DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-00263
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

06/09/2023

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Decision

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MURPHY, Braden M., Administrative Judge:

Applicant was indicted in 2016 on multiple federal charges, including bank fraud, making false statements, and other charges. He pleaded guilty to two of the charges in April 2017 and was sentenced to federal prison. Though the offenses are dated, Applicant did not provide sufficient evidence to mitigate the resulting security concerns, alleged under Guideline E (personal conduct) and cross-alleged under Guideline J (criminal conduct). Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 5, 2019, in connection with his employment in the defense industry. (GE 1) On June 28, 2021, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (personal conduct). The CAF issued the SOR 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 within DOD on June 8, 2017.

Applicant answered the SOR on October 21, 2021, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On December 17, 2021, his counsel submitted a related brief (Answer) accompanied by exhibits. (Answer Tabs A through E, all of which were resubmitted as hearing exhibits.) The case was assigned to me on October 5, 2022. On November 3, 2022, DOHA issued a notice of hearing scheduling the case to be held in person on December 8, 2022.

On December 7, 2022, the day before the hearing, Department Counsel filed a motion to amend the SOR, seeking to add as a cross-allegation under Guideline J (SOR ¶ 2.a), the same conduct alleged under Guideline E ¶¶ 1.a and 1.b. The basis for the amendment was a new theory of the case, rather than on new evidence. Applicant's counsel objected to the untimeliness of the motion, noting that his theory in defense was based, in large part, on the fact that the Government had not alleged a Guideline J case against his client, and that he had prepared his case accordingly. Were Guideline J to be included in the SOR, he would likely request a continuance in order to have additional time to brief the case and gather additional relevant evidence. The December 7 e-mails between the parties are marked as Hearing Exhibit (HE) I and the SOR Amendment is HE II.

During a conference call that afternoon, I heard brief arguments from counsel, after which I denied the Government's motion to add the Guideline J cross-allegation as untimely, given the ample opportunities available to the Government to add it earlier. The December 8 hearing was, therefore, to proceed as scheduled. (The conference call is summarized at Tr. 7-9)

Later that same evening, I was injured in an accident at home. As a result, I was medically unable to attend or conduct the in-person hearing scheduled for the next day. On the morning of December 8, I continued the hearing indefinitely, notifying the parties by phone. With the hearing continued, Department Counsel promptly renewed her motion to amend the SOR. (HE II, III)

On December 19, 2022, I held another conference call with the parties. I granted the renewed motion to amend the SOR, since Applicant now had sufficient time to respond, with no hearing date yet rescheduled. Applicant was given until January 19, 2023, to answer the added cross-allegation. This was memorialized in a December 19, 2022 e-mail. (HE IV) Applicant's counsel filed a timely Answer to the Amendment and a legal brief. (HE V) .

The hearing was then rescheduled for February 24, 2023, to occur virtually through the Microsoft TEAMS platform, by mutual agreement. DOHA issued a hearing notice on January 30, 2023. On February 17, 2023, Applicant's counsel requested an in-person hearing instead of one by TEAMS. After some e-mails between the parties,

an in-person hearing was then arranged for the same day, February 24, 2023. A notice for the in-person hearing was issued on February 21, 2023. (Tr. 10-11)

The in-person hearing then convened as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through 10, which were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AE) A, B, C, D-1 through D-10, and E, all of which were admitted without objection. (AE A is a power of attorney and AE B is the SOR).

I left the record open to enable Applicant to submit additional documentation. He subsequently submitted documents that were marked as AE F and AE G (a letter and payment ledger related to his restitution payments) and admitted without objection. DOHA received the hearing transcript (Tr.) on March 7, 2023. The record closed on March 27, 2023.

Amendment to the SOR

In her Amendment to the SOR, Department Counsel added a cross-allegation under Guideline J (criminal conduct) as follows:

2.a: That information set forth in subparagraphs 1.a and 1.b, above.

Findings of Fact

Applicant's Answer to the SOR was submitted by counsel. In a signed declaration (AE C), Applicant addressed the Guideline E allegations (SOR ¶¶ 1.a – 1.d), each with narrative explanations. (Tr. 70-71) His answers do not contain the phrases "admit" or "deny." I nonetheless construe his answers as admissions to most of the factual circumstances alleged, but otherwise take his explanations as denials. I construe his answer to SOR ¶ 1.c (concerning falsification) as a denial. Through counsel, Applicant admitted the cross-allegation at SOR ¶ 2.a. Applicant's admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, the exhibits, and the hearing testimony, I make the following additional findings of fact.

Applicant is 54 years old. He has a bachelor's degree, a master's degree, and other certifications. He was married from 1992-2014 and he remarried in January 2021. He has three grown children. From about 1989 until May 2017, he was employed by another government agency (AGA) in various cleared positions. He was terminated from the AGA in May 2017, and his clearance was revoked soon thereafter, following his arrest and guilty plea for the conduct that is largely the subject of this case. He has been employed in the defense industry, with the same employer, since May 2017, and he seeks a security clearance through that employment. He does not hold a clearance currently. (GE 1; AE C; Tr. 29-38; 71-72, 92-98, 133-136) He also works a side job as a city housing inspector, on a case-by-case basis, after hours. (Tr. 133-135)

In about 2011, Applicant started a nonprofit organization (NPO), a basketball program for about 20 or 30 underprivileged youths. Players were required to perform community service and keep up good grades. He became close friends with F, a woman whose son was in the program, and whom he had known for many years. They had social contact, but were not dating. She was a city employee. (Tr. 52-53, 64-67, 72-81; GE 2 at 4)

Applicant's friend F had two mortgages on her home from Bank S. By 2009, F was behind on her mortgage payments, and in May 2010, a notice of foreclosure had been filed with the city Recorder of Deeds. In spring 2013, Bank S began foreclosure proceedings. (GE 9 at 4; Tr. 109) Through their friendship, Applicant "offered to give her some advice" about selling her home, based on his own experience with a short sale in about 2012-13. (Tr. 52-53, 64-67, 72-81)

In October 2013, Applicant allegedly created and then filed fabricated certificates of satisfaction with the city Recorder of Deeds for the two liens on F's home. With the liens apparently satisfied, F would own her home "free and clear" with no amount due on any outstanding mortgage. F then put her home up for sale. When the house was sold, she received 100% of the proceeds from the sale, of about $337,000 – proceeds that should have gone to Bank S to satisfy the outstanding mortgages. After the sale was completed in December 2013, F split the proceeds with Applicant, who received about $170,000 days later, apparently as a loan, rather than as a gift. He quickly deposited the money into his bank account. (GE 4, GE 9; Tr. 85-86, 109-110)

In 2015, Applicant allegedly made a materially false statement on a financial disclosure form that he submitted to his government employer, when he failed to disclose the $170,000 gift or loan from F as required. (GE 9)

Federal law enforcement authorities opened an investigation into the transaction. In March 2016, Applicant was interviewed as part of their investigation. He denied preparing fraudulent certificates of satisfaction, denied knowing what the term "certificates of satisfaction" meant, and denied other activities by which Bank S was allegedly defrauded. (GE 4) He denied, for instance, going to the city Recorder of Deeds to file the fraudulent certificates of satisfaction, and he denied that the certificates contained his handwriting. (Tr. 84, 92, 141-142)

In August 2016, Applicant was indicted by a federal grand jury and charged with multiple felony counts, including Conspiracy, Bank Fraud, Wire Fraud, Money Laundering, False Statements, and Uttering a Forged Instrument. He was arrested days later. (GE 3, GE 4, GE 7) (SOR ¶ 1.a)

In April 2017, on the advice of his counsel, Applicant pleaded guilty to one count of Bank Fraud (18 USC 1344) and one count of False Statements (18 USC 2001(a)(2)). The remaining counts were dismissed. In July 2017, Applicant was sentenced to a prison term of one year and one day, followed by two years of supervised release. (GE

4, GE 5, GE 6) A forfeiture money judgment was also issued against him, and he was ordered to pay restitution of $337,105. (GE 4) (SOR ¶ 1.b)

Applicant was a cleared GS-15 employee of an AGA at the time. He was placed on administrative leave after he was indicted (August 2016) and in May 2017, following his guilty plea, he was terminated from his job. He testified that he tendered a resignation, but was then terminated days before his resignation was effective. (GE 1, GE 4; Tr. 81, 93-98) (SOR ¶ 1.d)

Applicant reported the charges, guilty pleas, and sentence on his August 2019 SCA. He also noted that he was still on supervised release (though he hoped for early termination). (GE 1 at 32-34) He disclosed that he had been terminated from his job at the AGA, and that his clearance had been revoked as a result. (GE 1 at 16, 37-38)

In the Employment section of his SCA, Applicant indicated that he had worked for his current employer since May 2017. (GE 1 at 14; Tr. 98-99) In listing his residences, he disclosed residing at an "FPC" (Federal Prison Camp) in State 1 from August 2017 to January 2018. (GE 1 at 10; Tr. 57, 99-104)

Applicant testified that when he was questioned by law enforcement authorities, he said this was the first he had heard about a "certificate of satisfaction." He said the authorities built a case against his friend (F). (Tr. 50, 55) He said a key part of the evidence against him was an address listed on the certificates. This was an address he had access to, but he said he had not been there in seven years. That residence was owned by a friend of his. He denied at hearing that he knew what that address was. (Tr. 56, 84-85, 88-89) At his hearing, he denied creating or receiving phony certificates of satisfaction of the liens and asserted he would have been exonerated at trial. (Tr. 82-85, 138)

Applicant said he did not want to plead guilty and accept the plea agreement, but only did so with the strong urging of his defense counsel. (AE C) This was confirmed by a letter from his defense counsel, Mr. B. (AE D-9) Applicant acknowledged that before pleading guilty, he was provided a copy of the indictment, the Statement of Offense, and a letter from the U.S. Attorney's Office detailing the terms of the plea agreement. (GE 7, GE 8, GE 9; Tr. 139-140) He acknowledged stipulating to the Statement of Offense and signing it under penalty of perjury. (Tr. 83, 111-112) GE 8 contains the following statement, under "Defendant's Acceptance:" "I am pleading guilty because I am, in fact, guilty of the offenses identified in this agreement." By his signature, he also indicated that he had read and understood the entire plea agreement and was entering into it "voluntarily and of my own free will, intending to be legally bound." (GE 8 at 12)

At his security clearance hearing, Applicant said, "I understand that, you know, although I, you know, was talked into it, that Statement of Offense that I signed in 2017 will always be the record, the official record. And so, going forward, I will acknowledge that as such. . . ." (Tr. 43, 47, 139-140) However, he also asserted that he always intended to go to trial and expected to be found not guilty. "And, I, to this day, believe in

my innocence." (Tr. 44, 110-111, 140) He acknowledged pleading guilty to two of the six counts. (Tr. 50; AE C)

Applicant also said he accepted responsibility and acknowledged signing the Statement of Offense. (Tr. 91-92) He asserted that he was advised by his attorneys that, even if he pleaded guilty, he was likely to be able to keep his job with the AGA and his clearance. (Tr. 45) (The plea agreement letter does not address this.) (GE 8) He also asserted that he was told that one of the charges (money laundering) carried a mandatory sentence. He was also concerned for his family and the things in life for which he was responsible. In the end, "it took a lot to convince me. I took the plea deal." (Tr. 56-57)

Applicant acknowledged that the Statement of Offense, which he signed, includes an admission that he filed false certificates of satisfaction with the city recorder of deeds. (GE 9 at 4) It also states that he "caused the creation" of the two "phony" certificates. (GE 9 at 4) He acknowledged that F therefore received proceeds from the sale that should have gone to Bank S. He acknowledged that the $50,000 loan he received from F was part of those proceeds and was part of the $170,000 he received. He believes he was not credited with paying that $50,000 back to her, so it should not be part of the restitution. (Tr. 128-131, 138; AE C)

Applicant also acknowledged that he appeared in federal court, with his counsel, before the judge who took and accepted his plea, and was questioned extensively about whether he was pleading guilty knowingly and voluntarily, accepting responsibility for what he did, and with an understanding of the possible punitive consequences. (GE 8 at 12) He asserted at hearing that he believed he would not get any jail time. He also acknowledged that he did not, at least formally, pursue an attempt to withdraw his guilty plea. (Tr. 112-118) He asserted that he pled guilty because he was scared, and never been in trouble before and trusted his attorneys, and "I did what they advised me to do." (Tr. 138-139) The plea agreement letter noted an "Estimated Guidelines Range" for a sentence of 24 to 30 months in jail. (GE 8 at 3)

Applicant testified at the security clearance hearing that he recognized that denying responsibility for the conduct yet also pleading guilty and admitting to the conduct in the Statement of Offense is a "catch-22," and he does not wish to appear deceptive. (Tr. 61, 91, 110-112, 140)

Applicant was allowed to "self-surrender" to begin his prison sentence. (Tr. 50) He testified that he did not have to leave his job as a contractor when he reported to federal prison. He said he was on administrative leave while he was in prison. (Tr. 51) (It is unclear what, if anything, Applicant told his employer where he was going).

Applicant's sentence of one year and one day was reduced due to good behavior to about four months in jail. He was released in early January 2018. He then resided in a "residential reentry center" (likely akin to a "halfway house") and returned to work at

his job. He participated in all the required rehabilitative training. (Tr. 58-59, 99-104) His period of supervised release also ended early, in January 2020. (GE 10; AE E)

Applicant explained that of the $170,000 in proceeds he received from the sale of F's house, $120,000 went to the NPO basketball team. He said the money went primarily for travel expenses, such as hotels and airline tickets. He used $35,000 for himself ("for what I wanted."). He said he later received $50,000 from an uncle's estate when his uncle died in about 2014. Applicant said authorities also seized his bank account and kept the funds (about $48,000). (Tr. 53-54, 73, 128-129)

Applicant asked F for a $50,000 loan in 2013, around the time her house was sold. He said he used the money to help his children. He said he repaid the loan in 2014. (Tr. 127-128; GE 2 at 4) He testified that he did not report the matter on his 2015 financial disclosure form because he paid it off the year before, and that most of the money went towards the basketball program, and not to him. (Tr. 89-90, 131-133) The Statement of Offense says he deposited the $170,000 into his own bank account. (GE 9 at 5) He acknowledged that it was "probably not" a good idea to ask F for a loan if he knew she had credit or financial problems. (Tr. 137-138)

In October 2019, Applicant had a background interview in connection with his SCA. In SOR ¶ 1.c, the Government alleges that Applicant made deliberately false statements to the investigator when, in discussing his criminal charges, he asserted that he did not engage in the underlying criminal conduct, despite having pled guilty and having signed a "Statement of Offense" in which he acknowledged various specific criminal acts. (GE 2 at 5; GE 9)

Applicant denies the allegation of falsification. He acknowledges "misstatements" that "did not correspond or correlate with the Statement of Offense" that he had signed in 2017 on the advice of counsel. (AE C; AE D-10; Tr. 38, 61, 90-91, 121-123) He said, however, that these "misstatements" were not "false statements." (Tr. 46, 125-126) He said he did not intend to mislead the government and apologized. (Tr. 40, 46; AE C)

Applicant also testified that he consulted legal counsel, Mr. D, before meeting with the interviewing agent "because I wanted to get guidance on . . . how I should approach the questions as they pertain to the incident that transpired in 2013" and to "add to the record" on the matter. (Tr. 41-42. 46; AE C)

The lawyer Applicant consulted, Mr. D, met Applicant days before his interview with the investigator. Mr. D wrote, in part:

> With [Applicant's] understanding that the statement his attorneys had him sign in the 2017 plea agreement would always be the official record, I advised him to tell the DCSA investigator the truth as he knew it and though it would differ from the official record, it would serve as a mechanism to get his account of the events that transpired in the Fall of 2013 in the record. In other words, based on our conversations, I believed

> that there were details that needed to be shared with the investigator that may not have been included in the official record. It has always been my position in this case and in similar cases that it is always best to give full disclosure and describe any and all events to the best of your knowledge, information, and belief. (AE D-10)

Applicant did not believe that either he or the interviewing agent (Agent B) had a copy of the Statement of Offense or the Plea Agreement Letter when he had the interview. He adopted the interview summary as accurate in an interrogatory response, and only provided an update as to the status of his supervised release. (GE 2 at 8-9; Tr. 126-127)

GE 4 indicates that Applicant has been ordered to pay about $337,000 in restitution. He testified that he and F are jointly and severally liable for the full amount, but then said he is responsible only for the $170,000 he received. He is still trying to settle what he owes in restitution but is also making $150 payments regularly on a monthly basis and is current, as of March 1, 2023. Court documentation reflects that he is jointly and severally liable for the full amount ($337,105). Almost $105,000 has been collected since 2017, with about $232,000 outstanding. Several line items are blacked out, so they may relate to payments by F (though this is unclear). (Tr. 55, 105-108; AE F, AE G)

Applicant volunteers in the community as a coach at a local high school working with at-risk youth. (Tr. 60; AE D-4, AE D-5, AE D-7, AE D-8) He is no longer involved with the NPO's basketball program and has not been involved since he was indicted. (Tr. 77-78)

Applicant has had no other arrests or offenses. He had no security violations when he held a clearance. (Tr. 43, 63, 119) He said, "I've never been in trouble before, I don't plan on being in trouble again." (Tr. 43) He cannot be blackmailed due to his conduct. (Tr. 48) He is trying to get back on track. He wants to regain his clearance to support national security. He has experience and expertise in his professional field and wants to contribute. He considers this work to be his life. (Tr. 68-69)

Applicant provided several letters from professional and personal character references, all of which I have reviewed. (AE D-1 – AE D-8) The professional references, all of them holding clearances, include the CEO of Applicant's employer (AE D-1), another director for the company (AE D-3), a former supervisor at another government agency (AE D-2), three other employees at the AGA (AE D-4, AE D-5, AE D-6), and a government employee in another federal government department (AE D-7).

All of these references have known and worked with Applicant for many years, and attest to his professional and technical skill and expertise in his professional community, as well as to his judgment, trustworthiness, reliability, honesty, integrity, decision-making, and work ethic, among other qualities. Applicant is also highly active as a volunteer in the community, proving a role as a mentor to under-privileged youths,

as previously noted. (AE D-5, AE D-8) All of the references attest that Applicant is a suitable candidate for renewed access to classified information.

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. (AG) 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:

> (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 single 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: . . . any disruptive, violent, or other inappropriate behavior; [and] a pattern of dishonesty or rule violations;
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> (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.

Department Counsel acknowledged that SOR ¶ 1.a (the charges in the indictment) and SOR ¶ 1.b (the guilty plea and sentence) relate to the same

circumstances. (Tr. 145) I will therefore treat them together as a single allegation (and they are cross-alleged as such under Guideline J.) (SOR ¶ 2.a).

In 2013, Applicant engaged in a scheme with his friend F to defraud her mortgage bank, Bank S, and take the proceeds of the sale of her house – proceeds that rightfully should have gone to Bank S when the home was sold. As he acknowledged when he affirmed the Statement of Offense and accepted the plea agreement, he had a hand in creating two phony certificates of satisfaction for the mortgage liens, filed them with the city Recorder of Deeds, and accepted his share of the proceeds when the sale was completed by depositing the money into his bank account. He also failed to declare those proceeds on his government financial disclosure form in 2015, as required. Even now, Applicant does not want to acknowledge the specifics of what he did, but as even he acknowledges, the record speaks for itself.

Applicant was indicted, charged, arrested, pled guilty to two of the charges (having received legal advice to do so), was sentenced to federal prison, served his sentence, and completed his probation (supervised release). He is still paying on the several hundred thousand dollars in restitution and will be doing so for a long time.

The Appeal Board has held that a plea of guilty is an admission not only of the facts underlying the offenses but of the crime itself. ISCR Case No. 11-06937 at 3-4 (App. Bd. Jan. 10, 2013) However, even though the doctrine of collateral estoppel may apply to a criminal conviction, Applicant must also be given an opportunity to explain his conduct, present it in a meaningful context, and ultimately have an opportunity to mitigate it. ISCR Case No. 11-00180 at 7 (App. Bd. Jun. 19, 2012)

AG ¶ 16(e) is implicated by Applicant's conduct, particularly since he was terminated from his job with the AGA as a result. AG ¶ 16(g) also applies. The general personal conduct security concern (AG ¶ 15) is also implicated, given Applicant's poor judgment and dishonesty shown by his involvement in the criminal scheme.

AG ¶ 16(d) does not apply. There is now a cross-allegation under Guideline J, so it cannot be said that his conduct is "not explicitly covered under any other single guideline."

SOR ¶ 1.d sets forth the consequences of the conduct (the termination by the AGA), rather than the conduct itself (the criminal conduct to which he pled guilty). Thus SOR ¶ 1.d does not constitute disqualifying conduct, since it concerns the AGA's action against Applicant, rather that something he did.

This leaves SOR ¶ 1.c. The Government alleges that Applicant engaged in deliberate falsification in denying in his background interview that he engaged in criminal conduct, notwithstanding his guilty plea and acceptance of the Statement of Offense detailing what he did, in various specific respects. Applicant denies the allegation of deliberate falsification.

Applicant disclosed the offense on his SCA, disclosed the subsequent termination and revocation of his clearance, and disclosed that he was still on probation. He also sought legal advice about what to say during the interview, and believed he was acting in accordance with that advice at the time. (See mitigating condition AG ¶ 17(b)). It is definitely true that Applicant has had (and continues to have) difficulty accepting full responsibility and acknowledging that he committed any crimes, either generally or specifically. But as to SOR ¶ 1.c, I conclude that, while he did not accept full responsibility for his criminal conduct, he also did not intend to give false information in his interview. AG ¶ 16(b) does not apply to SOR ¶ 1.c.

I will address the mitigating conditions under Guidelines E and J together, below.

Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for criminal conduct:

> 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 following disqualifying condition is applicable:

> (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.

SOR ¶ 2.a is a cross-allegation of the two criminal conduct allegations in SOR ¶ 1 (SOR ¶¶ 1.a and 1.b). The security concerns associated with that conduct are largely addressed under Guideline E above. Nevertheless, AG ¶ 31(b) also applies.

Applicant is still paying restitution and will continue to do so for a long time. However, he completed his jail term and his period of supervised release and did so early. Thus, AG ¶ 31(c) (individual is currently on parole or probation) does not apply.

The potentially applicable mitigating conditions under Guideline E are set forth under 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; 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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; 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.

The potentially applicable mitigating conditions under Guideline J are set forth under 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;

(c) no reliable evidence that the individual committed the offense; 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.

Some mitigation does attach here given the age of the criminal conduct at issue, and the fact that Applicant has no other instances of criminal conduct. He pled guilty, served his sentence, and was released early, both from jail and from supervised release. The conduct occurred about 10 years ago.

However, this was not a single act of poor judgment or lack of impulse control. This was a scheme, one that required planning and malice aforethought, and several steps to accomplish it. At each one of those steps, Applicant could have pulled back and decided not to proceed. He did not do that. Further, he held a clearance at the time as a longtime, trusted, cleared U.S. Government employee. Put simply, he should have known better.

Further, the mitigating effect of the age of the conduct is undercut by Applicant's continued insistence that he didn't do it and that he would have been found not guilty at trial. He pleaded guilty to the two charges and did so with considered advice from legal counsel. He professed to be surprised that he went to jail at all – when he received less

than the recommended term of 24 to 30 months. He claims not to have been involved either with the creation of the phony certificates of satisfaction or with filing them with the city, contrary to the specifics of the Statement of Offense, which he acknowledged, accepted voluntarily, and signed. He asserted that the basketball team got $120,000 of the money he received, when the evidence says he deposited it into his own bank account. These assertions undercut his acceptance of responsibility for his actions. They undercut a showing that he is fully rehabilitated. And they undercut his credibility since he professes innocence that I simply do not believe.

Even though I have concluded that Applicant did not make a deliberately false statement in his background interview in claiming not to have engaged in criminal conduct, I also conclude that he has never accepted full, unequivocal, unconditional responsibility for what he did – and for what he pled guilty to. This lack of acceptance of responsibility significantly undercuts any claim of rehabilitation, even ten years on.

AG ¶¶ 17(c) and 32(a) have some application due to the age of the offenses, but they do not fully apply. The seriousness of the offenses and the fact that he has not accepted full responsibility leads me to conclude that his actions continue to cast doubt on Applicant's current reliability, trustworthiness, and good judgment.

Similarly, AG ¶ 17(d) has some application, but this is undercut by the fact that Applicant has not fully acknowledged his behavior. AG ¶ 17(g) applies, since Applicant has no further contact with his friend F.

AG ¶¶ 17(f) and 32(c) do not apply, as the information is not unsubstantiated, and there is reliable information that Applicant committed the offenses to which he pled guilty.

AG ¶ 17(e) applies, as Applicant disclosed the offenses on his SCA, and the dated nature of the offenses (and the fact that he plead guilty to them in open court) make the possibility of exploitation rather unlikely.

Lastly, AG ¶ 32(d) is given some consideration. Applicant served his sentence, completed probation (both early) and has an excellent work record, and a long involvement in community outreach, as shown by his strong professional character references. He has no other criminal offenses. Despite the age of the offenses, however, their serious nature, the fact that he engaged in the conduct while employed in a cleared position while employed with the U.S. Government, and the fact that he has not accepted full responsibility for his actions precludes full consideration of mitigation.

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. On balance, and in consideration of the evidence as a whole, I conclude that Applicant provided insufficient evidence to mitigate the security concerns about his personal conduct and criminal conduct. Overall, the record evidence leaves me with questions and doubts as to Applicant's 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-1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant
Paragraph 2: Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant's access to classified information. Eligibility for access to classified information is denied.

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Braden M. Murphy
Administrative Judge