

KEYWORD: Guideline E; Guideline J; Guideline F

DIGEST: Applicant cites to some minor errors, such as the timing of theft charges. These errors did not likely affect the outcome of the case. Therefore, they are harmless. Adverse decision affirmed.

CASE NO: 14-04190.a1

DATE: 01/18/2017

DATE: January 18, 2017

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In Re:	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 22, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline J (Criminal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 25, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall, Jr., denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed to consider all of the evidence and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant has worked for Defense contractors since 2009. He earns about \$98,000 a year, and his wife earns between \$150,000 and \$160,000. In 2000, Applicant discovered that a former wife had been unfaithful to him. As a result of their argument, Applicant was charged with assault and battery. He pled guilty and was sentenced to 90 days confinement, which was suspended. A couple of years later, he was charged and convicted of driving under a suspended license. Later, he was disciplined at work for failing to comply with regulations concerning the submission of customer paperwork.

In 2008, Applicant worked in a secure facility. He was experiencing difficulty in making his family's mortgage payments and did not disclose this to his wife. Instead of seeking her contribution, he made out checks to himself from his employer's account and used the funds to pay his mortgage. All totaled, he took about \$52,000 from his employer.

Upon being confronted with the evidence, Applicant confessed to his employer and subsequently to Federal investigators. Applicant was terminated from his job. Officials charged Applicant with embezzlement, a felony, and a theft scheme exceeding \$500, also a felony. Applicant pled guilty to the theft scheme and was sentenced to probation and restitution. After completing the probation, Applicant was granted a probation before judgment determination, a conditional avoidance of sentence imposition.

When he completed his security clearance application in 2013, Applicant stated that he had left his prior employment through mutual agreement following charges of misconduct. This was not totally correct, insofar as he had actually been fired. In 2015, Applicant's theft record was expunged. He currently lives within his means and accepts his wife's contribution to the household finances. Applicant has undergone therapy as a consequence of his criminal acts and has employed a financial advisor.

### **The Judge's Analysis**

Applicant's conduct was alleged under Guidelines E and J. His theft of funds and its subsequent legal consequences were the basis for the Guideline F concerns. The Judge entered adverse findings for all of the SOR allegations. Among other things, he noted that Applicant did not disclose his criminal conduct until he was confronted with it by his employer. He stated that Applicant's theft and its legal consequences occurred several years ago. However, he concluded that the severity of the misconduct was such that the passage of several years was not enough to demonstrate mitigation.

The Judge also cited to Applicant having received early release from probation. However, he concluded that the "egregious nature" of the theft remained a concern. Decision at 7. He also noted that Applicant's conduct was rooted in financial problems and entailed "an extraordinary

breach of the fiduciary trust extended to him by his former employer.” *Id.* The Judge noted that, despite his objectively false SCA answer, Applicant had placed the Government on notice of his criminal history.

In the whole-person analysis, the Judge stated that Applicant’s assault and battery conviction was troubling but that the couple had since divorced. He also described the driving offenses as minor. However, the 2007 and 2008 incidents of work-related misconduct, especially the theft that led to job termination and prosecution, were serious. He repeated his conclusion that the passage of several years was not sufficient to demonstrate mitigation.

### **Discussion**

Applicant contends that the Judge’s whole-person analysis did not incorporate significant record evidence. In support of his argument, he cites to the length of time since his last offense, the expungement of his theft record, his employment record, his therapy, his admission of all the allegations against him, etc. The Judge made findings about these matters and discussed them in his analysis. Applicant’s argument is not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 15-02854 at 2 (App. Bd. Nov. 22, 2016). The Judge’s whole person analysis complies with the requirements of Directive ¶ 6.3, in that he considered the totality of the evidence in reaching his decision. *See, e.g.*, ISCR Case No. 14-06653 at 3 (App. Bd. Nov. 18, 2016).

Applicant cites to some minor errors, such as the timing of theft charges. These errors did not likely affect the outcome of the case. Therefore, they are harmless. *See, e.g.*, ISCR Case No. 14-03601 at 3 (App. Bd. Jul. 1, 2015). Applicant states that his loss of a clearance has affected his ability to earn money and has caused strain on his family. We are not permitted to consider the impact of an unfavorable decision. *See, e.g.*, ISCR Case No. 14-02619 at 3 (App. Bd. Apr. 7, 2016).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

**Order**

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan  
Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board