DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
---------------------	)	ISCR Case No. 08-08025
SSN: -----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

August 31, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on November 5, 2007. On February 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 F and E. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on March 3, 2009, and answered it on April 25, 2009. Department Counsel was ready to proceed on June 30, 2009, and the case was assigned to an administrative judge on July 1, 2009. DOHA issued a notice of hearing on July 2, 2009, scheduling the hearing for July 30, 2009. Applicant requested a continuance until August 3, 2009, to enable his wife to attend the hearing. The case was reassigned to me on July 7, 2009, and the hearing was rescheduled for August 3, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on August 11, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.b and 1.d-1.j. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 44-year-old information assurance analyst employed by a federal contractor. He served on active duty in the U.S. Army from August 1983 to October 2003, retiring as a staff sergeant (pay grade E-6). He received a security clearance in 1986, while on active duty (Tr. 6, 23). He worked for federal contractors from November 2003 to July 2006, when he left his job under unfavorable circumstances. He was unemployed from July to October 2006. He worked for another federal contractor from October 2006 to June 2007. He has worked for his current employer since July 2007.

Applicant was married in February 1987 and divorced in April 1989. He remarried in May 1993. He has a 20-year-old stepson and a 16-year-old daughter. His stepson will begin college in the fall of 2009.

In February 2006, while working for a former employer, Applicant received an Employee of the Quarter award (Tr. 87; Answer to SOR). In May 2006, he was counseled in writing for coming to work without his Common Access Card (CAC) (GX 9 at 10). The formal counseling occurred after he came to work without his CAC for the third time (Tr. 67). The written counseling form states he was verbally counseled after he forgot his CAC for the first time.

In April 2008, during an interview by a security investigator, Applicant stated he did not have "any problems, reprimands, or incidents," leading up to his termination in July 2006 (GX 3 at 20). In his response to DOHA interrogatories dated December 18, 2008, he answered "no" to the question, "Other than allegations which led to your separation from [your former employer], were you ever counseled or reprimanded verbally or in writing by [your former employer]?" At the hearing, he testified he did not disclose his counseling in May 2006 because he did not remember it (Tr. 68).

In July 2006, Applicant was accused by a female co-worker of touching her inappropriately. According to the co-worker, Applicant came up behind her, rubbed her

leg, shoulders, face, and hips several times on July 11, 2006. He held a necklace she was wearing and placed his hand over her breast area. He invited her to go with him to an office on an upper floor to see the view. She declined, telling him that she needed to remain at her place of duty. Later in the day, Applicant gave her a note inviting her to meet him on the upper floor. She gave the note to their supervisor (GX 9 at 5-7). Their immediate supervisor and the company's regional director found the woman's allegations to be true, and Applicant was terminated for sexual harassment (GX 9 at 3).

During his interview with the security investigator in April 2008, Applicant denied touching the woman inappropriately or sexually harassing her (GX 3 at 20). At the hearing, he again denied touching the woman sexually (Tr. 71-72, 86). He testified that he and his co-workers, including the woman who complained, sometimes touched each other by pushing, bumping, or similar horseplay, but there was never any sexual touching (Tr. 38, 72-73, 83-85).

Applicant answered "yes" to question 22 on his e-QIP (GX 1 at 32), asking him if any of the following had happened to him during the past seven years:

1. Fired from a job.
2. Quit a job after being told you'd be fired.
3. Left a job by mutual agreement following allegations of misconduct.
4. Left a job by mutual agreement following allegations of unsatisfactory performance.
5. Left a job for other reasons under unfavorable circumstances.

In the section explaining his answer, he listed his severance type as "Left a job for other reasons under unfavorable circumstances." He listed the reason for his severance as, "There was an altercation with a co-worker."

At the hearing, Applicant admitted he knew he had been terminated. When asked why he did not say he was fired, he responded, "Because my understanding of that question was that I did leave under – that I left that job under unfavorable actions." He was not asked and did not explain why he stated on his e-QIP that he was terminated because of an altercation with a co-worker.

Applicant purchased a new home in 2006, intending to sell the home he bought while on active duty. He was unable to sell his old home and decided to rent it, but it took eight months to find a tenant. While trying to find a tenant, he was terminated for sexual harassment. The combination of paying for two homes and being unemployed drained him financially (Tr. 36). He borrowed $20,000 from his credit union for living expenses during his period of unemployment (Tr. 59-60). As of the date of the hearing, he had an offer to buy his old home in a short sale. He testified he would surrender the home to the bank if the short sale was not completed (Tr. 61-62).

In February 2009, before receiving the SOR, Applicant and his spouse contacted a bankruptcy attorney (Answer to SOR at 5). On April 29, 2009, they filed a petition for

Chapter 13 bankruptcy (GX 8). All creditors except those alleged in SOR ¶¶ 1.a and 1.e are specifically listed in the bankruptcy petition. Applicant and his spouse received budget counseling as part of the Chapter 13 process (Tr. 37). They are obligated to pay $1,600 per month on the debts included in the bankruptcy (Tr. 63-64).

Applicant submitted a current family budget reflecting total family income of $10,114 per month and expenses of $10,037, leaving a monthly remainder of $77. The monthly expenses include the mortgage payments on their residence and payments to the bankruptcy trustee (AX A). As of the date of the hearing, Applicant and his spouse had made three monthly payments to the trustee (Tr. 64).

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 F, Financial Considerations

The SOR alleges 10 delinquent debts totaling about $179,038. The concern under this guideline is set out in AG ¶ 18 as follows:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Several disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised by an "inability or unwillingness to satisfy debts." AG ¶ 19(c) is raised by "a history of not meeting financial obligations." AG ¶ 19(e) is raised by "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis." Applicant's financial history raises AG ¶¶ 19(a), (c), and (e), 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 based on financial problems can be mitigated by showing that "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 20(a). This mitigating

condition is not established because Applicant's delinquent debts are ongoing, numerous, and did not arise from circumstances that are unlikely to recur.

Security concerns under this guideline also can be mitigated by showing that 'the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances." AG ¶ 20(b). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established.

Applicant's loss of employment was due to his own misconduct and was within his control, but the downturn in the housing market was a circumstance beyond his control. After eight months, he found a tenant for his previous residence. He borrowed money from his credit union until he found new employment. I conclude AG ¶ 20(b) is partially established, to the extent that Applicant's financial problems were due to his inability to sell or rent his former residence.

Security concerns under this guideline also can be mitigated by showing that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." AG ¶ 20(c). Applicant and his spouse received the counseling required by the bankruptcy court and have taken significant first steps toward resolving their debts. It is not clear from the record whether the delinquent debts alleged in SOR ¶¶ 1.a and 1.e are included in the bankruptcy. Even if they are not included, the Chapter 13 bankruptcy is a significant step toward resolution of Applicant's financial problems. I conclude AG ¶ 20(c) is established.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). An applicant is not required, as a matter of law, to establish resolution of each and every debt alleged in the SOR. *See* ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.* Applicant and his spouse have a plan to resolve their problems, and they have taken significant steps to implement it. They both are gainfully employed, and they have adopted a realistic budget that includes payments under their Chapter 13 bankruptcy. I conclude AG ¶ 20(d) is established.

Guideline E, Personal Conduct

The SOR alleges that Applicant repeatedly touched a female co-worker inappropriately (SOR ¶ 2.a), and he was terminated for his conduct (SOR ¶ 2.b). It also alleges he falsified material facts on his e-QIP by intentionally failing to accurately disclose the circumstances of his termination in July 2006 (SOR ¶ 2.c). It alleges he falsified his responses to DOHA interrogatories in December 2008 by intentionally failing to disclose that he had been counseled verbally and in writing by his previous employer (SOR ¶ 2.d). Finally, it alleges he falsified material facts during a security interview in April 2008 by denying his inappropriate behavior with a female co-worker and falsely stating he had not had any "problems, reprimands, or incidents" prior to the allegations of sexual harassment (SOR ¶ 2.e).

SOR ¶ 2.b does not allege an act by Applicant. Instead, it alleges his employer's response to the conduct alleged in SOR ¶ 2.a. As such, it duplicates SOR ¶ 2.a. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3. Accordingly, I resolve SOR ¶ 2.b in Applicant's favor.

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 pertaining to Applicant's answer on his e-QIP about his termination by a previous employer is AG ¶ 16(a):

> [D]eliberate 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.

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission or misstatement, standing alone, does not prove an applicant's state of mind. An administrative judge must consider the record evidence as a whole to determine whether an applicant intentionally omitted or misstated material facts. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

While the word “fired” does not appear in his former employer’s investigative file, Applicant knew he had been terminated for cause. His explanation for using a less pejorative term to describe being fired might be plausible if he had not misstated the reason for his termination, describing it as an altercation between co-workers instead of sexual harassment of a female co-worker. I conclude AG ¶ 16(a) is raised.

The relevant disqualifying condition pertaining to Applicant’s response to DOHA interrogatories and his responses during an interview with a security investigator is AG ¶ 16(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’s explanation for his failure to disclose that he was counseled for repeatedly coming to work without his CAC was that he had forgotten about it. I find this explanation implausible and not credible. I conclude AG ¶ 16(b) is raised.

Three disqualifying conditions are relevant to the allegations of inappropriate behavior alleged in SOR ¶¶ 2.a and 2.b. AG ¶ 16(c) is raised by:

> [C]redible adverse information in several adjudicative issue 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 protected information;

AG ¶ 16(d) is raised by:

> [C]redible 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. This includes but is not limited to consideration of . . . disruptive, violent, or other inappropriate behavior in the workplace.

AG ¶ 16(e) is raised by:

> [P]ersonal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant denied touching his co-worker sexually, but his supervisor resolved the factual issue against him after considering the complainant's testimony and the note she received from Applicant. Applicant's lack of candor on his e-QIP, his false response to DOHA interrogatories, and his false statements to a security investigator lead me to doubt the credibility of his denial and to agree with the factual determination made by his former employer. Accordingly, I conclude that the disqualifying conditions in AG ¶¶ 16(c), (d), and (e) are raised.

Security concerns raised by false or misleading answers on a security clearance application or during the security investigation 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). This mitigating condition is not established, because Applicant made no effort to correct or explain his multiple misstatements and omissions until the hearing.

Security concerns based on personal conduct also may be mitigated by showing that "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 inappropriate sexual touching of a female co-worker was a serious breach of his employer's rules and was properly treated as a serious offense by his former employer. Although the time period of his misconduct was confined to one day, it consisted of multiple acts. His conduct did not occur under unique circumstances.

The second prong of AG ¶ 17(c) ("so much time has passed") focuses on whether the conduct was recent. There are no "bright line" rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*. Applicant's sexual harassment of a co-worker was three years ago, and there is no evidence of other sexual harassment. On the other hand, Applicant falsified his e-QIP in November 2007, falsely denied inappropriately touching his co-worker during a security interview in April 2008, and gave false responses to DOHA interrogatories in December 2008. His repeated falsifications negate a finding of reform or rehabilitation. I conclude Applicant's misconduct is recent and it casts doubt on his trustworthiness, reliability, and good judgment. AG ¶ 17(c) is not established.

Security concerns under this guideline may 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). Applicant has denied acting inappropriately with a former co-

worker and offered implausible and incredible explanations for his falsifications. This mitigating condition is not established.

Finally, security concerns under this guideline may be mitigated if "the information was unsubstantiated or from a source of questionable reliability." AG ¶ 17(f). Although Applicant has denied acting inappropriately with a former co-worker, his misconduct was established by her statements and the written note she received from Applicant. His falsifications were established by the employment records of his former employer. This mitigating condition 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 F 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 is a mature adult with a long record of federal service. He has held a clearance for many years, apparently without incident. His inappropriate behavior in July 2006 led to his unemployment and financial difficulties. His repeated falsifications about his employment record cast doubt on his reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on financial considerations, but he has not mitigated the security concerns raised by his personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his 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 F (Financial Considerations):	FOR APPLICANT
Subparagraphs 1.a-1.j:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Subparagraphs 2.c-2.e:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge