DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No.12-11559
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Christopher Morin, Esq., Department Counsel
For Applicant: *Pro se*

05/29/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 12, 2012. On February 19, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on February 21, 2014; answered it on March 21, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 21, 2014, and the case was assigned to me on May 1, 2014. On the same day, the Defense Office of Hearings and Appeals (DOHA) issued a

notice of hearing, scheduling the hearing for May 13, 2014. On April 21, 2014, Department Counsel provided Applicant's attorney with copies of the documents he intended to submit at the hearing. (Hearing Exhibit (HX) I.) He provided the documents to Applicant on April 29, 2014. (HX II.)[1] I convened the hearing as scheduled. Applicant waived the 15-day notice requirement in the Directive ¶ E3.1.8. (Tr. 9-10.) Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through N, which were admitted without objection.[2] DOHA received the transcript (Tr.) on May 21, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in ¶¶ 1.a-1.d and 1.g-1.n. There is no ¶ 1.e in the SOR. He admitted the conviction in ¶ 1.f but denied the underlying conduct. He admitted ¶ 2.a, which cross-alleges the allegations in ¶¶ 1.a-1.d and 1.f-1.n. He denied the allegations of falsification in ¶¶ 2.b-2.f, but he admitted the foreign contacts alleged in ¶¶ 2.e.1 and 2.e.2. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 37-year-old employee of a defense contractor. He has worked for his current employer since June 2012. He previously worked for defense contractors in Afghanistan from February 2009 to February 2010 and from May 2011 to May 2012, and in Kyrgyzstan from June to September 2012, serving in several jobs, including laborer, supply specialist, truck driver, and movement control lead. (GX 1 at 13-17; GX 3 at 1; AX C; Tr. 74-78.) He received a favorable trustworthiness determination before his deployment to Afghanistan in May 2011, but he has never held a security clearance.

While deployed to Afghanistan, Applicant earned a reputation for dedication, hard work, and dependability. (AE L.) A former supervisor commented, "[Applicant] was a very driven and hardworking employee. If a task needed to get done, he could always be counted on to do the job right the first time." (AX E at 2.) In September 2011, he received a certificate of appreciation from an Army field support brigade in Afghanistan. (AE M.) In October 2011, he received a certificate of appreciation from his employer for his Afghanistan service. (AE N.) A PowerPoint briefing slide prepared by his employer recognized him for his "incomparable initiative," his "above and beyond drive in his approach to the daily tasks," and his "can do" attitude. (AE O.)

A friend of Applicant, who has known him for seven years, considers him honest, hardworking, dependable, and dedicated. (AX K at 1.) Another friend, who has known him for six years, is aware of his overseas service and confident that he would never

[1] Applicant was represented by an attorney when he responded to DOHA interrogatories and the SOR, but he chose to represent himself at the hearing. (Tr. 6-7.)

[2] Applicant attached 15 exhibits to his answer to the SOR, labeled as Exhibits A through O. To distinguish the exhibits attached to Applicant's answer to the SOR from the exhibits submitted at the hearing, the exhibits attached to his answer are identified in this decision as Answer Exhibits (AE) A through O. The exhibits submitted at the hearing are identified as Applicant's Exhibits (AX) A through N.

compromise classified information (AX G.) A third friend, a retired Army master sergeant, describes him as polite, well-mannered, and appearing to have found happiness in being a team player and working alongside military personnel. (AX F.)

Applicant is the youngest of three siblings. He has a 42-year-old sister and a 39-year-old brother. He has never married and has no children. He dropped out of high school after completing the tenth grade. (GX 3 at 2; Tr. 116.) After dropping out of school, he spent his time "hanging out, going to clubs and trying to party and stuff." (Tr. 117.) He received his general educational development (GED) certificate in June 1995. He was 18 years old when he found his first job. He worked as a truck driver in the private sector from January 1995 to March 2005. He was unemployed from March 2005 to October 2006. He worked as a temporary employee for an aircraft tire manufacturer from October 2006 to December 2008, was laid off after a strike at the company, and was unemployed from December 2008 to February 2009. (GX 1 at 17-20; GX 3 at 3.) At the hearing, he presented information from an unknown source reflecting that his home town is among ten towns having the lowest median incomes in the United States. (AX A.)

The evidence concerning the criminal conduct alleged under Guideline J is summarized below in chronological order and in reverse alphabetical order of the subparagraphs in the SOR.

SOR ¶¶ 1.m and 1.n. In February 1995, Applicant was riding in a car with an acquaintance after attending a night club. For reasons not reflected in the record, his acquaintance fired a handgun, they were stopped by police, and both were charged with felony use of a firearm in the commission of a felony. The police found gunpowder residue on his acquaintance's hands but none on Applicant's hands. Applicant provided evidence against his acquaintance. The charges against Applicant were dismissed, the acquaintance was released on bail, and the court ordered them to not come within 100 feet of each other. According to Applicant, his acquaintance approached him shortly after being released on bail and threatened to kill him with a handgun. Applicant attempted to take the handgun from his acquaintance and the handgun discharged, wounding his acquaintance. In November 1995, Applicant was convicted of felony unlawful wounding. He was sentenced to prison for three years, with two years and nine months suspended, and placed on probation for four years. (Answer at 5-6; GX 3 at 5-6; GX 4 at 3; GX 5 at 3; AE A.)

SOR ¶ 1.l. In August 1996, Applicant was involved with another altercation with the acquaintance alleged in SOR ¶¶ 1.m and 1.n, and was charged with assault. He claimed that he was acting in self-defense, but he was convicted and sentenced to 30 days in jail, suspended on condition of good behavior for 12 months.[3] (Answer at 6; GX 4 at 3; GX 5 at 3.)

[3] The other party in the incidents alleged in SOR ¶¶ 1.l, 1.m, and 1.n was shot and killed in an altercation with another person in March 2008. (AX G.)

SOR ¶ 1.k. In November 1998, Applicant was kicked out of the house by his father, was unemployed, and was angry. He was charged with destruction of property of a value less than $1,000, reckless driving, use of profane or threatening language over a public airway, and assault and battery. He was convicted of assault and battery. The other charges were dismissed. The record does not reflect the details of the incident or the sentence that was imposed. (Answer at 5; GX 4 at 4; GX 5 at 3.)

SOR ¶ 1.j. In March 1999, Applicant was arrested for stalking after he broke up with his girlfriend and tried to persuade her to resume their relationship. When his girlfriend called the police, Applicant resisted arrest. He was convicted of stalking and resisting arrest. The record does not reflect the sentence that was imposed. (Answer at 5; GX 4 at 4; GX 5 at 3.)

SOR ¶¶ 1.h and 1.i. In September 1999, Applicant missed an appointment with his probation officer and was arrested for violating the probation that was imposed as a result of the conviction of unlawful wounding (alleged in SOR ¶ 1.n). In his answer to the SOR, he stated that he notified the probation officer that he would be unable to make the appointment because of a conflicting job requirement. His probation was revoked, and he served two years and nine months in jail. (Answer at 4; GX 4 at 4; GX 5 at 3.) In his answer to the SOR and at the hearing, Applicant presented evidence that his probation officer was convicted in 2006 of corruption and selling drugs. There is no evidence that the probation officer's drug-dealing and corruption affected the decision to revoke Applicant's probation, but the evidence reflects widespread corruption in the law enforcement community at the time of Applicant's offenses. (AX H through N.) The record does not reflect whether the judge considered the charges and convictions alleged in SOR ¶¶ 1.j, 1.k, and 1.l before revoking Applicant's probation.

SOR ¶ 1.g. In May 2005, Applicant was arrested for assault and battery on a family member after his intoxicated father attacked him and Applicant defended himself. The charges were dismissed. (Answer at 3-4; GX 4 at 4.)

