



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



In the matter of:)
)
-----) ISCR Case No. 05-06723
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: Joyce E. Peters, Esquire

March 6, 2008

Decision on Remand

HARVEY, Mark W., Administrative Judge:

Applicant mitigated security concerns regarding his personal conduct. Clearance is granted.

Statement of the Case

On February 28, 2004, Applicant submitted a Security Clearance Application (SF 86).¹ On February 10, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2,

¹Government Exhibit (GE) 1 (Security Clearance Application, Electronic Personnel Security Questionnaire or "EPSQ", dated February 28, 2004). For convenience, the security clearance application in this decision will be called an SF 86. There is no allegation of falsification of the 2004 SF 86.

²Appellate Exhibit (App. Ex.) II (Statement of Reasons (SOR), dated Feb. 10, 2006). App. Ex. II is the source for the facts in the remainder of this paragraph unless stated otherwise.

1992, as amended, modified and revised.³ The SOR alleges security concerns under Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer dated March 27, 2006, and received at DOHA on March 30, 2006, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing.⁴ The case was assigned to Judge Graham on March 22, 2007. Judge Graham held a hearing on May 17, 2007. At the hearing, the Government did not present any witnesses (transcript or record (R.) 14). Applicant presented four witnesses. The Government offered ten exhibits (GE 1-10; R. 13-14), and Applicant offered 18 exhibits (AE A-R).

Procedural Issues

The Government objected to consideration of AE R⁵ because OPM's opinion that there were no security issues is not relevant (R. 88-90). Judge Graham overruled the Government objection, indicating it would be considered for a limited purpose due to its low relevance (R. 90-91). I will not consider AE R for any purpose. At most AE R establishes that OPM conducted an investigation, and did not note any significant security issues. However, OPM did not render an opinion about the allegations in the SOR. Because the scope and quality of the OPM investigation was not presented, the relevance of OPM's determination is too low to warrant admission into evidence.

The Government objected to consideration of one letter in AE D because it was duplicated (R. 32-33). Judge Graham admitted both copies because two offices sent the letters to Applicant on different occasions (R. 33). I will only consider one copy of the letter, but I will not remove the letter from AE D.

All other exhibits were admitted without objection. DOHA received the transcript on May 30, 2007. Judge Graham issued his decision granting a clearance on July 19, 2007.

³On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the Statement of Reasons (SOR) was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are not applicable to Applicant's case because the SOR, is dated Feb. 10, 2006, which is prior to Sep. 1, 2006.

⁴App. Ex. IV (Applicant's response to SOR, dated Mar. 27, 2006).

⁵ AE R is an Office of Personnel Management (OPM) document indicating that as of August 29, 2005, the OPM investigation was complete and closed. The one-page document does not cite any security issues concerning Applicant's background.

Appellate Litigation

The Government appealed Judge Graham's decision.⁶ On November 14, 2007, a majority of the Appeal Board remanded Applicant's case for a new decision. The Appeal Board highlighted footnote 2 of Judge Graham decision:

After reviewing the transcript, I have decided to adopt Applicant's answers to the SOR as the basis for my findings of fact. His answers state the case and present the issues much more succinctly than trying to cobble together gleanings from the transcript.

ISCR Case No. 05-06723 at 3-4 (App. Bd. Nov. 14, 2007).

Judge Graham's decision cited to the transcript eight times. Moreover, the only record source for his summaries of supervisory recommendations, and the descriptions of the problems in the police department are from witnesses' statements at the hearing. The Appeal Board describes Department Counsel's citation to contrary facts not mentioned in Judge Graham's decision; however, the Appeal Board did not cite any evidence not discussed by Judge Graham that is material, and contrary to Judge Graham's factual findings. *Id.* at 2-3. It would have been helpful if the Appeal Board had articulated the particular facts, conflicting with Judge Graham's decision, requiring consideration or discussion in the remand decision. The Appeal Board elaborated upon Judge Graham's error:

Thus, based on his notion that evidence in the SOR answer was more "succinct" than evidence in the transcript, it appears that the Judge may have failed to consider properly evidence that conflicts with evidence in the SOR answer. A Judge is required to weigh conflicting evidence and to resolve such conflicts based upon a careful evaluation of factors such as the comparative reliability, plausibility and ultimate truthfulness of conflicting pieces of evidence. In this case, the Judge may have excluded a large block of evidence solely as a result of his dissatisfaction with the presentation of that evidence. To have done so is error.

Id. at 4.

The Appeal Board remanded Applicant's case "to issue a new decision in which he evenhandedly considers all record evidence." *Id.* I will not restate or rely on Judge Graham's findings or conclusions in the Findings of Fact, Analysis or the Formal Findings sections of this decision, and will issue a *de novo* opinion.⁷

⁶The briefs filed by the parties were not part of the file provided to me. I recommend that briefs of counsel filed with the Appeal Board be routinely provided to those judges who conducted the hearing (who so request), as is the practice at other U.S. civil and military courts.

⁷ The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase "de novo determination":

On February 5, 2008, Applicant waived his right to a re-hearing, and elected a decision based on the existing record (App. Ex. V). The Government did not request a re-hearing. I approved the request to decide the case based on the transcript and admitted exhibits, as described above.

Findings of Fact

Applicant admitted most of the SOR allegations in his response to the SOR and at his hearing. His response to the SOR also provided mitigating information concerning the SOR allegations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant was born in April 1975 (R. 16). His current employment is to review background investigations for a federal contractor. He married in August 2003 (R. 16, 64). His wife works at the police department, where Applicant was employed from 1999 to 2003 (R. 64). She is now a supervisor (R. 64). He has a 10-year-old stepdaughter, and an 18-month-old son (R. 16). In 2003, he earned a bachelor's degree (R. 16). He joined the Coast Guard in 1995 (R. 17). During his Coast Guard service he was trained in port security (R. 18). He left active Coast Guard service in December 1998 and obtained employment with a police department (R. 19). He went from active reserves to inactive reserves in April 2001 (R. 57). He attained the rank of petty officer third class (E-4) (R. 57). He held a security clearance in the Coast Guard. He was Honorably Discharged from the Coast Guard Reserve on March 4, 2003 (AE E).

Applicant's police employment was primarily patrol duties (R. 21). He successfully completed his probationary training, and received a satisfactory appraisal on May 17, 2000 (R. 23-24; AE A). On June 21, 2000, he was nominated, but was not awarded an outstanding job performance award (R. 24, 27; AE C). His appraisal after his first year was satisfactory (R. 25-27; AE B). He received 20 letters of appreciation, mostly from citizens in the community, for his performance as a patrol officer (R. 28; AE D). He was promoted from Police Recruit, to Police Officer I, to Police Officer II, and then to Corporal in Mid-2001 (R. 34-35).

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define "de novo proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence." And, in *United States v. First City National Bank*, 386 U.S. 361, 368 [(1967)], this Court observed that "review de novo" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.

(footnotes omitted).

False statement in internal affairs investigation (SOR ¶ 1.a)

In September 2001, a female police officer (A) and her female roommate (V) were involved in an altercation (R. 36). A drew her weapon on V and told V to get away (R. 36). V left their apartment, called the police dispatcher (D), and told D that A drew her weapon on her (R. 36). V asked D for advice about what she should do (R. 36). Applicant lived near V and A, and Applicant and A were friends (R. 37-38). D and Applicant were friends and eventually married each other (R. 37). D told Applicant about the incident between A and V (R. 37). Later, D's supervisor told D not to discuss the incident (R. 39). D told Applicant about the directive from her supervisor, and asked him not to reveal their conversation or spread rumors (R. 39). D did not tell him to lie to internal affairs (R. 145-146). When Applicant was questioned by internal affairs about the incident, he denied discussing it with anyone (R. 39).⁸ Internal affairs confronted D and Applicant about their discussion, and Applicant admitted lying about not discussing the incident (R. 40). D did not lie to internal affairs (R. 145-146). D was suspended for two days (R. 40).

