



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



In the matter of:)	
)	
)	ISCR Case No. 19-00656
)	
Applicant for Security Clearance)	

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

06/09/2020

Decision

MURPHY, Braden M., Administrative Judge:

Applicant, an accountant and business manager by training, was terminated for cause in 2014 for failing to complete a company financial audit as required. She was later found to have used a company credit card for personal purposes on numerous occasions, charging several thousand dollars, without authorization and without reimbursing her employer. That conduct later led to criminal charges, which were dismissed after Applicant participated in a pretrial intervention program and paid restitution. Applicant did not provide sufficient evidence to mitigate the resulting security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant’s eligibility for continued access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 5, 2017. On April 5, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). The DOD CAF took the action 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 Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017,

Applicant answered the SOR on May 5, 2019, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Her answer included 14 documents, marked during her hearing as Answer Exhibits (Ans. Ex.) A through N. On August 23, 2019, the assigned administrative judge scheduled the hearing for September 25, 2019. That hearing was postponed after Applicant retained counsel. I was assigned the case on December 11, 2019. On January 16, 2020, DOHA issued a notice scheduling the hearing for February 6, 2020. The hearing convened as scheduled.

At the hearing, Department Counsel submitted Government's Exhibits (GE) 1 through 11. Applicant testified and submitted Applicant's Exhibits (AE) A through N. All exhibits, including Ans. Ex. A through N, were admitted without objection. After the hearing, Applicant submitted additional exhibits. They included a letter from Applicant (AE O), a certificate of completion regarding an ethics course (AE P), her academic degrees (AE Q) and 17 certificates of completion for other professional training or refresher programs (AE R). All post-hearing exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on February 19, 2020. The record closed on February 20, 2020.

Request for Administrative Notice

The Government requested that I take administrative notice of the pretrial diversion program requirements under the state criminal code of Applicant's home state. (Administrative Notice (AN) I). I did so without objection. (Tr. 15)

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b, and 2.a (a cross-allegation of SOR ¶ 1.b), all with explanations and a narrative statement. Her admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 44 years old. She and her husband married in 2004. They have a young son. Applicant earned a bachelor's degree in accounting in 1999 and another bachelor's degree in management information systems in 2001. She has worked in the defense industry, with a security clearance, since September 2002. (Answer; GE 1; Tr. 9, 31-38, 62-64)

Applicant has worked in business management or accounting for her entire career. She worked as a business manager for her first defense employer from 2002 to 2009. (Answer; Ans. Ex. B; GE 1) She was then employed as an accounting manager by

defense contractor X from 2009 until September 2014, when she was terminated for cause. (SOR ¶ 1.a, discussed below). She was then briefly unemployed. Since December 2014, she has been employed as an accountant and financial auditor for a defense contractor working with a defense agency. (Answer; Ans. Ex. A & B; GE 1; Tr. 33-34, 45-47)

As the accounting manager for Company X, Applicant managed payroll, invoicing, and expenses. She managed five employees directly. They included an employee who handled invoices; an employee who handled corporate expenses; a payroll accountant; an employee who handled expenses for contract employees; and Applicant's personal assistant. Company X had about 400 employees nationwide. Only a few of them worked at the headquarters location, among them the company owners, as well as Applicant and a few others. (Tr. 39, 64-70)

Among Applicant's duties as the accounting manager was the responsibility to oversee an annual audit of the company's financial bookkeeping. She testified that in 2013, the company began using a new accounting system. Applicant said the accounting system had problems, and she wanted to fix those problems before having the audit completed by the 2014 due date. The company president, Mr. W, wanted the audit completed so the company could apply for a loan, and pressured Applicant to complete it more promptly. (Answer; Tr. 39-42, 90-96)

Applicant told Mr. W that she needed more time to complete the project, and the audit was not completed. In September 2014, Mr. W lost patience with Applicant and terminated her for failure to complete the audit. (Tr. 41-42, 89-92, 100-104; GE 2 at 14-15, GE 4 at 7-9; GE 8) (SOR ¶ 1.a) Applicant applied for unemployment compensation, but did not receive it. (Tr. 43-45; GE 9)

Company X had a corporate credit card program. Applicant testified that about 100 company credit cards were for travelling employees. About 10 company credit cards were for employees at corporate headquarters to purchase items such as office and kitchen supplies. (Tr. 67-68) Applicant had oversight of the corporate credit card program in her role as the accounting manager. (GE 11 at 28, 55-56) Applicant had a corporate credit card, as did several of the people she supervised. (GE 11)

