of the senior executive service (SES). (Tr. 58, 230; AX 8B-8; AX 88-9.) Her area of expertise was information technology (IT), and she had only supervisory experience in personnel and contracting practices. (Tr. 67.)

In May 2006, Applicant filed an equal employment opportunity (EEO) complaint against senior AGA officials after a staff reorganization that resulted in her working for a

² When Applicant was interviewed by the IG investigator, her attorney stated that Applicant did not know the motive for the allegations against her. The investigator stated that he did not know who made the allegation or whether the allegations were "some sort of retaliatory action." (GX 6 at 14.)

male former subordinate. Her complaint was settled by mediation. In July 2006, consistent with the mediated settlement of her EEO complaint, she was detailed to work in the AGA headquarters. She was assigned to a permanent position in the headquarters in November or December 2006. (Tr. 58-60; GX 6 at 10.3) In January

2007, she began working as the chief technology officer (CTO) for the AGA. In April 2007, she was appointed to a newly-created position in charge of information protection and risk management. (Tr. 151-52.) She was terminated in February 2010 as a result of the IG investigation. She was unemployed from February 2010 to January 2011, when she began working for a federal contractor. She held security clearances from June 1984 until her employment with the AGA was terminated. She appealed her termination by the AGA to the MSPB, and a decision on her appeal is pending.⁴

The factual findings by the AGA IG and the premises for the AGA's decision to terminate Applicant's employment were in four categories:

1. Abusing her position to help a professional acquaintance, Ms. Doe,⁵ by persuading a potential AGA contractor to hire her, by using Ms. Doe to perform the duties of an executive assistant while Ms. Doe was a contractor's employee, by attempting to employ Ms. Doe as an executive assistant, by preselecting Ms. Doe for employment as a supervisory IT specialist, by hiring Ms. Doe at a higher pay rate than required, and by improperly reassigning Ms. Doe to be her executive assistant;
2. Improperly disclosing non-public contracting information;
3. Failing to provide contract oversight by performing duties as a COTR without proper training or certification and improperly delegating COTR duties to subordinates; and
4. Taking advantage of an inappropriate personal relationship with her supervisor to gain approval of a reassignment to a location near her home and engaging in excessive official travel to visit her supervisor after being transferred.

³ The transcripts of the IG interviews were printed with four pages of transcript on each page of the exhibit. References to these interviews use the page numbers from the IG transcript rather than the page numbers from the exhibit.

⁴ Applicant's counsel and Department Counsel agreed that there was no issue of collateral estoppel raised by the MSPB proceedings because (1) the appeal to the MSPB was on procedural due process issues rather than the substantive merits of the allegations investigated by the IG, and (2) the MSPB had not rendered a decision in the case and was not expected to render its decision in the near future. See ISCR Case No. 03-24233 (App. Bd. Oct. 12, 2005) (collateral estoppel applies in ISCR hearing if MSPB has made findings and conclusions on the same issue).

⁵ In order to protect their privacy, this decision uses fictitious names (Ms. Doe, Mr. Smith, Mr. Jones, and Ms. Blank) for the persons involved in the IG investigation.

In the late 1990's, Applicant became acquainted with Ms. Doe, who did business development and marketing for an AGA contractor. Applicant was the AGA's chief information technology officer (CTO), and Ms. Doe contacted her with a view toward renewing a contract. Applicant and Ms. Doe were active in a professional organization

for women in the information technology field, and networking among the members of the organization was common. (Tr. 128-29.) They saw each other at industry events. They worked together organizing programs for the professional organization. They lived about ten miles from each other and periodically drove to work together. (GX 13 at 18.) According to Ms. Doe, they would have dinner together while traveling on business "every so often, every couple of months." Ms. Doe had dinner with Applicant and her family at Applicant's home in October 2008. Applicant told the IG investigator that she recalled attending a barbecue and the children's birthday party at Ms. Doe's home. (GX 4 at 11-15; GX 6 at 44-46.) Applicant testified that she did not consider herself and Ms. Doe as friends but as business acquaintances. (Tr. 126-27.) She and Ms. Doe exchange Christmas cards but have seen each other only once since Applicant left the AGA. (Tr. 332.)

In May 2006, the AGA had a major breach of information security, and thousands of files containing personal information were potentially compromised. In July 2006, Applicant, who was then the CTO for a subordinate AGA activity, was detailed to the AGA headquarters to assist in the efforts to control and repair the damage and take corrective action. (Tr. 70-71.) The AGA decided to award an identify security (IS) contract to conduct an assessment of the breach and provide recommendations for improvement of the security of sensitive information. The AGA decided that the contract would be a sole source procurement, and that Applicant would take the lead formulating, executing, and supervising the implementation of the IS contract.

When Applicant was detailed to the AGA headquarters, she had no office, no staff, and no office equipment. She moved around in various cubicles until she finally found a "closet" that she used as her office. She was given an office in April 2007, after she was assigned to the newly-created position in charge of information protection and risk management. (Tr. 75-77.)

Applicant's husband, a data center manager, noticed that she was under great stress because of her recent change of jobs due to the EEO settlement and her reassignment to a job involving concepts that were unfamiliar to her. Her husband suggested that she contact Mr. Smith, a business development consultant, with a view toward being referred to subject-matter experts in the information security area. (Tr. 248-49.) Applicant testified that she contacted Mr. Smith because she did not understand breach analysis technology and she thought he would have contacts who could explain it to her. (Tr. 94.)

Numerous companies approached Applicant, offering services in connection with the data breach. (Tr. 104-07.) She told the IG investigator that she received more than 120 inquiries. (GX 6 at 19.) In early to mid-July 2006, Mr. Smith contacted Applicant and offered to introduce her to Mr. Jones, the vice-president of the company that eventually

was awarded the IS contract. Mr. Smith had been hired as a consultant by Mr. Jones's company in May 2006.⁶ Applicant did not have an office or a conference room, and so they met in a cafeteria. Mr. Jones told Applicant about their previous work for the AGA. Mr. Jones did not specifically ask for any potential work and Applicant did not discuss any potential contract with him. Applicant testified that at the time of this meeting, "[She] didn't know how they would fit into [her] world at all." (Tr. 105.) Mr. Jones told Applicant

that he had several federal contracts, but most of them were only 50% staffed, because he was having difficulty hiring project managers with the requisite technical skills. (Tr. 131-33.)

Ms. Doe had been laid off by a federal contractor in May 2006 and was working as an individual consultant. She told the IG investigator that she learned about Mr. Jones's company "through industry and also through [Applicant]." (GX 4 at 9.) Applicant told the IG investigator that she put Ms. Doe in contact with four or five companies with potential job openings, including Mr. Jones's company. Applicant contacted Mr. Jones and told him that he might want to consider Ms. Doe for a position in the company. Ms. Doe emailed a resume to Applicant on the morning of August 7, 2006, and Applicant forwarded it to Mr. Smith on the afternoon of the same day, using her government email account. (GX 26; Tr. 260-70.) In turn, Mr. Smith forwarded it to Mr. Jones. Applicant testified that she forwarded Ms. Doe's resume because she "did it all the time It's just networking." (Tr. 262.)

The IG report states that Applicant forwarded an "edited version" of Ms. Doe's resume to Mr. Jones. Applicant denied editing the resume. The version of the resume attached to the email forwarded by Applicant and the resume attached to the company's proposal are different in content, format, and font, apparently leading the IG to conclude that Applicant did the editing. (GX 26; GX 27.) However, Ms. Doe told the IG investigator that she edited the version attached to the company's proposal after she was hired as a consultant. (GX 13 at 13.) Applicant told the IG investigator that she made it very clear that she was not asking Mr. Jones to do anything except to "evaluate her for her ability." (GX 6 at 52.)

Mr. Jones told the IG investigator that Applicant told him several times that he "ought to look at this woman because [Applicant thought] she has got the right credentials." He told the investigator that Applicant never said that Ms. Doe needed a job, but that she was "pretty sharp." He did not believe hiring Ms. Doe was a condition for being awarded the contract. He told the investigator that when he first met Ms. Doe, she "knocked [his] socks off" and demonstrated that "she had the tickets." He also stated that hiring Ms. Doe solved his minority-hiring problem, because he had no women in management positions. (GX 9 at 35-39.) Applicant testified that she did not pressure Mr. Jones to hire Ms. Doe, and she never told Mr. Jones that his company

⁶ Mr. Smith initially told the IG investigator that he began working for Mr. Jones's company in September 2006, but later told the investigator that he would "have to check with [Mr. Jones] to give you an exact date. (GX 11 at 19). Mr. Jones told the investigator that Mr. Smith became a paid consultant for his company in May 2006 (GX 9 at 20-21.)

would not get the contract if Ms. Doe was not hired. She testified, "It's their business decision, they're the prime [contractor], they can decide how they're going to deliver the work." (Tr. 145.)

On July 25, 2006, Applicant sent a draft statement of work (SOW) for a data breach analysis contract, proposed evaluation factors, an independent government cost estimate (IGCE,) and a best value proposal worksheet to Mr. Smith for transmission to

Mr. Jones. She sent the documents from her personal computer, because she was working at home late in the day, did not have a lap top computer, and did not have an assigned computer at work. (AX N at 17-19.) She also visited the company's facilities, met with several division chiefs, and visited the digital forensic laboratory. She received Mr. Smith's suggestions regarding the draft SOW on July 29, 2006. (GX 30.) She testified that, after she sent the materials to Mr. Smith, the AGA decided not to award a contract for data breach analysis because the AGA obtained the services through a gift agreement. (Tr. 88.)

According to a senior logistics and acquisition official at the AGA, the SOW is always public information unless it is classified.⁷ (AX G at 50-51.) Applicant testified that she knew she was not allowed to share the IGCE and "the money stuff" with a potential contractor. (Tr. 109.)

In August 2006, Mr. Jones contacted Ms. Doe and offered her a job as a consultant "as a concession" to help them prepare a proposal for the IC contract, with the understanding that she would be hired to be the program manager for the contract if the AGA awarded them the contract. (GX 13 at 6, 27.) Ms. Doe signed a contingent employment contract on September 6, 2006.

The acquisition strategy used by Applicant and members of the AGA contracting staff was to look at other contractors that were already working for the AGA and look specifically for a small business or a disabled veterans' company. They wanted a veteran-owned company that was local, had a culture of security, and had the ability to do forensics. At the suggestion of the contracting officer, they searched the General Services Agency 8(a) Streamlined Technology Acquisition for Services (8(a) STARS) registry and identified several potential contractors. (Tr. 98-101.)

On September 29, 2006, Applicant and the AGA contracting officer signed the justification for a sole-source procurement, and the IS contract was awarded to Mr. Jones's company, which was a STARS company. (GX 21; AX V.) Ms. Doe became the program manager for the contract four days later. (AX V.)

The SOW for the IC contract required the contractor to assist the AGA's eTa "to effectively create and implement the Enterprise Identity Safety (EIS) [program] and

⁷ The rules for awarding a negotiated sole-source contract are substantially different from the rules for a contract awarded through competitive bidding.

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create an Identity Protection Management Office." It also stated, "The intent of this contractual effort is to obtain consulting and advisory support services in the area of EIS and to bring an external perspective and best business practice from industry and government to the important area of data protection in the department." The contract provided for six mandatory tasks:⁸

1. Provide a detailed Program Management Plan (PMP) and PMP briefing for the CTO's project team.

2. Survey the industry and provide a set of standards, processes and procedures that would be the "Gold Standard" for EIS in government agencies.
3. Develop a strategy and implementation plan for changing the internal culture of the AGA with respect to information security, provide implementation planning support for the rollout of the new EIS plan, support the CTO in holding planning sessions, support the CTO in planning activities to implement the EIS plan, develop briefings to implement the EIS plan, and provide status updates for senior government officials and the AGA senior management team.
4. Support the rollout of the EIS plan by activities such as developing an awareness plan and materials to advocate and communicate the new culture in the EIS plan to all components of the AGA, supporting the communication processes, monitoring and assessing the progress of the implementation effort, recommending adjustments to the communication process, assessing the lessons learned during the implementation process, and documenting the results.
5. Support the AGA organizational vision and EIS activities by tracking and documenting the outcomes of vision and planning sessions and realignment decisions, providing input and recommendations to AGA regarding other agencies' approaches, lessons learned, and best practices, and recommending organizational changes to facilitate implementation of the new EIS vision.
6. Support the CTO in assessing new or changed roles and associated responsibilities and determining the impacts of the changes by conducting and documenting interviews, analyzing and offering recommendations for

⁸ The tasks are not listed verbatim. They have been summarized and paraphrased.

realigning roles and responsibilities, and perform analyses of issues and the impact of the new roles and responsibilities.
(AX DD.)

As the program manager for the IS contract, Ms. Doe worked closely with Applicant. At the time the contract was awarded, Applicant was the intended recipient of the consulting and advisory support services. (Tr. 145-48.) She had no staff, and she relied heavily on Ms. Doe, because the program had "huge political scrutiny," and she wanted it be successful. (Tr. 148, 150.)

When the IC contract was awarded, Applicant was informed by the contracting officer that she would be the COTR for the IS contract. She testified that she did not think she should be the COTR because she had not received the training for COTR duties. She had completed three seminars on federal acquisition at a local university, but she did not know if those seminars were sufficient to qualify her to be a COTR. (GX 3 at 5; GX 6 at 29; AX N at 12-13; AX " at 4.) The contracting officer told her, "it doesn't matter." (Tr. 110-11.) Applicant then talked to the SES in charge of contracting matters and told him that she did not think she was trained or certified as a COTR. He responded by saying, "I need you, I need your brain, you're going to do this for us ... we're going to help you." (Tr. 274.) Applicant testified that they were dealing with an emergency, and the contracting staff assured her that if she could look at the technical products and tell them whether they were delivered, they would help her. With that assurance, she agreed to be the COTR. (Tr. 315-16.) When Department Counsel asked her if she considered complaining to the IG, she responded, "The IG had already failed me before in my career. Why would I go to them again?"⁹ (Tr. 315.)

The record does not reflect what training, if any, the AGA required for certification as a COTR. At a deposition in connection with the MSPB proceedings, a senior official in charge of the AGA's contracting testified that it was the contracting officer's responsibility to ensure that a COTR has received the proper training. (AX Gat 17-18.)

The IG investigators were unable to find a document from the contracting officer designating Applicant as a COTR, and they concluded that it did not exist. However, the record contains an email dated September 27, 2006, from a contract specialist, informing Applicant that she needed Applicant's signature on a "COTR delegation letter" and asking Applicant to email the contractor's office so that the specialist could arrange to obtain her signature. (GX 32.) Applicant testified that she believed that she signed the delegation letter and the contract specialist took the signed document with her. (Tr. 123.) Applicant did not ask for or receive a copy of the COTR delegation letter. (Tr. 287.) A senior contracting official who was the contracting officer's second-level supervisor described the contracting officer as a person "with somewhat limited skills," whose record keeping was careless, and in one case it was "a disaster." (AX Gat 13.)

⁹ This comment apparently refers to Applicant's EEO complaint.

The record contains 10 invoices authorizing payments totaling \$700,962 to the IS contractor between November 30, 2006, and October 9, 2007. (GX 21.) Two were signed by an administrative specialist, with a notation "per the COTR" and eight were signed by an IT specialist. The IT specialist entered the payments into the AGA contracting database, notified Applicant by email, and provided a courtesy copy of the approved invoice to the IS contractor. The IT specialist told the IG investigator that he did not know if Applicant reviewed the invoices before they were sent to him. (GX 19 at 2; GX 35 at 6.)

Applicant testified that she reviewed each invoice, compared it with the monthly status reports, and verified delivery of services by email, telephone or personal visits.

(Tr. 280-83.) For each invoice, she signed a cover memorandum indicating approval of the invoice. The cover memoranda are not in the record. She testified that she did not delegate her COTR duties to anyone. (Tr. 120.) However, she did not have access to the database recording the invoices because she was not certified as a COTR, and she depended on the IT specialist who signed eight of the invoices to input the data into the system. (Tr. 112-16.) The IG investigators did not identify any instances in which a contractor was paid for services that were not performed satisfactorily.

After Applicant's position was formalized in April 2007 and she was assigned to a senior position in the AGA headquarters, the EIS program became a component of the AGA, and Ms. Doe remained as the contractor's program manager. (Tr. 151.) Applicant, Ms. Doe, and Ms. Blank, an SES employee who was one of Applicant's subordinates, shared an office for a time. The office responsible for the EIS program was virtually unstaffed, and several other offices were seriously understaffed. (Tr. 151-54.)

Some AGA employees believed that Ms. Doe seemed to be involved in numerous activities beyond the scope of the IC contract, attending meetings, participating in the daily operation of the AGA, and having information that AGA employees did not have. (See, e.g., GX 3 at 8.) The IG investigated allegations that Applicant assigned Ms. Doe duties that were not included in the scope of her duties under the contract. The record includes an email between Applicant and Ms. Doe in August 2007 regarding revisions of Applicant's biography; a September 2007 email from Ms. Doe, transmitting to Applicant a proposed draft of a letter to the IS contractor, commending Ms. Doe for the quality and timeliness of her performance; and several October 2007 emails regarding input for Applicant's performance appraisal. (GX 31.) When Ms. Doe was asked why she was performing these and similar duties, she responded, "I just did what [Applicant] asked me to do." (GX 13 at 32.)

At Applicant's request, Ms. Doe reviewed and updated Applicant's biography in preparation for her presentation to an industry group. Applicant had been invited, in her capacity as a senior official in the AGA, to speak to the group about the work the AGA had done in response to the data breach. Ms. Doe had drafted the EIS strategic plan, and Applicant wanted her add substance to the biography to accurately reflect what they were doing regarding identity safety. (Tr. 158-59.) Applicant believed that Ms. Doe's participation in AGA's communications to the industry about identity protection

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was encompassed in the Task Number 4 of the SOW ("The contractors will support [the AGA's] organizational vision and Enterprise Identity Safety activities.") Applicant believed that this task included reaching out to industry representatives and telling them what AGA was doing. (Tr. 157-60,289-90.)

Ms. Doe requested that Applicant send a letter to the IC contractor setting out Ms. Doe's accomplishments. Ms. Doe prepared a draft, and asked Applicant review it, suggest changes, sign the final version on AGA letterhead, and send it to the IC contractor. Ms. Doe intended the letter to be used by the contractor in evaluating her performance. (Tr. 160-61.)

Applicant testified that she asked Ms. Doe to help her write her [Applicant's] own performance plan and self-assessment narrative for her own performance appraisal. Applicant testified that Ms. Doe was the subject-matter expert on EIS and could identify

Applicant's accomplishments during the appraisal period. (Tr. 162-64.) Applicant admitted that she had doubts about whether a contractor should be preparing input for her own performance appraisal and bonus justification, but Ms. Doe told her, "It's fine. It's part of the communications stuff." Applicant testified that the input into her own performance appraisal and bonus justification created "touchstone" documents that she could use repeatedly to describe her identity security program. (Tr. 293-95.)

Shortly after Ms. Doe began working as the program manager for the IS contract, Applicant told her that "it would be great" to have her on board as a government employee. When Ms. Doe noticed that the AGA was hiring new employees, she decided that she could be more valuable as an employee instead of a contractor, and she informed Applicant of her interest in becoming an employee. In her interview by an IG investigator, Ms. Doe stated that Applicant told her that she intended to hire an executive assistant. (GX 13 at 34-35.) When interviewed by the IG investigator, Applicant stated that she and Ms. Doe discussed several jobs that were available, including the executive assistant job, the risk management job, and the incident response job. (GX 17 at 159-60.)

In March 2007, Applicant requested that an executive assistant position be created, and the request was approved in May 2007. (GX 29.) Applicant believed she needed an executive assistant because she did not have a deputy and her organization had grown from about 40-60 employees to about 400, plus about 200 contractors. The AGA was undergoing a massive reorganization in response to two reports from the Government Accountability Office. Between April 2007 and February 2008, 410 additional personnel joined the staff. (AX Y; AX Z; Tr. 167-70.)

The executive assistant position was advertised on May 29, 2007, limited to current AGA "status eligible" employees. (GX 29 at 17.) At Applicant's direction, the position was advertised again to include "current and former competitive service Federal employees, and people eligible under special hiring authorities." (Tr. 180; GX 29 at 98.) Ms. Doe applied for the executive assistant position in July 2007.

On August 2, 2007, the human relations (HR) office referred a certificate of eligible employees to Applicant, containing five candidates, including Ms. Doe. One candidate (not Ms. Doe) was entitled to a veteran's preference. On August 14, 2007, Applicant cancelled the position. On August 28, 2007, she signed the certificate of eligible candidates and stated that she did not select any of the candidates. (GX 12 at 36-39; GX 28 at 4.) Applicant testified that she did not see the certificate of eligible candidates compiled on August 2, 2007, because she was away from her office, attending a funeral of a relative and caring for her recently hospitalized husband. She did not see the certificate until August 28, 2007, and on that date she declined to select any of the candidates. (Tr. 190; GX 28 at 4.) She testified that she did not select any candidate because the position was a non-supervisory position that she intended to eliminate. She told the HR specialist to rewrite the job description to make it a supervisory position, so that she would have fewer people reporting directly to her. (Tr. 192-93.)

When the HR specialist who handled the attempt to fill the executive assistant

position was interviewed by the IG investigator, she told the investigator that Applicant could not select Ms. Doe for the executive assistant position because another candidate was entitled to a veteran's preference. The following exchange ensued:

INVESTIGATOR: Are you saying that she canceled this job because she wanted [Ms. Doe] to have it and she could not because there was a veteran in her way?

WITNESS: That's a way to do it, but I can't honestly say. That would have been a way to get [Ms. Doe] in that job, but I can't say that's exactly what she did because I no longer worked in that office

* * *

INVESTIGATOR: Okay. You left that office in February of '08. You were there in August of '07.

WITNESS: I wasn't there for this. I'll have to look up the exact day, but I wasn't here when [Ms. Doe] got selected.

* * *

INVESTIGATOR: This was canceled. Okay. So we need your best recollection of anything that you observed or heard that would lead you to believe that this job was canceled because [Ms. Doe] could not be chosen over this veteran. And I know you said you can't, but we need you to.

WITNESS: Okay.

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INVESTIGATOR: Any information that you have.

WITNESS: She never ...

At this point, the IG investigator interrupted and informed the HR specialist of her duty to testify "freely and honestly," and exhorted her, "So if there's information that you know about or even in the back of your mind, I implore you to bring it out at this point." She responded, "I understand," and she continued her statement as follows:

WITNESS: She never, ever told me that, but I knew that she wanted [Ms. Doe] to work for her. She did tell me that at some point. She wanted to bring her on board to work for her.

INVESTIGATOR: Exact words she used?

WITNESS: [Ms. Doe] would make a great government employee. I would love for her to work for me.

INVESTIGATOR: When was that?

WITNESS: It had to be from the time frame that I worked for her. March of '07 to February '08 or whenever, up until the point I left.

INVESTIGATOR: How often did she say that?

WITNESS: I don't know. She may have said it to me once or twice.

(GX 12 at 40-44.)

During a deposition taken on November 10, 2010, in connection with the MSPB proceedings, the same witness testified as follows:

ATTORNEY: Do you have any evidence that [Applicant] cancelled that vacancy announcement because she could not hire [Ms. Doe] due to the vet on the cert?

WITNESS: No, I do not.

ATTORNEY (after reading the above portion of the IG statement to the witness): Did you know that that was -occurred?"

WITNESS: Absolutely not.

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ATTORNEY: Okay. Were you just speculating based on the document that [the investigator] gave you?

WITNESS: Yes.

The witness then explained that there was a permissible process to bypass a veteran. When asked if she believed that Applicant would bypass the hiring of a veteran, she responded, "From my dealing with her, she knows what the regulations are, so no." (AX H at 101-03.)

Ms. Doe applied for a supervisory IT specialist position (GS-15) on August 14, 2007. On September 12, 2007, she was selected for the position. One of Applicant's subordinates, Ms. Blank, was the selecting official, Applicant was the concurring official, and Applicant's supervisor was the approving official. Three days before Ms. Doe was selected for the position, Ms. Blank sent an email to her deputy setting out the "Latest Lineup Proposal," to assign a male employee to "IB Safety," to assign Ms. Doe to "Risk" and "then you move her to either EA [the executive assistant position] or cyber policy." The email stated, "[Applicant] is ok with this lineup for the 15s if you haven't found any other gems." (AX U.) .

Ms. Blank told the IG investigator that the email was intended to inform her deputy that Applicant had been briefed on the proposed lineup and agreed with it. (GX 16 at 145-46, 150.) Ms. Blank also told the IG investigator that Ms. Doe was hired during a period when the AGA was hiring 23 or 24 new employees and was receiving inadequate support from the HR staff. Ms. Doe was "just one" of four senior employees who were hired at the same time. (GX 5 at 128-30, 149-50.) Ms. Blank knew that Applicant had worked with Ms. Doe when Ms. Doe was a contractor employee. When Applicant told Ms. Blank that Ms. Doe would be good for the IT position, Ms. Blank considered Applicant's comments a "strong reference check." Ms. Blank considered Applicant as her mentor as well as her supervisor. (GX 5 at 131-33.) Ms. Blank's deputy told the IG investigator that Applicant "couldn't wait" to have Ms. Doe in the executive assistant position. (GX 14 at 10.)

The IG report states that Applicant admitted giving Ms. Doe preferential treatment during the hiring process. (GX 35 at 9.) Applicant told the IG investigator that she gave Ms. Doe preferential treatment as a contractor employee because she knew that Ms. Doe was a mother with three children, and she allowed her to telework and work flexible hours in order to accommodate her family needs. (GX 17 at 231-33.) After Ms. Doe became the program manager for the IC contract, she, Applicant, and Ms. Blank were "all squashed" in a small work area and became well acquainted. Based on Ms. Doe's performance as the program manager, Applicant and Ms. Blank knew that Ms. Doe was "a huge producer of work" and any preference she received was because of her past performance. (GX 6 at 98-100.)

Applicant told the IG investigator that she told Ms. Blank "to go through the process and see how [Ms. Doe] ranked." She told Ms. Blank that she "really wanted

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[Ms. Doe] to come on board," but she "didn't know which job she was best for." (GX 6 at 83.) She also testified that she tried to discourage Ms. Doe from applying for a government job, because she had more flexibility as a contractor. Finally, she testified that she preferred that Ms. Doe not be a government employee because she did not want supervisory responsibility for Ms. Doe and her career. (Tr. 296-97.) She remembered telling Ms. Doe that if she accepted the risk management position, she would work for Ms. Blank and not for her. (Tr. 300.)

The IG investigated allegations of irregularities in the hiring of AGA employees, and concluded that Ms. Blank and two other AGA employees engaged in prohibited personnel practices in the hiring of four GS-15 employees, including Ms. Doe. (GX 35 at 17-18.) An experienced HR consultant employed by the AGA told an IG investigator that as many as three eligible veterans should have been selected ahead of Ms. Doe, that Ms. Doe was not the best qualified for the position, and that the documentation of the selection and hiring process was incomplete. (GX 19; AX 0 at 90-100.) The IG concluded that the hiring of four GS-15 employees, including the hiring of Ms. Doe for the supervisory IT position, did not follow established procedures for rating and ranking candidates and that in some cases the score sheets for candidates were fabricated after the fact. (GX 35 at 17-18.)

Ms. Doe was hired as a GS-15, Step 10. Applicant told the IG investigator that

Ms. Doe was hired at a pay rate above Step 1 because she was making more as a contractor than the minimum pay for a GS-15. Applicant testified that Ms. Blank, for whom Ms. Doe would work, informed her that Ms. Doe did not intend to accept the job, because the pay was too low. (Tr. 215.)

The AGA personnel handbook required that justification for paying a new hire more than Step 1 include a justification describing recruitment efforts, a comparison of the candidate's skill level to other available candidates, documentation of the candidate's current pay, an explanation of how the proposed pay rate was determined to be appropriate, the reason for using a higher rate of pay instead of or in addition to a recruitment incentive, and other relevant factors, such as considering the impact of the higher rate of pay on other employees in the organization. When the IG investigator asked Applicant if she considered all the factors listed in the personnel handbook, she responded, "They brought in a form, the form was checked. I signed it. ... I must have considered those things." When the IG investigator told her that Ms. Doe was hired as a GS-15, Step 10, Applicant responded, "Wow. I didn't even know that." (GX 6 at 87-88.)

At the hearing, Applicant testified that she did not know what step was negotiated when Ms. Doe was hired, she did not know who made the decision to hire her at Step 10, and she was not involved in the negotiations about Ms. Doe's pay. She assumed that Ms. Blank made the decision to hire Ms. Doe at Step 10, because Ms. Blank wanted to hire her. She testified that it was not uncommon to hire new employees at a pay rate higher than Step 1. She explained, "When you have very specific, highly technical skills that other people don't have in the marketplace, yes, you do that." (Tr. 215-16.)

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The IG report quotes from a September 20, 2007 memorandum from Applicant to her supervisor, which states, "After carefully reviewing [Ms. Doe's] qualifications and conducting an in-depth interview, we strongly believe that based on her unique knowledge and experience, she should be hired as a GS-15, Step 10, which is commensurate with what she is making now in the private sector." The memorandum indicates that Applicant's supervisor approved the request to hire Ms. Doe at Step 10. The personnel records examined by the IG contained only Applicant's memorandum and a copy of Ms. Doe's paycheck as documentation for the decision. The memorandum and the records examined by the IG were not submitted by either party and are not included in the record. (GX 35 at 11.)

The executive assistant position was reclassified as a supervisory position on December 7, 2007. (AX JJ.) Applicant assigned another AGA employee to the restructured executive assistant position. He served as Applicant's executive assistant from January to April 2008, when he was reassigned, at his request, to a newly established project management office position. (GX 17 at 182-85; AX H at 90-91; AX Q at 5.) Applicant testified that her executive assistant requested reassignment because he was not happy with the "paper-pushing" aspects of being an executive assistant, and he wanted to work on a project management plan to deal with cybersecurity issues. His reassignment created a vacancy that was filled by a lateral reassignment of Ms. Doe. (GX 22; Tr. 214.) When Ms. Doe was reassigned to fill the vacancy, she had worked as a supervisory IT specialist for four months, thus complying with the requirement that an employee work in a position for at least 90 days before being reassigned to another

position. (GX 35 at 12.)

In February 2008, Applicant was given responsibility for field security operations and the network security operations center, which added about 450 personnel to her organization. In March 2008, Applicant's supervisor decided to move her to a large AGA location in another state. Placing a senior AGA official at this location was part of a longterm plan for continuity of operations. As part of the AGA's "business continuity plan," it operated several sites that were located throughout the continental United States and equipped and staffed to continue the operations of the AGA in the event of a natural disaster, terrorism, or similar event. Applicant's move was part of the business continuity plan and was also designed to give her field experience and to place a senior leader at the field site. The personnel at the field site had experience with natural disasters and had a "culture of preparedness" that was different from the rest of the AGA. (Tr. 211.) (GX 3 at 19; GX 5 at 39; GX 6 at 121-49.) Applicant testified that business continuity was "a stepchild of the organization," that a new organizational structure was being set up to address it, and that she had considerable experience with disaster recovery. (Tr. 220.)

Applicant and her supervisor had an extramarital affair from April 2007 to February 2009, but she denied using her personal relationship with her supervisor to obtain approval for the move to the field location or to justify her frequent travel to the

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headquarters area. (GX 6 at 121-35; GX 35 at 19-20; Tr. 218-20.)¹⁰ When the IG investigation began but before Applicant was interviewed, she and her supervisor discussed the possibility of disclosing their affair. Her supervisor advised her not to reveal their relationship to the IG investigator or her husband, and she told him that she had to do it. (GX 17 at 277-281.)

Applicant and her husband owned a second home near the field location, and her husband and her daughter resided in the home. Applicant's husband had developed serious health problems, including a brain tumor, and he had moved to the home while recovering from his medical problems. Applicant asked her supervisor to move her to the field location near her husband and daughter. Her supervisor agreed to allow her to work from the field location on a trial basis. Her supervisor told the IG investigator that he had some reservations about the move because the information protection and risk management office had not yet matured, but he felt that he either had to allow her to move or remove her from her current position. (GX 35 at 19.) The move was approved by Applicant's "boss's boss," a political appointee. (Tr. 222.)

The IG report stated that Applicant's field office was in "an isolated location" and that AGA employees "had very little contact" with her. (GX 3 at 20.) Applicant disputed this conclusion, noting that her office was near the elevator, one floor above the IG's office, was staffed by several information technology technicians in addition to Applicant, and was still in transition to the new mission at the time of the IG investigation. (Tr. 308-09.)

The IG investigator found that Applicant traveled from the field location to the

AGA headquarters 22 times between July 2008 and March 2009, spent 70 percent of her work days away from the field location, and almost 60 percent of her work days in the area of the AGA headquarters. The investigator also found that Applicant continued to travel to the area of the AGA headquarters an average of twice a month after April 2009. (GX 35 at 20.) The IG concluded that the reassignment of Applicant to a field location was a pretext and that her frequent travel to the AGA headquarters area was unjustified. (GX 35 at 21.)

Applicant disputed the IG's conclusions, pointing out that the arithmetic and number of days were incorrect, and that the IG's own numbers established that Applicant spent 49 percent of her days in the area of the AGA headquarters instead of 60 percent. Applicant pointed out that the days counted by the IG included three days devoted to the IG interview, three days spent at another field location away from the AGA headquarters, and four days on annual or sick leave. Applicant also pointed out that travel to the AGA headquarters twice a month was normal for a person in her position, and noted that Ms. Blank had also moved to a field location and traveled to AGA headquarters twice a month. (HX II at 45-50.)

10 Applicant's supervisor provided a statement to the IG investigator, but his statement was not included in the IG report or in the evidence submitted by Department Counsel.

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Applicant testified that she did not have blanket travel orders or the authority to approve her own travel. Each trip was individually approved by a budget officer and her supervisor (with whom she was having an affair), and they were usually multipurpose trips. (Tr. 333-35.) When interviewed by an IG investigator, her supervisor denied that her travel to the headquarters area was the result of their relationship. (GX 35 at 20.)

None of the travel records considered by the IG investigators were submitted at the hearing. Applicant reconstructed her travel records and submitted them after the hearing. Her records reflect that, between March 2008, when she moved to a field location, and February 2009, when her affair with his supervisor ended, Applicant traveled from her field location 34 times. She traveled to the AGA headquarters area 18 times. She testified that the AGA met at least quarterly for either management meetings or to visit staff. (Tr. 221.) The purposes for her travel to the AGA headquarters area between March 2008 and November 2008 were as follows:

- July 6-17, 2008: Attend an IT conference
- July 28-August 2, 2008: Meetings
- August 11-14, 2008: Meetings and document signing
- August 19-22, 2008: Meetings
- August 26-30,2008: Meetings and document signing
- September 7-12,2008: Meetings and two awards ceremonies
- September 21-26,2008: Meetings
- October 7-20, 2008: Leadership Meetings at two locations
- October 21, 2008: New information security officer orientation
- November 14-15,2008: Contractor's "all hands" meeting

The document signing referred to in the August 2008 trips involved 604

voluminous certification and accreditation records. The normal volume was about 100 certification and accreditation actions in a year, but they were working to clear the backlog after a change of leadership in the AGA. Applicant did not make special trips solely to sign documents, but she included that duty when she traveled to the headquarters for other purposes. (GX 6 at 150-59.) She told the IG investigator that, when she moved away from the headquarters in July 2008, she did not realize that she would need to come back to the headquarters as often as she did. (GX 6 at 171.)

In December 2008 and January 2009, Applicant traveled to the headquarters area six times, for a total of 20 work days, in preparation for the transition of political appointees to a new administration. All managers above Applicant's level were political appointees and expected to be replaced upon the change of administration between political parties. (AX GG; HX II at 49.) She continued to travel to the headquarters area about twice a month even after her inappropriate personal relationship terminated. (GX 35 at 20.)

On September 18, 2009, Applicant received a notice of proposed removal based on the IG report. (AX B.) She received an amendment to the notice of proposed removal on December 7, 2009, adding an additional allegation. (AX D.) She responded on

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January 15, 2010. (AX C.) She was notified of the decision to remove her on February 1, 2010. The specific reasons for the termination were:

- Sharing proprietary information with Ms. Doe by telling her that the AGA planned to send a request for a proposal to Mr. Jones's company and suggesting that Ms. Doe contact Mr. Jones about potential employment.
- Repeatedly telling Mr. Jones that he should consider Ms. Doe for a position and forwarding Ms. Doe's resume to Mr. Jones, who later used Ms. Doe to help draft the contract proposal, included Ms. Doe's resume in the proposal, and, after being awarded the contract, hired Ms. Doe in a position specifically created for her.
- Improperly disclosing nonpublic contracting information to Mr. Smith that was passed to Mr. Jones and gave Mr. Jones an advantage in obtaining an AGA contract.
- Abusing her authority and engaging in a prohibited personnel practice by giving Ms. Doe preferential treatment in her selection for employment by the AGA and subsequent reassignment as Applicant's executive assistant.
- Improperly assigning duties to Ms. Doe, while she was employed by the contractor vendor, that were outside the scope of her contract and that she would later perform as an AGA employee.
- Providing inadequate contract oversight by signing invoices or having her subordinate employees sign invoices even though the agency records did not contain a letter designating Applicant as a COTR.

Applicant's notice of proposed removal did not include an allegation regarding her reassignment to a field office near her home or excessive travel from the field office to the AGA headquarters. In a deposition related to the MSPB proceedings, an official of the AGA who participated in the drafting of the notice testified that the rationale for not including that allegation was based on the fact that she could not reassign herself, and it was her supervisor who reassigned her. (AX K at 221.) In connection with the MSPB proceedings, the AGA official who decided to terminate Applicant testified that "there were questions related to the move to [the field location] and the travel claims," but that after reviewing the evidence, the AGA decided that "there was not a reason to pursue it down that path." He also testified that he found the references in the IG report to the relationship between Applicant and her supervisor unnecessary and "salacious." (AX E at 169, 171.) Applicant's termination notice resolved one allegation in her favor: that she inappropriately shared proprietary procurement information with Ms. Doe by telling her that the AGA planned to invite a potential contract vendor to submit a proposal and

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suggesting that she contact the potential contractor vendor for potential employment. All other allegations were resolved against her.¹¹ (AX X.)

Applicant appealed her termination to the MSPB. Many of the witnesses interviewed by the IG also provided evidence for the MSPB. In April 2011, an MSPB judge reversed the AGA decision on procedural due process grounds, and Applicant was placed on paid leave. In May 2011, the AGA petitioned for review of the MSPB judge's decision. In November 2012, the full MSPB board remanded the case back to the original MSPB judge for further consideration, and Applicant's interim appointment (on paid leave) was terminated. Applicant's appeal to the MSPB has not been resolved.

The chief operating officer and vice-president of Applicant's current employer, a company that has served as a government prime contractor since 2005, submitted a lengthy and detailed letter on her behalf. He reviewed the AGA IG report before hiring Applicant, and he found it "sloppy and incomplete." His letter includes an issue-by-issue analysis of the IG report and his conclusion that it lacks credibility. He had professional contact with Applicant while she was employed by the AGA, and he considered her "a competent skilled manager and IT security professional." She was a "straighter shooter" and very skilled at getting groups to work together. He has noticed that she has "a diminished exuberance in personality," when compared to the person he knew at the AGA. Since Applicant joined the company, he has found that she "shows incredible responsibility, reliability, integrity, and shows the best elements of being an industry professional." He considers her "incredibly honest and straight forward." Based on his review of the IG report, his observation of Applicant's performance, and his lengthy military and civilian experience in working in a classified environment, he strongly recommended that Applicant be granted a security clearance. (AX AA-1.)

An AGA employee who interacted with Applicant from 2007 to 2009 and maintains social contact with her states that Applicant has always "behaved morally, exhibiting honesty, loyalty, and integrity." She found that Applicant was devoted to her work and protecting personal information. She has no doubts about Applicant's loyalty

or trustworthiness. (AX AA-2.)

A retired AGA employee who worked closely with Applicant was "impressed with her professional demeanor and the magnitude of her awareness of the AGA's need for a revamp of our security program." He states that the AGA staff held Applicant "in the highest regard with great respect and integrity."

A program analyst who worked for Applicant at the field location attests to her "extreme professionalism and high ethical standards." He was interviewed by an IG investigator, "who appeared to be digging for dirt, and he was disappointed that there was no dirt to be found." (AX AA-4.)

11 The reasons for Applicant's termination are not set out verbatim. They have been paraphrased and summarized.

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A retired SES employee, who first met Applicant in 1999 when he was interviewing candidates for an SES position, has remained in contact with her professionally and socially. He has observed that she is "an extremely intelligent and insightful professional whose character is above reproach." (AX AA-5.)

A retired AGA employee stated that when she was Applicant's deputy, "for the first time in years, I actually enjoyed coming to work." She regards Applicant as an honest and trustworthy individual who is deserving of a security clearance." (AX AA-6.)

A retired federal employee, who worked under Applicant's direct supervision for ten years, finds it "impossible to envision" the conduct set out in the IG report. He found her completely trustworthy and does not believe that she would deviate from her "own demonstrated commitment to the highest professional ethics and performance." (AX AA-7.)

A retired federal employee, who was Applicant's mentor before Applicant was hired by the AGA and was a co-chair with Applicant in a professional organization for women in technology, considers her reliable, honest, trustworthy, and effective. (AX AA-8.) Three former coworkers from Applicant's previous positions, a subordinate from the AGA, and a former classmate and lifelong friend submitted statements extolling her honesty, loyalty, and integrity. (AXAA-9; AXAA-10; AXAA-11; AXAA-13; AXAA-15.)

Applicant's brother, an independent computer consultant with experience in federal contracts, has also been her coworker and supervisor during the 1980s and 1990s. He found the IG report and the SOR to be "at great odds" with what he knows about her. He states, "As a child she would admit to even small child transgressions as soon as questioned, and as a co-worker and supervisor, she was extremely forthcoming about her intentions, actions, and mistakes." (AX AA-12.)

A former coworker, current friend, and fellow member of a professional association for women in technology has known Applicant for 15 years. She has observed that Applicant has worked hard to strengthen her leadership skills and to broaden her professional network, and she is eager to help others in developing their

skills, capabilities, and networks. Based on her observations of Applicant's behavior in professional and social situations, she stated:

On every occasion, [Applicant] has exhibited honesty, integrity, trustworthiness, and a keen sense of responsibility and loyalty. She has a strong sense of right and wrong and adheres to a strong moral code. In her work life, she is the consummate professional. In her personal relationships, [she] is caring, thoughtful, generous, compassionate, and communicative.

(AX AA at 14.)

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A professional associate, who was mentored by Applicant in an executive development program and then worked with her to mentor others, considers her forthright and honest and a person who does not bend the rules. He cites an example of a situation where he was seeking employment by the AGA and asked Applicant for contacts within the AGA. She provided him with contact names and telephone numbers, "but was adamant that she would only help with this information, no other avenues that would be considered unethical." (AX AA-16.)

A former subordinate who is now the president of a small federal contracting business described several aspects of Applicant's personality and professional style. He describes her as a "tough-minded Senior Executive She can be (and is talked about sometimes as) abrasive, quick to judge, and sharp tongued-and not only to subordinates She is not mean-spirited, but thoughtful and interested in getting tasks done " He describes her as innovative, with a highly developed ability to shift viewpoints. She exhibited a genuine care for her staff, making sure that they received the training they wanted, gave them credit for their work, and shared recognition with them when credit was given to her. This witness enjoyed making business development calls to her office, because "she was good at trying to get people connected-directing me to others that could help me, highlighting companies that I might want to work with or take my pitch to-she enjoys connecting people and building relationships " (AX AA-17.)

Applicant has received numerous awards for exceptional service, contributions to equal employment opportunity, and contributions to the IT community. She has served in leadership positions and been recognized for her professional achievements by several professional IT organizations. (AX BB.)

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.

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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 11 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 112(b).

Analysis

Guideline E, Personal Conduct

The concern under this guideline is set out in AG 11 15 as follows: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." The following disqualifying conditions under this guideline are potentially applicable:

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AG Para 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

AG Para 16(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 person may not properly safeguard protected information. This includes but is not limited to consideration of ... a pattern of dishonesty or rule violations; and

AG Para 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as ... engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The SOR was written in general conclusory terms but did not cite specific instances of conduct. On its face, the SOR does not comply with the requirement in Directive 11 E3.1.3 that an SOR "shall be as detailed and comprehensive as the national security permits." However, Applicant was represented by two experienced attorneys, and they did not challenge the sufficiency of the SOR or request that it be made more specific. Counsel for both sides treated the allegations investigated by the IG as specific allegations in the SOR. Accordingly, I have analyzed the evidence and made findings regarding each allegation investigated by the IG, including those that the AGA leadership found to be not established and which were not included in the action terminating Applicant's employment. My analysis of the evidence pertaining to each allegation is below.

Allegation 1: Applicant Misused Her Position for the Personal Gain of a Friend.

The ethical standards for executive branch employees include obligations to act impartially and not give preferential treatment to any private organization or person, to

refrain from using their government positions for private gain or the private gain of a friend, and to avoid giving the appearance of violating the law or ethical standards. 5 CFR §§ 2635.101 and 2635.702. Employees are also prohibited from using work time and government equipment for private purposes, with certain limited exceptions. 5 CFR §§ 2635.704 and 2635.705.

Applicant and Ms. Doe were both active members of a professional organization for women working in IT, whose activities included networking with potential employers. Applicant had a reputation for working hard to improve her leadership skills and broaden her professional network and for being compassionate, generous and helpful. The evidence shows that Applicant learned from Mr. Jones that he was looking for qualified employees and learned from Ms. Doe that she had recently been laid off. It also shows that Applicant received a resume from Ms. Doe in the morning of a work day and forwarded it to Mr. Jones in the afternoon, using her government-issued computer or mobile device. The evidence does not support the IG's conclusion that Applicant edited Ms. Doe's resume before forwarding it. Applicant's limited use of government equipment appears to fall within the authorized limited uses of AGA government equipment; except that she forwarded the email and resume during work time. 12

Applicant has refuted the allegation that she improperly gave proprietary information to Ms. Doe by telling her that the AGA planned to issue a request for proposal to Mr. Jones's company and suggesting that Ms. Doe contact Mr. Jones about potential employment. This allegation was resolved in Applicant's favor by the AGA, and it is unsupported by the evidence. At the time that Applicant suggested to Ms. Doe that she contact Mr. Jones, Applicant was still gathering information and educating herself, and at the time of her meeting with Mr. Jones in July 2006, she "didn't know how [Mr. Jones's] company would fit into [her] world." All that Applicant knew when she referred Ms. Doe to Mr. Jones was that Mr. Jones had contracted with the AGA previously and that he was looking for qualified project managers.

The unspoken premise of the IG's conclusions is that Applicant and Ms. Doe developed a close personal friendship that motivated Applicant to promote the Ms. Doe's career. That premise is unsupported by the evidence. The record reflects that Applicant and Ms. Doe were professional colleagues and that they greatly respected each other, but it was not a special relationship of any sort.

On the other hand, Applicant's repeated exhortations to interview and evaluate Ms. Doe went beyond networking and could reasonably lead a potential contractor to believe that hiring Ms. Doe would increase the likelihood of being awarded a contract. Mr. Jones was adamant that he did not feel pressured to hire Ms. Doe. However, after he interviewed her and was greatly impressed, he admitted that having Ms. Doe on his team probably was advantageous in obtaining the IC contract. I conclude that Applicant abused her position by repeatedly exhorting Mr. Jones to interview and evaluate Ms. Doe, and using government equipment and work time to forward Ms. Doe's resume.

12 The applicable AGA directive allows limited personal use of government equipment, including information technology, if the use does not interfere with official business and involved minimal expense

to the government. The AGA directive provides that personal use should take place during non-work time. A copy of the AGA directive is attached to the record as HX VI.

Allegation 2: Applicant Failed to Provide Proper Contract Oversight.

Applicant refuted this allegation. A contracting officer is authorized to designate a COTR, but must provide written notice of the designation.¹³ The CFR does not require the recipient to sign the notice of designation. The signature at issue in this case apparently was Applicant's signature acknowledging receipt of the required notice, thus documenting that she actually received it. She testified that she was appointed as COTR despite her concerns about her lack of training.

The inability of the IG to find a copy of the delegation letter is overcome by Applicant's testimony and the documentary evidence that a contracting specialist sought a meeting with Applicant to obtain her signature acknowledging the letter appointing her as a COTR. The lack of documentation of her appointment as a COTR reflects the significant disarray in the contracting office's records, but it does not establish that Applicant acted *ultra vires* by reviewing and approving invoices for services.

The evidence establishes that Applicant did not improperly delegate her duties. Instead, it establishes that Applicant utilized documentary evidence and personal observation to ensure that the services required by the contract were delivered, that she certified that the services were provided, and that she, lacking access to the contracting database, utilized technicians to enter her approvals into the database. The record contains no evidence that the AGA paid for any services that were not delivered. The absence of the cover memoranda used by Applicant to reflect her approval of the invoices is another indication of the disarray in the contracting office.

Allegation 3: Applicant Abused Her Authority and Engaged in a Prohibited Personnel Practice for the Personal Gain of a Friend by (1) Using Ms. Doe to Perform Executive Assistant Duties for Applicant While a Contractor Employee; (2) Attempting to Obtain Federal Employment for Ms. Doe as an Executive Assistant; (3) Preselecting Ms. Doe for Employment as a Supervisory IT Specialist; (4) Improperly Hiring Ms. Doe at a Rate Above the Minimum Salary; and (5) Improperly Reassigning Ms. Doe to the Executive Assistant Position.

The allegation that Applicant improperly assigned executive assistant duties to Ms. Doe is partially established. The SOW for the IC contract was extremely broad, because it encompassed changing the culture, attitude, and organizational structure of the AGA. Consequently, it was not surprising that AGA employees were concerned by the extent of Ms. Doe's involvement in AGA activities. It is also significant that performance under the SOW began at a time when Applicant had no documented position in the AGA, no office, no equipment, and no staff, forcing her to rely on Ms. Doe and employees borrowed from other AGA offices.

The revision of Applicant's biography in preparation for an appearance before an

industry group was encompassed in the SOW task to support the AGA's organizational

13 See 48 CFR 3052.242-72.

vision by reaching out to industry representatives and telling them what the AGA was doing to protect personal information. Applicant's letter to the contractor, submitted in response to Ms. Doe's request, was encompassed in her overall supervision and evaluation of Ms. Doe's performance. However, Applicant's use of Ms. Doe to provide input into her own performance appraisals was outside the scope of the SOW.

There is no evidence that Applicant used Ms. Doe for purely clerical duties or to conduct her personal affairs. If Applicant assigned duties to Ms. Doe that exceeded the broad scope of the SOW, it would constitute a breach of the contract, but would not necessarily violate any ethical rule or regulation. It would entitle Ms. Doe or her company to complain, to request a modification of the SOW, or to seek additional compensation. Ms. Doe and her company performed the assigned duties with no complaints or requests.

Applicant refuted the allegation that she improperly attempted to hire Ms. Doe as her executive assistant. Ms. Doe applied for a position as Applicant's non-supervisory executive assistant in July 2007. She was one of five candidates certified by the HR office as qualified and eligible on August 2, 2007. One of the candidates was entitled to a veteran's preference. On August 14, 2007, Applicant cancelled the non-supervisory position because she wanted it to be a supervisory position to reduce the number of subordinates reporting directly to her. She credibly testified that she did not see the list of candidates until August 28, 2007, because she was away from her office, attending a funeral and caring for her seriously ill husband. On August 28, 2007, she declined to select any candidate, because she intended to abolish the non-supervisory position and replace it with a supervisory position. In December 2007, another AGA employee was assigned to be Applicant's executive assistant.

The IG concluded that Applicant declined to select any of the candidates because she could not select Ms. Doe over a candidate with a veteran's preference. The IG conclusion was largely based on the speculative testimony of an HR specialist, in response to aggressive questioning by the IG investigator, which she later recanted during the MSPB proceedings.

Applicant refuted the allegation that she preselected Ms. Doe for employment as a supervisory IT specialist. When Ms. Doe was selected, she was one of four GS-15 employees who were hired during a period of intense recruitment and hiring. Ms. Blank, an SES employee who worked for Applicant, was the selecting officer. Applicant was the concurring official, and Applicant's supervisor was the approving official. Applicant testified that she told Ms. Doe that if she accepted the IT position, she would work for Ms. Blank and not for her.

The IG found numerous procedural discrepancies in the hiring of the five GS-15s and some evidence that scoring of the candidates was fabricated after the fact. The IG referred the file of the five candidates to a HR specialist, who opined that Ms. Doe was

not the best qualified of the candidates for the supervisory IT position. The record does not contain the application files of the candidates or the evaluation documentation,

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except for the scoring matrix that apparently was prepared after the fact. Applicant relied heavily on Ms. Blank and her deputy to run the selection process, and there is no direct evidence showing the Applicant was aware that Ms. Blank had short-circuited the selection process to achieve a result that she believed Applicant wanted.

Applicant told the IG investigator that she wanted Ms. Doe "on board," as an employee, but she told Ms. Blank to "go through the process" and see how Ms. Doe ranked among the candidates for the IT position. Ms. Blank, who regarded Applicant as her mentor, construed Applicant's favorable comments about Ms. Doe as a strong endorsement.¹⁴ Three days before Ms. Doe was formally selected, Ms. Blank told her deputy that Applicant had included a proposed lineup that included hiring Ms. Doe for the IT position and then moving her to the executive assistant position or a "cyber policy" position. The evidence shows that Ms. Blank knew that Applicant had high regard for Ms. Doe, based upon her performance as the project manager for the Ie contract. Ms. Blank also knew that Applicant wanted Ms. Doe to be an AGA employee. Ms. Blank and her deputy then bypassed the formal evaluation and scoring process and selected Ms. Doe and four other GS-15s.

Applicant has refuted the allegation that she improperly hired Ms. Doe at a pay rate above Step 1. She was not the selecting official or the approving official. It is likely that she did not consider all the factors in the AGA personnel handbook, despite her statement to the IG that she "must have considered those things." The record reflects that hiring at a step above Step 1 was not uncommon. Applicant's only specific recollection of the hiring of Ms. Doe was that her pay in the private sector was substantially more than the pay of a GS 15, Step 1, and her only specific recollection of the documentation required was that proof of a candidate's private-sector pay was necessary.

The evidence reflects that Applicant relied on Ms. Blank to process the applications and supervise the selection process, and that she treated the determination of Ms. Doe's pay as a routine action that was not unusual in light of her previous experience with candidates recruited from high-paying jobs in the private sector. Applicant's vague recollection of the events, reflected in her statement to the IG investigator and her testimony at the hearing, indicates that Applicant was presented with a forwarding memorandum by Ms. Blank, that she signed it, and that Applicant's supervisor approved Ms. Blank's recommendation to hire Ms. Doe as a GS 15, Step 10. While Applicant has refuted this allegation, her involvement in the pay determination was not faultless. The evidence reflects that Applicant was not aware of the AGA's criteria for hiring above Step 1, made no effort to familiarize herself with those criteria, paid little attention to the justification for hiring at Step 10, and did not challenge Ms. Blank's decision to hire Ms. Doe at Step 10.

¹⁴ Applicant told the IG investigator that she has learned that "when a manager speaks, you know, you think you're speaking properly, but it's a roar to your people." GX 17 at 299.

Applicant has refuted the allegation that she improperly reassigned Ms. Doe to the executive assistant position. The evidence reflects that the supervisory executive assistant position was filled by an AGA employee shortly after it was established, the employee was Applicant's executive assistant from January to April 2008, the employee was reassigned to a project management position at his request, and that Ms. Doe was laterally reassigned to fill the vacant executive assistant position. When Ms. Doe was laterally reassigned, she had worked as a supervisory IT specialist for four months, thus complying with the requirement for working at least 90 days in a position before reassignment.

Allegation 4: Ms. Blank and [Two Other AGA Employees] Abused Their Authority and Engaged in Prohibited Personnel Practices.

This allegation and the IG conclusions regarding it were not the basis for the AGA decision to terminate Applicant. However, the personnel practices encompassed in this allegation involved the hiring of Ms. Doe for a supervisory IT position, which is discussed above under Allegation 3.

Allegation 5: Applicant Misused Her Position for Personal Gain by Taking Advantage of an Inappropriate Personal Relationship to Gain Approval for a Reassignment to a Location Near Her Home and by Engaging in Excessive Official Travel.

Applicant refuted the first component of this allegation, regarding her reassignment. It is incongruous and implausible to conclude that she used her personal relationship with her supervisor in order to geographically separate herself from him. Her reassignment was based on compassionate grounds, *i.e.*, her desire to be near her daughter and her ailing husband. Her supervisor's statement to the IG reflected his belief that she intended to move, whether or not the AGA reassigned her. He believed that his choice was to support her request or remove her from her position.

Applicant also refuted the second component of this allegation, excessive travel. The evidence indicates that frequent travel was the norm for senior AGA officials. The evidence also shows that Applicant was standing up a new organization, requiring frequent meetings and coordination. It shows that Applicant underestimated how much travel would be required to take care of a large backlog of certification and authentication actions. Finally, it shows that significant travel was required to prepare for the transition to new political leadership after the elections. It is possible that Applicant, as well as her other SES colleagues, could have been more frugal in their official travel. It is possible that Applicant may have erred on the side of travel when the choice was close. However, there is no evidence that any of Applicant's official trips were fraudulent or pretexts for romantic liaisons.

Applicant's inappropriate relationship with her supervisor, a high-ranking political appointee, was not specifically alleged, but it was the underlying premise for the allegation that she misused her position for personal gain. However, Applicant's ability

to obtain a compassionate reassignment and to travel frequently back to the headquarters area was not an exploitation of her official position. Even if her personal relationship with her supervisor was a factor in the decision to transfer her to a field location, that decision would be the product of her personal relationship, not her official position. The troubling aspect of her inappropriate relationship is that it could have led others to conclude that she received preferential treatment. In this regard, responsibility for the perception of favoritism falls heavily on her supervisor.

Independent of its impact on her transfer and frequent travel, Applicant's inappropriate relationship demonstrated bad judgment. The record does not reflect who, if anyone, was aware of her inappropriate relationship before she disclosed it. Nevertheless, her conduct made her vulnerable to exploitation, manipulation, or duress.

Additional Allegation: Inappropriate Sharing of Nonpublic Contracting Information.

This additional allegation was not included in the IG report or the AGA's September 2008 Notice of Proposed Removal. (AX S.) It was added in the AGA's December 2009 Amendment to Proposed Removal, and it was based on Applicant's July 2006 email to Mr. Smith, which was passed on to Mr. Jones, which forwarded a draft of data analysis SOW, evaluation factors, IGCE, and best value proposal evaluation worksheet. (GX 30.)

The Federal Acquisition Regulation (FAR), 48 CFR 3.104-3 (a) prohibits knowingly disclosing contractor bid or proposal information or source selection information before a contract is awarded. A government employee is prohibited by 5 CFR 2635.703 from allowing "the improper use of nonpublic information to further an employee's private interest or that of another to further his [or her] private interest or that of another, whether through advice or recommendation, or by the knowing unauthorized disclosure." The evidence shows that the SOW was public information. The Federal Acquisition Regulation (FAR) 48 CFR 9.505-2(b)(1)(i) permits a sole source contractor to participate in preparing a SOW. Applicant admitted at the hearing that she should not have shared the IGCE with a potential contractor. At the time of her improper disclosure, she was unfamiliar with the contracting process, still learning how to do her new job. I am satisfied that her disclosure, albeit careless, was inadvertent and not a "knowing unauthorized disclosure." Her improper disclosure of non-public information to Mr. Smith and Mr. Jones had no impact on the contracting process, because the AGA obtained the data analysis services through a gift agreement. Thus, I conclude that the additional allegation is partially established with respect to the unauthorized disclosure of the IGCE.

I conclude that IG Allegations 1 and 3 and the AGA's additional allegation are partially established. Therefore, I conclude that disqualifying conditions AG 1111 16(c) and 16(d) are established. While Applicant's inappropriate relationship with her supervisor implicates AG 11 16(e), that conduct was not specifically alleged, and thus it may not be an independent basis for denying her application. However, it may be considered to

whether she has demonstrated successful rehabilitation; or as part of the whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted).

The following mitigating conditions are potentially relevant:

AG Para 17(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;

AG Para 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

AG Para 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and.

AG Para 17(f): the information was unsubstantiated or from a source of questionable reliability.

AG Para 17(c) is established. Applicant's use of government time and equipment to forward Ms. Doe's resume to Mr. Jones was minor. Her over-enthusiastic efforts to obtain an interview for Ms. Doe and her unauthorized disclosure of the IGCE were isolated incidents, and there is no evidence that similar conduct has recurred. The conduct occurred almost eight years ago. It occurred during a turbulent time for the AGA and for Applicant. Applicant was thrust into a high visibility, politically-sensitive situation, working with contracting and personnel issues for which she had limited experience. She had no staff and no office for several months. She was working with a dysfunctional contracting office. It is unlikely that she will find herself in such turbulent circumstances again. Her current employer and an old friend who sought out her assistance in job hunting both indicate that her earlier exuberance has waned and she is more circumspect about helping others find employment. She recognized during her IG interview that her intention to speak softly may have seemed to others like a roar. Her current employer speaks highly of her integrity, reliability, and trustworthiness. I am confident that her inappropriate conduct will not recur.

AG Para 17(d) is established. Applicant has acknowledged that she was unqualified to be a COTR, that she should not have disclosed the IGCE, and that her inappropriate relationship with her superior was a mistake. She has acknowledged that she may not have realized how her comments were heard by her subordinates. The stressors that she experienced while employed at the AGA are no longer present. For these reasons

and the reasons set out in the above discussion of AG 1117(d), I am satisfied that her inappropriate conduct will not recur.

AG Para 17(e) is established for the uncharged inappropriate relationship. The

relationship has ended. Applicant made full disclosure to her spouse, the IG investigators, and her current employer.

AG Para 17(f) is not established. Even though I have concluded that Applicant refuted Allegation 2 and parts of Allegation 1, 3, and 5, this mitigating condition is not applicable, because there was some evidence to support the allegations.

Whole-Person Concept

Under AG Para 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 112(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 E in my whole-person analysis. Some of the factors in AG 11 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. The IG investigation, her subsequent termination, the MSPB litigation, and this hearing have taken a toll on her. She has been a federal employee since 1993, and she worked for the AGA from December 1999 until February 2010, receiving numerous awards. Her current employer holds her in the highest regard. Even though it was painful and embarrassing, she has disclosed her affair with her supervisor to her husband, the IG, and her current employer.

After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on personal conduct. Accordingly, I conclude she

has carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline E (Personal Conduct):

FOR APPLICANT

Subparagraph 1.a:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge