



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-00838
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esquire, Department Counsel  
For Applicant: Rosval A. Patterson, Esquire

May 7, 2009

**Decision**

GALES, Robert Robinson, Chief Administrative Judge:

Applicant failed to mitigate the security concerns regarding criminal conduct, alcohol consumption, and personal conduct. Eligibility for a security clearance and access to classified information is denied.

**Statement of the Case**

On April 5, 2005, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). On August 13, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). The SOR alleged security concerns under Guidelines J (Criminal Conduct), G (Alcohol Consumption), and E (Personal Conduct), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It should be noted that on December 29, 2005, the President promulgated revised *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information*, and on August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing implementation of those revised Adjudicative Guidelines (hereinafter AG) for all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended and modified (Regulation), in which the SOR was issued on or after September 1, 2006. The AG are applicable to Applicant's case because his SOR was issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on August 18, 2008. In a sworn, written statement, dated September 18, 2008, Applicant responded to the SOR allegations and requested a hearing before an Administrative Judge. Department Counsel indicated the Government was prepared to proceed on December 2, 2008, and the case was assigned to Administrative Judge Noreen A. Lynch on December 5, 2008. It was reassigned to me on February 6, 2009, due to caseload considerations. A Notice of Hearing was issued on March 6, 2009, and I convened the hearing, as scheduled, on March 26, 2009.

During the hearing, nine Government exhibits and four Applicant exhibits were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on April 3, 2009.

### **Procedural Matters**

At the conclusion of Applicant's case, Department Counsel moved to amend the SOR to conform to the evidence presented. Specifically, she moved to withdraw SOR ¶ 3.d. There being no objection, the motion was granted.<sup>1</sup>

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted nearly all of the factual allegations pertaining to Criminal Conduct in the SOR (¶¶ 1.a., 1.b., 1.d., 1.e., 1.g. through 1.k., and 1.m. through 1.w.). He denied the remaining allegations, as well as all of the factual allegations pertaining to Alcohol Consumption and Personal Conduct.

Applicant is a 51-year-old employee of a defense contractor, and he is seeking to obtain a security clearance, the level of which has not been divulged. He has been gainfully employed by the same defense contractor since January 2005, and currently serves as a modular radio systems engineer.<sup>2</sup> His employment history since 1997 includes a variety of positions with different employers, both as an employee and as either an intern or a member of a student Co-op. Before that, during the 1980s and early

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<sup>1</sup> Tr. at 121.

<sup>2</sup> Applicant Exhibit B (Curriculum Vitae, undated), at 1.

1990s, he held different positions in the construction industry, working with iron workers, glazers, and pipe layers.<sup>3</sup> Applicant earned a B.S.E.E. in December 2002 and an M.S.E.E. in May 2005.<sup>4</sup> He is a member of Mensa, an international high-IQ society.<sup>5</sup> He has never served in the U.S. military.<sup>6</sup> He was married to his first wife from August 1990 until December 2004, and was married to his second wife from December 2004<sup>7</sup> until 2008.<sup>8</sup> He has one daughter, born in 2006.<sup>9</sup>

Applicant described his lifestyle during his time with the construction industry, as follows:<sup>10</sup>

I would say it was more of a cavalier lifestyle that lacked focus for long-term ambitions and dreams. Just living for the day versus following my dreams and just mapping a course to complete the degree that I had chosen in electronics engineering.

In discussing his feeling toward authority during that period, he stated:<sup>11</sup>

It was perhaps a cavalier attitude. Not one of contempt but not holding it in I guess, utmost respect and or even the proper fear thereof.

### **Criminal Conduct & Alcohol Consumption**

Applicant was a substance abuser whose substances of choice have been alcohol and cocaine. Over the years, from about 1980 until about 2005, Applicant was involved in numerous incidents with law enforcement authorities. Some of those incidents involved alcohol or cocaine, and others did not. Likewise, in some of those incidents, Applicant correctly identified himself to the authorities, and in some others, he used various aliases. His Federal Bureau of Investigation (FBI) Identification Record indicates his use of 23 variations of his name or other false identities, 10 different social security numbers, and 6 different dates of birth.<sup>12</sup> The SOR alleges 23 incidents, but there are other non-alleged incidents as well:

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<sup>3</sup> Tr. at 30.

<sup>4</sup> Applicant Exhibit B, *supra* note 2, at 1.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Government Exhibit 1 (SF 86, dated April 5, 2005), at 10.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> Tr. at 56.

<sup>9</sup> *Id.* at 57.

<sup>10</sup> *Id.* at 30-31.

<sup>11</sup> *Id.* at 31.

<sup>12</sup> Government Exhibit 2 (FBI Identification Record, dated July 8, 2008), at 1-2.

SOR ¶ 1.w.: On December 2, 1980, when he was 23 years old, Applicant was arrested for driving off in someone else's vehicle, without permission, and charged with one count of grand larceny and two counts of petit larceny.<sup>13</sup> He was convicted of petit larceny and sentenced to 30 days in the county jail.<sup>14</sup> He was released after a few weeks.<sup>15</sup>

SOR ¶ 1.v.: On January 27, 1981, Applicant was arrested for urinating in an alley and charged with one count of indecent exposure.<sup>16</sup> He does not recall if he had been drinking before the incident.<sup>17</sup> Applicant denies he was ever convicted of the charge,<sup>18</sup> and there is no evidence to refute his contention.

SOR ¶ 1.u.: On December 18, 1981, Applicant was arrested for stealing something, not otherwise identified, and charged with one count of theft.<sup>19</sup> Applicant does not recall if he was ever convicted of the charge,<sup>20</sup> and there is no evidence to indicate that he was.

SOR ¶ 1.t.: On March 20, 1982, Applicant was arrested for stealing an automobile, and charged with one count of auto theft.<sup>21</sup> He does not recall if he was ever convicted of the charge,<sup>22</sup> and there is no evidence to indicate that he was.

SOR ¶ 1.s.: On September 8, 1982, Applicant was arrested and charged with one count of trespass, and one count of destroying property.<sup>23</sup> Applicant does not recall if he was ever convicted of the charge,<sup>24</sup> and there is no evidence to indicate that he was.

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<sup>13</sup> Government Exhibit 5 (FBI Identification Record, dated March 16, 1999), at 2.

<sup>14</sup> Tr. at 58-59.

<sup>15</sup> *Id.* at 59.

<sup>16</sup> Government Exhibit 5, *supra* note 13, at 2.

<sup>17</sup> Tr. at 60.

<sup>18</sup> *Id.*

<sup>19</sup> Government Exhibit 5, *supra* note 13, at 2.

<sup>20</sup> Tr. at 60-61.

<sup>21</sup> Government Exhibit 5, *supra* note 13, at 2.

<sup>22</sup> Tr. at 61.

<sup>23</sup> Government Exhibit 5, *supra* note 13, at 2.

<sup>24</sup> Tr. at 62.

Not alleged in the SOR: On June 25, 1983, Applicant was not arrested but was charged with one count of driving under the influence (DUI) and one count of speeding.<sup>25</sup> He was convicted of the charges and sentenced to a fine and three years probation.<sup>26</sup>

SOR ¶ 1.r.: On January 18, 1986, Applicant was arrested and charged with robbery.<sup>27</sup> He admitted the incident but disputed the characterization, claiming it was merely “an exaggeration of personal fisticuffs,” and not robbery.<sup>28</sup> There is no evidence to indicate he was ever convicted of the charge.

SOR ¶ 1.q.: On January 21, 1986, Applicant was arrested and charged with grand theft auto.<sup>29</sup> On February 11, 1986, the charge was dismissed *nolle prosequi*.<sup>30</sup>

SOR ¶ 1.p.: On March 10, 1986, Applicant was arrested and charged with assault with a deadly weapon - pipe.<sup>31</sup> He admitted the incident but disputed the characterization, claiming it was “another incident of fisticuffs” following a rock concert, and not assault with a deadly weapon.<sup>32</sup> On May 20, 1986, the charge was dismissed.<sup>33</sup>

SOR ¶ 1.o.: On March 26, 1986, Applicant was arrested and charged with destruction of property.<sup>34</sup> On August 13, 1986, the charge was dismissed.<sup>35</sup>

SOR ¶ 1.n.: On November 18, 1986, Applicant was arrested and charged with theft.<sup>36</sup> He was subsequently convicted of the charge and sentenced to a fine and to be confined in the county jail for an unspecified period.<sup>37</sup>

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<sup>25</sup> Government Exhibit 2, *supra* note 12, at 4.

<sup>26</sup> *Id.*; Tr. at 64.

<sup>27</sup> Government Exhibit 5, *supra* note 13, at 3.

<sup>28</sup> Tr. at 62-63.

<sup>29</sup> Government Exhibit 5, *supra* note 13, at 3.

<sup>30</sup> *Id.* at 3-4.

<sup>31</sup> Government Exhibit 5, *supra* note 13, at 4.

<sup>32</sup> Tr. at 65-66.

<sup>33</sup> Government Exhibit 5, *supra* note 13, at 4.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; Tr. at 68.

SOR ¶ 1.m.: On November 5, 1988, Applicant was arrested and charged with battery.<sup>38</sup> Applicant does not recall if he was ever convicted of the charge, but speculates it was dismissed,<sup>39</sup> and there is no evidence to indicate the actual disposition.

SOR ¶ 1.l.: On December 14, 1988, Applicant was arrested and charged with theft over \$300.<sup>40</sup> He admitted the arrest but disputed the characterization of the underlying conduct that led to the arrest.<sup>41</sup> He does not recall if he was ever convicted of the charge,<sup>42</sup> and there is no evidence to indicate that he was.

SOR ¶ 1.k.: On May 26, 1991, Applicant was arrested and charged with DUI.<sup>43</sup> He had spent the day “tubing” down the river and had consumed an unspecified quantity of beer before driving home and being stopped for speeding.<sup>44</sup> He was administered a breathalyzer, but the results were not specified. He subsequently entered a plea of guilty and was sentenced to a fine and his operator’s license was suspended.<sup>45</sup>

SOR ¶ 1.j.: On March 2, 1992, Applicant was arrested and charged with possession of a narcotic drug – felony.<sup>46</sup> The substance in question was cocaine.<sup>47</sup> Although he has admitted using cocaine in the past, he could not recall if he was using it at the time of his arrest.<sup>48</sup> He was convicted of the charge and sentenced to 18 months confinement.<sup>49</sup> Applicant only served about 10 months confinement and was released on parole and remained in that status for three years.<sup>50</sup>

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<sup>38</sup> *Id.* Government Exhibit 5, *supra* note 13, at 4-5.

<sup>39</sup> Tr. at 69.

<sup>40</sup> Government Exhibit 5, *supra* note 13, at 5.

<sup>41</sup> Tr. at 70.

<sup>42</sup> *Id.* at 71.

<sup>43</sup> Applicant’s Answer to SOR, dated September 18, 2008, at 4

<sup>44</sup> Tr. at 71.

<sup>45</sup> *Id.* at 71-72.

<sup>46</sup> Government Exhibit 5, *supra* note 13, at 5.

<sup>47</sup> Tr. at 76.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 77.

<sup>50</sup> *Id.* at 77-78.

SOR ¶ 1.i.: On November 11, 1992, Applicant, using an alias, was arrested and charged with one count of assault – misdemeanor, one count of possession of narcotic drug – felony, and one count of forgery – felony.<sup>51</sup> Prior to the arrest, Applicant and his first wife were drinking beer and using cocaine, and someone had complained to the police about a loud stereo.<sup>52</sup> While he was being processed incident to the arrest, the police found the cocaine.<sup>53</sup> The charges for assault and forgery were apparently dismissed because no complaint was filed.<sup>54</sup> The drug charge was amended to possession of drug paraphernalia, and Applicant was convicted of that amended charge and sentenced to 1-5 years confinement, concurrent with the charge set forth in SOR ¶ 1.h., below.<sup>55</sup>

SOR ¶ 1.h.: On April 19, 1993, Applicant was arrested and charged with one count of failure to appear – felony, and three counts of forgery – felonies.<sup>56</sup> The forgery counts were related to Applicant’s possession of fake operator’s license(s) during a prior arrest.<sup>57</sup> Two of the forgery charges were dismissed, and the failure to appear charge was not pursued by the prosecution, but was amended to solicitation.<sup>58</sup> He was convicted of one possession of a forged instrument and the amended charge of solicitation, and sentenced to prison for 1-5 years, concurrent with the charges set forth in SOR ¶ 1.i., above.<sup>59</sup> He was released on bail on about August 26, 1993.<sup>60</sup>

SOR ¶ 1.g.: On August 26, 1993, Applicant was arrested and charged with one count of criminal damage to property – misdemeanor, and one count of trespass – felony.<sup>61</sup> When Applicant was released on bail from his earlier incarceration, he went home to discover another man with his first wife. While there was no physical violence involved, there was arguing and yelling, and when the police arrived, they determined

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<sup>51</sup> Government Exhibit 5, *supra* note 13, at 5.

<sup>52</sup> Tr. at 78-79.

<sup>53</sup> *Id.* at 79.

<sup>54</sup> Government Exhibit 5, *supra* note 13, at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 6.

<sup>57</sup> Tr. at 80-81.

<sup>58</sup> Government Exhibit 5, *supra* note 13, at 6.

<sup>59</sup> *Id.*

<sup>60</sup> Tr. at 87.

<sup>61</sup> Government Exhibit 5, *supra* note 13, at 6.

that Applicant had violated one of the terms of his bail.<sup>62</sup> The charges were subsequently dismissed.<sup>63</sup>

SOR ¶ 1.f.: On May 4, 1994, Applicant was arrested and charged with DUI – misdemeanor.<sup>64</sup> He admitted the incident but disputed the characterization as a DUI, claiming his arrest was on a bench warrant for failure to appear for an earlier charge related to his April 19, 2003, use of an alias.<sup>65</sup> There is no evidence to indicate he was ever convicted of the SOR alleged charge.

SOR ¶ 1.e.: On August 29, 1995, there was an incident at Applicant’s university dorm room when three individuals, all under 21 years of age, and Applicant, all of whom had been drinking,<sup>66</sup> got into an argument. The police arrived during the scuffle and arrested and charged each of the individuals with disorderly conduct.<sup>67</sup> The charge was subsequently dismissed.<sup>68</sup>

SOR ¶ 1.d.: On July 12, 1998, Applicant was arrested and charged with two counts of menacing threats, and one count of resisting arrest.<sup>69</sup> The incident started when Applicant was serving in a summer internship out of state and he and his roommate at the hotel hosted a party for other interns. Police officers responded to a complaint regarding loud music, and Applicant refused to “submit [himself] weakly and humbly” to the officers.<sup>70</sup> He was subsequently convicted but the sentence has not been specified.<sup>71</sup>

SOR ¶ 1.c.: On March 31, 2001, while at a heritage gathering, Applicant was arrested and charged on outstanding warrants with two counts of false report to law enforcement (because he had used a false identity during an earlier arrest), and one count of DUI – liquor/drugs/vapors/combo (purportedly stemming from that earlier arrest).<sup>72</sup> It is not clear what the individual charge dispositions were, but he was

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<sup>62</sup> Tr. at 87-88.

<sup>63</sup> Government Exhibit 5, *supra* note 13, at 6-7.

<sup>64</sup> *Id.*

<sup>65</sup> Tr. at 89-90.

<sup>66</sup> Government Exhibit 4 (University Department of Public Safety Traffic Ticket and Complaint, dated August 29, 1995), at 6-8.

<sup>67</sup> *Id.*

<sup>68</sup> Tr. at 93.

<sup>69</sup> Government Exhibit 5, *supra* note 13, at 7. It should be noted that while the SOR refers to the arrest as having occurred on July 11, 1998, the FBI Identification Record reflects a July 12, 1998 arrest.

<sup>70</sup> Tr. at 101-102.

<sup>71</sup> Applicant’s Answer to SOR, *supra* note 43, at 2.

<sup>72</sup> Government Exhibit 2, *supra* note 12, at 7.



convicted of at least one of the counts and sentenced to a fine and 18 months confinement.<sup>73</sup>

SOR ¶ 1.b.: On October 7, 2001, Applicant was arrested and charged with disorderly conduct.<sup>74</sup> The incident started when Applicant returned to his girlfriend's house, where he had been periodically staying, to retrieve his belongings, and a dispute arose over his possessions. The police responded to a call, and when they appeared and told Applicant to be quiet, he refused to shut his mouth.<sup>75</sup> He spent the night in jail and went before the judge the following morning where he was convicted and sentenced to time served.<sup>76</sup>

SOR ¶ 1.a.: On September 19, 2005, five months after applying for his security clearance, Applicant was arrested and charged with one count of DUI – liquor/drugs/vapors/combo, and one count of DUI with BAC of .08 or more.<sup>77</sup> He was eventually convicted of the amended charge of Extreme DUI with BAC of .15 or more, the other counts were dismissed, and he was sentenced to a fine and 30 days confinement.<sup>78</sup>

Not alleged in the SOR: On or about December 24, 2007, Applicant was arrested and charged with speeding after driving his vehicle 96 miles per hour (mph) in a posted 75 mph zone. He paid a substantial fine for that violation.<sup>79</sup>

Applicant started using alcohol when he worked in construction and consumed beer after work with his crew.<sup>80</sup> Although he abstained for a few months following his 2005 DUI, he resumed his consumption of beer with the same frequency, but with a diminished quantity.<sup>81</sup> In November 2006, he indicated that he drank a couple of beers on the weekends, while watching football, and on one other unspecified occasion during the week.<sup>82</sup> He estimated it would take two or three beers to “put him over the legal limit,” and six or seven beers “to make him intoxicated.”<sup>83</sup> At the hearing, he stated that

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<sup>73</sup> Government Exhibit 3 (Interrogatories and Answers to Interrogatories, dated April 22, 2008), at 5.

<sup>74</sup> Government Exhibit 2, *supra* note 12, at 7.

<sup>75</sup> Tr. at 95.

<sup>76</sup> *Id.* at 95-96.

<sup>77</sup> Government Exhibit 2, *supra* note 12, at 7.

<sup>78</sup> *Id.* at 7-8; Government Exhibit 8 (Public Access to Court Information, dated March 15, 2008).

<sup>79</sup> Tr. at 110.

<sup>80</sup> Government Exhibit 3, *supra* note 73, at 4.

<sup>81</sup> *Id.* at 5.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

he currently consumes three or four 12 ounce beers during the course of a sporting event, on one or two occasions per month.<sup>84</sup> He claims the last time he consumed alcohol to the point of intoxication was in 2005,<sup>85</sup> and there is no evidence to rebut his claim. Additionally, since 2005, there is no evidence to indicate that he has attempted to drive an automobile while legally impaired.

Applicant's relationship with cocaine was much more limited. He contends he purchased it on two occasions for his own use in 1992, and used it on three or four occasions that same year.<sup>86</sup> He claims he last used cocaine in 1992,<sup>87</sup> and there is no evidence to rebut his claim.

Applicant has never undergone alcohol treatment or counseling,<sup>88</sup> nor has he ever been evaluated or diagnosed as an alcohol abuser or alcohol dependent.<sup>89</sup> On March 13, 2007, he successfully completed 54 hours of alcohol education and counseling after being referred to the program by the court.<sup>90</sup>

### **Personal Conduct**

On February 8, 1999, Applicant applied for a security clearance and submitted a completed Questionnaire for National Security Positions (QNSP).<sup>91</sup> The SOR alleges Applicant deliberately failed to disclose two aspects of his police record in Section 23 thereof. The SOR ¶ 3.a. refers to question 23.d. (*Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?*). There is no express limitation to that particular question which would decrease the reportable period to anything less than "ever."<sup>92</sup> The SOR ¶ 3.b. refers to question 23.f. (*In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)*). Applicant answered "Yes" to the questions and listed four such incidents: a June 1992 forgery conviction, an August 1992 possession of cocaine conviction, both of which purportedly resulted in 18 months in jail,<sup>93</sup> a May 1991 DUI

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<sup>84</sup> Tr. at 107.

<sup>85</sup> *Id.* at 108.

<sup>86</sup> *Id.* at 77.

<sup>87</sup> *Id.*

<sup>88</sup> Government Exhibit 3, *supra* note 73, at 4-5.

<sup>89</sup> Tr. at 108.

<sup>90</sup> Applicant Exhibit C (Center for Recovering Families Certificate of Completion, dated March 13, 2007).

<sup>91</sup> Government Exhibit 6 (Questionnaire for National Security Positions, dated February 8, 1999).

<sup>92</sup> It should be noted, however, that questions 23.e. and 23.f. do limit the reportable period to the previous seven years. *Id.* at 9.

<sup>93</sup> *Id.*

conviction for which he was fined,<sup>94</sup> and a September 1996 disorderly conduct charge which was dismissed.<sup>95</sup> It is unclear what he meant by the first two or last entries for they do not coincide with any known incidents of those dates.

As noted above, Applicant was arrested on March 2, 1992 (SOR ¶ 1.j.), and charged with possession of a narcotic drug – felony. He was convicted of the charge and sentenced to 18 months confinement. He was also arrested on April 19, 1993 (SOR ¶ 1.h.), and charged with one count of failure to appear – felony, and three counts of forgery – felonies. The purported September 1996 incident actually occurred in August 1995 (SOR ¶ 1.e.). He was convicted of one possession of a forged instrument and the amended charge of solicitation, and sentenced to prison for 1-5 years, concurrent with other charges as set forth in SOR ¶ 1.i. The May 1991 incident is set forth in SOR ¶ 1.k. Applicant certified that his responses were “true, complete, and correct” to the best of his knowledge and belief.<sup>96</sup> They were not, for he omitted his July 11, 1998 arrest (SOR ¶ 1.d.) for menacing threats and resisting arrest, his May 4, 1994 arrest (SOR ¶ 1.f.) for DUI, his August 26, 1993 arrest (SOR ¶ 1.g.) for criminal damage and trespass – felony, as well as his June 25, 1983 arrest (not alleged in the SOR) for DUI, for which he was sentenced to a fine and three years probation.

Applicant attributes his failure to list every incident required by the questions to a variety of possibilities which he failed to fully explore or explain. In his answer to SOR he raised the possibilities that: (1) he genuinely forgot the arrest, (2) he inadvertently overlooked it, (3) he misunderstood the question, (4) he thought the arrest had been related to a prior charge and did not need to be reported, and (5) in his haste to submit the application he reported all of the more serious incidents.<sup>97</sup> Furthermore, it was his impression that felonies were the most important issue and he “did not carry over the same degree of completeness or thoroughness to [the question dealing with offenses dealing with alcohol or drugs].”<sup>98</sup> Despite denying a deliberate falsification, he admitted deliberately omitting any alcohol or drug incidents in the 1980s because he was purportedly under the impression that there was a seven-year time-frame for such offenses.<sup>99</sup> He intentionally omitted the other arrests of interest either because they were based on bench warrants for earlier incidents or they still remained unresolved.<sup>100</sup>

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<sup>94</sup> *Id.* at 11.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 11.

<sup>97</sup> Applicant’s Answer to SOR, *supra* note 43, at 7-8.

<sup>98</sup> Tr. at 112.

<sup>99</sup> *Id.* at 111.

<sup>100</sup> *Id.* at 112-115; Government Exhibit 3, *supra* note 73, at 4.

On April 5, 2005, Applicant applied for a security clearance and submitted a completed SF 86.<sup>101</sup> The SOR alleges Applicant deliberately failed to disclose one aspect of his police record in Section 24 thereof. The SOR ¶ 3.c. refers to question 24: (*Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.*). There is no express limitation to that particular question which would decrease the reportable period to anything less than "ever."<sup>102</sup> Applicant answered "Yes" to the question and listed two such incidents: an August 1992 possession of cocaine conviction and a May 1991 DUI conviction.<sup>103</sup> Applicant certified that his responses were "true, complete, and correct" to the best of his knowledge and belief.<sup>104</sup> They were not, for he omitted his March 31, 2001 arrest (SOR ¶ 1.c.) for two counts of false report to law enforcement, and DUI - liquor/drugs/vapors/combo, and his May 4, 1994 arrest (SOR ¶ 1.f.) for DUI. Once again, Applicant attributes his failure to list every incident required by the question to the same variety of possibilities set forth above which he failed to fully explore or explain.

Applicant's testimony during the hearing was replete with "I do not recall" responses to inquiries regarding the circumstances of his arrests, the dispositions of those arrests, and whether or not he had consumed alcohol prior to the individual incidents. Likewise, when questioned pertaining to a particular incident, he sometimes responded by referring to other incidents. He referred to incidents with the wrong dates. He admitted stealing the identity of others.<sup>105</sup> When asked what assurances he could provide that he would not have future "momentary errors of judgment," he stated that his firm conviction and the fact that he does not repeat prior mistakes would guide his future actions.<sup>106</sup>

According to a person who has known Applicant for 12 years, including their undergraduate years, Applicant is "intelligent, capable, and ethical," as well as "readily capable of handling any situation with thoughtfulness, insight, and maturity, always using sound judgment in his work and personal areas of responsibility." He is considered organized, efficient, and extremely competent.<sup>107</sup>

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<sup>101</sup> Government Exhibit 1, *supra* note 6.

<sup>102</sup> It should be noted, however, that questions 25 and 26 do limit the reportable period to the previous seven years. *Id.* at 12.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 15.

<sup>105</sup> Tr. at 72-75.

<sup>106</sup> *Id.* at 104.

<sup>107</sup> Applicant Exhibit A (Character reference, dated October 6, 2008).

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”<sup>108</sup> As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”<sup>109</sup>

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”<sup>110</sup> The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.<sup>111</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

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<sup>108</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>109</sup> Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

<sup>110</sup> “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>111</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”<sup>112</sup>

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”<sup>113</sup> Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

## **Analysis**

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), “a single serious crime or multiple lesser offenses” is potentially disqualifying. Similarly, under AG ¶ 31(c), an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” may raise security concerns. Applicant’s lengthy history of criminal conduct, involving over 20 arrests and a substantial number of convictions (along with a number of dismissals), is documented in his police and court records, his answers to interrogatories, and the evidence, including his testimony, presented during the hearing. The Government has established AG ¶¶ 31(a) and 31(c).

