DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
(Redacted)	)	ISCR Case No. 09-07391
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

February 7, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 1, 2009. On September 13, 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 E and J. 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 September 17, 2010; answered it in an undated document; and requested a hearing before an administrative judge. DOHA received the

request on October 14, 2010. Department Counsel was ready to proceed on October 21, 2010. On October 27, 2010, Department Counsel amended the SOR to add nine allegations under Guideline E (SOR ¶¶ 1.g-1.o) and to amend SOR ¶ 1.f. Applicant did not respond to the amendments to the SOR. At the hearing, he admitted the allegations in SOR ¶¶ 1.g through 1.o, and he denied SOR ¶ 1.f as amended. (Transcript (Tr.) at 22-24.).

The case was assigned to me on November 3, 2010. DOHA issued a notice of hearing on November 9, 2010, scheduling it for December 1, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 39 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. I kept the record open until December 10, 2010, to enable Applicant to submit additional documentary evidence. He timely submitted AX C. Department Counsel's comments regarding AX C are attached to the record as Hearing Exhibit I. DOHA received the transcript on December 8, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.e and 1.g-1.o, which are cross-alleged in SOR ¶ 2.a under Guideline J. He did not admit or deny SOR ¶ 2.a. He denied SOR ¶ 1.f as amended. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 36-year-old asset management technician employed by a defense contractor since November 2007. He has never held a security clearance.

Applicant is unmarried, but he has been cohabiting in a committed relationship since September 2007. (GX 1 at 28-29.) He has two daughters, ages six and two. His younger daughter and his cohabitant's two teenaged sons live with them. Applicant is a high school graduate with some community college credits. (Tr. 50.)

A friend of Applicant for 12 years, who is a former employer and has become his mentor, describes him as intelligent, dedicated, hard working, thoughtful, and mature. (AX A.) A coworker who has known him for two years considers him dependable and efficient, with a "can-do" attitude toward his job. (AX B.) A manager for whom Applicant worked describes him as honest, efficient, dedicated, detail-oriented, and a stickler for following procedures. (AX C.)

When Applicant submitted his SCA in May 2009, he answered "Yes" to the following questions about his police record: question 22a, asking if he was awaiting trial on criminal charges; question 22b, asking if he had been arrested in the past seven years; question 22c, asking if he had ever been charged with a felony; and question 22e, asking if he had ever been charged with any offenses related to alcohol or drugs. Question 22b excludes traffic offenses not involving alcohol or drugs and resulting in fines of less than $300. Applicant disclosed that he was pending trial for driving under the influence, and he disclosed a felony conviction of leaving the scene of an accident in

August 1997[1]. He did not disclose any of the other arrests and convictions alleged in the SOR. The table below summarizes the evidence of the arrests and convictions alleged in the SOR, listed in chronological order.

SOR	Offense	Date	Disposition	Evidence
1.e	Hit and run with personal injury (felony)	3-2-96	Guilty plea; jail for 2 months	GX 1, 39
1.d	Possession of marijuana	2-14-98	Probation for six months	GX 2, 3
1.j	Driving on a suspended or revoked license	4-20-01	Guilty in absentia; $100 fine	GX 22, 23
1.o	Open alcohol container	7-7-01	Guilty plea; $45 fine and costs	GX 37, 38
1.c	Credit card theft (felony), credit card forgery (felony)	2-19-02	Nolle prosequi	GX 4-11
1.i	Driving on a suspended or revoked license	8-9-02	Nolle prosequi	GX 20, 21
1.m	Driving on a suspended or revoked license, reckless driving, destruction of property	12-22-02	Nolle prosequi on license offense and reckless driving; guilty of destruction of property; $100 fine and 3 years of unsupervised probation	GX 28-33
1.g	Driving on a suspended or revoked license, reckless driving	4-9-03	Guilty of having no license and reckless driving; fines of $100 and $250, license suspended for 30 days	GX 14-17
1.b	Disorderly conduct	10-17-04	Guilty; jail for 30 days (suspended), $150 fine, unsupervised probation for 12 months	GX 2, 12, 13
1.h	Reckless driving (82 mph[2] in 55 mph zone)	5-20-06	Guilty; $120 fine	GX 18, 19
1.l	Speeding (57 mph in 40 mph zone)	7-24-06	Guilty in absentia; $85 fine	GX 26, 27
1.n	Speeding (74 mph in 55 mph zone)	8-19-06	Guilty in absentia; $95 fine	GX 34, 35
1.k	No driver's license	2-5-07	Dismissed	GX 24, 25
1.a	Driving while intoxicated (DWI)	3-28-09	Guilty; jail for 30 days (suspended), $250 fine, license suspended for 12 months, VASAP[3]	GX 2, 36

[1] The date on the SCA is incorrect. The offense occurred on July 2, 1996, as alleged in SOR ¶ 1.e.

[2] Miles per hour

[3] Participation in alcohol safety action program

In July 2009, Applicant told a security investigator that he did not disclose the February 1998 arrest for possession of marijuana, alleged in SOR ¶ 1.d, because he mistakenly thought the question about drug-related charges was limited to the last seven years. (GX 3 at 3.) In August 2009, during a second interview, Applicant admitted the October 2004 disorderly conduct arrest, alleged in SOR ¶ 1.b, claiming that he thought the incident was outside the seven-year period covered by the question. (GX 3 at 6.) At the hearing, he testified he rushed through the SCA without reading the questions carefully. However, he admitted making telephone calls while completing his SCA to obtain information about previous residences and jobs. (Tr. 67-68, 71, 79-80.)

During the August 2009 interview, Applicant responded to an open-ended question about "any other law enforcement encounters," by disclosing his arrest for credit card theft and credit card forgery, alleged in SOR ¶ 1.c. He told the investigator that the charges arose when he found a wallet and was stopped for a traffic offense before he had an opportunity to turn it in. He told the investigator he was on his way to the gym and intended to turn the wallet in at the gym. He told the investigator he did not disclose the arrest for credit card theft and forgery, both felonies, on his SCA because the charges were dismissed. He also said that he thought the question was limited to the last seven years. (GX 3 at 7-8.) At the hearing, he testified he intended to drop the wallet in a mailbox. He also testified that he was not confronted with evidence of the arrest but that he volunteered the information. (Tr. 60.)

Applicant's conviction in December 2002 of destruction of property occurred after Applicant argued with his then girlfriend and kicked her car, breaking off one of the side mirrors. The traffic offenses arising from the same incident were not prosecuted.

Applicant testified that he had consumed two beers before his DWI arrest in March 2009. (Tr. 51-52.) However, his blood-alcohol level of .13 at the time of his arrest suggests that he had consumed considerably more. (GX 3 at 4.)

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, 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 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 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 14 incidents between March 1996 and March 2009, involving minor traffic infractions, misdemeanors, and several felonies (SOR ¶¶ 1.a-1.e, 1.g-1.o). Applicant admitted all 14 arrests, and his admissions are corroborated by the Government's documentary evidence. Although he admitted the arrests, he claimed he was not guilty of the credit card theft and forgery alleged in SOR ¶ 1.c.

SOR ¶ 1.f alleges that Applicant falsified his SCA by intentionally failing to disclose the incidents alleged in SOR ¶¶ 1.b, 1.c, 1.d, 1.g, and 1.m. Applicant denied intentionally falsifying his SCA.

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 pertaining to falsification of an 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).

In his response to question 22a, Applicant did not disclose his arrest and conviction of destruction of property in December 2002 (SOR ¶ 1.m) and disorderly conduct in October 2004 (SOR ¶ 1.b), even though both offenses were within seven years of the date he submitted his SCA. He also did not disclose his arrest for driving on a suspended or revoked license and reckless driving in April 2003 (SOR ¶ 1.g), but this offense was not within the scope of question 22a, because each of the traffic offenses involved in that incident resulted in a fine of less than $300.

In his response to question 22c, asking about felony arrests, Applicant disclosed the felony hit and run in July 1996 (SOR ¶ 1.e), but he did not disclose his felony arrest for credit card theft and forgery in February 2002 (SOR ¶ 1.c). In response to question 22e, asking about offenses relating to alcohol or drugs, he did not disclose his drug-related arrest in February 1998, alleged in SOR ¶ 1.d, or the July 2001 arrest for having an open container of alcohol, alleged in SOR ¶ 1.o. He claimed that he misread the questions because he rushed through the SCA without reading them carefully, but his claim is not plausible or credible. It is contradicted by his testimony that he took the time to make telephone calls to obtain information about previous residences and employment. It is contradicted by the detail he provided for other parts of the SCA concerning his former residences, members of his family, and employment record. It is inconsistent with his reputation for careful attention to detail. His disclosure of the 1996 felony arrest but his failure to disclose the 2002 felony arrest is inconsistent with his claim that he thought the question about felonies was limited to the last seven years. I conclude that AG ¶ 16(a) is raised by Applicant's intentional failure to disclose the incidents alleged in SOR ¶¶ 1.b, 1.c, 1.d, 1.e, and 1.m. He also intentionally failed to

disclose the alcohol-related incident in SOR ¶ 1.o, but his failure to disclose that incident is not alleged in SOR ¶ 1.f.

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a-1.e, and at the hearing he admitted SOR ¶¶ 1.g-1.o. During his hearing testimony, he denied stealing the credit cards and forging the card holder's signature, alleged in SOR ¶ 1.c. His explanations regarding his intention to turn in the wallet containing the credit cards were somewhat vague and contradictory, but they support his claim of innocent possession of lost property. The record does not reflect the basis for the forgery charge. I recognize that *nolle prosequi* can be based on factors other than sufficiency of the evidence, but in this case it tends to support Applicant's claim of innocence. I conclude that SOR ¶ 1.c is not supported by substantial evidence of conduct having security significance.

Similarly, the driver's license offense in February 2007 alleged in SOR ¶ 1.k was dismissed. No evidence was adduced at the hearing regarding the circumstances of this incident. I conclude that SOR ¶ 1.k is not supported by substantial evidence of conduct having security significance.

Applicant's admissions and the corroborating evidence presented by the Government are sufficient to establish the allegations in SOR ¶¶ 1.a, 1.b, 1.d-1.l, and 1.m-1.o. The evidence establishes 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; 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.

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 16(a), (c) and (e), 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 raised by false or misleading answers on a security clearance application or during a security interview 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 fully disclose his record of arrests and convictions until confronted with the evidence at two subsequent interviews in July and August 2009. However, he volunteered the information about the credit card theft and forgery during the August 2009 interview. I conclude that AG ¶ 17(a) is established for Applicant's failure to disclose the incident alleged in AG ¶ 1.c, but not for his failure to disclose the other arrests and convictions alleged in the SOR.

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).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 DWI arrest preceded submission of his SCA by less than two months, and his trial was a month after he submitted his SCA. His falsification pertained to his current application for a security clearance. He has been under pressure to obtain a security clearance since his DWI arrest. In the context of his track record of multiple offenses over a period of almost 15 years, insufficient time has passed to demonstrate that he has been rehabilitated. I conclude that DWI arrest and his falsification of his SCA were recent, and the first prong of AG ¶ 17(c) is not established. The remaining prongs are also not established because his arrests and convictions were numerous, did not occur under unique circumstances, and they cast doubt on Applicant's current reliability, trustworthiness, and good judgment.

Security concerns based on 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). The first prong of this mitigating condition is established by Applicant's acknowledgement of his behavior, but there is no evidence of counseling or "other positive steps" taken to make recurrence of his irresponsible behavior unlikely. Thus, I conclude that AG ¶ 17(d) is not established.

Finally, security concerns based on personal conduct 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 established by Applicant's eventual full disclosure of his record of arrests and convictions.

Guideline J, Criminal Conduct

The SOR cross-alleges the personal conduct alleged in SOR ¶¶ 1.a through 1.e. The concern under this guideline is set out in AG ¶ 30: “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 ¶ 30.

Applicant’s conduct, as alleged in SOR ¶¶ 1.a, 1.b, 1.d-j, and 1.m-1.o and established by substantial evidence, is sufficient to establish the disqualifying conditions in 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).

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). For the reasons set out in the above discussion of AG ¶ 17(c), I conclude that this mitigating condition is not established.

Security concerns under this guideline may be mitigated by “evidence that the person did not commit the offense.” AG ¶ 32(c). This mitigating condition is established for the offenses alleged in SOR ¶ 1.c and 1.k, but not for the remaining allegations.

Finally, security concerns raised by criminal conduct 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). Applicant has established a good employment record, as shown by the favorable character references he has submitted. He expressed remorse at the hearing and declared his intention to be a responsible person. Nevertheless, for the reasons set out in the above discussion of AG ¶ 17(c), I am not convinced that he is rehabilitated. Accordingly, I conclude that AG ¶ 32(d) is not established.

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 E and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant presented himself at the hearing as intelligent and articulate. He obviously enjoys his job, and he has earned the respect and support of supervisors and colleagues. He was remorseful about his record of arrests and convictions, and he sincerely desires to turn his life around. On the other hand, insufficient time has passed for him to demonstrate rehabilitation, and his lack of candor on his SCA raises serious concerns about his reliability and trustworthiness.

After weighing the disqualifying and mitigating conditions under Guidelines E and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on personal conduct and criminal conduct. Accordingly, I conclude he has not 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): AGAINST APPLICANT

Subparagraphs 1.a-1.b: Against Applicant
Subparagraph 1.c: For Applicant
Subparagraphs 1.d-1.j: Against Applicant
Subparagraph 1.k: For Applicant
Subparagraphs 1.l-1.o: Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge