DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-04317
	)	
	)	
Applicant for Security Clearance	)	

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

07/24/2013

Decision

DAM, Shari, Administrative Judge:

Applicant failed to disclose information about previous criminal offenses related to alcohol and drugs on his security clearance application. He mitigated the personal conduct security concerns related to the non-disclosure. Based upon a review of the record evidence as a whole, eligibility for access to classified information is granted.

Statement of the Case

On September 21, 2009, Applicant submitted a security clearance application (SF 86). On February 8, 2013, the Defense of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within DOD for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 13, 2013, and requested a hearing before an administrative judge (Answer). On April 18, 2013, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On May 16, 2013, DOHA issued a Notice of Video Teleconference Hearing. The case was heard on June 11, 2013, as scheduled. The Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence without objection. Applicant offered Applicant Exhibits (AE) A through C into evidence without objection. Applicant testified. DOHA received the hearing transcript on June 20, 2013.

Procedural Rulings

At the commencement of the hearing, Department Counsel withdrew Paragraph 1.a of the SOR. (Tr. 10.) During the hearing, Counsel for Applicant made a Motion requesting the Department Counsel withdraw Paragraphs 1.c through 1.f of the SOR. After Applicant's testimony, Department Counsel withdrew Paragraphs 1.c through 1.f because the evidence indicated that the alleged non-disclosed information was outside of the time frame listed in the allegations.[1] (Tr. 76-78.). Paragraph 1.b remained as the sole allegation.

Findings of Fact

In his Answer to Paragraph 1.b of the SOR, Applicant wrote "Admit" in the margin next to the last sentence in the Paragraph, which appeared to be an admission of the eight criminal offenses referenced in the SOR.

Applicant is 42 years old and married since 2000. He and his wife have an 11-year-old daughter. He also has a 17-year-old stepchild. After high school, Applicant worked as a carpenter. In 2000, he began working as a machine operator. His wife works in the manufacturing field. In June 2008, he began a position with a defense contractor. Between then and December 2012, Applicant worked as a maintenance mechanic for U.S. military organizations in a Middle Eastern country. (Tr. 24-25.) He lived there most of the time and returned home for various periods of leave. He has not worked for the last seven months pending the outcome of this hearing.

Applicant has a history of criminal arrests and offenses that occurred between 1991 and November 1997. In 1991, he was arrested and charged with violating a restraining order and contempt of court. He was 20 years old. In 1992, he was arrested and charged with violating a restraining order, attempted burglary and public intoxication. He was found guilty of public intoxication and the other charges were dropped. In 1995, he pled guiltily to False Police Report and was fined. In 1996, he pled guilty to an assault charge involving his former girlfriend. He was fined and given a 6-month restraining order. In 1996, he was charged with his first Driving Under Influence (DUI) offense after being in an automobile accident. In 1997, he entered a plea agreement for violating a restraining order after telephoning a victim repeatedly. In

[1] Sections 22(b), 23(c), 24 (a), (b), and (c) limit their inquiries for information to the last 7 years before the questionnaire was signed.

1997, he pled guilty to another charge of driving while intoxicated. He was fined and sentenced to 1-year court supervision. In August 1997 he was arrested and found guilty of conspiracy to distribute cocaine, amphetamine, and methamphetamine, a felony. He was 26 at the time of the arrest. In November 1997 he was sentenced to serve 42 months in a federal prison and was required to complete a substance abuse program. He served 34 months and was released in January 2000 and placed on probation for five years. (Tr. 45-46.) He has not been arrested since his release. (Tr. 49.)

In September 2009 Applicant completed a SF 86. He was in the Middle East at the time. His employer gathered Applicant and 40 to 50 other co-workers in the same building where they worked and asked them to fill out security clearance applications. (Tr. 52.) They sat at a bench and hand-wrote information on to a SF 86 over two or three days. (Tr. 50.) He signed the certification sheet of the SF 86 during that time. While Applicant and others were working on their SF 86s, some people mentioned to the supervisors in attendance that that they did not have information from ten years ago. A supervisor told the group "to go seven years back." Applicant followed that advice while completing the SF 86, seemingly in spite of the use of the word "ever" for one question. (Tr. 29, 52.) After finishing the SF 86, the Human Resource personnel gathered his documents, and subsequently inserted the information into an electronic version of the SF 86. Applicant saw the printed version before it was submitted. (Tr. 64-67; GE 1.) He was not briefed on how to complete the application, and found the experience confusing. (Tr. 52.)

In response to *"Section 22.e Your Police Record: Have you EVER been charged with any offense(s) related to alcohol or drugs,"* Applicant answered, "No."[2] He did not disclose the 1992 public intoxication offense; the 1996 DUI offense; the August 1997 DUI; or the November 1997 conspiracy conviction related to drugs. While testifying he said he followed his supervisor's seven-year instruction when completing the SF 86. (Tr. 29, 35.) He did not deny any charges listed in Paragraphs 1.a.(1) through (8). He knew he could not hide his criminal background from the Government. (Tr. 53.) He was not attempting "to lie to the Government." (Tr. 56.)

In October 2010 a Government investigator interviewed Applicant about his criminal background. (Tr. 53.) During that interview, the investigator apparently noted that Applicant failed to disclose information regarding his criminal background on the SF 86. Applicant said he thought he did not need to list any offenses that did not occur within the last ten years. He then discussed his criminal offenses in detail. He said he did not intend to mislead the Government. (GE 3.) After reviewing that interview, he completed a set of Interrogatories. He made some corrections and clarifications of the information in the interview. He also disclosed an arrest that was not included in the criminal record that he reviewed with the investigator. (GE 3.)

[2] Numerous sections in the SF 86 list a 7-year time frame for disclosing information and an alternate 10-year time frame for Single-Scope Background Investigations (SSBI). Sections 22(a) and (b) limit their inquiry to "the last 7 years (if an SSBI go back 10 years)." Sections 22(c), (d), and (e) use the word "EVER" in reference to a time frame. (Emphasis in original.)

Applicant reiterated throughout the hearing that he had no intention to deceive the Government. He said, "That was not my intentions (sic) at all to do that." (Tr. 67.) He has not been arrested since leaving prison. He has matured as a consequence of his incarceration and recognized his mistakes. (Tr. 69.)

He submitted letters of recommendation. The responsible officer for the field support brigade where Applicant worked between 2009 and 2010 wrote a letter supporting Applicant. He said Applicant "performed his duties in an exceptional manner. His technical expertise and council (sic) on a daily basis has been invaluable. He is resourceful, honest and trustworthy." (AE A.) An Army lieutenant colonel essentially concurred with that opinion and stated that Applicant "would be a welcome (sic) to my organization." (AE C.)

Policies

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2(a), describing 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline E, Personal Conduct

The security concerns pertaining to the personal conduct guideline are 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 Government alleged in SOR ¶ 1.b that Applicant deliberately falsified answers to a question on his September 2009 SF 86, by failing to disclose information relevant to past alcohol and drug offenses. The Government contended that those falsifications constituted potential 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.

Applicant acknowledged that he did not disclose the information about four charges and convictions, but denied that he intentionally misled the Government. When a falsification allegation is controverted or denied, as in this case, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant's explanation that he did not intentionally disclose the arrests or convictions because his supervisor instructed him and others to only go back seven years (or possibly ten years) in answering the questions was credible. This was

Applicant's first security clearance application and he completed it under unusual circumstances while in the Middle East and without a briefing. The majority of questions in the SF 86 have a 7-year or 10-year limitation regarding incidents required to be disclosed, and several questions do not incorporate a time limit. Those various time frames can be confusing. Applicant's reliance on his supervisor's directions was not unreasonable. He noted that during an interview he disclosed adverse information about an arrest and charge that was not included in the investigator's record, lending credence to his explanation that he did not intentionally falsify his security clearance application. After listening to Applicant testify and observing his demeanor, I find that his explanations for failing to disclose specific information as alleged in SOR ¶ 1.b are adequate and credible. SOR ¶ 1.b is found in his favor. As a consequence, a discussion of the applicability of mitigating conditions is not warranted.

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). They include the following:

> (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 include 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 pertinent facts and circumstances surrounding this case, including Applicant's age, and candid testimony. Applicant is a hardworking 42-year-old man, who has proven to be a valuable mechanic for the military branches for whom he has worked overseas from 2008 to 2012. He also has a background of criminal activity that occurred during the 1990's, including a serious felony that resulted in imprisonment in 1997 and a subsequent term of probation. He does not deny that background and his mistakes. However, he strongly denied that he intentionally failed to disclose that conviction and three lesser alcohol-related charges in his 2009 SF 86. He asserted that he followed his supervisor's advice while completing a SF 86 and only went back seven years, despite the inquiry into his entire history. He knew that he could not lie to the Government, which would have access to said information. His non-disclosure was contributed to by

the improper advice he received from his supervisor while completing the application under unusual circumstances.

Overall, the record evidence leaves me without questions as to Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for personal conduct.

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 E:	FOR APPLICANT
Subparagraph 1.a:	Withdrawn
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c through 1.f:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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SHARI DAM
Administrative Judge