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

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 08-03320 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

September 10, 2008

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## Decision

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HARVEY, Mark W., Administrative Judge:

Applicant mitigated the security concerns regarding Guideline E (Personal Conduct) and J (Criminal Conduct). Clearance is granted.

## Statement of the Case

On June 20, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 3). On May 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him (GE 14), 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

[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*

concerns under Guidelines E (Personal Conduct) and J (Criminal 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 May 28, 2008, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (GE 15). Department Counsel exercised his right to a hearing. On August 6, 2008, Department Counsel stated he was ready to proceed and on August 8, 2008, the case was assigned to me. On August 8, 2008, notice was issued for the hearing, which was held on August 26, 2008 (GE 13). Department Counsel offered twelve exhibits into evidence (Tr. 21-22). Applicant did not object to my consideration of these documents and I admitted them into evidence (Tr. 22-23; GE 1-12). On September 4, 2008, Applicant provided additional documentation (AE F). Department Counsel did not object to my consideration of AE F, and I admitted AE F into evidence. I held the record open until September 7, 2008, to permit Applicant to provide additional documentation (Tr. 36, 64-65). I received the transcript (Tr.) on September 8, 2008.

## Findings of Fact

Applicant admitted the allegations with explanations (GE 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 24 years old (Tr. 5).[2] He was born in September 1983. He married in 2003 and divorced in 2006. He does not have any children. He graduated from high school in 2001, and attended college from August 2006 to May 2007 (Tr. 6). His college education focused on information technology (Tr. 6). He served on active duty in the U.S. Marines from January 2002 until January 2006. His DD Form 214 (AE A) listed the following awards: Marine Corps Good Conduct Medal, Combat Action Ribbon, Navy and Marine Corps Achievement Medal, Global War on Terrorism Service Medal, Global War on Terrorism Expeditionary Medal, Sea Service Deployment Ribbon and National Defense Service Medal. His military specialty was as a Data Network Systems Technician (AE A). He does not currently hold a security clearance (Tr. 6). He had an interim clearance when he was on active duty (Tr. 7).

### Criminal Conduct

In June 2001, Applicant was charged in Juvenile and Domestic Relations Court with two counts of Arson (Burn Building), a felony offense (GE 15). He pleaded nolo

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(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]GE 3 (2007 security clearance application) is the source for the facts in this paragraph, unless stated otherwise.

contendere to an amended charge of Destruction of Private Property (GE 15). On or about September 30, 2002, the court ordered Applicant to pay $1,000 restitution (GE 15). On November 18, 2003, the court agreed Applicant completed the court ordered requirement and the matter was "closed" (GE 11).

On April 29, 2002, the police arrested Applicant, and officials charged him with "Embezzlement and Grand Larceny," both felonies (GE 15). A court document describes the criminal complaint for the embezzlement [GE 5 at 2] as follows:

> On 1-1-02 [Applicant], while on duty as an employee of [a store], removed from the stock of that business a . . . wardrobe valued at $999.00, a Metropolitan leather chair valued at $1,229.00, and a Manhattan sofa valued at $2,499.00. He took those items to the rear loading dock of the store. . . . He called [B], who came to the loading dock in a truck and took possession of the items and took them to [B's] residence. [B] maintained possession of the items and took them to his own residence until [the police] seized them on 1-29-02 and returned them to the business. . . Applicant admitted to [the police] that he stole from the [store].

The criminal complaint for the grand larceny indicated on October 31, 2001, Applicant and B entered a truck and took three laptop computers valued at $8,754.00 (GE 6 at 1, 3). It also indicates "both subjects were adults on the date of this larceny . . . [Applicant] and [B] have admitted at least three other incidents of larcenies from vehicles under similar circumstances. These cases will be held for direct indictment at a later time" (GE 6 at 3). Applicant had turned 18 one month before the break-in and theft of the computers.

On October 1, 2004, Applicant pleaded nolo contendere to the charges in Circuit Court, and the court ordered him to pay $9,504 in restitution, court costs of $706, and two years of unsupervised probation (GE 8, 10, 15). His pretrial agreement stipulated to deferred adjudication of the findings (GE 8 at 2). Applicant complied with the terms of the agreement, and on December 6, 2004, the charges were dismissed (GE 11).

Applicant explained that when he committed the offenses he was 17 years old (Tr. 26). He was charged with the second felony after he turned 18 years of age (Tr. 27). He thought his criminal record was expunged (Tr. 27-29). He did not have any expungement orders (Tr. 28). He thought his lawyer said after he served three years "it goes away" (Tr. 29). He believes when the charge is dismissed it meant expunged (Tr. 29).

**Falsification of Security Clearance Applications**

Applicant signed SF 86s on July 9, 2002 (GE 1), and June 20, 2007 (GE 3), and incorrectly responded, "No" to questions pertaining to previous criminal offenses. Questions 21, 23 and 26 of his SF 86, dated July 9, 2002, (GE 1) asked:

**21. 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. Have you ever been charged with or convicted of any felony offense?

**23. Your Police Record – Pending Charges** Are there currently any charges pending against you for any criminal offense?

**26. Your Police Record – Other 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. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24 or 25? (Leave out traffic offenses of less than $150 unless the violation was alcohol or drug related.)

Section 23 of his SF 86, dated June 20, 2007, (GE 3) 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 **Section 23: Your Police Record** 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.)

During a July 31, 2007, interview with an investigator for the Department of Defense (DoD), Applicant said he had never been arrested for, charged with, or convicted of any offense within the last seven years (GE 11). At his hearing, he confirmed that he provided false information about not being charged to the investigator (Tr. 32).

On April 2, 2008, Applicant explained why he answered, "No" to these questions. First, he was never "arrested" because he went to the police station without being taken into custody (GE 11). He explained, "I was never arrested, nor convicted for these incidents. I was however charged with these Felonies but failed to mention them due to

misunderstanding. These charges were juvenile and I was under the impression that they all went away after the d[e]ferred finding case and dismissal of all charges." And later he said, "I was under the impression, after being told by my attorney, that they all went away after the d[e]ferred finding case and dismissal of all charges." He concluded his statement (GE 11):

> Since these charges, I have served my country in the United States Marine Corps for 6 years, have been decorated for two overseas combat tours, have received three Navy and Marine Corps Achievement medals, received a good conduct medal, and have been consistent with exemplary behavior and stature far beyond an immature teen could ever imagine. I have dealt with Secret and at times TS sensitive data and documents that have saved peoples lives in war.

Applicant's statement at his hearing was consistent with his April 2, 2008, statement (Tr. 29). He believed he disclosed the criminal offenses to his recruiter, but was not sure whether he placed that information on his enlistment documents (Tr. 46-48). He did not have copies of his enlistment documents (Tr. 46). He was charged with the second felony after boot camp, and did not believe he was charged with the second felony at the time he completed his 2002 security clearance application (Tr. 30).[3] He was never charged with fraudulent enlistment in the Marines (Tr. 31). He did not receive any letters of reprimand or nonjudicial punishment (Tr. 31). He did not provide information on his security clearance applications and to the DoD investigator because he thought he had an expungement order (Tr. 33). He thought "expunge" meant the charges did not exist (Tr. 42). He described the failure to disclose the criminal information as a problem with being uneducated and confused (Tr. 41, 42). He contended his lawyer who handled the criminal cases was not clear about the meaning of expungement (Tr. 42). Back in 2001 or 2002 he was told the charges "went away" and he did not have to put them on employment records (Tr. 43-44). He was not sure he was actually told not to put the information on employment documents (Tr. 50). He was sure he was told after successful probation the charges would be "all gone. It's - - killed. You're free and clear, no charges." (Tr. 50). His assumptions about the charges led to uneducated answers (Tr. 51). Applicant said once he became aware that the convictions had to be disclosed, he disclosed them (Tr. 33). After he received DOHA's interrogatories, he went back to the attorney who handled the criminal litigation, and confronted his attorney about the expungement issue (Tr. 49). His attorney told Applicant he should have put the offenses on his security clearance documents, and should never put false information on such a form (Tr. 44, 49).

[3]Applicant's indictments for embezzlement and theft of the laptop computers were filed on April 24, 2002 (GE 5 at 1, GE 6 at 1), which was before Applicant executed his 2002 security clearance application on July 11, 2002. The date of service of the embezzlement indictment is not indicated on the indictment (GE 5). The indictment for theft of the laptop computers was served on Applicant's attorney on April 29, 2002 (GE 6 at 1). There is no evidence that Applicant was aware of these two indictments before he executed his 2002 security clearance application.

Applicant said when he was in high school he lacked direction (Tr. 33). He made very poor decisions when he was 17 (Tr. 37). He said, "I was just pretty much on a deteriorated path" (Tr. 33). He joined the Marines to straighten out his life (Tr. 34). His life is now going a completely different direction (Tr. 37). He wanted to be part of an elite force (Tr. 34). He finished first in his class of 320 Marines and was designated Company Honor Graduate (Tr. 34; AE F at 9-10). He was promoted within two months (Tr. 34). He completed two combat tours in Fallujah, Iraq (Tr. 34). His Marine Corps duties were as a Data Network Systems Technician (Tr. 38). He was very conscientious about the information in his care (Tr. 38). He was entrusted with highly classified information in Iraq that was used to save lives in the war (Tr. 37). He provided documentation describing his duties in combat (AE F at 5, 6, 7, 13). After leaving active duty in 2006, he worked with information technology and computer networks, and his responsibilities included safeguarding sensitive information (Tr. 38-40). He emphasized his hard work and dedication to his duties as well as his regret and remorse about his misconduct before he joined the Marines (Tr. 40).

**Recommendations**

Applicant provided letters of support from a major (AE F at 5), a master gunnery sergeant (AE F at 6), and a gunnery sergeant (AE F at 7), describing his duty performance in the Marines in garrison and in Iraq. He also provided a fitness report (AE F at 8), and two certificates for the Navy and Marine Corps Achievement Medal (AE F at 12, 13). Applicant "exemplified a combat leader." He participated in "countless combat convoys" (AE F at 13). The documentation emphasized his expertise, superb professionalism, total dedication, conscientious attention to his duties, initiative, perseverance and sterling character.

Applicant's co-worker at the government contractor for 18 months, and his supervisor the last six months (Tr. 57; AE B) lauded Applicant's professionalism, trustworthiness, solid character and technical expertise.[4] Applicant told him the offenses were the product of his youth and stupidity, and now he is mature and responsible (Tr. 54-57). He has made positive changes in his character (Tr. 57). Applicant's performance is outstanding. He recommended Applicant receive "a position of National Security."

Another co-worker with Applicant for six months in 2006 averred Applicant has a positive attitude, and produced quality work quickly. Applicant is proactive, innovative, creative, and efficient. Applicant is helpful to others and shows leadership. He recommends Applicant receive a secret clearance.

A manager, who has worked with Applicant since June 2007, described Applicant as a "key part of our technical team." Applicant is a model employee with "outstanding

[4]The sources for the facts and opinions in this paragraph and the next three paragraphs are AE B-E, respectively.

technical and management[] skills." He shows efficiency and solid character. She recommends Applicant for "a position of National Security."

A close friend and co-worker at Applicant's current employer explained that Applicant has grown and matured in his discipline and responsibility. He believes Applicant is genuine and honest. Applicant is helpful to others and takes his responsibilities seriously. Applicant does not have any character flaws.

## 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,"[5] 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."

[5] *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).

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).[6]

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 E (Personal Conduct) and J (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

[6] "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).

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 failed to disclose his criminal offenses in 2001 and 2002 on his 2002 SF 86 (SOR ¶ 1.a), his 2007 SF 86 (SOR ¶ 1.b) and his 2007 Defense Department interview (SOR ¶ 1.c). AG ¶¶ 16(a) and 16(b) both apply.

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.

AG 17(b) partially applies because Applicant received inadequate legal advice concerning the legal status of his dismissed offenses. His subsequent omissions and/or concealment resulted from this inadequate advice. However, this mitigating condition does not fully apply because such advice was not provided "specifically concerning the security clearance process." Upon being made aware of the requirement to provide the information about his offenses, Applicant did disclose the information sought fully and truthfully.

The mitigating condition in AG ¶ 17(f) fully applies. Although he admitted preparing his 2002 and 2007 SF 86, and answering incorrectly, on these clearance documents and to a DoD investigator in 2007, he did not fully understood the requirement to provide the information the government sought. He was confused by the instructions from his lawyer. He believed that once the charges were dismissed, they were "gone" for reporting purposes.[7] I found his statement at the hearing and in his SOR response to be credible. He honestly thought the charges were gone and not reportable. His statements show confusion about the requirement to disclose criminal information. His confrontation of his attorney shows he had a bona fide belief that his attorney in 2002 said the charges would be dismissed and "gone" provided he successfully completed the two-year probation period. At the time he provided the false information to security officials, he thought that the answers he provided were permitted. He did not intend to violate the rules, and did not have the necessary intent to establish the disqualifying conduct. *See* Department Counsel's closing argument at Tr. 61. Applicant has provided sufficient information to unsubstantiate the allegations in SOR ¶¶ 1.a to 1.c.

**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."

[7]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)).

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), "a single serious crime," and ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." The allegations in SOR ¶ 2.b are established. Applicant committed criminal destruction of private property in 2001 as a juvenile, and felony embezzlement and grand larceny. He committed the grand larceny as an adult. SOR ¶ 2.a alleges that Applicant violated 18 U.S.C. § 1001 by falsifying his security clearance applications in 2002 and 2007, and by failing to provide information about his criminal record to the DoD investigator in 2007. Applicant provided false information under the mistaken belief that he did not have to report such information.

For a violation of 18 U.S.C. § 1001 to occur, the falsification must be material. 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 recent and serious[8] to jeopardize approval of his security clearance in 2002, and possibly in 2007. 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). Accordingly, AG ¶¶ 31(a) and 31(c) apply because there is "substantial evidence" Applicant violated 18 U.S.C. § 1001.

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.

[8] In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

AG ¶¶ 32(a) and 31(d) apply to the criminal offenses in 2001 and 2002. Applicant committed the offenses while he was 17 and 18 years old. He admitted his misconduct and pleaded nolo contendere. He subsequently joined the Marines in 2002 and served honorably, including two tours in combat in Iraq. He completed his probation, paid restitution and fines, and his charges were dismissed. He does not have any convictions. He has demonstrated remorse and been reformed. He received job training and has a good employment record. There is a strong evidentiary record in this case showing his full rehabilitation.

AG ¶ 32(c) applies to the falsification allegations. Applicant denied the 2001 and 2002 charges on his 2002 and 2007 SF 86s and to a Defense investigator in 2007. However, I am convinced that he simply misunderstood about the requirement to provide this information. He is not knowledgeable about judicial or security clearance matters. Taking into consideration his lack of sophistication and limited education,[9] his mistake is reasonable. He admitted providing incorrect information, and the reason he did so. For a falsification to be a criminal offense, there must be an intent to provide false information. He did not believe he was required to disclose the criminal charges because of their ultimate disposition, and the ambiguous advice of his attorney. He honestly believed he did not have to provide information about his 2001 and 2002 criminal record. *See* Department Counsel's closing argument at Tr. 60-61. The criminal offenses of false statements outlined in SOR ¶ 2.a are unsubstantiated, and AG ¶ 32(c) fully applies.

**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.

[9] Although Applicant graduated from high school, it is evident from his statement at the hearing that he is not well educated. He conduct was delinquent in high school and likely he was also a below average student.

The comments in the Analysis section of this decision are incorporated in the Whole Person Concept. Applicant committed offenses in 2001 and 2002, and pleaded nolo contendere. He believed he received deferred adjudication for all offenses. The court order indicated the 2001 offenses were "closed" and the 2002 offenses were dismissed. He paid all restitution and fines. Most importantly after committing the offenses, he joined the U.S. Marines and served two combat tours in Iraq.[10] After leaving active duty he worked for defense contractors, and aside from the SOR allegations no other disciplinary or security related problems surfaced. He erroneously misunderstood that the offenses were not reportable because of their ultimate status. He failed to disclose them on two SF 86s and to a Defense Department investigator. His record of good employment weighs in his favor. His military service especially shows responsibility, rehabilitation, and mitigation.

I do not have any 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 the security concerns pertaining to personal conduct and criminal 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"[11] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude he is 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:

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[10] In ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006) the Appeal Board explicitly limited the applicability of such service to foreign influence cases, but noted:

> where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security. *See, e.g.,* ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006). The presence of such circumstances can give credibility to an applicant's assertion that he can be relied upon to recognize, resist, and report a foreign power's attempts at coercion or exploitation.

Applicant's loyal, dedicated and conscientious combat service in Iraq weighs towards approval of his clearance. Combat service can mature an individual. One can learn the value of freedom, living in law-abiding society, and the importance of national security through service in Iraq. Applicant's combat service has facilitated the rehabilitation process, and makes him a much better candidate for access to classified information.

[11] *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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|---|---|
| Paragraph 1, Guideline E: | FOR APPLICANT |
| Subparagraphs 1.a to 1.c: | For Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT |
| Subparagraphs 2.a and 2.b: | For Applicant |

## Conclusion

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

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Mark W. Harvey
Administrative Judge