DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-03087
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

July 30, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on October 28, 2008. On February 18, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J and E. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on February 23, 2010; answered it on March 16, 2010; and requested a hearing before an administrative judge. DOHA received the request on March 17, 2010. Department Counsel amended the SOR on March 29, 2010, and was ready to proceed on the same date. The case was assigned to me on March 31, 2010. Applicant answered the amendment to the SOR on April 19, 2010. DOHA issued a notice of hearing on April 20, 2010, scheduling the hearing for May 10, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 13 were admitted in evidence without objection. Applicant testified but presented no witnesses or documentary evidence. DOHA received the transcript (Tr.) on May 18, 2010.

Findings of Fact

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

Applicant is a 44-year-old employee of a federal contractor. He has worked for his current employer since May 2005. He served on active duty in the U.S. Navy from March 1984 to May 2005 and retired as a first class petty officer. (GX 3 at 6.) He received a security clearance while he was in the Navy.

Applicant married in January 1988 and separated in August 1995. He and his wife have two sons, ages 22 and 19. (Tr. 25.) After their separation, Applicant paid his wife $500 per month in child support pursuant to an informal, verbal agreement. (GX 3 at 6.)

In November 1997, Applicant was arrested for driving under the influence (DUI). He was convicted in September 1998 and sentenced to 90 days in jail (suspended) and a $250 fine. His driver's license was suspended for one year and he was required to attend an alcohol safety action program (ASAP). (GX 13 at 4.)

In June 2003, Applicant was arrested for DUI (2nd offense) and being a habitual offender, a felony. He pleaded guilty to DUI and a misdemeanor habitual offender offense. He was sentenced to 12 months in jail (suspended) and placed on unsupervised probation for three years. His driver's license was suspended for three years. (GX 4; GX 5.) He did not apply for reinstatement of his driver's license after the three years had passed. (Tr. 33-34.)

After the June 2003 arrest for DUI, Applicant appeared before an administrative separation board convened to determine whether he should be discharged from the Navy for misconduct. The board retained him on active duty. (Tr. 30.)

In February 2004, Applicant was charged with public intoxication. He was fined $25 and required to pay court costs of $69. (GX 6.)

In January 2007, Applicant was charged with speeding and being a habitual offender, a felony. He did not have a driver's license, because he had not applied for reinstatement after the period of suspension had passed, but the driver's license offense was not specifically charged. (Tr. 34.) The speeding charge was disposed of by nolle prosequi. He pleaded guilty to a misdemeanor habitual offender charge. He was sentenced to 12 months in jail, with 10 months suspended, and placed on unsupervised probation for two years. (GX 8; GX 9.)

In May 2007, Applicant was charged with fictitious display of license plates and being a habitual offender. He told a security investigator that the license plate violation occurred when he purchased a car from a friend and used the friend's license plates to drive the car home. (GX 13 at 5.) At the hearing, he testified he borrowed the car from a friend and did not know that the license plates were for another vehicle. (Tr. 52-53.) He was found guilty of the license plate offense in absentia in September 2007. In January 2009, he pleaded guilty to the felony habitual offender charge, and was sentenced to 12 months in jail. (GX 10; GX 11.) The record does not reflect how much time, if any, he spent in jail. The court records reflect some jail time served on weekends. (GX 11 at 1.) At the hearing, he testified that he was not sure if he was still on unsupervised probation, but he knew that his driver's license was suspended.

When Applicant submitted his security clearance application in October 2008, he answered "yes" to question 23d, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs. He disclosed his DUI arrest in 2003, but he did not disclose his DUI in 1997 or his arrest for public intoxication in 2004. In his answer to question 23d, he explained that he had another "traffic charge" that was pending, apparently referring to the habitual offender charge of which he was convicted in January 2009. He answered "no" to question 23a, asking if he had ever been charged with or convicted of any felonies, and he did not disclose his felony arrests in June 2003, January 2007, and May 2007.

Applicant testified that he stopped drinking alcoholic beverages after his arrest for public intoxication in 2004. (Tr. 28, 31.) He completed the ASAP program and also received alcohol counseling from the Navy. (Tr. 29.) He testified that he stopped drinking because he was concerned about its impact on his Navy career. (Tr. 30-31.)

At the hearing, Applicant testified he did not disclose his 1997 DUI because he was told to limit his responses to incidents that occurred during the last seven years. (Tr. 50.) A summary of an interview with a security investigator in February 2009 reflects that Applicant first told the investigator that he did not disclose all his criminal charges because he did not remember the details of the offenses. However, on further questioning, he told the investigator he did not disclose his complete criminal history because it might adversely affect his security clearance and his employment. In his February 2009 security interview and at the hearing, he admitted he did not disclose his criminal record to his facility security officer. (Tr. 45; GX 3 at 5.)

At the hearing, Applicant admitted that the security investigator's summary of the interview was accurate. His hearing testimony was vague and equivocal: he admitted that he did not volunteer adverse information; but he insisted that he did not intend to conceal information, because he knew that the investigators would find it. (Tr. 45-50.)

Policies

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

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

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

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

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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

Analysis

Guideline J, Criminal Conduct

The SOR alleges a DUI arrest in November 1997 and conviction in September 1998 (¶ 1.a); DUI and habitual offender arrests and convictions in June 2003 (¶ 1.b); arrests for driving with a revoked license and being a habitual offender in January 2007, and a conviction of being a habitual offender in July 2007 (¶ 1.c); falsification of a security clearance application in October 2008(¶ 1.d); an arrest for public intoxication in February 2004 (¶ 1.e); and arrests for fictitious display of license plates and being a habitual offender in May 2007, and conviction of being a habitual offender in January 2009 (¶ 1.f). Applicant's admissions, corroborated by documentary evidence, establish SOR ¶¶ 1.a-1.e. The documentary evidence establishes SOR ¶ 1.f.

The concern raised by criminal conduct is set out in AG ¶ 30 as follows: "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." Applicant's record of arrests and convictions raises two disqualifying conditions under this guideline: AG ¶ 31(a) ("a single serious crime or multiple lesser offenses") and AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted").

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the United States Government. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the United States Government. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. Applicant's false answers on his e-QIP, discussed below under Guideline E, also raise the disqualifying condition in AG ¶ 31(a).

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 31(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has

the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 32(a). The first prong of this mitigating condition focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*.

Applicant's last criminal conviction was in January 2009, for conduct that occurred in January 2007, more than three years ago. He falsified his security clearance application in March 2008, and was less than candid about the falsification at his hearing. Although three years is a significant period of time, Applicant's conduct since January 2007 does not demonstrate reform or rehabilitation. His misconduct, including his falsification, did not occur under unusual circumstances. I conclude AG ¶ 32(a) is not established.

Security concerns raised by criminal conduct also may be mitigated if "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement." AG ¶ 32(d). For the reasons set out above in the discussion of AG ¶ 32(a), I conclude that this mitigating condition is not established.

Guideline E, Personal Conduct

The SOR cross-alleges the criminal conduct in SOR ¶¶ 1.a-1.e as personal conduct under this guideline (¶ 2.a). In addition, it alleges Applicant falsified his security clearance application in his response to question 23d, asking about offenses related to alcohol or drugs (¶ 2.b), and in his response to question 23a, asking about felony charges or convictions (¶ 2.c). The concern under this guideline is set out in AG ¶ 15 as follows:

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

The relevant disqualifying condition for falsification of a security clearance application is AG ¶ 16(a) ("deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire"). When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant's explanation for not disclosing his 1997 DUI was plausible and credible, but he has not adequately explained his failure to disclose his arrest for public intoxication four years before submitting his application. He has not persuasively explained why he did not disclose his multiple felony arrests for being a habitual offender. He admitted to a security investigator that he was concerned that full disclosure of his criminal record would cost him his security clearance and his job. Applicant's experience with a Navy administrative elimination board made him aware of the likelihood of losing his clearance. I am satisfied that he did not fully disclose his criminal record because he was afraid of losing his job. I conclude that AG ¶ 16(a) is raised.

Applicant's record of criminal arrests and convictions alleged in SOR ¶ 1.a, 1.c, 1.e, and 1.f raises the following disqualifying conditions under this guideline:

> AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;
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> AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and
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> AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). Applicant did not correct the omissions until he was confronted with the evidence by a security investigator in February 2009, more than three months after he submitted his application. I conclude AG ¶ 17(a) is not established.

Security concerns raised by personal conduct may be mitigated if "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment". AG ¶ 17(c). Applicant has several felony arrests and one felony conviction, and his deliberate falsification of his security clearance application was a serious offense. His misconduct was frequent and did not occur under unique circumstances. For the reasons set out above in the discussion of AG ¶ 32(a), insufficient time has passed to demonstrate rehabilitation. I conclude AG ¶ 17(c) is not established.

Security concerns raised by personal conduct may be mitigated if "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." AG ¶ 17(d). Applicant receives some credit under this mitigating condition because he received counseling from both military and civilian sources for his excessive alcohol consumption, and he stopped consuming alcohol some time in 2004. This mitigating condition is established for the alcohol-related conduct alleged in SOR ¶ 1.a, 1.b, and 1.e, but not for the other personal conduct alleged in the SOR.

Finally, security concerns under this guideline may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). This mitigating condition is not established because Applicant has attempted to conceal the extent of his arrest and conviction record.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant served honorably in the U.S. Navy for more than 20 years, although his continued service was jeopardized by his conduct and he faced an elimination board shortly before his retirement. He held a security clearance for many years while in the Navy and while working as a federal contractor employee. He stopped drinking alcohol when he realized that it jeopardized his clearance and prospects for continued employment. On the other hand, he has a long record of ignoring rules and regulations, and he has not been completely candid during the security clearance process.

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

Formal Findings

I make the following formal findings on the allegations in the SOR:

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

Conclusion

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

LeRoy F. Foreman
Administrative Judge