



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



In the matter of:	)	
	)	
-----, -----	)	ISCR Case No. 08-05020
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: *Pro Se*

July 30, 2009

**Decision**

WHITE, David M., Administrative Judge:

Applicant’s employment as manager of an overseas military exchange facility was terminated for her involvement in cigarette ration violations, falsifying ration and gift cards, and destroying ration control records to conceal the fraudulent activity. Contrary to substantial evidence, Applicant and her former employees admit only what was directly observed, and deny the larger fraud. Applicant’s appeal of her termination and subsequent Equal Employment Opportunity Commission (EEOC) complaint were unsuccessful. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted her Questionnaire for National Security Positions (SF 86), on February 12, 2007.<sup>1</sup> On March 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E.<sup>2</sup> The action was taken under Executive Order 10865, *Safeguarding*

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<sup>1</sup>Item 4.

<sup>2</sup>Item 1.

*Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on April 12, 2009, and requested that her case be decided by an administrative judge on the written record without a hearing.<sup>3</sup> Department Counsel submitted the Government's written case on June 9, 2009. A complete copy of the file of relevant material (FORM)<sup>4</sup> was provided to Applicant, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of her copy of the FORM on June 16, 2009, and returned it to DOHA. On June 19, 2009, she submitted a letter with additional evidence and some corrections to statements made by Department Counsel in her argument. Applicant made no objection to consideration of any evidence submitted by Department Counsel, other than to note her disagreement with some of the conclusions and decisions reached by her former employers. On July 14, 2009, Department Counsel initialed a memorandum to indicate that she did not object to the admissibility into evidence of the materials submitted by Applicant. Accordingly, the Applicant's July 13, 2009 letter and all attachments thereto are admitted into evidence and the record. I received the case assignment on July 21, 2009.

### **Findings of Fact**

Applicant is a 34-year-old former employee of a military exchange system overseas applying for a NATO civilian security clearance. Her father is retired from U.S. military service and her mother is a foreign national from the country where they have lived since 1993. Applicant was a dual citizen until renouncing her foreign citizenship to qualify for employment at the exchange as a U.S. employee.<sup>5</sup>

Applicant worked as a sales associate at the exchange from 1993 to 1998, when she joined the Security (later Loss Prevention) Department as an exchange detective. She performed all these duties in an exemplary manner, and received numerous formal awards and commendations. In 2001, she was selected to be the supervisory manager of a remote retail annex. All other employees at this annex were local nationals.<sup>6</sup> Applicant was authorized to buy exchange merchandise, but none of her employees were authorized to do so.

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<sup>3</sup>Item 3.

<sup>4</sup>The Government submitted six items in support of the allegations.

<sup>5</sup>Item 4 at 1, 2; Item 5 at 5, 7.

<sup>6</sup>Applicant's responses to the SOR and to the FORM.

On several occasions throughout the day of November 14, 2006, exchange loss prevention guards observed one of Applicant's local-national employees leaving the store with several bags of merchandise and placing them in his car. Applicant accompanied the employee on one of these trips to his car. The bags contained exchange merchandise and purchase receipts, including a jacket, two pairs of shoes, two fruit drinks, and twelve cartons of ration-controlled cigarettes. All items except the cigarettes had been purchased by Applicant using her credit card, and were intended as gifts for the employee's children. The employee claimed two unknown American service members had agreed to his request to purchase the maximum ration of six cartons each of cigarettes for him. Further investigation revealed that the purchases were made with cash, and were recorded by another employee on the daily ration-control record (RCR) using names and ration card numbers that were false. The purchases were recorded together on the RCR, but register records indicated that they were actually made at 9:22 a.m. and 1:47 p.m. on the two different registers in the store. A second employee made the first sale using her regular register. She also claims that she made the second sale on the other register while using Applicant's log-in number by mistake. Applicant denies having made the sale, or otherwise having any knowledge of her employee's purchase of rationed cigarettes. However, register records showed that the second employee made two sales on her regular register at 1:46 p.m., one sale at 1:47 p.m., and another sale at 1:48 p.m. that day. Neither of the two other employees who worked that day rang up any register sales between 1:21 p.m. and 2:09 p.m., and both said they left the store for lunch during that period. The employee caught with the contraband goods did not have register privileges, so the simultaneous sales on the two registers, located some 12 feet apart, were most likely made by Applicant and the second employee.<sup>7</sup>

Exchange loss prevention personnel were sent to the annex on November 16, 2006, to obtain the retained RCRs for investigation of further fraudulent names and ration card numbers. Applicant produced the RCRs for November 15 and 16, but said she had no older records because she routinely destroyed them after a few days in order to prevent their being modified. She said she had followed this practice for several years but never sought permission or confirmation for such a procedure. She claims no written regulation requires retention of these records, although she did have past copies of all other required records.<sup>8</sup>

Records of cigarette sales at Applicant's annex were examined to determine how often sales of the monthly maximum of six cartons at one time were made from February to November 2006. There were no such sales in February, 4 in March, 1 in April, 2 in May, 6 in June, 16 in July, 11 in August, 8 in September, 15 in October, and 11 in November (ending with the two on November 14). One July sale and three of the August sales fully or partially involved a brand different from the one found in the employee's car. All other full-ration sales were of that same cigarette brand.<sup>9</sup>

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<sup>7</sup>Item 6 at 1-11.

<sup>8</sup>*Id.*

<sup>9</sup>Item 6 at 13-15.

From March to July 19, 2006, one full-ration purchase was made by credit card and all the rest were paid by cash. From July 20 to August 7, 2006, one such purchase was by credit card and all of the remaining 11 full-ration purchases were made using the same exchange gift card. Two of these gift-card sales were of 12 cartons, twice the monthly limit. All the full-ration sales from the annex between August 8 and November 14, 2006, were paid by cash.<sup>10</sup>

Research into the gift card used for the purchases in late July and early August revealed that it was originally issued on July 20, 2006, at a register in Applicant's annex by a person using her employee log-in number (ID). Two minutes later, it was used at the other register, operated by the second employee, to purchase six cartons of cigarettes. The following day, the card was reloaded with funds at the second employee's register and six minutes later it was used at the same register to purchase 12 cartons of cigarettes. Five days after that, the card was reloaded with funds from a merchandise return recorded on the second employee's register and eight minutes later used again at that register to purchase 12 cartons of cigarettes. Two days later it was reloaded on the other register using Applicant's ID, and the next minute used to purchase six cartons of cigarettes on the second employee's register. This pattern continued until August 7, the last time the card was used to purchase cigarettes. On August 11, 2006, the card was used twice, once for toothpaste and a Tang drink, and once for food and merchandise items. The first time it was reloaded at the second employee's register under her ID and used for the purchase a minute later at the other register under Applicant's ID. The second transaction was reversed, with Applicant reloading the card and the sale on the second employee's register six minutes later. Neither Applicant nor the second employee could explain why a customer would use one register to reload money on the card, then go to the other register to make purchases when both transactions could be made at the same register.<sup>11</sup>

Further research revealed that this gift card was purportedly issued to a woman with a work address on the installation where Applicant's annex is located. After unsuccessful attempts to contact this person, it was determined that no person by that name was then, or had ever been, employed or been granted access to that facility. Investigators concluded that this name, like those recorded on the RCR for the two November 14 full-ration purchases, was "bogus," and created by members of Applicant's staff.<sup>12</sup>

On August 2, 2006, four minutes after being reloaded under Applicant's register ID, the gift card was used to purchase a 100-liter fuel allotment and six cartons of cigarettes on the second employee's register. Fuel is also a rationed item, requiring signature receipt for a purchase and registration by social security number of the purchaser. The very next transaction on the second employee's register was a sale of

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<sup>10</sup>*Id.*

<sup>11</sup>Item 6 at 15-19.

<sup>12</sup>*Id.*

another 100 liters of fuel and one carton of the same brand of cigarettes charged to Applicant's credit card. The fuel receipts show that Applicant personally signed for both of the foregoing purchases of 100 liters of fuel coupons. The exchange records further showed that the second employee had manually input Applicant's social security number as identification of the authorized purchaser for both sales. The explanations for these facts offered by Applicant and the second employee in support of their claims of ignorance concerning abuse of this gift card are not credible.<sup>13</sup>

The formal exchange investigation into these matters concluded that its:

findings strongly indicate [Applicant] has complicity in the creation and use of the fraudulent [exchange] gift card in the [false] name; by personally using the card to purchase a gas ration and cigarettes to include signing the gas receipt; the failure to retain the Cigarette Ration Control Logs, which [sic] is required as official documents. Since the RCR logs were disposed of in an ongoing manner, it is also probable that [Applicant] had knowledge that bogus names and ration card numbers were being used to conceal the unauthorized sale of ration controlled cigarettes at [her] store; and by providing dishonest statements in an attempt to cover these events [sic]. The findings also show that [the employee caught with the goods] and [the second employee] are both complicit as well in participating in these events.<sup>14</sup>

Despite Applicant's protestations of her innocence, her employment was terminated based on these grounds. Her appeal, and a subsequent EEOC complaint were both unsuccessful. She now admits that she should not have purchased the jacket, shoes, and drinks for her employee's children, and should have sought permission to destroy the RCR documents, but considers those to be minor transgressions. She submitted statements from her former employees supporting her good character and denying that she had any involvement in fraudulent circumvention of ration control measures. Given the complicity of at least two of those employees in the schemes, their assertions carry little weight. Applicant also noted that both of the local-national employees found to be complicit in the fraudulent activity were re-hired by the exchange system.

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider and apply the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

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<sup>13</sup>*Id.*

<sup>14</sup>Item 6 at 19-20.

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 AG ¶ 2, describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and (c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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: "Any doubt concerning personnel being considered for access to classified information 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 avoided drawing inferences grounded in 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, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to 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 information. Of special interest is any failure to provide truthful

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying under this guideline. Department Counsel asserts only AG ¶ 16(d) in her argument, but I find that four of them apply under the facts of this case:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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 person may not properly safeguard protected information;

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

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

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is

legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's denials of knowledge and participation in the fraudulent violations of cigarette ration control measures uncovered by the exchange investigation into operations at her store are contrary to the great weight of the objective evidence. This is not a matter about which she could be confused or forgetful. Accordingly, I find that she deliberately provided false and misleading information to her former government employer and its investigators. Her conduct in connection with this pattern of illegal introduction of contraband into her host country, and her concealment of information about it from family members and professional associates, adversely affected her personal and professional standing, and created significant vulnerability to exploitation, manipulation, and duress. The evidence of record thus establishes security concerns under AG ¶¶ 16(b) and (e).

My whole person analysis will be set forth below, but Applicant's participation in, and attempted concealment of, ration-control violations after working as a loss-prevention detective and having been entrusted with overseeing operations at a remote annex is serious. She put a 13-year career at risk for relatively minimal personal gain, and demonstrated her willingness to violate rules and regulations established to facilitate the national security mission of the U.S. in a foreign country. Her conduct supports findings of questionable judgment, untrustworthiness, unreliability, lack of candor, and unwillingness to comply with rules and regulations, thereby establishing security concerns under AG ¶¶ 16(c) and (d).

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the



stressors, circumstances, or factors that caused 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 activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant continues to deny and minimize her culpability. She offered no evidence of improper advice urging her either to mislead investigators or to engage in the fraudulent breaking of regulations. The violations were increasingly frequent and only stopped when Applicant and her employees were caught in the act. While her loss of employment makes recurrence of this particular form of smuggling unlikely, the evidence is insufficient to conclude that it no longer casts doubt on her reliability, trustworthiness and judgment. She has not acknowledged most of her culpability, precluding any finding of rehabilitation or that her vulnerability to exploitation is reduced. The adverse allegations were substantially supported by the findings and conclusions of the exchange investigation. Accordingly, she failed to establish mitigation of personal conduct security concerns under any AG ¶ 17 provision.

### **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(a):

(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. Applicant is a mature individual who is responsible for her entirely voluntary choices and conduct that underlie security concerns expressed in the SOR. She engaged in a clandestine scheme to violate cigarette ration-control measures based on treaty obligations with an allied nation, for her personal benefit and the benefit of at least some of her employees. She destroyed official records designed to detect such violations, and attempted to mislead investigators about the activity with false information. She provided no convincing evidence that she regrets having done this to the point that she would not engage in similarly wrongful behavior if entrusted with classified information. She did not disclose this activity to significant people in her life, and demonstrated no reduction in her susceptibility to pressure, coercion, exploitation or duress. The record contains insufficient other evidence about her character, trustworthiness, or responsibility to mitigate these concerns, or tending to make their continuation less likely.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from her personal conduct.

### **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

### **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 eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE  
Administrative Judge