



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-06286

Appearances

For Government: Nichole L. Noel, Esquire, Department Counsel

For Applicant: David P. Price, Esquire

May 5, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant admitted 10 of the 12 statement of reasons (SOR) personal conduct allegations. However, at his hearing he mitigated all SOR allegations except for six incidents of fraudulent activity and one allegation of making a false statement to an Office of Personnel Management (OPM) investigator on February 21, 2008. He failed to mitigate security concerns under Guideline E. Access to classified information is denied.

Statement of the Case

On October 26, 2005, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or Security Clearance Application (SF 86). (Government Exhibit (GE) 1) On September 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges security concerns under Guideline E (personal conduct). (Hearing Exhibit (HE) 3) 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 Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On October 5, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. (HE 4) On January 12, 2010, Department Counsel announced she was ready to proceed on Applicant's case. On January 22, 2010, DOHA assigned Applicant's case to me. On January 25, 2010, and February 19, 2010, DOHA issued hearing notices. (HE 1, 2) On March 3, 2010, Applicant's hearing was held. At the hearing, Department Counsel offered four exhibits (GE 1-4) (Tr. 13), and Applicant offered five exhibits (AE A-E) with 15 enclosures to AE A, and 55 enclosures to AE E. (Tr. 14-15; AE A-E) There were no objections, and I admitted GE 1-4 (Tr. 16), and AE A-E. (Tr. 16) Additionally, I admitted the hearing notices, SOR, and response to the SOR. (HE 1-4) On March 11, 2010, I received the transcript. I admitted AE F-I on March 11, 2010.¹ I held the record open until March 25, 2010, to receive closing arguments, which were admitted along with some emails as HE 5-7.

Findings of Fact²

In Applicant's response to the SOR, he admitted the conduct alleged in SOR ¶¶ 1.c to 1.i. (HE 4) As for SOR ¶¶ 1.a and 1.b, he did not disclose on his October 26, 2005, SF 86 that his security clearance was denied at another government agency (AGA) because he was not aware that the AGA had denied his access to classified information. (HE 4) He said he did not read the letter received at his residence in May 2005 from AGA informing him his security clearance was revoked. (HE 4) He also provided extenuating and mitigating information. (HE 4) 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 is a 57-year-old employee of a defense contractor. (Tr. 19; AE E at 1)³ His primary function for his employer is in the area of computer security. (Tr. 97-100) He served an initial enlistment in the military from 1974 to 1980. (Tr. 182) In 1982, he reenlisted and served until 1998. (Tr. 183) The awards and medals he received during his military career are listed in his DD Form 214. (AE E at 1) He retired at the grade of E-7. (AE E at 1) He held a security clearance through most of his military service. (Tr.

¹Department Counsel objected to the admissibility of AE F-I because the record was previously closed. (HE 5) Department Counsel's objection was overruled.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Unless stated otherwise, the facts in this section are from Applicant's October 26, 2005, security clearance application. (GE 1)

184) From September 2005 to October 25, 2008, Applicant worked as a security guard. From July 2005 to September 2005, he was unemployed. From February 2003 to July 2005, he was employed as a senior staff manager. He married in June 1992, and divorced in April 2002. In September 2002, he married his current spouse. His son was born in 1975, and is currently serving in the Navy. Applicant has completed some college and numerous courses while in military service.

SOR allegations

In about 1975, Applicant set his vehicle on fire, told the police the vehicle was stolen, filed a claim with his insurance company, and received a \$600 payment. (Tr. 149-150; SOR ¶ 1.l) Applicant was on active duty in the military at that time, his son was in the hospital, and Applicant's had just completed basic training. (Tr. 150) His pay was low and he committed the fraud because he needed money for his family. (Tr. 150)

Applicant left active duty in 1980 after his first enlistment. (Tr. 153) In about 1980 or 1981 after leaving active duty, Applicant took his roommate's stereo and speakers, stored them at a friend's house, told his roommate that the property was taken in a robbery, and then kept the property. (Tr. 150-152; SOR ¶ 1.k; HE 3, 4) At his hearing, Applicant admitted all of the allegations as stated, except he denied he told his roommate the property was taken in a robbery. (Tr. 151) He claimed his roommate told the police the property was taken in a robbery, and he never corrected the roommate's statement to the police. (Tr. 151) He explained his roommate owed him money for his roommate's share of the rent, and the property he took was of a lesser value than the debt. (Tr. 152) The roommate moved out a week after the theft without paying the rent he owed Applicant. (Tr. 152)

