



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 19-03292
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

04/13/2022

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 June 20, 2018. On November 28, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J. The 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 adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on January 21, 2021, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 23, 2021, and the case was assigned to me on June 6, 2021. Scheduling of the hearing was delayed

by the COVID-19 pandemic. On January 10, 2022, I notified Applicant by email that his hearing would be conducted by video teleconference on January 27, 2022. (Hearing Exhibit (HX) I.) On January 14, 2022, the Defense Office of Hearings and Appeals (DOHA) confirmed my email and sent Applicant a formal hearing notice and the link to the video teleconference system. I convened the hearing on January 27, 2022, as scheduled. Government Exhibits (GX) 1 through 5 and Applicant's Exhibit (AX) A were admitted in evidence without objection.

After the exhibits were admitted, Department Counsel moved to amend the SOR to conform to the evidence by adding an allegation under Guideline E, cross-alleging the Guideline J conduct alleged in SOR ¶¶ 1.a and 1.b. Department Counsel also requested leave to present additional evidence. Because Applicant had not received notice of Department Counsel's intention to amend the SOR and submit additional evidence, I did not rule on the motion to amend the SOR. I recessed the hearing until February 7, 2021. DOHA received the transcript (Tr. 1) of the January 27 session on February 4, 2022.

I reconvened the hearing on February 7, 2022. Applicant submitted an amended answer to the SOR and a motion to strike or deny Department Counsel's motion to amend the SOR. I granted Department Counsel's motions to amend the SOR and submit additional evidence. (Hearing Exhibit (HX) II.) I denied Applicant's motion.

Department Counsel submitted GX 6 through 12, which were admitted without objection. Applicant testified and submitted AX B and C, which were admitted without objection. The record closed at the conclusion of the hearing. DOHA received the transcript of the February 7 session (Tr. 2) on February 15, 2022.

Findings of Fact

In Applicant's original answer to the SOR, he admitted the allegation in SOR ¶ 1.a and denied the allegation in SOR ¶ 1.b. In his amended answer to the SOR, he did not expressly admit or deny SOR ¶ 2.a, but he argued that it was irrelevant. I have treated his response to SOR ¶ 2.a as a denial. Applicant's admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 38-year-old business intelligence developer employed by a defense contractor since June 2018. He worked for a home-improvement store for about six months before being hired by his current employer. He has never held a security clearance. He has never married and has no children. His father is a retired Navy veteran. His father and brother are both disabled, and he takes care of them. (Tr. 2 at 16, 119.)

In March 2001, Applicant, then 17 years old, was employed at a gas station located on a military installation. Because the amount of the money in the cash register did not match the amount of gas that was sold, an investigation was initiated. There was a cash shortage of \$20.87 on March 30, 2001, and a surveillance camera was installed in the office, which captured a video of Applicant taking money from the cash register. He was accused of embezzling about \$200 by ringing a "no sale" on the cash register on several

occasions and keeping the cash. At the hearing, he admitted taking money from the cash register, but stated that he needed exact change for bus fare and sometimes exchanged his money for smaller bills or change in the cash register. (Tr. 2 at 14-15.)

At the hearing, Applicant testified that he believed the cash shortage at the gas station occurred because employees programmed the gas pumps incorrectly so that a \$1.97 transaction was registered as 19 cents. He believed that the programming error caused the loss of about \$3,000 and triggered the investigation. (Tr. 2 at 99.) He testified that, after the investigation, the loss-prevention supervisor concluded that there was no embezzlement, and no further action was taken. (Tr. 2 at 14-16.) The incident report reflects that Applicant was turned over to his mother, but it does not reflect any legal or administrative actions taken against him. (GX 3.) This incident was the basis for SOR ¶ 1.b. The juvenile court records of the jurisdiction where Applicant resided and worked reflect no record of a charge or conviction of embezzlement or any other criminal activity. (Answer to SOR, Exhibit B.)

Applicant attended a community college from 2002 to 2006, while working as an information technology consultant and earning about \$40,000 per year. He dropped out of school because he was failing. His girlfriend at the time (GF), who was nine years older than him and who worked for a credit union, introduced him to business friend (BF) who was involved in real estate.

BF was the owner and operator of a real estate development company as well as the owner and operator of an apartment building management company. He had a reputation for successfully revitalizing communities. (GX 8 at 20.) He and several others purchased multiple-family buildings, converted them to condominiums, and sold the condominiums as individual units. BF's business staff included a mortgage broker, two experienced realtors, a certified real estate appraiser, and an experienced real estate lawyer, all of whom were in their 30s and 40s. One realtor was in his 60s. (GX 10 at 2.) Around September 2006, BF offered Applicant an opportunity to become involved in the enterprise, and Applicant accepted it. (Tr. 2 at 17-18.). He was 23 years old at the time. (GX 1 at 7.)

Applicant, GF, BF, and others recruited buyers to purchase condominiums as investment properties or second homes. In fact, the properties were rentals and had tenants living in them. Buyers were assured that they would not be required to make down payments, pay closing costs, or be responsible for mortgage payments, even if they did not have renters in their units. They were promised that they would share in the profits when the units were sold. (GX 4; Tr. 2 at 57.)

Once a potential buyer agreed to participate, BF and others involved in the scheme would engage mortgage loan brokers and mortgage originators to prepare loan applications which reflected a falsely inflated purchase price; falsely represented that the buyer would occupy the condominium as a primary or secondary residence; and falsely represented that the buyer had substantial assets. The buyer's income would be inflated in the mortgage application by adding the anticipated rental income from the

condominium to the buyer's other income. (Tr. 2 at 37.) BF and others would arrange with a closing attorney to prepare false documents, including a HUD-1 settlement statement, which would falsely represent that the buyer had made a down payment and paid closing costs. The mortgage lenders would then fund the mortgage loan through a wire transfer to the bank account of the closing attorney. The proceeds of the loan would then be disbursed to BF, who paid a 3% commission to the person who recruited the buyer. (GX 7 at 6-7.)

Applicant started an investment consulting business in April 2007. (GX 1 at 17.) He used this business to recruit buyers for BF's enterprise. (GX 4.) Applicant recruited 11 or 12 buyers who were his friends or friends of his friends. (Tr. 2 at 42.)

In November 2006, Applicant purchased a condominium through BF's enterprise as an investment. The purchase price was \$302,000. He wrote a check for \$1,000. The documentation for the purchase falsely reflected that he had made a payment of \$20,000 for closing costs and had about \$23,000 in his bank account. (GX 7 at 8.) On the same day, he purchased a second condominium in a similar transaction. (GX 9 at 1; Tr 2 at 36.) He used the rental income from the two condominiums to pay the mortgages. (Tr. 2 at 31-34.)

Applicant was not directly involved in the preparation of the falsified documents. However, he did attend about 23 closings, in which he signed documents for buyers, using a power of attorney. (Tr. 2 at 46-48.) He testified that he knew the closings included fraudulent documents, but insisted that he did not intend to participate in fraud. He knew that the buyers were not paying the closing costs as represented in the documents, but "everybody knew they were not coming from the buyer. The lawyers knew. The banks know." (Tr. 2 at 48.) He testified that he thought it "made sense" for buyers to include anticipated future income from rentals in their statements of current assets. (Tr. 2 at 50.) When he signed closing documents, he thought he was "just signing documents," and he was not thinking about whether they were factually correct. (Tr. 2 at 51.)

Applicant testified that he was young at the time and depended on the more experienced members of the operation to know what should be done. He admitted that his lawyer told him that he was guilty of "willful blindness." (Tr. 2 at 53.) He admitted that he had questions about some of the transactions, but the more experienced members of the enterprise gave him answers, and his concerns were superseded by their experience, knowledge, and professional licenses. (Tr. 2 at 85.)

Applicant earned a 3% commission for each buyer that he recruited. He expected to earn \$182,000, but he received only about \$50,000. He testified that he stopped recruiting for BF because he was not being paid. (Tr. 2 at 78.) When the real estate market declined, most of the mortgage loans involved in the fraud went into default and some went into foreclosure. (GX 7 at 7.) During the sentencing proceedings, the government presented evidence that the fraudulent scheme created mortgage company losses aggregating \$2,844,565 for 16 properties purchased by buyers that Applicant recruited.

(GX 9 at 2.) Applicant's two mortgage loans defaulted, and his properties created bank losses of \$239,800 and \$284,500 respectively. (GX 9 at 1.)

Court records reflect multiple judgments obtained against Applicant between March 2008 and February 2009. He filed a Chapter 7 bankruptcy petition in May 2009 and his debts were discharged in October 2009. He filed a Chapter 13 bankruptcy petition in August 2010, which was dismissed in December 2010. He filed another Chapter 13 bankruptcy petition in July 2011, which was dismissed in August 2011. (GX 5.)

Applicant was arrested in November 2006. After a lengthy investigation, he was indicted in September 2010 for 11 counts of wire fraud and 6 counts of bank fraud (GX 7 at 47.) On November 28, 2015, pursuant to a plea agreement, he pleaded guilty to one count of wire fraud and one count of bank fraud. The remaining counts were dismissed. (GX 11 at 1) He was sentenced to imprisonment for 24 months and supervised probation for 36 months after release from prison. (GX 11 at 3.) He served his sentence and successfully completed his probation in September 2020. (GX 12.)

While Applicant was awaiting trial, he finished the requirements for an associate's degree in December 2010. He earned a bachelor's degree in May 2013 and a master's degree in May 2015. He also worked for a non-government company as the manager of business intelligence until he surrendered to government authorities to serve his sentence to incarceration. His supervisor observed that he demonstrated discretion and integrity in all his business dealings, that he had a strong sense of community, and that he routinely volunteered for or directly supported many charitable events to benefit military personnel and veterans. (Answer to SOR, Attachment 1.) A coworker who became a friend describes him as hardworking, smart, incredibly loyal, and selfless in his efforts to help others. The coworker is familiar with the facts that led to his conviction and regards them as an anomaly and a life lesson. She regards him as a faithful and trustworthy friend. (Answer to SOR, Attachment 2.)

Applicant also was ordered to pay restitution of \$3,786,815 and was ordered to forfeit at least \$7,413,712, jointly and severally with his co-defendants. (GX 11 at 5,11.) He has been paying the restitution at the rate \$50 per month since 2015 and is current on his payments. (Tr. 2 at 97-98.) He filed a petition for commutation of his sentence, which was still pending at the time of the hearing. (AX C.) He testified that the purpose of his clemency petition is to obtain a review of the restitution requirement. (Tr. 2 at 96.)

Applicant's ex-girlfriend, who introduced him to BF, was sentenced to imprisonment for two years, three years of supervised probation, and ordered to pay restitution of \$3,099,224 and forfeit \$7,413.712. BF was sentenced to imprisonment for 135 months, five years of supervised probation, and ordered to pay restitution of \$11,374.201 and to forfeit \$7,413.712. (GX 4.)

On November 20, 2020, the governor of the state where Applicant resides and is employed restored his civil rights and removed the political disabilities resulting from his conviction, except the ability to ship, transport, possess or receive firearms. His right to

vote, hold public office, serve on a jury, and be a notary public were restored. (Answer to SOR, Exhibit A.)

Applicant was working for his current employer when the SOR was issued. His performance appraisal for June 2020 through June 2021 rated him as “exceeds job requirements,” the highest rating. His appraiser made the following comments at the end of his appraisal: “[Applicant] is one of the best supply chain SME- (subject matter expert) we have, plus equally proficient from [a] technical standpoint as well. Another great year completed with flying colors!” (AX A.)

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.

Eligibility for a security clearance 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 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.” 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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.

Analysis

Guideline J, Criminal Conduct

The SOR alleges that Applicant was charged with wire fraud and bank fraud in November 2006 and incarcerated from about January 2016 to July 2017 (SOR ¶ 1.a), and that he was charged in April 2001 with embezzlement (SOR ¶ 1.b). The concern under this guideline 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.”

The following disqualifying conditions are relevant:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

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; and

AG ¶ 31(c): individual is currently on parole or probation.

AG ¶ 31(a) is not established. The embezzlement charge in 2001 was a “minor” offense under the circumstances, but the charges in 2006 were felonies. Thus, there is not a “pattern of minor offenses.” However, AG ¶ 32(b) is established by a “credible allegation” of embezzlement and Applicant’s conviction of wire fraud and bank fraud.

AG ¶ 31(c) is not established. Applicant has completed his period of probation. The unsatisfied restitution does not constitute parole or probation.

The following mitigating conditions 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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) is established for the charge of embezzlement alleged in SOR ¶ 1.b. Applicant was 17 years old at the time. No action was taken, the offense was minor, and more than five years elapsed before Applicant became involved in the criminal conduct alleged in SOR ¶ 1.a.

AG ¶ 32(a) is not fully established for the criminal conduct alleged in SOR ¶ 1.a. The first prong of AG ¶ 32(a) focuses on whether the criminal conduct was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *Id.*

Applicant's criminal conduct ended with his arrest in November 2006, more than 14 years ago, which is a "significant period of time." However, he was awaiting trial, incarcerated, or on probation until September 2020. He has been under pressure to obtain a security clearance until the present. He has not completed the restitution imposed by the court. When Applicant purchased his first property, he was aware that his documents falsely represented that he had made a down payment, paid the closing costs, and was purchasing a first or second home. Nevertheless, he continued to recruit purchasers and sign documents that he knew were false. He purchased a second property through the same fraudulent process.

However, Applicant's criminal conduct occurred under somewhat unusual circumstances. He had dropped out of college due to failing grades, was sporadically employed, and he had low income. He was introduced to BF's criminal enterprise by GF, an older woman with financial experience, with whom he was romantically involved. He did not know that GF was also involved in BF's enterprise.

AG ¶ 32(b) is established. Applicant was remorseful, candid, and credible at the hearing. He has successfully completed his probation and is making regular payments in restitution. He was highly regarded by his employer for whom he worked while awaiting trial. He completed his college education and earned a master's degree while awaiting trial. A current coworker who became a friend described his conduct as an anomaly and a life lesson, and she regards him as a faithful and trustworthy friend. His most recent performance evaluation rated him in the top category ("exceeds job requirements"). In November 2020, the governor of the state where he lives and works restored his civil rights and removed most of the political disabilities resulting from his conviction. After carefully considering all the evidence, I am satisfied that Applicant is rehabilitated.

Guideline E, Personal Conduct

The SOR cross-alleges the criminal conduct alleged in SOR ¶¶ 1.a and 1.b under this guideline. 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 or sensitive information. . . ."

I have considered whether the following disqualifying conditions under this guideline are applicable:

AG ¶ 16(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;

AG ¶ 16(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. . . ; and

AG ¶ 16(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 . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶ 16(c) is established by the evidence. Although Guideline F was not alleged in the SOR, Applicant's conduct was covered by Guideline F and Guideline J, specifically

AG ¶ 19(d) (“deceptive or illegal financial practices such as embezzlement, . . . mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust”), if it had been alleged.

AG ¶ 16(d) is not applicable. Applicant’s conduct was explicitly covered under Guideline J.

AG ¶ 16(e) is established. Applicant’s participation in fraudulent conduct adversely affected his personal, professional, and community standing.

The following mitigating conditions are potentially applicable.

AG ¶ 17(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;

AG ¶ 17(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;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(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.

AG ¶ 17(c) is established for the reasons set out in the above discussion of AG 32(a).

AG ¶¶ 17(d) and 17(e) are partially established by Applicant’s acknowledgment of his criminal behavior and his outstanding performance as an employee of a defense contractor.

AG ¶ 17(g) is established because Applicant no longer associates with persons involved in criminal activity.

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(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.

I have incorporated my comments under Guideline J and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under those guidelines, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has mitigated the security concerns raised under Guidelines J and E.

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 and 1.b:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge