DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 11-06274
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: Michael F. Fasanaro, Jr., Esq.

04/03/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 27, 2010. On November 26, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on December 4, 2013; answered it on the same day; and requested a determination on the record. On January 10, 2014, Department Counsel requested a hearing before an administrative judge. (Hearing Exhibit (HX) I.) Department Counsel was ready to proceed on January 15, 2014, and the case was

assigned to me on January 16, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 27, 2014, scheduling the hearing for February 19, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on February 27, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, and 2.a. He denied SOR ¶ 2.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old logistics analyst employed by a federal contractor since February 2010. He served on active duty in the U.S. Navy from October 1982 to October 2003, and he retired as a petty officer first class (E-6). He worked as a logistics analyst for federal contractors from October 2003 to October 2005 and from November 2005 to June 2009, when he was laid off because his employer's government contract expired. He worked as a retail store manager from July 2009 until he was hired for his current job. He received a security clearance in the Navy and has held it continuously to the present. (Tr. 33.)

Applicant completed the requirements for a general educational development (GED) high school diploma in 1984, while on active duty. He received a bachelor's degree in history in June 2012 and a master's degree in higher education in August 2013. (AX D.)

Applicant married in March 1992 and divorced in September 1993. He married his current spouse in August 1994. He and his current spouse have two children, ages 16 and 19.

In early 2009, Applicant became depressed because he felt that his marriage was failing, and he was experiencing work-related stress. He testified that in his first job after retiring from the Navy, he continued to work in a military environment. However, when he moved into the civilian corporate world, he had difficulty adjusting. He testified, "[I]n the military it is not uncommon for a supervisor to cuss or yell at people to get something done. And in the corporate world it is not like that." (Tr. 44.)

On March 16, 2009, while he was home alone and feeling depressed, he decided to make an obscene telephone call. He picked a number at random from the phone book. When a woman answered, he asked her for sexual favors. The woman did not respond, and Applicant hung up. Applicant testified that this incident was one of his "lowest spots." He and his wife were not communicating, and he made the phone call because he did not want to "physically cheat." (Tr. 39.)

About two weeks after Applicant made the phone call, he was contacted by the police. He admitted making the call and turned himself in on April 9, 2009. In July 2009, he pleaded guilty to using profane language over a public airway. Disposition was deferred for one year, and he was required to report to a probation officer once a month for a year. (GX 3; GX 6 at 6.)

On April 23, 2010, Applicant ordered take-out food at a fast-food restaurant. When he arrived home, he discovered that he received less food than he ordered and what he received was not what he ordered. He returned to the restaurant and demanded his money back. An argument ensued because the restaurant manager wanted to "make amends" with a corrected order, but Applicant insisted on a refund. When the store manager asked Applicant what she could do to make him happy, he responded that he would be happy if the restaurant burned down and they all lost their jobs, but he would settle for a refund. He then gave the manager his name and address and departed. (Tr. 38.) Applicant testified that his comment was "an immature, flippant remark," and he never intended it to be a threat. (Tr. 37-38.)

On April 26, 2010, Applicant was contacted by a fire department investigator and informed that he was being charged with threatening to burn down the restaurant, a felony. The store manager also alleged that Applicant had thrown food at her. Applicant turned himself in and was arrested. The case was tried in June 2010. A customer testified that Applicant did not threaten to burn down the restaurant, and a security video showed that he did not throw food at the store manager. Applicant was offered an opportunity to plead guilty to disorderly conduct, and his attorney advised that he accept the offer to avoid the risk of being convicted of a felony. He pleaded guilty to disorderly conduct and he was sentenced to 365 days in jail, suspended, and placed on unsupervised probation for two years. (GX 4; GX 6 at 8.) As a result of the incident at the fast-food restaurant, Applicant was charged with "failure to be of good behavior," because he was still on probation for the obscene phone call. (GX 5.)

Applicant promptly reported both incidents to his security manager and made statements to be placed in his security file. Before the June 2010 trial, Applicant had already begun marital counseling and anger-management counseling. He sought out a psychiatrist because he felt that he needed more than therapy, and he received psychiatric treatment from June 7, 2010, to September 25, 2012. His psychiatrist diagnosed him with depression and gave him a prescription for an antidepressant drug to control his mood swings. (GX 6 at 6.) The psychiatrist stated that Applicant did well in his treatment, was compliant, and demonstrated no behavioral issues during his treatment. (AX A.) After 2012, Applicant enrolled in the Employee Assistance Program, and he sees a physician every three or fourth months. He receives his prescriptions for antidepressants from a physician and obtains his medications through TRICARE. (Tr. 45-46.) As of the date of the hearing, he was taking medication for depression daily. (Tr. 50.) He testified that his marriage "is stronger than it has ever been." (Tr. 35.)

When Applicant submitted his SCA in February 2010, he reviewed and updated his previous SCA that was submitted in 2005. In response to Questions 22b and 22e,

asking if he had been arrested during the last seven years and if he had ever been charged with any offenses related to alcohol or drugs, he answered "Yes," and he disclosed an arrest and conviction for driving under the influence in April 1987. He answered "No" to Question 22d, asking if he had ever been charged with a firearms or explosives offense. He did not disclose his arrest for the obscene telephone call. He did not list the arrest for threatening to burn the restaurant, because it occurred after he submitted his SCA. In a personal subject interview (PSI) in June 2010, he explained that he did not think about listing the obscene phone call on the SCA, because he had already disclosed it to his security officer ten months earlier. He denied that he intended to hide any adverse information. (GX 6 at 9.) His PSI statement that he previously disclosed the incident is corroborated by GX 2, his Joint Personnel Adjudication System (JPAS) Incident History.

A retired master chief petty officer considered Applicant his "right hand man" from 2000 to 2003, while they both were on active duty. He regards Applicant as "an outstanding individual who stands head and shoulders above his peers in reference to work ethic, behavior, attitude, and appearance." (AX C.) The deputy director of hazardous property management at the warehouse where Applicant works describes him as trustworthy, diligent, capable, and dedicated. (AX B.) A social friend, who holds a security clearance and has known Applicant for about 15 years, testified that he plays golf with Applicant every week and has never seen him lose his temper. (Tr. 26-27.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges that Applicant was charged with a threat to burn or bomb, pleaded guilty to a lesser charge of disorderly conduct, and was sentenced to a 12-month jail sentence (suspended), probation for two years, and assessed court costs (SOR ¶ 1.a). It also alleges that Applicant was summoned and charged with using profane language over a public airway, pleaded guilty, and was placed on probation. (SOR ¶ 1.b).

The concern raised by 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." Applicant's arrest for a felony and two convictions establish the disqualifying conditions in 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").

The following mitigating conditions under this guideline are potentially relevant:

> AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
>
> 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.

AG ¶¶ 32(a) and (d) are established. The obscene phone call was five years ago, and his argument with the fast-food restaurant manager was four years ago. Both offenses happened when Applicant was suffering from marital problems, job-related stress, and untreated depression. Those problems are resolved, making recurrence unlikely. He promptly self-reported after each incident. He is extremely remorseful for his behavior. He has continued to perform well at work and has earned a bachelor's degree and a master's degree. A dark period of his life is behind him, and it does not cast doubt on his current reliability, trustworthiness, or good judgment.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his February 2010 SCA by intentionally failing to disclose the obscene phone call and the charge of threatening to burn the restaurant (SOR ¶¶ 2.a and 2.b). The security concern under this guideline 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 relevant disqualifying condition in this case is AG ¶ 16(a). ("deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . ."). When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information

on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant's explanation for not disclosing the obscene phone call on his SCA, *i.e.,* that he thought the question applied only to new arrests not previously disclosed, was plausible and credible under the circumstances of this case. The JPAS incident report reflects that he reported the obscene phone call in April 2009, when he learned that he had been charged, and he submitted his SCA approximately ten months later to the same security office. The timing of the JPAS incident report is inconsistent with intentional concealment of the same information on his SCA. The arrest for threatening to burn the restaurant occurred after Applicant submitted his SCA. I conclude that AG ¶ 16(a) is not established.

Whole-Person Concept

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. In applying the whole-person concept, an 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. 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.

I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant served honorably in the U.S. Navy for 21 years, and he has held a security clearance for about 30 years. The obscene phone call alleged in SOR ¶ 1.b occurred during a dark time in his life that he has overcome. The alleged threat alleged in SOR ¶ 1.a was an overblown incident in which he lost his temper, and it was appropriately downgraded to a charge of disorderly conduct. Applicant was sincere, remorseful, and credible at the hearing.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude

Applicant has refuted the allegations of falsification and mitigated the security concerns based on his criminal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge