DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-06982
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tom Coale, Esq., Department Counsel
For Applicant: *Pro se*

August 28, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on January 21, 2008 (Government Exhibit (GX) 4). On March 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J and E (GX 1). 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 for SORs issued after September 1, 2006.

Applicant received the SOR on March 20, 2009; answered it on March 31, 2009; and requested determination on the record without a hearing. DOHA received his response on April 3, 2009. Department Counsel submitted the government's written case on April 28, 2009. On April 29, 2009, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on May 5, 2009, but he did not respond. The case was assigned to me on August 12, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a through 1.e, and he denied the allegations in SOR ¶ 1.f and 2.a. His admissions are incorporated in my findings of fact.

Applicant is a 56-year-old senior staff software engineer for a federal contractor. He has worked for his current employer since May 2007. He is a college graduate. His security clearance application states he received a security clearance while working for a previous employer, a defense contractor (GX 4 at 28). The record does not reflect whether he currently holds a security clearance.

Applicant was married in August 1974. He and his wife have a 28-year-old daughter, a 26-year-old son, and a 20-year-old daughter.

Applicant admitted in his answer to the SOR that he was arrested for disorderly conduct in May 1990 and was fined. In a response to DOHA interrogatories in September 2008, Applicant explained that this incident arose as a result of an argument between his spouse and a neighbor about rock-throwing incidents involving their children (GX 8 at 3).

Applicant also admitted he was arrested in September 1995 and charged with assault. He explained to a security investigator that this incident arose out of a domestic argument. While he was driving, his wife began punching him in the arm with her fist, and he accidently backhanded her in the face while trying to deflect the blows (GX 5 at 3).

Applicant admitted he was the subject of a domestic disturbance incident report in September 2005 and two domestic disturbance incident reports in September 2006. In response to DOHA interrogatories in September 2008, he explained that these incidents arose from arguments with his younger daughter. Both had undiagnosed bipolar disorder and would engage in loud arguments with occasional physical contact, causing Applicant's wife to summon the police. Both Applicant and his daughter are receiving psychiatric care and responding well to medication (GX 6 at 2). His daughter no longer lives them (GX 6 at 3).

Court records reflect that Applicant was arrested in September 2007 after a domestic disturbance, and he was charged in December 2007 with criminal damage and disorderly conduct (GX 7). This incident occurred when Applicant intentionally broke his wife's cell phone during an argument. Both Applicant and his wife were charged with disorderly conduct. Court records reflect that he pleaded guilty pursuant to a plea agreement (GX 8), and the finding of guilty based on his plea was deferred. He was placed on unsupervised probation for 24 months, ordered not to possess alcoholic beverages, and required to obtain 52 weeks of psychological and alcohol counseling (GX 9). His psychiatrist certified that he has been "compliant" with his treatment, is making progress, is more pleasant, and has maintained sobriety (GX 3 at 3). He will be on probation until January 25, 2010.

On his security clearance application, Applicant answered "no" to question 23f, asking about charges or arrests not covered elsewhere on the form (GX 4 at 26). He did not disclose his arrest in September 2007 and charges of criminal damage and disorderly conduct that were preferred in December 2007 (GX 7). In his answer to the SOR, he admitted he was notified by mail on December 19, 2007, that a complaint had been filed against him for the September 2007 incident and he was required to appear in court on January 25, 2008. He stated he answered "no" to the question because he thought he was not "charged" until he was arrested or appeared in court. When he was interviewed by a security investigator on March 11, 2008, he disclosed the details of the incident and the disposition of the charges. He told the investigator he did not disclose the incident on his security clearance application because he was never arrested and, at the time he submitted his application, he did not know if he would be charged (GX 5 at 3).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges an arrest for disorderly conduct in May 1990 (SOR ¶ 1.a), an arrest for assault in September 1995 (SOR ¶ 1.b), three domestic disturbances in 2005 and 2006 (SOR ¶¶ 1.c, 1.d, and 1.e), and an arrest and charges of criminal damage and disorderly conduct in September 2007 that resulted in 24 months of unsupervised probation that will run through January 25, 2010 (SOR ¶ 1.f). It also alleges Applicant intentionally omitted the latest charges from his security clearance application (SOR ¶ 2.a).

The concern raised by criminal conduct is that it "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 ¶ 30. Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c). A disqualifying condition also may be raised if "the individual is currently on parole or probation." AG ¶ 31(d). Applicant's criminal record raises AG ¶¶ 31(a), (c), and (d), shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated if "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." AG ¶ 32(a). The neighborhood argument that occurred in May 1990 happened long ago. Applicant has not been involved in any similar incidents, and it is not likely to recur. The domestic violence in September 1995 also happened long ago, but it is part of a pattern of recurring domestic violence that continued through September 2007. Now that Applicant's younger daughter no longer lives at home, recurrence of violence with her is unlikely, but the evidence does not justify a conclusion that recurrence of the domestic violence with his wife is unlikely. He is still on probation for the latest incident, and it is too soon to determine whether he will adhere to the therapy to control his bipolar disorder. I conclude AG ¶ 32(a) is established for the May 1990 incident but not for the remaining incidents.

Security concerns based on criminal conduct also may be mitigated if "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(d). As noted above, too little time has passed since the latest criminal conduct, and Application is still on probation for that conduct. He has presented no evidence of his employment record or community involvement. The evidence from his psychiatrist contains no prognosis for the future. I conclude AG ¶ 32(d) is not established.

Guideline E, Personal Conduct

The SOR alleges Applicant intentionally failed to disclose the arrest and charges related to his domestic violence incident in 2007 (SOR ¶ 2.a). The concern under this guideline is set out in AG ¶ 15 as follows:

> 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.

The relevant disqualifying condition in this case is "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." AG ¶ 16(a). When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant's explanation is that he did not know he had been charged, even though he was informed in writing that a complaint had been filed and he was required to appear in court to answer it. He is a mature, well-educated adult. He is not a neophyte regarding the criminal justice system. I find his explanation implausible and not credible. I am satisfied he knew he was pending charges but chose not to disclose it. I conclude AG ¶ 16(a) is raised.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). Although Applicant entered his guilty plea and was placed on probation four days after submitting his application, there is no evidence he attempted to correct his omission until he was confronted by a security investigator two months later and questioned about his failure to disclose the arrest and charges on his application. I conclude AG ¶ 17(a) is not established.

Security concerns based on personal conduct can be mitigated if "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." AG ¶ 17(c). Applicant's falsification of his application was serious because it tended to undermine the integrity of the security clearance process. It was recent, did not happen under unique circumstances, and casts doubt on his reliability, trustworthiness, and good judgment. I conclude AG ¶ 17(c) is not established.

Security concerns based on personal conduct also can be mitigated if "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." AG ¶ 17(d). During his security interview in March 2008 and in his answer to the SOR, Applicant admitted the omission from his application, but

he has not acknowledged that it was intentional. He is receiving counseling from a psychiatrist, but the psychiatrist's report, while generally favorable, stops short of a favorable prognosis. His behavior is constrained by the fact that he is still on probation. Too little time has passed to warrant a conclusion that his behavior is unlikely to recur. I conclude AG ¶ 17(d) is not established.

Whole Person Concept

Under the whole person concept, an 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. An 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 Guidelines J and 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 has a long history of domestic violence and disorderly conduct. As a condition of his ongoing probation, he is receiving treatment, but it is too soon to conclude that he is rehabilitated. His lack of candor on his security clearance application raises serious doubts about his reliability and trustworthiness.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.f:	Against Applican
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

LeRoy F. Foreman
Administrative Judge