DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-11518
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: Paul Origlio, Esquire

January 22, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant was arrested once in 2001, twice in 2002, and once in 2003. The 2002 offense resulted in a conviction in 2004 for Possession of Injection/Ingestion device. On September 7, 2005, Applicant completed a security clearance application and failed to disclose these four arrests, and his 2004 conviction. He also failed to disclose 16 delinquent debts and two liens. He mitigated the security concern under Guideline J because his criminal conduct was not recent; however, he failed to mitigate security concerns under Guideline E. Access to classified information is denied.

Statement of the Case

On September 7, 2005, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On July 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as

amended and modified; and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges security concerns under Guidelines J (criminal conduct) and E (personal conduct) (Hearing Exhibit (HE) 2). 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 a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On September 22, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge (HE 3). On October 7, 2009, Department Counsel announced he was ready to proceed on Applicant's case. On October 8, 2009, DOHA assigned Applicant's case to me. On November 13, 2009, DOHA issued a hearing notice (HE 1). On December 15, 2009, Applicant's hearing was held. At the hearing, Department Counsel offered six exhibits (GE 1-6) (Tr. 15-16), and Applicant offered four exhibits (Tr. 17-18; AE A-D). There were no objections, and I admitted GE 1-6 (Tr. 16), and AE A-D (Tr. 18). Additionally, I admitted the hearing notice, SOR, and response to the SOR (HE 1-3). On December 23, 2009, I received the transcript. I held the record open until January 19, 2010, to permit Applicant to provide additional documentation (Tr. 101-102, 108). On January 19, 2010, I received additional documentation from Applicant and his employer (AE E). Department Counsel's objection to the admissibility of portions of AE E is overruled. The objection to emails between Applicant's Counsel and an employee of the contractor goes to their weight, rather than to the admissibility of AE E.

Findings of Fact[1]

In Applicant's response to the SOR, he admitted the conduct alleged in SOR ¶¶ 1.a to 1.d (HE 3). He denied that he intentionally failed to provide accurate information on his security clearance application as alleged in SOR ¶¶ 2.a to 2.d (HE 3). He also provided clarifications and explanations about the various SOR subparagraphs, and provided other mitigating information (HE 3). 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 a 47-year-old employee of a defense contractor (Tr. 19).[2] He is employed as a cultural advisor and interpreter (Tr. 46). He was born in Afghanistan (Tr. 19). In 1987, he moved to the United States (Tr. 19). In 1993, he became a U.S. citizen (Tr. 19). He worked as a translator from April 2004 until July 2009, primarily in Afghanistan (Tr. 20). Applicant's tribe in Afghanistan is an ally of the United States (Tr.

[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]Unless stated otherwise, the facts in this section are from Applicant's September 7, 2005, security clearance application (GE 1).

21). The United States freed his tribe from the oppression of the Taliban (Tr. 21-22). The Taliban killed many people from his tribe (Tr. 22-23). Applicant loves the United States and hates the Taliban and al Qaeda (Tr. 23). Applicant's family has supported the United States for many years (Tr. 22). For example, Applicant's brother works as a translator for the U.S. government (Tr. 22).

Applicant provided information to law enforcement about individuals associated with or supporting the Taliban in his community (Tr. 25-26; 87-88). He moved from state C to state D, which was several thousand miles away because he was concerned about his safety (Tr. 25-26, 87-88).

Criminal conduct

Applicant's cousin married Applicant's sister (he will be referred to hereinafter as Cousin A). Applicant's sister was not living in the United States. Cousin A and Cousin A's girlfriend were living in Applicant's body shop (Tr. 26-27, 31-33, 87). They had access to Applicant's computer (Tr. 26-27). Applicant said they used Applicant and his wife's personal information for identity theft (Tr. 27, 33). In December 2001, the police arrested Applicant, and he was charged with five counts of using other's identity for credit (SOR ¶ 1.a; HE 3). In May 2002, the police arrested Applicant, and he was charged with using other's identity for credit (SOR ¶ 1.b; HE 3). On May 5, 2003, the court dismissed the charges relating to both arrests (Tr. 27; SOR ¶¶ 1.a and 1.b; HE 3).

Around August 2002, the police arrested Applicant for failure to appear in court (Tr. 27-28). The police found drugs in a sock near where Applicant was sitting in a police car (Tr. 30). When they arrested him, the police searched his person and vehicle (Tr. 28). Applicant denied possession of illegal drugs (Tr. 28-30). Nevertheless, the police arrested Applicant for possession of drugs (Tr. 28).

Around August 2002, Applicant reserved a hotel room for a friend (Tr. 29). Applicant paid for the room for one day (Tr. 86-87). There was a warrant for the friend's arrest (Tr. 29). The police found drugs in the room that Applicant reserved (Tr. 29). They also found a drug pipe or a crack-cocaine pipe (Tr. 97). On August 7, 2002, Applicant was visiting his friend at the hotel room when the police made the arrest (Tr. 100; AE A). Applicant was charged with two counts of possession of drug paraphernalia, and possession of a controlled substance (SOR ¶ 1.c). On March 5, 2004, Applicant was convicted of possession of injection/ingestion device after a contested jury trial (Tr. 31; SOR ¶ 1.c). He was represented at his trial by a public defender (Tr. 94). The court sentenced him to three years of court probation, 74 days in county jail with credit for time served, a $610 fine, and a $100 payment to the victim's restitution fund (Tr. 31, 69; SOR ¶ 1.c; AE A). He served 63 days in jail, paid his fine and successfully completed his probation (AE A).

In March 2003, the police arrested Applicant for obtaining credit with another's identification, and possession of drug paraphernalia (SOR ¶ 1.d; HE 3). Applicant said the charge was dismissed, and no record evidence was presented contradicting this disposition.

Applicant denied drug possession and claimed someone set him up (Tr. 30). He did not know who set him up; however, he suspected that Cousin A and possibly Cousin A's girlfriend were responsible for his arrests (Tr. 30, 33-34). Applicant thought Cousin A blamed Applicant for his divorce from Applicant's sister (Tr. 32, 88). Cousin A suspected Applicant of telling Applicant's sister about Cousin A's infidelity; however, Applicant did not tell his sister about Cousin A's girlfriend (Tr. 33). The police told Applicant that Cousin A and his girlfriend used crack-cocaine (Tr. 34). Applicant suspected Cousin A of telling others in the Afghan community about his cooperation with law enforcement (Tr. 88-89).

Disclosure of financial considerations[3]

From 1990 to 2003, Applicant owed a body shop in state C (Tr. 23-24). The police searched his shop (Tr. 81). Cousin A was not supposed to stay in the shop (Tr. 82, 87). Cousin A is not a U.S. citizen (Tr. 94). Cousin A's residence in the shop violated the lease (Tr. 83). Applicant's landlord did not extend the lease where Applicant's business was located when the lease-term was completed (Tr. 24, 81). His landlord had previously promised to renew his lease, and then at the end of the lease the landlord locked the doors and kept Applicant's equipment (Tr. 82). His landlord obtained a court order against Applicant (Tr. 82). Applicant owed the landlord some money (Tr. 84).

In 2003 and 2004, Applicant did not file an income tax return with state C (Tr. 84). He did not believe he needed to file a state tax return because he lost his business (Tr. 84-85). In July 2004, state tax officials filed a $7,600 lien against Applicant and put the information on his credit report (Tr. 85, 95; SOR ¶ 2.c.i; HE 2, 3). He said he paid the lien (HE 3). In February 2003, the country tax collector filed a lien against Applicant in the amount of $771 (SOR ¶ 2.c.ii; HE 2, HE 3). He paid the lien (HE 3).

