DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-02894
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: James P. Roche, Esquire

April 25, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant has an extensive criminal record, including several convictions for assault and battery, and a felony conviction of possession of a controlled substance with intent to distribute. In the last 10 years, he was convicted of only one offense, resisting arrest and detention in August 2008, although he also assaulted his current girlfriend. He was not candid about his arrest record when he applied for his security clearance in December 2008 and in October 2009. Clearance denied.

Statement of the Case

On July 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), which provided the basis for its preliminary decision to deny him a security clearance. The action was taken 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) effective within the Department of Defense on September 1, 2006.

Applicant responded to the SOR allegations on July 22, 2010, and requested a hearing. On August 24, 2010, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On September 2, 2010, I scheduled a hearing for October 8, 2010.

I convened the hearing as scheduled. Eleven Government exhibits (Ex. 1-11) were entered into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on October 14, 2010.

Summary of SOR Allegations

The SOR alleged under Guideline J, Criminal Conduct, that Applicant was arrested on 38 occasions between February 1975 and August 2008 (SOR 1.a-1.n, 1.p-1.mm) for various criminal offenses, and that he sold heroin and cocaine from at least December 1989 to January 1990 (SOR 1.o). While some of the charges were dismissed or otherwise disposed of without a conviction, he was fined for being a disorderly person in June 1982 (SOR 1.c) and July 1986 (SOR 1.h); for operating a vehicle after suspended license (SOR 1.y) and open container (SOR 1.z) in May 1995; and for resisting arrest and detention in August 2008 (SOR 1.mm). He was sentenced to one year in jail (suspended) for a January 1983 possession of a Class D controlled substance (SOR 1.d); to three months in jail for January 1987 assault and assault and battery on a police officer (SOR 1.i); to probation on November 1989 for assault and battery and assault and battery with a dangerous weapon charges (SOR 1.n); to ten years in prison on two counts of possession of a controlled substance with intent to distribute in February 1990 (SOR 1.q); to one year in jail for assault and battery in June 1995 (SOR 1.aa), to 270 days confinement for an October 1999 simple assault with an additional 12 months for violating sentencing terms (SOR 1.gg). He was also found guilty of September 1991 charges of assault and battery on a police officer, threatening to murder, liquor law violation, and a city ordinance (loud noise) (SOR 1.w); and of a September 1995 operating a vehicle after suspended license (SOR 1.bb), although these charges were later filed. A warrant was issued for his arrest on an April 1990 firearms violation charge that was later not prosecuted because he was incarcerated for another offense (SOR 1.r).

Under Guideline E, Personal Conduct, Applicant allegedly falsified his December 2008 Questionnaire for National Security Positions (QNSP) for denying that he had ever been charged with or convicted of a felony offense (SOR 1.a); that he had ever been charged with or convicted of a firearms offense (SOR 1.b); that he had any charges then pending (SOR 1.c); that he had ever been charged with or convicted of any offense related to alcohol or drugs (SOR 1.d); and that he had been charged with or convicted of any offense not otherwise listed in the last seven years (SOR 1.e). Applicant was alleged to have also falsified an October 2009 QNSP by not disclosing that he had been arrested in November 2006 and in December 2006 for simple assault and convicted of resisting arrest

and detention in 2008 (SOR 1.f); and by falsely denying any felony charges (SOR 1.g), any firearms charges (SOR 1.h), and any charges related to alcohol or drugs (SOR 1.i).

Findings of Fact

In his Answer, Applicant admitted the criminal arrests and convictions as alleged under Guideline J. He acknowledged the discrepancy between his responses on the security clearance applications and his criminal record, but he denied any intent to falsify. Applicant's admissions are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is 45 years old and works as a project specialist subcontracted to perform component or mechanical work for defense contractors. He has been with his present employer only since the summer of 2010. (Tr. 23-25.) Applicant applied for a security clearance during his previous employments as a technician from November 2008 to October 2009 (Ex. 1.) and then as a hybrid assembler technician placed with a major defense contractor. (Ex. 2.) Applicant held a security clearance as a part-time security guard for a defense contractor from 1997 to 1999 (Tr. 25.), and he was granted an interim Secret clearance in December 2008. (Ex. 2.) He has never been married, but has fathered four children who range in age from 15 to 24. None of the children live with him. (Ex. 1; 2.) Applicant currently resides with his significant other in a home that they purchased in December 2008. (Ex. 2; Tr. 26.)

Applicant grew up in a rough neighborhood, and he "started running the streets" with his peers. (Tr. 27-28.) Criminal records indicate that that in February 1975, when he would have been only nine years old, he was arrested for disturbing the peace (SOR 1.a). The charge was dismissed. A June 1977 arrest for gaming (SOR 1.b) was continued without a finding. In June 1982, he was reportedly fined for being a disorderly person (SOR 1.c). (Ex. 7.) However, Applicant denies any arrest before January 1983, when he was arrested for possession of a class D controlled substance (marijuana) (SOR 1.d). (Tr. 37-38.) He was found guilty in district court in March 1983 and given a one year suspended sentence. (Ex. 3; 7; Tr. 38.)

In October 1983, he was arrested for indecent assault and battery on a child over 14 (two counts) (SOR 1.e and 1.f). Applicant and his friend had given a ride to a female friend. She complained Applicant had sexually assaulted her, which he denies. (Ex. 3.) On November 23, 1983, the indictments were dismissed in district court, and he was charged as an adult in superior court with felony assault with intent to rape, indecent assault and battery, and assault and battery. The assault and battery charge was continued without a finding until May 30, 1986. The other charges were "nolle prosequi" (not prosecuted). (Ex. 7.)

In May 1984, Applicant was arrested for possession with intent to distribute a Class D controlled substance (SOR 1.g). The charge was dismissed. In July 1986, he was fined $125 on a disorderly conduct charge (SOR 1.h). In early January 1987, he was charged with assault and battery on a police officer and with assault (SOR 1.i). Applicant was pulled

over while driving for a reason that he cannot now recall. He maintains that he accidentally struck the officer when he opened his car door (Ex. 3.); although in October 1987 he was committed to the house of corrections for three months on both charges. (Ex. 7.)

In mid-March 1988, Applicant was charged with threatening to commit crime and with two counts of assault and battery with a dangerous weapon (knife) (SOR 1.j). The charges were dismissed in mid-April 1988. (Ex. 7.)

In June 1988, Applicant was charged in district court with burglary (assault in dwelling), assault and battery, and malicious destruction of property less than $250 (SOR 1.k and 1.l). He failed to appear in court in September 1988, and a default warrant was issued for his arrest in October 1988. In late November 1988, the charges were dismissed in district court and Applicant was bound over to the superior court. In March 1989, Applicant was charged in superior court with assault and battery, felony assault and battery with a dangerous weapon, burglary, threatening to murder, and malicious destruction of property.[1] In August 1989, a "nolle prosequi" was entered as to the burglary charge. The remaining charges were continued without a finding to February 25, 1991, and then dismissed. (Ex. 7.)

In August 1989, Applicant was charged in district court with witness intimidation and with assault and battery. He failed to appear in court and a default warrant was issued for his arrest (SOR 1.m). While those charges were pending, he was arrested in November 1989 for assault and battery and two counts of assault and battery with a dangerous weapon (brass dove and telephone cord) (SOR 1.n). A default warrant was issued for Applicant's arrest when he failed to appear. In September 1990, the district court dismissed the August 1989 charges, but sentenced Applicant to one year probation on the November 1989 assault and battery and assault and battery with a dangerous weapon (brass dove) charges. The other count of assault and battery with a dangerous weapon was dismissed. (Ex. 7.) Applicant testified that the assault and battery offenses in 1988 and 1989 involved his then girlfriend, and that he had hit her. (Tr. 41.)

Around December 1989, Applicant began selling heroin and cocaine on the streets and in the city parks (SOR 1.o). He denies he was "an experienced pusher or anything like that" (Tr. 64.), but admits he sold between $1,200 and $1,500 of the illicit substances in 30 to 60 drug transactions within that month. In January 1990, the police searched his apartment. In addition to heroin and cocaine, they seized two handguns (a 357 magnum and a 25-caliber pistol). (Ex. 3.) Applicant was arrested and charged in district court with possession to distribute a class A controlled substance (heroin); possession to distribute a

[1] Under the pertinent state law, a crime punishable by death or imprisonment in the state prison is a felony and all other crimes are misdemeanors. Mass. Gen. Laws ch. 274 §1. The punishment for assault and battery with a dangerous weapon is imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 2 ½ years, or by a fine or not more than $5,000, or by both such fine and imprisonment. Mass Gen. Laws ch. 265 § 15A. (Ex. 8.) Simple assault and battery is a misdemeanor, as the crime is punishable by imprisonment for not more than 2 ½ years in a house of correction or by a fine of not more than $1,000. Mass Gen. Laws ch. 265 § 13A. (Ex. 8.) Burglary in the nighttime while armed is a felony, as the crime is punishable by imprisonment for life or for any term not less than ten years. Mass. Gen. Laws ch. 266 § 14.

class B substance (cocaine); conspiracy to violate the Controlled Substances Act to possess heroin with intent; possession of a firearm without identification; and possession of ammunition without identification (SOR 1.p and 1.q). In February 1990, the charges were dismissed by the district court and he was indicted in superior court on charges of possession of a Class A controlled substance with intent to distribute; possession of a Class B controlled substance with intent to distribute; possession of a controlled substance with the intent to distribute cocaine or PCP; possession of ammunition; and two counts of possession of a firearm without identification. On January 25, 1991, he was convicted of possession of a Class A controlled substance with intent to distribute and of possession of a Class B controlled substance with intent to distribute, both felonies. He was sentenced to ten years in prison for each offense, to serve five years and 11 months. (Tr. 43.) The possession of a controlled substance with intent to distribute cocaine or PCP was not prosecuted, and the firearms violations were filed. (Ex. 7.) Applicant served two years in prison and then was paroled only to violate his parole by committing assault and battery. (Tr. 43.) He testified he served an additional three years and 11 months. (Tr. 70.)

While Applicant was awaiting trial in superior court on the drug and firearms charges, he was charged in district court in late April 1990 with a firearms violation (false identification in his application for a firearm) (SOR 1.r). Default warrants were issued for his arrest, including in May 1991, but in September 1991, the charge was not prosecuted because he was incarcerated on the felony drug charges. (Ex. 7.) On June 8, 1990, again while the felony charges were pending, Applicant was charged in district court with threatening to commit a crime and with assault and battery on a police officer (SOR 1.s and 1.w). Later in June 1990, he was arrested for a liquor law violation (keeping) and with violating a city ordinance against loud, unreasonable noise (SOR 1.t and 1.w). In November 1990, all the charges were bound over for a "first instance jury trial" of six persons. (Ex. 7; 10.) In September 1991, he was found guilty by a jury of six and the charges were filed. (Ex. 7.)

In July 1990, Applicant was charged in district court with two counts of armed robbery; assault and battery with a dangerous weapon (knife); assault and battery; threatening to commit murder; and knowingly receiving stolen property valued at less than $250 (SOR 1.u). Applicant maintains that while he sat in a friend's car, unbeknownst to him, his friend stole some jewelry. The police stopped their vehicle and Applicant was arrested for being an accomplice. (Ex. 3.) The charges were not prosecuted. In February 1991, Applicant was arrested or assault and battery (SOR 1.v). In August 1991, his case was continued without a finding and then dismissed one year later. (Ex. 7.)

The criminal records indicate that Applicant was arrested in November 1994 and charged with larceny and uttering a forged instrument (SOR 1.x). The state elected not to prosecute on the charges, although not until after several warrants had been issued for his arrest. (Ex. 7.)

In May 1995, Applicant was arrested for operating a motor vehicle after his license had been suspended (SOR 1.y). He was found guilty and fined $625. Later in May 1995,

Applicant was charged with violating an open container law (SOR 1.z). He was fined $50 for the offense in June 1995. (Ex. 7.)

In June 1995, Applicant had an argument with his then girlfriend while out at a local swimming area. He forced her into the car and once they were back at their residence, he threw a coat hanger, which struck her. She called the police, and he was arrested for assault and battery with a dangerous weapon; kidnapping; and assault and battery (SOR 1. aa). (Ex. 3.) In August 1995, he was found not guilty of assault and battery with a dangerous weapon, and the kidnapping charge was "nolle prosequi." But he was sentenced to one year in jail for assault and battery. He was incarcerated until September or October 1997 for violating his parole on the 1990 felony drug charges. (Tr. 43.) Criminal records report that Applicant was charged in September 1995 with operating after his license had been suspended (SOR 1.bb), that he was found guilty, and that the charge was filed. (Ex. 7.) Apparently, he was re-imprisoned after that offense, although the available criminal records do not show the dates of his confinement.

Around October 1997, Applicant moved to his present locale. In four separate incidents occurring in late October 1997 (SOR 1.cc), November 1997 (SOR 1.dd), March 1998 (SOR 1.ee), and September 1999 (SOR 1.ff), Applicant was arrested for simple assault. He was not convicted of any of those charges. (Ex. 5.) He recalls only with respect to the November 1997 incident that he and his then girlfriend pushed each other during an argument. He had been drinking alcohol at the time. (Ex. 3.) The March 1998 and September 1999 incidents involved his current girlfriend, who was not willing to testify against him. (Tr. 44.)

In early November 1999, he was arrested for a misdemeanor simple assault on his current girlfriend that occurred in late October 1999 (SOR 1.gg). (Tr. 44-45.) He was found guilty and his case was continued for sentencing. In June 2000, he was sentenced to 270 days, with one additional year deferred for two years conditioned on not committing any felony or misdemeanor, and no contact with the victim. (Ex. 5; 11.)

In December 1999, Applicant was arrested for witness tampering, a felony (SOR 1.hh) for an incident that allegedly occurred in late November 1999. He was found not guilty. (Ex. 5.) In May 2000, Applicant was arrested for second degree assault, a felony, and for two counts of misdemeanor simple assault, following an incident that allegedly happened in April 2000 involving his children (SOR 1.ii and 1.jj). (Tr. 60, 68.) In January 2001, Applicant was found not guilty (Ex. 5.); although he admits that he hit his daughter with a belt. (Tr. 60.)

In February 2001, Applicant was sentenced to 12 months confinement for apparently assaulting a neighbor. (Tr. 62.) Applicant testified that he served only eight months, so the term must have been concurrent with the 270 days for assaulting his girlfriend. (Tr. 45.) Following his release from incarceration, Applicant began working in April 2002 as an inspector in the circuit board industry. After two years, he left that job for a position as a research and development technician. (Ex. 2.)

Applicant appeared in court in April 2007 on two simple assault charges stemming from separate incidents that occurred in early November 2006 (SOR 1.kk) and December 2006 (SOR 1.ll). Applicant admits that he struck his current girlfriend in the face while they were arguing, causing her lip to swell. Both charges were dismissed when his girlfriend refused to press charges. (Ex. 3; 5; Tr. 46.)

In August 2008, Applicant was arrested for misdemeanor resisting arrest or detention (SOR 1.mm). He had just finished his shift at a local bar when the police investigating a "hit and run" accident summoned him to the scene. Applicant claims that he had only walked a short distance away from the officer when the officer called for backup and he was arrested. While he denies any basis for the charge (Ex. 3; Tr. 48.), Applicant maintains that he pleaded no contest and agreed to pay a $250 fine to put the incident behind him (Tr. 49.), although criminal record checks indicate he pleaded guilty on December 18, 2008. (Ex. 3; 5.)

In November 2008, Applicant was laid off from his employment as a research and development technician that he had held since April 2004. (Ex. 1; Tr. 29.) He was hired as a technician for a company involved in defense work. On December 11, 2008, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) incorporating a QNSP version of the security clearance application. Applicant responded "No" to the police record inquiries, including 24.a., "Have you ever been charged with or convicted of any felony offense?"; 24.b, "Have you ever been charged with or convicted of a firearms or explosives offense?"; 24.c, "Are there currently any charges pending against you for any criminal offense?"; 24.d, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"; and 24.f, "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above?" (Ex. 1.) Applicant was apparently granted an interim Secret clearance in December 2008. (Ex. 2.)

On January 26, 2009, Applicant was interviewed by an Office of Personnel Management (OPM) investigator about his unlisted arrests. He admitted that he did not disclose his arrests because he was "desperate" for the job that he wanted to keep, and he felt that his arrests would be addressed sometime. When asked about the specific offenses, Applicant detailed what he could recall about the arrests in SOR 1.d, 1.p (disposition shown in SOR 1.q), 1.kk, and 1.mm. Applicant told the investigator that for the 1990 felony drug offenses, he was committed to state prison for one year and then placed on probation for nine years after his release. He denied any recall of the arrests identified in SOR 1.g, 1.s, 1.w, and 1.z. (Ex. 3.) The evidence does not show whether he was asked about the assault and burglary charges that had been dismissed, and Applicant testified that he was asked about offenses based on the information the investigator had before him. (Tr. 56.) When confronted at this hearing about the discrepancy between time actually served for his 1990 felony drug offenses and the one-year reported during his interview, Applicant testified that he "picked up what they call a jail house ticket, which is a conduct ticket in jail." (Tr. 70.)

Applicant was re-interviewed by an OPM investigator on March 12, 2009, about some of the arrests that were not discussed during his first interview. Applicant explained that he intentionally omitted his arrests from his QNSP because there were so many arrests and he knew they would be discovered during his investigation. Applicant claimed to have no knowledge of those arrests alleged in SOR 1.b, 1.j-1.n, 1.s, 1.v-1.x, 1.ff, 1.hh, 1.jj, or 1.kk. However, he admitted that some of the unrecalled arrests might well be valid. (Ex. 3.)

Applicant was laid off while his clearance investigation was pending. (Tr. 52.) In October 2009, Applicant began working for an avionics corporation, where he was placed with a major defense contractor. On October 5, 2009, he completed another QNSP. He responded "Yes" to questions 22.a, "Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you; are you on trial or awaiting a trial on criminal charges; or are you currently awaiting sentencing for a criminal offense?," and 22.b, "Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?." He indicated that he had been arrested around October 2008 [sic] for disorderly conduct, and in April 2003 for a traffic citation, but the charges had been dropped. He answered "No" to questions concerning whether he had ever been charged with a felony offense, any firearms or explosives offenses, and any alcohol or drug-related charges. (Ex. 1.)

At his hearing, Applicant continued to deny any intent to falsify his QNSPs ("I knew that somewhere later on I had to explain a lot of that stuff."). (Tr. 32.) When asked why he listed only two minor offenses on his latest QNSP rather than his felonies, Applicant responded, "There's no reason for that." (Tr. 53.) On redirect examination, he testified that when he completed his second QNSP, he believed that all the information he had previously disclosed about his arrest record to the OPM investigator "was all included." (Tr. 54.) On re-cross examination, Applicant indicated he did not list his arrest record on his second QNSP "because there was a lot of information to put down." (Tr. 57.) Despite his lengthy criminal record, Applicant believes the Government should grant him a security clearance because he has "reinvented" himself by learning technical skills, gaining experience, and becoming more responsible, as evidenced by his home purchase. (Tr. 34-35.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative

process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security concern about criminal conduct is set out in Guideline J, 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.

Applicant now disputes any arrests before January 1983, when he was caught with marijuana in his possession. He is not likely to have been involved in gaming activities at age 11. Several of the criminal charges were dismissed, which in the absence of evidence of culpability, must be resolved in Applicant's favor. Even so, his long criminal record spans most of his adult life and includes serious felony drug offenses and several assaults on former and current girlfriends, his daughter, and a neighbor. AG ¶ 31(a), "a single serious crime or multiple lesser offenses," AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted,"

and AG ¶ 31(e), "violation of parole or probation, or failure to complete a court-mandated rehabilitation program," are amply established.[2]

Mitigating condition AG ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," cannot reasonably apply in light of his long criminal history, his bad conduct while in prison, his violation of his parole by committing new assaults, and his relatively recent August 2008 resisting arrest. AG ¶ 32(c), "evidence that the person did not commit the offense," has some applicability to those charges that were not prosecuted or dismissed and for which the evidence is insufficient to prove culpability. In addition to those charges alleged in SOR 1.a-1.c, Applicant denies that he sexually assaulted a female friend in October 1983 (SOR 1.e and 1.f, same offense), and although he was indicted in superior court for felony assault, the charges were not prosecuted or were continued without a finding. The November 1994 larceny and uttering charges were not prosecuted (SOR 1.x). The March 1988 threatening and assault and battery with a dangerous weapon charges were dismissed (SOR 1.j). The burglary and related charges filed against him in June 1988 (SOR 1.k, disposition in SOR 1.l) were not proven. However, the issuance of a default warrant in that case and in subsequent cases raises concerns about whether he can be counted on to comply with the law. Applicant denies any responsibility in the July 1990 incident involving theft of jewelry and those charges were not prosecuted, so AG ¶ 32(c) could apply to the crime alleged in SOR 1.u. The witness tampering charge in SOR 1.jj was not substantiated.

Applicant's consistent employment since April 2002 is some evidence of reform, but even so, his assault of his current girlfriend in 2006 and his resisting arrest in 2008 undermine his case in rehabilitation. He also demonstrates an unacceptable tendency to minimize the seriousness of his criminal drug sales, as evidenced by his testimony that he was not an experienced drug pusher and sold heroin and cocaine for only a few months. Moreover, I cannot fully apply AG ¶ 32(d), "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," because of his lack of candor about his criminal record when he applied for a security clearance in December 2008 and October 2009. *See* Guideline E, *infra*. The Criminal Conduct concerns are not sufficiently mitigated.

[2]Applicant's incarceration for more than a year would have brought his case under AG ¶ 31(f), "conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than one year" of the adjudicative guidelines revised August 2006. With the addition of Section 2003 to 50 U.S.C. § 435(b) in January 2008, the disqualification absent meritorious waiver for persons who were sentenced to and served imprisonment for more than one year only applies to prevent clearances that would provide access to special access programs (SAP), Restricted Data (RD), or any other information commonly referred to as "special compartmented information" (SCI). Such access is not at issue in this case.

Personal Conduct

The security concern for personal conduct is set out in Guideline E, 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.

Applicant did not disclose any of his extensive criminal record when he applied for a security clearance in December 2008. His negative responses to inquiries into any felony charges, firearms charges, pending criminal charges, alcohol or drug charges, and charges within the last seven years were knowingly false. He was obligated to provide "true, complete, and correct" information, irrespective of whether the Government was likely to find out about his criminal record, whether he was personally "desperate" for the job, or in the case of his October 2009 QNSP, whether he had provided some details about his criminal past during his subject interviews. It is difficult to find that Applicant acted in good faith when the information reported on his more recent QNSP was so incomplete and largely inaccurate. As he had on his first QNSP, he denied that he had ever been charged with a felony, a firearms offense, or an offense related to alcohol or drugs. He listed only an April 2003 traffic violation and a 2008 disorderly conduct charge, and indicated that both had been dropped. Disqualifying condition AG ¶ 16(a),"deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," is established.

Applicant acknowledged during his first subject interview that he did not disclose any information about his criminal record on his December 2008 QNSP out of concern for his job (Ex. 3.), and he provided some details about some of his offenses. Yet AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," cannot fully apply. The disclosures during interviews conducted in January 2009 and March 2009 were in response to questions from the investigator from the criminal record information discovered during the investigation. Furthermore, Applicant's misrepresentation of his criminal record on his October 2009 QNSP undermines his evidence in reform. When he answered the SOR, he claimed to not know why his written responses on his security clearance applications were the way they were and he suggested he may not have understood the questions at the time. Without a meaningful acknowledgement of responsibility and expression of appropriate remorse for his QNSP falsifications, I also cannot apply AG ¶ 17(c), "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," or AG ¶ 17(d), "the individual has acknowledged the behavior and obtained counseling to change the behavior

or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." I remain concerned about Applicant's candor and whether he can be counted on to fulfill the fiduciary obligations of a security clearance.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances in light of 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.

In Applicant's favor, his lifestyle appears to be more stable in that he has a record of consistent employment, and he owns his home. The frequency of his criminal activity has diminished since 2002 when he was released from his last incarceration. That said, he has yet to demonstrate that he possesses the good judgment, reliability, and trustworthiness that must be expected from those persons granted security clearance eligibility. Despite evidence that he pleaded guilty to the August 2008 resisting arrest charge, he denies any merit to the charge. His October 2009 QNSP responses were glaring in their omission of his imprisonment for some five years in total for, in part, bad conduct in prison and violating his parole.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	Against Applicant
Subparagraph 1.p:	Against Applicant
Subparagraph 1.q:	Against Applicant
Subparagraph 1.r:	Against Applicant
Subparagraph 1.s:	Against Applicant
Subparagraph 1.t:	Against Applicant
Subparagraph 1.u:	For Applicant
Subparagraph 1.v:	For Applicant
Subparagraph 1.w:	Against Applicant
Subparagraph 1.x:	For Applicant
Subparagraph 1.y:	Against Applicant
Subparagraph 1.z:	Against Applicant
Subparagraph 1.aa:	Against Applicant
Subparagraph 1.bb:	Against Applicant
Subparagraph 1.cc:	For Applicant
Subparagraph 1.dd:	Against Applicant
Subparagraph 1.ee:	For Applicant
Subparagraph 1.ff:	For Applicant
Subparagraph 1.gg:	Against Applicant
Subparagraph 1.hh:	For Applicant
Subparagraph 1.ii:	For Applicant
Subparagraph 1.jj:	For Applicant
Subparagraph 1.kk:	Against Applicant
Subparagraph 1.ll:	Against Applicant
Subparagraph 1.mm:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	Against Applicant
Subparagraph 2.g:	Against Applicant
Subparagraph 2.h:	Against Applicant

Subparagraph 2.i: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

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Elizabeth M. Matchinski
Administrative Judge