Applicant and a friend burned-down a garage owned by the friend so his friend could make an insurance claim. (Tr. 153; SOR ¶ 1.h; HE 3, 4) Applicant told the friend about the arson of his vehicle, and the friend came up with the idea of burning his own garage as a way to make money. (Tr. 153) Applicant set fire to the garage and then called the Fire Department. (Tr. 154) Applicant received about \$100 for setting the fire. (Tr. 154)

In about 1982 while serving on active duty in the military, Applicant filed a request for a travel advance for about \$1,000. (Tr. 154-155; SOR ¶ 1.j; HE 3, 4) After he received the \$1,000, he spent it and then filed a false claim to a Government Finance Office indicating the money was taken from him in a robbery. (Tr. 154) He filed the false claim because he was behind on his house payment and needed funds. (Tr. 155)

In about 1984, Applicant pushed his car over a cliff and then filed a claim with his insurance company. (SOR ¶ 1.i; HE 3, 4). At his hearing, Applicant denied that he pushed his car over a cliff. (Tr. 157) Instead, he said his car was on a hill, and his leg cramped from riding his bicycle earlier that day. (Tr. 157) He jumped out of his car, and forgot to set the brake. (Tr. 157) The car rolled down the hill, and Applicant thought it was too risky to try to stop it. (Tr. 157) His car was damaged when it came to rest at the bottom of the hill. (Tr. 157-158) A tow truck hooked-up to his car; however, the tow truck

driver negligently failed to properly use his wheels and brakes on the hill. (Tr. 157-158) The tow truck rolled over on top of Applicant's vehicle. (Tr. 158) He argued he would not push his car off a cliff because the area is busy, and if he pushed his car off a cliff he may have been caught. (Tr. 158) Also, the area back to his residence was isolated and dangerous, and it would be inconvenient to return to his home on foot. (Tr. 158)

In 1993, Applicant was transferred on a permanent change of station move. (Tr. 159) His household goods were badly damaged in the move. (Tr. 159) He filed a claim for tens of thousands of dollars at the legal office at an Air Force Base. (Tr. 159) Applicant's claim form indicated that some compact discs (CD) were damaged in the move. (Tr. 160) The claims office advised Applicant that some inspectors were coming over to look at the damaged household goods. (Tr. 160) Applicant called his spouse, and told her that the claims office might not pay the claim for the CDs because they would not be able to see the damage to them. (Tr. 160) His spouse told Applicant that she would take them out to the porch and scratch them up on the concrete porch. (Tr. 160) He claimed when the CDs were shipped they were in a wooden box, which was broken to pieces, and the CDs were damaged in the move and skipped. (Tr. 160) She took their CDs out onto the porch and damaged them with the objective of bolster their claim for damage to their household goods. (SOR ¶ 1.g; Tr. 160)

In about 1997, Applicant's van was shipped from overseas to the United States, and the shipper volunteered that the van was damaged during transit. (Tr. 161) The shipper thought his radio had been stolen because the dash was ripped open and the radio was missing. (Tr. 162) Applicant filed a claim for the missing radio and did not disclose that the radio was not working when the vehicle was shipped. (Tr. 162; SOR ¶ 1.f; HE 3, 4) He did not know why his radio did not work, and it could have been a loose wire or some very minor problem. (Tr. 162)

During Applicant's last active duty assignment, he was a first sergeant, and Applicant felt pressure when his spouse threatened to tell his commander false stories of his misconduct. (Tr. 178) He did not elaborate about the content of her threats. Applicant began to change after he retired from military service in 1998. (Tr. 177) In 2001, he had an argument with his spouse about whether her son should go to Canada to avoid a possible draft. (Tr. 178) He decided to divorce his spouse. (Tr. 178-179)

In about 2001, Applicant and his spouse argued about each other's extramarital relationships. (GE 4 at 10) Applicant's spouse wanted to take the hard drive from Applicant's computer because of Applicant's emails to his future spouse. (GE 4 at 10) During a brief struggle, Applicant and his spouse bumped together and some computer disks fell onto the floor. (GE 4 at 10) Applicant's spouse called the police, who arrested Applicant and jailed him overnight. (GE 4 at 10-11) The police charged Applicant with harassment and domestic violence. (Tr. 162; SOR ¶ 1.e; HE 3, 4) Dr. S, *infra*, at page 9 prepared a psychological assessment, which indicated Applicant did not have any psychological problems that would lead to violence. (Tr. 163-164; AE C) The charge against Applicant was dismissed, and the court sealed the records relating to the charge. (Tr. 164) Applicant disclosed the charges on his October 25, 2005, SF 86. (Tr. 164)

In about 2002, Applicant retained U.S. Government speakers valued at about \$30 without authorization. (Tr. 165; SOR ¶ 1.d; HE 3, 4) Applicant said his supervisor authorized him to take the speakers home. (Tr. 165) The speakers were scheduled to go to the Defense Rehabilitation and Management Office (DRMO), and the value of \$30 was an estimate. (Tr. 166) The salvage value at DRMO might be about one dollar. (Tr. 167) Applicant was living in a hotel room, and he lost the speakers in the cluttered hotel room. (Tr. 166) The speakers were loaded into a box and forgotten. (Tr. 167)

In June 2003, July 2003, and December 2004, AGA investigators interviewed Applicant. (Tr. 204) Each time he was interviewed, he provided more damaging information about his background. (Tr. 204) At the last AGA interview, he revealed that he damaged 200 CDs to bolster his claim on his permanent change of station move and he filed a claim for reimbursement relating to a missing inoperable radio in his vehicle. (Tr. 205-206) He disclosed the two potentially inflated claims after being aggressively interrogated for a substantial period of time and not at the start of the last interview. (Tr. 206-208)

2005 security clearance application (SOR ¶ 1.b)

On October 26, 2005,⁴ Applicant completed his most recent security clearance application. (Tr. 196; SF 86; GE 1) Section 26a asks, “a. Has the United States Government ever investigated your background and/or granted you a security clearance? If your response is ‘No,’ or you don’t know or can’t recall if you were ever investigated and cleared, check the ‘No’ box.” Applicant checked, “Yes” and disclosed in February 2003 the Defense Department conducted a background investigation for sensitive compartmented information (SCI). (GE 1 at 36-37) In August 2000, the Defense Department investigated Applicant’s background for a Top Secret clearance. (GE 1 at 37) Applicant did not know the date the Defense Department investigated him for a Secret clearance; however, it was sometime after he entered military service in 1975. (GE 1 at 37-38) Section 26b asks, “To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment? (As administrative downgrade or termination of a security clearance is not a revocation.)” Applicant responded, “No.” (GE 1 at 38)

In May 2005, AGA denied his access to classified information. AGA sent Applicant a letter, dated May 11, 2005, and postmarked May 17, 2005 (denial letter). AGA’s denial letter arrived at Applicant’s residence, and he signed for it on May 18, 2005. Applicant, however, denied that he read AGA’s denial letter. In March 2009, Applicant asked for any correspondence between AGA and DOHA. He said he first

⁴SOR ¶ 1.b incorrectly lists the security clearance application date as January 19, 2006. However, the SF 86 is actually dated October 26, 2005. The admitted release forms are dated January 19, 2006. (GE 1) Applicant did not make a motion to dismiss SOR ¶ 1.b or request a delay in the proceeding because of lack of notice. The favorable resolution of SOR ¶ 1.b shows Applicant was not prejudiced by this error.

learned of the contents of the letter in March or April 2009 when he received a letter from DOHA.

Applicant is familiar with completion of security clearance applications. (Tr. 184-188) He considered the issues of SCI access and his security clearance to be two separate matters. (Tr. 188) After his association with AGA ended, the necessity for SCI ended. (Tr. 188-189) Applicant denied that his clearance was ever revoked. (Tr. 174) He admitted that he signed for AGA's certified letter on May 18, 2005. (Tr. 174, 189-190) He put the letter on a table by the door, and headed back to lunch. (Tr. 174) When he came home from work, he did not see the letter. (Tr. 175) Things were chaotic at home due to the pending move from the East Coast to another state. (Tr. 175) The AGA letter is from an unknown person using a post office box address. (GE 3 at 5) There is no indication on the outside of the envelope that it is from AGA. (Tr. 176; GE 3 at 5) The first time he opened the May 2005 AGA letter was after receiving the DOHA interrogatories in March or April 2009. (Tr. 176-177)

Office of Personnel Management (OPM) investigative interview (SOR ¶ 1.c)⁵

In February 2008, an OPM investigator interviewed Applicant and generated a 16-page statement. (GE 4) Applicant signed the statement on February 21, 2008 (GE 4 at 1-16). Applicant and the OPM interviewer discussed the multiple AGA interviews. (GE 4 at 8-9) Applicant noted the AGA investigators interviewed him three times and asked him about his prior incident of alleged domestic violence. (GE 4 at 8) He told the OPM investigator that he was not aware of the SCI status, and contended the three interviews were necessary because of his alcohol and drug abuse during his first enlistment and his difficult relationship with his alcoholic and abusive father. (GE 4 at 8) The AGA

⁵Some of Applicant's OPM statement was inconsistent with his admissions during his AGA interview. For example, Applicant told the AGA interviewer during his February 2004 interview that he used marijuana 10 times from January 1976 to December 1980, and twice from October 1982 to March 1983. (GE 3 at 7) He used cocaine approximately five or six times from May 1978 to December 1980. (GE 3 at 7) However, Applicant told the OPM interviewer that he used marijuana on average twice a week more or less from high school to 1982. (GE 4 at 13) He used cocaine after the 1980 to about 1982 on average of once per week by snorting and injecting it. (GE 4 at 13) Once he could not find a vein suitable for cocaine injection and he shot it into his tongue. He denied that he used illegal drugs while holding a security clearance. (GE 4 at 13) Only one security clearance application is included in the record, and Applicant was unsure whether he held a security clearance from 1974 to 1980. Applicant's drug abuse and failure to disclose the extent of his drug abuse to the AGA interviewer were not alleged in the SOR. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have not considered this portion of Applicant's statement to the OPM investigator for any adverse purpose because the record was not fully developed concerning this issue.

wanted an additional interview; however, his security manager informed him it was not necessary.⁶ (GE 4 at 8)

The OPM investigator asked an open question about Applicant's personal conduct, "Has your personal conduct ever been in question on any of your prior employments, including the Air Force?" and Applicant answered, "Only the incident at [a prior job] where I commented on the lack of decent equipment to train on." (GE 4 at 9)

The following colloquy occurred between Applicant and the investigator relating to his history of fraudulent activity:

Q: Have you ever committed any illegal financial acts such as embezzlement, financial frauds or theft?

A: I have never been charged with any financial fraud acts, but I may have embellished an insurance claim one time. One time in [location omitted] in approximately 1984 or 1985 I had ridden up the mountain on my mountain bike. When I was coming back down the mountain with my bike stored in my car, I got a leg cramp. I stopped on the side of the road to stretch my leg, and my car rolled off the mountain. My insurance paid for my car and for the bicycle. I asked the insurance company if they wanted the bicycle back and they said no. I initially thought the bicycle had been totaled, but realized the frame was not cracked. I was able to repair the bicycle and use it again. I therefore felt guilty about the \$200 or \$300 that I received for the bicycle. I was never charged with any insurance fraud, I just felt guilty over taking the money when the bike was able to be repaired with only a new wheel.

Q: Any other financial type fraud activity?

A: No, none at all.

(GE 4 at 12) The interview concluded:

Q: Do you feel that you have been afforded a full and fair opportunity to properly present the information about the matter under discussion?

A: Yes. You are an excellent interviewer. You listen well, and you ask very clear and direct questions. You allowed me to fully explain myself without rushing.

⁶The SOR did not allege that Applicant attempted to mislead the OPM investigator about the reasons for the multiple interviews AGA conducted. I have not considered this portion of Applicant's statement to the OPM investigator for any adverse purpose because the record was not fully developed concerning this issue. See n. 5, *supra*.

(Tr. 199-200) At his hearing, Applicant did not contradict his concluding comment about the lack of coercion involved in his interview. (Tr. 200) He had the opportunity to make changes before he signed his written statement, and he did not change or clarify the critical quoted portion above concerning his history of filing fraudulent claims. (Tr. 200-201; GE 4 at 12)

At his hearing, Applicant explained his answer about filing fraudulent claims:

Q: Why did you give that answer [denying any other fraud-type activity] then?

A: The question above says, "Did you ever commit. Have you ever committed any illegal financial acts." And because the word "ever" was in there I went back into my – my memory banks, and this is what I picked out. When she went into the second question, any other financial type fraud activity. I had reverted at that time back to – when you're looking at a periodic review or you're filling out an SF-86, you're looking at basically a ten-year window of activity. And when I went back to that second question, when she asked me that, my mind went to that ten-year window, and not beyond that.

(Tr. 169; 191-192) Although the investigator never mentioned the 10-year window, Applicant mentally limited the scope of the question to ten years. (Tr. 192-193) Applicant further rationalized that he had already revealed other fraudulent activity in his interviews with AGA.⁷

Applicant denied that he was aware that his clearance was revoked by AGA in 2005. (Tr. 170) He said he was aware that the AGA interviews concerning his clearance had not gone well, and his security manager told him in March 2005 that he was not going to be allowed to work on AGA's contracts because of the interviews. (Tr. 170) His security manager told him his security clearance was still active, and he was allowed to continue to work on classified matters, just not on AGA's contract. (Tr. 172)

Applicant's current spouse

Applicant met his current spouse in 1987 or 1988. (Tr. 107) When she met Applicant his reactions to his son were inappropriately severe. (Tr. 109) Applicant's father was an alcoholic who abused Applicant. (Tr. 121-122) There were scars on Applicant's back from his father's beatings. (Tr. 122) Applicant had an issue of excessive anger. (Tr. 110-111) Applicant and his current spouse broke up in 1990 when the military sent Applicant to Germany. (Tr. 112) They became involved again in 2001

⁷It is clear from the overall content of the OPM statement, that the OPM interviewer was unaware of Applicant's specific admissions to the AGA interviewer. Applicant is an intelligent, mature person and would have known that the OPM investigator did not know what he told AGA about his history of fraudulent acts.

(Tr. 113). Applicant had changed dramatically in recent years. He has become more compassionate. (Tr. 117) They married in September 2002. (Tr. 120)

In April 2005, Applicant and his spouse decided to move from the East Coast to a different state for an employment opportunity. (Tr. 123-124) Around May 7, 2005, Applicant and his spouse traveled by car several thousand miles to a different state. (Tr. 125-127, 145) Applicant returned to the East Coast, sold their house on the East Coast and then joined his wife around the end of June 2005 (Tr. 127). In the March to April 2009 timeframe, Applicant searched their residence and found the May 11, 2005, denial letter from AGA concerning his security clearance in a box in their basement. (Tr. 128-129, 145-146; GE 3) He was shocked and astonished that he had not seen the letter in 2005. (Tr. 128, 129) She believed his astonishment was sincere. (Tr. 130)

Sometimes Applicant communicates in a narrow, out-of-context fashion. (Tr. 133) She asks follow-up questions to discover his meaning. (Tr. 133) Applicant complained about his treatment at AGA, indicating AGA interviewers aggressively questioned and “badgered” him about his conduct. (Tr. 137) They insisted that he was not telling the truth, and he was unhappy about his interactions with the interviewers. (Tr. 137) After the second interview at AGA, he told her that he told the truth, and they were still very aggressive and skeptical about his truthfulness and integrity. (Tr. 138-139) Applicant was worried about whether he would receive the clearance he sought. (Tr. 139)

When Applicant’s spouse read the SOR, she was surprised and thought it was unbelievable. (Tr. 131) She thought the SOR-listed conduct was inconsistent with Applicant’s current character. (Tr. 131) He discussed the SOR allegations with her, and was embarrassed and ashamed about his conduct. (Tr. 134) He emphasized he would not repeat the same misconduct today. (Tr. 135) He is more mature now. (Tr. 132) He is exceptionally honest now. (Tr. 134)

Dr. S

Dr. S is a licensed professional counselor with specialties in pain management, medical technology, and behavioral health. (Tr. 20-21) He consults on cases with a psychiatrist. (AE C) He evaluated Applicant in 2002 and 2009. (Tr. 22-23) He provided a 21-page 2010 report and a 13-page 2002 report that included a thorough description of Applicant’s background. (AE B; AE C) Applicant participated in various psychometric tests. (Tr. 24, 28-30, 66-67; AE B; AE C) In October to December 2009, Applicant sought Dr. S’s assistance because Applicant had memory issues and concerns about his childhood. (Tr. 26) Dr. S concluded that Applicant had a difficult childhood, which caused him to disassociate from his environment. (Tr. 42-43; AE B at 11) His psyche caused him not to remember things, and he described Applicant as having a type of partial, episodic amnesia. (Tr. 43; AE B at 11-12) Applicant was very concrete in his thinking and literal in his responses to questions. (Tr. 35-37; AE B; AE C) If a minor part of the question was incorrect, then Applicant would answer, “No,” without explaining his answer. (Tr. 35-36) His view of questions is very narrow. (Tr. 64) This trait caused him to appear evasive or deceptive (Tr. 35). Applicant had good scores on the index showing he was not being deceptive. (Tr. 30)

Comparing the 2002 and 2009 evaluations, Dr. S described Applicant in 2009 as more mature, polished, courteous, humble, and cooperative. (Tr. 39-40, 65; AE B; AE C) In 2002, Applicant was in a maladapted relationship and had a narcissistic persona of a macho guy. (Tr. 75; AE C) In 2009, his communication style had improved and his thinking was less concrete. (Tr. 40-41, 45; AE B) Applicant understands the difference between right and wrong. (Tr. 54) In 1980 or 1981, Applicant took his roommate's property, and then falsely told the roommate the property had been taken in a robbery. (SOR ¶ 1.k) The statement about the property being taken in a robbery is literally correct. (Tr. 54-56) In 2009, Applicant recognized such conduct was embarrassing. (Tr. 56) In 1984, when Applicant was 32, he pushed his car over a cliff and filed a claim to his insurance company for the loss. (Tr. 57; SOR ¶ 1.i) Applicant told Dr. S that he needed the money for food and rent and "you do what you got to do to feed your family." (Tr. 57) Between 2002 and 2009, Applicant had an epiphany, and he increased his self-esteem, self-value, and self-dignity. (Tr. 63) Applicant's history demonstrates a pattern of questionable judgment and irresponsible conduct. (Tr. 71) However, he believed Applicant had matured, was honest, and would report a security violation. (Tr. 62-63)

Character evidence

Applicant provided evidence from 15 character letters and four witnesses supporting reinstatement of his security clearance. (AE A; Tr. 80-147) Family members describe Applicant as being the victim of his father's harsh physical abuse. (AE A) Relatives, friends, colleagues, his spouse, and his supervisor, some of whom have known Applicant on and off duty for decades, indicated he has changed for the better in recent years. (Tr. 80-102) He is described as diligent, cordial, positive, caring, loyal, physically fit, dedicated to successful accomplishment of the mission, and trustworthy. (AE A) His character witnesses and several persons who provided statements reviewed the SOR and recommended reinstatement of his security clearance because they believed he is honest and trustworthy. (Tr. 85, 92-93, 100; AE A) Applicant's awards, certificates of achievement, diplomas, certificates of training, letters of commendation, medals, and performance evaluations document his solid contributions to the Air Force and his employer (AE E at 1 to 55).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *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 applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). "[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline E (personal conduct).

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes six conditions that could raise a security concern and may be disqualifying with respect to the alleged falsifications of documents used to process the adjudication of Applicant's security clearance in this case:

- (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;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;⁸
- (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;

⁸The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

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

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(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: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; and (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant admitted 10 of the 12 allegations (SOR ¶¶ 1.c to 1.l) in his SOR response. (HE 4) In 1975, he set fire to his vehicle, made a false police report that the vehicle was stolen, and then filed a false insurance claim. (SOR ¶ 1.l) In 1980 or 1981, he stole his roommate's stereo. (SOR ¶ 1.k) In 1982, he filed a false claim with the government and received \$1,000. (SOR ¶ 1.j) In 1984, he intentionally allowed his car to roll down a steep hill and crash,⁹ and then filed an insurance claim. (SOR ¶ 1.i) He burned a friend's garage so the friend could file an insurance claim, and was paid \$100 for setting fire to this building. (SOR ¶ 1.h) He bolstered a claim for damage of his household goods, by permitting his spouse to damage 200 CDs. (SOR ¶ 1.g) In 1997, he filed a claim for a missing car radio, and did not disclose the radio did not work. (SOR ¶ 1.f) In 2001, he was charged with domestic violence/harassment of his spouse. (SOR ¶ 1.e) In 2002, he kept U.S. government owned speakers valued at about thirty dollars. (SOR ¶ 1.d) On February 21, 2008, Applicant signed a sworn statement prepared by an OPM investigator in which he falsely denied the conduct in SOR ¶¶ 1.d, 1.f, 1.g, 1.h, 1.k, and 1.l. (SOR ¶ 1.c) When he completed his security clearance application on October 26, 2005, he failed to disclose AGA had revoked his access to classified information in May 2005. (SOR ¶ 1.b)

The allegation in SOR ¶ 1.a that AGA revoked Applicant's clearance in May 2005, for the conduct in SOR ¶¶ 1.d to 1.l is factually correct; however, this allegation does not allege disqualifying conduct. AGA's revocation of his access to classified information is an action by the AGA, and not an action by Applicant. There is substantial evidence as defined in the policy section, that AG ¶¶ 16(a), 16(b), 16(c), 16(d)(1), 16(d)(3), and 16(e)(1) apply.

⁹I am not convinced Applicant pushed his car off a cliff. I am convinced he got out of his car on a hill, and intentionally did not set the brake because he wanted to damage it so he could file an insurance claim.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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;
- (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;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and
- (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions outlined in AG ¶ 17 apply to all of the SOR allegations. Some elements of various mitigating conditions partially apply. For example, Applicant received some counseling from Dr. S. He has changed with his marriage in 2002, and he is more calm, conscientious, and able to overcome his difficult childhood in most instances.

Applicant rebutted the allegation that he falsified his October 25, 2005, security clearance application. I accept Applicant statement that he was unaware AGA had revoked his security clearance in May 2005 as truthful and accurate. He freely mentioned the multiple difficult interviews at AGA to the OPM investigator. The AGA envelope was not marked so he had no way of knowing the significance of the letter when he received it. The allegation in SOR ¶ 1.b is not substantiated, and it is mitigated under AG ¶ 17(f).

The allegation in SOR ¶ 1.d that in 2002 Applicant retained some government-owned stereo speakers, which he valued at about \$30, is mitigated under AG ¶ 17(c). He said his retention of the speakers was initially with his supervisor's permission and subsequently inadvertent. The speakers had a salvage value of about one dollar. It is the only allegation of misappropriation of government property. This offense is not similar to his other thefts because it does not involve any deceptive, fraudulent conduct. It is not frequent and minor.

The allegation in SOR ¶ 1.e is mitigated under AG ¶¶ 17(c) and 17(f). In 2001, Applicant and his spouse were involved in a brief mutual affray not involving injury. Applicant served one-day in jail and was charged with harassment/domestic violence. The charge was dismissed and the record was sealed. He received some counseling from Dr. S, and no other spousal abuse or domestic violence occurred.

The allegation in SOR ¶ 1.f is mitigated under AG ¶¶ 17(c) and 17(f). In 1997, Applicant filed a claim for shipping damage to his vehicle. He claimed a radio that did not work, and he did not disclose that the radio did not work on his claim. Without being able to review the claim documentation, it is not possible to substantiate that this is actually a false claim. The documentation would have to include a false statement that the radio was working, or some other indication of excessive or inflated valuation to constitute a false claim.

The allegations in SOR ¶¶ 1.g to 1.i are all substantiated offenses that show a pattern of false claims and fraudulent activity. Alteration of evidence (causing damage to CDs to bolster a claim for shipping damage), arson of a vehicle, intentionally allowing a vehicle to roll down a hill to cause damage for an insurance claim, arson of a garage, filing a false claim for loss of advance pay, and stealing his roommate's stereo (causing the roommate to file a police report) are all similar theft-by-trick type offenses. Most importantly, Applicant deliberately and intentionally lied to the OPM investigator about these offenses. The only fraudulent activity he revealed was the false insurance claim concerning the time he allowed his car to be damaged by rolling down a hill. Even for that particular false claim, he did not reveal that he intentionally damaged his car to submit an insurance claim. Instead, he said he felt guilty about claiming the total loss of his bicycle, and he repaired it.

Applicant's stated at his hearing that he thought the only fraudulent activity at issue was within the 10-year scope of the interview. The sole fraudulent activity he disclosed was in 1984, which was 14 years before his OPM interview. Moreover, his explanation of the 1984 false insurance claim was self-serving, and inconsistent with his statement to the AGA and his SOR response.

In sum, Applicant's false statement to the OPM investigator about his fraudulent actions is significant, recent, serious, and not mitigated. I have not considered non-SOR-alleged misconduct, such as his inconsistent statements about his past illegal drug use, in determining whether Applicant's conduct is mitigated. See note 5 at page 6, *supra*. The six fraudulent acts outline in SOR ¶¶ 1.g to 1.i were all admitted in his SOR

response. They show a pattern of rules violations and similar fraudulent conduct to falsely obtain funds from the U.S. Government and from private insurance companies.

Whole-Person Concept

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

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting approval of Applicant's access to classified information. There is no evidence that he has committed any fraudulent actions after 1993. He served on active duty for 22 years, and received positive supporting endorsements and character references from military personnel and civilians, friends and family, superiors and colleagues, who have known him many years. Applicant significantly contributed to the national defense. He is 57 years old. He is mature and responsible. There is no evidence of any disciplinary problems at work or disloyalty. There is no evidence he would intentionally violate national security, or that he would deliberately fail to safeguard sensitive or classified information. He has provided an exceptional file of good character evidence including awards, evaluations, commendations, and endorsement spanning many years. His good work performance and endorsements of his character witnesses show substantial responsibility, rehabilitation, and mitigation.

The evidence against approval of Applicant's clearance is more substantial. Applicant's conduct from 1975 to 1993 shows a pattern of false claims and fraudulent activity. His spouse altered evidence at his behest. She caused damage to CDs to bolster a claim for shipping damage by scratching the CDs on concrete. In order to file false insurance claims, he burned his vehicle and intentionally allowed another vehicle to roll down a hill to damage it. He engaged in a conspiracy to burn a garage to defraud an insurance company, and received \$100. He also defrauded the U.S. Government out of \$1,000 by filing a false claim for loss of advance pay. He stole his roommate's stereo.

He presented no evidence that he has apologized or repaid the victims for the funds he had fraudulently obtained, or the stereo he took.

Most importantly, Applicant deliberately and intentionally lied to an OPM investigator in February 2008 about these offenses. The importance of providing accurate information to an OPM investigator seeking information on whether access to classified information should be granted is manifest. At his hearing, he had an opportunity to accept responsibility for his previous false statement to the OPM investigator by admitting he intentionally provided false information to the OPM investigator. He did not take full responsibility for providing false information to the OPM investigator. At his hearing, he falsely claimed that he thought the scope of the time frame for providing information about his fraudulent activity was ten years, even though elsewhere in his OPM statement, he described drug use and provided other information that was outside the 10-year-window. His claim about his mental state when he failed to disclose his other fraudulent conduct is not credible, and I conclude his false statement to the OPM investigator, the critical basis for denial of this clearance, was intentional and deliberate. He was 55 years old at the time that he made it and sufficiently mature to be fully responsible for his conduct. His false statement to the OPM investigator shows lack of judgment and a failure to abide by the law. Such conduct establishes a serious security concern, and access to classified information is not warranted.

After weighing the disqualifying and mitigating conditions, my application of the pertinent factors under the adjudicative process, and all the facts and circumstances in the context of the whole person, I conclude he has not mitigated the security concerns relating to personal conduct. *See Department of Navy v. Egan*, 484 U.S. 518 (1988). Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

Formal Findings

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

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraphs 1.d to 1.f:	For Applicant
Subparagraphs 1.g to 1.i:	Against Applicant

Conclusion

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

MARK HARVEY
Administrative Judge