DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-10456
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace L. Le'i, Esquire, Department Counsel
For Applicant: *Pro Se*

October 3, 2008

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Decision

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HARVEY, Mark W., Administrative Judge:

Applicant mitigated security concerns regarding Guideline J (Criminal Conduct); however he did not mitigate security concerns pertaining to Guideline E (Personal Conduct). He deliberately falsified his 2006 security clearance application, when he failed to disclose the majority of his criminal arrests, charges and convictions. Clearance is denied.

Statement of the Case

On June 12, 2006, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On June 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him (GE 9), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

dated January 2, 1992, as amended, modified and revised.[1] The SOR alleges security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On July 25, 2008, Applicant responded to the SOR allegations and elected to have his case decided by a hearing before an administrative judge (GE 10). On August 19, 2008, Department Counsel stated she was ready to proceed and on August 19, 2008, the case was assigned to me. On August 28, 2008, notice was issued for the hearing, which was held on September 18, 2008 (GE 8). At the hearing, Department Counsel offered seven exhibits (GEs 1-7) (Transcript (Tr.) 20), and Applicant offered nine exhibits (Tr. 21-26; AE A-I). There were no objections, and I admitted GEs 1-7 (Tr. 20), and AEs A-I (Tr. 25-26). Additionally, I admitted the SOR, response to the SOR and Hearing Notice (GEs 8-10). I received the transcript on September 25, 2008. At Applicant's request, I authorized until September 29, 2008, for him to submit documentation (Tr. 26, 45, 54). On September 29, 2008, I received AEs J-Q. Department Counsel did not object to my consideration of AEs J-Q (AE J), and I admitted AEs J-Q.

Findings of Fact[2]

Applicant admitted the allegations in SOR ¶¶ 1.a to 1.bb, and he denied the allegations in SOR ¶ 2 (GE 10; Tr. 15). 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 45-years-old, and a high school graduate (Tr. 6). He has not attended college (Tr. 7). He currently holds an interim secret clearance (Tr. 7). He is married. He has a two-year-old daughter and a 22-year-old stepson (Tr. 53).

Criminal Conduct

Applicant has ten convictions involving concealment, larceny, theft, shoplifting or trespassing, three of which are felonies. He has two drug-related convictions, one is a felony. He has seven convictions involving probation violations, contempt of court, and interfering with a police officer, three of which are felonies. His most recent arrests

[1]On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

[2]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. GEs 2 (Responses to Interrogatories) and 10 (Response to SOR) are the sources for the facts in this section unless stated otherwise.

were for assault and battery in July 2004, and for disorderly conduct in 2005. The assault and battery related to domestic violence (GE 2 at 5) and the disorderly conduct resulted from a disturbance at a Taco Bell restaurant (Tr. 28, GE 2 at 6). Applicant was arrested for blowing his horn. The disorderly conduct was dismissed (Tr. 28). He has not had any convictions since June 1996 (Tr. 27), and no arrests since the 2005 disorderly conduct (Tr. 28). He is not currently on probation or parole (Tr. 28-29).

Applicant had a serious problem with heroin abuse from the early 1980s until about 1995 (GE 2 at 6). By 1995, he was "snorting" two, $20 bags of heroin per day (GE 2 at 6). He has purchased heroin almost every day when he was not in jail from about 1985 to 1995 (GE 2 at 6). Since his release from jail in 1999, Applicant attends Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) approximately three times a month (Tr. 29-30). He learned that he had to stop getting high because he was harming his family and himself (Tr. 30). He was at step one in NA and AA because he had a difficult time fully admitting that he had a problem (Tr. 31). He receives support from AA and NA as well as from his family, including his siblings (Tr. 33). He avoids any association with those who abuse drugs (Tr. 34). Applicant attributed the criminal offenses from 1985 to April 1996 to heroin addiction (Tr. 32). He denied drug use after 1996 (Tr. 32). His employer conducts random drug testing and he offered to submit to random drug testing (Tr. 33).

1985 to 1989

During the 1980s, Applicant was charged with ten criminal offenses. Ultimately, he was convicted of five misdemeanors and one felony. The particular offenses, charges and dispositions are as follows:

In September 1985, the court found Applicant guilty of Concealment/Alter Price, a misdemeanor. The court sentenced him to 30 days in jail (30 days suspended), fined him $25, and placed him on probation for one year. (SOR ¶ 1.bb)

In January 1986, the court found Applicant guilty of Concealment, a misdemeanor. The court sentenced him to 30 days in jail (28 days suspended), and fined him about $100 (SOR ¶ 1.aa).