Applicant testified that administration of the expense reports for the travel cards worked well but "the corporate side was very informal, very laid back, didn't really have a formality with them. And we were not required to give expense reports on the corporate side." (Tr. 68)

Employee J, who worked directly for Applicant, was responsible for directly monitoring the company credit card program. Employee J maintained the credit card files and made sure the credit card bills were paid. The credit card invoices were mailed in to Employee J for payment by the company. Applicant described herself as a "very laid-back manager," because she felt she could trust her employees. She did not make inquiries about employees' corporate credit card purchases. (Tr. 70-72, 74-89, 96, 117, 118)

During 2013 and 2014, Applicant used her company credit card for personal expenses on numerous occasions. Charges on her card included medical expenses and gas, as well as appropriate items such as supplies and food for the office. (Tr. 67, 78-81) She acknowledged that there was no system in place to differentiate between personal charges and proper corporate charges on the credit card. She acknowledged that, as the accounting manager, she was responsible for that failing. (Tr. 113-115, 118, 123) She did not reimburse her employer for any of her personal charges. Applicant acknowledged that she never went to Employee J to see the monthly invoices for Applicant's corporate credit card account, so she could review them for personal charges. (Tr. 115) Applicant denied that she was having financial difficulties at the time. (Tr. 110, 128)

Applicant, an at-will employee, received the Company X employee handbook when she began the job. (Tr. 118; GE 10) The handbook noted that "All charges to [the company credit card] must be for travel unless otherwise authorized." It further noted that "Any abuse of the company credit card will be grounds for immediate revocation of the privilege, and for discipline, up to and including termination." (GE 10 at 49)

The company audit was completed after Applicant's termination. It revealed that Applicant and three employees she supervised were using company credit cards for personal expenses. (GE 4) Those employees were also terminated. (GE 11 at 28)

This led to a state criminal investigation. (GE 11) Mr. W, the company president, told investigators that the company's internal audit revealed over \$224,000 in unauthorized personal expenses on company credit cards, by Applicant and the three other employees, during 2013 and 2014. Of those charges, \$29,845 were found to be personal charges on Applicant's corporate credit card. (AE 11 at 21, 37, 38; Tr. 81)

Applicant testified at her hearing that Mr. W "gave multiple people the authority to use their corporate credit cards for personal expenses." (Tr. 120) However, Mr. W denied to the criminal investigators that he had given employees such authorization. Mr. W told criminal investigators that "there was no one allowed to use [a] credit card to purchase personal items." (GE 11 at 28)

Mr. W also told criminal investigators that in 2008 or 2009, Applicant charged two tanks of gas on a company credit card. He said he made her repay the charges and counselled her not to do it again. (GE 11 at 27) Applicant did not start working for company X until 2009, but she otherwise confirmed the essence of the conversation. (Tr. 120-121)

Information provided by Company X to state criminal investigators included an e-mail Company X sent to its insurance company in March 2015 concerning an insurance claim related to the credit card theft. (GE 11 at 53-56) The e-mail notes that Company X's established procedures required expense reports to be completed for all expenses incurred on company credit cards. Applicant and another employee had approval authority on the expense reports. (GE 11 at 53) Only the company president, Mr. W, had check-signing authority. However, Employee J paid the credit card invoices online and not by check. Applicant, as the accounting manager, had the responsibility to review and

approve credit card expenses and to reconcile the accounts monthly. The company chief financial officer determined that no such reconciliation took place. (GE 11 at 54-55)

In October 2015, Applicant was indicted on state charges of: 1) theft of \$29,845 of company property and 2) illegal use of a credit or debit card. (GE 2 at 29-30; GE 11 at 1-3) A warrant was then issued for her arrest. Applicant learned of the warrant in June 2016, when it came up on a background check performed when she attempted to purchase a firearm as a gift for her husband. She turned herself in to authorities and was arrested. (SOR ¶¶ 1.b, 2.a)(Answer; Ans. Ex. D; GE 2 at 29; Tr. 48-52, 81-84, 104-105) The other three employees were also charged. (GE 11)

Applicant informed her current employer about the charges. This led to an incident report in the Defense Department's Joint Personnel Adjudication System (JPAS), to her 2017 SCA, and thus, to the pending hearing. (GE 3; GE 7; Tr. 124-125)

The district attorney offered Applicant an opportunity to participate in a pretrial intervention program. The charges were dismissed in December 2016. Applicant participated in counseling two hours a week for five or six weeks. She and the other three defendants had to pay a combined \$25,000 in restitution. Applicant paid over \$9,000 in restitution, as well as court costs. She completed the pretrial intervention program successfully in November 2018. (Answer; Ans. Ex. E – I; GE 3 at 2, GE 5, GE 6; AN I; AE A-G; Tr. 52-57, 108-110, 125-126)

During her testimony, Applicant denied that she failed to complete the audit because she knew that it would bring to light her own credit card misuse. She said she was not trying to hide anything about her conduct by failing to complete the audit, and was not worried that anything would be discovered. (Tr. 102-103, 111-113)

Applicant testified that she will never do anything like this again. It has been the most stressful event of her life. She did not intend to hurt anyone. She is a team player. She acted out of character. She would not put her family through this again. She apologized for her actions and asserted that she is trustworthy. She recognized her failings as a financial manager. (Tr. 58-60, 127-128)

In her current job, Applicant works as an accountant and financial auditor. (Answer; Ans. Ex. C) In 2017, she had an annual salary of just under \$100,000. (AE H) She does not hold a corporate credit card currently, but said she is not barred from having one. (Tr. 123-124)

In 2017, Applicant was regarded by her employer as a trusted partner to the government and a welcome and contributing member of the accounting team. She performs at a very high level. (AE I) She has been honored with awards for her performance. (Ans. Ex. C; AE J – AE M) Applicant's performance evaluation from 2019 reflects that she easily meets client expectations and that her leadership and experience is valued and highly appreciated. She is highly prepared and leads by example. (AE N) Applicant is active in her local school and church community. (Answer; Ans. Ex. J – M)

After the hearing, Applicant submitted documentation that she recently took an ethics refresher course for accountants as well as documentation of numerous other professional training or refresher courses. (Tr. 142-143; Ans. Ex. N; AE O, AE P, AE R)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the 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 not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 and has the ultimate burden of persuasion to obtain a favorable security decision.”

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 safeguard classified information.

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

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. . . .

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

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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 individual may not properly safeguard classified or sensitive information; and

(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . .

(3) a pattern of dishonesty or rule violations;

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

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant is a trained business manager and accountant. She was the accounting manager for Company X from 2009 until September 2014. When she began the job, she signed the company handbook, which detailed the restrictions for company credit card

use. In about 2009, she used her corporate card to buy gas, and was cautioned by the company president not to do it again.

As the accounting manager, Applicant had supervisory responsibility over several other employees, three of whom also used their company credit card for personal purposes. While one of those employees, Employee J, handled the payments for the credit card accounts, Applicant, as the accounting manager, had supervisory responsibility over the company's finances, specifically including the company credit card program.

Applicant attributed the credit card misuse to a "laid back" management style at the corporate headquarters, particularly with respect to the expense reports for credit card accounts for employees at headquarters (among them the three employees under Applicant's supervision, and Applicant herself). But it was Applicant who was most responsible for this.

In 2013 and 2014, Applicant used her company credit card for personal purposes on numerous occasions. This was in violation of company policy, as detailed in the company handbook, which she signed when she began the job.

Applicant repeatedly asserted that Mr. W had authorized her personal charges on her corporate card, as well as those of the other three employees. This assertion is not only uncorroborated, it is rebutted by Mr. W's representations to the state criminal investigators in GE 11. Indeed, it stands to reason that the criminal investigation would not have occurred had Mr. W (or someone else at Company X) not contacted authorities.

Applicant was terminated for cause in 2014 for failing to complete a company financial audit as required. (SOR ¶ 1.a) She was later found to have used a company credit card for personal purposes on numerous occasions, totaling several thousand dollars, without authorization and without reimbursing her employer. This led to criminal charges, in 2016. (SOR ¶ 1.b)

In one sense, the two allegations are intertwined, as they both concern Applicant's conduct while employed with Company X. However, they are also at least technically separate, on two grounds. First, SOR ¶ 1.a concerns a performance issue: Applicant's termination for cause due to her failure to perform an aspect of her job (the audit). SOR ¶ 1.b concerns separate criminal misconduct: her arrest about a year and a half later (for theft and misuse of her company credit card while at Company X). Second, the credit card misconduct did not come to light until after Applicant was terminated (indeed, after the audit was completed), so by definition, that misconduct did not lead to the termination.

Therefore, the two personal conduct allegations are not entirely duplicative. Because they are not, neither allegation can be found in Applicant's favor solely on that basis.

SOR ¶¶ 1.a and 1.b both satisfy the general personal conduct security concern of AG ¶ 15 because they are both acts showing Applicant's poor judgment and unwillingness to comply with rules and regulations. SOR ¶ 1.b also satisfies AG ¶ 16(d)(3) due to Applicant's pattern of dishonesty and rule violations; AG ¶ 16(d)(4) due to Applicant's significant misuse of Company X's resources; and AG ¶ 16(f) because abuse of the company credit card is specifically mentioned in the company handbook (that Applicant signed) as grounds for termination.

AG ¶ 17 sets forth the applicable mitigating conditions under Guideline E:

(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; and

(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.

Applicant's conduct occurred in 2013 and 2014, several years ago. Applicant accepted some responsibility for her actions, and provided documented evidence of counseling and trainings she undertook in an effort to show that her actions will not recur. Indeed, there is no evidence of subsequent misconduct or performance issues at her current job, where she is respected and highly regarded. AG ¶¶ 17(c) and 17(d) therefore both have some application.

However, Applicant's actions were a continuing course of conduct and were not isolated. Applicant's actions were also criminal in nature, so by definition, they were not minor. They also occurred despite the fact that Applicant has degrees in business management and accounting, and has spent her career in those fields. As the accounting manager for company X, she had professional responsibility for maintenance of the company's accounting and bookkeeping in general, and of the company's credit card program in particular. Also, despite Applicant's professional training, not once did she review a bill. Not once did she attempt to pay or take responsibility for any personal charges made on her corporate card.

During her testimony, Applicant accepted some responsibility for her actions. However, while another employee, Employee J, was responsible for the actual management of the program, Applicant had overall oversight responsibility. In this regard, Applicant's testimony about the "laid-back" oversight of the corporate credit card program rings hollow, since it was she who was ultimately responsible for that very oversight. Applicant's actions constituted a severe breach of the professional fiduciary duty to which she was entrusted by her employer.

Applicant asserted that personal use of corporate credit cards was sanctioned by Mr. W. This, too, rings hollow, as it was Mr. W who terminated Applicant and later provided the information to state investigators that led directly to the criminal charges. In addition, the company handbook detailed the restrictions on use of a corporate credit card, and Mr. W counseled Applicant early in her time at Company X not to use her corporate credit card for personal purposes. This evidence, too, cuts against Applicant's assertions that her actions were sanctioned.

Applicant's failure to perform the audit led to her termination in September 2014. Applicant asserted that she was not trying to hide anything about her conduct by failing to complete the audit, and was not worried that anything would be discovered. I do not really believe this, but there is no concrete evidence in the record to the contrary. Regardless, Applicant's failure to perform an important aspect of her job, in the face of requests from her supervisor to do so, is another example of Applicant's breach of a fiduciary duty to her employer and a disregard for rules and regulations. AG ¶¶ 17(c) and 17(d) do not fully apply to mitigate the personal conduct security concerns shown by SOR ¶¶ 1.a and 1.b.

Guideline J: Criminal Conduct:

AG ¶ 30 sets forth the criminal conduct security concern:

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. The charges against Applicant satisfy AG ¶ 31(b) (evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted).

AG ¶ 32 sets forth the applicable mitigating conditions under Guideline J:

(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.

The sole criminal conduct allegation is not mitigated for the same reasons as set forth under Guideline E, above. AG ¶¶ 32(a) and 32(d) do not fully apply.

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):

- (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 be 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and J in my whole-person analysis.

This case is not about punishing Applicant for her past performance issues or her criminal misconduct. Instead, it is about whether, given Applicant's actions, she has provided sufficient evidence to mitigate that conduct so as to establish that it is clearly consistent with the interests of national security that she maintain continued eligibility for access to classified information.

Particularly given Applicant's professional training, I did not find her justifications for her actions believable. Applicant took advantage of the trust her employer gave her and caused great damage. Even though her actions occurred several years ago, she has proven that she cannot be trusted. The risk is too great that she may again breach some fiduciary duty entrusted to her, whether it concerns classified information, financial information, or rules and regulations overall. And overall, the record evidence leaves me with questions and doubts as to her eligibility for access to classified information. Applicant did not provide sufficient evidence that it is clearly consistent with national interest to grant her continued 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances, presented, it is not clearly consistent with the interests of national security to grant Applicant continued access to classified information. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge