DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 10-00278
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

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

January 4, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant has accumulated a number of alcohol-related incidents during 1989–2009 as well as arrests and charges for other criminal conduct. In addition, Applicant gave false answers about his police record when he completed security clearance applications. He did not present sufficient evidence of reform and rehabilitation to mitigate the security concerns. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,[1] on May 21, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline G for alcohol consumption, Guideline J for criminal conduct, and Guideline E for personal conduct. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR and requested a hearing. The case was assigned to me August 4, 2010. The hearing took place September 9 and 29, 2010. The hearing transcript (Tr.) was received October 7, 2010.

Findings of Fact

Applicant is a 46-year-old man who works in information technology (IT) in the field of help desk support. He is unmarried and has no children. His education background includes a high-school diploma, some college, and completion of IT certifications.

The evidence shows Applicant has accumulated a number of alcohol-related incidents during 1989–2009 as well as arrests and charges for other criminal conduct. In addition, Applicant gave false answers about his police record when he completed security clearance applications. The various incidents are discussed below.

1. Applicant's record of alcohol-related incidents

Applicant has been involved in seven alcohol-related incidents away from work. The incidents took place in three different state-level jurisdictions. The first took place in about 1989, while the most recent occurred in 2009. Applicant prefers to drink beer, and the various incidents related to his consumption of beer.

The first incident took place in about 1989, when Applicant was charged with driving under the influence (DUI) and operating a vehicle while intoxicated (OWI).[2] He

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[1] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

[2] Exhibit A.

pleaded not guilty to the DUI charge and it was *nolle prossed* (meaning the prosecution relinquished the action). He pleaded guilty to the OWI charge, and the court sentenced him to confinement for ten days, suspended, and a $50 fine.

The second incident took place in about 1993, when Applicant was charged with disorderly conduct or drunk in public or both.[3] It was disposed of in 1994, when he pleaded not guilty and it was placed on a stet docket (meaning an order staying legal proceedings, as when a prosecutor determines not to proceed on a case and places it on a stet docket).

The third incident took place in about 1994, when Applicant was cited for having an open container of alcohol in public.[4] The criminal citation was disposed of when he pleaded guilty and was placed on unsupervised probation before judgment, and he was ordered to pay a small fine and costs.

The fourth incident took place in about 2001, when Applicant was charged with DUI and OWI offenses.[5] The charges were *nolle prossed* several months later in 2002.

The fifth incident took place in about 2005, when he was cited for or charged with having an open container of alcohol in public.[6] He was found guilty and ordered to pay a small fine and costs.

The sixth incident took place in about 2008, when he was charged with multiple offenses based on a traffic stop as follows: (1) unsafe lane change; (2) following a vehicle too closely; (3) driving or attempting to drive a vehicle while under the influence of alcohol; (4) driving or attempting to drive a vehicle while under the influence of alcohol per se; and (5) driving or attempting to drive a vehicle while impaired by alcohol.[7] Charges (2), (3), and (4) were *nolle prossed* in about June 2009. Applicant pleaded guilty to charges (1) and (5) and he paid costs and was placed on probation before judgment.

The seventh incident took placed in about 2009, when he was cited for having an open container of alcohol in public.[8] The criminal citation was disposed in 2010, when it was *nolle prossed*.

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[3] Exhibits 9 and B.

[4] Exhibits 11 and C.

[5] Exhibits D and E.

[6] Exhibit 24.

[7] Exhibits F.

[8] Exhibits 23 and G.

2. Applicant's police record

Applicant has been involved in six incidents that resulted in arrests or charges or both, although none resulted in conviction. These incidents took place in three different state-level jurisdictions and are separate and apart from his alcohol-related incidents. The first took place in about 1983, while the most recent occurred in 2008.

The first incident took place in about 1983*,* when Applicant was charged with second-degree theft and shoplifting.[9] The theft charge was disposed of in 1983, when it was "no papered," which I take to mean it was dismissed. The shoplifting charge was *nolle prossed* in 1984.

The second incident occurred in about 1986, when Applicant was charged with possession of phencyclindine, commonly initialized as PCP, with intent to distribute.[10] The charge was disposed of a few days later when it was no papered.

The third incident occurred in about 1993, when Applicant was charged with theft of less than $300 in value.[11] The charge was *nolle prossed* in 1994.

The fourth incident occurred in about 2005, when Applicant was caught in a sting operation and charged with solicitation of prostitution.[12] Applicant appeared in court and believes the charge was dismissed.

The fifth incident occurred in 2008, when Applicant was charged with second-degree assault and fourth-degree sex offense.[13] The incident stemmed from Applicant's encounter with a woman while walking to a subway station. Words were exchanged, offense was taken by both, and the woman in turn called the police who responded to the scene. Applicant was released once the police heard his explanation, but he was served with a warrant a few days later. The charges were disposed of in February 2008, when the prosecution *nolle prossed* the case.

The sixth incident occurred in 2008, when Applicant was charged with malicious destruction of property of more than $500 in value and trespass.[14] The incident stemmed from Applicant's efforts to protect himself from street thugs, and so he entered an establishment and sought refuge in an enclosed room with a security officer. He

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[9] Exhibit H.

[10] Exhibit H.

[11] Exhibits 10 and I.

[12] Exhibit 25.

[13] Exhibits 12 and J.

[14] Exhibits K and L.

damaged the door in doing so. The charges were disposed of in August 2008, when the prosecution *nolle prossed* the case. In addition, Applicant obtained an order of expungement for the entire matter in July 2009.

3. Applicant's security clearance applications[15]

Applicant completed security clearance applications in 2006, 2008, and 2009 that are at issue in this case. Each required him to provide truthful answers in response to a number of questions about his background, to include his police record.

Applicant completed the first application in March 2006.[16] In response to Question 23d about his police record, he answered "no" thereby denying having ever been charged with or convicted of any alcohol- or drug-related offense. He did not report the five alcohol-related incidents from 1983 to 2005. Likewise, in response to Question 23f about his police record, he answered "no" thereby denying in the last seven years having been arrested for, charged with, or convicted of any offense not otherwise reported. He did not report the 2005 charge of solicitation of prostitution.

Applicant completed the second application in August 2008.[17] In response to Question 20 about his police record, he answered "yes" and disclosed the 2008 destruction of property charge, but otherwise denied in the last seven years having been arrested for, charged with, or convicted of any offenses. He did not report the 2005 charge of solicitation of prostitution, and he did not report the 2008 charges of second-degree assault and fourth-degree sex offense.

Applicant completed the third application in September 2009.[18] In response to Question 22 about his police record, he answered "no" to all questions thereby denying any reportable matters. In response to Question 22b, he answered "no" thereby denying in the last seven years having been arrested by a law-enforcement officer. He did not report his single arrest in 2005 or his two arrests in 2008. Likewise, in response to Question 22e, he answered "no" thereby denying having ever been charged with any alcohol- or drug-related offense. He did not report the seven alcohol-related incidents from 1983 to 2009.

4. Applicant's additional incidents

Applicant has been involved in other similar incidents not alleged in the SOR. First, included in his documentary evidence, Applicant presented a court record showing

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[15] The phrase "security clearance application" is the term used to describe the three governmental applications completed by Applicant in 2006, 2008, and 2009.

[16] Exhibit 1.

[17] Exhibit 2.

[18] Exhibit 3.

he was charged with DWI in 1987, although the charge was *nolle prossed* in 1988.[19] Second, he reported receiving a citation for having an open container of alcohol in 2010, although he did not have to go to court for it.[20] Third, he reported an arrest in about July 2010 after a fight with his uncle due to a family dispute.[21] Also, he reported having about one 24-ounce beer before the fight with his uncle. In due course, the charge was dismissed when witnesses did not appear for court.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.[22] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[23] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[24] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[25]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[26] The Government has the burden of presenting

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[19] Exhibit N at 6–7.

[20] Tr. 87–89.

[21] Tr. 91–93, 95–97.

[22] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[23] 484 U.S. at 531.

[24] Directive, ¶ 3.2.

[25] Directive, ¶ 3.2.

[26] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.[27] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[28] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[29] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[30] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[31]

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[32] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

The alcohol consumption and criminal conduct matters are discussed together because, given the facts here, the concerns are largely interrelated. Under Guideline G, the concern is that "excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."[33] Likewise, under Guideline J, the concern is that "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness."[34]

To start, of the 13 incidents alleged in the SOR, I have given no weight to the 2 incidents of alleged criminal conduct in 2008, because it appears Applicant was not

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[27] Directive, Enclosure 3, ¶ E3.1.14.

[28] Directive, Enclosure 3, ¶ E3.1.15.

[29] Directive, Enclosure 3, ¶ E3.1.15.

[30] *Egan*, 484 U.S. at 531.

[31] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[32] Executive Order 10865, § 7.

[33] AG ¶ 21.

[34] AG ¶ 30.

engaged in criminal conduct on either occasion. This conclusion is supported by the *nolle pross* disposition for both incidents as well as the expungement order for one incident. What remains are 11 incidents involving alcohol or criminal conduct or both, and these matters raise the following disqualifying conditions under the guidelines:

> ¶ 22(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> ¶ 31(a) a single serious crime or multiple lesser offenses; and
>
> ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

I have considered all the potential mitigating conditions under the guidelines,[35] and I conclude that none are sufficient to mitigate the security concerns. The evidence shows Applicant has engaged in a pattern of misconduct that frequently results in law-enforcement intervention (arrests and charges, but remarkably few convictions). Sometimes the misconduct is an alcohol-related incident, and sometimes it is misconduct of a different type. The most recent alcohol-related incident is the 2009 open container citation. The most recent other misconduct is the 2005 arrest and charge for solicitation of prostitution. Applicant did not present sufficient evidence of reform and rehabilitation to establish this pattern of misconduct has concluded, is safely in the past, and will not recur. The 2010 open container citation and the 2010 fight with the uncle, as testified to by Applicant, are the best evidence on this point.[36] Accordingly, Guidelines G and J are decided against Applicant.

Under Guideline E for personal conduct, the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide

[35] AG ¶ 23 and ¶ 32.

[36] Although not alleged in the SOR, I considered these additional matters to evaluate the evidence in mitigation and the extent to which Applicant demonstrated reform and rehabilitation. *See* ISCR Case No. 03-20327 at 4(App. Bd. Oct 26, 2006) (describing five examples when it is proper to consider conduct not alleged in the SOR) (citations omitted).

truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.[37]

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The issue here is the truthfulness of Applicant's answers to five questions about his police record on security clearance applications completed in 2006, 2008, and 2009. Rather than analyze each question and answer individually, it is appropriate to consider them together and analyze them based on the evidence as a whole. In doing so, the evidence shows Applicant answered the five questions incorrectly in that he failed to report the matters called for by the questions. The evidence also shows his answers were deliberately false. It simply boggles the mind to suggest that Applicant—with his record of alcohol-related incidents and his police record of arrests and charges—could have genuinely thought he was not obliged to disclose these matters. The only incident he did report was the 2008 destruction of property charge, which was eventually subject to the order of expungement. The evidence is clear that Applicant did not make an honest and reasonable effort to report his extensive record of misconduct. The most likely explanation for his false answers is that he was trying to paint himself in the most favorable light to obtain a security clearance and the good job that comes with it.

The established falsifications support application of the relevant disqualifying condition that addresses the deliberate omission, concealment, or falsification of relevant facts from a security questionnaire.[38] I reviewed all the potential mitigating conditions under Guideline E[39] and conclude none apply. Making false or misleading statements to the federal government during the security clearance process is serious misconduct. A deliberate falsification is not easily explained away, excused, or mitigated. Accordingly, Guideline E is decided against Applicant.

To conclude, the evidence as a whole justifies current doubts about Applicant's judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept[40] and Applicant's favorable evidence.[41] Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. At this point, Applicant's suitability

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[37] AG ¶ 15.

[38] AG ¶ 16(a).

[39] AG ¶ 17(a)–(g).

[40] AG ¶ 2(a)(1)–(9).

[41] *See* Exhibits O, P, and Q.

or fitness for a security clearance is a work in progress and he has much work to do. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline G:	Against Applicant
Subparagraphs 1.a–1.h:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a–2.d:	Against Applicant
Subparagraphs 2.e and 2.f:	For Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraphs 3.a–3.e:	Against Applicant
Subparagraphs 3.f and 3.g:	Withdrawn[42]

Conclusion

In light of the record as a whole, 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.

Michael H. Leonard
Administrative Judge

[42] Tr. 105–106.