In July 1986, the police charged Applicant with (1) Robbery, a felony, and (2) Use of a Firearm in Commission of a Robbery, a felony. In August 1986, the court nolle prossed these charges (SOR ¶ 1.z, GE 5 at 5).

In September 1986, the police charged Applicant with Possession of Controlled Drugs With Intent, a misdemeanor. In November 1986, the court found him guilty as charged, and sentenced him to 30 days in jail (SOR ¶ 1.y).

In November 1988, the police charged Applicant with (1) Interfere With Police, a misdemeanor, and (2) Forgery, a felony. In December 1988, he was found guilty of Interfere with Police, a misdemeanor. The court sentenced him to 30 days in jail, and

fined him approximately $50. In January 1989, the court amended his Forgery change, and found him guilty of Interfere With Police, a felony. The court sentenced him to six months in jail (SOR ¶ 1.x).

In November 1988, the police charged Applicant with Concealment 3rd Offense, a felony. In December 1988, the court dismissed this charge (SOR ¶ 1.w).

In July 1989, the police charged Applicant with Petit Larceny. In July 1990, this charge was nolle prossed (SOR ¶ 1.v).

In October 1989, the police charged Applicant with Petit Larceny, a misdemeanor. In October 1989, the court found him guilty as charged (SOR ¶ 1.u).

In November 1989, the police charged Applicant with Concealment/Alter Price, a misdemeanor. In December 1989, the court dismissed this charge (SOR ¶ 1.t).

1990 to 1995

From 1990 to 1995, Applicant was charged with 17 criminal offenses. Ultimately, he was convicted of six misdemeanors and five felonies. He served about 20 months of imprisonment in total, and was ordered to pay a substantial amount of fines and court costs. The particular offenses, charges and dispositions are as follows:

In February 1990, the police charged Applicant with two counts of Capias Failure to Appear. In February 1990, the court found him guilty of one count of Failure to Pay Fines, a misdemeanor. The court fined him approximately $50, and ordered him to pay approximately $1,126 in costs (SOR ¶ 1.s).

In February 1990, the police charged Applicant with (1) Shoplifting, a misdemeanor, and (2) Refuse ID to Police Officer, a misdemeanor. In March 1990, the court nolle prossed Charge (1), and found him guilty of Charge (2). The court sentenced him to nine months of imprisonment (eight months were suspended) (SOR ¶ 1.r).

In March 1990, the police charged Applicant with (1) Grand Larceny, a felony, and (2) Petit Larceny 3rd Offense, a felony. In June 1990, Charge (1) was nolle prossed. In September 1990, the court found him guilty of Charge (2), and sentenced him to three years of imprisonment (two years and three months were suspended) (SOR ¶ 1.q).

In September 1990, the police charged Applicant with Shoplifting, a felony. In February 1991, the court found him guilty as charged, and ordered him to pay approximately $510 in costs (SOR ¶ 1.p).

In September 1991, the police charged Applicant with Failure to Pay Fines. In October 1991, the court found him guilty and sentenced him to 60 days in jail (SOR ¶ 1.o).

In November 1991, the police charged Applicant with Trespassing. In February 1992, the court found him guilty, fined him approximately $100, and sentenced him to 10 days in jail (SOR ¶ 1. n).

In November 1991, the police charged Applicant with Concealment/Alter Price, a felony. In November 1991, the court found him guilty of Concealment, a misdemeanor (SOR ¶ 1.m).

In February 1992, the police charged Applicant with (1) Larceny of U.S. Government Property and (2) Trespassing. The court found him guilty of Larceny of Government Property and sentenced him to 8 months of imprisonment, which he began serving in a federal correctional facility in April 1993 (SOR ¶ 1.l).

In February 1994, the police charged Applicant with Possession of Drug With Intent, a felony. In July 1994, the court found him guilty of Possession of Heroin, a felony. The court sentenced him to four years of imprisonment (four years was suspended). The court also sentenced him to county jail for six months and placed him on supervised probation for two years. The court ordered him to pay approximately $907 in costs (SOR ¶ 1.k).

In August 1994, the police charged Applicant with Concealment, a felony. In October 1994, the court found him guilty as charged (SOR ¶ 1.j).

In August 1994, the police charged Applicant with Violation of Probation, a felony. In October 1994, Applicant's probation was revoked (SOR ¶ 1.i).

In November 1994, the police charged Applicant with (1) Conceal Merchandise and (2) Petit Larceny-3rd Offense (SOR ¶ 1.h). Applicant did not remember the disposition of this offense (Tr. 34-35).

1996 to 2000

From 1996 to 2000, Applicant was charged with three criminal offenses. Ultimately, he was convicted of two misdemeanors and one felony. He served about 29 months of imprisonment in total, and was ordered to pay a substantial amount of fines and court costs. The particular offenses, charges and dispositions are as follows:

In March 1996, the police charged Applicant with Grand Larceny, a felony. In June 1996, the court found Applicant guilty of Petit Larceny, a misdemeanor, and fined him approximately $1,500. The court sentenced him to 12 months in jail (three months were suspended) (SOR ¶ 1.g).

In November 1995, the police charged Applicant with Contempt of Court, a misdemeanor. In April 1996, the court found him guilty as charged (SOR ¶ 1.f).

In June 1996, the police charged Applicant with Violation of Probation-2nd Offense, a felony. In August 1996, the court found him guilty as charged, and sentenced him to four years of imprisonment. Applicant was incarcerated from February 28, 1997, until November 2, 1999, and then placed him on probation for two years (SOR ¶ 1.e, GE 4 at 4). On May 2, 2001, he successfully completed probation (AE Q).

2001 to Present

In July 2001, the police charged Applicant with Assault and Battery-Family Member, a misdemeanor. In May 2002, the court dismissed this charge (SOR ¶ 1.d).

In August 2001, the police charged Applicant with Assault and Battery, a misdemeanor. In September 2001, the court dismissed this charge (SOR ¶ 1.c).

In December 2002, the court charged Applicant with Driving While License Suspended. In January 2003, the court dismissed this charge (SOR ¶ 1.b).

In July 2004, the police charged Applicant with (1) Assault and Battery-Family Member and (2) Violate Protective Orders, both misdemeanors (SOR ¶ 1.a, GE 3 at 9-14). In August 2004, he received deferred adjudication. He successfully completed the probation period and did not have a conviction (Tr. 38-39, GE 2 at 6).

When an Office of Personnel Management (OPM) investigator interviewed him on February 7, 2007, he admitted arrests and charges going back to the 1980s (GE 2). He also provided details concerning his 2004 arrest and charges for assault and battery and 2005 disorderly conduct (GE 2 at 5-6). He described his attendance at domestic family class for ten weeks (GE 2 at 6). On May 19, 2005, Applicant completed all court-required probation and was released from probation (AE I).

Falsification of Security Clearance Applications

Applicant signed his SF 86 on May 18, 2006 (GE 1). He incorrectly responded, "No" or did not provide complete information in his responses to questions pertaining to previous criminal arrests, charges and convictions. Section 23a, 23b and 23f of his SF 86, (SOR ¶¶ 2.a, 2.b, 2.c, respectively) asked:

> **Section 23: Your Police Record – Felony Offenses** for this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.
>
> a. Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.); and

b. Have you ever been arrested charged with or convicted of firearms or explosives offense?

f. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic offenses of less than $150 unless the violation was alcohol or drug related.)

Applicant answered, "Yes" to subsections 23a and 23d. He disclosed in February 1994 he was convicted of felony heroin possession (GE 1). At his hearing he explained, he could only remember that one offense when he was filling out his security clearance application (Tr. 36-39). He thought he did not have to disclose the 2004, assault and battery because it was in a type of deferred adjudication and subsequently dismissed after he completed a domestic violence counseling program (Tr. 38-39). He did not subsequently volunteer to investigators that he failed to disclose some of his past criminal record on his security clearance application (Tr. 40-41).

Recommendations and Achievements

Applicant's program manager indicates Applicant has worked for the contractor for seven years.[3] He describes Applicant as a valued employee. Applicant is a quick learner, punctual, and highly motivated. He has a positive attitude and is a team player.

Applicant received a certificate of achievement in August 2008 (AE B), certificates of completion for training and/or certification in October 2003 (AE O), July 2004 (AE L), April 2005 (AE E), June 2005 (AE C), May 2006 (AE D), January 2007 (AE M), and May 2008 (AE K). He was entrusted to perform fire watch duties (AE F, G and H). He achieved qualification and technical expertise as shown by his training records and qualification sheets (AE N and P).

Applicant met his spouse in 2002 (Tr. 53). His spouse went though the domestic violence family program with him in 2004 (Tr. 52). She attested to his attendance at NA meetings and noted that he speaks at some of the NA meetings (Tr. 53). Applicant had the support of his family and his church (Tr. 52). He and his spouse received marital counseling (Tr. 53). Applicant has been "clean" for more than 12 years and his spouse has been clean for eight years (Tr. 53). Applicant has definitely changed and should receive a security clearance (Tr. 54).

Applicant explained that after he was released from incarceration in 1999, he changed (Tr. 42). He married and had a daughter (Tr. 42). He cares for and supports his family (Tr. 42). He loves his family and his work (Tr. 44). He has not been disciplined at his job (Tr. 43). He has a good relationship with his associates at work and his supervisors (Tr. 43). He paid his debt to society and abstains from drugs (Tr. 42). He is loyal to the United States (Tr. 42).

[3]AE A, a letter dated September 17, 2008, is the source for the facts in this paragraph.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"[4] demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. 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).[5]

[4] *See* Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant security concern is under Guidelines J (Criminal Conduct) and E (Personal Conduct).

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "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."

AG ¶ 31 describes six conditions that could raise a security concern and may be disqualifying:

> (a) a single serious crime or multiple lesser offenses;
>
> (b) discharge or dismissal from the Armed Forces under dishonorable conditions;)
>
> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
>
> (d) individual is currently on parole or probation;
>
> (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and

(f) conviction in a Federal or State court, including 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.[6]

AGs ¶¶ 31(a), 31(c) and 31(e) apply. Applicant was convicted of several felonies and more than 10 misdemeanors. In June 1996, the police charged Applicant with Violation of Probation-2nd Offense, a "felony." The record indicates, in August 1996, the court found him "guilty as charged," and sentenced him to four years of imprisonment. Applicant was incarcerated from February 28, 1997 until November 2, 1999 and then placed on probation for two years (SOR ¶ 1.e, GE 4 at 4). The pertinent state code references § 19.2-306 and describes a judgment of probation revocation issued by the same court that issued the initial sentence to probation. It does not describe a trial on the merits or a "conviction." However, the original offense involved a conviction and an

[6] The SOR cited facts that would have brought Applicant's case under the prohibitions of the Smith Amendment (10 U.S.C. § 986), because he was convicted and sentenced to and served more than 12 months of confinement. However, this section of the United States Code, which applied only to clearances granted by the Department of Defense (DoD), was repealed on January 28, 2008, when the President signed the National Defense Authorization Act for Fiscal Year 2008 into law. It was replaced by adding Sec. 3002 to 50 U.S.C. § 435b (the Bond Amendment), which applies throughout the Federal Government. Sec. 3002(c) of this new provision continues the requirement for disqualification, absent a meritorious waiver, for persons who were sentenced to and served imprisonment for more than a year. However, this disqualification only applies to prevent clearances that would provide access to special access programs (SAP), Restricted Data (RD), or any other information commonly referred to as "special compartmented information" (SCI).

This statutory modification ends the former Smith Amendment requirement for a meritorious Secretarial waiver to grant or continue a regular, or "collateral," security clearance to a person who has served more than a year on a criminal sentence. On June 20, 2008, the same day the SOR was issued in this case, the Under Secretary of Defense (Intelligence) issued a memorandum providing interim guidance for implementation of the Bond Amendment. This memorandum set forth guidance for adjudicators to assess the potential application of the Bond Amendment to security clearance determinations and requirements for "Exception" identification of persons subject to its limitations in the Joint Adjudication Management System (JAMS) if a collateral clearance is granted. The granting of access to SAP, RD or SCI to such individuals requires a meritorious waiver under the terms of that memorandum. Such access is not at issue in this case, and accordingly the Bond Amendment was not addressed in either the SOR or at the hearing.

The repeal of the Smith Amendment also nullified the legal authority by which the Under Secretary of Defense for Intelligence modified the revised Adjudicative Guidelines (AG) that were approved by the President on December 29, 2005. When the Under Secretary promulgated the AG for use within DoD, on August 30, 2006, he added provisions reflecting the Smith Amendment. AG H (Drug Involvement), AG I(Psychological Conditions), and AG J (Criminal Conduct) were each modified, but only the latter guideline is involved in this case. It was modified by adding ¶¶ 31(f), 32(e),and footnotes 1 and 2. Because the President, in Executive Order 12968, intended to establish "a uniform Federal personnel security program" (Intro.), and required a "common set of adjudicative guidelines for determining eligibility for access to classified information" (Sec. 3.1(f).), the authority for these DoD modifications to the guidelines ended with the repeal of the Smith Amendment. The new statutory requirements are in effect and must be followed pending formal revision of the AG, but only the prohibition against granting clearances to unlawful drug users and addicts under AG H applies to "collateral" security clearances. Accordingly, the Smith Amendment-related provisions added to AG J have been repealed, and do not apply to the remaining proceedings in this case.

original sentence of more than one year of imprisonment. Ultimately he served 20 months of imprisonment. As indicated in n.6 infra, I have not found AG ¶ 31(f) applicable as a disqualifying condition.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

> (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;
>
> (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
>
> (c) evidence that the person did not commit the offense; and
>
> (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.

AG ¶¶ 32(a) and 32(d) apply to mitigate the criminal conduct. Applicant's last offense resulting in a conviction occurred in June 1996, more than 12 years ago. He has changed his lifestyle and his environment. He has attended NA meetings for 10 years and continues to receive NA counseling. He completed his probation. His NA attendance reinforces his rehabilitation. The source of his criminal problem was a decade of heroin abuse. He stopped using heroin when he was incarcerated in 1996. He has 12 years of heroin abstinence. He has demonstrated his intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) an appropriate period of abstinence. His criminal offenses are unlikely to recur. His demonstrated intent is encompassed in these two mitigating conditions. He has demonstrated remorse and been reformed with respect to his heroin-related criminal activity. He received job training and has a good employment record. There is a strong evidentiary record in this case showing his full rehabilitation for the particular offenses resulting in arrests, charges or convictions. Any doubt about his current reliability, trustworthiness, or good judgment arises from his lack of candor, discussed below, and not from his past criminal 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 two conditions that could raise a security concern and may be disqualifying 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; and,
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant disclosed only one of his criminal offenses—his 1994 arrest and conviction for possession of heroin. He did not disclose his other felonies (SOR ¶ 2.a). He did not disclose his July 1986, charges of (1) Robbery, a felony, and (2) Use of a Firearm in Commission of a Robbery, a felony (SOR ¶ 2.b). He did not disclose his 2001 and 2004 arrests for assault and battery (SOR ¶ 2.c). AG ¶¶ 16(a) and 16(b) both apply.[7]

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;

[7]Deliberate and materially false answers on a security clearance application may violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." *See also United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the government to deny his security clearance. His criminal offenses are sufficiently serious to potentially jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a $10,000 fine). In light of my ultimate decision, and the absence to alleged a violation of 18 U.S.C. § 1001 in the SOR, it is unnecessary for me to decide whether or not Applicant actually violated 18 U.S.C. § 1001.

(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 fully apply. He does receive some credit for truthfully describing his criminal offenses and background to an OMP investigator. At his hearing, he admitted preparing his 2006 security clearance application and answering incorrectly. However, he was not honest and candid at his hearing about his state of mind when he completed his security clearance application. He said he was confused about the requirement to disclose arrests when the charges were ultimately dismissed. He also said he could only remember one felony.[8] His statement at his hearing about his reasons for not disclosing the police information is not credible. He was well aware of more than one reportable felony, and knowingly and deliberately chose not to disclose full information about those felonies on his security clearance application.

[8]The 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)).

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.

The comments in the Analysis section of this decision are incorporated in the Whole Person Concept. Applicant committed numerous offenses from 1985 to 1996. However, the evidence of the offenses after 1996 is not compelling, as he was not convicted and the offenses are less serious. His lengthy criminal record is connected to his addiction to heroin. Applicant receives substantial credit for his ten years of NA attendance, his devotion to his family, and his other efforts to reform and rehabilitate himself after 1996. His work for a defense contractor is excellent, and aside from the SOR allegations no other disciplinary or security-related problems surfaced. His record of good employment weighs in his favor. There is some compelling evidence of his responsibility, rehabilitation, mitigation. I am convinced that he is loyal to his family, his company, his church and his country.

Applicant's deliberate failure to disclose information on his security clearance application is serious, recent and not mitigated. At his hearing on September 18, 2008, he was not candid about why he failed to provide full and complete information on his security clearance application. He said he could only remember one felony, and I do not believe this to be a truthful, candid explanation for failing to list more of his criminal history. I have questions about his current ability or willingness to comply with laws, rules and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated security concerns pertaining to criminal conduct, but has not mitigated such concerns about his personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors" and

supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

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

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraphs 1.a to 1.bb:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a to 2.c:	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 eligibility for a security clearance for Applicant. Clearance is denied.

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Mark W. Harvey
Administrative Judge