SOR ¶ 1.f. In January 2006, Applicant was arrested for stalking. A woman ahead of him in grocery store checkout line left a bag in the store, and he pursued her in an attempt to give it to her. She drove away before he could catch up to her, and he followed her in his car and attempted to get her attention by honking his horn. He followed her into her driveway at her home. She was frightened, and she called the police and accused Applicant of stalking her. Applicant was arrested for stalking and spent two months in jail because he could not afford bail. (GX 3 at 8.) He was convicted and sentenced to 12 months in jail, suspended. (GX 4 at 5; GX 5 at 2.)

SOR ¶¶ 1.c and 1.d. The SOR alleges that Applicant was arrested in January 2006 and again in February 2006 for contempt of court. In his answer to the SOR, he stated that there was only one contempt charge, and it occurred because he missed a court date due to lack of transportation. (Answer at 2-3; AE D.) Court records reflect that he was convicted of contempt of court in February 2006 and sentenced to 45 days in jail, and convicted again of contempt of court in June 2006 and sentenced to six months

in jail. (GX 4 at 5.) I conclude that SOR ¶¶ 1.c and 1.d allege the same offense, and that a second contempt charge in June 2006 resulted in a conviction but was not alleged in the SOR.

SOR ¶ 1.b. In May 2007, Applicant was charged with public intoxication and disorderly conduct. In his answer to the SOR, he stated that this incident was the result of another confrontation with the same person involved in SOR ¶¶ 1.m and 1.n, and that the confrontation violated a court order prohibiting both Applicant and the previous assailant from being within 100 feet of each other. (Answer at 2.) Applicant was fined $250 for disorderly conduct and $25 for public intoxication. (AE C.)

SOR ¶ 1.a. In May 2008, Applicant was charged with driving while intoxicated (DWI). In June 2008, he was convicted, fined $350, and sentenced to confinement for 30 days (suspended). His driver's license was suspended for 12 months, and he was required to complete an alcohol education program. (GX 4 at 5; GX 5 at 4.) When Applicant was hired by a defense contractor in January 2009 for service in Iraq, the "good behavior" requirement on which suspension of confinement was based was lifted for as long as he was employed by the defense contractor for service outside the United States. (AE B and F.) Applicant has not consumed alcohol since his arrest for DWI. (GX 3 at 6; Tr. 33.)

When Applicant submitted an application for a trustworthiness determination in October 2010, his application asked, "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)?" He answered "Yes" and disclosed the arrest for DWI alleged in SOR ¶ 1.a. (GX 6 at 22.) He did not disclose the arrests and convictions alleged in SOR ¶¶ 1.b-1.d, 1.f, and 1.g. His application was initially denied. He believed that the denial was based on his felony conviction in 1995 and other criminal conduct. (GX 3 at 9.) In March 2011, he appealed the denial, citing the quality of his service in Afghanistan and supporting his appeal with letters of recommendation. (AX B.) His appeal was granted, and he was allowed to deploy again to Afghanistan in May 2011. (AX C at 4.)

At the hearing, Applicant admitted that he listed only his "last situation" on his October 2010 application. He testified, "I might have did lie (sic) to the Government here. And I maybe didn't want to disqualify myself from the job at that time, but I did fill that form out." (Tr. 81.)

When Applicant submitted his SCA in June 2012, the part of Section 22 captioned "Police Record" asked him:

> Have any of the following happened? (If "Yes" you will be asked to provide details for each offense that pertains to the actions that are identified below.)
>
> - In the past seven (7) years, have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against

you? (Do not check if all the citations involved traffic infractions where the fine was less than $300 and did not include alcohol or drugs.)

- In the past seven (7) years have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?

- In the past seven (7) years have you been charged, convicted or sentenced of a crime in any court? (Include all qualifying charges, convictions or sentences in any Federal, state, local, military, or non-U.S. court, even if previously listed on this form.)

- In the past seven (7) years have you been or are you currently on probation or parole?

- Are you currently on trial or awaiting a trial on criminal charges?

He answered "No" and did not disclose the arrests, charges, and convictions alleged in SOR ¶¶ 1.a-1.d and 1.f. (GX 1 at 32.)

In the part of Section 22 captioned "Police Record (EVER)," Applicant was asked:

Other than those offenses already listed, have you EVER had the following happen to you?

- Have you EVER been convicted in any court of the United States of a crime, sentenced to imprisonment for a term exceeding 1 year for that crime, and incarcerated as a result of that sentence for not less than 1 year? (Include all qualifying convictions in Federal, state, local, or military court, even if previously listed on this form.)

- Have you EVER been charged with any felony offense? (Include those under the Uniform Code of Military Justice and non-military/civilian felony offenses.)

- Have you EVER been convicted of an offense involving domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common?

- Have you EVER been charged with an offense involving firearms or explosives?

- Have you EVER been charged with an offense involving alcohol or drugs?

Applicant answered "Yes" to these questions and disclosed his 1995 felony conviction of unlawful wounding alleged in SOR ¶ 1.n, but he did not disclose the charges and convictions alleged in SOR ¶¶ 1.a and 1.b.[4] (GX 1 at 33-34.) He testified that he did not know why he did not disclose the May 2008 DWI conviction alleged in SOR ¶ 1.a. (Tr. 95.)

In the part of Section 22 captioned "Police Record (EVER)-Summary," he was asked the same questions as the preceding part captioned "Police Record (EVER). He answered "No" and did not disclose the convictions alleged in SOR ¶¶ 1.a and 1.b. (GX 1 at 34-35.)

During a personal subject interview in August 2012, he admitted that he intentionally omitted his DWI conviction from his June 2012 SCA because he was afraid that disclosing all of his criminal record would hurt his chance of obtaining a security clearance. He told the investigator that he did not think that his May 2008 DWI would be reflected anywhere, because Army personnel had told him that his record was "wiped clean" when his application for a position of public trust was granted. (GX 3 at 6-7.)

In his June 2013 response to DOHA interrogatories, Applicant stated that he was told by an Army representative that the lesser offenses and any other charges after his felony conviction had been removed from his record. He stated that, based on the information from the Army representative, he believed "that the charges no longer existed on [his] record [and he] did not need to disclose them." He denied intending to mislead or to conceal or withhold information. He stated that he volunteered the information during his PSI "in order to be completely honest and forthcoming, and with a large degree of trust and belief that the interviewer would do his best to understand [him] and record this information in an adequate and fair manner." (GX 2 at 4.)

At the hearing, Department Counsel asked Applicant, "[Y]ou are saying that you didn't list them because someone in the Army told you that you didn't have to?" Applicant responded, "He didn't tell me that I didn't have to, but he told me my background was cleared up enough to receive this overturned decision with my [trustworthiness determination]." Department Counsel asked, "But you understand that this process is completely different than that, right? Applicant responded, "Yes, sir. And I lied on -- I mean, I see what you are saying." (Tr. 90-91.)

In Applicant's answer to the SOR, he stated that his omission of his criminal record was "caused significantly by improper or inadequate advice of authorized personnel." However, at the hearing, he reviewed the investigator's summary of the PSI reflecting that he admitted falsifying his SCA, and he acknowledged that the

[4] Applicant did not disclose his arrest for domestic violence alleged in SOR ¶ 1.g. However, the question regarding domestic violence did not encompass an assault on a parent.

investigator's summary, including his admission of intentional falsification, was accurate. (Tr. 103-05.) He also admitted that he did not disclose the omitted offenses until the investigator asked him about them. (Tr. 102-03.)

Section 19 of Applicant's June 2012 SCA, captioned "Foreign Contacts," asked him,

> A foreign national is defined as any person who is not a citizen or national of the U.S. Do you have, or have you had, close and/or continuing contact with a foreign national within the last seven (7) years with whom you, or your spouse, or cohabitant are bound by affection, influence, common interests, and/or obligation? Include associates as well as relatives, not previously listed in Section 18.

Applicant answered "No," and he did not disclose a relationship with a citizen of Kyrgyzstan in 2011 and 2012 and a relationship with a citizen of the Philippines in 2010 and 2011. (GX 1 at 27.)

Applicant admitted the two relationships in his answer to the SOR, but he asserted that he thought the question pertained only to foreign nationals who were a potential threat. (Answer at 10.) In his August 2012 PSI, he told the investigator that he met a woman from Kyrgyzstan on the Facebook website in 2011 and they corresponded on Facebook weekly. He visited her in Kyrgyzstan in May 2011, while on R & R leave from Afghanistan, and decided to break off the relationship. During the same PSI, he told the investigator that he met the woman from the Philippines in 2010 on an internet dating site, and they emailed each other two or three times a week. Applicant knew that she was a very poor single mother, and he sent her $200 a month from July to December 2011. In December 2011, he visited her in the Philippines, decided that she was interested only in his money, and broke off the relationship. (GX 3 at 3.)

In Applicant's PSI, answer to the SOR, and testimony at the hearing, he described in great detail how his employment by a defense contractor revealed to him a world that he did not know existed. It allowed him to travel to foreign countries and interact with contractor employees from foreign countries. For the first time in his life, he worked with military personnel and contractors who were dedicated, highly motivated, and concerned about each other. He found himself working in an environment where everyone wanted to do "the right thing." He developed feelings of kinship with the combatants he supported, felt responsible for providing them the best possible support, worried about them when they were on operational missions, and was taken aback by their generous expressions of gratitude for his service and respect for his abilities. Last but not least, he was well paid for his services and was able to plan for a better life. (Tr. 56-70.)

In early 2014, Applicant petitioned his state governor for restoration of his rights to vote, hold public office, serve on a jury, and serve as a notary public. He was notified

on May 1, 2014 that his application is under review. (AX D.) As of the date of his hearing, he had not been notified of the results of that review. (Tr. 60-61.)

Policies

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

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges the multiple arrests, charges and convictions set out above in the "Findings of Fact" (SOR ¶¶ 1.a-1.d and 1.f-1.n). The concern raised by 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 evidence shows that the two contempt of court charges alleged in SOR ¶¶ 1.c and 1.d were the same offense. 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). Thus, I resolve SOR ¶ 1.d in Applicant's favor.

Similarly, the arrest for a probation violation alleged in SOR ¶ 1.i and the revocation of probation alleged in SOR ¶ 1.h are duplicative, because they are components of the same event. Thus, I resolve SOR ¶ 1.i in Applicant's favor.

Applicant's admissions and the evidence presented at the hearing establish four disqualifying conditions under this guideline:

> AG ¶ 31(a): a single serious crime or multiple lesser offenses;
>
> AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted;
>
> AG ¶ 31(e): violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and

AG ¶ 31(f): conviction in a Federal or State court, include a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.[5]

The following mitigating conditions under this guideline are potentially applicable:

AG ¶ 32(a): 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(c): evidence that the person did not commit the offense; and

AG ¶ 32(d): 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.

The first prong of AG ¶ 32(a) focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*.

AG ¶¶ 32(a) and 32(d) are not established. Six years have passed since Applicant's arrest for DWI. He stopped consuming alcohol after his arrest. Nineteen years have passed since his first and most serious offense, the wrongful wounding. He has served with distinction in a combat zone as a contractor employee. He is remorseful for his past criminal behavior and is determined to put his past behind him. His attitude and conduct changed drastically after he began working for a defense contractor in Afghanistan. He has discovered that there is a better life than what he was living before May 2008.

However, for the reasons set out in greater detail in the discussion of Guideline E, I conclude that Applicant's criminal record is not mitigated by the passage of time, because his repeated falsifications preclude a finding that he is rehabilitated. He intentionally omitted most of his criminal record, including a felony conviction, from his

[5] Even though Applicant was sentenced to incarceration for three years and was incarcerated "for not less than one year," the disqualification from holding a clearance imposed by the Bond Amendment, 50 U.S.C. § 435c, does not apply to this case because Applicant is not seeking eligibility for special access programs, restricted data, or any other information commonly referred to as "sensitive compartmented information."

application for a public trust position in October 2010,[6] intentionally omitted most of his criminal record from his SCA in June 2012, and falsely claimed that his omissions were not intentional in his June 2013 responses to DOHA interrogatories.[7]

AG ¶ 32(c) is established for the domestic assault alleged in SOR ¶ 1.g. The evidence reflects that Applicant's father was the aggressor, and as a result the charged were dismissed.

AG ¶ 32(c) is not established for the felony use of a firearm in the commission of a felony, alleged in SOR ¶ 1.m. Although the charge was dismissed, the record does not reflect the extent of Applicant's participation in the felonious conduct, whether the charge was dismissed for lack of evidence, or whether the charge was dismissed in return for Applicant's testimony against his acquaintance.

AG ¶ 32(c) is not established for the felony unlawful wounding alleged in SOR ¶ 1.n and the assault and battery alleged in SOR ¶ 1.l. In both instances, Applicant claimed that he was the victim of an assault and was acting in self-defense. However, the doctrine of collateral estoppel applies in both instances, because he was convicted by a court of competent jurisdiction after a full trial on the merits.

The doctrine of collateral estoppel generally applies in DOHA hearings and precludes applicants from contending that they did not engage in criminal acts for which they were convicted. ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997). There are exceptions to this general rule, especially with respect to misdemeanor convictions based on guilty pleas. Relying on federal case law, the Appeal Board has adopted a three-part test to determine the appropriateness of applying collateral estoppel to misdemeanor convictions. First, the applicant must have been afforded a full and fair opportunity to litigate the issue in the criminal trial. Second, the issues presented for collateral estoppel must be the same as those resolved against the applicant in the criminal trial. Third, the application of collateral estoppel must not result in "unfairness," such as where the circumstances indicate lack of incentive to litigate the issues in the original trial. Federal courts recognize that an individual may not have an incentive to fully litigate a misdemeanor offense because there is less at stake or because a plea

[6] The SOR does not allege that Applicant falsified his October 2010 application for a public trust position. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's omissions from his application for a public trust position for these limited purposes.

[7] Applicant's falsification of his June 2012 SCA was not alleged under Guideline J. It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the Government of the United States. Deliberately false answers on a security clearance application or in response to questions from security investigators and adjudicators are serious crimes within the meaning of Guideline J.

bargain creates a disincentive to litigate the issues. ISCR Case No. 04-05712, 2006 WL 354122 (App. Bd. Oct. 31, 2006) (citations omitted).

AG ¶ 32(c) is not established for the two convictions of stalking alleged in SOR ¶¶ 1.f and 1.j. Although Applicant claimed that he had innocent motives for his conduct, he did not contest the facts. It is not established for the conduct alleged in SOR ¶¶ 1.b-1.d, 1.h, 1.i, and 1.k, which Applicant admitted.

Guideline E, Personal Conduct

The SOR cross-alleges the criminal conduct alleged in SOR ¶ 1 under this guideline (SOR ¶ 2.a). It also alleges that Applicant falsified his responses to questions in his SCA regarding his police record and his foreign contacts (SOR¶¶ 2.b-2.e) and that he falsified his responses to DOHA interrogatories by denying that he falsified his SCA (SOR ¶ 2.f).

The concern under this guideline 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.

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 falsification. An administrative judge must consider the record evidence as a whole to determine 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). An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

The disqualifying conditions relevant to the falsifications alleged in SOR ¶¶ 2.b-2.f are:

> AG ¶ 16(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; and

> 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;

The disqualifying conditions relevant to the criminal conduct cross-alleged under this guideline are:

> AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;
>
> AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and
>
> AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant admitted during his August 2012 PSI and at the hearing that he intentionally omitted most of his criminal record on his June 2012 SCA, because he was afraid that he would not receive a security clearance and would lose his job if he fully disclosed his previous record. In his response to DOHA interrogatories, he stated that he believed that his previous record had been "wiped out" when he received a favorable trustworthiness determination, but his PSI reflects that his belief extended only to a belief that his previous record would not be discovered during his background investigation. He has not plausibly or credibly explained why he disclosed the 1995 felony conviction in his June 2012 SCA if he believed that his previous criminal record had been "wiped out." I conclude that AG ¶ 16(a) is established.

In response to the June 2013 DOHA interrogatories, Applicant partially recanted the portion of his PSI admitting intentional falsification of his SCA. Instead, he attributed his omissions to inaccurate advice from Army officials, and he asserted that he did not intentionally omit relevant information from his SCA. At the hearing, he reverted to his version of the facts summarized in the PSI, and he admitted that he intentionally omitted

information from his SCA. Based on his testimony at the hearing, his admissions during the PSI, and the implausibility of his explanation for the omissions from his June 2012 SCA, I conclude that he falsified his response to the DOHA interrogatories. Thus, I conclude that AG ¶ 16(b) is established.

Applicant fully disclosed his criminal record during his PSI, but only after he was confronted with the evidence by the investigator. He did not disclose his past until the investigator told him that his integrity was more important that any issues about his past. (GX 3 at 9.)

On the other hand, Applicant's explanation for not disclosing his contacts with natives of Kyrgyzstan and the Philippines was credible and plausible. He had contacts with contractor employees from other countries and did not believe that he was required to report casual friendships with foreigners on his SCA. His contacts with the two women alleged in the SOR consisted of email correspondence and one visit to each, and the two relationships never progressed beyond long-distance email and one meeting in person. The monthly $200 sent to the woman in the Philippines was prompted by Applicant's compassion for a needy person rather than a sense of affection or obligation. I conclude that his failure to disclose these two relationships was not an intentional omission within the meaning of Guideline E.

The following mitigating conditions are potentially relevant:

> AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> AG ¶ 17(b): the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
>
> AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

AG ¶ 17(a) is not established. Applicant made full disclosure of his criminal record in August 2012, two months after he submitted his SCA, but only after being confronted with the evidence by a security investigator.

AG ¶ 17(b) is not established. Although Applicant asserted in his responses to DOHA interrogatories and his answer to the SOR that his omissions were due to incorrect advice from Army authorities that his criminal record was "wiped out," he admitted to a security investigator during his August 2012 PSI that he intentionally omitted most of his criminal record because he was afraid that full disclosure would hurt his chance of obtaining a security clearance and keeping his overseas job. Notwithstanding his claim that he thought his criminal record was "wiped out," he disclosed his 1995 felony conviction, thereby undercutting his assertion that he believed his previous convictions no longer existed and were not encompassed by the questions on the SCA.

AG ¶ 17(c) is not established. Applicant's falsifications were not minor because they were intended to undermine the integrity of the security clearance process. His falsifications were repeated and did not occur under unique circumstances making them unlikely to recur.

AG ¶ 17(d) is partially established, because Applicant acknowledged his falsifications at the hearing. AG ¶ 17(e) is established, because Applicant's full disclosure of his criminal record during his PSI and at the hearing reduced his vulnerability to exploitation, manipulation, or duress.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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.

I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has matured since he dropped out of high school and began associating with crime-oriented companions. When he was hired by a defense contractor in 2009, he discovered a new world that he did not know existed. He found a sense of purpose and responsibility, and discovered that good work is appreciated. He found his work as a contractor employee extremely rewarding. His desire to continue his new lifestyle was strong, but his lack of judgment caused him to resort to deception in an effort to maintain it. He has acquired skills and experience that he would not have but for his service in Afghanistan. It is possible that his experience with the security clearance process will cause him to learn the importance of integrity and candor, but insufficient time has passed to determine if he has learned that lesson. This is a sad case, because Applicant has made great progress in turning his life around, and he has provided valuable service under combat conditions. However, my obligation is to resolve close cases in favor of national security.

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 personal conduct. 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 on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j-1.n:	Against Applicant

Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	Against Applicant

Conclusion

I conclude that 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