On December 28, 2001, Applicant was demoted from Corporal to Police Officer II (R. 40, 98-100).⁹ He appealed the demotion because he believed a minor suspension or a loss of 40 hours' leave was the usual punishment for the offense (R. 53-54, 109).

The chief of police concluded that the misconduct was not so egregious that Applicant should be fired and recommended he should be reduced in rank from Corporal (pay \$22.57/hr) to Police Officer II (pay \$21.01/hr) (GE 3). The assistant county manager affirmed the demotion, but noted that Applicant had taken full responsibility for his misconduct, recognized the seriousness of his falsification, and guaranteed that such conduct would not happen again (GE 6).

In sum, he lied to protect a friend, D, and not with the intent to obstruct the investigation of the assault by the police officer (R. 145). He recognized his lie to internal affairs was "stupid" and wrong (R. 144, 42). He learned from his mistake (R. 144), and promised that he would not lie in the future (R. 42).

Insubordination (SOR ¶ 1.b)

In May 2002, Applicant received a shift-level counseling or contact card for failing to complete an accident report, as Sergeant B, his supervisor specified (R. 43-

⁸The information about D's conversation with Applicant was collateral to the Internal Affairs' investigation because the dispatcher tapes tape recorded D and V's conversation (R. 39). Applicant and D were not eyewitnesses to the assault. Applicant did not interview or discuss the assault with the participants of the assault.

⁹The police department notified Applicant he was demoted because he "violated administrative regulations and/or department rules, regulations and/or procedures when [he] lied during an Internal Affairs investigation" (R. 101; GE 3).

47; 103-106).¹⁰ One of the individuals involved in the accident was from out of town, and Applicant failed to ask for a local telephone number, a cell number, or any other telephone contact information other than his out-of-state, home telephone number (R. 43-45; 104). He was unable to contact the person, because that person had not returned home (R. 43-45).

Applicant told Sergeant B, his supervisor, that it was impossible for him to get the information for the report that evening. Sergeant B demanded that he submit the accident report that night with all of the information, and that he should remain at the police station until the report was completed (R. 45). Applicant asked to see the Watch Commander to protest Sergeant B's order (R. 45). Sergeant B opined that the Watch Commander would not intervene, and again directed Applicant to fully complete the report and not to leave until the report was done (R. 45-46). Applicant wrote unknown in the boxes of the report for the contact information, filed the report with another supervisor (who approved it), and explained he would supplement the report when he had the additional information (R. 45-46). Later, he obtained the remainder of the information, and filed a supplemental report (R. 46). Applicant contended it was not uncommon to file incomplete reports, and then supplement the report later after additional information was obtained (R. 44).¹¹ Sergeant B wrote up a contact card or letter of reprimand on Applicant for insubordination because he did not complete the report before going home (R. 47). He did not receive formal disciplinary action, loss of pay or a suspension (R. 47). The contact card was supposed to be removed from his file after one year (R. 47). The incident involving Sergeant B is documented in Applicant's final evaluation, dated April 9, 2003 (GE 10).

Abuse of sick leave (SOR ¶ 1.c)

In June 2002, Applicant received a supervisory contact card or letter of reprimand for improper use of sick leave (R. 54-56, 106). After Applicant received the demotion, he was depressed¹² and unhappy (R. 54, 110). During the six-month period after the demotion, he called in sick too many times and used too much vacation time

¹⁰Contact cards are similar to written counseling statements commonly used in the Department of Defense. Contact cards may result from minor rule violations, and do not constitute formal disciplinary action (R. 35). They are more serious than an oral reprimand, but less serious than a written reprimand (R. 200). They are supposed to be removed from one's personnel file after one year (R. 35, 200). It is possible to receive positive contact cards. For example, Applicant's rating in 2000 notes he received "three positive contact cards." (AE B at 5).

¹¹ Applicant's rating for June 6, 1999, to June 6, 2000, resulted in his certification after probation. In regard to completion of reports and following procedures, it notes:

His work is complete and contains few errors. He takes pride in his reports which are very complete and contain much detail . . . [He] complies with Departmental Manual and Section Policies. [He] projects himself as a confident and professional officer. He always follows supervisory direction and readily seeks clarification if unsure.

AE A at 4.

¹² He self-diagnosed himself as "depressed" (R. 106-107). He did not seek a professional diagnosis for his mental or emotions state (R. 106-107).

(R. 54). The reprimand required him to provide a doctor's note when he was absent due to being sick, and a particular supervisor had to approve his leave (R. 55). After receipt of the reprimand, he was very cautious about using sick leave (R. 56). The abuse of sick leave was also documented on his performance evaluation (R. 107-108). He did not appeal the contact card or letter of reprimand (R. 109).

The contact card refers to ten examples of abuse of sick leave in a four month period, as well as use of over 400 hours of sick leave in the past twelve months. This dereliction was noted in Applicant's final evaluation (GE 10).

Failure to turn-in license plate (SOR ¶ 1.d)

Between December 2000 and the end of 2001, Applicant received a supervisory contact card for failing to turn in a license plate that he seized from a privately owned vehicle (R. 48-51; 114-117). Applicant had a part time, off-duty job providing security at an apartment complex (R. 48). He noticed a license plate on a vehicle, and determined it did not belong on the vehicle (R. 48). He removed the license plate and put it in the trunk of a police car so that he could turn it in later (R. 49). When he went off duty, he left the license plate in the trunk, and turned the police car over to the assigned officer, placing the keys through a mail slot (R. 49). Later, the department discovered the license belonged on the vehicle, and the vehicle was towed in error (R. 50). When the department called him about the license plate, he attempted to contact the assigned officer to retrieve the plate, but could not reach her (R. 50). The department had to use another key to open the police car to retrieve the license plate (R. 50). The issuance of the contact card was noted in his performance appraisal of March 2002 (R. 115-117).

Use of privately-owned emergency light (SOR ¶ 1.e)

Applicant also received a supervisory contact card regarding unauthorized use of emergency equipment, because he used an extra emergency blue light on his unmarked police car (R. 51-52, 117-118).¹³

Applicant had noticed other officers, including a sergeant, using an extra blue light on unmarked cars to make them more visible (R. 52). He purchased his own personal "blue light" and used it when he made traffic stops in an unmarked vehicle so that the stopped police car would be more visible (R. 51). He believed use of his "blue light" added safety for himself and other drivers (R. 51). The department manual only permitted use of attached equipment, and his blue light was not attached to the vehicle (R. 52). After he received the contact card, he threw the blue light away to avoid any possibility that he would be accused of using it again (R. 52).

¹³ His 2000 performance evaluation notes Applicant "conducts himself in a safe manner. He properly utilizes available safety equipment." AE B at 8.

Slapping a suspect (SOR ¶ 1.f)

In January 2003, Applicant arrested a person for possession of crack cocaine (R. 58). Applicant, another officer, the suspect, and the suspect's family member were in the same room of the suspect's apartment (R. 58). Applicant described the incident as follows:

I was standing next to the [suspect] (who was restrained). I had an officer standing behind me and a family member sitting across the room from me. While I was trying to speak to the family member to obtain what happened, the [suspect] was becoming very unruly, very loud. I turned to tell the [suspect] to quiet down. At which point when I turned, the back of my hand touched the back of his head. There was no physical injury.

(R. 58). The suspect started screaming about being hit, and the family member accused Applicant of striking the suspect (R. 58). As Applicant walked out of the building, the other officer made a remark about the possibility of a complaint, and Applicant responded along the lines of he did it because "the guy would not shut up" (R. 59).

Internal Affairs Investigation and Police Department Resignation (SOR ¶ 1.g)

In February 2003, Applicant was advised of his rights in connection with an internal affairs investigation for slapping the suspect (R. 129; GE 8). Applicant admitted to internal affairs that he touched the suspect with the back of his hand, but denied that he intentionally struck the suspect (R. 60).

Applicant learned that the internal affairs investigation about striking the suspect was going to have an unfavorable result, and knew that he could be fired (R. 60). His chain of command informed him they were making a recommendation to the chief to discipline him, and one option would be to fire him (R. 119-121). He could not afford a good lawyer, and did not believe the free lawyer assigned to defend police officers was competent (R. 61). Although Applicant was generally aware of his appellate rights, he never received any written, formal notice about the action to terminate his employment or his appellate rights (R. 118, 125-127). After he resigned, he received his final performance review summary, which stated the process of termination was initiated (R. 63, 122). Applicant submitted a voluntary resignation from the police department at the end of March 2003 (R. 64; GE 9). At the time his resignation was approved, he was unsure about whether the internal investigation about slapping the suspect was completed (R. 123).

Post-Police Department Education, Employment and References

After leaving the police force, Applicant returned to college and earned his bachelor's degree in May 2003 (R. 64). He married on August 3, 2003 (R. 64). He worked several part time jobs and he was responsible for child care, while he searched for a job (R. 64-65, 139).

In April 2004, he began working in the parts department of a large motorcycle company (R. 65). He currently handles internet sales on a part-time basis for the same company (R. 66). He is so trusted that he is permitted to keep about \$10,000 in merchandise at his residence, which permits him to perform his duties while at home (R. 66-67). Applicant received pay raises and very favorable appraisals from the motorcycle company (R. 68-73; AE F, G). He also received a monetary award based on customer satisfaction in October 2005 (R. 74; AE I). His general manager said (R. 156-167) that he supervises about 70 employees, and has known Applicant for about three years (R. 157, 165). He described Applicant as honest, reliable, and trustworthy (R. 158-161, 166; AE G, H). He has high integrity, exercises sound judgment, and scrupulously follows all rules (R. 158-161, 167). If Applicant requested, he would hire Applicant back fulltime without any hesitation (R. 162).

From October 2005 to May 2007, Applicant was employed in a part-time job performing background investigations for the federal government (R. 75-76).¹⁴ In October 2006, he received a promotion to supervisor (R. 76-77, 80-81; AE L). In January 2007, he was moved because of changes in his employer's contract with the government (R. 84; AE. N). His performance appraisals documented his diligence, reliability and leadership (R. 77-79, 81-82; AE J, K, M). He received a \$200 award on March 8, 2007 for his hard work (R. 84-85; AE O).

Applicant's current employment for a defense contractor involves reviewing and assigning cases for background investigations (R. 95-96). He answers questions about the requirements to complete an adequate investigation (R. 96). After the investigators complete their reports, he reviews the report to ensure it is thorough, complete and in the correct format (R. 96). He intended to continue his employment with the contractor, and seek greater responsibility and supervisory authority (R. 97).

A deputy program manager and program manager (PM) for a company that did background investigations for security clearances described Applicant's performance over an 18-month period as a case reviewer (R. 168-188; AE K, AE M). Applicant began as a case reviewer, then he became a field investigator (R. 169-170). Later, he was promoted to Deputy Field Operations Manager (R. 179-180). She rated him as an above average employee and supported a performance increase for Applicant (R. 178-179). At the end of his employment, he received a monetary award (R. 181-182; AE O). The PM said Applicant was good at following the rules (R. 172). He is hard working, intelligent and honest (R. 174). He has integrity and displayed that characteristic throughout his service with the employer (R. 172). She emphasized his

¹⁴ Applicant disclosed in response to Question 20 on his 2004 security clearance application that he left a job under other than favorable circumstances, and mentioned an internal affairs investigation (R. 135, GE 1). He said he resigned from the police force in 2003 based upon a false complaint and a previous disciplinary issue, which had damaged his credibility (R. 135; GE 1). He listed three other reasons for resigning: (1) to obtain better employment; (2) to finish school, and (3) to avoid the delay and expense of litigation (R. 135, GE 1). He did apply for another police department job after resigning in order to support his family (R. 138), but the application was unsuccessful. At his hearing, he maintained that he accurately disclosed his reasons for leaving the police department.

good judgment, integrity and maturity (R. 175-176, 187-188). She would hire him again (R. 183).

A program manager for a Homeland Security contractor, Mr. A, made a statement on Applicant's behalf (R. 189-207). Mr. A currently has a Top Secret clearance with SCI access (R. 202). Mr. A left the police department (where he worked with Applicant) about 2 ½ years ago with the rank of corporal (R. 201, 203). Mr. A was deployed to Iraq when Applicant left the police department in 2003 (R. 204). Mr. A has known Applicant for 12 years (R. 189). They met in Coast Guard basic training (A School) (R. 190). They subsequently served together in a Coast Guard port security unit (R. 190). Mr. A joined a police department, and encouraged Applicant to take a job with his department (R. 191-192). Mr. A acted as a mentor for Applicant at the police department (R. 196), and he described Applicant as a good police officer (R. 192-193). Mr. A witnessed the incident with Sergeant B, involving completion of the accident report, and opined that Sergeant B's demand was unreasonable (R. 193-194). Applicant thought his demotion was unfair, and became frustrated with his work in the police department (R. 197). Mr. A described Applicant as being honest, trustworthy, non-violent, serious and mature (R. 202). Applicant is more serious and mature now than he was when he worked at the police department (R. 202).

Mr. A was unable to "discern any cohesive leadership[,] management training or competency amongst the front-line supervisors" at the police department (R. 195). There was a culture that if a sergeant didn't like a particular officer, the other sergeants would harass or ride the officer (R. 195, 206-207). In addition to Applicant, other, very good officers were the victims of this unprofessional treatment by the sergeants (R. 195). This "riding" of Applicant began before the first internal affairs investigation (R. 196). Punishments for infractions were inconsistent, and upper level management would not address complaints of supervisor abuse (R. 198-199). There was high turnover of police officers at the department (R. 205). Mr. A was never the victim of harassment at the police department (R. 207).

Conclusion

Applicant's family is aware of his problems in the police department, and he had informed others with the need to know, such as some of his employers, about his past employment problems (R. 147). Not all of his supervisors are aware of his problems in the police department (R. 148). He recognized that his integrity and reputation were very important, and thought he was now much more mature than when he worked for the police department (R. 93). He changed after he left the police department, and characterized his poor decisions as a police officer from 2001 to 2003 as "stupid mistakes" (R. 93-94). He said he would not make such mistakes in the future (R. 93-94). His family is his supportive network now (R. 152). He now faces problems head on, and admits his mistakes, and asks supervisors how to take corrective action (R. 151). He emphasized his more recent performance appraisals as proof he had changed (R. 94).

Policies

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to the relevant adjudicative guidelines are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." 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.

In the decision-making process, facts must be established by "substantial evidence."¹⁵ The government initially has the burden of producing evidence to establish

¹⁵ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime*

a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).¹⁶

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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 under this Directive include, by necessity, consideration of the possible risk an 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.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. 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.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Comm'n, 383 U.S. 607, 620 (1966). "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).

¹⁶"The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Guideline E (Personal Conduct)

Under Guideline E, “[c]onduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that [applicant] may not properly safeguard classified information.” Directive ¶ E2.A5.1.I.

Three personal conduct disqualifying conditions (PC DC) could potentially raise a security concern and may be disqualifying in this case. PC DC 1 applies where there has been “[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.” Directive ¶ E2.A5.1.2.1. PC DC 4 applies when there has been, “[p]ersonal conduct . . . that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.” Directive ¶ E2.A5.1.2.4. A security concern may also result under PC DC 5 when there is “[a] pattern of dishonesty or rule violations.” Directive ¶ E2.A5.1.2.5.

