DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-04220
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro se*

January 20, 2012

Decision

DUFFY, James F., Administrative Judge:

Applicant has not mitigated the Criminal Conduct and Personal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 22, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On November 3, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). DOHA acted under Executive Order (EO) 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 on September 1, 2006.

The SOR set forth reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue Applicant's eligibility for a security clearance. On November 7, 2011, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On November 18, 2011, the Government compiled its File of Relevant Material (FORM) that contained documents identified as Items 1 through 14.

On November 18, 2011, DOHA forwarded to the Applicant a copy of the FORM with instructions to submit any additional information and objections with 30 days of its receipt. On December 5, 2011, Applicant submitted a three-page response containing documents. His entire response has been marked as Item 15. Department Counsel had no objection to Item 15. The case was assigned to me on January 10, 2012. Items 1 through 15 are entered into the record.

Findings of Facts

Applicant is a 51-year-old employee of a defense contractor. He has worked for his current employer since October 1999. He graduated from high school in 1979. He is married and has two children, ages 16 and 24. He served on active duty in the U.S. Army from August 1979 to August 1999. He retired from the Army in the grade of Staff Sergeant (E-6). He has held a security clearance for 32 years.[1]

The SOR contained nine Guideline J allegations (SOR ¶¶ 1.a through 1.i) asserting the Applicant was charged with various criminal offenses between December 1983 and June 2009. Under Guideline E, the SOR alleged he falsified responses in security clearance applications submitted in August 2000 and December 2009 (SOR ¶¶ 2.a and 2.b) and provided false information to an authorized investigator representing the Department of Defense in April 2010 (SOR ¶ 2.c). Additionally, the three falsification allegations were cross-alleged in a single Guideline J allegation (SOR ¶ 1.j) as violations of 18 U.S.C. § 1001 (a felony statute), and the nine criminal conduct allegations under Guideline J were cross-alleged in a single Guideline E allegation (SOR ¶ 2.d). In his Answer, Applicant admitted all of the SOR allegations. In Item 15, however, he stated that he never intended to mislead or conceal anything on his security clearance applications, which constituted a denial of the two e-QIP falsification allegations. His admissions are incorporated herein as findings of fact.[2]

On December 12, 1983, Applicant shoplifted a key ring, men's wallet, and woman's wallet from a post exchange. When questioned by the military police, he admitted that he removed the merchandise. On May 1, 1984, he was taken to a nonjudicial punishment proceeding for larceny of non-appropriated fund property. He pled guilty to the larceny charge and was awarded a reduction from E-5 to E-4.[3]

[1] Items 5 and 15. In Item 5, he stated that he was an electronics technician. In Item 15, however, he indicated that he was a supply technician and did not have access to classified information.

[2] Items 1 and 4.

[3] Item 7. The SOR incorrectly listed the nonjudicial punishment awarded for the larceny offenses on December 12, 1983, (SOR ¶ 1.a) and February 14, 1989, (SOR ¶ 1.b). Specifically, the punishment listed in SOR ¶ 1.a was actually the punishment awarded for the offense in SOR ¶ 1.b, and vice versa.

On February 14, 1989, Applicant shoplifted a watch valued at $39 from a post exchange. On March 2, 1989, he was taken to a nonjudicial punishment proceeding for larceny of non-appropriated fund property. He was found guilty of this offense and was awarded a reduction from E-5 to E-4 (suspended), 45 days extra duty (suspended), and a forfeiture of $610 per month for two months. His collateral access to classified information was also suspended for this offense.[4]

On December 5, 1990, Applicant backed a government vehicle into a post entrance gate. This accident resulted in minor damage to the vehicle's rear bumper. He fled the scene of the accident. On January 7, 1991, he was taken to a nonjudicial punishment proceeding for fleeing the scene of an accident, but no nonjudicial punishment was awarded. He was given an administrative corrective measure, an oral reprimand, for this misconduct.[5]

At 1:00 a.m. on October 2, 1993, military police stopped Applicant in his vehicle on post. The military police officer detected a strong odor of alcohol emanating from him as he exited the vehicle. A search of the vehicle revealed a cup containing an alcoholic beverage. He failed a field sobriety test and was transported to the local police station for a breathalyzer test. During the breathalyzer test, he failed to give an adequate breath sample for the test. He was charged with driving while intoxicated (DWI) in U.S. Magistrate's Court. He completed an alcohol and drug abuse prevention and control program on March 4, 1994. On March 7, 1994, he was sentenced to probation before judgment for 18 months and fined $350. A Report of Unfavorable Information for Security Determination dated November 22, 1993, reflected that Applicant was not only suspected of the DWI offense but also of an assault consummated by a battery offense. The security determination, however, contained no further information about the suspected assault offense. Consequently, the date and circumstances surrounding the suspected assault are unknown. In his Answer to the SOR, Applicant admitted the assault charge was later changed to domestic disturbance. The security determination indicated that Applicant was not viewed as a security risk, and his access to classified information was not suspended.[6]

On August 22, 2005, Applicant shoplifted a 750 ml bottle of alcohol valued at $30 from a post exchange. While being observed by video surveillance, he concealed the bottle of alcohol and walked around the exchange. He later went to the garden section of the exchange and placed the bottle on the ground near the fence. He exited the exchange at the garden section gate, looked around the premises, returned to the fence, and reached inside to retrieve the bottle while still trying to conceal it. At that point, store security confronted him. While walking back inside the exchange, he was captured on video trying to dispose of the bottle in a bush as he and the security officer

[4] Item 8. *See also* note 3 above.

[5] Items 4 and 9.

[6] Item 10. The SOR incorrectly listed the date of this offense as November 22, 1993.

walked past it. The security officer retrieved the bottle from the bush. The evidence contains no record of the disposition of this incident.[7]

On March 7, 2007, video surveillance at a post exchange captured an unknown male throwing a bottle over the fence from the exchange's garden section. Later, the suspect returned to the garden section, knelt down, and placed another item through the fence near where he previously threw the bottle. The suspect departed the exchange. Store security attempted to detain him, but was unable to do so before he departed the area in a vehicle. The items placed outside the garden section fence were recovered and identified as a bottle of alcohol valued at $25 and medications valued at $13. Store security was able to determine that the suspect's vehicle was registered to Applicant. The investigative report concluded that Applicant was responsible for this offense and, as a result of this incident, a Special Assistant U.S. Attorney sent Applicant a warning letter.[8]

On June 15, 2009, Applicant shoplifted a dietary supplement valued at $9 from a post exchange. On this occasion, he was videotaped taking a box of dietary supplements to the garden center. While there, he took the dietary supplements out of its box and discarded the empty box in the garden center trash can. He proceeded to the cash register where he paid for other items. He departed the exchange without paying for the dietary supplements. A store security officer stopped him outside the store and escorted him to the security office. He refused a consent search of his vehicle and was arrested. The contents of his vehicle were inventoried before it was towed and the dietary supplements were found in the vehicle. As a result of this conduct, he was charged in U.S. district court with stealing government property and unlawful entry. The latter charge reflected that he "did go upon a military reservation for a purpose prohibited by law or lawful regulation or did re-enter or was found within a military reservation after having been removed therefrom or ordered not to return by a officer in command or in charge thereof." He completed a pretrial diversion program and the charges were dismissed on July 28, 2011.[9]

On September 1, 2000, Applicant submitted a security clearance application (SF-86). Question 24 of the SF-86 asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" He responded "No" to that question and failed to disclose his DWI charge of October 2, 1993. He was required to report information regardless of whether it was sealed or otherwise stricken from the record.[10]

[7] Item 11.

[8] Item 12. The investigator's statement in police report apparently listed the incorrect last name of the owner of vehicle that drove away. The registered owner was identified as an individual who had Applicant's first name, middle name, and lived at his address, but the last name did not match his. Of note, other statements in the report indicated Applicant was the registered owner of that vehicle.

[9] Item 13.

[10] Item 14. SOR ¶ 2.a incorrectly indicated the DWI incident occurred on November 22, 1993. That date is when a report (DA Form 5248-R) was submitted.

On December 22, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). Section 22e of the e-QIP asked, "Have you ever been charged with any offense(s) related to alcohol or drugs?" He responded "No" to that question and again failed to disclose his DWI charge of October 2, 1993. Instructions in Section 22 provided that applicants were to "report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed." In responding to other questions in Section 22, he did disclose that a theft of property charge from June 2009 was pending against him.[11]

In responding to the FORM, Applicant made the following statement:

> [I]t was never my intention to lie, mislead or attempt to hide anything on my SF86 (Security Questionnaire for Investigation Processing). I was hopeful that admitting to the questions on The Statement of Reason would show good intension (sic). It was the right thing to do. Again this is not to make excuses for or minimize my actions, but I feel the need to clarify my thinking at that time.
>
> At the time I was told by legal counsel and by my chain of command that the information regarding my charges under the Uniform Code of Military Justice would remain on my restrictive fiche and would be destroyed upon my retirement, and that in the absents (sic) of a conviction no information would be recorded or carried forward, that charges are just accusations and don't constitute guilt when guilt is not established. To further boost my belief in what I was told, was when the SF86 I submitted September 9, 2000 was approved and my security clearance renewed. At that point I foolishly believed that the guidance I had received was true. I was absolutely stunned when I read the Statement of Reasons. My first thought was, who is this person? I thought this must be someone else's file. It was like I did not recognize the person I was reading about. The older charges happened so long ago I had simply forgotten. The more resent (sic) charges because of the manner in which they were dissolved, in that there were no legal proceedings, I automatically assumed there was no information recorded. If I had been more educated regarding the legalities and knowledgeable of the information contained in DOD Directive 5220.6, I would have had clarity and been better situated to answer all questions with through and honest answers. I realize I am responsible and have only myself to blame for the predicament I am in. I ask that after your full and impartial review you find I am unquestionably loyal to both my country and to my profession. I ask that you rule in my

[11] Item 5. SOR ¶ 2.b incorrectly indicated the DWI incident occurred on November 22, 1993. That date is when a report (DA Form 5248-R) was submitted.

> favor so I can continue serving this great nation. I owe everything to my country, for trusting me and training me to protect its sovereignty.[12]

On April 5, 2010, an investigator from the Office of Personnel Management interviewed the Applicant about the pending theft charge he disclosed in his e-QIP. The summary of that interview reflected the following:

> [Applicant] believes the incident [in June 2009] is just a mistake due to the vitamins found in his vehicle was from his previous usage. This is an isolated incident, and he has not had any other incidents of this nature.[13]

I have taken administrative notice of 18 U.S.C. § 1001 which states in pertinent part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

Except for some minor amendments to the sentencing provisions, this statute has been in its present form since 1948.[14]

In his response to the FORM, Applicant stated he has never been a security risk and asked that his professional conduct and exemplary service to the United States be taken into consideration. He also stated that, since turning 50 years old, he found a degree of maturity and has focused on being the very best person he can be. While serving in the Army, he was awarded four Army Achievement Medals, four Army Commendation Medals, a Meritorious Service Medal, six Good Conduct Medals, and

[12] Item 15.

[13] Item 6.

[14] *See* Hearing Exhibit (HE) 1. Even without prompting from the parties an administrative judge may take administrative notice of any pertinent federal statutes or court decisions. ISCR Case No. 98-0507 at 5 (App. Bd. May 17, 1999); ISCR Case No. 00-0244 at 7 (App. Bd. Jan 29, 2001)

other medals and ribbons. He also received a number of certificates of achievement. He also provided a document showing he had an appointment with a licensed clinical social worker to discuss theft, why people shoplift, and alternatives to shoplifting.[15]

Policies

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 to be used 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, administrative judges apply the guidelines 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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

[15] Item 15.

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

AG ¶ 30 sets out the security concern relating to criminal conduct:

> 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and following potentially apply:

> (a) a single serious crime or multiple lesser offenses; and
>
> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant shoplifted, or attempted to shoplift, merchandise from post exchanges on five occasions from December 1983 to June 2009. He fled the scene of an accident in December 1990. In November 1993, he was charged with DWI, which was resolved through probation before judgment and imposition of a fine. As discussed in more detail under Guideline E below, he deliberately failed to disclose his DWI charge in an SF 86 in August 2000 and in an e-QIP in December 2009. He also intentionally provided false information to an OPM investigator in April 2010. The false statements on his security clearance applications and to the investigator constituted violations of a federal criminal statute, 18 U.S.C. § 1001, which are felony offenses. The evidence is sufficient to raise the above disqualifying conditions.

I have considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and the following potentially apply:

> (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; and
>
> (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.

Applicant's fleeing the scene of an accident offense was a minor infraction and occurred over 21 years ago. His DWI and domestic disturbance offenses occurred 18

years ago, and there is no evidence that he subsequently engaged in similar misconduct. The fleeing the scene of the accident, domestic disturbance, and DWI offenses are mitigated under AG ¶ 32(a).

Applicant's shoplifting and falsification offenses are crimes of moral turpitude. Although the shoplifting offenses in 1983 and 1989 were committed long ago, they remain relevant because they are part of a pattern of misconduct that continues to cast doubt on his reliability, trustworthiness, and good judgment. His shoplifting offenses in 2005, 2007, and 2009 and his falsifications in 2009 and 2010 are recent criminal conduct. While serving in the Army, Applicant was punished twice for shoplifting. Such punishment did not reform him because he subsequently continued to steal merchandise from post exchanges. His history of shoplifting spans 28 years. Based on the evidence presented, I cannot find that Applicant is unlikely to engage in shoplifting or falsification offenses in the future. I find that none of the mitigating conditions apply to those offenses.

Guideline E, Personal Conduct

The security concern for Personal Conduct 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

> (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;
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
>
> (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.

Applicant failed to disclose that he was charged with DWI in responding to Question 24 of a SF 86 submitted in August 2000 and Section 22e of an e-QIP submitted in December 2009. In his response to the FORM, he indicated that he believed information about his military charges was destroyed upon his retirement. This statement shows he did not disclose the DWI because he thought the Federal Government no longer retained such records. He was required to disclose the DWI charge even though it might have been stricken from records. I find that Applicant intentionally failed to disclose the DWI charge on both security clearance applications. AG ¶ 16(a) applies.

During an interview with an OPM investigator in April 2010, Applicant indicated that the shoplifting charge then pending against him was an isolated incident and he had no other incidents of that nature in the past. This statement was a deliberate lie. At the time of the interview, he had been punished at nonjudicial punishment proceedings for shoplifting at post exchanges in 1983 and 1989, was caught while shoplifting at a post exchange in 2005, and attempted to shoplift from a post exchange in 2007. His false statements to the investigator were apparently based on his belief that there were no records of these prior incidents. AG ¶ 16(b) applies to his false statements to the investigator.

As discussed above, Applicant has engaged in a pattern of shoplifting offenses. His shoplifting or attempted shoplifting offenses are sufficient to raise AG ¶ 16(c).

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advise of unauthorized personnel or legal counsel advising or instructing the individual specifically concerning security clearance process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;
>
> (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;
>
> (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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant deliberately provided false information on two security clearance applications and during an interview with an OPM investigator. He also engaged in a pattern of shoplifting offenses. His misconduct is recent and repetitive. After examining all of the applicable mitigating conditions, I find that none apply. He has not mitigated the Guideline E security concerns.

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 the applicant's conduct and all relevant circumstances. The 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 considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant served in the Army for 22 years and was awarded a number of medals and letter of appreciation for his service. Since retiring from the Army, he has continued to serve the Federal Government by working for a defense contractor for 12 years. Nevertheless, he has a long history of shoplifting and has committed multiple falsifications. Those offenses raise serious questions about his reliability, trustworthiness, and good judgment. He has failed to present sufficient evidence to conclude such wrongdoing is unlikely to recur. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security

clearance. For all these reasons, I conclude Applicant has not mitigated the Criminal Conduct and Personal Conduct security concerns.

Formal Findings

Formal findings 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
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraphs 1.c – 1.e:	For Applicant
Subparagraphs 1.d – 1.j:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.d:	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.

_____
James F. Duffy
Administrative Judge