DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

09/13/2012

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On February 9, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline J (Criminal Conduct) and 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 (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a response dated April 10, 2012, Applicant admitted eight of the 10 allegations raised under Guideline J and all five allegations set forth in the SOR under Guideline E. He also requested a hearing. DOHA assigned the case to me on July 16, 2012. The parties proposed a hearing date of August 14, 2012. A notice setting that date for the hearing was issued on July 26, 2012. I convened the hearing as scheduled. Applicant testified. Department Counsel offered 17 documents, which were admitted as Exs. 1-17 without objection. The transcript (Tr.) of the proceeding was received on August 22, 2012, and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden of mitigating security concerns related to personal conduct. Clearance is denied.

Findings of Fact

Applicant is a 46-year-old field service representative for a defense contractor. He has a high school diploma and has received some post-secondary education through the U.S. military. Applicant is married. He and his wife have two children. They are expecting a third child within the month.

Over the years, Applicant has faced several criminal charges. As a teenager in 1985, he was charged with 2nd degree assault (a felony) after an argument with an acquaintance turned into a physical skirmish.[1] The charge was reduced to 3rd degree assault and Applicant was placed on Adjournment in Contemplation of Dismissal until July 1989.[2] In October 1993, Applicant was charged with criminal mischief, resisting arrest, and disorderly conduct. He does not recall the incidents underlying the charges. In August 1994, Applicant was arrested for impaired driving and he refused to undergo either a field sobriety or breathalyzer test.[3] He pled guilty to the charge of operating a motor vehicle under the influence (OUI), was ordered to attend some meetings of Alcoholics Anonymous (AA), and was placed on two years of probation.

In October 1996, Applicant was working at a facility where he handled isopropyl alcohol. On his way home from work one morning after a lengthy shift, he stopped to have three beers. He felt tired, but not intoxicated. As he continued his way home, he was stopped by police, who smelled alcohol. Applicant refused to take a field sobriety test.[4] He assumed that the isopropyl alcohol with which he worked would be in his system and impact a blood alcohol reading. Ultimately, Applicant was found guilty of operating with defective equipment.

In January 1998, Applicant had been drinking before he "passed out" in a van on the side of a road.[5] A police officer saw multiple uncapped gas cans in the vehicle. The officer then saw Applicant and knocked on the vehicle. The next thing Applicant remembers is an officer shaking him and using pepper spray. He was charged with and eventually found guilty of disorderly conduct and resisting arrest. In September 1998, Applicant's girlfriend saw Applicant's car and deduced he was in a bar drinking with friends. The couple had a volatile relationship and the girlfriend needed to take antidepressants "to keep her calm."[6] She entered the bar and struck him on the side of the head. They went out to their vehicles. She again struck Applicant, who pushed her

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[1] Tr. 19-21. The record shows that the arrest occurred in 1985, not 1986, as reflected in the SOR.

[2] Tr. 23. Applicant stated that the case was ultimately dismissed by the judge, who "got tired of looking at" the matter.

[3] Tr. 24-26.

[4] *But see* Tr. 31.

[5] Tr. 33.

[6] Tr. 41.

away. As a result of the push, she stumbled and hit the car door. Applicant was found guilty of assault and battery with a dangerous weapon, a felony.

After another altercation with his volatile girlfriend, Applicant was charged with assault and battery on an unspecified date between December 2000 and January 2001. Applicant was found guilty. Imposed jail time was suspended and he was placed on probation for 18 months. In May 2001, Applicant's girlfriend became abusive at a party. She threw a candle at him, covering his face in hot wax. He threw a beer bottle at her. He was arrested for assault and battery with a dangerous weapon. As he was being driven to the police station, he decided to end his relationship with this girlfriend. Ultimately, the case against him was dismissed.

By July 2004, Applicant was living with a different girlfriend. While his girlfriend was away one weekend, Applicant drove to a local mountaintop and drank beer. He started to drive home and apparently fell asleep. His truck was found in the middle of the road with the vehicle running and the brake lights on. He was arrested and charged with OUI and marked lanes violations. He was found guilty of OUI, placed on probation for two years, and ordered to attend a 14-day inpatient alcohol treatment program. Applicant was thankful to take the treatment program and took it seriously.[7]

By 2006, Applicant had quit abusing alcohol, acknowledging that he "and alcohol don't mix."[8] He met his current wife in 2007. She is a "hard line Buddhist" with no tolerance for alcohol; she helps him maintain his sobriety.[9] Now married and expecting a third child, Applicant is happy in his new life. At most, he enjoys an occasional beer.[10] They have their own home and Applicant has found a new direction in his life.[11] Becoming a family man has brought stability to his life.

On November 23, 2009, Applicant completed a Questionnaire for Public Trust Position (QPTP). On October 24, 2010, he signed an Electronic Questionnaire for Investigations Processing (e-QIP). He was encouraged by his company to complete the e-QIP quickly.[12] He testified that he did not read the questions carefully, and that he did not know that the application and his answers were "a big deal."[13] In response to Section 22b (*Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?*), he answered "No." At the hearing, Applicant

[7] Tr. 48.

[8] Tr. 61.

[9] Tr. 62.

[10] Tr. 65-66.

[11] Tr. 62.

[12] Tr. 54-55.

[13] Tr. 55. Applicant stated that he knew the form was important, just not "super, super important."

stated that he must have believed that the question was limited to events within the preceding seven years, a limitation applicable in the preceding question (Section 22a).

In response to Section 20 on his November 2009 QPTP, Applicant denied having been arrested for, charged with, or convicted of any offenses in the preceding seven years. In his 2010 e-QIP, there were similar questions, but they lacked the seven year qualification. There, he answered "No" in response to Section 22c (*Have you EVER been charged with any felony offense,* emphasis in the original) and Section 22e (*Have you EVER been charged with any offense(s) related to alcohol or drugs?*, emphasis in the original). Despite the inclusion of the term "EVER" set forth all in capital letters in Sections 22c and 22e of the 2010 e-QIP, Applicant believed the questions were restricted to events in the preceding seven years.[14]

In response to Section 24b of the e-QIP, Applicant answered "No" (*In the past seven years, have you been ordered, advised, or asked to seek counseling or treatment as a result of your use of alcohol?*). In so doing, he neglected to note that he was court-ordered to attend a 14-day inpatient alcohol treatment program in 2004. He testified that he had thought the incident was outside the seven-year time frame contemplated in the question, and that he had forgotten the incident occurred in 2004.[15]

Finally, in response to Section 13c (*Has any of the following happened to you in the last 7 years? (1) Fired from a job, (2) Quit a job after being told you would be fired, (3) Left a job by mutual agreement. . . . (4)Left a job for other reasons under unfavorable circumstances, and (6) Laid off from job by employer*) of the 2010 e-QIP, Applicant answered "No." However, in response to an inquiry as to past employment under Section 13 of the e-QIP, Applicant wrote that he was "laid off" from the welding position he had maintained until 2005. In addition, there is some evidence that he was actually fired or otherwise told that he was to be let go from that position.[16] Applicant admits that he intentionally provided a false answer because it was "embarrassing to be fired."[17] He does not believe anyone at his current place of employment knows that he was fired from that job.[18]

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead,

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[14] Tr. 53, 55.

[15] Tr. 57.

[16] Tr. 58.

[17] Tr. 58-59.

[18] Tr. 60-61.

recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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. The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ."[19] The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.[20]

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.

Section 7 of Executive Order 10865 provides that decisions shall be in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned. *See also* EO 12968, Section 3.1(b) (listing prerequisites for access to classified or sensitive information). The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.[21] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.[22]

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[19] *See also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

[20] ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

[21] *Id*.

[22] *Id*.

Analysis

Guideline J – Criminal Conduct

The concern under this guideline is that 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.[23] In this case, Applicant admits he was charged with about eight criminal acts between 1985 and 2004. Several of those arrests resulted in convictions. In addition, he admitted that he provided a false answer on his October 2010, e-QIP, thus acting in violation of 18 U.S.C. § 1001. This is sufficient to raise both Criminal Conduct Disqualifying Condition AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Consequently, it is Applicant's burden to mitigate the security concerns raised.

The 1985 incident occurred when Applicant was a teen, and he no longer recalls the 1993 criminal mischief, resisting arrest, and disorderly conduct charges. He admits that he was found guilty of operating a motor vehicle under the influence in 1994 and in 2004. He admits that he was found guilty of operating with defective equipment in 1996, both disorderly conduct and resisting arrest in 1998, and for domestic assault and battery charges between 1998 and 2001 while in a volatile relationship. That relationship ended years ago, and Applicant is now happily married to another woman. He successfully completed an intensive in-house alcohol treatment program. He no longer abuses alcohol. Rather, his use of alcohol currently is minimal, responsible, and under the watchful eye of his wife, whose faith eschews the use of alcohol.

Applicant has completed all requirements related to his past criminal charges and convictions. However, his recurrent criminal conduct did not end in 2004. Applicant admits that he intentionally failed to disclose that he had been let go from a job on his 2010 e-QIP. This admission makes Applicant's string of criminal violations more recent, obviating application of Criminal Conduct Mitigating Condition AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, 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*). At most, his expressed contrition, reset goals, nearly two years without further criminal behavior, and his commitment to being a role model for his wife and children raise AG ¶ 32(d) (*there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*).

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply

[23] AG ¶ 30.

with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.[24] In addition, any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process is of special interest.[25]

Less than two years ago, in October 2010, Applicant completed the e-QIP at issue. He admits that he intentionally denied having been laid off from a job, having been fired from a position, or having left a job for other reasons under unfavorable circumstances. He explained that he did so because it would have been embarrassing to reveal that he had been fired from a job in 2005. In addition, he inaccurately denied having been arrested by any type of law enforcement officer, ever having been charged with any felony offense, and ever being charged with any offense related to alcohol. Furthermore, he also incorrectly denied having been ordered, advised, or asked to seek counseling or treatment as a result of his alcohol use in the preceding seven years. Under these circumstances, there is sufficient evidence to give rise to Personal Conduct Disqualifying Condition AG ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) and AG ¶ 16(e) (*personal conduct or concealment of information about one's conduct that creates a vulnerability to exploitation, manipulation, or duress. . . .*) Consequently, the burden shifts to Applicant to mitigate the security concerns.

Applicant admitted that he falsified his 2010 e-QIP answer regarding having been laid off or fired in 2005. As to the other incorrect answers at issue, he alternatively argues that he completed the e-QIP in haste, misread or misunderstood the questions, or failed to recall the dates or other specifics regarding some of the incidents at issue. In light of his credible testimony, and giving Applicant the benefit of the doubt, I find that Applicant did not intend to falsify or mislead when he provided his answers to Sections 22b, 22c, 22e, ad 24b, but only in his response to Section 13c. Taking the e-QIP as a whole, however, intentional falsification occurred, obviating application of the available mitigating conditions found at AG ¶ 17(a)-(g).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

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[24] AG ¶ 15.

[25] *Id*.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole-person” factors. Applicant is a credible and forthright middle-aged man who was involved in a string of crimes from his teen years until his early 40s. In the past few years, he has redirected his life. Through marriage, fatherhood, domestic stability, and job satisfaction, he no longer succumbs to reckless temptations or immature impulses. He is now a mature and responsible married man and father. He has not been arrested or charged with criminal conduct since July 2004, over eight years ago. There is no evidence that he has been involved with criminal activity since he signed his October 2010 e-QIP. I find it highly unlikely he will again be involved in the types of criminal conduct at issue between 1985 and 2004.

What remains troubling is Applicant’s acknowledged October 2010 e-QIP falsification (Section 13c). Less than two years is insufficient time to amend the breach of trust caused by Applicant’s admittedly false e-QIP answer from late October 2010. As noted above, this process demands that any questions regarding an applicant’s reliability should be decided in favor of the protection of classified information. Therefore, while I find that Applicant mitigated criminal conduct security concerns, I also find that he failed to mitigate personal conduct security concerns. Clearance is denied.

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
Subparagraphs 1.a-1.j:	For Applicant
Subparagraph 1.j:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-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 national interest to grant Applicant a security clearance. Clearance denied.

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ARTHUR E. MARSHALL, JR.
Administrative Judge