PC DCs 1, 4, and 5 apply. Applicant lied in an internal affairs investigation, he disobeyed a sergeant's order not to go home without completing a report, he abused sick leave, he failed to turn in a license plate to the property room the day it was seized, he used a privately owned blue-light without required permission, and there is “substantial evidence” he assaulted a suspect by slapping him with the back of his hand. His former employer provided this reliable, unfavorable information. Applicant admitted all of the conduct, except for slapping the suspect. This conduct reflects adversely on Applicant and if known, would affect his reputation in the community. The misconduct is a series of rules violations.

A security concern based on Guideline E may be mitigated by any of the following mitigating conditions:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;

E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

E2.A5.1.3.6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to

comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; and,

E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

Applicant admitted the conduct alleged in the SOR, except for the allegation that he deliberately struck a suspect with his hand. The rule violations are pertinent to a determination of judgment and reliability.¹⁷ Therefore, the mitigating condition in Directive ¶ E2.A5.1.3.1 (PC MC 1) does not fully apply.¹⁸ Applicant admitted that he struck a suspect with his hand in February 2003. However, the touching was not deliberate or intentional. The allegation of the assault and battery on the suspect is unsubstantiated, and is therefore mitigated under PC MC 1.

Applicant did not falsify any security clearance-related documentation, responses to interrogatories, or omit any requested information. The mitigating conditions in Directive ¶¶ E2.A5.1.3.2 to E2.A5.1.3.4 do not apply.

Security concerns can be mitigated under PC MC 5 when an Applicant “has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.” Directive ¶ E2.A5.1.3.5. Applicant disclosed his problems concerning the police department to his family and employers. He admitted his conduct in his response to the SOR and on his security clearance application. PC MC 5 applies to mitigate “[p]ersonal conduct . . . that increases [Applicant’s] vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.” PC DC 4. He has come to terms with his conduct and problems in the police department, and is open with security officials and others, as necessary about his past mistakes and misjudgments. Applicant is not susceptible to

¹⁷In ISCR Case No. 02-23133 at 4 (App. Bd. June 4, 2004) the Appeal Board explained why historically remote allegations may remain pertinent and non-mitigated under PC MC 1:

Security clearance adjudications are not limited to consideration of an applicant's present circumstances. To the contrary, an applicant's security eligibility requires consideration of the applicant's present conduct and circumstances in light of the applicant's past conduct and circumstances. See Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. See also *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Although the Administrative Judge might conclude Applicant's history of alcohol abuse was extenuated or mitigated for purposes of Guideline H (Alcohol Consumption), it was arbitrary and capricious for the Judge to declare Applicant's past alcohol-related incidents as not being pertinent to a determination of Applicant's current security eligibility. Applicant's overall history of alcohol abuse, not just his most recent instances of alcohol abuse, was pertinent and relevant to evaluating his security eligibility. Cf. ISCR Case No. 98-0582 at 4-5 [App. Bd. Nov. 12, 1999] (“Furthermore, under the whole person concept, the entire history of Applicant's drug abuse, not merely the most recent period of that drug abuse, must be considered in evaluating Applicant's security eligibility.”). Accordingly, the Judge [in ISCR Case No. 02-23133 at 4 (App. Bd. June 4, 2004)] erred by applying Guideline E Mitigating Condition E2.A5.1.3.1.

¹⁸ See ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, “some credit” is still available under that same mitigating condition).

blackmail or coercion because of his past problems. PC MC 5 mitigates PC DC 4; however, it does not mitigate PC DCs 1 and 5.

Applicant did not refuse to cooperate with any security-related inquiry. The mitigating condition in Directive ¶ E2.A5.1.3.6 does not apply.

“Association with persons involved in criminal activity,” Directive ¶ E2.A5.1.2.6 is not alleged in the SOR, and does not apply. Accordingly, the mitigating condition in Directive ¶ E2.A5.1.3.7 does not apply.

In sum, PC DCs 1 and 5 are partially mitigated by PC MC 1. However, these two disqualifying conditions are fully mitigated under the “whole person concept,” *infra*.

Whole Person Concept

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under Directive provision E2.2.1 Applicant’s actions were knowledgeable and voluntary when he: (1) lied in an internal affairs investigation on January 13, 2002, (2) disobeyed a sergeant’s order not to go home without completing a report on May 29, 2002, (3) abused sick leave in mid-2002, (4) failed to turn in a license plate to the property room the day it was seized in 2002, and (5) used a privately-owned blue light without required permission in 2002.

His pattern of rule violations occurred over a 13 month period, from January 13, 2002 to February 2003. In 2002, he was 27 years old, sufficiently mature to be fully responsible for his conduct. The motivation for his lying about discussing an investigation with the dispatcher was to protect, his friend, the dispatcher. The motivation for failing to turn in the license plate, and his initial failure to complete a report was lack of attention to detail. His insubordination when he violated Sergeant B’s order to remain at the station until the report was completed was motivated by frustration. His motivation to use a privately-owned blue light was for his safety and that of other motorists; however, his failure to seek advance permission was motivated by a desire to cut corners, and possibly because he expected his request to be disapproved.

Applicant admitted he struck a cocaine-using suspect with the back of his hand, but said it was unintentional. The unauthorized touching resulted when he turned from a family member to the suspect, while the suspect was being arrested at the suspect’s apartment. The striking did not result in injury to the suspect. This non-deliberate touching or slap does not violate a rule. Applicant has refuted this allegation, and it therefore, has no security significance. As indicated previously, the allegation that he struck a suspect is unsubstantiated, and is mitigated under PC MC 1.

A person who engages in “conduct involving questionable judgment, untrustworthiness, [and] unreliability . . . could indicate that [applicant] may not properly safeguard [sensitive] information.” However, the likelihood of recurrence is insignificant because he was forthright and candid at his hearing about his misconduct as a police

officer. More than five years has elapsed since Applicant broke any rules. All his problems occurred when he was employed as a patrol officer at the police department. At the police department when a police officer had problems working with one of the sergeants, sometimes the other sergeants singled out and put excessive pressure on that police officer. Applicant was immature, and did not respond well to such pressure. He resorted to abuse of sick leave, and likely made other mistakes concerning attention to detail, compliance with regulations, insubordination, etc. Once Applicant left the unpleasant, stressful environment at the police department, his performance improved and the rules' violations ended, as documented in his post-police employment performance reports.

The absence of evidence of any prior or subsequent violation of his employer's rules or requirements (outside the period January 2002 to February 2003), and his evident sincerity about making future progress all weigh in his favor. He has provided sufficient evidence of his efforts to change, and demonstrate his maturity, attention to detail, compliance with rules, responsibility and rehabilitation. He is unlike to have future disciplinary problems. His marriage, birth of his child, acceptance of responsibility for a step child, success in new employment, and bachelors degree have all occurred since his last disciplinary problem, which occurred early in 2003.

The likelihood of recurrence is also reduced because of improvement in Applicant's understanding of his situation. Although he did not receive counseling or therapy, he does have a clear perception of, or understanding about, how to avoid problematic situations. Applicant admitted he made stupid mistakes and described what he had done. He provided evidence of remorse, or regret for his mistakes. He promised that in the future he would not lie about his conduct. Instead, he would admit his errors immediately and seek guidance from his supervisors. His record of good post-February 2003 employment weighs in his favor. His wife, child and step child are positive influences on his life. His past rules violations do not create current doubt about his judgment, reliability, and trustworthiness, and his past problems do not call into question his current ability or willingness to comply with laws, rules and regulations.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns. The evidence leaves me without doubts as to Applicant's security eligibility and suitability.

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"¹⁹ and supporting evidence, and my interpretation of my responsibilities under Enclosure 2 of the Directive. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude he is eligible for access to classified information.

¹⁹See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 E:	FOR APPLICANT
Subparagraphs 1.a to 1.g:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

Mark W. Harvey
Administrative Judge