DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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SSN: ----------	)	ISCR Case No. 07-12478
	)	
Applicant for Security Clearance	)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Ronald C. Sykstus, Esquire

July 11, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on January 8, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline J for criminal conduct and Guideline E for personal conduct (falsification of a security-clearance application). For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005.

[1] Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.[2] The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's Answer to the SOR was received on February 5, 2008, and he requested a hearing. The case was assigned to me on March 7, 2008. At the request of Applicant's counsel, the hearing took place on June 26, 2008. The transcript (Tr.) was received on July 7, 2008.

Procedural Rulings

The government moved to withdraw the criminal conduct allegation in SOR ¶ 1.d, which alleged that Applicant was disqualified as a matter of law from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986 (as amended).[3] The statute was repealed effective January 1, 2008, several days before the SOR was issued to Applicant. Accordingly, the motion was granted.

Findings of Fact

Under Guideline J, the SOR alleges the following criminal conduct: (1) an arrest for third-degree burglary, theft, and receiving stolen property, all felonies, in October 1981, which resulted in a sentence to incarceration; (2) an arrest for third-degree burglary, a felony, in April 1982; (3) an arrest for assault – domestic violence/ third-degree harassment stemming from an incident with his wife in May 2004; and (4) a violation of 18 U.S.C. § 1001 by making a false statement to a federal agency as set forth under Guideline E. The SOR alleges under Guideline E that Applicant gave false answers in response to two questions about his police record when he completed a security-clearance application in April 2007. In his Answer, Applicant admitted the three arrests and denied the falsifications. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 44-year-old employee of a federal contractor. He has worked for his current employer since April 2006. His recent employment record reflects average to above average performance (Exhibits A, B, and C). He is seeking to retain an industrial security clearance that he has held for several years, since about 1996.

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[2] *See* Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

[3] *See* Attorney Sheldon I. Cohen's several articles on the origin, history, and repeal of 10 U.S.C. § 986, the so-called Smith Amendment, at www.sheldoncohen.com/publications.

Applicant has been married twice. His first marriage ended in a divorce in 1997. He married the second time in 2002. Applicant has two children from his first marriage, his wife has one from a previous marriage, and together they have one child. There are currently three children living in the household.

Applicant graduated from high school in about June 1981. Since then, he has attended college periodically without earning a degree. He is now enrolled in an online college, and his goal is to obtain a business degree (Exhibit D).

Applicant has a history of criminal conduct (Exhibits 2, 3, 4, and 5). In October 1981, shortly after finishing high school, the then 18-year-old Applicant was arrested for the first time. He and a friend got together and decided to break into a neighbor's home and steal items in an effort to collect on a debt (Tr. 41–42). The police were called and investigated. The police asked Applicant if he knew anything about the incident and he admitted his involvement (Tr. 42). He was arrested and charged with third-degree burglary, theft, and receiving stolen property (Exhibit 4). His parents hired an attorney to represent Applicant and the case proceeded accordingly.

On April 19, 1982, Applicant appeared in court with his attorney and applied for treatment as a youthful offender (Exhibit 4 at 1). The case was continued until June 14, 1982 for a youthful offender hearing and/or trial.

Five days later on April 24, the then 18-year-old Applicant was arrested for the second time and charged with third-degree burglary. The charge stemmed from an incident where Applicant and two others were discovered in a sports facility after hours (Tr. 43–44).

On June 14, 1982, the initial case against Applicant was continued (Exhibit 4 at 1). Subsequently, both cases were disposed of in September 1982 when the then 19-year-old Applicant appeared in court with his attorney and pleaded guilty to an amended charge of third-degree burglary stemming from the first case. The court found him guilty and sentenced him to imprisonment in the state penitentiary for five years. In addition, the court ordered restitution and requested that Applicant be incarcerated at a youth center. The second case of third-degree burglary was *nolle prossed*[4] based on his guilty plea in the first case. Applicant was incarcerated in a youth center from about October 1, 1982, until paroled on January 9, 1984, a period of nearly 14 months. The court's paperwork does not indicate the disposition of Applicant's youthful-offender application (Exhibit 4).

Applicant was arrested for the third time in May 2004. The arrest stemmed from an argument with his wife that ended with Applicant slapping his wife twice. She called the police after the second slap. The police arrived at the home and met Applicant

[4] The term *nolle pros* is a verb form of *nolle prosequi*, which "denotes either (1) the legal notice of abandonment of suit, or (2) a docket entry showing that the plaintiff or the prosecution has relinquished the action." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 591 (2nd ed., Oxford University Press 1995).

outside. He was placed under arrest, handcuffed, and taken to the local police station where he was processed and held for about 12 hours. He was charged with assault – domestic violence/third-degree harassment. He and his wife went to court in June 2004, and Applicant agreed to enter a domestic violence intervention program. The case was deferred while he was in the program. He completed the program's requirements on December 1, 2004. As a result, the criminal case against Applicant was *nolle prossed* on December 8, 2004, when the court granted the prosecution's motion (Exhibit E).

Applicant completed a security-clearance application in April 2007 (Exhibit 1). In doing so, he was required to answer Question 23, which is a six-part question seeking information about a person's police record. The instruction for the question provides that information must be reported regardless of whether the record in the case has been sealed or otherwise stricken from the court record except for certain convictions for controlled-substance offenses under federal law. Applicant answered all six parts of Question 23 in the negative, thereby denying any police record within the scope of the questions. In particular, he answered "no" to the following two questions:

- Question 23a–Have you ever been charged with or convicted of any felony offense?
- Question 23f–In the last seven years, have you been arrested for, charged with, or convicted of any offenses not listed in response to Questions 23a–23e, except for traffic fines of less than $150 unless it was alcohol or drug related?

He did not report that he was charged with felonies, he did not report his conviction for third-degree burglary, and he did not report his 2004 domestic-violence arrest. No mention of these matters was made anywhere in his security-clearance application.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.[5] As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[6] A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[7] An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any

[5] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

[6] *Egan*, 484 U.S. at 531.

[7] Directive, ¶ 3.2.

level.[8] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[9] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[10] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[11] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[12] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[13] The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[14]

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[15] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

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[8] Directive, ¶ 3.2.

[9] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[10] Directive, Enclosure 3, ¶ E3.1.14.

[11] Directive, Enclosure 3, ¶ E3.1.15.

[12] Directive, Enclosure 3, ¶ E3.1.15.

[13] *Egan*, 484 U.S. at 531.

[14] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[15] Executive Order 10865, § 7.

Analysis

Personal conduct under Guideline E[16] includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.[17]

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The gravamen of the SOR is the truthfulness of Applicant's answers to Question 23 in his security-clearance application, as it is undisputed that he was required to report the felony charges, the felony conviction, and the more recent domestic-violence arrest. He denies that his responses to Question 23 were intentionally false. For Question 23a about felony charges or convictions, Applicant contends that his answer was based on his understanding of youthful-offender status or a misunderstanding of disclosure requirements (Answer). For Question 23f about other offenses within the last seven years, Applicant contends that his answer was based on his understanding of *nolle prosse* or perhaps a misunderstanding (Answer). In his hearing testimony, Applicant further explained that he answered these two questions the way he thought he was supposed to answer (Tr. 59–63).

His contentions and explanations are not credible. First, the youthful-offender status is not supported by the record because there is no indication that youthful-offender application was granted or denied. And his explanation, based on the youthful-offender status, is a *non sequitur* because Applicant was required to report any felony charge, regardless of disposition.

Second, given his age, background, and experience in the defense industry, he had to know that his police record might be a problem for his security clearance. He simply omitted the information hoping he would pass, as apparently he had before (he has held a security clearance since about 1996). It is simply too difficult to believe that a man of his age, background, and experience—who pleaded guilty to a burglary at the

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[16] Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

[17] Revised Guidelines at 10.

age of 19 and served more than a year of confinement followed by a period of parole—could genuinely believe that it was correct and proper to submit a security-clearance application without mentioning his police record. This is also the case for the relatively recent domestic-violence arrest in May 2004. The record evidence does not support a conclusion that Applicant misunderstood either question, genuinely thought the information did not need to be reported, or made an honest mistake. His explanations are merely after-the-fact rationalizations. But the record evidence does support a conclusion that he deliberately omitted, concealed, or falsified material facts about his police record.[18]

All of the MC under Guideline E have been reviewed and none apply in Applicant's favor. Making false statements to the federal government during the security-clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated. Accordingly, Guideline E is decided against Applicant.

Under Guideline J for criminal conduct,[19] the concern is that "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."[20]

In general, a security concern is raised by Applicant's history of criminal conduct. In particular, DC 1[21] and DC 3[22] apply against Applicant as evidenced by his three arrests, several charges, and burglary conviction. In addition, as described above, Applicant violated federal criminal law (18 U.S.C. § 1001) in 2007 when he gave false answers on his security-clearance application. To sum up, the totality of the criminal conduct calls into question Applicant's judgment as well as his ability or willingness to comply with laws, rules, and regulations.

The guideline also contains several conditions that could mitigate security concerns. All the MC have been considered and none apply in Applicant's favor. In particular, due consideration was given to the passage of time since Applicant's offenses in the early 1980s and 2004 as well as the evidence of reform and rehabilitation. But these circumstances are negated by Applicant's recent criminal

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[18] DC 1 is the "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."

[19] Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

[20] Revised Guidelines at 21.

[21] DC 1 is "a single serious crime or multiple lesser offenses."

[22] DC 3 is the "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

conduct in 2007 when he falsified his security-clearance application. Accordingly, Guideline J is decided against Applicant.

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept (to include his good employment record and his favorable character witnesses) was given due consideration and that analysis does not support a favorable decision.

In addition, I acknowledge that an adverse clearance decision may have negative consequences on Applicant's current employment, his future employment, and his ability to provide for his family. Nevertheless, the agency appeal board has consistently ruled that the adverse impact of a clearance decision on an applicant's personal situation is not relevant and material to security clearance eligibility. Accordingly, any potential negative consequences have not been considered. This case is decided against Applicant.

Formal Findings

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

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a, 1.b, 1,c, 1,e:	Against Applicant
Subparagraph 1.d:	Withdrawn
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a, 2b:	Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge