DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

03/20/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding criminal conduct and personal conduct considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On July 14, 2000, Applicant applied for a security clearance and submitted a Security Clearance Application (SCA).[1] On August 21, 2009, he submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).[2] On an unspecified date in 2011, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on May 2, 2011.[3] On an unspecified date in 2011, DOHA issued him

[1] Item 6 (SCA), dated July 14, 2000.

[2] Item 7 (SF 86), dated August 21, 2009.

[3] Item 8 (Applicant's Answers to Interrogatories, dated May 2, 2011).

another set of interrogatories. He responded to the interrogatories on May 2, 2011.[4] On July 14, 2011, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on July 27, 2011. In two statements, one dated and notarized November 15, 2011,[5] and the other undated and not notarized,[6] Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on January 9, 2012, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on January 13, 2012, but as of February 24, 2012, he had not submitted any further documents or other information. The case was initially assigned to another administrative judge on February 27, 2012, but was reassigned to me for caseload reasons on March 8, 2012.

Findings of Fact

In his second Answer to the SOR, Applicant admitted all of the factual allegations pertaining to criminal conduct and personal conduct in the SOR (¶¶ 1.a.-1.e., and 2.a.-2.e.), adding explanations for his actions. The Government subsequently moved to amend the SOR by withdrawing SOR ¶ 2.c., and that motion is hereby granted. Applicant's admissions and other comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 35-year-old employee of a defense contractor. He has been serving as a master tradesperson since August 2002. He was previously employed as a backhoe driver from July 1995 to June 1997; a ship fitter from July 1997 until April 1999; a rigger from May 1999 until November 1999; a tradesperson from November 1999 until

[4] Item 9 (Applicant's Answers to Interrogatories, dated May 2, 2011).

[5] Item 5 (Applicant's Second Answer to the SOR, dated November 15, 2011).

[6] Item 3 (Applicant's First Answer to the SOR, undated).

April 2000; and a tradesperson from May 2000 until August 2002.[7] He was unemployed from August 1993 until June 1995.[8] Applicant has never served in the U.S. military.[9] He attended high school from June 1991 until June 1995, but did not receive a diploma.[10] Applicant was married in October 2004.[11]

Criminal Conduct

Applicant has a lengthy history of criminal conduct commencing in 1997, and it has continued through at least April 2010. In September 1997 (SOR ¶ 1.a.), after consuming either 24 beers during a seven-hour period or sharing several pitchers of beer and consuming three doubles of Crown Royal over a similar period (Applicant furnished both scenarios), he was pulled over for racing another vehicle, and charged with driving under the influence (DUI), a misdemeanor. He was represented by counsel and eventually found guilty. In February 1998 he was sentenced to 365 days in jail, with 364 days suspended, fined $1,500, with $800 suspended, and placed on supervised probation for two years. He was also ordered to successfully complete an approved agency chemical dependency evaluation and comply with any recommended treatment, successfully complete a DUI victim's panel, not to drive after drinking any alcohol, and have no violations of any criminal laws. Applicant's driver's license was suspended effective February 27, 1998.[12]

In April 1998 (SOR ¶ 1.b.), Applicant was arrested for forgery and theft in the first degree, both felonies, and charged with first degree conspiracy to commit theft, later amended to theft in the third degree, a gross misdemeanor, involving a scheme to commit bank fraud involving counterfeit checks with a purported face value of approximately $46,800. In September 1998, Applicant was represented by counsel, and Applicant's guilty plea to the amended charge was accepted. In September 1998, he was sentenced to 365 days in jail, with 360 days suspended, fined $1,135, and placed on supervised probation for two years. He was also ordered to have no violations of any criminal laws for the period of his probation.[13] Other than Applicant's memory of his sentence, which contradicts the actual court records, there is no evidence to support the

[7] Item 6, *supra* note 1, at 80-83; Item 7, *supra* note 2, at 12-14.

[8] Item 6, at 83.

[9] Item 7, *supra* note 2, at 15.

[10] *Id.* at 11.

[11] *Id.* at 18-19.

[12] Item 11 (Court Judgment and Sentence, dated February 23, 1998); Item 15 (Court Docket, dated March 14, 2002); Item 8 (Personal Subject Interview, dated October 21, 2009 (PSI-2009)) at 2, attached to Applicant's Answers to Interrogatories; Item 8 (Personal Subject Interview, dated August 9, 2010 (PSI-2010)) at 1, attached to Applicant's Answers to Interrogatories.

[13] Item 13 (Police file, various dates); Item 14 (Court records, various dates); Item 16 (Federal Bureau of Investigation (FBI) Identification Record, dated September 13, 2009); Item 10 (Statement, dated June 28, 2001) at 2-3; Item 8 (PSI-2010), at 2.

SOR allegation that the sentence included six months in jail, a fine of approximately $5,000, or probation for five years.[14]

In November 1998 (SOR ¶ 1.c.), Applicant was charged with driving while license suspended/revoked, in the third degree. He was fined $250.[15]

In August 2000, in connection with his 1998 conviction for theft in the third degree, a notice of violation was issued by the court alleging violations of Applicant's conditions of probation. He had failed to pay his legal financial obligations as ordered by the court, leaving an unpaid balance of $865, and he had failed to pay the cost of the supervision fees, leaving an unpaid balance of $130. Applicant's adjustment to supervision was characterized as "fair to poor." The matter was sent to collection.[16] It is unclear if the matter was ever resolved.

In April 2010 (SOR ¶ 1.d.), after sharing a pitcher of beer with his former supervisor and eating some pizza during a three-hour period, Applicant was pulled over for running a red light. Several breathalyzers were administered, and Applicant's blood alcohol content registered 0.14. He was charged with DUI. Applicant entered a plea of guilty to the charge, and he was subsequently fined $1,962. He was also ordered to complete an alcohol education first offender/conviction program and successfully complete a Mothers Against Drunk Driving (MADD) impact panel. His driver's license was suspended for 30 days.[17] There is no court-generated evidence to support the SOR allegation that the sentence included a five-year period of probation. Nevertheless, Applicant admitted the allegation.

Personal Conduct

On July 14, 2000, when Applicant completed and submitted his SCA, he responded to several questions set forth therein. The SOR alleges Applicant deliberately failed to disclose complete information in response to the following police record questions: § 21 - (*Have you ever been charged with or convicted of any felony offenses? . . . For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order . . .* .) (SOR ¶ 2.a.), and § 24 – *(Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?*

[14] Item 8 (PSI-2010), at 2.

[15] Item 12 (Court Docket, dated November 18, 1998).

[16] Item 14, *supra* note 13, at 22-25.

[17] Item 9 (Court Records, various dates), attached to Applicant's Answers to Interrogatories. It should be noted that there is an Item 18 (Incident History, dated November 23, 2011), wherein the incident referred to as an April incident is reflected to as a June incident with references to a bail amount and a suspension of the sentence for five years. This document is clearly second degree hearsay that is disputed by the official court records, and, without more, I consider it unreliable and inaccurate.

For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order . . . .) (SOR ¶ 2.b.). Appellant answered "no" to both questions.[18] Applicant admitted incorrectly answering § 21 related to the arrests for forgery and theft in the first degree. He also admitted intentionally falsifying the answer to § 24 related to the 1997 DUI, but explained that he "was unaware that the above information was to be included. . . ."[19]

On August 21, 2009, when Applicant completed and submitted his SF 86, he responded to a question set forth therein. The SOR alleges Applicant deliberately failed to disclose complete information in response to the following police record question: § 22e - (*Have you EVER been charged with any offense(s) related to alcohol or drugs?* (SOR ¶ 2.d.). Appellant answered "no."[20] Although he subsequently admitted the allegation, he previously denied intentionally falsifying the material facts, and contended that his failure to list the 1997 DUI was based on erroneous advice he had received from a coworker, who possessed a security clearance, that he should only go back ten years.[21] He later explained that he thought the question "only referred to non-driving violations."[22]

During his personal subject interview with an investigator of the U.S. Office of Personnel Management (OPM) in October 2009, Applicant furnished the investigator false and erroneous information pertaining to the incidents for which he was convicted of theft in the third degree. He initially denied any wrongdoing and furnished a scenario that was clearly at odds with the police investigation. Furthermore, Applicant's claim that the investigator told him "not to add [the incident] if [Applicant] didn't commit the crime,"[23] stretches credulity. That interview was conducted under oath. Applicant's statements were intentionally false, and in violation of 18 U. S. Code § 1001. In addition, Applicant admitted the allegation.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[24] As Commander in Chief, the President has the authority to control access to information bearing on national

[18] Item 6, *supra* note 1, at 86-87.

[19] Item 5, *supra* note 5, at 2.

[20] Item 7, *supra* note 2, at 34-35.

[21] Item 8 (PSI-2009), *supra* note 12, at 1.

[22] Item 5, *supra* note 5, at 2.

[23] *Id.*

[24] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[25]

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[26] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[27]

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information.

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[25] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[26] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

[27] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Furthermore, "security clearance determinations should err, if they must, on the side of denials."[28]

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[29] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Criminal Conduct

The security concern under the guideline for Criminal Conduct is set out in AG ¶ 30:

> Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), "*a single serious crime or multiple lesser offenses*" is potentially disqualifying. Similarly, under AG ¶ 31(c), an "*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*," may raise security concerns. As noted above, Applicant has a lengthy history of criminal conduct commencing in 1997, and it has continued through at least April 2010. He has two DUI convictions, a conviction for driving while his license was suspended/revoked, and most importantly, a conviction for theft in the third degree. He also knowingly violated 18 U. S. C. § 1001, when he failed to disclose these offenses on his SCA and SF 86, as well as during his OPM interview. Accordingly, AG ¶¶ 31(a) and 31(c) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where "*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*." Similarly, AG ¶ 32(d) may apply where "*there is evidence of successful rehabilitation: including but not limited to the passage of time without recurrence of*

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

[29] *See* Exec. Or. 10865 § 7.

criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."

AG ¶ 32(a) does not apply. Applicant's course of criminal conduct commenced in 1997, and continued through at least April 2010. The frequency and diversity of the conduct, and Applicant's apparent disregard of his probationary rules regarding continued criminal conduct, cast doubt on Applicant's reliability, trustworthiness, or good judgment.

AG ¶ 32(d) only partially applies. It appears that Applicant eventually complied with some of the court-imposed sentence and probation requirements which arose from his 1997 and 1998 convictions, as well as his 2010 conviction, but there is also evidence that he failed to comply with elements of his sentences. He did not avoid participation in additional criminal enterprises, or stop driving on his suspended or revoked driver's license. When expected to tell the truth on security clearance applications in 2000 and 2009, as well as during a 2009 security interview, he lied in violation of 18 U. S. C. § 1001. Applicant has offered minimal evidence of successful rehabilitation and remorse. There is little evidence of a good employment record or constructive community involvement. Five years of criminal conduct, and less than two years without recurrence of criminal activity, is too brief a period to conclude that such conduct will not recur.

Guideline E, Personal Conduct

The security concern under the guideline for Personal Conduct is set out in 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.

The guideline notes a condition that could raise security concerns. Under AG ¶ 16(a), 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 potentially disqualifying. Also, "*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*," may raise security concerns under AG ¶ 16(b).

Since the SCA question pertaining to § 24 is unambiguous, I conclude it was unreasonable for Applicant to omit his 1997 DUI. Also, as to the SF 86 question pertaining to § 22e, since the question in issue used capital letters for the word "EVER,"

I conclude it was unreasonable for Applicant to ignore the focus on that word and accept the guidance of someone who was not in authority to give meaningful advice or to claim an unreasonable interpretation. Applicant deliberately falsified responses and concealed critical information in his security clearance applications in 2000 and 2009, as well as during his 2009 security interview. After examining his responses and various explanations, as well as his admissions, it seems unreasonable for him to take the positions he has taken. Under those circumstances, I find Applicant's explanations are not credible in his denial of deliberate falsifications. AG ¶¶ 16(a) and 16(b) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct, but none of them apply.

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 the 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. Moreover, I have evaluated this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[30]

There is some evidence in favor of mitigating Applicant's conduct. Applicant's criminal activity resulted in his being convicted and sentenced on four occasions. Upon completion of his sentences and probation, his debts to society were satisfied.

The disqualifying evidence under the whole-person concept is more substantial. Applicant has a history of criminal activity, including the four incidents for which he was convicted, as well as his three violations of 18 U. S. C. § 1001. Equally troubling is Applicant's repeated disregard of the parameters of his sentences and probation, as well as his cavalier attitude regarding truthfulness. Applicant's actions indicate poor self-

[30] *See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

control, lack of judgment, or unwillingness to abide by rules and regulations, all of which raise questions about his reliability, trustworthiness and ability to protect classified information. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c.:	Withdrawn
Subparagraph 2.d.:	Against Applicant
Subparagraph 2.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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES
Administrative Judge