DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 09-04458
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

February 16, 2012

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 13, 2007. On October 15, 2010, the Defense Office of Hearings and Appeals (DOHA) notified him/her that it was unable to find that it is clearly consistent with the national interest to grant him access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to deny his application. DOHA set forth the basis for its action in a Statement of Reasons (SOR), citing security concerns under Guideline 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 December 8, 2010; answered it on December 9, 2010; and requested a hearing before an administrative judge. DOHA received the request on December 27, 2010. Department Counsel was ready to proceed on December 13, 2011, and the case was assigned to an administrative judge on December 21, 2011.[1] It was transferred to me on January 3, 2012, based on workload. DOHA issued a notice of hearing on January 10, 2012, scheduling it for January 19, 2012. I convened the hearing as scheduled, and Applicant affirmatively waived the 15-day notice requirement. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified but presented no witnesses or documentary evidence. DOHA received the transcript (Tr.) on January 27, 2012.

Jurisdiction

A copy of the notice of hearing was sent to the federal contractor who initially sponsored Applicant for a clearance. After the hearing adjourned and the record closed, DOHA received an undated, handwritten note from the personnel security manager for that federal contractor, stating that Applicant had been separated at some time before January 2011. (Hearing Exhibit (HX) I.)

On February 7, 2012, I issued an order reopening the record, to enable to parties to show cause why the case should not be administratively terminated in accordance with the Directive ¶ 4.4. (HX II.) Department Counsel submitted a letter from the President and Chief Executive Officer of the federal contractor by whom Applicant was employed at the time of the hearing. This former employer stated that he intended to sponsor Applicant for a clearance, but did not complete the documentation of his intent before Applicant's hearing. Shortly after the hearing, the contract on which Applicant had been selected to work was cancelled, and the entire team for that contract, including Applicant, was laid off. Applicant is eligible for rehire if he receives a clearance, and his most recent employer intends to rehire him as soon as possible. (HX III.) Based on this information, I conclude that Applicant needed a clearance at the time of the hearing, and that DOHA has jurisdiction to continue processing his application under Directive ¶ 4.4.1.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶ 1.a in part and 1.b in its entirety. He denied SOR ¶ 1.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

At the time of the hearing, Applicant was a 37-year-old employee of a federal contractor. He received a clearance in January 1994, while on active duty in the U.S. Army. He married in September 2001. He and his wife have two sons, ages eight and five.

[1] The administrative record does not reflect the reason for the delay from December 2010 to December 2011, but Applicant testified that he was deployed to Afghanistan during part of this period.

Applicant received an associate's degree in computer networking in April 2003. He began working for federal contractors in April 2007. He was deployed to Afghanistan from June 2007 through February 2011, working as a network administrator. (Tr. 26.) He held an interim clearance while he was deployed. (Tr. 27.)

Applicant served on active duty in the U.S. Army from January 1994 to July 1996. (GX 2 at 5.) He was trained and assigned as a military policeman. On February 1, 1996, he and an Air Force security policeman began engaging in horseplay, which culminated in Applicant drawing his weapon, inserting a clip of ammunition, chambering a round, and pointing it at the Air Force security policeman. Applicant testified that he intended it to be a joke, but the other participant took it seriously and reported it.

In April 1996, Applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815, for an aggravated assault involving a handgun. He did not exercise his right to demand trial by court-martial. His punishment was reduction from the grade of specialist (pay grade E-4) to private first class (pay grade E-3), forfeiture of $537 per month for two months, and extra duty for 15 days. He appealed his punishment and the appeal was denied. In July 1996, he was administratively discharged for unsatisfactory performance, with an honorable discharge. (GX 2 at 5)

Applicant was 21 years old when the incident for which he was punished occurred, and 22 years old when he was discharged. In his answer to the SOR and at the hearing, he referred to his 1996 conduct as immature and stupid. (Answer to SOR at 2-3; Tr. 24.)

In November 1996, the US Army Central Personnel Security Clearance Facility (USA CCF) sent Applicant a letter of intent (LOI) to revoke his security clearance, citing Guideline J (Criminal Conduct), and based on the conduct for which he received nonjudicial punishment. The LOI was addressed to the U.S. Army Reserve Personnel Center in St. Louis, Missouri instead of Applicant's home. His DD Form 214, Certificate of Release or Discharge from Active Duty, listed his mother's address as his mailing address after separation. However, Applicant and his parents moved from that address to another state in October 1996, before the LOI was sent. (Tr. 32-35.) In March 1997, the USA CCF sent Applicant a letter of revocation (LOR), noting that he had not responded to the LOI. The LOR also was sent to the U.S. Army Reserve Personnel Center instead of his residence.

When Applicant submitted his SCA in April 2007, he answered "No" to question 26, asking if he had ever had a clearance or access authorization denied, suspended, or revoked. In his response to the SOR and at the hearing, he stated that he was unaware that his clearance had been revoked. He assumed that it had been administratively terminated at some time after his discharge from the Army. He testified that he first saw the LOR when he received it from Department Counsel. (Tr. 33.)

Applicant also answered "No" to question 23a, asking if he had ever been charged with or convicted of a felony, and question 23b, asking if he had ever been charged with or convicted of a firearms or explosives offense. He testified that he answered "No" to these questions because his military attorney had advised him that disposition by nonjudicial punishment meant that he would not have any criminal charges on his record. (Tr. 35-37.) His negative answers to these were not alleged in the SOR.

Applicant's supervisor while he was deployed to Afghanistan described him as reliable, hard working, honest, and dedicated. He commented that Applicant's patriotism "is evident and quite an inspiration." A coworker in Afghanistan described him as goal-oriented, devoted to his work, and organized. He was known as a person who thrived under adversity and was "driven in equal measure by both quality and efficiency." (Attachments to Answer to SOR.) In his response to my show-cause order, his most recent employer stated that Applicant is "a good American" and "a strong ethical young man." (HX III at 3.)

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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 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).

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 E, Personal Conduct

The SOR alleges that Applicant committed an assault with a loaded pistol in February 1996 (SOR ¶ 1.a). It also alleges that Applicant's security clearance was revoked in March 1997 because of the assault (SOR ¶ 1.b), and that Applicant falsified his April 2007 SCA by deliberately failing to disclose that his security clearance was revoked in March 1997 (SOR ¶ 1.c).

The concern under this guideline is set out in AG ¶ 15:

> 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.

SOR ¶ 1.b recites a consequence of the conduct alleged in SOR ¶ 1.a and the evidentiary basis for the falsification alleged in SOR ¶ 1.c, but it does not allege any conduct separate from the conduct in SOR ¶ 1.a. As such, SOR ¶ 1.b duplicates SOR ¶

1.a. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3. Accordingly, I will resolve SOR ¶ 1.b in Applicant's favor.

The disqualifying condition relevant to Applicant's failure to disclose the revocation of his clearance on is SCA 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).

The SOR does not allege that Applicant falsified his responses to questions 23a and 23b on his SCA, asking about charges or convictions of felonies and firearms offenses. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered Applicant's responses to SCA questions 23a and 23b for these limited purposes.

Applicant testified that he did not disclose the February 1996 assault in response to questions 23a and 23b because a military attorney advised him that disposition of his misconduct by nonjudicial punishment would not result in any criminal charges on his record. I found his explanation plausible and credible. Nonjudicial punishment is not a criminal proceeding, but the exercise of a commander's disciplinary authority. It may be imposed only for criminal conduct proscribed by the UCMJ, but it does not involve formal charges or a conviction. Records of nonjudicial punishment are handled as personnel records rather than criminal records. The distinction between criminal proceedings and nonjudicial punishment is recognized in question 23e of the SCA. Applicant correctly answered "No" to question 23e, because it is limited to the last seven years preceding the SCA.

The LOI and LOR pertaining to the revocation of Applicant's clearance were sent to an administrative headquarters, not to the address listed on his DD 214 or the address where he actually resided. Accordingly, I find his testimony that he did not receive the LOI and LOR plausible and credible, and I conclude that he did not falsify his response to question 26 on his SCA. Thus, I conclude that AG ¶ 16(a) is not established by substantial evidence.

The disqualifying conditions relevant to the assault alleged in SOR ¶ 1.a are:

> 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; and
>
> 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.

Applicant's record of nonjudicial punishment and his admissions in response to the SOR and at the hearing are sufficient to establish AG ¶¶ 16(c) and (e).

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's conduct was handled as a minor offense, even though an assault involving a dangerous weapon ordinarily would be considered serious. It happened 16 years ago and was an isolated incident. Applicant has matured and conducted himself as a law-abiding citizen since his discharge from the Army. I conclude that this mitigating condition is established.

Security concerns also 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 the record does not reflect that Applicant disclosed his nonjudicial punishment to his employers, supervisors, security officials, or coworkers. However, Applicant enjoys a reputation for honesty, integrity, and strength under adversity, and it is highly unlikely that he would succumb to exploitation, manipulation, or duress based on a 16-year-old military disciplinary action.

Whole-Person Concept

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. In applying 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 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.

I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was candid, sincere, remorseful, and credible at the hearing. He has matured and established a reputation for honesty, integrity, and strength under pressure. After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge