DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-04902
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

May 21, 2009

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 20, 2007. On October 1, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline E that provided the basis for its decision to deny him a security clearance and refer the matter to an administrative judge. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

Applicant acknowledged receipt of the SOR on October 6, 2008. He answered the SOR in writing on October 16, 2008, and requested a hearing. The case was assigned to me on November 17, 2008, to conduct a hearing. On November 18, 2008,

Applicant indicated he no longer wanted a hearing, and on November 20, 2008, I referred the case to DOHA for processing of a File of Relevant Material (FORM).[1]

On December 30, 2008, the government submitted a FORM consisting of six exhibits (Items 1-6). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. No response was received by the February 14, 2009, due date. On March 24, 2009, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. Based upon a review of the government's FORM, including Applicant's Answer to the SOR allegations (Item 2), eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

In the FORM, Department Counsel moved to amend the SOR to add a new Guideline J to allege that the conduct set forth under ¶ 1.a. of Guideline E also raised security significant criminal conduct concerns. There is nothing in Department of Defense Directive 5220.6 that prohibits the government from amending the SOR before a hearing or decision based on the written record provided the proposed allegation has a reasonable basis, is not confusing, and is relevant to a determination of the applicant's suitability for access.

Department Counsel informed Applicant in the FORM of the motion and of his opportunity to respond. The FORM was forwarded to Applicant on January 8, 2009, with clear instructions that he file any objections within 30 days of receipt. Applicant received the FORM on January 15, 2009. No response was received by the February 14, 2009, due date. Given the specific allegation concerns an outstanding warrant for Applicant's arrest in connection with criminal charges filed against him, and Applicant was placed on notice and had an adequate opportunity to respond, I granted the motion to amend on April 23, 2009. Applicant was directed to answer SOR ¶ 2.a on or before May 4, 2009, and that a failure to respond would be taken as an admission to the new allegation. No response was received.

Findings of Fact

In the amended SOR DOHA alleged under Guideline E, personal conduct, and Guideline J, criminal conduct, that a warrant for Applicant's arrest remains active after he failed to appear at a pretrial conference on charges filed in September 1983 of carrying a pistol without a license, altering marks of identification on a firearm, and simple assault/battery (SOR ¶¶ 1.a and 2.a). Applicant was also alleged under Guideline E to have deliberately falsified the November 2007 e-QIP by denying that he

[1]The case file returned to me on or about March 24, 2009, for a decision based on the written record, did not include the previous case assignment, Applicant's request for a decision without a hearing, or my memorandum returning the case for further processing. Copies of those documents concerning Applicant's request for a decision on the written record had been retained by me, pending final adjudication of Applicant's security suitability, and I included them in the file presented to me for a decision.

had ever been charged with or convicted of a firearm or explosives offense (SOR ¶ 1.b). Applicant admitted the outstanding arrest warrant and explained that he was in the process of moving to another state for employment and had to carry his gun with him. He denied falsifying his e-QIP and added that he had believed he had to list convictions only. After considering the evidence of record, I make the following findings of fact:

Applicant is a 58-year-old electronic technician, who has been employed by a defense contractor since October 1983. He seeks to retain the secret-level security clearance that he has held since November 1997 (Item 3).

Applicant served on active duty in the United States military from March 1974 to November 1979 where he was trained as a fire control technician. He was awarded the National Defense Service Medal, and at the end of his four-year enlistment term, the First Good Conduct award. In March 1978, his enlistment was ordered extended for 24 months at the request and convenience of the government, but in November 1979 he was granted an honorable discharge for reason of "personality disorders." (Item 4). Applicant and his spouse divorced in about August 1978 after six years of marriage (Item 3).

In July 1983, an employee of a school bus company complained to police that a person he did not know entered the office and punched him in the face for no reason. The assailant was stopped by the police while walking along the road, and he was found to be in possession of a loaded .25 caliber semiautomatic pistol. Placed in custody, Applicant was positively identified at the station as the assailant, and his weapon was confiscated. Applicant had an application for purchase and a bill of sale showing that he had procured the weapon legally the month before, but the serial number had been filed off the handgun. On August 1, 1983, the handgun was test-fired by the police and it was found to function perfectly. Applicant was charged with three criminal offenses: carrying a concealed weapon without a license,[2] a felony; altering marks of identification on a

[2]Applicant was charged with violating § 11-47-8, which states in pertinent part:

11-47-8 License or permit required for carrying pistol-Possession of machine gun. (a) No person shall, without a license or permit issued as provided in §§ 11-47-11. 11-47-12 and 11-47-18, carry a pistol or revolver in any vehicle or conveyance on or about his or her person whether visible or concealed, except in his or her dwelling house or place of business or on land possessed by him or her as provided in §§ 11-47-9 and 11-47-10. The provisions of these sections shall not apply to any person who is a holder of a valid license or permit issued by the licensing authority of another state, or territory of the United States, or political subdivision of the state or territory, allowing him or her to carry a pistol or revolver in any vehicle or conveyance or on about his or her person whether visible or concealed, provided the person is merely transporting the firearm through the state in a vehicle or other conveyance without any intent on the part of the person to detain him or herself or remain within the state of Rhode Island. No person shall manufacture, sell, purchase, or possess a machine gun except as otherwise provided in this chapter. Every person violating the provision of this section shall, upon conviction, be punished by imprisonment for not less than one nor more than ten (10) years, or by a fine up to ten thousand dollars ($10,000), or both, and except for a first conviction under this section shall not be afforded the provisions of suspension or deferment of sentence, nor a probation. (R.I. Gen. Laws § 11-47-8).

firearm,[3] a felony; and simple assault,[4] a misdemeanor.[5] Applicant pleaded not guilty at his arraignment in early September 1983, and was released on $9,000 bail after acknowledging that he would appear before the court as required for all hearings, would keep the peace and be of good behavior, would not leave the state while the matter was pending without permission of the court, and would notify his attorney/bondsman and the court clerk of any change of address. A week later, a public defender entered his appearance on Applicant's behalf. Applicant failed to appear at a pretrial conference on January 26, 1984, and a warrant was issued for his arrest. In or before September 1984, Applicant retained private counsel, who entered his appearance formally on October 24, 1984. Applicant did not appear at a proceeding to cancel the warrant in November 1984, and the warrant was ordered to remain in effect (Item 6).

On November 20, 2007, Applicant completed an e-QIP for his employment. He responded negatively to the police record inquiries, including questions 23a. "Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice)," 23b. "Have you ever been charged with or convicted of a firearms or explosives offense?," and 23c. "Are there currently any charges pending against you for any criminal offense?."

Applicant was interviewed by a government investigator on March 24, 2008, to discuss the 1983 criminal charges and possible omission of those charges from his e-QIP. Applicant told the investigator that he had been visiting his mother at a nursing home (name unrecalled) when a maintenance man at the facility called him a slang term for a homosexual. Applicant averred that the maintenance man referred to him in the same derogatory manner when he returned to visit his mother a few days later. This time, Applicant became enraged and an argument between the two men escalated into a mutual physical altercation during which punches were traded. Applicant added that

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[3] **11-47-24 Alteration of marks of identification on firearms**.

No person shall change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any firearm. Possession of any firearm upon which any of these marks shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated it. Violation of the provisions of this section may be punished by imprisonment for not more than five (5) years. (R.I. Gen. Laws § 11-47-24).

[4] **11-5-3 Simple Assault or battery**.

(a) Except as otherwise provided in § 11-5-2, every person who shall make an assault or battery or both shall be imprisoned not exceeding one year or fined not exceeding one thousand dollars ($1,000), or both. (R.I. Gen. Laws § 11-5-3).

[5] Pursuant to section 11-1-2 of the state's general laws, any criminal offense which at any given time may be punished by imprisonment for a term of more than one year, or by a fine of more than $1,000, is a felony. Any criminal offense which may be punishable by imprisonment for a term not exceeding one year, or by a fine of not more than $1,000, or both, is a misdemeanor. Any criminal offense which may be punishable by imprisonment for a term not exceeding six months or by a fine of not more than $500, or both, is a petty misdemeanor. (R.I. Gen. Laws § 11-1-2).

when the police were called, only he was arrested for simple assault and battery. Additional charges were filed against him because the police found a loaded .25 caliber pistol on him, and the serial number on the pistol had been altered. Applicant indicated that he pleaded not guilty and was released on his own recognizance. He acknowledged that he had not returned to court, and claimed to be unaware that he was required to do so. When the investigator informed him that there was an outstanding warrant for his arrest on the charges, Applicant denied any knowledge of the warrant. Informed that a follow-up investigation might be conducted to determine the status of his case, Applicant indicated he had no intent to attempt to resolve the matter. Applicant admitted that in 1983, he had routinely carried the .25 caliber handgun for his own protection, and that he had purposely filed off its serial number, knowing that it was illegal to obliterate the serial number of a firearm. He claimed to have etched his name on the pistol and explained that he thought his certificate of completion of a one-hour handgun safety course was his permit to carry the firearm. Applicant explained that he did not list the charges on his e-QIP because he had not been convicted. He denied knowing that he was required to list criminal charges. Applicant indicated that his employer and coworkers were unaware of his arrest, but he denied he could be blackmailed or caused to act contrary to U.S. interests because of his arrest (Item 4).

By way of an interrogatory, DOHA asked Applicant to furnish court documents reflecting the status of his outstanding warrant. Applicant did not provide the documents because he had been "released on [his] own cognizance." He explained in his response of July 7, 2008, that he had moved out of the state for a job. Concerning any additional facts that might assist in determining whether it was clearly consistent with the national interest to grant or continue a security clearance for him, Applicant added that he had served his country and had lost his family while serving. He was raising his grandson with his daughter, who were living with him (Item 4).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 overarching 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. Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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 that 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Personal Conduct

The security concern for personal conduct is set out in Guideline E, AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant exercised poor judgment within the meaning of AG ¶ 15 by carrying a .25 caliber loaded handgun without a license in July 1983, by purposing filing the serial number from the pistol knowing that it was against the law to do so, and in failing to comply with the terms of his release on personal recognizance. The evidence shows that he not only failed to appear in court for his pretrial conference, which led to the issuance of the outstanding warrant for his arrest, but that he also left the state without notifying the court. Applicant's version of the events that led to his arrest cannot be reconciled with the police report. He indicated he was provoked into a physical altercation with a maintenance man at a nursing home while the police report indicates he was arrested on the street following a complaint that he punched a school bus driver with no apparent provocation. At the same time, Applicant does not dispute that he had a loaded handgun in his possession or that he had filed the serial number off the

weapon. Since this conduct is appropriately covered under the criminal conduct guideline, neither AG ¶ 16(c) nor AG ¶ 16(d) under Guideline E squarely apply.[6]

However, the evidence supports application of AG ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Applicant responded "No" to the police record inquiries (question 23) on his e-QIP completed on November 20, 2007. The government alleged only a falsification of question 23.b (ever been charged with or convicted of a firearms or explosives offense), although clearly Applicant should have also answered "Yes" to questions 23.a (ever been charged or convicted of any felony offense) and 23.c (currently any charges pending for any criminal offense). Applicant denies any intentional falsification, citing a belief that he had to list only convictions. While a mistaken belief held in good faith could negate the willful intent required for a knowing falsification, he clearly knew that he had been arrested, and released after posting bail. He retained a private attorney after a warrant had been issued for his arrest, so he knew that charges were still pending against him as of September 1984. In the absence of any evidence of a final resolution of the charges, and given the unambiguous nature of the questions, his denial of deliberate falsification is not credible.

As of March 2008, Applicant believed his coworkers and supervisors at work were not knowledgeable about the arrest. He had not discussed his arrest with them as he believed it was none of their business. Although it would not be reasonable to expect Applicant to inform his coworkers about his arrest, there is no indication that he has ever informed his employer about the charges, which are still pending against him. He started working for the defense contractor in October 1983, only one month after his arraignment. Vulnerability concerns are implicated under AG ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing."

None of the potentially mitigating conditions under Guideline E are pertinent. His disclosures about the offense during his March 2008 interview with a government investigator were not before confrontation, so AG ¶ 17(a), "the individual made prompt, good faith-efforts to correct the omission, concealment, or falsification before being confronted with the facts," does not apply. AG ¶ 17(c), "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such

[6]AG ¶ 16(c), "credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information," and AG ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information."

unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," cannot be applied in this case despite the passage of 25 years since his arrest. Carrying a loaded handgun without a license and eradicating the serial numbers from the gun are not minor offenses. His falsification of his e-QIP raises recent personal conduct issues.

Furthermore, considerable concerns persist for his judgment because he does not intend to make any attempt to resolve the matter of the outstanding arrest warrant and pending criminal charges. Trustworthiness concerns are not overcome by ongoing denials of intentional falsification of his e-QIP or by an account of his arrest that is irreconcilable with the police report. AG ¶ 17(d), " the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur," does not apply. Nor has he taken the steps needed to trigger AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." His assertion that he cannot be pressured or blackmailed has not been tested.

Criminal Conduct

AG ¶ 30 sets out the security concern about 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.

Applicant was arrested in July 1983 on charges of simple assault and on felony gun charges of carrying a concealed weapon without a permit and altering the markings on the handgun. He pleaded not guilty at his arraignment, but failed to show for a pretrial conference, and a warrant was issued for his arrest. According to the available evidence, that warrant remains outstanding. The lack of a conviction does not preclude me from considering the conduct for its security implications (*see* AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted"). As noted under Guideline E, *supra*, the record evidence is conflicting on the facts of the assault. A police officer reported that he stopped Applicant as he was walking in the vicinity of the school administration building, which would tend to substantiate the victim's version of events. Yet, in light of Applicant's not guilty plea, and the absence of a conviction, the information does not prove that Applicant committed the assault that led to his arrest. But Applicant does not dispute that he was caught with a loaded gun, or that he had scratched off its serial number knowing it was against the law to do so. It is simply not credible for Applicant to claim that he thought a certificate of completion of a one-week handgun training class was his license to carry the gun. AG ¶ 31(c) applies to an evaluation of Applicant's continued security eligibility.

Although 25 years have now passed since his arrest, I am unable to fully apply AG 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not

cast doubt on the individual's reliability, trustworthiness, or good judgment," because of the outstanding arrest warrant. Applicant claimed in March 2008 that he did not know about the outstanding warrant, which was issued when he failed to show for the pretrial conference in January 1984. Applicant retained a private attorney in September 1984, and this attorney formally entered his appearance with the court in October 1984. A hearing was then held on November 8, 1984, to cancel the warrant. Applicant's actions tend to indicate he knew as of that time that he had serious criminal charges pending against him. When Applicant failed to appear in November 1984, the warrant was ordered to remain in effect. Applicant cannot now claim ignorance where he made no effort to comply with the court's conditions for his release on bail. Relocation for his present employment is no excuse when he started his job in October 1983, well before he retained private counsel, and he was required a condition of his release to notify the court before he left the state.

Applicant has yet to resolve the matter of the outstanding warrant and criminal charges pending against him and he is unlikely to do so. He told a government investigator in March 2008 that he did not intend to hire an attorney, to contact the court or the police, or to make any attempt to resolve the pending charges. He blamed the court for releasing him on his own recognizance. He made no effort to comply with DOHA's request to provide the court documents reflecting the status of the outstanding warrant, citing the fact that he had been released on his own recognizance. Applicant's ongoing, knowing disregard of a court order precludes me from concluding that he is rehabilitated. AG ¶ 32(d), "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," does not apply despite his longtime employment with the defense contractor.

Whole Person Concept

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

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

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

AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant's ongoing, knowing disregard of a court order and his lack of candor about his arrest on his e-QIP reflect an unacceptable tendency to act in self interest that is incompatible with continued retention of a security clearance. He has shown little appreciation for his fiduciary obligations as a cleared employee. Based on all the information presented, I am unable to conclude that it is clearly consistent with the national interest to grant or continue his access to classified information.

Formal Findings

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

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

ELIZABETH M. MATCHINSKI
Administrative Judge