DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-06632
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel

For Applicant: David P. Price, Esq.

04/19/2012

Decision

O'BRIEN, Rita C., Administrative Judge*:*

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant submitted a Questionnaire for National Security Positions signed on April 1, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding[1] that it is clearly consistent with the national interest to grant Applicant's request.

[1] *See* Executive Order 10865 and DoD Directive 5220.6. Adjudication of this case is controlled by the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

On June 15, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline E (Personal Conduct) of the Adjudicative Guidelines (AG). Applicant signed his notarized Answer on July 25, 2011, in which he admitted the five allegations, and requested a hearing before an administrative judge.

The first Department Counsel was ready to proceed on September 16, 2011. The case was assigned to me on September 27, 2011. DOHA issued a Notice of Hearing on October 14, 2011, setting the hearing for November 17, 2011. In a memorandum dated November 4, 2011, the subsequent Department Counsel requested a continuance to obtain additional relevant evidence. By Order dated November 8, 2011, I granted the Government's request. At the re-scheduled hearing on December 13, 2011, the Government offered eight exhibits, which I admitted without objection as Government Exhibits (GE) 1 through 8. Applicant testified on his own behalf and presented two witnesses. He also offered 12 exhibits, which were admitted without objection as Applicant Exhibits (AE) A through L. I held the record open until January 6, 2012, to allow him to submit additional documentation. He timely submitted four exhibits, which I admitted without objection as AE M through P. DOHA received the transcript on December 21, 2011.

Procedural Matters

On November 30, 2011, Department Counsel submitted a Motion *in Limine* requesting that collateral estoppel be applied to prevent Applicant from contending at the hearing that he did not commit the offense for which he was convicted at a general court-martial. By memorandum dated December 6, 2011, Applicant objected. By Order dated December 12, 2011, I granted the Government's motion.[2]

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings and the record evidence, I make the following additional findings of fact.

Applicant is a 30-year-old single employee of a defense contracting company, where he has worked as a logistician since March 2010. Following high school, Applicant enlisted in the Air Force, serving on active duty from 1999 to 2001. From 2001 to 2006, he attended college on an ROTC scholarship and received a bachelor's degree. He was commissioned as an officer in January 2007 and served on active duty until 2009. Applicant held a security clearance and access to sensitive compartmented

[2] Applicant failed to disclose his arrest on a 2002 DUI charge, and was convicted of fraudulently obtaining his appointment as an Air Force officer. He can present extenuating and mitigating information about the offense, but cannot re-litigate the guilty finding. However, I allowed sufficient testimony to evaluate Applicant's behavior under the personal conduct guideline.

information (SCI) since 2001. He was court-martialed in 2008, and in 2009, he was administratively separated from the Air Force. (GE 1, 7; AE I; Art. 32 Investigations Report (IR); Tr. 89-95, 156-157)

On October 26, 2002, while an Air Force cadet, Applicant went out with a friend and drank "a large quantity of alcohol." (A1 at 7; Tr. 95) Later, he became lost and drove onto a railroad track. An approaching train was able to stop approximately ten feet before hitting Applicant. Applicant was arrested, given breathalyzer tests, fingerprinted, and spent the night in jail. His blood alcohol content (BAC) was 0.16 at the scene, and 0.14 later at the police station. He was charged with two misdemeanors: driving under the influence of alcohol (DUI), and driving at 0.08 or above. Applicant testified at the hearing that he was aware he had been charged with DUI. He described his day in court as,

> I am waiting for the public defender to come out, and the public defender comes out, and I'm a wreck because I don't know if it's a DUI, under my assumption at that time, if it was a DUI, it was like literally nail in the coffin. (Tr. 105-106)

He pled no contest, and on April 16, 2003, he was convicted on lesser charges of drunk in public and reckless driving. He paid a $400 fine, and his attorney told him the charges would be removed from his record after one year. On March 21, 2005, Applicant withdrew his plea of no contest, and the complaint was dismissed on April 11, 2005. (AE A1, A2; Art. 32 IR at 7, 15; Tr. 105-110, 159-160)

Upon entry into the ROTC program, and at the beginning of each fall term, cadets were counseled on the requirement to report all contacts, citations, or charges by civil or other authorities, regardless of how slight or serious the event, or the ultimate disposition. Any arrest, charge, or conviction was required to be reported within 72 hours on Form 35, and the obligation continued throughout the cadet's enrollment. These warnings were repeated during Applicant's college career.[3] In accord with this policy, Applicant reported a speeding ticket in 2001. Counseling about this requirement occurred on September 30, 2002, less than 1 month before Applicant's DUI, and also on November 11, 2002, 16 days after his DUI. Between October 2002 and early 2005, he did not report that he was arrested, charged with DUI, or convicted on charges of drunk in public and reckless driving. (ROT 207-208, 230; Forms 16, 24, 35)

Applicant testified about the consequences of having a DUI while a cadet:

[3] Among the pertinent Air Force forms were the following: AFOATS Form 35 – *Certification of Involvement with Civil, Military or School Authorities/Law Enforcements Officials* (AE H; ROT at 230) Prosecution Exhibit (PE) 3); Form 4 – to provide a detailed description of civil involvement (ROT 230); Form 16 – *Officer Candidate Counseling Record* (ROT 106; 207; PE 5); AF IMT Form 24 – *Application for Appointment as Reserve of the Air Force or USAF Without Component.* (PE 4)

> In fact actually, I remember somebody asking during the sophomore year, a fellow cadet asked our instructor who was a Major, active duty person, and said, "What would happen with a DUI?" Well, "DUIs are really serious," blah, blah, blah. I mean, you're, you know, "You're facing termination from ROTC." (Tr. 106-107)

According to trial testimony of the Deputy Registrar for ROTC, if the deputy had discovered Applicant had not reported his arrest and DUI charge, Applicant would have been investigated for an integrity breach. He also would have been dis-enrolled from ROTC for a DUI involving a BAC of 0.14, regardless of the fact that he was later convicted on lesser charges. (ROT 33-39, 226-232)

In spring 2005, Applicant asked the commandant of cadets, then-Captain R, if he needed to report a 2002 civil involvement. Applicant testified,

> A: Which I, upon talking to Captain [X], I say, "I have all the paperwork and everything. This is not a DUI." I literally say, "It's a reckless dr[u]nk in public. It's been off my record." And I show him the order on that.
> And I go, "I paid $400 in fines, and that was it." Well, I tell him, and I was like, 'and that was it. That's all that became of this." And he goes, "And you were never found guilty of a DUI? Or you were never found guilty of DUI?" I was like, "No." Then he goes, "Okay, fine. I'm not going to worry about this then."
>
> Q: Okay. Did he say anything about whether you needed to then report that further?
>
> A: Well, and then I said, I was like, "Well, what do we do as far as the ROTC? Because I want to make sure this is okay." He goes, "As far as ROTC is concerned, you don't have to report it. You just did." (Tr. 112-113)

Now-Major R testified during Applicant's court-martial that, in 2005, Applicant asked him if, before getting his physical examination for pilot training, he should report a certain event. The Major stated that Applicant gave him no details other than that "he had been [in] an incident back in 2002, where he got in trouble, went to court, paid a fine, and that the incident had been wiped of (sic) his record." Major R stated that Applicant did not tell him what he had been arrested for, or the initial charges. Major R asked him if he had been fined for a DUI, and Applicant answered "No." Major R told Applicant that since it did not involve a DUI, and had been removed from his record, he should go ahead and report it, because it was not a problem.[4] Major R testified at

[4] Applicant reported convictions for Drunk in Public and Reckless Driving on a Form 8500-B, Medical Certificate and Student Pilot Certificate. Although it concerns a physical examination for pilot training, I cannot determine if this is the report that Applicant discussed with then-Capt R in 2005 because the form is not properly dated; in the date block, Applicant wrote his birth date. (AE A-4)

Applicant's court-martial that he did not learn Applicant was convicted of public intoxication and reckless driving until two weeks before the May 2008 court-martial.[5] (ROT at 20-26)

Several months later, in October 2005, Applicant was interviewed as part of his security clearance investigation. He described the 2002 alcohol-related incident involving the police, and told the agent the following: he was alone in a bar; had 48 ounces of beer over two to three hours; was approached by police while he was walking outside the bar; he did not know the results of his breathalyzer, but he was not intoxicated; he was held in jail for two hours; no charges were filed; he did not have to go to court. Because no charges were filed, he was not "arrested," and had no further contact with authorities. He considered the matter dropped, did not tell anyone, and did not have to report it on his security clearance application. He did not consider it a serious matter. When asked two times during the security interview if he had ever been arrested, charged, or convicted of any crime, he answered "No" both times. He explained in his interrogatory response that he answered "No" because it was expunged and because he thought Major R's statement that he was not required to report it to ROTC leadership also applied to the security clearance process. (GE 2)

At his 2010 security interview, Applicant's provided a different description of the events surrounding his 2002 DUI arrest: he was with a friend; had 64 ounces of beer; drove after leaving the bar; became stuck on railroad tracks; was arrested and held until the following morning; later received legal papers notifying him that he was charged with DUI and was required to appear in court; was assigned a public defender; and was found guilty in court of reckless driving and public intoxication. DOHA provided copies of both interview summaries to Applicant as part of the current adjudication. He adopted the 2010 summary as accurate. However, he provided corrections to the 2005 summary, maintaining that the summary was "not an accurate reflection" of the information he gave the investigator. (GE 2)

When Applicant was asked at the hearing why he waited three years to inform his command of the 2002 arrest, he testified,

> Because in my mind it was not resolved yet. At the time I was like, "Well, as long as it gets resolved, and as long as I take care of it before I graduate," you know, I will go hat in hand and here we go. That was a very incorrect though[t] process. (Tr. 185)

[5] This statement conflicts with Major R's letter of August 27, 2009, in which he states that (1) Applicant told him he was convicted of reckless driving and public intoxication in spring of 2005; and (2) that Applicant "did **not** need to further document or report his civil involvement from 2002 to anyone." [emphasis added] However, in that letter, Major R reiterates that Applicant told him "that it was not a DUI." (GE 2; AE A-3)

He admitted he should have reported it earlier. He testified that, "There's - I learned definitely a huge lesson, don't get me wrong. Granted, it's a very expensive one. But, really at the time, it was just - it ended up being just a huge mistake on my part." (AE A-1, A-2; Tr. 108-110, 159-160, 185)

In 2006, Applicant applied to become an Air Force officer by completing AF IMT Form 24, which asked if he had ever been arrested or convicted of any civil law violation, including minor traffic violations. Applicant answered "No." He was appointed as a second lieutenant. (ROT-Prosecution Exhibit (PE) 3)

In summer 2007, Applicant attended the six-week Air and Space Basic Course (ASBC). He began a sexual relationship with a female second lieutenant. On June 16, after a party where he admits he had "a lot of alcohol," they had sexual relations. The next morning, she accused him of rape, although she later changed her statements. As a result of this incident, Applicant's Squadron Commander (Lt. Col. Z) ordered Applicant, on June 18, 2007, not to consume alcohol during his temporary duty (TDY) at ASBC. On July 3, 2007, Lt. Col. Z issued Applicant a Letter of Reprimand (LOR-1) stating that, while inebriated, Applicant forced a classmate to engage in sexual acts. In his written response to the LOR, he denied the allegation. He provided his cell phone to support his claim of the ongoing relationship, and contended that the sex was consensual. Applicant's witness, who had read the report of the investigation, testified that within the first day after the incident, the woman who accused Applicant changed her mind and said he did not rape her. Applicant was interrogated by the Office of Special Investigations (OSI), but he was not arrested. In a letter dated July 9, 2007, Applicant's defense counsel provided facts that undermined the accuser's credibility, including the contradictory statements she made in sworn statements. Criminal charges were not filed against Applicant. (GE 2, 3, 4, 5; AE B1, D1, D2; Tr. 68-69, 121-135, 161-167)

In an LOR dated July 12, 2007 (LOR-2), Applicant was reprimanded for failing to obey the order not to consume alcohol. The squadron commander noted in the LOR that Applicant's team leader saw three six-packs of beer in Applicant's room, and that Applicant told him not to say he had seen the alcohol. The squadron commander also found full and empty alcohol containers and an empty 12-pack box in his room. Applicant testified that the empty boxes were trash he collected in the dorm. He admitted he possessed full containers of beer, some of which he intended to offer to people who visited his room, and three six-packs that he intended to give it to a friend. He denied he consumed alcohol. In a letter dated July 16, 2007, Applicant's defense counsel submitted a statement that there was no direct evidence showing that Applicant consumed alcohol. A written statement by the person who received the gift of beer supported Applicant's claim. (GE 2, 4; C1, C2; Tr. 135-141, 168-170)

Based on the two LORs, Applicant was dis-enrolled from ASBC, with prejudice, in July 2007. On July 17, 2007, Lt. Col. C, deputy commander of Applicant's operations group, accompanied Applicant from state A, where he had been attending ASBC, to his

duty station in state B. On that day, according to Applicant's statement dated October 5, 2007, Lt. Col. C ordered him not to consume or possess alcohol. (AE D1, M)

Applicant's operations commander, Col. P, learned Applicant had been involved in an alcohol-related incident in 2002. In October or November 2007, he held a meeting to counsel Applicant about his drinking, and also asked about the circumstances of the 2002 incident. Applicant stated that he drank at a party, started driving, realized he had too much to drink, pulled over, left his car, and called for help. He also said he could not be convicted of DUI because the police had not seen him driving, and the charge was thrown out of court. Col. P. subsequently requested a copy of the police report, and discovered that the facts differed from what Applicant reported to him. (Art. 32 Investigation Report)

At the same meeting, according to Applicant, Col. P. said that he was "not sure about the issuing of a no alcohol order" and that "…he would assume that I should stay away from alcohol, especially since I could not afford any further problems…" At the hearing, Applicant testified that, when he met with Col. P, "There was nothing said or written at the time with regard to saying, 'Do not drink alcohol.'" During the meeting, Applicant told Col. P he would be taking action "… in order to remedy an already bad situation, along with an apology for embarrassing the [X] Operations Group as a member."[6] (AE M; Tr. 145, 171-173)

In a memorandum dated October 5, 2007, Applicant admits that he consumed alcohol on August 31, 2007, September 21, 2007, and September 27, 2007, at public events, where he was observed by his chain of command. He was not intoxicated. Lt. Col. C informed him his actions violated the orders not to consume alcohol. In his response to LOR-2, Applicant stated he thought the order applied only to his return trip from state A to state B in July 2007. However, at the hearing, Applicant testified that he thought LOR-2 covered the period of his TDY at ASBC. On December 5, 2007, Lt. Col. C issued a third letter of reprimand to Applicant (LOR-3). It noted that Col. P had "re-issued the no drinking order previously given by me." It also noted that Applicant had violated two orders not to possess or consume alcohol, that neither order had a termination date, and that Applicant had violated Art. 92 of the UCMJ. Applicant was offered a choice of a non-judicial punishment (NJP) or court-martial, and chose the latter. (GE 2, 5; AE M; Tr. 42-46, 143-152)

The Director for Administrative Law, Office of the Judge Advocate General, in an April 14, 2009 case review, found that Applicant's file contained "insufficient evidence to support the misconduct Respondent [Applicant] was alleged to have committed in two of the three letters of reprimand he received. Additionally, the legal basis for two of the

[6] Applicant's first witness, who was Applicant's squadron commander in summer 2007, testified that Col. P described Applicant as "wired wrong" and commented to the witness, "I just don't think he thinks like us." The witness described Col. P as having a vengeful attitude toward Applicant, and testified he told Col. P that he disagreed with his actions concerning Applicant. (Tr. 39-48)

letters of reprimand (failure to obey orders not to drink) are questionable."[7] The letter also stated Applicant "admits he should have disclosed the reckless driving conviction in 2002," but noted that Applicant characterized his failure as a "mistake" and "minor misconduct." (GE 7)

In May 2008, a general court-martial tried Applicant for violating Art. 83 of the USMJ--Fraudulent Enlistment, Appointment, or Separation--for accepting the appointment after deliberately concealing his 2002 arrest and DUI charge.[8] He was found guilty and sentenced to a $25,000 fine and a reprimand. Applicant was not dismissed and continued to serve as an officer until 2009.[9] (GE 6; AE H; ROT)

Applicant was promoted to first lieutenant in January 2009. The same month, the Deputy Chief of Standardization/Evaluation wrote a referral letter of evaluation covering February 2007 to April 2008. It described Applicant as proactive, and having displayed tenacity and selfless volunteer leadership. It also noted "questionable integrity" because of Applicant's failure to report the DUI on his pre-commissioning paperwork. He also noted Applicant's "problematic judgement" [*sic*] because he violated an order not to drink during the period and received a letter of reprimand. Applicant's response noted that he had not had any integrity or judgment issues since July 2007. He also stated, "Although I continue to assert my innocence with regard to the Art. 83 offense, I acknowledge and respect the findings of my case." (AE E1, E3)

Shortly after his promotion, Applicant was informed he was being processed for administrative separation. He was separated in June 2009, with a general discharge, under honorable conditions. He was required to "repay the United States Government the unearned, pro-rata share of the funds" that the Air Force expended on his AFROTC scholarship and tuition assistance. (GE 7; Tr. 153-156)

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[7] The Art. 32(b) Investigation Report discusses the legality of military orders not to consume alcohol. In *U.S. v. Wilson,* (12 USCMA 165, 30 CMR 165, 1961), the court held that, for an order that restricts individual rights to be legal, "…it must be connected with the morale, discipline and usefulness of military service." The court further noted that, "In the absence of circumstances tending to show its connection to military needs, an order which is so broadly restrictive of a private right of an individual is *arbitrary and illegal."* [emphasis in original]. In *Wilson*, the court found no military connection and held the order not to consume alcohol to be illegal. The court later overruled *Wilson* to a limited extent, when the order not to consume alcohol occurred under certain circumstances not applicable to this case. (*U.S. v. Blye*, 37 M.J. 92, CMA 1993) (GE 8)

[8] Applicant also failed to disclose his 2002 arrest and DUI charge on his March 2005 security clearance application (Question 24. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?") and provided an inaccurate description of the event to an investigator during his 2005 security interview. These failures to disclose are not alleged in the SOR. (GE 2; Art. 32 Report, Exhibit 9)

[9] Applicant testified that the fine and the scholarship repayment are the same debt. During the eight months he remained in the Air Force after the court-martial, repayment was accomplished through deductions of approximately $1,000 to $1,500 per month from his pay. Since his separation, the government has applied his income tax refunds to the debt. He is unaware of the remaining balance, is not making any other payments, and has not been contacted by the Department of the Treasury regarding the debt. (Tr. 186-196)

In June 2009, Applicant's commander during the period April 2008 to June 2009 wrote a letter of evaluation describing him as a selfless volunteer, a team builder, and take-charge leader "with unlimited potential." The ROT lists numerous citations and certificates of recognition and appreciation, all awarded between 2001 and 2008. (AE F, G, N-P; ROT, Defense Exhibits K through AF).

Applicant's colleagues attest to his performance and character. A Lt. Col who worked with him after the general court-martial found him to be a "valuable and trusted member of the unit" who performed in an outstanding manner. More than one reference mentioned his participation in community and volunteer work with the Company Grade Officer's Council (CGOC) and the Special Olympics, as well as his work with homeless veterans, and terminally ill children. A colleague who is an Air Force captain describes him as honest, hardworking, and trustworthy. Several military members who were colleagues during the time period when the LORs were issued described Applicant as professional, dedicated, and trustworthy. Applicant's recognitions include being selected Company Grade Officer (CGO) of the Quarter, three nominations for CGO of the month, and nomination for Military Outstanding Volunteer Service Medal for his many volunteer activities. (GE 7; AE J-L, N-P; ROT-PE 14)

Policies

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent adjudication policy in the AG.[10] Decisions must also consider the "whole-person" factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy governing the grant or denial of access to classified information. In this case, the pleadings and the information presented require consideration of the security concerns and adjudicative factors addressed under Guideline E (Personal Conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest[11] for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy

[10] Directive at § 6.3.

[11] *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

burden of persuasion.[12] A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interests as her or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.[13]

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Guideline E allegations implicate the following disqualifying conditions under 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;
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;
>
> (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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

[12] *See Egan,* 484 U.S. at 528, 531.

[13] *See Egan;* Adjudicative Guidelines, ¶ 2(b).

person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing….

Applicant received three LORs in 2007. The first was based on an accusation of rape by a victim who gave contradictory statements, and then withdrew the accusation. Applicant was never arrested or charged. The second and third LORs stemmed from Applicant's alleged violation of orders to forego consuming alcohol. It appears, based on *U.S. v. Wilson,* that these were not lawful orders; therefore, Applicant did not have an obligation to obey them. On review of the case, the JAG office determined that the legal basis for the alcohol-related orders was questionable. I find for the Applicant as to the LORs listed in the SOR.

After being granted an ROTC scholarship, Applicant failed to report a civil involvement--his 2002 DUI arrest–during his years as a cadet, a period when he was repeatedly counseled on the requirement to complete Forms 4 and 35 to report and describe any civil involvement. He was informed of this obligation less than 1 month before his DUI, and again 16 days after his DUI. Believing that a DUI charge would have dire consequences for his military career, he deliberately ignored his obligation to report. In 2005, he provided the Commandant of Cadets, then-Capt. R, with an incomplete and misleading description of events. The true facts were not revealed until Col. P sought out the police report in 2007. Applicant's conduct demonstrates a pattern of dishonesty. AG ¶¶ 16(a), (b), and (d) apply. AG ¶ 16(e) also applies because Applicant's concealment of these facts, which he believed could have ended his Air Force career, made him vulnerable to exploitation during the years he concealed the truth.

Under AG ¶ 17, the following mitigating conditions are relevant:

(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 advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the 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; and

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

Rather than acting in good faith by disclosing his DUI arrest, Applicant repeatedly concealed it for three years, each time he failed to disclose his civil involvement on the Air Force forms while a cadet. Applicant's concealment cannot be considered minor, as it led to a criminal conviction. The DUI is ten years old, and the court-martial conviction is four years old. Generally, distance in time supports at least some mitigation. Here, however, Applicant's contention at hearing that he simply made a "huge mistake" brings his poor judgment into the present. Moreover, Applicant's failure to admit that he deliberately chose to hide his DUI charge because of the damage it would cause to his career, undermines a claim of rehabilitation, and does not engender confidence in his trustworthiness or support a conclusion that he will not engage in self-serving conduct in the future. AG ¶ 17 (a), (c), and (d) do not apply.

AG ¶ 17 (b) is not relevant because it applies to improper advice that specifically relates to the security clearance process. As to AG ¶ 17(e), Applicant's vulnerability to coercion is no longer a security concern because once his command became aware of the true facts, his secret was no longer a source of exploitation. However, over the years from 2002 to 2007, while he held a security clearance and kept the knowledge of his DUI arrest from his command, he was vulnerable to exploitation. His actions to conceal the true nature of his civil involvement demonstrate his desire that his command never learn of events that would jeopardize his military career. Moreover, his concealment was revealed not through his own positive steps, but by Col .P's request

for the police report. He is no longer vulnerable, and AG ¶ 17(e) applies to his current vulnerability. However, Applicant allowed himself to be vulnerable to coercion for the years that he kept the secret from his command[14] and AG ¶ 17(e) does not does not mitigate his conduct during those years. AG ¶ 17(e) can only be applied to mitigate AG ¶ 16(e); the remaining personal conduct concerns are not mitigated.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

In evaluating the whole person, I considered that Applicant has provided evidence of a strong work ethic, high-quality job performance, willingness to engage in volunteer activities, and to encourage others to do so. On the other hand, Applicant's pattern of concealment does not reflect good judgment or reliability and demonstrates a troubling willingness to place his own interests above those of the government.

Applicant engaged in a serious violation of trust when he deliberately and repeatedly concealed information that he was on notice he was required to disclose. After hiding the information completely until early 2005, he disclosed misleading facts to his command. He did so for his own benefit, to avoid jeopardizing his career. His actions resulted in a conviction at general court-martial, and his administrative separation from the Air Force.

Applicant failed to disclose his 2002 arrest and charge of DUI on his March 2005 security clearance application. In addition, October 2005 security interview summary differs substantially from the true facts of his DUI arrest. Applicant did not explain why

[14] *See* ISCR Case No. 91-0259 (App. Bd. October 7, 1992)

these discrepancies occurred and, certainly, an agent might inaccurately record a few details. But to claim that the agent recorded a 25-line version of events that differs in so many details from what Applicant told him is not credible. I conclude Applicant deliberately provided the agent with incomplete, inaccurate, and misleading information during his 2005 security interview. This conclusion is supported by the fact that Applicant minimized and misrepresented the events to then-Capt R just a few months before the security interview. The failures to disclose in the security clearance application and security interview are not alleged in the SOR, and I did not consider them in drawing my conclusions on the SOR allegations. However, under the whole-person concept, I find that these additional falsifications and misrepresentations further undermine Applicant's credibility and claims of rehabilitation.[15]

Applicant left himself vulnerable to exploitation from 2002 to 2007 while he held a security clearance and concealed the true facts about his DUI. He demonstrated persistently poor judgment over a period of several years, continually minimized his serious misconduct, and continues to maintain that his concealment was the result of mistake rather than his deliberate choice. His behavior indicates lack of rehabilitation and raises serious questions about his reliability and trustworthiness.

Applicant placed his own desires above the Government's need for those who hold security clearances to be candid and forthright. Overall, his conduct raises doubts about his suitability for access to classified information. Such doubts must be resolved in favor of the national security. For these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

Paragraph 1, Guideline E	AGAINST APPLICANT
Subparagraphs 1.a – 1.c	For Applicant
Subparagraphs 1.d – 1.e	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge

[15] ISCR Case No. 03-20327 (App. Bd. Oct 26, 2006) at 4.