The guidelines also include examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where “so much time has elapsed since the criminal behavior

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<sup>112</sup> *Egan*, 484 U.S. at 531.

<sup>113</sup> See Exec. Or. 10865 § 7.

happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." In addition, when there is "evidence that the person did not commit the offense," AG ¶ 32(c) may apply. Similarly, AG ¶ 32(d) may apply when "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."

AG ¶ 32(a) only partially applies in one instance, but not for the remaining incidents, for several reasons. Applicant's history of criminal conduct, as set forth in the SOR, commenced in 1980, when he was 23 years old, and continued repeatedly over the next 25 years with few significant breaks between incidents. Criminal conduct, sometimes only months apart from each other, occurred largely because of Applicant's cavalier attitude towards authority and regulations, including the law. His cursory explanation and justification for his conduct that he had a cavalier lifestyle at the time provides no mitigation. Moreover, Applicant apparently transformed himself from the old construction industry lifestyle to an engineering lifestyle in 1997, and five incidents occurred after that. Over an extensive period, arrests and judicial punishment failed to stem the tide of his criminal activities. Instead, emboldened by some relatively light fines and brief periods of confinement, as well as some dismissals of charges, he added identity theft to his misconduct.

The circumstances of Applicant's criminal conduct were not so unusual that it would be unlikely to recur. To the contrary, the circumstances cast substantial doubt as to Applicant's reliability, trustworthiness, and good judgment. While I might be persuaded that one incident which was fully detailed and described during the hearing might justify the application of AG ¶ 32(a), Applicant's inability to explain or describe the circumstances of other incidents indicates AG ¶ 32(a) should not apply to the remaining incidents.

Applicant has argued that sufficient time has elapsed since the criminal behavior occurred to support mitigation of such conduct. He contends the last incident occurred in October 2001, and that the September 2005 incident was merely a slip or relapse. Considering the lengthy period of criminal conduct, the three and one-half years since his last SOR-alleged arrest, and the two years since he completed the alcohol education and counseling program stemming from that conviction, I believe the time elapsed does not yet satisfy the intent of AG ¶ 32(a).

AG ¶ 32(c) partially applies. The SOR alleges a large number of arrests, and in some instances, Applicant was convicted on one or more charges. In some instances, there is no evidence of a court disposition, and in other instances, the evidence is that the charges were dismissed. Moreover, Applicant's recollection pertaining to many of those events was not significant. It is noted that the earlier version of the AG contained the mitigating condition for "acquittal," but that condition was changed to the current condition: "evidence that the person did not commit the offense." I recognize that acquittal on the basis of a technicality does not address the substance of the charge and should not be the sole basis for mitigation. The revised AG condition mitigates only

on the basis of evidence that the person did not commit the offense. In other words, it requires an applicant to prove a negative. The burden of proof is different in the courtroom than in the personnel security system herein. However, considering the quality of the evidence, while there is evidence of some arrests and some dismissals, there is no evidence dispositive of Applicant's actual commission of the particular offenses in issue.

AG ¶ 32(d) does not apply. Applicant argues that there is evidence of substantial rehabilitation because he has successfully completed the alcohol education and counseling program, has not had any negative incidents during the past three and one-half years, and has a new lifestyle and respect for the law. There is insufficient evidence of successful rehabilitation despite Applicant's program completion and there being no further SOR-alleged criminal conduct. While a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future.

### **Guideline G, Alcohol Consumption**

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 22(a), "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent" is potentially disqualifying. Similarly, "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," may apply under AG ¶ 22(c). AG ¶ 22(a) is established by Applicant's DUI arrests and/or convictions; and AG ¶ 22(c), because he habitually consumes alcohol to the point of impaired judgment.

Applicant was arrested and charged with DUI in May 1991, May 1994, March 2001, and September 2005. The evidence reflects convictions for all but the May 1994 incident. As for Applicant's continued consumption of alcohol to the point of impairment, the following evidence is significant. Applicant abstained for a few months following his 2005 DUI, but resumed his consumption of beer with the same frequency, but with a diminished quantity. He estimated it would take two or three beers to "put him over the legal limit," which is .08, and six or seven beers "to make him intoxicated." He currently consumes three or four 12 ounce beers during the course of a sporting event, on one or two occasions per month. He claims the last time he consumed alcohol to the point of intoxication was in 2005. By his own admission, if two or three beers put him over the



legal limit, his current consumption of three or four beers, once or twice a month, while not sufficient to make him intoxicated, clearly passes the point of impaired judgment.

The guideline also includes examples of conditions that could potentially mitigate security concerns arising from alcohol consumption under AG ¶¶ 23(a)-(d). But in this instance, none of the mitigating conditions apply. Furthermore, after careful consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude Applicant's continued alcohol consumption to the point of impairment after his DUI conviction, and after completion of the alcohol education and counseling program, indicate he is unwilling or unable to curtail his alcohol consumption. As such, his conduct demonstrates a lack of judgment and/or a failure to control impulses which is inconsistent with the holder of a security clearance.

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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), a "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," is potentially disqualifying. Similarly, under AG ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative," may raise security concerns. Applicant's omissions of critical information pertaining to arrests, provides sufficient evidence to examine if his omissions were deliberate falsifications or were the result of simple oversight or negligence on his part.

As noted above, Applicant attributes his failure to list every incident required by the questions to a variety of possibilities which he failed to fully explore or explain. Some of those possibilities are inconsistent with each other, and, except for certain instances, he never explicitly selected one particular one to justify his actions. His "I do not recall" responses to inquiries regarding the circumstances of his arrests, the dispositions of those arrests, and whether or not he had consumed alcohol prior to the individual incidents, also are cause for concern. His responses to inquiries during the hearing were less than full and complete, and conveyed the impression that he was

unconcerned, unprepared to be candid, or deliberately evasive. He also admitted stealing the identity of others.

When asked what assurances he could provide that he would not have future “momentary errors of judgment,” he stated that his firm conviction and the fact that he does not repeat prior mistakes would guide his future actions. There is one problem accepting that explanation and that is that Applicant’s history is one violation, one arrest, one conviction, one falsification, and one omission after another.

His explanations are at odds with the characterization of him by his character witness: Applicant is “readily capable of handling any situation with thoughtfulness, insight, and maturity, always using sound judgment in his work and personal areas of responsibility.” A person so characterized would not have overlooked the incidents or misconstrued the questions. He is clearly very intelligent. I find Applicant’s explanations are incredible in his denial of deliberate falsification.<sup>114</sup>

Furthermore, contrary to Applicant’s contentions, and despite denying deliberate falsifications, he admitted deliberately omitting certain incidents in the 1980s because he was purportedly under the erroneous impression that there was a seven-year time-frame for such offenses, and he intentionally omitted other arrests of interest either because they were based on bench warrants for earlier incidents or they still remained unresolved. AG ¶¶ 16(a) and 16(b) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct under AG ¶¶ 17(a)-(g). But in this instance, none of the mitigating conditions apply.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of

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<sup>114</sup> The Appeal Board has explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines J, G, and E in my analysis below.

As noted above, Applicant's 25 year history of criminal conduct, as set forth in the SOR, commenced in 1980, when he was 23 years old, and continued repeatedly over the years with few breaks between incidents. His criminal conduct, according to Applicant, occurred largely because of his cavalier attitude towards authority and regulations, including the law. Arrests and judicial punishment failed to stem the tide of his criminal activities. Instead, he added identity theft to his conduct. He currently consumes enough beer to cause him to pass the point of impaired judgment.

His testimony and explanations pertaining to both his criminal conduct and the alleged falsifications on his QNSP and SF 86 are at odds with the characterization of him by his character witness: "readily capable of handling any situation with thoughtfulness, insight, and maturity, always using sound judgment in his work and personal areas of responsibility." A person – a member of Mensa – so characterized would not have overlooked the incidents or misconstrued the questions. To the contrary, his testimony, including his flawed memory and explanations, as well as his continued alcohol consumption, establishes irresponsibility, immaturity, a cavalier attitude towards the law, and absence of rehabilitation and true remorse. Taken together, his conduct over the years vitiates any other mitigation. (See AG ¶¶ 2(a)1, 2(a)(2), 2(a)(3), 2(a)4, 2(a)(5), 2(a)(6), 2(a)(7), and 2(a)(9).)

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the criminal conduct, alcohol consumption, and personal conduct security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

## Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	For Applicant
Subparagraph 1.p:	For Applicant
Subparagraph 1.q:	For Applicant
Subparagraph 1.r:	For Applicant
Subparagraph 1.s:	For Applicant
Subparagraph 1.t:	For Applicant
Subparagraph 1.u:	For Applicant
Subparagraph 1.v:	For Applicant
Subparagraph 1.w:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant
Subparagraph 3.d:	Withdrawn - For Applicant
Subparagraph 3.e:	Against Applicant

## **Conclusion**

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

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ROBERT ROBINSON GALES  
Chief Administrative Judge