DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 04-11456
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

April 17, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on July 8, 2003. On October 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 23, 2007; answered it in an undated document; and requested a decision on the record without a hearing. DOHA received his answer on November 5, 2007. On December 7, 2007, Department Counsel requested a hearing before an administrative judge, pursuant to Directive ¶¶ E3.1.8. Department Counsel was prepared to proceed on December 27, 2007, and the case was assigned to me on January 2, 2008. DOHA issued a notice of hearing on February

7, 2008, setting the case for February 28, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibit (AX) A, which was admitted without objection. The record closed when the hearing adjourned. DOHA received the transcript of the hearing (Tr.) on March 7, 2008. Eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations of criminal conduct under Guideline J, but he denied the allegation of falsifying his SF 86 under Guideline E. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 28-year-old apprentice draftsman employed by a federal contractor. If he successfully completes his apprenticeship, he will receive an associate's degree in marine engineering (Tr. 7). He worked in a number of entry-level jobs after high school and was working as a pizza delivery driver before being hired by his current employer. He has worked for his current employer since July 2004 (GX 5 at 1). He has never held a security clearance.

Applicant was convicted of burglary in 1999 and placed on supervised probation for about two years. He was 19 or 20 years old at the time. The offenses occurred when Applicant, his brother, and a friend were drinking beer and were intoxicated. The friend decided to break into a store. Applicant and his brother remained outside the store while the friend broke in and stole some beer. Applicant testified he tried to stop his friend from breaking in (Tr. 56). The friend put the beer in his car and all three drove away (GX 5 at 2; Tr. 53-54). Applicant was charged with a felony; but the charge was reduced to a misdemeanor, he was treated as a youthful offender, and the record was sealed (Tr. 49-50).

In 2001, Applicant was charged with driving under the influence (DUI) after his girlfriend caused a disturbance in the parking lot of a bar and the police were summoned. When the police arrived, Applicant was sitting in his car with the keys in the ignition. He had turned on the ignition switch to operate the cigarette lighter (Tr. 59). The case was pending for about 18 months because his lawyer contested the charge. Finally, Applicant agreed to plead guilty if the record would be sealed (Tr. 60). His driver's license was suspended for about 18 months and he paid a fine (Tr. 60-61; GX 5 at 3).

In December 2001, Applicant and his girlfriend had an argument during which he punched her in the face and she stabbed him. His girlfriend drove him to a hospital, which notified the police because of the stab wound. Applicant and his girlfriend told the police that an intruder had entered their residence, stabbed Applicant, and hit his girlfriend in the face. Applicant later admitted the report was false. He was charged with false reporting and domestic violence. Two warrants were issued for his failure to

appear in court. He was arrested and pleaded guilty to filing a false report. He was sentenced to ten days in jail, suspended, and a fine. The domestic violence charge was disposed of by a nolle prosequi (GX 4 at 1-2; GX 5 at 3-4).

In April 2002, Applicant and his girlfriend moved to the New England area. In February 2003, they had another argument and altercation. It occurred after Applicant broke off their relationship when he learned his girlfriend was selling crack cocaine. His girlfriend accused him of punching her in the face and kicking her in the stomach. When the police arrived, Applicant initially used his brother's name to identify himself, but then reconsidered and identified himself correctly (Tr. 68-69; GX 3 at 3, 6, 9-10). He was charged with domestic violence and disorderly conduct. Applicant denied striking his girlfriend. According to Applicant, she struck him in the head with a pipe and then injured and bruised herself to make herself look like a victim (GX 5 at 4; Tr. 67-71). Applicant enrolled in anger management classes for one and half months in an effort to look good for his trial. He stopped attending the classes when he decided he did not have an anger-management problem (GX 5 at 6). The charges were disposed of by a nolle prosequi (GX 3; GX 5 at 4).

At the time of the hearing, Applicant had long since ended his relationship with the girlfriend involved in the above incidents, and was married to another woman (Tr. 52). He blamed the offenses on "bad choices in a girlfriend" and testified he had matured, changed, and become a responsible person (Tr. 52).

Applicant executed his SF 86 in July 2003, about a year before he was hired. He answered "yes" to question 23 on the SF 86, asking if there were currently any charges pending against him. He disclosed the charges arising from the February 2003 incident, which were pending at the time he executed his SF 86. He answered "no" to question 24, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs, and he did not disclose the 2001 DUI charge. The instructions for this question directed him to "report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record." He also answered "no" to question 26, asking if, during the last seven years, he had been arrested for, charged with, or convicted of any offenses not listed in questions 21 through 25. He did not disclose the 1999 burglary charge, the 2001 DUI charge, or the arrest for false reporting and domestic violence in February 2002, all of which had occurred before he moved to New England. In this question, like question 24, he was directed to report information even though the case was "sealed" or otherwise stricken from the record.

Applicant completed his SF 86 at home and spent "maybe a couple of hours" completing it (Tr. 71, 72, and 75). He made several handwritten corrections after it was printed, including corrections to his birth date, his mother's first name, his sister's first name, an employer's name, and a supervisor's name (GX 2 at 1, 3, and 5).

Applicant testified he misunderstood the questions and was unaware that he was required to disclose his arrests because they were either youthful offender arrests, sealed records, or cases disposed of by nolle prosequi (Tr. 49). He admitted the arrests

in an interview with a security investigator in July 2004, about a year after he executed his SF 86, except for the February 2002 arrest, which was not mentioned. He also told the security investigator he did not intentionally omit information from his SF 86, but the arrests occurred during a hard time in his life. He told the investigator, "I try to forget those issues in my life." (GX 5 at 1.) At the hearing, he testified he did not remember the February 2002 arrest when he executed his SF 86 (Tr. 51).

During cross-examination, Applicant testified he did not know why he did not disclose his arrests. He testified he did not omit the information for fear of not getting the job, but he "didn't care to answer the questions," because he did not expect to be offered the job (Tr. 77, 86). He testified he may have mentioned some of his arrests to some people at work, but most of his coworkers and supervisors are unaware of his arrest record (Tr. 86).

A senior draftsman who works with Applicant regards him as honest, knowledgeable, and helpful (AX A). A union steward who has worked for Applicant's employer for 28 years and known Applicant since he began his current job testified that he trained Applicant and became his friend. He testified Applicant is a quick learner, trustworthy, and has done nothing to raise doubt about his character (Tr. 27-32). This witness believed the security concerns were based on two sealed arrests, but he apparently was unaware of the allegation of falsifying the SF 86 (Tr. 31).

A coworker who has worked for Applicant's employer for 20 years and known Applicant for about four years testified Applicant is a hard worker, diligent, polite, a good friend, and "an all around good guy." He believes Applicant is honest and "absolutely" could be trusted with sensitive information (Tr. 35-40). This witness was aware in general terms of the allegation of falsifying the SF 86 (Tr. 39).

Another coworker and friend who has worked for Applicant's employer for 20 years and known Applicant for about four years testified he has never seen anything to indicate Applicant would be a security risk (Tr. 42-46). This witness was unaware of the allegations in the SOR (Tr. 45).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not

inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to 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.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges Applicant was charged with burglary in 1999 (¶ 1.a), charged with DUI in 2001 (¶ 1.b), charged with making a false police report and assault (¶ 1.c), and arrested for assault in February 2002 (¶ 1.d). It also alleged two warrants were

issued for his failure to appear on the charges of assault and making a false police report (¶¶ 1.e and 1.f). Finally, it alleges he was charged with assault and disorderly conduct in 2003 (¶ 1.g).

The record reflects that the allegations in SOR ¶¶ 1.c and 1.d duplicate each other because they are based on the same assault. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶ 1.d in Applicant's favor.

The concern raised by criminal conduct is that it "creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30. Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c). Applicant's record of arrests and convictions is sufficient to raise these two potentially disqualifying conditions.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 31(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 32(a). Applicant's record of criminal conduct began nine years ago and ended more than five years ago. His passive participation in the burglary was the product of alcohol, bad judgment, and bad company. He was an aider and abettor, not a principal. His other arrests arose from an ill-advised relationship long since ended. His life turned around once he broke up with his old girlfriend and started his current job. With the exception of the false police report, none of these offenses cast doubt on his current reliability, trustworthiness, or good judgment. His false police report, however, was the beginning of a pattern of falsehoods, followed by falsely identifying himself to a police officer and falsifying his SF 86, discussed in greater detail below. Accordingly, I conclude AG ¶ 32(a) is established for the burglary, DUI, and domestic assaults, but not for the false police report.

Security concerns arising from criminal conduct may be mitigated if "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(d). Applicant's current job was his first opportunity for a career and successful future. During the past four years he has gained the respect of his colleagues and mentors,

married, and acted responsibly. He has admitted his mistakes and wants to put them behind him. He no longer engages in crimes against property (i.e., burglary), alcohol-related misconduct, or domestic violence. He has continued, however, to have problems with candor. I conclude AG ¶ 32(d) is established for the burglary, DUI, and domestic assaults, but not for the false police report.

Guideline E, Personal Conduct

The SOR alleges applicant falsified his SF 86 by deliberately omitting the arrests and charges alleged in SOR ¶¶ 1.a, 1.b, 1.c and 1.d. The concern under this guideline is set out in AG ¶ 15 as follows:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. 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 relevant disqualifying condition in this case is "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." AG ¶ 16(a). When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant presented himself at the hearing as intelligent and articulate. He had no difficulty understanding the questions on his SF 86 at the hearing. However, his explanations for not disclosing his full arrest record were implausible and contradictory. He finally admitted he "didn't care to answer the questions" because he did not believe he would get the job. I conclude he intentionally omitted his record of arrests in his previous home state, thereby raising AG ¶ 16(a) and shifting the burden to him to refute, explain, extenuate, or mitigate the facts.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). This mitigating condition is not established because Applicant made no effort to correct the omissions from his SF 86 until he was confronted with the facts a year later.

Security concerns under this guideline may be mitigated if "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 17(c). The first prong ("so minor") is not established, because the falsification of his SF 86 is a felony under 18 U.S.C. § 1801. The second prong ("so much time") is not established, because the falsification occurred in his current application for a clearance. The third prong ("so infrequent") is not established, because his falsification was part of a pattern of dishonesty, starting with his false police report in December 2001, continuing when he attempted to deceive a police officer about his identity in February 2003, and ending with his false answers on his current security clearance application. The fourth prong ("unique circumstances") is not established because the falsification occurred during a routine security clearance application. Finally, his pattern of falsification casts doubt on his current reliability, trustworthiness, and good judgment. I conclude AG ¶ 17(c) is not established.

Security concerns under this guideline also may be mitigated if "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." AG ¶ 17(d). After considerable ducking and weaving during cross-examination at the hearing, Applicant finally acknowledged that he chose not to make full disclosure of his criminal record because he did not think he would get the job. The circumstances in which he falsified his SF 86 have changed, in that he has matured, made new friends, married, and found a good job with a future. However, the last element of this mitigating condition ("unlikely to recur") is undermined by his record of falsification in other circumstances. I conclude Applicant has not carried his burden of establishing AG ¶ 17(d).

Finally, security concerns under this guideline may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). This condition is not established, because Applicant has not made full disclosure of his criminal record to his supervisors and most of his coworkers.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An 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 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. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is still a young man, but he is a substantially different person from the misguided youth involved in the burglary in 1999 or the person involved in a three-year dysfunctional romantic relationship that ended in February 2003. His outlook on life appears to have changed after he started his current job. He has matured and grown in many respects. However, candor is essential in the security clearance process, and he has not yet established a record of candor.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct and his falsification of his SF 86. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

_____
LeRoy F. Foreman
Administrative Judge