**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**OFFICE OF FEDERAL OPERATIONS**

| | | |
|---|---|---|
| **John S. Morter,** | ) | |
| | ) | **OFO Docket No. 0120180397** |
| **Appellant,** | ) | **EEOC No. 510-2015-00236X** |
| | ) | **Agency No. DIA-2014-00052** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **Mark T. Esper, Secretary,** | ) | |
| **U.S. Department of Defense,** | ) | |
| **Defense Intelligence Agency, and** | ) | |
| **United States Special Operations Command,** | ) | |
| | ) | |
| **Agency.** | ) | **Date: September 24, 2020** |
| | ) | |

**APPELLANT'S BRIEF IN SUPPORT OF APPEAL**

Pursuant to 29 C.F.R. §§ 1614.401 - 1614.403, Appellant John S. Morter[1], *pro se*, timely submits this brief in support of his appeal of the United States Department of Defense ("Agency") Final Agency Decision (FAD), dated August 5, 2020, finding that it did not discriminate against him as to any of the claims and bases raised in his Complaint. Based on the record, and for the reasons provided below, the Commission should determine that summary judgment is not appropriate because there are genuine issues of material facts still in dispute, thus requiring a closer examination of those facts. I respectfully request that the Commission vacate the FAD and either reverse the Administrative Judge's (AJ) decision, or if necessary, remand the case for additional discovery and a hearing with testimonies from expert authorities and all available witnesses to resolve the matters that are still in dispute.

## I. ISSUE ON APPEAL

1. Whether the record presented any genuine issues of material facts in dispute.

[1] Throughout this document, Mr. John S. Morter will occasionally be referred to by using first-person singular pronouns.

## II. INTRODUCTION

The Administrative Judge in this case claims that I attempt to create the appearance that disputed material facts exist by making assertions – based on my desired application and interpretation of the documents while disregarding material facts – which are not supported by all the relevant documentary evidence or undisputed material facts, and which do not sufficiently alter the material undisputed facts so as to preclude a Summary Judgment Decision. I disagree.

This case centers on the fact that the responsible officials appointed over me were aware of my disability and willfully disregarded that knowledge to take unfavorable administrative actions against me. The Agency has claimed, and the AJ has accepted, the notion that the officials responsible for punishing me were unaware of my disability. I intend to prove that everyone involved in the decisions to suspend my security clearances, physically remove and banish me from my workspace, and ultimately force me in to an unwilling reassignment outside of the local commuting area, were all well aware of my disability and chose to not consider it. The Agency has admitted that the unfavorable administrative actions in question were taken against me based solely on my performance during repeated polygraph examinations. Upon filing this EEOC Complaint, I requested to be reasonably accommodated. I requested to return to my official duty position (Intelligence Officer), and to suspend the pending reassignment action until the polygraph issue was resolved. These accommodations were not only reasonable, they were in fact, required by the approved and relevant regulations.

An Agency produced psychological examination stated that in order for someone to be diagnosed with my condition, "an individual's reactive symptoms or behaviors must be judged to be out of proportion to the intensity of the stressor, and to cause significant impairment." Therefore, it is a logical statement to say that an individual with a condition such as mine will not be capable of performing as an able-bodied person during a polygraph examination. Consequently, using this impairment against me is unquestionably discriminatory and abusive. Polygraph examiners are not physicians and they make assumptions about physiological responses that they are not adequately trained to make. The fundamental problem is that there is no unique physiological response to lying. An out of proportion response to a stressor would produce what is termed a false positive.

In the "Examiner's Comments" from my first two polygraphs, when I had been interrogated for over of total of six hours, it was reported: "Analysis of the data collected revealed Subject's physiological data lacked sufficient criteria on which to base a decision, therefore No Opinion (NO) was rendered." The third exam lasted nearly another three hours and ended with me having a verbal altercation with the polygraph examiner. The "Examiner's Comments" from this polygraph report for this exam said, "Subject was administered three separate tests concerning mishandling classified information and unauthorized foreign contacts. Two tests were deemed No Opinion. On the last test Subject displayed Significant Response to the questions." Even though I adamantly denied any wrongdoing, I was told that I was lying and repeatedly asked the same two

questions seemingly *ad infinitum*. In this pressure filled environment, my anxiety intensified, and I could not remain calm. I feared what the consequences would be for "failing." It was impossible not to produce a "Significant Response." I was forced to submit to two more anxiety-inducing sessions or lose my job. The fourth was deemed "No Opinion," and the fifth was "Significant Response." My doctors ultimately determined that each successive interrogation brought on more and more anxiety to the point where I developed Post-Traumatic Stress Disorder from the abuse.

There is evidence to show that other similarly situated employees were treated differently than I was. Based on the statistics, there are theoretically thousands of employees who receive the exact same polygraph results as I did yet do not face any unfavorable administrative actions. According to DoDI 5210.91, a polygraph is a diagnostic instrument used to measure and record respiration, electrodermal, blood volume, and heart rate responses to verbal or visual stimuli. A "response" is defined as the physiological change to the applied stimulus. The examinee's responses are then categorized as "No Significant Response", "Significant Response", or "No Opinion." The Agency has admitted to as many as 22% of the examinations that it conducts result in either "No Significant Response" or "No Opinion."

There is also evidence that shows the Agency and USSOCOM blatantly violated approved and relevant Department of Defense policies and procedures regarding the use of the polygraph and its results. As a government agency, the Department of Defense is exempted from the Employee Polygraph Protection Act of 1988, however, the Department has created internal regulations to prohibit and limit any potential misuse and abuse of the polygraph by its subordinate elements. Taking unfavorable administrative actions against an otherwise innocent individual, based solely on their polygraph results, is clearly a violation of those DoD policies, and a violation of my individual rights. The AJ is incorrect in stating that "both Complainant and the Agency rely on different sections of the same Agency PCA Instructions, Directives, Guidance and/or Manual for their respective positions." In fact, we are both using the same sections of the same policies, but the Agency is misapplying them.

## III. FACTUAL BACKGROUND & CHRONOLOGY OF EVENTS[2]

1. In May of 2000, I began working as a contractor in the Joint Intelligence Center Special Operations Command (JICSOC) Geospatial Intelligence (GEOINT) Branch of the U.S. Special Operations Command (USSOCOM) at MacDill Air Force Base in Tampa, Florida. In September 2002, I was hired as a Department of the Air Force, Federal Employee (GG-13) and excelled in a

[2] Due to the absence of a hearing in this case, and to help to explain my complaint more thoroughly, I have incorporated into this section a sequence of events with commentary and references.

variety of roles. (ROI 073, 202[3]) I also served for 20 years as an active duty enlisted member in the Electronic Security Command of the United States Air Force. Therefore, I had continuously held a Top Secret (TS) level security clearance with Sensitive Compartmented Information access (SCI) without incident since 1980. *Id*.

2. From 1145 to 1445 on March 23, 2011, I voluntarily submitted to a series of polygraph creditability assessments (PCA) which were administered by the Defense Intelligence Agency (DIA) in a hotel room in Tampa, Florida. I truthfully answered all the questions and remained at the testing location until all the examinations were completed, and I was excused to leave by the polygraph operator. The polygraph report for this session states that I displayed "No Significant Response" to questions related to espionage or terrorism against the U.S. and deliberately damaging any government information or defense system. When asked questions related to deliberately handling classified information and reporting foreign contacts, analysis of the data collected revealed "No Opinion." Contained in this report is the first mention of my disability. I informed them that I was becoming increasingly anxious during the process, and I continued to express concerns about my increasing general anxiety. (MORTER AGY 0078[4])

3. From 0758 to 1110 on March 25, 2011, I voluntarily submitted to another PCA by DIA which was conducted in a hotel room in Tampa, Florida. Once again, I honestly answered all the questions and remained at the testing location until I was dismissed by the polygraph operator. The technical opinion for this series of tests was once again declared as "No Opinion." (MORTER AGY 0080)

4. On January 31, 2012, from 1248 to 1535, I again voluntarily submitted to another PCA and endured aggressive interrogations. I honestly answered all questions in three separate tests - posed by two different polygraph operators - and remained at the testing location until I was dismissed. In the summary of the polygraph examination report, it was stated, "SUBJECT did not complete the referenced examination with no reportable information developed." Examiner comments were, "This was Subject's third day of testing. During the March 23, 2011 exam, Subject was

[3] ROI ### refers to the Report of Investigation dated 4/27/2015. Title: REVISED ROI_Morter, DIA-2014-00052.pdf

[4] MORTER AGY ### refers to the Agencies response to my 2020 Discovery Request for production. These files are contained on the enclosed CD.

administered four separate tests concerning mishandling classified information and unauthorized foreign contacts. All tests were deemed No Opinion. During the March 25, 2011 exam, Subject was administered one test concerning mishandling classified information and unauthorized foreign contacts. This test was deemed No Opinion. During the January 31, 2012 exam, Subject was administered three separate tests concerning mishandling classified information and unauthorized foreign contacts. Two tests were deemed No Opinion. On the last test Subject displayed Significant Response to the questions." No signs of deception were indicated. It is important to note that after this ordeal, I experienced a nervous breakdown and had to remain in the hotel lobby for an extended period of time before driving back to work. (MORTER AGY 0081-82 and ROI 048-50)

5. In a briefing to his superiors, the SOCOM SSO, Frank Branch, references an email from Karl James to himself and Don Kendrick on February 27, 2012, "John Morter's poly results don't qualify as 811. He passed: espionage, sabotage, and terrorism, but not handling. Made no admissions. (DIA MORTER 0250[5])

6. In early June 2012, I authored a memorandum that explained my concerns with the question about inappropriately handling classified information, and the reasons why I felt it was causing me to be anxious and apprehensive. (ROI 052-53) This memorandum was later included in the August 3, 2012 Agent Report. (ROI 073)

7. On June 26, 2012, I was ordered to travel to DIA Headquarters for more interrogations and polygraphing. From 1300 to 1500, I answered every question honestly, and waited to leave until the polygraph operator officially terminated the examination and dismissed me. The official polygraph report states, "Subject did not complete the referenced examination with no reportable information developed." No signs of deception were noted, but it was stated that, "additional polygraph testing is dependent upon the outcome of the referral." (MORTER AGY 0083)

8. On August 3, 2012, in response to that referral, DIA Special Agent Koeningsbauer filed a report which included an interrogatory, a list of things that I felt were causing me concerns with the polygraph, and my sworn statement. In this statement, I described in detail my uncontrollable anxiety and apprehension over the fear of failing the polygraph. I reported that I had been experiencing nightmares about being interrogated and had been fretting over this situation for

[5] DIA MORTER #### refers to the Agencies response to my 2015 Discovery Requests for production. These files are also contained on the enclosed CD.

months. Also noteworthy in this report, is the fact that I openly acknowledged that I had researched the polygraph because I wanted to know how innocent people could supposedly "fail." Through my research, I concluded that every time I was asked the question that I had previously allegedly "failed," I panicked because of the consequences of failing, which then produced a false positive. SA Koeningsbauer coordinated with another Supervisory Special Agent from the Washington DC Field Branch, who opined, based on the absence of any wrongdoing, and my failure to provide additional reportable information that would warrant further polygraph testing, this investigation should be closed in the files of this office. (MORTER AGY 069-71)

9. On February 8, 2013, a Security Review and Evaluation Record reports that the investigation is closed. It states, "Continue TS/SCI with no further action. SUBJ passed the espionage, sabotage and terrorism questions but is hung up on mishandling and unauthorized foreign contacts. He made no relevant admissions. SUBJ, though, has concerns regarding the practice in their office concerning the transfer of classified data. To help alleviate these types of problems and address potential areas of concern, SOCOM JICSOC leaders have directed JG computer support personnel to create a workstation that has all the necessary applications on the JWICS. SUBJ has had no security violations/infractions and appears to be a security conscionable worker." (MORTER AGY 0160)

10. On February 13, 2013, an Agency Adjudicative Action on OPM Personnel Investigations On-Line File Release Request was generated and it was determined that any issues related to my security clearance/eligibility determination were "minor and the conduct or issue, standing alone, would not be disqualifying." (MORTER AGY 0125-127)

11. On March 13, 2013, a Counter-Intelligence Review and Risk Assessment (CIRA) was submitted by the Agency's Chief, Force Protection Branch. In it, he concludes that "based on the written concerns of the adjudicators found in the file, there is not sufficient information to render a decision on SUBJECT's suitability to maintain HIS security clearance." (MORTER AGY 0148-150)

12. On March 16, 2013, a Security Review and Evaluation Record was created with a recommendation to "reopen the investigation to verify Subject's hard copy reporting of foreign contacts. Also, interview Subject's supervisors and co-workers to verify the handling and transfer protocols with regards to transferring information between the SIPRNET and JWICS and to

ascertain if HE was certified by HIS command to be a transfer agent." (MORTER AGY 0163-0165)

13. In May 2013, the DIA's Security Investigations conducted a follow-up activity with the Special Security Office (SSO) at USSOCOM regarding my foreign contact reporting and status as a "trusted agent," who is authorized to transfer data between classified networks. According to the SSO, SUBJECT was an ITA, and any foreign contact reports by SUBJECT would go through DIA's office of security and USSOCOM did not have any other foreign contacts reports on file for SUBJECT. (DIA MORTER 0378)

14. On September 19, 2013, in an email exchange between Pamela Prewitt (DIA) and Frank Branch, Branch requests a DIA Instruction regarding the polygraph. He also requests any polygraph reports. He states, "Thanks again I know you and your team are working through 170 cases and I'm only concerned with two." Prewitt responds, "Frank: Attached is the final draft of the DIA Instruction, "Insider Threat Detection and Mitigation" for your information. Relevant paragraphs to our discussion this morning in 4.4. I have been unable to pull the string on MORTER today due to optempo, but it is on my "to do list" for tomorrow." (DIA MORTER 0161)

15. On October 7, 2013, Mr. William Lanham, a DIA employee working for USSOCOM's Counterintelligence and HUMINT Intelligence Division, notified me that my access to classified information was being suspended, and that I would be relocated to a position outside of the Sensitive Compartmented Information Facility (SCIF). (ROI 37; ROI 40)

16. On November 3, 2013, DIA's Office of Security coordinated with USSOCOM and the DIA Insider Threat Program (InTP) Staff Psychologist to schedule an interview with me to determine whether psychological factors were responsible for my inability to "successfully complete portions of previous CSP examinations." (DIA MORTER 0210)

17. On November 5, 2013, for approximately an hour, I met with Dr. Joe Soo-Tho, the InTP Staff Psychologist. I presented my theory for my inability to "pass" the polygraph and backed it up with printouts from some of the leading psychologists on polygraph research. I also presented a copy of DoDI 5210.91 and a recently completed study by the National Academy of Sciences. Dr. Joe keyed in on this development and asked if he could have the printouts. He even had me initial the corners of each page like it was evidence of something. His line of questioning became increasingly accusatory, as he insisted that I was hiding something. This caused me to suffer an

emotional breakdown and after witnessing it, he advised me to get professional counseling. When I informed him that I had previously sought help with my mental issues, he requested that I send him copies of my medical records. (ROI 153-154)

18. Upon returning to work on November 14, 2013, I submitted a trip report which included details of my meeting with Dr. Soo-Tho. (ROI 048-50) I also provided my medical records to my supervisor, Timothy Grimes, Chief, GEOINT Branch, who in turn forwarded the documents to Frank Branch, Chief, USSOCOM Special Security Office (SSO), who in turn forwarded the documents to Dr. Soo-Tho and DIA's Office of Security. (ROI 385-386.) I also provided a letter to Grimes that was written by a licensed psychologist that recommended that I be allowed to use sick leave to address the symptoms of my disorders and prevent the deterioration of my overall functioning. (ROI 189, 327)

19. On December 2, 2013, based solely on the previously mentioned interview and my medical records, K.M. (Joe) Soo-Tho, PhD, submitted a psychological evaluation. (MORTER AGY 087-90) He explained that the primary purpose of the InTP psychological evaluation was to; (1) assess and rule out any medical and/or psychiatric reasons underlying SUBJECT's inability to successfully complete the CSP examinations; (2) explore and address psychosocial factors which may have adversely impacted the outcome of these examinations; and (3) identify appropriate interventions, if any, to support mitigation strategies. Under "Impressions," the doctor noted that "A persistent degree of mild to moderate anxiousness was noted in SUBJECT's demeanor throughout the interview: this nervousness became more prominent when he was being confronted and when he was sharing his fears about the potential adverse impact of his unsuccessful CSP examination on his professional future. Under the heading "Psychological/Emotional Conditions," he notes that I reported to him that I had been suffering from anxiety for a long time. Dr. Soo-Tho goes on to describe my condition and its symptoms. After reviewing my diagnosis, he explains that my disorder "is associated with a cluster of psychological and emotional symptoms. Individual predisposition and psychological/emotional vulnerabilities are important factors in the occurrence of this condition, as well as the manifestation of symptom type, severity, duration, and prognosis. In order to be diagnosed with this condition, an individual's reactive symptoms or behaviors must be judged to be out of proportion to the intensity of the stressor, and to cause significant functional impairment." Under "Other Relevant Findings," the doctor displays antagonism by claiming that

I "inadvertently revealed" that I had "done extensive research on polygraph examinations." There was nothing inadvertent about it, this was planned – I even had printouts with me to validate what I was saying. He asked if I had ever reported it to anyone else. When I informed him that I had (Item #7 above), he called me a liar and berated me for being a poor self-historian. In his conclusion, Dr. Soo-Tho shows more animosity by asserting that I verbalized intent and demonstrated efforts to subvert the CSP examination. There is no evidence that I ever attempted to "subvert" anything. The doctor was deliberately trying to falsely portray my case by accusing me of something that I simply did not do. He also declares that I would be unlikely to be a suitable candidate for further polygraph testing. Finally, the doctor recommends that my case be widely socialized and referred to SEC-3 for adjudicative review and action.

20. On December 12, 2013, a Defense Intelligence Agency – Agent Report was filed in response to the referral by SEC-3A. The Agent concluded that "based on information provided by the USSOCOM SSSO and the TMC Staff Psychologist, no further investigative action was warranted, and this investigation should be closed in the files of this office." (MORTER AGY 0085-86)

21. On January 29, 2014, the Chief, SSO, USSOCOM sent a "Correction Notice" email to three DIA addressees. In it, he states, "When I asked our Information Assurance section to check on Mr. Morter's status as an Information Transfer Authority (ITA) they initially responded back that He was not. Having reviewed their response I've noted that they misspelled his name "Mortar" not "Morter", "John Morter" is or was in fact at the time of his assignment to the J2 (JICSOC) an ITA. Please correct the record on this account. (MORTER AGY 0040)

22. On January 31, 2014, the Chief, Defense Intelligence Central Adjudication Facility issued a Security Review and Evaluation Record. It reads, "Spouse's loss of employment due to a failed poly and SUBJ's repeated failure to pass the CSP exams, no doubt, have compounded his unfavorable expectations of such examinations and given rise to an increasing degree of anxiety associated with each additional process. His negative attitude toward the poly will only result in continued failures. Although the exam is a condition of employment, there is no current information provided to cast doubt on SUBJ's judgement, reliability, or trustworthiness. SUBJ has been in the intelligence business for 32 years and it may be important to note that, to date, no evidence of nefarious activity and/or improper conduct has been uncovered, and that his work

history has been favorable. Given the above, it is recommended that he be: 1) referred for counseling to address his anxiety associated with the CSP exam; 2) retested (CSP) no sooner than six months from his last CSP examination (**and preferably, following sufficient counseling**); and 3) Continued to be scrutinized via other means (e.g. electronic monitoring, etc.) if deemed viable and realistic." In her handwritten notes, the Chief also states, "Researching the poly program is not an action that warrants revoking clearances, especially if there is a reason. Spouse could not get through her exam and loss (sic) her job. **SUBJ has been diagnosed with an "Adjustment Disorder with Anxiety" and is in counseling. SUBJ should continue counseling and scheduled for another CSP within 6-12 months. Give Subj an Advisory Ltr**." (MORTER AGY 0169-0171) The Advisory Letter is addressed in #23 below.

23. On January 31, 2014, Dr. Soo-Tho composed an email to Steven McIntosh, Pamela Prewitt, David Owen, and Rosemerrie Purkey. In this email, the doctor states, "Just a quick FYI – Per my conversation with Pam just a moment ago, I closed the loop with USSOCOM SSO, Frank Branch. Mr. Branch indicated that he will inform his leadership of DIA SEC-3's declination to take adjudicative action on this case. Mr. Branch further indicated that USSOCOM leadership will probably contact DIA OHR to relay their "loss of confidence" in the SUBJECT, and request the SUBJECT's return to DIA." (DIA MORTER 0367)

24. On February 5, 2014 the InTP Coordinator, Steven McIntosh writes an Insider Threat Mitigation Report. Out of the blue, McIntosh claims "SUBJECT admitted he engaged in extensive and concerted efforts to deliberately subvert the CSP examination process; such behavior contravenes guidelines and expectations regarding standards of conduct for individuals entrusted with national intelligence information." (MORTER AGY 0143-0147) This document refers to the InTP Staff Psychologist's report and states, SUBJECT reported he has suffered from anxiety for a long period of time and has sought the aid of a psychiatrist (NFI). SUBJECT did not provide complete information about any recommended course of treatment or compliance with such treatment. SUBJECT claimed the CSP examination process has exacerbated his anxiety to the degree that he recently sought mental health treatment again (04 November 2013)." What this document does not include is the fact that Dr. Soo-Tho had also stated in his report that he had received diagnosis of anxiety disorder from my doctor.

25. On February 6, 2014 I received an advisory letter from the Chief, Defense Intelligence Central Adjudication Facility (SEC-3.) This letter acknowledges my disability and encourages me to continue counseling/treatment with my psychiatrist. Highlights of this letter include, "**A favorable security decision was made** on the basis of your decision to seek mental health care and comply with treatment recommendations." And "**There is no restriction on your use of disclosure of the information**." (ROI 035) (A better copy can be found in Complainant's 2015 Motion to Move for Summary Judgment, Exhibit 9, and Agency's Motion from the same year, Exhibit C)

26. On February 6, 2014, Michael Teegarden from the DIA, Office of Security, Personnel Security Division (SEC-3) sends an email to USSOCOM SSO, Frank Branch (copied is Karen McCord) and says, "Frank, Request your assistance in issuing the attached Advisory Letter. Once issued, please send me a copy to close out this security action." (DIA MORTER 0170)

27. On February 7, 2014, Frank Branch sends an email to RDML Sharp, USSOCOM Director of Intelligence (J2) (with the Advisory Letter – MORTER, John.pdf attached) and says, "Attached you'll find the advisory letter I will be providing Mr. Morter today. I have also requested from DIA copies of the polygraph reports, or at a minimum the exact language used to describe the previous reports." Sharp responds three hours later. Also, copied on this email are Thomas Gendron, William Lanham, Lilliam Martinez, William Kendrick, Shawn Nilius, and Matthew Wallace. Sharp states, "Thanks Frank… Ensure you're coordinating with J2X and with JIC leadership so that they're aware. DCDR is tracking this as one of our ongoing CI issues. Will need to update him. I may have the opportunity to give him a heads up at one of my meetings with him today. 15 minutes later, Branch replies to all, "Yes Sir. "All on the CC line please don't distribute the advisory letter further. I will be contacting Mr. Morter and briefing him today, we need to protect his privacy while ensuring that our shared security reporting responsibilities are met." An hour and a half later, Sharp replies to all, "I discussed this briefly with the DCDR. Although DIA has made this determination, he does not want to authorize access into the SCIF. Not without further feedback and recommendation from the CI team (meaning Lanham and J2X.) (DIA MORTER 0167-69)

28. On February 10, 2014, Steven McIntosh convenes a 'virtual Insider Threat Mitigation Panel (ITMP)' to address the John Samuel Morter matter. There were five DIA recipients of this

email, but their names were redacted. Pamela Prewitt, Soo-Tho Kok Mun and two other DIA personnel whose names were redacted were also CC'd on the email. The ITMP was convened "primarily to address whether or not the ITMP recommends, as an initial strategy, to reassign SUBJECT from the US Special Operations Command's (USSOCOM) Joint Intelligence Operations Center (JOIC) to DIA Headquarters. If the ITMP concurs, OHR will initiate the permanent change of station (PCS) action." Each member of the ITMP was requested "to notify by return email whether or not you concur with the proposed course of action to officially reassign SUBJECT to DIA HQ." (MORTER AGY 0102)

29. On February 12, 2014, the Chief, Personnel Security Division (SEC-3) replies to the afore-mentioned email, "I non-concur with the recommendation to PCS Mr. Morter to the NCR. Justification: This only transfers an unresolved CSP to another element and I believe SOCOM has the ability to monitor his activities. Mr. Morter was seeking counseling for his anxiety and I believe he should be given the opportunity to continue this treatment and be retested in 6 – 12 months. Also, regarding paragraph #8 on the attached report – the attached email is a correction that the SSO from SOCOM wanted added to the SEC4 report. Mr. Morter was appointed as a "Information Trust Agent." (MORTER AGY 033-34) 12 minutes later, Dr. Soo-Tho forwards the SEC-3 Chief's email to McIntosh and Prewitt with the comment, "Are you kidding me? SUBJECT is a DIA employee who has been unsuccessful in completing his CSP examinations due, in large part, to his extensive efforts to subvert CSP testing. IMHO, DIA is in no position to transfer this risk to USSOCOM, especially when USSOCOM leadership (a three-star general, no less) has clearly stated and taken action to show their loss of confidence in this SUBJECT. Further USSOCOM had made it very clear that they want the SUBJECT removed from their facility; unless I am grossly mistaken, DIA is in no position to insist that SUBJECT remain." (MORTER AGY 0033)

30. On February 18, 2014, aware of the fact that the command is about to violate approved and relevant national policy, Frank Branch, SSO, USSOCOM, composes a Memorandum for the Deputy Director DJ2, Subject: Security Recommendation for Access to Classified Information. In his letter, Branch references DoDI 5210.91 in that the regulation states, "No unfavorable administrative action (to include access, employment, assignment, and detail determinations) shall be taken solely on the basis of either a refusal to undergo a PSS examination or an unresolved PSS examination." He states that my situation was referred to the Defense Intelligence Central

Adjudication Facility and on 6 FEB 14, DICAF released an advisory letter to Mr. Morter positively adjudicating his clearance but advising him of his security responsibilities. Mr. Branch also provides an SSO Recommendation: While it is apparent from numerous interactions with Mr. Morter, he has significant hostility with the polygraph examination process, other information concerning his spouse's loss of clearance and employment and his experiences may be mitigating factors. Additionally, the command can limit his access to classified information if the commander and SIO believe information is at risk. The Staff Judge Advocate should be brought in to assess the different regulations and policies governing Morter's activities and ensure the command is protected from lawsuits stemming from the potential inequitable administration of these policies. (DIA Morter 0246 – part 1, DIA MORTER 0226 – part 2)

31. On February 20, 2014, my supervisor, Tim Grimes composed a Memorandum For the Record, SUBJ: Supervisor Comments concerning Mr. John "Sam" Morter. Mr. Grimes provides extensive background and details of my exemplary record. He also corroborates my claims that we were given conflicting guidance on moving and marking data from different systems. Additionally, he remarks how I had been under a lot of stress, I was seeing a mental health specialist, and I was resolved to letting the process play out. (DIA MORTER 0265-266)

32. On March 12, 2014, in an email composed by Kelly Sanborn, DIA, Senior HR representative to CCMDs and sent to Dwayne Houston and CC'd to Deborah Hartman, Ann Danner, and Frank Branch she states, "I wanted to follow up with you regarding the security issue with SOCOM employee, John Morter. I have spoken with Security to get some of the background information and their perspective. From what I understand, the mitigation panel just concluded, and Security determined it would be in the Agency's best interest to bring the employee back to HQs into a position of less risk." Houston then forwards the email to Mark Anderson, Shawn Nilius, Keith Lawless, Ann Danner, and Frank Branch saying; "Per our discussion this afternoon, HR is working to send Morter to DIA HQs. However, Deb Hartman has agreed to place this action on hold until we get a final decision from the DCDR. In the meantime, they still want to be proactive and get things set up in case we decide to move forward. In that light, Ann will be getting with you to obtain the requested information below." (MORTER AGY 0623-625)

33. On April 29, 2014, Steven McIntosh, DIA Insider Threat Program Coordinator composed an email to Keith Lawless and Dwayne Houston, and CC'd Pamela Prewitt, Gloria Smith, Kelly

Sanborn, David Owen, Rosemerrie Purkey, Soo-Tho Kok Mun and Kelly Sanborn. In this email, McIntosh provides a synopsis of the issue as well as background data regarding DIA's InTP. Most importantly to my claim that the decision makers in my case knew about my disability, McIntosh states, "SUBJECT reported he has suffered from anxiety from a long period of time and has sought the aid of a psychiatrist. SUBJECT claimed the CSP examination process has exacerbated his anxiety to the degree that he recently sought mental health treatment again (04 November 2013.)" Remarkably, the synopsis also includes a reference to the policy regarding Polygraph and Credibility Assessment Procedures (DoDI 5210.91) where "if an employee fails to successfully RESOLVE all relevant questions, the Head of the relevant Department of Defense Component may temporarily suspend an individual's access to controlled information and deny the individual assignment or detail that is contingent on such access, based upon a written finding that, considering the results of the examination and the extreme sensitivity of the classified information involved, access under the circumstances poses an unacceptable risk to national security. Such temporary suspension of access may not form the part of any basis for an adverse administrative action or an adverse personnel action." Removing an individual from his position of 14 years and forcing him to relocate to another less sensitive position most certainly qualifies as an adverse administrative action and an adverse personnel action. McIntosh goes on to state that, "On 10 February 2014, a DIA Insider Threat Mitigation Panel was convened. After a thorough discussion of the facts and circumstances in this matter, the Panel concurred with the following recommendations: As an initial insider threat mitigation strategy, SUBJECT will be returned to DIA HQ in order to discontinue the transference of risk to USSOCOM." (DIA MORTER 0105-109)

34. On May 12, 2014, I was verbally counseled by Shawn Nilius that the Command decided not to retain my services[6]. (DIA MORTER 0102)

35. On May 12, 2014, I initiated complaints to the SOCOM OIG (DIA MORTER 000336) and the DIA OIG that SOCOM was violating approved and relevant policies regarding the use of the polygraph. SOCOM OIG informed me that because I was a DIA employee, I would need to address

[6] The basis for this decision clearly originated from the ITMP actions and decisions.

the matter with DIA. The DIA OIG consulted with someone in the DIA Office of Security and determined that this was "not a matter for the IG." (DIA MORTER 0293)

36. On May 13, 2014, I requested a statement in writing regarding the decision to move me. (DIA MORTER 087) This resulted in another email from McIntosh to Lawless and Houston, and CC'd to Prewitt, Owen, Purkey, Brentin Evitt, Karen McCord, Sanborn, and Mary Byers. This email included as an attachment, the "Reassignment Action" letter, and requested SOCOM's assistance to personally deliver the memorandum to me. The memo outlined the rationale for the reassignment. (DIA MORTER 088) On May 27, 2014, I received this letter. (ROI 037)

37. On June 4, 2014, I composed a "Notice to Appeal" and sent it via email to Grimes, Nilius, Sharp, Branch, Lanham, Howell, Simpson, and Evitt. (ROI 041-43) Stephen Norton, DIA Director of Security sent me a letter acknowledging their receipt (ROI 045), as did Nilius (DIA MORTER 000114), and Howell (DIA MORTER 000316.) In my Appeal, I stated, "It is my contention that my polygraph testing experience had been compromised from the beginning - undoubtedly from a classic "guilt grabbing" condition - and resulted in a false positive on the question involving the handling of classified Information. Also significant, is the fact that I have been clinically diagnosed with an anxiety disorder - a medical condition that unquestionably invalidates the readings of the test, and one that could identify the decisions against me as discriminatory, based on Equal Employment Opportunity laws. Grimes also acknowledged that he, Nilius, Sharp, Branch and Lanham were recipients of the Appeal. (ROI 329) originated

38. On June 13, 2014, I contacted the Agency's EEO department and filed a complaint, (ROI 000033) In the complaint, I claimed that "For the past eight months, I have been subjected to a series of discriminatory actions that have severely impacted my employment rights and opportunities. In addition to the direct violation of DoD regulations, I believe that I am being discriminated against due to a mental disability that essentially invalidates measurements obtained through the repetitive use of the polygraph examination. My inability to perform satisfactorily on this test is a direct result of the symptoms associated with the mental condition known as anxiety disorder. These symptoms include motor tension, autonomic hyperactivity, apprehensive expectation, irrational fear and severe panic attacks. I have been informed that the actions to suspend my security accesses, terminate my employment at the United States Special Operations Command and force my reassignment to Headquarters, Defense Intelligence Agency (DIA) are a

direct result of my inability to "successfully pass" the Counter-Intelligence Polygraph and Credibility Assessment (PCA). I requested reasonable accommodations to allow me to return to my official duty position and to suspend the pending reassignment action until the polygraph issue is resolved. On June 17, 2014, I was initially interviewed by an EEO counselor, and on June 18, 2014 I was notified of my rights and responsibilities regarding the processing of my EEO Complaint. I waived my right to remain anonymous during the informal process and elected to participate in Alternative Dispute Resolution.

39. On June 17, 2014, I received an email from Elton Howell, Deputy Assistant IG for Investigations, DIA OIG. In it, Howell states, "I have reviewed your notice to appeal and all documents associated that you sent to myself and the hotline. Again, as this was an Agency decision to suspend and/or revoke an individual's security clearance/access, any appeal should go the Agency head responsible for the appeal. In your particular matter, we recommend you file your appeal with the Director of Security (Mr. Stephen Norton), and if you do not believe that appeal was properly addressed, you can always file your appeal with the Director, DIA." (DIA MORTER 000316)

40. On June 18, 2014, I was informed that Alternate Dispute Resolution was inappropriate with regards to the concerns that I brought forth, and consequently, I immediately entered the formal EEO complaint process. (ROI 000031)

41. The Agency has conceded that I am an individual with a disability, as I was diagnosed with a general anxiety disorder on or about October 17, 2013. The Agency also has conceded that I was a qualified for the position that I held, and that the management-directed reassignment from USSOCOM to DIA Headquarters qualifies as an unfavorable administrative action. (Agency MSJ, p. 8)

42. The Agency conceded that Timothy Grimes was aware of my disability of anxiety disorder and post-traumatic stress disorder. (Agency's 2015 MSJ, p. 8, ¶ 2)

43. The Agency conceded that Frank Branch was aware of my disability of anxiety disorder. (Agency's 2015 MSJ, p. 8, ¶ 2)

44. The Agency conceded that Dr. Joe Soo-Tho was aware of my disability of anxiety disorder. (Agency's 2015 MSJ, p. 8, ¶ 2)

45. The Agency conceded that Karen McCord was aware of my disability of anxiety disorder. (Agency's 2015 MSJ, p. 8, ¶ 2)

## IV. STANDARD OF REVIEW

The applicable standard of review from a final agency decision issued without a hearing is *de novo* review. 29 C.F.R. § 1614.405(a). In accordance with EEOC Management Directive 110, Chapter 9, § VI, the de novo standard of review requires that the EEOC (1) examine the record without regard to the factual and legal determinations of the previous decision maker; (2) review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties; and (3) issue its decision based on its own assessment of the record and its interpretation of the law. *See Boylan v. U.S. Postal Servic*e, EEOC Appeal No. 01A53287 (March 28, 2006); *Dabney v. U.S. Postal Service*, EEOC Appeal No. 01A50466 (February 28, 2006).

## V. SUMMARY JUDGMENT STANDARDS

The following circumstances dictate when issuing a decision without a hearing is improper. First, a decision without a hearing should not be issued when there are genuine issues of material fact. *See* 29 C.F.R. § 1614.109(g); Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. *Anderson*, 477 U.S. at 248. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. *Anderson*, 477 U.S. at 255.

Second, summary judgment should not be issued if the investigative record has not been adequately developed. *See Petty v. Dep't of Def.*, EEOC Appeal No. 01A24206 (July 11, 2003). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is need for strident cross examination and summary judgment on such evidence is improper." *Pederson v. Dept. of Justice*, EEOC Request No. 05940339 (February 24, 1995). The hearing

process is intended to be an extension of the investigative process, designed to "ensure that the parties have a fair and reasonable opportunity to explain and supplement the record and to examine and cross-examine witnesses." *See* EEOC MD-110, Ch. 6, p. 6-1; *see also* 29 C.F.R. §1614.109(c)-(d). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives complainant of a full and fair investigation of her claims." *Bang v. U.S. Postal Service*, EEOC Appeal No. 01961575 (March 26, 1998).

Third, a decision without a hearing cannot stand if facts first have to be found to do so. *Id*. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Anderson*, 477 U.S. at 255. Fourth, there should not be any ruling of summary judgment without a hearing unless it is clear that the party opposing the ruling is given: (1) ample notice of the proposal to issue a decision without a hearing; (2) a comprehensive statement of the allegedly undisputed material facts; (3) the opportunity to respond to such a statement; and (4) the chance to engage in discovery before responding, if necessary. *See Petty* at EEOC Appeal No. 01A24206.

Additionally, while proving pretext "may be complainant's ultimate burden of proof on the merits of his case, it is not his burden with respect to surviving a motion for summary judgment." *See Bignall-Kreckel v. Dept. of the Army*, EEOC Appeal No. 01984132 (April 18, 2001).

## VI. ARGUMENT

### A. There Are Genuine Issues of Material Fact

Summary judgment should not be issued when there are genuine issues of material facts based on the contradictory statements between Complainant and Agency witnesses as well as internally inconsistent statements by Agency witnesses. A decision without a hearing cannot be issued when there are genuine issues of material fact. *See* 29 C.F.R. § 1614.109(g); Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Factual disputes can come from inconsistencies in the agency's explanation. *See Schmidt v. U.S. Postal Service*, EEOC Appeal No. 01A10581 (2001). Summary judgment is inappropriate where there is a fact agreed upon by the parties, but there are additional facts which demonstrate the complainant was aggrieved. *See Wilson v. U.S. Postal Service*, EEOC Appeal No. 01A10516 (2001). Inferences drawn in favor of the nonmoving

party can create genuine issues of material facts in dispute. *See Levingston v. Department of the Treasury*, EEOC Appeal No. 0120091224 (2009). Summary judgment may be inappropriate where complainant specifically testifies that an employer was specifically notified of his protected EEO activity. *See Perez v. U.S. Postal Service*, EEOC Appeal No. 01986162 (2001). Summary judgment may not be appropriate where the testimony of complainant and the manager were contradictory. *See Murray v. U.S. Department of the Army*, EEOC Appeal No. 01A10164 (2001).

The Administrative Judge is mistaken to assume that I am simply making unfounded assertions that are based on my desired application and interpretation of the documents. The judge disregards the material facts – which are supported by relevant documentary evidence. Rather than simply take the Agency's word that they did not violate any national policies concerning the use of the polygraph, a competent authority must testify and provide an interpretation of the regulations to determine if the Agency and USSOCOM were in accordance with the approved and relevant regulations regarding the use of the polygraph.

Based on the evidence of record, I will prove without a doubt that the Agency and USSOCOM knew of my disability and refused to grant me reasonable accommodations. These accommodations were not only reasonable but **required** by the approved and relevant regulations. I will also show that I was treated disparately and disproportionately.

Therefore, summary judgement is inappropriate because there are several inconsistencies in the Agency's testimony, and there are several genuine issues of material fact. These include, but are not necessarily limited to the following:

**Issue of Fact 1: Whether the Agency and USSOCOM correctly followed the approved and relevant policies regarding the use of the polygraph.** (As explained in Administrative Judge Rodriguez' Decision & Order Entering Judgment)

As I referenced in my cross motion and objection to the Agency's Motion for Summary Judgement (MSJ), Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, "Establishes the single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." It is important to note that in the "conditions that could raise a security concern and may be disqualifying" in each of the 13 adjudicative guidelines, there is no mention of a requirement to "successfully complete" the polygraph. In fact, in Appendix A, *National Security Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, it is stated in the introduction:

*"(c) The U.S. Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in making a national security eligibility determination. No negative inference concerning eligibility under these guidelines may be raised solely on the basis of mental health counseling.* ***No adverse action concerning these guidelines may be taken solely on the basis of polygraph examination technical calls in the absence of adjudicatively significant information****."*

In this motion, I also presented an exhibit (E), *Department of Defense Polygraph Program Process and Compliance Study*. The Principal Deputy, Under Secretary of Defense for Intelligence (PDUSD(I)) commissioned this study in June 2011 to assess the practices, methodologies and compliance with existing policies of the nine Department of Defense (DoD) Polygraph Programs and to assess the DoD component's use of polygraph examination results, with particular emphasis on determining compliance with DoD Instruction (DoDI) 5210.91, "Polygraph and Credibility Assessment (PCA) Procedures." Several of the observations in this report are extremely relevant to my case.

For example,

"*DoDI 5210.91, Enclosure 4 provides guidance regarding steps the DoD Component may take in those cases where the individual fails to resolve a PSS, including additional polygraph testing, referral for a counterintelligence (CI) investigation, and/or temporary suspension of access and denial of the individual assignment or detail that is contingent upon such access. Enclosure 4 clearly states that temporary suspension of access may not be part of any basis for an adverse administrative or personnel action*."

And,

"*Our random sampling of cases at the DoD Intelligence Community (IC) elements and review of their procedures determined that, if no other disqualifying information is uncovered and all that remains is the series of SR/NO polygraphs, then the subject is placed in a conditional clearance status and remains in access*."

Also,

*"Our interviews and file reviews at the DoD CAFs and components determined no instance of adverse administrative actions or adverse personnel actions being taken against DoD-affiliated personnel whom either refused to take or failed to successfully complete the polygraph examination, except in those situations when the subject made pre-test or post-test admissions to the polygraph examiner. All eleven DoD CAFs are in full compliance with current requirements found in DoDI 5210.91 and in particular the requirement that no unfavorable administrative action will be taken solely on the basis of either a refusal to undergo a PSS examination or an unresolved PSS examination, except as permitted in sections 6 and 7 of the instruction (i.e. denial of access or assignment due*

*to refusal to take a PSS for positions requiring access to Top Secret or Special Access Programs) Interviews of DoD adjudicative and security personnel determined that all were completely conversant on DoD policy regarding proper use of the polygraph and polygraph-derived information. Further, a random review by the Study Team of DoD CAF adjudicative files containing Significant Response (SR)/No Opinion (NO) polygraph findings confirmed that no adjudicative or administrative actions were taken solely upon the unresolved polygraph"*

*"It is noted that the study team was made aware of one situation where adverse personnel action was taken against a DoD employee after he did not successfully complete the polygraph examinations and apparently no pre-test or post-test admissions were made. This situation occurred prior to this study's scope period and resulted in the Secretary of Defense granting the employee's appeal. Our study efforts did not disclose any similar occurrences, and the policies and procedures contained in DoDI 5210.91 afford adequate guidance that clearly prohibit such adverse administrative/personnel actions."*

The primary directive for the use of the polygraph within the Department of Defense is DoDI 5210.91, Polygraph and Credibility Assessment (PCA) Procedures. Relevant instructions are found in Enclosure 3, PCA PROGRAM. Section 2. GENERAL PROGRAM PROCEDURES. Item g. (P.11) - PCA examinations are a supplement to, not a substitute for, other methods of screening or investigation. No unfavorable administrative action (to include access, employment, assignment, and detail determinations) shall be taken solely on the basis of either a refusal to undergo a PSS examination or an unresolved PSS examination, except as provided in sections 6 and 7 of Enclosure 4. In his decision, the AJ misreads this critical portion of the regulation and makes the statement that I did not cite Sections 6 and 7. This is not true. For the record:

Enclosure 4, POLYGRAPH EXAMINATIONS. Section 6. REFUSAL TO TAKE OR COMPLETE A PSS. (p.22) DoD-affiliated personnel who refuse to take or complete a polygraph examination, and are in positions designated as requiring a PSS polygraph examination as part of determining **initial** eligibility for access to Top Secret, SAP, or other sensitive intelligence or operational information or for **initial** assignment or detail to the CIA or other IC elements, may be denied access, assignment, or detail.

Enclosure 4, POLYGRAPH EXAMINATIONS. Section 7. FAILURE TO RESOLVE A PSS. (p.22) DoD-affiliated personnel in positions cited in section 6 of this enclosure who are unable to resolve all relevant questions of a PSS shall be so advised. The results of the examination shall be forwarded to the requesting agency.

a. If, after reviewing the examination results, the requesting agency determines that they raise a significant question relevant to the individual's eligibility for a security clearance or continued access, the individual shall be given an opportunity to undergo additional examination.

b. If the additional examination fails to resolve all relevant questions, the Head of the DoD Component may initiate a CI investigation in accordance with DoD policy.
c. Additionally, the Head of the relevant DoD Component may temporarily suspend an individual's access to controlled information and deny the individual assignment or detail that is contingent on such access, based upon a written finding that, considering the results of the examination and the extreme sensitivity of the classified information involved, access under the circumstances poses an unacceptable risk to the national security. Such temporary suspension of access **may not** form the part of any basis for an adverse administrative action or an adverse personnel action.
d. The individual shall be advised in writing of the determination, that the determination may be appealed to the Head of the relevant DoD Component, and that his or her final determination is conclusive.

In his Decision and Order & Order Entering Judgment (p.5-12), the AJ incorrectly addressed the OFO's five questions. First, he mistakenly assumes, based on the Agency's testimony, that there is a genuine requirement for every individual assigned to USSOCOM to "pass" the polygraph. He then explains that "it is possible for one to temporarily work at USSOCOM while attempting to successfully complete unresolved PCAs. However, there is nothing to support a contention that such attempts to resolve PCSs in order to maintain a Top-Secret security clearance and have access to USSOCOM is a process intended to continue *ad infinitum*." In fact, as is identified above, the ordered process is to initiate a CI investigation if the second examination fails to resolve all relevant questions. CI investigations were conducted in July 2012 and January 2014 and were subsequently terminated due to an absence of any wrongdoing. Once again, the Agency failed to follow the approved and relevant regulations and forced me to endure a third, fourth, and fifth polygraph examination before deciding to revoke my clearance and force me into an involuntary reassignment.

Also, fundamentally relevant to my case is DoD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)* (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit J). The purpose of this regulation is to "Assign responsibilities and prescribes procedures for investigations of individuals seeking to hold national security positions or perform national security duties who are required to complete Standard Form (SF) 86, "Questionnaire for National Security Positions," for personnel security investigations (PSIs.)" Section 7.12. Polygraph and Credibility Assessment Procedures (p.43), states,

> b. Except as authorized by DoDI 5210.91, no unfavorable national security eligibility determination will be taken based solely on a polygraph examination that is interpreted as indicating deception or is inconclusive. Refusal to take a voluntary polygraph will be given no consideration, favorable or unfavorable, when making a national security eligibility determination. (Complainant's 2020 Motion and Objection to the Agency's MSJ – Exhibit J)

In his interrogatory, Mr. William Lanham, the DIA Insider Threat Program liaison to USSOCOM and is the person primarily responsible for briefing the SOCOM DCDR about my status as a risk toward USSOCOM's classified information, describes an entirely different scenario. He claims that:

> *"All employees at SOCOM go through the exact same process. "If you cannot complete the exam and there are no pre-test or post-test admissions, you are rescheduled for a follow-on exam. If that exam concludes with the same result, the individual is referred for a 3rd attempt. If after that 3rd attempt, the individual still cannot complete the exam they are sent to my office for a discussion to determine if a better understanding of the tool and its utility might assist the individual in getting through the exam. Based on that discussion **we** generally refer the individual to the parent origination/service for additional support. In the case of a DIA employee **we** refer the individual for psychological screening through their Insider Threat Program Office. Based on the results of that discussion **we** recommend mitigation strategies to limit access to classified information while simultaneously attempting to resolve the identified problem. Once the security team made up of my staff and the Insider Threat Program Office at DIA are satisfied with the progress we recommend a final exam. If the individual passes, all is forgotten. If not, **we** brief the case to the USSOCOM DCDR who makes the final determination as to whether to assume risk associated with having the individual maintain access to SOCOM's classified information. USSOCOM has no impact on the individual's retention with DIA or his overall clearance adjudication. **We** simply remove him from **our** spaces and away from **our** information."* (ROI 348, Q.16)

The use of first-person plural pronouns in this context indicates that Mr. Lanham indeed considered himself to be an integral part of the decision to take unfavorable administrative actions against me. In fact, it appears that his input was the deciding factor.

In his interrogatory, Mr. Steven McIntosh claims that,

> *"DIA employees who are unable to successfully complete the CSP examination remain DIA employees and may be relocated to DIA Headquarters, or if already assigned to DIA Headquarters, they may be aligned to a less sensitive position commensurate with their grade."* (ROI 336)

Also, Mr. McIntosh reveals discriminatory animus when he states:

> *"As the DIA Insider Threat Program Coordinator, I make the recommendation to relocate and/or realign DIA employees who do not successfully complete the CSP examination. As such, I am aware of DIA employees who were relocated to DIA Headquarters or realigned to another DIA position within DIA Headquarters as a result of their inability to successfully complete the CSP examination. Claims of disability were not presented in these cases; however, **if a claim of disability was presented, it would not have altered the outcome** as the issue is the DIA employee being unsuccessful in*

*completing the CSP examination and presenting a threat, risk, or vulnerability to national security information and operations."*

Finally, when asked if I had complained to anyone in management that the actions were unjustified, Mr. McIntosh states:

*"Complainant filed a "Notice to Appeal," dated 4 June 2014, addressed to "Whom it may concern," which detailed Complainant's belief the reassignment action was an adverse action and therefore unjust. Complainant's Notice to Appeal was provided to Stephen R. Norton, DISES, Director of Security, who also serves as DIA's Designated Senior Official for the Agency's Insider Threat Program. DIA also received a Congressional Inquiry, dated 15 August 2014, from Representative Gus M. Bilirakis regarding Complainant's appeal to DIA's decision to reassign Complainant to DIA Headquarters."*

And when asked, what was management's response? He stated:

*"Complainant was returned to DIA Headquarters and on 4 August 2014, and interviewed by a representative from the Investigations Division, Office of Security; no additional information was developed regarding Complainant's inability to successfully complete the CSP examination. Complainant agreed to take another CSP examination which was administered on 5 August 2014. Complainant failed to successfully complete the CSP examination. At the request of the Director of Security, the DIA Special Security Office at U.S. Central Command (USCENTCOM) was directed to obtain USCENTCOM's position regarding a proposed mitigation strategy of realigning Complainant to a DIA Academy for Defense Intelligence (ADI) position physically located within the USCENTCOM facility at MacDill AFB. USCENTCOM would have to accept risk and monitor Complainant's activities within USCENTCOM spaces. On 12 August 2014, the USCENTCOM Vice Director for Intelligence declined to accept the risk of having Complainant realigned to a DIA position within USCENTCOM facilities due to Complainant's inability to successfully complete the CSP examination. On 13 August 2014, the Director of Security concurred with the course of action to continue the administrative process to reassign Complainant to a position at DIA Headquarters."*

These inexplicable failures to follow the approved and relevant policies and procedures is material because they have the potential to affect the outcome of the case as to determining the veracity of the Agency's "legitimate, non-discriminatory" reasons for its actions. Summary judgment in favor of the Agency is improper in light of this material fact in dispute.

**Issue of Fact 2: Whether the Agency and USSOCOM correctly followed the approved and relevant policies regarding the suspension of my security clearance and subsequent taking of unfavorable administrative actions.** (Administrative Judge Decision & Order Entering Judgment, p. 11-12, 14)

As explained in the OFO remand decision, "some background information concerning the dismissed claim would be helpful to give context to the accepted claims." The Agency has provided various explanations for their actions, but it is indisputable material fact that on October 8, 2013, I was physically removed and prohibited from working on or otherwise accessing any work at USSOCOM's SCIF when my GREEN badge was taken, and I was issued a RED badge and assigned to work in an UNCLASSIFIED environment. Essentially, this is when my Top-Secret Security Clearance was suspended. Throughout the discovery periods in this case, I have requested documentation from my Personal Security files, both from HQ USSOCOM's Security Management Office and the Special Security Office, specifically regarding any changes in my Security Clearance status. The Agency failed to produce any documentation regarding this temporary suspension and responded with statements such as:

> *"DIA did not make any changes to Mr. Morter's security status. Once an employee is no longer a DIA affiliate, DIA loses jurisdiction over that clearance."* (Request for Supplementation of the Agency's 2015 Discovery Responses, Q.8[7])

Also,

> *"Complainant possessed a Top-Secret security clearance throughout the period identified."* (Agency's 2020 Responses to Complainant's Discovery Requests[8])

DoDM 5200.02, Procedures for the DoD Personnel Security Program (PSP) defines a Security Clearance as: A personnel security determination by competent authority that an individual is eligible for access to national security information, under the standards of this manual. Also called a clearance. **The individual must have both eligibility and access to have a security clearance.** Eligibility is granted by the central adjudication facilities, and the access is granted by the individual agencies." It also defines Access as: The ability and opportunity to obtain knowledge of national security information. An individual may have access to national security information by being in a place where such information is kept if the security measures that are in force do not prevent the individual from gaining knowledge of such information.

According to DoDM 5200.02, Appendix 7A: Determination Authorities, the Chairman of the Joint Chiefs of Staff and Combatant Commanders are authorized to grant, deny, revoke, or suspend national security eligibility. Inherent in this authority is the ability to make interim access determinations. (p.47) Therefore, the USSOCOM Commander, or his authorized representatives is authorized to temporarily suspend my access for cause, but he is not authorized to make the decision to ban me forever. Furthermore, there is a specific process that commanders must follow when temporarily revoking someone's access. Section 9.4. Suspension of National Security Eligibility or Access states that (b). DoD Component heads, commanders, or their authorized representatives, **may suspend access for cause when information relative to any of the adjudicative guidelines exists and raises a serious question as to the individuals' ability**

[7] This response was included in an email which is contained on the enclosed CD, titled: Request for Supplementation of the Agency's 2015 Discovery Responses – Morter v. DOD EEOC No. 510-2015-00236X.txt

[8] These responses are also included on the enclosed CD, titled: Morter Agency's 2020 Discovery Responses.pdf

**or intent to protect national security information**. (c.) Commanders, or their authorized representatives must report access suspensions to the appropriate adjudication facility via the Joint Personnel Adjudication System (JPAS) incident report link within the same calendar day as the suspension. This action alerts registered JPAS users of the change in the person's status. (d.) Commanders, or their authorized representatives must include a command recommendation to the supporting adjudication facility on whether to retain the individual's national security eligibility pending the conclusion of an investigation or when rendering a final determination, and provide the individual with a copy of that recommendation. (e.) Local commanders must notify persons in writing when their eligibility or access has been suspended and include a brief statement of the reason(s) for the suspension of access consistent with the interests of national security. (f.) Adjudication facilities must notify persons in writing when their eligibility has been suspended and include a brief statement of the reason(s) for the suspension of eligibility consistent with the interests of national security. (h.) The adjudication facility will render a new national security eligibility determination upon receipt of a finalized incident report associated with a suspension of national security eligibility and enter the determination in JPAS. Before restoring access, local commanders, organization heads, or security professionals must verify eligibility in JPAS. (i.) Suspension cases must be resolved as quickly as circumstances permit. Suspensions exceeding 180 days must be closely monitored and managed by the adjudication facility concerned so as to expeditiously reach a new national security eligibility determination.

For the record, when USSOCOM revoked my access, none of these procedures were followed, and they did not adhere to the DICAF's favorable adjudication. According to the Agency's responses to my discovery requests, there was nothing in JPAS that indicated a change in my security clearance status. I was never provided with a written notification from USSOCOM as to why my security clearance was being temporarily revoked, or that there was information relative to me violating any of the adjudicative guidelines. However, 121 days after having my clearance revoked, I did receive a favorable adjudication letter from the DICAF (ROI 035). USSOCOM's inexplicable deviation from the approved and relevant regulations, as well as the complete disregard for the DICAF's favorable security decision, has the potential to affect the outcome of this case as well as the veracity of the Agency's asserted "legitimate, nondiscriminatory" reasons. Summary judgment in favor of the Agency is improper in light of this material fact.

**Issue of Fact 3: Whether I had ever admitted to unreported foreign contacts after not "successfully completing" the PCAs.** (AJ Decision & Order Entering Judgment. p. 5)

In his interrogatory, Mr. Lanham makes the claim that,

> *"During one of the exams the complainant made post-test admissions of previous unreported contact with foreign nationals."* (ROI 347, Q.13)

This statement is at odds with the fact that this was never mentioned by any other witnesses, or contained in any of the polygraph examination reports, counter-intelligence investigations, or security reviews. In fact, it was noted several times in the case history that after each polygraph

examination "no reportable information was developed." Also, in the August 3, 2012 Agent Report, (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit L) it was reported that,

> *"SUBJECT claimed, since HIS initial DIA administered CSP in March 2011, HE had made a conscious effort to report all unofficial foreign contacts. SUBJECT related HIS spouse's (also a DIA contract employee, employed by US Central Command, USCENTCOM, in Tampa, FL) job duties included being a liaison officer between the US Coalition Countries operating at CENTCOM and CENTCOM. As such, HE had been invited to numerous official functions in which HE had contact with foreign nationals belonging to the Coalition Forces. SUBJECT adamantly denied HE disclosed classified material to any of the foreign nationals HE met at HIS wife's official functions and stated HE had completed unofficial foreign contact reports on all persons encountered during the functions. SUBJECT claimed HE completed the unofficial foreign contact reports in "hardcopy" and provided them to HIS SSO at USSOCOM. SUBJECT was provided the opportunity to disclose any additional unreported unofficial foreign contacts and denied HE had any."*

The completely inaccurate statement made by Mr. Lanham is material because it has the potential to affect the outcome of the case as a determination of Mr. Lanham's credibility and the veracity of the Agency's asserted "legitimate, nondiscriminatory" reasons. Summary judgment is inappropriate considering this material fact in dispute.

**<u>Issue of Fact 4</u>: Whether my disability is irrelevant because it has nothing to do with the October 8, 2013 restrictions placed on my access to USSOCOM and corresponding Top Secret security clearance because at the time, I did not have, and the Agency was not aware of any disability.** (AJ Decision & Order Entering Judgment. p.8)

The notion that my disability is irrelevant because it was not known at the time my security clearance access was initially revoked on October 8, 2013 is immaterial. When I was physically removed from my duty section and prohibited from reentering it, I decided to give the situation time to resolve itself. I knew that I had done nothing wrong, and any investigation would eventually clear up the matter and exonerate me. In early November 2013, I notified the responsible authorities at USSOCOM and DIA of my diagnosed disability. The EEOC complaints that I filed were directed at the decisions to not retain my services at USSOCOM and to involuntarily reassign me to the National Capital Region. These incidents are without question unfavorable administrative actions and occurred on May 12 and May 27, 2014, respectively. By this time, I had been officially diagnosed with a disability, and key officials from the Agency and USSOCOM were all very aware of it. In his December 2013 Psychological Examination Report, (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit G) Dr. Soo-Tho points out that I reported suffering from anxiety for a long time. He also states that, "Individual predisposition and psychological/emotional vulnerabilities are important factors in the occurrence of this condition." Dr. Soo-Tho requested that this matter be socialized and referred to SEC-3 for adjudicative review and action. On January 31, 2014 my security clearance was favorably

adjudicated by the DICAF. (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit Q)

The AJ's decision and order also referenced an updated medical report prepared by Dr. Michael Rothburd. This was a requirement for my Office of Worker's Compensation Program (OWCP) application and subsequently used by the Agency to approve my Federal Disability Retirement. This in-depth Psychological Evaluation was completed just two months after I submitted my EEOC complaints, but it is directly relevant to my case because it provides valuable insight as to how I developed the disability. (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit L) Among many other things, Dr. Rothburd's report states:

> *"On March 23, 2011, as part of a routine polygraph examination, the patient developed a group of anxiety symptoms including obsessive thoughts regarding what might have produced irregular results, sleep onset and sleep continuance disorder, increasing loss of appetite (was told following a medical exam that he was mildly hypertensive and had borderline diabetes). Overt anxiety apparently incubated and its intensity increased. Nocturnal anxiety attacks (nightmares) disrupted his sleep pattern almost every night. The patient firmly believes in "the rules" and obsessed about what he might have done and its effect on his job status, security rating, etc. A repeat polygraph and three day period of questioning was conducted in July 2012 with similar anxiety symptoms triggered by the procedure, except that at that point, his anxiety symptoms (and accompanying depression) had become severe. He felt that the investigator implied some wrong-doing on his part. A sense of agitated depression and difficulty with mental concentration followed this second investigation."*

And,

> *"At the present, the patient's acute anxiety disorder and depression appear to be a result of his being repeatedly subject to a traumatizing set of stimuli (polygraph examination with verbal interrogation), which he could not refuse or avoid, for fear of losing his employment. With each unavoidable repetition of the polygraph examination his stress-responses and depressive affect cascaded to the point in which he cannot effectively function. Mr. Morter is acutely anxious, suffers moderate to severe depression and has suffered an acute insult to his self-esteem. The traumatizing events outlined above have caused the patient to suffer many emotional and physical losses."*

In summary,

> *"This patient's severe anxiety disorder was initially triggered by a required polygraph examination (a requirement for the security level of his employment) and exacerbated by repeated polygraph examinations. Although the patient located regulations and identified those which prohibit or exempt the use of polygraph examinations for individuals suffering disabilities, apparently no one in authority recognized this situation. As a result, the patient was removed from his position and subject to further repetitions of traumatizing polygraph*

*examinations. The required polygraph examination had become the traumatizing stimulus which, with repetition, intensified the patient's anxiety disorder."*

According to this doctor, it was obvious that I had this disorder prior to October 8, 2013 – well before the unfavorable actions were taken against me on May 12 and 17, 2014.

There was also another Psychological Consultation that was performed by two DIA psychologists and occurred immediately after I was polygraphed and interrogated on August 6, 2014. (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit H) Just as the background of my Claim #1 provided meaningful context to Claims #2 and #3, this report accurately summarizes my disability and describes my mental state during the polygraph examinations. Among many other pertinent details, in the recommendation section it states:

*"SUBJECT's anxiety is acute and appears genuinely debilitating. Psychotherapy is a good start, but it appears insufficient to address anxiety of this proportion. HE was educated on the benefits of psychotropic medication and was encouraged to consider seeking another consultation with a psychiatrist.* ***The sum of the available information suggests that SUBJECT is not likely to be a suitable candidate for future CSP examination.****"*

DIAD 5240.100, *Insider Threat Program*, directs that a key function of the DIA Insider Threat Mitigation Panel (ITMP)[9] is to address situations wherein a DIA employee is medically or psychologically unsuitable for polygraph testing. Ultimately, Dr. Soo-Tho failed to meet the standards of his profession, by not following up or conferring with my physicians[10]. He also failed to accurately account for and willfully disregarded my documented disability after being informed on December 5, 2013. Under any circumstances, an anxiety disorder unquestionably qualifies as a psychological impairment that would account for my inability to "pass" a polygraph. In an email conversation initiated by Mr. McIntosh and members of the ITMP in February 2014, (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit T) McIntosh requests that "each member of the ITMP notify by return email whether or not you concur with the proposed course of action to officially reassign SUBJ to DIA HQ." And, "This option has been pre-coordinated with OHR."

In response, the DIA, Chief of Personnel Security Division/SEC-3 (presumably Karen McChord), replies to McIntosh's request and states:

[9] The ITMP is/was comprised of DIA's The Insider Threat Program Coordinator; Deputy General Counsel; Chief, Personnel Security Division; Senior Expert, Counterintelligence Operations, Office of Counterintelligence; Chief, Threat Mitigation Cell; Chief, Cyber Security, Office of the Chief Information Officer; Case Managers, Threat Mitigation Cell; Staff Psychologist, Insider Threat Program

[10] It is noteworthy to point out that the Agency admitted in a March 10, 2020 supplemental response to discovery that the position of Insider Threat Division psychologist was eliminated in mid-2016. (See enclosed CD)

> *"I non-concur with the recommendation to PCS Mr. Morter to the NCR. Justification: This only transfers an unresolved CSP to another element and I believe SOCOM has the ability to monitor his activities. Mr. Morter was seeking counseling for his anxiety and I believe he should be given the opportunity to continue his treatment and be retested in 6-12 months."*

In response to this, Dr. Soo-Tho forwards the SEC-3 Chief's reply to McIntosh and Pamela Prewitt, in which he says:

> *"Are you kidding me? SUBJECT is a DIA employee who has been unsuccessful in completing his CSP examinations due, in large part, to his extensive efforts to subvert CSP testing. IMHO, DIA is in no position to transfer this risk to USSOCOM, especially when USSOCOM leadership (a three-star general, no less) has cleared (sic) stated and taken action not show their loss of confidence in this SUBJECT. Further, USSOCOM had made it very clear that they want the SUBJECT removed from their facility: unless I am grossly mistaken, DIA is in no position to insist that SUBJECT remain."*

The Chief, Defense Intelligence Central Adjudication Facility is the sole authority to determine security clearance eligibility of Intelligence Agency DoD personnel occupying sensitive positions and/or requiring access to classified material including Sensitive Compartmented Information (SCI). The Agency's deliberate failure to follow the regulations, as well as the instructions from a higher authority, has the potential to affect the outcome of this case as well as to establish pretext. Summary judgment in favor of the Agency is improper taking into consideration this material fact.

**Issue of Fact 5: Whether I attempted to use countermeasures while being administered the polygraph, or verbalized intent and demonstrated efforts to subvert CSP examinations.** (AJ Decision & Order Entering Judgment. p. 13)

It was never stated in any of the polygraph examination reports, counter-intelligence investigations, or security reviews, that I had attempted to deceive or subvert the CSP polygraph examination process. Dr. Soo-Tho fabricated this idea based on our conversation in his office on November 5, 2013. During questioning, Soo-Tho asked if I had ever done any research on the polygraph. I told him that I had because I was trying to determine why I was "failing." I even brought printouts with me of some of the relevant regulations, studies, and reports to support my ideas. He then became very accusatory and berated me for not reporting it and lying to investigators by saying I had not done research. In fact, I had always been very truthful about this. In the Agent Report from August 3, 2012 (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit L) I clearly explained that I had researched the polygraph and elaborated on the reasons for doing so. In his report, he also claimed that I had inadvertently disclosed the fact that I had performed this research. (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit G) This statement is at odds with the fact that I had obviously come prepared to discuss my findings with him as evidenced by the fact that I had actually brought the printouts with me and voluntarily presented them to him as evidence to affirm my claims. Dr. Soo-Tho's statements are inconsistent with the record and provide a factually false pretext for the unfavorable

administrative actions that were taken against me. This is material because it has the potential to affect the outcome of the case as a determination of Dr. Soo-Tho's credibility and the veracity of the Agency's asserted "legitimate, nondiscriminatory" reasons. Summary judgment is unsuitable in light of this material fact in dispute. This dispute is key to proving my case and needs to be fully resolved before a ruling can be rendered.

Mr. Lanham suggested that LTG Mulholland had banished me from USSOCOM because I attempted to defeat the polygraph by using internet researched countermeasures. (ROI 347, Q.13) Mr. Lanham's statement is at odds with the reality that using countermeasures throughout the course of a PCA is a profoundly serious offense and would warrant swift action. It was never documented in any of my polygraph examinations that I ever attempted to use countermeasures. Mr. Lanham's statements are inconsistent with the record regarding the status of my security clearance and provide a factually false pretext for the unfavorable administrative actions that were taken against me. Mr. Lanham's statement is material because it has the potential to affect the outcome of the case as a determination of Mr. Lanham's credibility and the veracity of the Agency's asserted "legitimate, nondiscriminatory" reasons. This dispute also needs to be resolved before a judgement can be determined.

**Issue of Fact 6: Whether Lieutenant General John Mulholland made the ultimate decision to reassign me from USSOCOM because he lost confidence in me because I could not "successfully complete" the polygraph examination.** (AJ Decision & Order Entering Judgment. p. 14)

Multiple Agency witnesses have claimed that LTG Mulholland reassigned me from USSOCOM because he lost trust and confidence in me after I failed a fourth PCA examination. Yet, this proffer is belied by the duration of time between when, on the one side, I failed the fourth examination and Mr. Lanham was supposed to brief LTG Mulholland about it (ROI 348, Q.16), while on the other side, my access to classified information was not suspended until over 16 months later on October 7, 2013 (ROI 37, Q. 5). If LTG Mulholland had truly lost trust in me to handle highly sensitive information after I failed the fourth PCA, it does not make sense that he would not have moved more swiftly toward a decision to remove me from USSOCOM. However, within only six months after I disclosed my diagnosis of anxiety disorder in November 2013, LTG Mulholland decided to ban me permanently from USSOCOM. According to Sharp, even though LTG Mulholland was aware that DIA/SEC-3 had issued a favorable security clearance determination, he did not want to allow me entry into the SCIF until he heard from the CI team. (Item 27 above)

Mr. Lanham, the CI team chief and DIA liaison to USSOCOM, describes a different explanation for LTG Mulholland's motivations in his interrogatory:

> *"In this particular case however, whether the complainant successfully passed the exam or not is almost irrelevant. He directly lied to the polygraph examiner and later to me [Mr.*

*Lanham] when confronted and questioned about his attempts to research and intentionally defeat the exam."* (ROI 347 Q.13).

He also claimed:

*"during one of the exams, the complainant made post-test admissions of previous unreported contact with foreign nationals."*

These are three entirely different reasons for reassigning me out of USSOCOM and yet there is no statement or even written communication from LTG Mulholland to identify what motivated him to permanently ban me from USSOCOM. There is a plethora of evidence however, to suggest that the DIA Insider Threat Program, specifically Steven McIntosh and Pamela Prewitt, were the ones ultimately responsible for the decision to initiate the unfavorable administrative actions against me. (Items 11, 12, 13, 19, 23, 24, 28, 32, 33 above) Lanham's testimony also confirms that it was he who briefed my case to the DCDR before the final decision was made. (ROI 349, Q.20) There is a genuine issue of fact because the evidence is such that a reasonable fact finder would discredit the Agency's statement about LTG Mulholland's motivation for reassigning me. Whether LTG Mulholland reassigned me simply because I could not "pass" the polygraph is material because it has the potential to affect the outcome of the case as a determination of the credibility of the Agency witnesses claiming to know LTG Mulholland's motivations and the veracity of the statement about "losing confidence." This material fact in dispute must be addressed before a Summary Judgment can be correctly ordered.

**Issue of Fact 7: Whether there is an absolute requirement that each DIA employee must "pass" a periodic PCA examination.** (AJ Decision & Order Entering Judgment. p. 3, 5)

Several Agency witnesses, including those identified as the decision makers, stated that there is an absolute requirement that each DIA employee must "successfully complete" a PCA examination. (ROI 255, line 15; ROI 280, line 1; ROI 309, lines 9 – 15; ROI 336, Q.12). The Administrative Judge also makes this assertion in his decision (p.5) However, their contention is inconsistent with DIA Office of Security and Counterintelligence Standard Operating Procedures 002 which is premised upon the acknowledgment that "that there may be persons, fit for employment with the Defense Intelligence Agency (DIA), who are not capable of completing a polygraph examination due to verifiable and documented medical or psychological conditions." (Agency MSJ 1, p. 44-46) Also, Department of Defense Instruction 5210.91, enclosure 4, paragraph 2 states that the Heads of DoD Components that are approved to conduct personnel security screening programs shall establish written procedures to: "h. Exempt or postpone examinations when individuals are considered medically, psychologically, or emotionally unfit to undergo an examination."

Moreover, there is doublespeak in the term "successfully complete" when used to describe the results of a DIA administered PCA examination. The term appears to have been created by conflating separate elements of DoDI 5210.91. Enclosure 4, paragraph 6 addresses "Refusal to

Take or Complete a PSS," and paragraph 7 covers "Failure to Resolve a PSS." Nothing in the regulation uses the term "successfully complete" to indicate either a failure, or a success of the polygraph examination. By using the words "successfully complete," the Agency implies that someone "passes," and to "not successfully complete" suggests that one "fails." This deliberate act of deception through semantics calls into question the Agency's "legitimate, non-discriminatory" reasons for its actions. This disputed fact needs to be resolved by a competent authority before any decision for Summary Judgement can be made.

As I mentioned above in Issue of Fact 1, refusing to take or complete a PSS may be grounds for denying one **initial** access, assignment, or detail. My Top-Secret SCI access had already been granted 34 years prior and had been re-investigated and approved every five years thereafter. Furthermore, nothing in DoD5210.91 mentions the term "successful completion" when referring to the examination. In my first two attempts at the polygraph, the results were: "SUBJECT did not successfully complete an initial Counterintelligence Scope Polygraph Examination." It was ultimately concluded that "Analysis of the data collected during the examination revealed No Opinion could be rendered." After my third attempt at the polygraph, they changed the terminology. This time, it was reported that, "Subject did not complete the referenced examination with no reportable information developed." It was ultimately determined that, "Subject was administered three separate tests concerning mishandling classified information and unauthorized foreign contacts. Two tests were deemed No Opinion. On the last test Subject displayed Significant Response to the questions. The report of my fourth polygraph used the same terminology as the third, "Subject did not complete the referenced examination with no reportable information developed." Removing the equivocal term "successfully complete" and replacing it with "did not complete the referenced examination with no reportable information developed" more accurately describes the outcome of the examination and removes any reference to it being a pass/fail type of test.

The Agency also suggests that there is a requirement that each DIA employee "pass" a periodic PCA examination by citing various policies (DIAI 1400.008, Intelligence Community Policy Guidance 704.6, DoD Directive 5210.48, DoD Instruction 5210.91.) These policies direct that the polygraph may be used, conducted, administered, or that an employee may be required to undergo or be subjected to it. Once again, there is no actual requirement for an existing employee to "successfully complete," or "pass" a PCA to remain in access. This is a disputed fact that needs to be resolved by a competent authority before any decision for Summary Judgement can be made.

**<u>Issue of Fact 8</u>: Whether officials from DIA improperly influenced the SOCOM DCDR to take the unfavorable administrative actions against me.**

There is evidence that directly points to the officials from the InTP as being responsible for ultimately making the decisions to revoke my access, banish me from my place of duty, and involuntarily reassign me to a position of lesser sensitivity – located over 900 miles away at DIA Headquarters. As I clearly laid out in the Background section above, these decisions were made by the DIA InTP, and then passed on to the USSOCOM DCDR by the CI team at USSOCOM.

Based on their input, the DCDR determined the unfavorable administrative actions were warranted and permitted. (Items 13, 22, 25, 29, 30, 33 above). With nothing to go on except for the four unresolved polygraph examinations, the record clearly shows that DIA began investigating me in March 2013 when the Counterintelligence and Security Activity (DAC) filed a Counterintelligence Review and Risk Assessment (CIRA). It was recommended the DAC-4 investigation be reopened and *"a more thorough investigation should lead to a more definitive interview of SUBJECT and polygraph retesting. This will provide adjudicators with sufficient information to render a decision."* (MORTER AGY 0147-151)

On September 9, 2013, one month before I was stripped of my clearance and banned from reentering my place of duty, Pamela Prewitt from the DIA Threat Mitigation Cell replies to an email to Frank Branch. In it, she states:

> *"Attached is the final draft of the DIA Instruction, "Insider Threat Detection and Mitigation" for your information. Relevant paragraphs to our discussion this morning in 4.4. I have been unable to pull the string on MORTER today due to optempo, but it is on my to do list for tomorrow"* (DIA MORTER 0161).

There is evidence of an overreliance on DIA by LTG Mulholland and RADM Sharp. (Issue of Fact #15, and Background item #27). They are obviously aware that the DIA Central Adjudication Facility had addressed my disability and positively adjudicated my clearance in the February 6, 2014 "Advisory Letter." Nevertheless, RADM Sharp replies to Branch in an email the very next day:

> *"Frank, I discussed briefly with the DCDR. Although DIA has made this determination, he does not want to authorize access into the SCIF. Not without further feedback and recommendation from the CI team[11]."*

To provide more context and to further reveal this conspiracy, I draw attention to the following September 2014 email exchange between the DoD IG and the USSOCOM SJA regarding my case (Complainant's Cross Motion and Objection to the Agency's MSJ – Exhibit X) In it, the DoD OIG asks the SOCOM Staff Judge Advocate (SJA):

> *"The DoD IG would like to know if you all reviewed the correspondence regarding the complainant statement about the HQ US Special Operations Command, MacDill AFB, FL having an issue with the complainant issues with them passing the polygraph. Please let me know if you have any questions."*

In response, the SOCOM SJA replies:

[11] According to Mr. Lanham, the CI team is made up of himself, his staff, and the InTP at DIA. (ROI 0348)

*"I am unsure of what DoD IG is asking but here goes. USSOCOM has reviewed these documents and believes it is a DIA issue since he is a DIA employee. SOCOM follows DIA guidance when it comes to the polygraph test. If an individual fails it several times, SOCOM suspends their access and moves them out of the secured area. The case is reviewed by DIA's General Counsel and Security Chief for disposition."*

Furthermore, when discussing my EEOC case in a mid-July 2015 email conversation (DIA MORTER 142-144) between Mr. Keith Lawless, Col Norman Allen (USSOCOM/SJA), and Agency's counsel William DiIorio, it is stated by DiIorio that:

*"The EEOC AJ added SOCOM because the employee claims that he was informed he could not remain at SOCOM and was reassigned to DIA following his inability to complete the polygraph. While the polygraph and reassignment were DIA actions, the ultimate decision to bar the employee from SOCOM came from senior SOCOM leadership, not from DIA or even from the J3. Because of that, DIA isn't position to defend that element of his claims."*

Lawless replies:

*"Norm, He's somewhat correct. DIA simply did what we asked them to do. Move Morter based on the DCDR's direction. DCDR stated he had lost trust and confidence in the individual because of the latter's inability to successfully complete a polygraph, which is a requirement for all DIA employees. Given the rise in insider threat activities across DoD and the sensitive information to which Mr. Morter had daily access, the DCDR believed this action was prudent to support both mission and personnel. Since DIA acquiesced to the DCDR's request to move Mr. Morter, they do bear some responsibility for that action. I was informed that DIA had minimal issue with moving Morter because he still was employed by DIA, albeit no longer in Tampa. They move DIA employees all the time. Hope this helps a bit."*

I attempted to expose this shell game before through my DoD OIG[12] complaints and my unsuccessful application for Worker's Compensation[13]. DIA officials claimed that USSOCOM decided to revoke my security clearance and ban me from their facility, while USSOCOM officials claimed that they were only doing what DIA directed them to do. Essentially, by pointing fingers at each other, no one was ever held accountable. When taken together, the Agency's statements about the reason for reassigning me are internally inconsistent and lack credibility. Whether officials from DIA improperly influenced officials from USSOCOM into making the determination to take unfavorable administrative actions against me is material because it has the

[12] I have obtained case summaries, case notes, email conversations, and other memorandums through the Freedom of Information Act that prove the DoD OIG failed to thoroughly investigate my complaints.

[13] My OWCP claim was denied because the Agency claimed that they had not violated any rule, regulation, or policy in taking the unfavorable actions against me. Essentially, I was disabled retired for the abuse that they inflicted upon me, but I was denied the claims to pay for my doctor's bills associated with it.

potential to affect the outcome of the case as a determination of pretext. This dispute needs to be resolved by a responsible authority before a summary judgment can be ordered.

**<u>Issue of Fact 9</u>: Whether researching the polygraph by DIA employees is prohibited and a punishable offense.** (AJ Decision & Order Entering Judgment. p. 13)

It was reported that performing research on the polygraph is prohibited. The Agency has offered no rule, regulation, instruction, or policy that references this ban. Performing research on a subject is an activity that people would naturally do and to try to stop them from doing it suggests that there is something surreptitious going on. In his report, Dr. Soo-Tho alleged that I had lied to the polygraph operators and the investigator about doing research on the polygraph. This was his supposed proof that I was a lair. In his report under "Other Relevant Findings", Dr. Soo-Tho writes:

> *"In the course of exploring SUBJECT's difficulties with CSP examinations, he inadvertently revealed that he has "done extensive research on polygraph" examinations, so much so that he considers himself to be "an expert in polygraph." SUBJECT explained that he and his spouse "began looking into polygraph right after she failed her polygraph tests in January 2011." SUBJECT provided to the undersigned hard copies of five articles (critical of CSP examination) which he had recently read (these articles were submitted to SEC-5 for their records on 11 December 2013)."*
>
> *"When queried, SUBJECT initially stated that he had not informed any CSP examiners or SEC-4 investigator about his extensive research into polygraph testing because "no one asked." Following notification that such inquiry was standard protocol in pre-test interviews, SUBJECT responded, "Yes, come to think of it, I did tell at least two of the polygraph examiners and the investigator." In response to the undersigned's opinion that it was highly implausible that all CSP examiners and SEC-4 investigator would leave out such a pertinent disclosure from their reports, SUBJECT averred, "It must be a conspiracy ... they're out to get me or something." When confronted on his lack of candor with CSP examiners and investigator, SUBJECT said, "You know, my wife did remind me that you work for the government and I should be careful about what I say to you."*

In fact, I was telling the truth. Five months earlier, in a sworn statement contained in an official DIA Report of Investigation, I said:

> *"I have conducted considerable research… and talked with dozens of people about the subject in order to determine why I am having trouble passing the poly. As a result, I have concluded that I have worked myself in to a situation where every time I am asked the question in an intensive environment such as being connected to the poly machinery, I worry that I will not be able to remain calm enough and I panic, producing a false positive."* (MORTER AGY 0075-76)

And when asked the question "Have you researched the polygraph examination or polygraph procedures on the internet or elsewhere?" I replied:

> *"Yes. Extensively. I read a book, searched the internet, and saw movies. I learned how the polygraph works. I was looking at physiological conditions that may inhibit a person from passing the test. I did not specifically look for information on how to 'beat the polygraph' however did come across some articles that discussed that topic. I read the articles but did not take any credence in them and did not feel they would help my situation."*

Dr. Soo-Tho goes on to write in his report:

> *"SUBJECT claimed that he was unaware that research into polygraph examination (particularly countermeasures) was prohibited until he was informed by the undersigned during this interview. However, during a Tandberg exchange between USSOCOM SSO and the undersigned on 15 November 2013, the SSO asserted that SUBJECT had been counseled against such activity on at least two occasions prior to SUBJECT's meeting with the undersigned."*

I admit that I had heard people say that it would not be a good idea, or the "less you know the better" type of thing, but there was never an official policy that prohibited anyone from doing research on the polygraph.

Also, it is implausible that I "inadvertently revealed" to Dr. Soo-Tho that I had conducted this research because I had come prepared with printouts of the regulations and studies to bolster my claims. When I tried offering my explanations for why I was producing false positives, the doctor berated me and accused me of lying, when in fact, it was he that was doing the lying. As I wrote in my trip report, the interview with Dr. Soo-Tho was more like a cross-examination rather than a psychological assessment (ROI 048-50). The report that followed his aggressive and accusatory interrogation was the impetuous for future decisions by the InTP. There is a genuine issue of fact because the evidence is such that a reasonable fact finder could discredit the Agency's explanations for their actions as being internally inaccurate and inconsistent, thus lacking credibility. Whether the Agency's reasons are legitimate is material because it has the potential to affect the outcome of the case as an inference of pretext. This dispute needs to be resolved by a responsible authority before entering a summary judgment.

**Issue of Fact 10: Whether DIAI 5200.002 *Credibility Assessment Program* is a legitimate Instruction.** (AJ Decision & Order Entering Judgment. p. 8, 16)

The Administrative Judge has ruled that the Agency's actions were legitimate because they were approved by an internal, For Official Use Only (FOUO) DIA policy (DIAI 5200.002) (DIA MORTER 0337-349) This instruction states, "When requested, DIA personnel will also undergo and successfully complete aperiodic CSP examinations as a condition of continued employment or access to DIA systems, facilities, or information." This instruction is at complete odds with

DoDM 5200.02 and DoDI 5210.91, which both explicitly prohibit using polygraph results as the sole basis for taking unfavorable administrative actions against an otherwise innocent individual. It is also in violation of Title VII, Civil Rights Act, and the American with Disabilities Act, by creating an employment policy that has the effect of disproportionately affecting individuals with psychological, emotional, or mental disabilities. Furthermore, this internal DIA instruction was signed on July 3, 2014 – three weeks after I filed the EEO complaints. In discovery, I requested a version of the regulation that was in effect at the time that the discriminatory actions were taken against me. The Agency replied in an email dated April 3, 2020, "All versions of DIAI 5200.002 have been pulled from systems." The fact that all versions of this directive were "pulled from systems" indicates that a major error existed, and the instruction was removed to avoid a potential violation of national policy and individual rights. Moreover, marking this document FOUO identifies it as material that is not appropriate for public release. An internal policy that is hidden from view is surreptitious. There is a genuine issue of fact because the evidence is such that a reasonable fact finder could discredit the Agency's witnesses. Whether there is an absolute requirement that each DIA employee must "successfully complete" or "pass" a periodic PCA examination is material because it has the potential to affect the outcome of the case as a determination of the veracity of the Agency's "legitimate, non-discriminatory" reasons for its actions. This dispute needs to be resolved by a competent authority before making a summary judgment.

**Issue of Fact 11: Whether an "Unfavorable Administrative Action" includes being restricted from access to classified information, physically removed and banned from a place of employment, and/or forced to involuntarily relocate to another position located hundreds of miles outside of the local commuting area.**

As I have articulated many times, the approved and relevant regulations (DoDI 5210.91/DoDM 5200.02) direct that no unfavorable administrative action (to include, access, employment, assignment, and detail determinations) shall be taken based solely on the polygraph test results. The Agency has implied that their actions were legitimate because they did not involve simply terminating my employment. The Code of Federal Regulations, Title 32 (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit Z) defines unfavorable administrative actions:

> (bb) Unfavorable administrative action. Adverse action taken as the result of personnel security determinations and unfavorable personnel security determinations as defined in this part.
>
> (cc) Unfavorable personnel security determination. A denial or revocation of clearance for access to classified information; denial or revocation of access to classified information; denial or revocation of a Special Access authorization (including access to SCI); nonappointment to or nonselection for appointment to a sensitive position; nonappointment to or nonselection for any other position requiring a trustworthiness determination under this part; reassignment to a position of lesser sensitivity or to a nonsensitive position; and nonacceptance for or discharge

from the Armed Forces when any of the foregoing actions are based on derogatory information of personnel security significance.

The officials in charge have indicated that the actions taken against me were legitimate because they did not terminate my employment. As I stated in my original EEOC complaint on June 17, 2014, due to the actions taken against me, I have had opportunities for employment obstructed, capabilities for professional advancement weakened, my reputation damaged beyond repair and experienced extensive emotional distress and mental anguish. This mischaracterization of the actions taken against me must be cleared up before making a summary judgment.

**Issue of Fact 12: Whether other similarly situated employees were subjected to unfavorable administrative actions based solely on their polygraph results.**

Based on the evidence that was provided through discovery (Morter - Agency's 2015 Response to Discovery[14],) from 2011 to 2014, as many as 22 percent of DIA administered polygraph examinations resulted in a "Significant Response" or a "No Opinion." As a matter of record, these are the exact same outcomes as my polygraph examinations. The Agency reported in its response to discovery that during this timeframe, 30,099 polygraph examinations were administered. Based on those numbers, there would be literally thousands of individuals who would have, like myself, faced unfavorable administrative actions. Yet, in its responses to my requests for a complete list of DIA employees who have been subjected to unfavorable administrative actions solely as a result of their inability to "successfully complete" the PCA examination, the Agency has provided shifting and contradictory answers.

In his interrogatory, when responding to the request for a complete list of DIA employees who have been subjected to unfavorable administrative action for not being able to "successfully complete" the polygraph, (ROI 337) Mr. McIntosh provides a list of 12 individuals who were realigned to less sensitive positions within DIA Headquarters, or reassigned to a DIA Headquarters position as a result of their inability to successfully complete the CSP examination. None of these individuals apparently reported having a disability, six of them were forced into an involuntarily assignment, and of those, four opted to retire.

In the 2015 Agency's Answers to Complainant's First Set of Interrogatories (Q.6, p.5), the Agency answered "**No DIA employee has been subjected to adverse actions solely as a result of their inability to successfully complete a CSP examination**." In the Agency's February 7, 2020, Responses to Complainant's Discovery Requests, (Q.19, p.5) the Agency's response to the question "For each individual assigned to USSOCOM who failed to pass a PCA examination at any time since January 1, 2009, identify what corrective action, if any, was taken, by who, and when." The Agency's response was "**The Agency has no record of any corrective action, as defined by Complainant, taken as a result of any Agency employee's inability to successfully complete a polygraph examination**."

[14] These responses are also included on the enclosed CD, titled: Morter Agency's 2015 Response to Discovery.pdf

Based on the total numbers of polygraphs administered and the absence of other individuals being subjected to unfavorable administrative actions, it can reasonably be inferred that the Agency's justification for taking unfavorable actions against me is proof of disparate treatment and adverse impact. Direct evidence of motive can be found in Mr. McIntosh's statement that:

> *"**If a claim of disability was presented, it would not have altered the outcome as the issue is the DIA employee being unsuccessful in completing the CSP examination and presenting a threat, risk, or vulnerability to national security information and operations** (ROI 337).*

**<u>Issue of Fact 13</u>: Whether after the Defense Intelligence Central Adjudication Facility issued the February 6, 2014 "Advisory Letter'" the question of whether my ability to maintain a national security position remained open.** (AJ Decision & Order Entering Judgment. p. 14)

The intent of the "Advisory Letter" is to favorably adjudicate my security clearance. The Chief, Defense Intelligence Central Adjudication Facility, SEC-3, issued this letter based on her January 31, 2014 Security Review and Evaluation Record (Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit Z).

Whether the intent of this letter was to provide a favorable security clearance determination, or to leave the question open is a material genuine issue of fact because it has the potential to affect the outcome of the case as a determination of the veracity of the Agency's "legitimate, non-discriminatory" reasons for its actions. This dispute needs to be resolved by a competent authority before making a summary judgment.

**<u>Issue of Fact 14</u>: Whether other similarly situated employees had been exempted, deferred, or otherwise excused from polygraph examinations.**

As highlighted earlier, DoDI 5210.91 directs that DoD Components authorized to conduct polygraphs must write internal procedures to assess and determine whether an individual is medically, psychologically, and emotionally fit to undergo an examination. (Encl. 3, l.6. p. 12) Also, exempt or postpone examinations when individuals are considered medically, psychologically, or emotionally unfit to undergo an examination. (Encl. 4, 2.h. p.18) Although my disability was not diagnosed prior to the first four PCA examinations, it was positively known before the fifth and last one.

In my 2015 Request for Discovery, I requested a current list, or an accurate percentage of DIA employees that have been exempted or postponed from PCA testing because of their mental, psychological, or emotional disabilities (Q.3. p.4) The Agency's answer was "a total of 43 DIA employees (~0.2%) were temporarily deferred from CSP examinations due to psychological or emotional conditions."

In my 2020 Request for Discovery, I asked the question "For each DIA employee temporarily deferred from Counterintelligence Scope Polygraph examinations since January 1, 2009, identify the employee deferred, each individual involved in the decision to defer the employee, the reason relied upon for the deferral, and the authority relied upon for such deferral." (Q.22, p.6) The Agency's response was "The Agency objects to this Interrogatory to the extent it seeks information protected from disclosure by 10 U.S.C. 424, to include organizational information regarding DIA employees, to include, but not limited to, names, office names, titles, business addresses, telephone numbers, email addresses. **Moreover, the Agency does not currently defer polygraph examinations**." The Agency responded to my request for supplementary information regarding this question, and this time, the Agency claimed that "The original number provided (43 persons) appears to have come from the Insider Threat Division psychologist, a position that was eliminated in mid-2016. SEC no longer collects or reports information on referrals (or deferrals as they were identified in 2015).

Whether DIA exempts some of its employees from PCA testing due to psychological, emotional, or mental impairments is material because it has the potential to affect the outcome of the case as a determination of disparate treatment. This dispute needs to be resolved before making a Summary Judgment.

**<u>Issue of Fact 15</u>: Whether LTG Mulholland was aware of my anxiety disorder prior to the decision to reassign me out from USSOCOM.**

The Agency's position that LTG Mulholland was unaware of my anxiety disorder prior to the decision to reassign me out from USSOCOM is insufficiently supported by the facts. (Agency's First MSJ, p. 8) There is no statement in the record from LTG Mulholland to support the Agency. Rather, the information in the record supports the contention that LTG Mulholland would have been made aware of my anxiety disorder prior to the decision to reassign me out by multiple people. There is no dispute that Special Security Officer (SSO) Frank Branch was aware of my anxiety disorder. (Agency's First MSJ, p.8) There is no dispute either that RDAM Sharp was aware also as he was in receipt of the February 6, 2014 DIA CAF favorable security decision. As the USSOCOM liaison between the DIA InTP and USSOCOM, Mr. William Lanham was also personally responsible for briefing LTG Mulholland (Deputy Commander) about my case, (ROI 348, Q.16). If any of these individuals neglected to accurately brief RADM LTG Mulholland about my disabilities, they were derelict in the performance of their duties. In late October 2013, USSOCOM officials, Mr. Lanham, and the Insider Threat Program coordinated a trip for me to be interviewed by the Insider Threat Program Staff Psychologist, Dr. Soo-Tho. During that interview, I reported my disability and subsequently sent him the official diagnosis per his request. Dr. Soo-Tho then put together a Psychological Evaluation, identified my disability and described the psychological/emotional conditions associated with it. The doctor forwarded this report to all interested parties and requested that it be "socialized" and referred to SEC-3 for adjudicative review. This report would have undoubtably been included in my personnel file and available for anyone connected to my case. On February 6, 2014, I received an "Advisory Letter Concerning Continued Access to Sensitive Compartmented Information" from the Chief, Defense Intelligence

Central Adjudication Facility (SEC-3). In this letter, the Chief acknowledges my disability and makes a favorable security clearance determination. (DIA MORTER 0081-82) Before issuing a decision to reassign me out from USSOCOM, LTG Mulholland supposedly examined all the circumstances surrounding my failure to pass the four PCA examinations, and that would have to include consideration of my documented anxiety disorder (ROI 0347, Q.13).

Finally, I submitted a detailed "Notice to Appeal" (Item 34 above) requesting relief from the unfavorable administrative actions that were being imposed on me. In this appeal, which was addressed to everyone in my chain of command, I stated, "I have been clinically diagnosed with an anxiety disorder – a mental condition that unquestionably invalidates the readings of the (polygraph) test – and one that could identify the decisions (taken) against me as discriminatory, based on Equal Employment Opportunity laws (ROI 148-150). There is a genuine issue of fact because the evidence is such that a reasonable fact finder could find that LTG Mulholland was aware of my anxiety disorder but decided to take unfavorable administrative actions against me anyway. Whether LTG Mulholland had prior knowledge of my anxiety disorder is material because it has the potential to affect the outcome of the case as a determination of the credibility of Agency witnesses or the veracity of the Agency's stated reasons for reassigning me out of USSOCOM. This dispute needs to be resolved at hearing.

**<u>Issue of Fact 16</u>: Whether Rear Admiral Sharp was aware of my anxiety disorder prior to the decision to reassign me out from USSOCOM.**

As the Director of Intelligence (J2) at USSOCOM, Rear Admiral Sharp was responsible for briefing the Command on the personnel and issues under his control. Since I worked for him in the J2, Sharp was in my direct chain of command, and he would have been responsible for knowing the details of my situation. Accordingly, Grimes, Nilius, Branch and Lanham all worked for him also, so they would have been responsible for informing Sharp of the facts of my case. In his testimony, Branch admits, "I advise the J2 senior intelligence officer (Sharp) on issues that could result in a problem with a person's security clearance or eligibility and so he's aware of those particular incidents." As mentioned previously, the psychological report submitted by Soo-Tho as well as the SEC-3 Chief's "Advisory Letter" clearly established the fact that I was diagnosed with an anxiety disorder. Furthermore, in an email reply to Branch on February 7, 2014, Cc'd to Gendron, Lanham, Martinez, Kendrick, Nilius, and Wallace, Sharp acknowledges receipt of the favorable security decision and states,

> *"I discussed this briefly with the DCDR (Mulholland). Although DIA has made this determination, he does not want to authorize access into the SCIF. Not without further feedback and recommendation from the CI team."* (DIA MORTER 0167)

On February 18, 2014 the USSOCOM SSO, Frank Branch authors a memorandum for the record, addressed to the Deputy Director DJ2, in which he refers to the relevant regulations and the February 6 letter from the Defense Intelligence Central Adjudication Facility (DICAF)

(Complainant's 2020 Cross Motion and Objection to the Agency's MSJ – Exhibit CC). Aware of the fact that the command is about to violate national policy, he states:

> *"Mr. Morter's failure to complete the polygraph, psychological screening and DIA interview and investigation were referred to the Defense Intelligence Central Adjudication Facility. On 6 Feb 14, DICAF released an advisory letter to Mr. Morter positively adjudicating his clearance but advising him of his security responsibilities."*

In conclusion, he recommends:

> *"While it is apparent from numerous interactions with Mr. Morter, he has significant hostility with the polygraph examination process, other information concerning his spouse's loss of clearance and employment and his experiences may be mitigating factors. Additionally, the command can limit his access to classified information if the commander and SIO believe information is at risk. The Staff Judge Advocate should be brought in to assess the different regulations and policies governing Morter's activities and ensure the command is protected from lawsuits stemming from the potential inequitable administration of these policies. SSO recommends restoring his access to collateral classified national defense information and SCI while mitigating the risk by monitoring his actions on classified networks and retraining him on his security responsibilities. Please note this is not an endorsement of Mr. Morter, but instead a disinterested assessment of personnel security processes as instituted by the command. The DICAF process noted above provides a means to neutrally assess all the available information."*

There is a genuine issue of fact because the evidence is such that a reasonable fact finder could find that RDML Sharp was aware of my anxiety disorder and had even discussed it with the DCDR. Whether RDML Sharp had prior knowledge of my anxiety disorder is material because it has the potential to affect the outcome of the case as a determination of the credibility of Agency witnesses or the veracity of the Agency's stated reasons for reassigning me out of USSOCOM. Sharp should be questioned, and this dispute needs to be resolved at hearing.

**<u>Issue of Fact 17</u>: Whether Mr. Lanham was aware of my anxiety disorder prior to the decision to reassign me out from USSOCOM.**

Mr. Lanham stated that he was never made aware of my disability. (ROI 346, Q.11; ROI 347 Q.15; ROI 348, Q.17). Yet, there is no dispute that Dr. Soo-Tho and the InTP, were all aware of my anxiety disorder. (Items 13, 22, 25, 29, 20, and 33 above) Since Mr. Lanham was in close coordination with the InTP, and served as its liaison to USSOCOM, it is extremely unlikely that he would not have been aware of my disability due to the nature of his position. Mr. Lanham communicated regularly between USSOCOM and DIA InTP officials concerning his assigned cases. Several of these emails, memos, investigations and reports refer to Dr. Soo-Tho's psychological report. It is reasonable to assume that Dr. Soo-Tho informed Mr. Lanham about my anxiety disorder since Lanham was responsible for arranging the meeting to begin with. Mr.

Lanham also coordinated with and was in close communication with Frank Branch. Mr. Lanham was cc'd or info'd on several emails regarding my disability and would have attended meetings where it would have been discussed. He was notified of the DICAF's advisory letter, as he was listed on the Cc line in the February 7, 2014 email exchanges between Branch and Sharp (DIA MORTER 0167-168). There is a genuine issue of fact because the evidence is such that a reasonable fact finder could discredit Mr. Lanham's statement that he was unaware of my anxiety disorder, which is material because it has the potential to affect the outcome of the case as a determination of Mr. Lanham's credibility and the veracity of the Agency's asserted "legitimate, nondiscriminatory" reasons. Summary judgment is unsuitable in light of this material fact in dispute.

**<u>Issue of Fact 18</u>: Whether Steven McIntosh was aware of my anxiety disorder prior to the decision to reassign me out from USSOCOM.**

Mr. McIntosh stated that he was not aware of me having any disability. (ROI 335 Q. 11) Mr. McIntosh was the DIA InTP Coordinator, which falls under DIA's Office of Security (ROI 334 Q. 2). In this position, Mr. McIntosh was responsible for serving as Chairperson of the DIA Insider Threat Mitigation Panel (ITMP). A key function of the Panel is to address situations wherein an employee or affiliate is deemed medically or psychologically unsuitable for polygraph testing. Historically, McIntosh reported, DIA lacked a formal process to address these situations and cases languished for months and even years. The InTP established a formal process addressing suitability determinations, medical and/or psychological validation, and presentation of the case to the DIA ITMP, which in turn provides a recommended mitigation strategy to account for the employee's non-suitability for polygraph examination. and to provide management and oversight to the DIA Threat Mitigation Cell (TMC) (DIA MORTER 0093-94).

It was Mr. McIntosh who arranged with Mr. Lanham and Mr. Branch to send me to D.C. to meet with Dr. Soo-Tho for the November 2013 psychological examination. Therefore, Mr. McIntosh became aware of my anxiety disorder immediately after Dr. Soo-Tho completed his psychological report and sent it to him. He was undoubtedly aware of my anxiety disorder, when he authored the February 5, 2014 Insider Threat Mitigation Panel Report. In it, he states:

> *"SUBJECT reported he has suffered from anxiety for a long period of time and has sought the aid of a psychiatrist (NFI). SUBJECT did not provide complete information about any recommended course of treatment or compliance with such treatment. SUBJECT claimed the CSP examination process has exacerbated his anxiety to the degree that he recently sought mental health treatment again (04 November 2013)."*

As the Chief, Personnel Security Division, and a member of the ITMP, Ms. Karen D.B. McCord had direct input to Mr. McIntosh. She informed him on at least two occasions of my disability. The first was on January 31, 2014 when she completed the Security Review and Evaluation Record (MORTER AGY 0169-71), and the second was in reply to his email on February 12, 2014.

As I stated earlier in Issue of Fact #1, Mr. McIntosh reveals his discriminatory animus by stating, ***"if a claim of disability was presented, it would not have altered the outcome as the issue is the DIA employee being unsuccessful in completing the CSP examination and presenting a threat, risk, or vulnerability to national security information and operations."***

Mr. McIntosh's reckless indifference and complete disregard for my disability is pretext for his discriminatory actions. There is a genuine issue of fact because the evidence is such that a reasonable fact finder could find in favor of my statement of facts and thus discredit the Agency's position that Mr. McIntosh was incapable of discriminating against me on the basis of disability. Whether Mr. McIntosh was aware of my disability is material because it has the potential to affect the outcome of the case as a determination of Mr. McIntosh's credibility or the veracity of the Agency's proffered reasons for reassigning me from USSOCOM to DIA NCR. Because of these material facts that are in dispute, it is completely inappropriate to issue a summary judgment.

## VII. CONCLUSION

The Administrative Judge incorrectly concluded that my facts were not supported by all the relevant documentary evidence or undisputed material facts. The facts as I have presented here do alter the material facts significantly and are clearly supported by the evidence. The AJ in this case set a hearing date, called for me to submit a list of witnesses, and then abruptly cancelled the hearing and entered his summary judgment.

Using the *de novo* standard of review, the Commission should find that summary judgment was inappropriately imposed because there are several genuine issues of material facts in dispute. Therefore, I respectfully request that the Commission reverse and vacate the FAD and either remand this Complaint back to an Administrative Judge for additional discovery and a hearing or deliver its own decision in my favor.

Respectfully Submitted,

John "Sam" Morter, USAF Retired
6815 Quail Hollow Blvd.
Wesley Chapel, FL 33544
(813) 472-9691
sammorter@gmail.com

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Statement in Support of Appeal were served this 24th day of September 2020, via the following method upon the following:

For the Commission USPS Certified Mail:

Director, Office of Federal Operations
The Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

For the Agency Via Email:

William Di Iorio
william.diiorio@dodiis.mil

Sharon Taylor
Sharon.Taylor@dodiis.mil

Respectfully,

John S. Morter, Appellant