The SOR alleged the following debts were delinquent and should have been reported on his September 7, 2005, security clearance application: (i) judgment in May 2002 for $360; (ii) tax lien filed in February 1996 for $900; (iii) credit card debt for $2,940; (iv) department store debt for $699; (v) bank debt for $632; (vi) bank debt for $410; (vii) department store debt for $383; (viii) collection debt for $64; (ix) collection debt for $3,676; (x) telecommunications debt for $2,526; (xi) bank debt for $2,364; (xii) towing company debt for $1,590; (xiii) collection debt for $1,296; (xiv) telecommunications debt for $158; (xv) telecommunications debt for $148; and (xvi) collection debt for $107 (SOR ¶ 2.d.i to 2.d.xvi; HE 2). Applicant said he paid all of these debts (HE 2). The government did not contest Applicant's contention that his delinquent debts were resolved.

Falsification of 2005 security clearance application

Applicant had past due financial obligations because he lost his body shop (Tr. 37). In October 2005, Applicant moved from state C to state D (Tr. 36, 95). In 2006, Applicant discovered he owed taxes to state C when he decided to finance his home

[3] The SOR did not allege a concern under Guideline F (financial considerations) (HE 2).

(Tr. 35). He promised to pay his obligations (Tr. 36). He sent proof of his income in state B to the tax collection office in state C (Tr. 36). He said he found out about tax liens to state C in the fall of 2009 (Tr. 37).

In 2003, Applicant's business was closed, and he went on welfare (Tr. 54-55). On April 10, 2004, Applicant started working for his present employer, a government contractor (Tr. 40, 54-55; 95-96; GE 1). He was first deployed to Afghanistan in May 2004 (Tr. 95).

After Applicant started working for the contractor, Applicant signed "a lot of documents" about every six months (Tr. 41). He said he did not read the documents that he signed (Tr. 42, 75-76). Sometimes a group of 20 to 50 contractors would sign their documents at the same time (Tr. 42). Applicant said when he signed his security clearance application, he thought it was just another Army contract (Tr. 42). No one told him to read his security clearance application before he signed it (Tr. 77). He denied that he read it before he signed it (Tr. 76, 78, 80). He did not read the certification on the signature page of his security clearance application (Tr. 77; GE 1). He would not have signed his security clearance application if he had known it contained false information (Tr. 43). He now understands the importance of reviewing before signing a security clearance application (Tr. 76). On September 7, 2005, he signed and dated the paper copy of his security clearance application (Tr. 40; 77; GE 1).

Applicant learned some English when he was in Afghanistan before he immigrated to the United States (Tr. 44, 52). He learned more English after arriving in the United States (Tr. 44). After leaving Afghanistan, he did not have any formal training in English (Tr. 45). He speaks English better than he writes it (Tr. 45). He does not understand legal words (Tr. 45). He can read English and has run a body shop for several years (Tr. 53). He understood the repair manuals, which were in English (Tr. 53). Sometimes he asked another employee to read the manual to him (Tr. 54).

Applicant's description of his interview about his security clearance application

In 2004 before he completed his SF-86, Applicant provided application information over the telephone to a recruiter or site manager for the government contractor (hereinafter interviewer) (Tr. 38-39). He did not know the name of the interviewer who talked to him (Tr. 55, 74). He did not try to find out the name of the interviewer (Tr. 74). He told the interviewer over the telephone that he was arrested; however, he also told the interviewer his case had been dismissed (Tr. 38; GE 3, Office of Personnel Management (OPM) interview). He meant the felony was dismissed (Tr. 39).[4] When he provided this information to the interviewer in 2004, Applicant knew he

[4] On August 22, 2008, an OPM investigator interviewed Applicant (GE 3). On May 15, 2009, as part of DOHA interrogatories, Applicant adopted the summary of his OPM interview as accurate. Applicant's OPM statement does not indicate he was ever convicted. His OPM statement reads, "Because it was subject's business, he went to jail. Subject was given a court-appointed lawyer, posted bond, and in all [he] spent about two months in jail. The case went before a [state C] judge and was dismissed because of lack of evidence and no wrong-doing on subject's part." The SOR did not allege

had been convicted of the misdemeanor; however, he claimed that at that time he did not know a misdemeanor was a criminal case (Tr. 39). He told the interviewer he had some credit problems, such as missed and late payments (Tr. 40). The interviewer said it was no problem as long as he did not have a bankruptcy (Tr. 40). The interviewer did not ask him if he had ever been to jail (Tr. 40). The interviewer said that if the case was dismissed, you are clean, and you have no problem (Tr. 39). He claimed he answered all of the interviewer's questions honestly (Tr. 40). I requested copies of Applicant's employment applications from 2004, and provided a 30-day delay for Applicant to submit additional evidence (Tr. 101). Applicant and his employer were not able to locate any employment application (AE E). However, Applicant did provide a candidate checklist, dated April 12, 2004 (AE E). The checklist had initials and dates in 11 areas, and no initials in five areas (AE E). His employer also provided an independent subcontractor agreement, dated April 7, 2004 (AE E). He is still employed by the same company that hired him in 2004 (Tr. 98).

The interviewer asked Applicant about his family for his security clearance application or his job application (Tr. 57). He did not fill out his own job application (Tr. 57). He provided the name, address, social security number, and citizenship of his spouse (Tr. 62). He faxed his social security card, citizenship evidence, and driver's license to assist with his application (Tr. 57). The interviewer called Applicant and asked his mother's maiden name and about his brother (Tr. 58). The interviewer asked Applicant about his previous addresses and about his body shop business (Tr. 59). He provided information about his children (Tr. 64). The interviewer asked for the names of some references and about any foreign travel, his U.S. passport, foreign contacts, and medical problems (Tr. 66).

Applicant denied that the interviewer asked him about his previous employers (Tr. 59). He denied that the interviewer asked for the dates he ran the body shop or the body shop's phone number (Tr. 60). Applicant's security clearance application indicates he owned the body shop from September 1990 to December 2002 (GE 1 at 12). It also includes his body shop's phone number and address (GE 1 at 12). The name, address, and telephone number of a person who can verify the employment information was one of his references (Tr. 60; GE 1 at 12-13). He did not provide the date of his marriage (Tr. 63); however, his security clearance application indicates Applicant and his spouse were married in September 1992 in Pakistan (Tr. 63-64; GE 1 at 14).

Applicant denied that the interviewer asked him about his foreign activities, whether he acted as a consultant for a foreign government, whether he had a foreign passport, his foreign properties, his employment record (whether he was fired or left employment under adverse conditions), or his foreign businesses (Tr. 65-67); however, his security clearance application includes answers to those questions (GE 1 at 21-23).

Applicant denied that the interviewer asked him about his police record (Tr. 67). He said he understood what it means to be arrested or charged with an offense and

---

Applicant provided false or incomplete information about the resolution of his offense to the OPM investigator. I have not drawn any adverse inference from Applicant's OPM interview.

what it means to be convicted of an offense (Tr. 67-68). However, later he said he was unsure about what a conviction was (Tr. 70). He understood that he was convicted of possession of drug paraphernalia, and that he served 72 days in jail for that offense (Tr. 71-72). He denied that the interviewer asked him whether he had ever been charged with or convicted of any felony offense, whether he had ever been charged with or convicted of any firearms or explosives offense, whether there were currently any charges pending against him for any criminal offense, and whether he had ever been charged with or convicted of any offense relating to alcohol or drugs (Tr. 67-68, 72). The interviewer did not ask him whether he had been in jail or arrested (Tr. 56, 72). Applicant noted that the interviewer called Applicant "two or three days" later to question Applicant about his brother, and Applicant asked the interviewer about whether his criminal record and going to jail might cause him not to be hired (Tr. 68-69).[5] Applicant insisted he told the interviewer about going to jail, and did not tell him about the conviction because he did not understand what a conviction was at that time (Tr. 73). Applicant explained that he believed when a charge was dismissed it was the same as a conviction because the case was completed (Tr. 69). However, Applicant's security clearance application indicates, "No" to all of these police-related questions about arrests, charges, and convictions (GE 1 at 24-25).

Applicant denied that the interviewer asked him about his use of illegal drugs or consumption of alcohol (Tr. 68). He denied that the interviewer asked him about whether he previously held a security clearance or was investigated for a security clearance. However, Applicant's security clearance application indicates, "No" to these questions (GE 1 at 24-26).

Applicant denied that the interviewer asked him about liens, judgments, civil court actions, debts over 180 days delinquent, and debts currently delinquent (Tr. 73-74). He denied that he knew what it meant to be 90 days delinquent on a debt (Tr. 74). He denied that the interviewer asked him about his associations as indicated in his security clearance application (Tr. 74). However, Applicant's security clearance application indicates, "No" to these questions (GE 1 at 26-27).

Service in Afghanistan

Applicant worked with U.S. military forces in Afghanistan as a linguist and cultural advisor (Tr. 47). He accompanied troops in the field (Tr. 47). Sometimes he met with important Afghan officials, and other times he met with lower-level, local Afghan officials and tribal leaders (Tr. 47-48). Sometimes Applicant helped train Afghan police and Afghan Army officers (Tr. 47). He assisted with interrogations of detainees (Tr. 49). He was able to save the lives of U.S. soldiers by warning the commander about Taliban ambushes, including the placement of improvised explosive devices (IEDs) (Tr. 50). In 2004, he received some shrapnel from an RPG, and the shrapnel was removed through

[5]Later in the hearing, Applicant said that after he completed his application someone applying for similar employment raised the issue of credit problems and jail being a disqualifier for employment (Tr. 78-79). In turn, Applicant raised these issues with the interviewer (Tr. 79).

a surgery in Afghanistan (Tr. 51). He wants to return to Afghanistan so he can help the U.S. forces (Tr. 51).

Recommendations[6]

On July 29, 2009, a lieutenant commander, who served with Applicant on special operations, lauded Applicant's service in Afghanistan as part of Operation Enduring Freedom. He went on multiple combat missions and was "absolutely mission critical." He was an "irreplaceable member" of his team. His linguistic capability, vast experience, and willingness to fight the Taliban shoulder-to-shoulder with the special operations forces were particularly noteworthy.

In 2007, a Department of Defense employee wrote recommending Applicant for a performance bonus and salary increase. He indicated Applicant routinely went above and beyond the call of duty and was absolutely superb as an interpreter. He emphasized Applicant's dedication and competence.

On July 6, 2007, Applicant received a certificate of commendation for his "quick thinking, intrinsic common sense, aggressive initiative and immense personal courage." His actions saved lives and demonstrated his dedication to the mission and safety.

On March 14, 2007, a U.S. Army lieutenant colonel noted Applicant's service in Afghanistan from October 12, 2006, to March 22, 2007. Applicant routinely volunteered for high-risk missions and worked at the most hazardous and productive locations. "He is without question the very best Department of Defense contract linguist in Afghanistan."

On September 14, 2006, a high-level Department of Defense employee serving in Afghanistan described Applicant's contributions to the war effort as "a key reason for the achievement of success in operations. He was a hard working team player who consistently produced good results, and he was a valued member of my organization." Applicant served at a remote firebase near the Afghanistan-Pakistan border.

Applicant provided five additional letters, not described previously, that similarly described his performance as a linguist and interpreter in Afghanistan from April 2004 to July 15, 2005, and from May 2006 to August 2006. He also provided a certificate of training, and a certificate of appreciation.

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

[6] AE B is the source for the facts in this section.

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 concerns are under Guidelines J (criminal conduct) and E (personal conduct).

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." Applicant was arrested four times. The offenses relating to three arrests were not sufficiently supported by evidence for the prosecutor to take the cases to trial. Applicant denied culpability for these three offenses. The offenses relating to these three arrests are not established.

Collateral Estoppel

On March 5, 2004, Applicant was convicted of possession of injection/ingestion device after a contested jury trial in state criminal court. He was represented at his trial by a public defender. The court sentenced him to three-years of court probation, 74 days in county jail with credit for time served, a $610 fine, and a $100 payment to the victim's restitution fund. He served 63 days in jail, paid his fine and successfully completed his probation. His conviction is a misdemeanor. Applicant denied that he possessed the drug paraphernalia. He denied criminal culpability for this offense.

In ISCR Case No. 04-05712 at 7 (App. Bd. Oct. 31, 2009) the Appeal Board addressed the collateral estoppel effects of a guilty plea to assault and battery, a misdemeanor, in a subsequent security clearance hearing and stated:

> The Board recognizes that *Otherson* [*v. U.S. Department of Justice*, 711 F.2d 267 (D.C. Cir. 1983)] ultimately held that the federal misdemeanor conviction resulting from a contested trial and based on a conduct issue that was before the Merit Systems Protection Board for hearing collaterally estopped the defendant from denying the underlying conduct at his MSPB hearing. Thus, there have been instances where federal courts have given

> collateral estoppel effect to misdemeanor convictions and any language of the Board suggesting otherwise is overstated.[7]

The Appeal Board articulated a three-pronged test for deciding when a prior decision would have collateral estoppel effect in a security clearance hearing:

> First, the party against whom the earlier decision is asserted must have been afforded a "full and fair opportunity" to litigate that issue in the earlier case. *Haring v*. *Prosise*, 462 U.S. [306, 313 (1983)]; *Allen v*. *McCurry*, 449 U.S. 90, 95 (1980). Second, the issues presented for collateral estoppel must be the same as those resolved against the opposing party in the first trial. *Montana v*. *United States*, 440 U.S. 147, 155 (1979). Collateral estoppel extends only to questions distinctly put in issue and directly determined" in the criminal prosecution. *Frank v*. *Mangum*, 237 U.S. 309, 334 (1915). Third, the application of collateral estoppel in the second hearing must not result in unfairness. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979)(detailing circumstances where allowing the use of collateral estoppel would result in unfairness); *Montana v*. *United States*, 440 U.S. at 155 (court should consider whether other special circumstances warrant an exception to the normal rules of preclusion).

See also United States v. Holzmann, 563 F.Supp.2d 54, 78-81 (D.D.C. 2008); *United States v. Uzzell*, 648 F. Supp. 1362, 1364 (D.D.C. 1986); *United States v. Khan*, 2008 U.S. Dist LEXIS 57043 (E.D. Mich., July 21, 2008) (all citing *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951) as establishing preclusion effect of a guilty finding from a criminal trial on subsequent civil litigation for the issues resolved against the defendant); *Truesdale v. U.S. Dept. of Justice*, 2009 U.S. Dist. LEXIS 89586 at *10-*12 (D.D.C. Sep. 29, 2009) (listing more restrictive three-pronged test as: (1) same issue; (2) issue actually decided; and (3) application does not result in basic unfairness and holding collateral estoppel bars defendant from pursuing issues in civil court that were resolved against him at his criminal trial).

In ISCR Case No. 04-05712 at 7-10 (App. Bd. Oct. 31, 2009), the Appeal Board remanded the case to an administrative judge because there was insufficient information about that applicant's guilty plea (to misdemeanor assault and battery), and the government had erroneously not been permitted to present aggravating information about the greater offense (indecent sexual acts committed upon a child-victim).

Under collateral estoppel, the finding of guilty in Applicant's case by a state criminal court after he contested the facts is binding on the federal government. His criminal conviction is conclusive proof and operates as an estoppel on him as to the facts supporting the conviction. "Under collateral estoppel, once an issue is actually and

[7] I was unable to locate any cases where a federal or state misdemeanor conviction after a contested trial was not given issue preclusion or collateral estoppel effect. *See Restatement of the Law, Second, Judgments*, § 86, "Effect of State Court Judgment in a Subsequent Action in Federal Court" and other cases cited in section 86.

necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. at 153.

The state court's finding of guilty involves a determination of guilt beyond a reasonable doubt whereas the government need only establish a contested offense at a security clearance hearing by a preponderance of the evidence, a lower evidentiary burden. It would be inappropriate to make a contrary decision when the key witnesses in Applicant's criminal trial, did not make a statement at Applicant's security clearance hearing. Moreover, a contrary decision in a federal agency-forum, would violate the policy promoting comity between the state courts and the federal government. *See* 28 U.S.C. § 1738 and *Allen v. McMurry*, 449 U.S. 90, 96 n.8 (1980). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. at 153-54.

As to particular facts established by his prior conviction, Applicant is estopped from denying that he possessed drug paraphernalia on August 7, 2002. *See* Otherson at 273-274. Applicant is not estopped, for example, from asserting extenuating or mitigating evidence concerning this offense.

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.

The sole criminal offense that Applicant committed was on August 7, 2002, more than seven years ago. It was a misdemeanor. There is strong evidence of rehabilitation. He provided superb service to the United States in Afghanistan from 2004 to 2009. His job performance is a very strong mitigating factor. No drug-related offenses have recurred. AG ¶ 32(a) and 32(d) fully apply to his misdemeanor conviction in 2004.

Assuming the offenses relating to his three arrests are sufficiently supported by evidence to meet the substantial evidence test, the burden then shifted to Applicant to

mitigate the three arrests. The record does not contain sufficient evidence to contradict Applicant's denial of culpability for these three offenses. The offenses relating to the three arrests that were not supported by conviction are not substantiated. AG ¶ 32(c) applies.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining 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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

> (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.[8]

On September 7, 2005, Applicant signed his security clearance application. A contractor employee (interviewer) previously interviewed Applicant before he signed his security clearance application. The contractor employee asked Applicant whether he had any prior drug-related charges or convictions, and Applicant responded, "No." A contractor employee used the information Applicant provided to complete his security

[8]The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

clearance application (SOR ¶ 2.a). Applicant knew he had a prior conviction for possession of drug paraphernalia. He knew the court found him guilty of this offense, and he served about 60 days in jail post-trial because of this offense. He had three other arrests and knew how those cases did not result in a conviction. He had sufficient involvement in state C's criminal justice system to understand about charges, convictions, and criminal offenses. Applicant's statement that he did not know what a conviction was in 2005 when he completed his security clearance application is not credible.

The interviewer asked Applicant whether he had any other arrests, charges, or convictions in the last seven years, and Applicant said, "No." A contractor employee then used the information Applicant provided to complete his security clearance application (SOR ¶ 2.b). This question is broader than the previous question, and any admission to criminal conduct under SOR ¶ 2.a would be duplicated under SOR ¶ 2.b (but not necessarily vice versa).

The interviewer asked Applicant whether he had any liens placed against his property for failing to pay his taxes in the last seven years, and Applicant said, "No." A contractor employee then used the information Applicant provided to complete his security clearance application (SOR ¶ 2.c). Applicant was in Afghanistan when the liens were filed. It is not clear that he received notice of the two state liens prior to completion of his security clearance application.

The contractor employee asked Applicant whether he had any debts currently more than 90 days delinquent, or any debts delinquent over 180 days in the last seven years. Applicant said, "No." A contractor employee then used the information Applicant provided to complete his security clearance application (SOR ¶ 2.d). Applicant admitted that he lost his business and was aware of delinquent debt. His SOR listed 16 delinquent debts.

Applicant intentionally provided false information to interviewer, who then provided it to the employee who generated his security clearance application (the interviewer and the person who prepared his security clearance application may be the same person), and then Applicant subsequently signed the false security clearance application. His contention that the interviewer did not ask him about his prior arrests, charges, convictions, liens, and delinquent debts is not credible. AG ¶¶ 16(a) and 16(b) apply.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual

specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions outlined in AG ¶ 17 apply. Applicant's false statements cannot be mitigated at this time because they are too serious and too recent. Even more importantly he was not truthful at his hearing. His argument that the contractor employee did not ask him about his prior arrests, charges, convictions, liens, and delinquent debts is not credible.

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 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.

There is some evidence supporting approval of Applicant's access to classified information. He has not committed any drug-related offenses since 2002. The sole established offense is a misdemeanor-level possession of drug-paraphernalia offense. He served in Afghanistan about five years, and received extraordinarily positive supporting endorsements from military personnel and civilian Department of Defense employees. Applicant significantly contributed to the national defense. He voluntarily risked his life as part of his duties on behalf of the U.S. forces in Afghanistan, and he was injured by shrapnel in 2005. Reliable military personnel serving with him in Afghanistan laud his duty performance and contributions to mission accomplishment. He has put himself in harm's way, working alongside U.S. Armed Forces. He has made contributions to national security, fully aware of the risks to himself. All these circumstances demonstrate that Applicant will recognize, resist, and report any attempts by a foreign power, terrorist group, or insurgent group at coercion or exploitation. *See* ISCR Case No. 07-00034 at 2 (App. Bd. Feb. 5, 2008). There is no evidence of any disciplinary problems at work. There is no other evidence of drug or alcohol abuse beyond his conviction for possession of drug paraphernalia. There is no evidence of disloyalty. There is no evidence that he would intentionally violate national security, or that he would deliberately fail to safeguard sensitive or classified information. His character and good work performance show substantial responsibility, rehabilitation, and mitigation.

The evidence against approval of Applicant's clearance is more substantial. The importance of providing accurate information on a security clearance application is manifest. It is even more important that an applicant provide accurate information at his or her security clearance hearing. Applicant received notice in the SOR that the Department of Defense might deny his clearance because in the past he was not truthful and candid when he denied or omitted potentially disqualifying information from his security clearance application. Nevertheless, he intentionally and falsely denied at his hearing that he was asked by a contractor-interviewer about his prior arrests, charges, convictions, liens, and delinquent debts. His contention that the contractor-interviewer only asked him about his family and other questions that would yield non-derogatory or disqualifying information from him, and then the interviewer or other contractor employee made up his answers to these highly-relevant questions, is not credible. I also believe, contrary to his statement at his hearing, that he reviewed his security clearance application before he signed it. I accept as true that he told the interviewer his charges were dismissed. I did not believe his statement at his hearing that he did not know a misdemeanor is a criminal case. At his hearing, he had an opportunity to correct his previous erroneous statements, and to admit that he intentionally provided false information on his security clearance application. He failed to

admit his mistakes. He failed to take full responsibility for providing false information on his 2005 security clearance application.

Applicant's false statements cannot be mitigated at this time because they were knowledgeable, voluntary, and intentional. He is 47 years old and sufficiently mature to be fully responsible for his conduct. His false statements show lack of judgment and a failure to abide by the law. Such conduct establishes a serious security concern, and access to classified information is not warranted at this time. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude he has mitigated the security concerns pertaining to criminal conduct because his criminal conduct in 2002 is not recent. However, he has not mitigated the security concerns relating to personal 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"[9] 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:	FOR APPLICANT
Subparagraphs 1.a to 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant (duplicates 2.b)
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

MARK HARVEY
Administrative Judge

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