



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
|                                  | ) | ISCR Case No. 17-02979 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel  
For Applicant: *Pro se*

12/13/2018

**Decision**

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on November 6, 2014. On January 19, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E, F, and J.<sup>1</sup>

Applicant responded to the SOR on March 20, 2018, and requested a hearing before an administrative judge. The case was assigned to me on May 17, 2018. The

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<sup>1</sup> The DOD CAF acted under Executive Order (Exec. Or.) 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 revised adjudicative guidelines (AG) effective on June 8, 2017.

Defense Office of Hearings and Appeals issued a notice of hearing on June 12, 2018, and the hearing was convened on July 11, 2018. Government Exhibits (GE) 1 through 15 were admitted into evidence without objection. Applicant and a witness testified. The record was held open for Applicant to submit documentary evidence. He submitted Applicant Exhibit (AE) A, consisting of letters regarding debt resolution efforts and two character letters. DOHA received the hearing transcript (Tr.) on July 24, 2018.

### **Findings of Fact**

Applicant is a 52-year-old aircraft mechanic for a defense contractor, employed since 2009. He was laid off in March 2018 pending security eligibility. He previously worked for another company from 1999 to 2009, until he was terminated for his involvement in an embezzlement scheme. Applicant graduated from high school in 1983, and honorably served in the U.S. Army from 1983 to 1998, including a deployment to Saudi Arabia during Operation Desert Storm. He was married in 1986 and divorced in 2003. He reconciled with his spouse in 2013, but remains unmarried. He has two children and three step children; all but one is an adult. He does not currently hold a security clearance.

The SOR alleges under Guideline E, that Applicant was a defendant in a civil suit for embezzlement of \$627,000 from his former employer. Applicant was terminated from employment as a result of his involvement in the theft. This incident was cross-alleged under Guideline J, for criminal conduct. Also, under Guideline E, the SOR alleges Applicant falsified his 2014 SCA by failing to disclose his arrests in 2002 and 2011 for driving while intoxicated (DWI), and the civil lawsuit described above. In addition, the SOR alleges Applicant deliberately falsified his 2010 and 2015 personal subject interviews by deliberately concealing the reason he was terminated from his job in 2009, claiming he was fired because of his connection to his co-defendant and that he was not involved in theft from the company. Under Guideline F, the SOR alleges the embezzlement incident, and three delinquent credit accounts that have been charged-off or are in collections, totaling approximately \$20,000.

Applicant worked for his previous employer from 1999 to 2009. In about 2000, he became friendly with a co-worker (B), who was the company comptroller. They eventually became romantically involved. Eventually B became pregnant with Applicant's child, who was born in 2002. From about 2002 to 2008, B used company funds to pay for her personal expenses, credit cards, mortgage, utilities, and other items, and used company funds to buy items for Applicant, including an all-terrain vehicle (ATV) and two rifles. B provided a credit card to Applicant in furtherance of the crime. Applicant stated that B usually paid the credit card for him, but that he also contributed money to her on occasion, but was not sure how it was spent. Among other uses of the credit card, B instructed Applicant to use his card to purchase \$27,800 in gift cards, and turn them over to another employee at the company. Applicant suspected B was stealing from the company and suspected his supervisor was involved.<sup>2</sup> At one point, B took Applicant's credit card from

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<sup>2</sup> Applicant also implicated the company president in a separate scheme to overcharge on aircraft parts, but the allegations were not supported nor are they relevant to Applicant's case.

him during a dispute, but it was later returned to Applicant by his supervisor. Applicant did not question why his supervisor would have his credit card, nor did he question B's extravagant purchases and credit card use even though he suspected she did not earn enough to afford them. At least a year before the company discovered the theft, Applicant acknowledged that he knew about the scheme, and maintained his involvement. When Applicant was confronted by the company president in 2009, Applicant admitted to the theft scheme, but maintained that he only received the property purchased with stolen funds. Applicant continues to assert that although he knew of the theft and purchases with stolen funds, he did not directly steal from the company. He stated that he never directly asked B about the origins of her money or questioned B about purchases and unusual credit card use. He suspected B and his supervisor in the theft scheme, but never reported his suspicions to company officials or law enforcement for fear of losing his job. On March 30, 2009, when confronted by the company president, Applicant acknowledged the theft scheme. He was fired. In October 2009, B moved into Applicant's home with him and Applicant considered her his "common law wife." (GE 4)

Applicant and B were sued by the company in May 2009, for embezzlement, breach of fiduciary duty, fraud, conversion, theft, and falsification of records. In 2010, the court granted the company a partial summary judgment as to liability only. B was convicted and imprisoned for theft of approximately \$627,000 from the company. Applicant's attorney requested the company agree to allow Applicant to return property purchased with company funds in lieu of prosecuting him. This was considered a partial reimbursement. Although Applicant's attorney told him that he was likely to be sued, Applicant claimed that he was never served with the complaint or appeared in court, nor was he aware of the lawsuit and summary judgment until he received the SOR in 2018. For these reasons, he asserted that he did not report the lawsuit on his 2014 SCA.

In his 2014 SCA, Applicant listed that he was fired in 2009 "because of conflict of interest." Applicant was interviewed several times by Office of Personnel Management (OPM) investigators, including in 2010 and 2015. In those interviews, he claimed that he was fired for his personal connection to B, but that he was not involved in any theft of money from the company. In a 2012 OPM interview, Applicant became uncomfortable during questioning regarding the theft scheme. Applicant refused to answer questions related to B's involvement, and he abruptly left the interview before it was complete. (GE 4) In testimony, Applicant admitted that he was not fully truthful in the answers he provided the investigators with respect to his involvement in the company theft scheme, stating that he was only 50% honest.

In 2002, Applicant was arrested and charged with driving while intoxicated (DWI). He was placed on probation and the charge was dismissed at its conclusion. In 2011, he was arrested for DWI while driving on a military installation. He was administratively barred from driving on base for one year. Applicant did not report these arrests or charges on his 2014 SCA. Despite discussing them in his 2012 interview, he again failed to report the charges on his 2014 SCA. He testified that he did not fully understand the SCA questions related to criminal charges involving alcohol.

The SOR alleges that Applicant is indebted to a credit card company on an account that has been charged-off for about \$14,943. Applicant noted after the hearing, that he contacted the creditor and they were unable to find the account. Applicant's credit report of November 2014 (GE 14) shows the account was opened in 2001 and the last activity was in 2012. Applicant is listed as an authorized user on the account and disputed his responsibility for it. Two other delinquent accounts placed in collection were resolved after the hearing. (AE A)

During testimony, Applicant was less than forthcoming, guarded, often unclear and disjointed when answering direct questions related to his involvement in the theft scheme and his knowledge at the time. He asserted that he was trying to answer questions truthfully and did not want to give deceptive answers. Applicant's current human resources and assistant facility security officer testified to Applicant's trustworthiness and honesty. The witness also provided a positive character letter, claiming that Applicant has overcome his past behavior, and it is no longer a concern. Likewise, Applicant's current site manager also attested to Applicant's good standing with the company, and stated that Applicant has not acted in a way to raise questions about his judgment. Both references claimed in similar language, that Applicant misunderstood SCA security questions or answered in a manner unique to him when he felt that questions were "misleading, misinformed or accusatory." They also claimed that Applicant "reached out" to all of his creditors to resolve his delinquencies.

### **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 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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.” 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 ¶ 1(d).

## **Analysis**

### **Guideline E; Personal Conduct**

AG ¶ 15 expresses the personal conduct security concern:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition are potentially applicable:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information . . .

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

(g) association with persons involved in criminal activity.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The personal conduct alleged is generally sufficient to implicate AG ¶¶ 16 (a), (b), (d), (e), and (g).

Guideline E includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's participation in the theft scheme over a period of years is not mitigated by time, circumstance, or other actions he asserts mitigates his behavior. Applicant has not fully acknowledged the full extent of his involvement, but claimed he was only a passive and mostly unwitting participation as a receiver of stolen property. The evidence does not support his assertions. Applicant's suspicions of B's criminal conduct were raised long before he was confronted by the company president. Based on his romantic involvement and fear of losing his job, he chose to bury his head in the sand and did not ask obvious questions about the source of B's money. After eventually acknowledging that B was stealing from the company, he should have known that his involvement in receiving property bought with stolen funds and the unusual use of a credit card, implicated him in the scheme. I find that Applicant willingly participated in the theft scheme, and in another error in judgment, allowed B to live with him after the crime was discovered and he was fired. He has not offered evidence of counseling nor taken full responsibility for his actions. Based on his guarded answers to direct questions during the hearing, he has not shown sufficient evidence of acknowledgment of his behavior and efforts in rehabilitation. I am not convinced that this incident is behind him or that similar irresponsible behavior will not recur. No mitigation fully applies to SOR ¶ 1.a.

Applicant deliberately failed to provide truthful answers regarding his DWI arrests in his 2014 SCA. He has not shown sufficient evidence of misunderstanding the SCA questions or his inability to recall previous arrests and charges. No mitigation is fully applicable to SOR ¶ 1.b. Applicant was unaware of the lawsuit filed against him as it was apparently resolved with his return of property purchased with stolen funds as a partial

reimbursement, and he was not criminally charged. I am convinced that, based on Applicant's testimony that he did not knowingly fail to report the lawsuit in his 2014 SCA. However, the record evidence is sufficient to show that Applicant was intentionally untruthful when he failed to fully describe his involvement with B, the theft scheme, and reason for his firing, during his 2010 and 2015 OPM interviews. No mitigation fully applies to SOR ¶¶ 1.d and 1.e.

#### **Guideline F: Financial Considerations**

The security concern under this guideline is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust.

Applicant's admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying conditions above.

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;



(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's involvement in a financial theft scheme from his company was fully detailed above, and has not been mitigated by his partial reimbursement of property purchased with stolen funds. He has failed to fully acknowledge his involvement and instead chose to bury his head in the sand. Rather than cutting off his relationship once the theft scheme came to light and he was fired, he instead chose to live with B. He continues to assert his minimal participation, and has not shown rehabilitative actions. SOR ¶ 2.a has not been mitigated. The debts remaining under SOR ¶¶ 2.b-2.d, were addressed post-hearing and have been resolved. Mitigation credit for these allegations is appropriate.

Overall, Applicant's involvement in the theft scheme and debts that remained unresolved until after his hearing, reflect poorly on his overall financial management decisions and raise significant concerns about his personal financial responsibility. I am not convinced Applicant is financially responsible or makes good financial decisions.

### **Guideline J, Criminal Conduct**

The security concern relating to 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(d) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, prosecuted or convicted.

Applicant's admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying condition above.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's involvement in the theft scheme spanned a considerable period of time. During that time, he chose to ignore the scheme and participated in its commission. At no time did he raise his suspicions with company officials or law enforcement for fear of his own job and relationship with B. Despite the discovery of the scheme and his firing, he permitted B to move in with him and considered her his "common law wife." Applicant's criminal behavior has not been mitigated by time, circumstance, or personal actions showing responsibility or rehabilitation. Despite the support of his current co-workers, he has not taken full responsibility for his actions and I am not convinced that his criminal behavior is behind him. No mitigation fully applies.

### **Whole-Person Concept**

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines E, F, and J, in my whole-person analysis. I also considered his military service and partial reimbursement to the company by turning over property purchased with stolen money. However, his knowing involvement in the theft scheme and efforts to protect himself and B have not been overcome by evidence of mitigation. I remain unconvinced of his financial responsibility, good judgment, and ability to resist further criminal activity.

Applicant's reprehensible track record and continued efforts to minimize his involvement in the criminal scheme are expressly contrary to the behavior expected of clearance eligible personnel. Accordingly, I conclude Applicant has not carried his burden

of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

### **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:  | AGAINST APPLICANT |
| Subparagraphs 1.a and 1.b: | Against Applicant |
| Subparagraph 1.c:          | For Applicant     |
| Subparagraphs 1.d and 1.e: | Against Applicant |
| Paragraph 2, Guideline F:  | AGAINST APPLICANT |
| Subparagraph 2.a:          | Against Applicant |
| Subparagraphs 2.b – 2.d:   | For Applicant     |
| Paragraph 3, Guideline J:  | AGAINST APPLICANT |
| Subparagraph 3.a:          | Against Applicant |

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for access to classified information. Clearance is denied.

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Gregg A. Cervi  
Administrative Judge