DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-10351
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

October 19, 2010

Decision

HEINY, Claude R., Administrative Judge:

Applicant has rebutted or mitigated the security concerns under personal conduct related to his overseas employment and completion of security clearance questionnaires. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a

[1] Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Statement of Reasons (SOR) on October 5, 2009, detailing security concerns under personal conduct.

On February 13, 2010, Applicant answered the SOR and requested a hearing. On April 22, 2010, I was assigned the case. On June 10, 2010, DOHA issued a Notice of Hearing for the hearing held on July 1, 2010.

The Government offered Exhibits (Ex.) 1 through 8, which were admitted into evidence without objection. Applicant testified on his own behalf. The record was held open to allow additional information from Applicant. No additional material was submitted. On July 12, 2010, DOHA received the hearing transcript (Tr.).

Modification to the SOR

At the hearing, Department Counsel (DC) moved to amend the SOR. In the last sentence of Paragraph 1.d. subparagraph 1.b.2 is listed twice. DC moved to replace the second entry of 1.b.2 with 1.b.3. There being no objection from Applicant, the motion was granted. (Tr. 17)

Findings of Fact

In Applicant's Answer to the SOR, he denied the factual allegations in ¶ 1.a of the SOR. He admitted the factual allegations as to the other SOR paragraphs, with explanations. He also provided additional information to support his request for eligibility for a security clearance. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 51-year-old staff maintenance logistician who has worked for a defense contractor since July 2007, and is seeking to obtain a security clearance. (Tr. 33) He is currently assigned overseas.

Applicant was in the U. S. Army from February 1980 through February 1983. In May 1981, Applicant—then age 21—after being stopped for running a red light, was found to be in possession of cocaine. Applicant received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for wrongful possession of cocaine. He was reduced in rank to PV2, ordered to forfeit $279 pay per month for two months, and he received 30 days in correctional custody. (Ex. 8)

From May 1982 through August 1982, Applicant was in a hospital after he broke his jaw and arm during a training mission. He fell 40 feet resulting in his jaw being wired shut. (Tr. 35) His wrist injury was painful. Every couple of weeks, he had to get a new cast for his wrist. Pain medication was restricted due to the possibility he might swallow his tongue. He roomed with three other soldiers and one day after having his cast adjusted, he was in pain. When he returned to his room, his roommates were smoking

marijuana and suggested it would relieve his pain. (Tr. 36) On August 16, 1982, he was observed smoking marijuana.

In September 1982, Applicant—then age 23—was investigated for the offenses of wrongful possession of marijuana, possessing contraband (a smoking device), and wrongful use of marijuana. (SOR ¶ 1.b. (2)) The charges were determined to be unfounded. (Ex. 7) No action was taken related to the offenses. (EX. 7) Applicant received counseling related to the incident, but never received Article 15 punishment.

Applicant's wrist injury resulted in a P-3 medical profile, which restricted his use of his right hand. Without the full use of his right hand, Applicant realized he would not be promoted and, in 1983, he left the Army as an E-4. (Tr. 37)

In December 1991, he was arrested and charged with Driving Under the Influence of Liquor (DUI) and Driving While Intoxicated (DWI). After leaving a bar, he was stopped by the police when his car hydroplaned into the other lane of traffic. Applicant declined to take a breath analyzer test. At court, he pleaded no contest to the charges, was fined $1,200, required to perform 24 months probation, and to attend a defensive driving course. Applicant completed all the requirements and his probation was reduced to one year. (Ex. 5) Applicant asserted his probation officer told him the arrest would be expunged after seven years. (Tr. 41)

In November 2003, Applicant completed a security clearance application, Standard Form (SF) 86. (Ex. 2) Question 24 asked Applicant if he had ever been charged with or convicted of any offenses related to alcohol or drugs. He answered "No" to the question and did not list the two drug-related incidents or his 1991 DUI/DWI arrest. (SOR ¶ 1.d.) When he completed the SF 86, he failed to remember the three incidents. The Article 15 had occurred 22 years before he completed his 2003 SF 86. The DUI/DWI incident had occurred 12 years earlier. In October 2007, when Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP) (Ex. 1), he again failed to lists the three incidents because he had forgotten about them. Applicant also stated he was confused by some questions on the questionnaires which limited the scope of inquiry to the previous seven years. (Tr. 41)

Both questionnaires asked about having "ever" been "charged with or convicted of any offense(s) related to alcohol or drugs." He should have listed his DUI/DWI arrest in response to this question. In 1981, he received non-judicial punishment[2] for possession of cocaine, but was never arrested for this incident. The more specific question related to disciplinary proceedings under the Uniform Code of Military Justice (UCMJ), to include non-judicial and Captain's mast, are listed in Section 23. f of the e-QIP (Ex. 1) and question 25 of the SF 86 (Ex. 2). Both questions limit the scope of the question to seven years.

[2] Non-judicial punishment is not a charge. A charge under the Uniform Code of Military Justice (UCMJ) requires a charge sheet, which is not part of the Article 15 procedure.

In November 2003, Applicant began working for a contractor in Iraq assigned to the installation property book office, which controlled property assigned to individuals. He worked for the contractor until March 5, 2005. In October 2004, Applicant received a certificate of appreciation for his excellent duty performance. (Tr. 50, Applicant's SOR Response) In November 2004, a new site lead arrived who was Applicant's supervisor. (Tr. 27) The site lead ran the office. (Tr. 44)

Applicant and the site lead did not agree on how the office was being run. Applicant believed accountable property was being issued without proper tracking documents. Applicant believed the site lead was a micromanager whose methods were very chaotic. (Tr. 27) He also believed some of the site lead's conduct not only violated company policy, but also defrauded the government. In February 2005, the contractor assigned a new country manager to Iraq. When Applicant reported what he believed were policy violations to the new country manager, the manager failed to take action. When the manager failed to act, Applicant reported the violations to the local Criminal Investigation Command detachment (CID). The day after he reported the violation to CID, Applicant was told he would be returning to the states. Applicant believed he was returning to be assigned to a new location and new position.

In February 2005, Applicant was scheduled to move from one contractor location in Iraq to another location. His job with the installation property book office was to remain the same. When items are transferred from one location to another, items are moved by shipping container and transferred from the property book at the losing location and to the property book at the new location. (Tr. 28)

On February 28, 2005, CID started investigating Applicant for theft and failure to obey General Order 1a (Ex. 9). It was alleged Applicant was attempting to move unaccounted property to his new location. The violation of General Order 1a allegation relates to an attempt to ship two AK-47 machine guns and ammunition to the new location without authorization.

Applicant asserted items were put in a shipping container to be transferred from one location to another in-country. (Tr. 54) Applicant documented those items on a form 11-3161, hand receipt for property. (Tr. 53) The hand receipt itemized the items by serial number. A copy of the 11-3161 was attached to the outside of the shipping container and another was placed inside the container. (Tr. 57) Applicant asserts the site lead signed the authorization for the goods to be shipped. (Tr. 58) When Applicant reviewed the list of items being investigated, he did not recognize some of the items. (Tr. 56)

In rebuttal, DC offered the Final Report of Investigation (ROI) issued on May 12, 2005. (Tr. 53, Ex. 9) Only the four page ROI was introduced at hearing. None of the sworn statements, exhibits, or other substantiating documents were attached to the ROI or present at hearing. The ROI referenced five sworn statements, including one from Applicant. The ROI attachments could establish or refute the allegations being investigated. Department Counsel (DC) was asked to review the file to determine if any

additional information or documents related to the ROI could be provided. (Ex. 61, 64) No additional documents were provided. (Hearing Exhibit I)

The ROI stated the investigation was terminated because it was determined that further investigation would be of little or no value or the leads remaining to be developed were not significant. (Ex. 9) The ROI indicates the commander's report of disciplinary action taken was pending. No indication of action taken was included in the record. Applicant had not seen the ROI until presented in rebuttal at the hearing. (Tr. 59-60)

After returning to the states, Applicant received an email from a new country manager asking if Applicant wanted to return to Iraq. (Tr. 39) Applicant did not want to return to his prior location and what he believed was a hostile work environment. Applicant informed the manger he was done working for the contractor. (Tr. 29) Having refused a new position, Applicant's employment with the company ended. The next day he received an email informing him he was no longer an employee of the company. Applicant was never informed he was being fired or terminated for cause from his employment. (Tr. 28, 29) Additionally, he did not leave by mutual agreement following allegations of misconduct. The year after he left, the contractor lost all government contracts it had in Iraq.

In May 25, 2005, three months after the contractor's project manager's last communication with Applicant, the project manager sent a letter (Ex. 3) to the CID stating Applicant was terminated for cause and was not eligible for rehire by the contractor. The reason given for the termination was Applicant's "actions while deployed to . . . Iraq. . ." The letter was not sent to Applicant and he never saw a copy of the letter until provided by the DC in preparation for the hearing. As previously stated, Applicant's last communication with the contractor was shortly after his return to the United States. (Tr. 65)

Since July 2007, Applicant has been working overseas for a different contractor providing logistics for maintenance of vehicles. In March 2010, he transferred from Iraq to Afghanistan. (Tr. 33) His current living arrangements in Afghanistan are rough. His living area is a six feet by seven feet area in a tent. The showers and latrines are in tents. There are no TVs or radios. (Tr. 52)

When Applicant completed his October 2007 e-QIP, he listed his prior employment in Iraq. In response to Section 22 of that e-QIP, Applicant did not indicate he had been fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following allegations of misconduct, or left a job for other reasons under unfavorable circumstances.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 commonsense 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.

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 to obtain 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 the applicant may deliberately or inadvertently fail to 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

Adjudicative Guideline (AG) ¶ 15 articulates the security concerns relating to personal conduct:

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

The Personal Conduct Disqualifying Conditions under AG ¶ 16 are potentially applicable:

> (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; and
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

In March 2005, when Applicant returned to the United States, he assumed he would be transitioning into a new position with the contractor. The contractor had work sites at locations throughout the United States and overseas and employees routinely returned to the United States before going to a new location.

Applicant's last communication with the contractor's project manager, or any other official from the contractor, was an email asking him if he wanted to return to Iraq and continue working for the contractor. This email was received shortly after his return to the United States. Applicant had no interest in continuing to work for the contractor, told the project manager so, and his employment ended.

On May 25, 2005, the contactor's project manager sent a letter to the CID indicating Applicant was terminated, with cause, and was not eligible for rehire by the contractor. (Ex. 3) This letter was sent after the May 12, 2005 final ROI was sent. The termination letter was never sent to Applicant and he did not see it until he received a copy in preparation for the hearing.

The Final ROI stated the CID investigation was terminated and closed. At the time of the Final ROI, the Commander's Report of Disciplinary Action Taken was still pending. The record fails to contain what, if any, action the commander took. None of the substantiation related to the investigation was attached to the ROI. Applicant asserts he did everything properly in relation to the transfer of the property. The ROI does not

state Applicant was punished for any misconduct or any action was taken against Applicant based on the investigation.

The termination notice sent to CID is sufficiently vague that I will not speculate as to Applicant's actions while employed by the contractor. Applicant was not provided an opportunity to contest the contractor's termination notice. I find for Applicant as to SOR ¶ 1.a.

There is nothing in Applicant's return to the United States in March 2005 that would indicate he was being sent back to the United States as a form of punishment or because he was being terminated. Applicant worked for the contractor in Iraq from November 2003 until March 2005. Employees routinely returned to the United States for morale purposes or before being assigned to a new work location. The contractor had numerous work sites in the United States and at overseas locations and Applicant thought he would be assigned to a new location.

When Applicant completed his October 2007 e-QIP, he listed his prior employment with the contractor ending in February 2005. He never indicated he had been fired, terminated from, left a job following allegations of misconduct, or left a job for other reasons under unfavorable circumstances. Applicant's last communication with the contractor was an offer of continued employment with the contractor, which Applicant declined. During this last communication between Applicant and the contractor, there was no indication Applicant was being fired, terminated for cause, left following allegations of misconduct, or left under other unfavorable circumstance. Had any of these events occurred, it would have been unlikely the country manager would have been asking Applicant to continue working for the company. I find Applicant did not deliberately falsify material facts in his answer to the question in section 22. I find for Applicant as to SOR ¶ 1.c.

A CID investigation was conducted concerning the transfer of property from one location in Iraq to another. The CID report contains a mere one-paragraph synopsis. The investigative activity and summaries of witness statements are not provided. Property would routinely be removed from the property log at one location and added to the property log at a new location, once goods were moved. Applicant put some items in a shipping container after he had completed an itemized form 11-1431 hand receipt, which the site lead authorized. Applicant recognizes some of the items listed in the CID report and has no idea about other items.

Failing to get along with one's supervisor or the fact Applicant complained to the CID about his supervisor is not the type of conduct contemplated in the SF 86 question, which asks if Applicant left a job for other reasons under unfavorable circumstances. The record fails to establish Applicant left the job because an investigation was being conducted. Moreover, the validity of the report's conclusions cannot be substantiated based on the record evidence.

In 2003, Applicant completed an SF 86. Twelve years earlier he had been arrested and convicted of DUI/DWI. This arrest and conviction should have been listed on the questionnaire because the question asked if he had ever been arrested or charged with an alcohol-related offense. His probation officer told him it would be expunged after seven years. Applicant's failure to disclose this arrest does not, in itself, prove he did so in a deliberate effort to conceal those facts from the government. Applicant denial of intentional falsification is relevant, but not conclusive. An intent to deceive or mislead the government does not require direct evidence and can be inferred from circumstantial evidence, but this is not the case here. Applicant asserted he failed to list the arrest because a number of the questions limited the scope of inquiry to the previous seven years. Although this question is not so limited, Applicant assumed the prior seven years was the scope of this question. His explanation for not listing the DUI/SWI arrest that occurred 12 years earlier is credible. Applicant did not list the arrest on his 2003 SF 86 and for the same reasons failed to list it on his 2007 e-QIP. My reasoning and findings are the same for both questionnaires.

The question in Section 23 d. of Applicant's October 2007 e-QIP and question 24 of his November 2003 SF 86 asked Applicant about his police record relating to drug offenses and are not limited as to when the offenses occurred. However, it is SF 86's question 25. "Your Police Record – Military Court" and the e-QIP's question Section 23 e., which specifically asks about disciplinary proceedings under the UCMJ and non-judicial punishment. These questions are more directly on point as to Applicant's drug use while in the military. In 1981, Applicant received an Article 15 for possession of cocaine. Questions 25 (SF 86) and 23.e (e-QIP) relating to court-martial or other UCMJ disciplinary proceedings limit the time being considered to the seven year period just prior to completing the questionnaire. Applicant's 1981 Article 15 had occurred more than 22 years before he completed his SF 86 and more than 25 years prior his completing the e-QIP. Applicant had not thought about the Article 15 or the other drug related incident until reminded of them when he received the SOR. (Tr. 37)

In 1982, Applicant was investigated for possession and use of marijuana. His commander took no action as to the incident and Applicant did not receive an Article 15 or other disciplinary action. Since he was neither "charged with" nor "convicted" of an offense, he was not required to list this on his SF 86 or his e-QIP.

When Applicant completed his questionnaires, he did not list his 1981 nonjudicial punishment. Only non-judicial punishment occurring within the previous seven years had to be listed. However, this does not prove Applicant deliberately failed to disclose information. Applicant denied any intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a security clearance, is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

When Applicant completed his questionnaires, he failed to remember this nonjudicial punishment. Having observed Applicant's demeanor, listened to his testimony, and noted the event occurred more than 20 years earlier, I find his answers were not deliberate omissions, concealments, or falsifications. I find for Applicant as to SOR ¶¶ 1.b and 1.d.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In March 2005, a CID investigation commenced. When Applicant returned to the United States, he assumed he would shortly be reassigned to a new location with the contractor. He never knew, until receiving a copy of the letter just prior to the hearing, that he had been terminated for cause. One cannot lie about being terminated if he never knew he was terminated. Applicant never attempted to hide his employment with the contractor. He listed his employment, but did not list being fired or terminated for cause because the last he knew, the contractor was offering him continued employment.

More than 20 years before he completed security clearance questionnaires Applicant was involved in two drug-related incidents while in the military. One resulted in no action and the other Article 15 punishment, neither of which he was required to list.

I had ample opportunity to evaluate Applicant's demeanor, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, and listen to his testimony. It is my judgment that his explanations regarding the completion of the questionnaires and his

previous employment are consistent and, considering the quality of the other information before me, are believable.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his personal conduct.

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, Personal Conduct:	FOR APPLICANT
Subparagraphs 1.a —1.d:	For Applicant

Conclusion

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

_____
CLAUDE R. HEINY II
Administrative Judge