DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-09444
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace Le'I, Esquire, Department Counsel
For Applicant: *Pro Se*

October 22, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant committed assaults in 1997, 2003, and 2006. Two assaults were misdemeanor-level offenses, and were ultimately dismissed. The 1997 assault resulted in a felony-level conviction. His misdemeanor-level, marijuana-related convictions in 1989 and 1994 are not recent. Applicant failed to mitigate security concerns arising from his criminal conduct. Clearance is denied.

Statement of the Case

On March 5, 2008, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (Government Exhibit (GE) 1). On March 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant (GE 13). The SOR detailed the basis for its preliminary decision to deny Applicant eligibility for a security clearance pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised; 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. The SOR alleges security concerns under Guideline J (criminal conduct) (GE 13). 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 his security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations on April 28, 2009, and the Applicant requested a hearing before an administrative judge (GE 14). On July 29, 2009, Department Counsel was ready to proceed with Applicant's case. On July 29, 2009, the case was assigned to me. On September 4, 2009, Applicant's hearing was held. Department Counsel offered 11 exhibits (GE 1-11) (Transcript (Tr.) 17-26), and Applicant offered four exhibits (AE A-D) (Tr. 29-31). Applicant objected to the records indicating he was charged with three assaults during January to March 1997 (Tr. 17-26). I admitted the records showing three sets of assault charges, and explained Applicant's objections would be applied to the weight given to the exhibits (Tr. 26-27). Ultimately, I determined that Applicant committed one assault in 1997. There were no other objections, and I admitted AE A-D (Tr. 31). Additionally, I admitted the SOR, response to the SOR, and Hearing Notice (GE 12-14). I held the record open until September 15, 2009, to permit Applicant to submit additional documentation (Tr. 99-116). For example, I suggested Applicant could submit police reports relating to the assaults, or statements from the witness-victim of the 1997 and 2006 assaults (Tr. 114-115). Applicant did not submit any post-hearing documentation. I received the transcript on September 14, 2009.

Findings of Fact[1]

In his response to the SOR, Applicant admitted the SOR allegations in ¶¶ 1.a, 1.b, 1.c, 1.g, and 1.h (GE 14). He denied the remaining SOR allegations (GE 14). 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 47 years old and has worked for a government contractor since May 2008 (Tr. 5, 90-92; GE 1). He graduated from high school in 1979 (Tr. 5). He attended a community college for a few months (Tr. 6). He has never married (Tr. 94).[2] His daughters are ages 29 and 21 (Tr. 96). One reason he left the mother of his children was because she was verbally abusive and talked down to him (Tr. 94). About six months ago, he lost his interim security clearance, and the contractor moved him to

[1]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[2] On August 22, 2008, Applicant told an Office of Personnel Management (OPM) Investigator that he was married (GE 2). In his response to DOHA interrogatories, he referred to the mother of his children as his "ex-wife" (GE 2). His 2008 security clearance application indicates he was never married (GE 1). Applicant was in a long-term relationship with the mother of his children that terminated when he was involved with another woman (hereinafter "P").

janitorial-type duties that did not require a security clearance (Tr. 92). He does not currently hold a security clearance (Tr. 6).

Marijuana-related criminal conduct

In August 1989, the police searched Applicant's car and found drug paraphernalia and part of a marijuana cigarette in his ashtray (Tr. 51-53; GE 2). The police arrested Applicant and he was charged with marijuana possession and possession of paraphernalia for using a controlled, dangerous substance (SOR ¶ 1.a). He pleaded guilty and the court fined him about $150 (SOR ¶ 1.a; Tr. 55; GE 2).

In July 1994, Applicant and a relative were in Applicant's company's van (Tr. 55-58, 62, 64). Applicant's relative had rolling papers for marijuana (Tr. 56). Applicant and his relative intended to smoke marijuana later that day (Tr. 64). His relative was either on parole or probation, and so Applicant accepted responsibility for the rolling papers to keep his relative out of trouble (Tr. 56-57). Applicant was charged with possession of paraphernalia for using a controlled, dangerous substance (SOR ¶ 1.b; Tr. 55-56). He pleaded guilty and the court fined him approximately $100 (SOR ¶ 1.b; Tr. 55-59, 65; GE 3).

On May 30, 2008, Applicant told an OPM investigator that he stopped using marijuana in 1992 (GE 2). On December 8, 2008, Applicant affirmed his OPM interview was accurate (Tr. 61; GE 2). In his opening statement at this hearing (which is not evidence), he reiterated that he stopped using marijuana in 1992 (Tr. 46). During his statement on the merits, he admitted using marijuana around the time of his July 1994 arrest (Tr. 59). Then he again averred he stopped using marijuana in 1992 (Tr. 59). After Department Counsel suggested he contradicted himself, he said he was a regular marijuana smoker from 1989 through 1994 (Tr. 59). Later, he corrected his statement to indicate he stopped using marijuana around January 1997, during the post-trial rehabilitation process after the assault discussed in the next paragraph (Tr. 59-60). In the last six months of 1997, he received urinalysis tests while in a halfway house, which established that he no longer used marijuana (Tr. 59-60).

Assault-related criminal conduct

Applicant and his female friend (P) have known each other since 1989 (Tr. 34). In January 1997, he had been living with P for three months (Tr. 34). They argued about a television program (Tr. 32). The argument escalated to physical violence (Tr. 33). P grabbed a baseball bat; however, Applicant took it away from her and threw P on her bed (Tr. 33). He pinned P to the bed and yelled at her (Tr. 33). Applicant was so angry he bit P's nose and broke a nasal bone (Tr. 35). Her nose and left eye swelled up immediately (Tr. 35). Applicant realized when he heard a snap sound what he had done and calmed down (Tr. 35). He thought the swelling of her eye might be caused by saliva and infection (Tr. 76). He denied that he punched P's face or eye (Tr. 76-77). Applicant decided to leave P's residence and to take his property with him (Tr. 36). While he was taking his property, mostly boxes of documents and records, P threw scalding hot grease in Applicant's face (Tr. 36-37). His face was blistered and some skin pealed off

of his face (Tr. 37). Applicant said he was on his way to telephone the police, when the police arrested him (GE 2).

In January 1997, Applicant was charged with second degree assault and first degree assault based on the injuries he caused to P (SOR ¶ 1.c). In February 1997, Applicant was charged with second degree assault and first degree assault (SOR ¶ 1.d). In March 1997, Applicant was charged with battery and second degree assault (SOR ¶ 1.e). The charges from January to March 1997 were *nolle prosequi* (SOR ¶ 1.e). Applicant said all of the charges alleged in SOR ¶¶ 1.c, 1.d, and 1.e related to the January 1997 altercation discussed in the previous paragraph (Tr. 37-39, 45, 65-73).

In May 1997, Applicant was charged with three counts of second degree assault and one count of battery (SOR ¶ 1.f).[3] He pleaded guilty to one count of second degree assault, and the court sentenced him to three years of incarceration, restitution of $1,500, and a $150 fine (SOR ¶ 1.f; Tr. 74).[4] He said the restitution included the damage P caused to her own furniture the night of the altercation (Tr. 74). The court suspended all incarceration except for 179 days (SOR ¶ 1.f). Applicant actually served a month in confinement and six months in a pre-release center (Tr. 43). While he was in pre-release status, he and P began corresponding with each other (Tr. 43). As part of the rehabilitation process, he completed anger management and other classes, including drug abuse counseling (Tr. 90).

In October 2003, Applicant was delivering a package at a restricted-access federal building (Tr. 48).[5] An occupant of the building (O) refused to give Applicant entry into the building even though he had seen Applicant delivering packages inside the building on multiple occasions over the last several years (Tr. 48). Someone else let Applicant into the building. Applicant went to O's office and confronted O about not letting Applicant into the building. O put his finger in the vicinity of Applicant's face, and Applicant pushed O's hand to the side (Tr. 48-50). Applicant asked O not to put his hand in Applicant's face (Tr. 48-49). Applicant was charged with simple assault[6] and

[3] In January 2007, P was charged with second degree assault (GE 5; Tr. 68). The disposition of P's charge was *nolle prosequi* in February 2007 (GE 5). P's height is listed as 62 inches and her weight as 127 pounds (GE 5). Applicant's height is listed as 74 inches and his weight as 155 pounds (GE 6).

[4] Applicant did not list this 1997 offense on his security clearance application even though Section 23a asks whether he was ever charged with or convicted of any felony offense (GE 1). Applicant told an OPM Investigator that he did not disclose this offense because he thought he was not required to list offenses occurring more than seven years ago (GE 2). The SOR did not allege falsification of his security clearance application as a security concern. I decline to hold this possible falsification against Applicant in this decision because of this lack of notice.

[5] Unless stated otherwise, the source for the information in this paragraph is the summary of an OPM interview on May 30, 2008 (GE 2).

[6] Applicant did not list this offense on his security clearance application even though Section 23f asks whether he was ever charged with or convicted of any misdemeanor offense (GE 1). Applicant told an OPM Investigator that he did not disclose this offense because it was thrown out in court (GE 2). The SOR did not allege falsification of his security clearance application as a security concern. I decline to hold this possible falsification against Applicant in this decision because of this lack of notice.

speeding (SOR ¶ 1.g). The court dismissed the simple assault charge because O did not appear in court (GE 2). Applicant was found guilty of speeding (SOR ¶ 1.g; Tr. 50). The court fined him approximately $150 (SOR ¶ 1.g). His employer suspended him for three months without pay as a result of the incident (Tr. 49).

In November 2005, Applicant voluntarily completed a three-day workshop involving alternatives to violence (AE A at 2-4). He learned and assisted others in the development of conflict management skills, which help with avoiding violence in stressful situations (AE A at 2-4).

In March 2006, Applicant and P were arguing in a public parking lot (Tr. 40, 77-82). Applicant grabbed P's shirt collar or coat collar and told her that he was tired of the way she was talking to him and "degrading him" (Tr. 81-82; GE 2 at 4). Applicant got out of the car and started walking home (GE 2 at 5). P drove to an adjoining parking lot and was crying in her car (Tr. 40). A woman came out of a nearby flower shop, and P told the woman what occurred (GE 2 at 5). Applicant believed woman from the flower shop reported the alleged offense to the police (Tr. 41). Applicant denied that he committed any offense (Tr. 40-41). Applicant was charged with second degree assault (SOR ¶ 1.h). Applicant's attorney suggested that Applicant volunteer for anger management classes, and the prosecutor recommended dismissal of the charge (Tr. 41). P did not show up in court (GE 2). The charge was *nolle prosequi* (SOR ¶ 1.h; Tr. 96-97). Applicant believed if he completed the anger management class and provided a certification, the record of this assault would be expunged (Tr. 96-97, 105). Applicant completed nine of ten sessions of the class; however, he did not go to his last class or receive his certificate of completion (Tr. 42, 84-85).[7]

Applicant denied that he ever had any anger management issues (Tr. 87). He denied that he was an angry or argumentative person (Tr. 88). However, he hates for anyone to be disrespectful to him (Tr. 89). He hates verbal abuse or being talked down to (Tr. 89, 94). He recognizes that his anger can build up and then "boil over" (Tr. 89). He learned that he should walk away from emotional situations where anger might result in violence (Tr. 87). He learned to avoid topics with P that might degenerate into arguments (Tr. 88). He recognized the importance of maintaining control of his emotions and responses (Tr. 89).

Applicant and P are currently good friends and often do things together (Tr. 34, 75, 82). He described her as intelligent, dignified, and beautiful (Tr. 43). P has two master's degrees and is working on her dissertation for her PhD (Tr. 75). She is also controlling and possessive (Tr. 80). He had a dysfunctional relationship with P (Tr. 43). If P does something for him, she tends to use it against him later in arguments (Tr. 79-80). She refused to make a statement at his hearing (Tr. 46, 75). She did not want to make a statement because it might adversely affect her reputation (Tr. 76). He maintained that they were still friends; however, they are not intimate friends now (Tr. 82).

[7]Applicant disclosed this offense on his security clearance application and said he "appeared in court and charges were dropped because of my innocence" (GE 1).

From 2004 to 2009, Applicant has provided valuable volunteer support for an important event designed to generate funds for the treatment of cancer (AE A). He also volunteered and assisted with the inauguration of President Barack Obama (AE A at 5). He actively supported state-level legislation to obtain and protect cemeteries at the sites of state hospitals (AE B). He volunteered at a variety of food kitchens for the indigent over the last four years (AE C). During elections, he volunteered at polling places, ensuring compliance with election laws (AE D).

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). 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 applicant's 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 "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. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. 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). 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). "[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline J (criminal conduct) with respect to the allegations set forth in the SOR.

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."

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 of criminal conduct listed in SOR ¶¶ 1.a, 1.b, 1.f, 1.g, and 1.h are all established. He admitted all the drug offenses (SOR ¶¶ 1.a and 1.b), as well as the 1997 assault offense (1.f). He admitted he touched the victims in SOR ¶¶ 1.g and 1.h in an offensive manner, the victims called the police, and he was charged with assault. I conclude Applicant committed assaults in 1997, 2003, and 2006.

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.

AG ¶¶ 32(a) and 32(d) apply to his marijuana-related offenses listed in SOR ¶¶ 1.a and 1.b. There are some positive signs of rehabilitation. He admitted his drug-related misconduct. He was more truthful at his hearing than he was to the OPM investigator, and in his response to DOHA interrogatories. He admitted to continuing to use marijuana until he was incarcerated in 1997, as opposed to his claim to the OPM investigator that he ended his marijuana consumption in 1992. Because he ended his marijuana consumption 11 years ago (in 1997), new marijuana-related offenses are unlikely. He has articulated remorse and received drug abuse counseling. There is no adverse information about his current employment, and he volunteers in his community. There is a sufficient evidentiary record in this case of his rehabilitation to mitigate his marijuana-related offenses.

AG ¶ 32(c) applies to the allegations of charged assaults in SOR ¶¶ 1.c, 1.d, and 1.e. Applicant committed one assault in January 1997, and this assault resulted in four sets of assault charges. The alleged assaults in SOR ¶¶ 1.c, 1.d, and 1.e are merged into the charged assault in SOR ¶ 1.f.

None of the mitigating conditions fully apply to all of the offenses listed in SOR ¶¶ 1.f, 1.g, and 1.h. Applicant committed three assaults, and the most recent assault occurred in March 2006. I am not convinced that he was completely truthful about the surrounding facts involving the three assaults. He did not complete his anger management counseling. Although he admitted offensively touching the victims in the three assaults, and that his conduct was wrong, improper, and showed poor judgment, he also tended to blame the victims, asserting that he was responding to their disrespectful or improper treatment of him.

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 in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is considerable evidence supporting approval of Applicant's clearance. Applicant stopped using marijuana in 1997, and has been rehabilitated from his many years of marijuana abuse. He provided more accurate information about his marijuana abuse at his hearing than he did to an OPM investigator and in his response to DOHA interrogatories. He knows the consequences if he is caught with marijuana in the future. He received drug abuse counseling as part of his 1997 rehabilitation. Applicant is a valued employee, who contributes to his company and the Department of Defense. There is no evidence at his current employment of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show some responsibility, rehabilitation, and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question. From 2004 to 2009, Applicant provided volunteer support for the treatment of cancer, the inauguration of President Barack Obama, state-level legislation to obtain and protect cemeteries at the sites of state hospitals, food kitchens for the indigent, and at polling places, ensuring compliance with election laws.

I am satisfied that if he continues to abstain from drug abuse, and avoids future offenses he will have <u>future</u> potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a substantial problem with marijuana as shown by two marijuana-related convictions and his admissions that he frequently abused marijuana for many years. However, he stopped using marijuana in 1997, and his drug abuse is no longer a security concern because it is not recent. His problem with assaultive behavior is still a security concern and cannot be mitigated at this time. The 1997 assault was sufficiently violent to result in medical treatment for the victim, who had a broken nasal bone, and for Applicant, who had second degree burns on his face. His decisions to offensively touch others in 1997, 2003, and 2006 were knowledgeable, voluntary, and intentional. He continues to have a relationship with the person he assaulted in 1997 and 2006. He did not complete the anger management course as agreed. He was sufficiently mature to be fully responsible for his conduct. Assaultive behavior shows a lack of judgment and/or impulse control. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not fully mitigated the security concerns pertaining to 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"[8] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently 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:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a to 1.e:	For Applicant
Subparagraphs 1.f to 1.h:	Against Applicant

Conclusion

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

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Mark Harvey
Administrative Judge

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