



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-04509
	)	
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Francisco J. Mendez, Jr., Esq., Department Counsel  
For Applicant: *Pro se*

September 28, 2010

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, Criminal Conduct and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On February 16, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Criminal Conduct and Guideline E, Personal Conduct. DOHA acted under Executive Order 10865, *Safeguarding 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 adjudicative guidelines (AG).

Applicant answered the SOR on March 3, 2010, and requested a hearing before an administrative judge. The case was assigned to me on May 17, 2010. DOHA issued a notice of hearing on May 19, 2010, and the hearing was convened as scheduled on June 16, 2010. The Government offered Exhibits (GE) 1 through 10, which were admitted without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified but did not offer any exhibits. DOHA received the hearing transcript (Tr.) on June 22, 2010.

### **Findings of Fact**

In Applicant's answer to the SOR, she admitted ¶ 1.a and denied ¶¶ 1.b and 2.a - 2.e. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 34 years old. She has been married for nine years and has one child. Since 2008, she has worked as program support specialist for a defense contractor. From 2008 until February 2009, she also worked part-time at a delivery company as a shift supervisor. She has an associate's degree. She served on active duty in the Army as an enlisted member from 1995 until 2001. She was discharged with an honorable discharge at the pay grade of E-4. She has held a secret clearance since 2008.<sup>1</sup>

Applicant's conduct raised in the SOR includes: (1) being arrested, charged and pleading guilty to a felony count of embezzlement in February 2009 (admitted); (2) making false statements in violation of 18 United States Code § 1001 to Office of Personal Management (OPM) investigators about her involvement with thefts from the delivery company where she worked and about her being fired from the company (denied); (3) being fired from the delivery company because of her involvement with the thefts of electronics from the delivery company where she worked (denied); and, (4) making false statements to OPM investigators about whether she was fired or resigned from the delivery company, whether she participated in the electronics thefts in question (two different statements), and whether she failed to report her Chapter 7 bankruptcy filing and resulting discharge in November 2009 to her defense contractor employer (denied).

In December 2008, the delivery company where Applicant worked part-time was experiencing internal thefts of certain electronic devices. The losses were over \$50,000. All the thefts were occurring at one particular warehouse. The company's loss prevention investigator called upon local law enforcement to assist with the investigation. Law enforcement was able to contact several purchasers of the stolen electronics (through registration information from the products manufacturer) nine of whom revealed that they bought their items from the same seller on the same internet-based shopping network. The seller in each case was the Applicant. The investigators also discovered that the Applicant worked as a part-time supervisor at the warehouse

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<sup>1</sup> Tr. at 6, 43-45.

where the electronic devices were stolen, and she was working at the time all but one theft took place. With this information, Applicant was confronted on February 3, 2009, by the company's loss prevention investigator and she admitted to being involved with the theft of five electronic devices from her employer's facility. She was allowed to resign her position for "personal reasons". She wrote out one statement describing her actions related to the thefts and a second statement tendering her resignation.<sup>2</sup>

On February 20, 2009, Applicant was arrested and charged with five felony counts of embezzlement of the electronic devices from her former employer. She entered a plea agreement where she would plead guilty to one count of embezzlement and the other four counts would not be pursued by the prosecution. The plea was accepted and on November 5, 2009, she was sentenced to 12 months incarceration (suspended); two years supervised probation requiring her good behavior; and payment of \$5,000 in restitution.<sup>3</sup> Applicant has paid a portion of her restitution and remains on probation.<sup>4</sup>

Applicant met twice with OPM investigators. The first time was on May 14, 2009, and in an interview that was summarized in writing and later attested to as accurate, Applicant denied being involved in any way with the thefts of the five electronic devices. She also stated she was asked to resign her position at the shipping company.<sup>5</sup> On November 18, 2009, Applicant signed a sworn affidavit stating that she pled guilty to the one count of embezzlement because of her attorney's advice. She continued to deny participating in the actual thefts or even having knowledge of them.<sup>6</sup> She maintained this position during her testimony at the hearing.<sup>7</sup>

Applicant's credit report reveals that she filed a Chapter 7 bankruptcy action in July 2009 and her debts were discharged in November 2009.<sup>8</sup> Applicant testified that she notified her facility security officer (FSO) about the bankruptcy action.<sup>9</sup> There is no evidence in the record contradicting this assertion by the Applicant.<sup>10</sup>

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<sup>2</sup> GE 2, pp. 2-3, GE 10.

<sup>3</sup> GE 3-5.

<sup>4</sup> Tr. at 72.

<sup>5</sup> GE 6.

<sup>6</sup> GE 7.

<sup>7</sup> Tr. at 71.

<sup>8</sup> GE 8.

<sup>9</sup> Tr. at 64-68.

<sup>10</sup> There was no security clearance application (SF-86 or e-QIP) offered by the Government; See Tr. at 83-84.

## Policies

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 access to classified information will be resolved in favor of 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.

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 that an applicant may deliberately or inadvertently fail to 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

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

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

Applicant pled guilty to a felony count of embezzlement from her employer and she remains on probation for that crime. Additionally, Applicant gave false information to government investigators about the extent of her involvement with the thefts at issue. For a violation of 18 U.S.C. § 1001 to occur, the false statement to the Government must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995), as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a fine). I find that the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and especially considered the following:

- (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) evidence that the person did not commit the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or

restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal conduct was recent and happened under such circumstances that show she violated her employer's trust by stealing electronic items she was entrusted with protecting. Applicant's behavior casts doubt on her reliability, trustworthiness and good judgment. AG ¶ 32(a) does not apply. Although Applicant minimized her involvement in the thefts (by saying she was not involved with the thefts and knew nothing about them) when she gave statements to OPM, her voluntary and knowing guilty plea to embezzling the electronic items establishes that she committed the crime. AG ¶ 32(c) does not apply. Sufficient time has not passed to determine whether Applicant's rehabilitation has been successful particularly since she is still on probation. AG ¶ 32(d) does not apply.

### **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 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 in this case. The following disqualifying conditions are potentially applicable:

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

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

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

Applicant was allowed to resign her position (as opposed to being fired as the language of SOR ¶ 2.a states) once it was learned that she was involved with the thefts of merchandise. Her actions demonstrate dishonesty toward her employer and questionable judgment. AG ¶ 16(d) applies to SOR ¶ 2.a.

SOR ¶ 2.b (alleging Applicant made a false statement to investigators by stating she resigned from her job rather than telling the investigator she was fired) is not factually supported by the evidence. The delivery company's own document supports the characterization that Applicant was allowed to resign. Although Applicant's thefts prompted management to seek her resignation and it is most probable had she not resigned she would have been fired, nevertheless her description to the OPM investigators that she resigned her position was factually accurate. AG ¶ 16(b) does not apply to SOR ¶ 2.b.

Applicant's initial admissions to the loss prevention investigator and her subsequent guilty plea to embezzling the electronic devices directly contradict her two statements to the OPM investigator who queried her on her involvement with the thefts. AG ¶ 16(b) applies to SOR ¶¶ 2.c and 2.d.

Applicant testified that she informed her FSO about her 2009 Chapter 7 bankruptcy action. There is no other evidence in the record either supporting or contradicting Applicant. AG ¶ 16(b) does not apply to SOR ¶ 2.e.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(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.

Applicant's thefts against her former employer and her false statements to investigators were multiple, recent, and involve the element of dishonesty. Her actions cast doubt on her overall reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply.

## Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the 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. I have considered Applicant's current position, her honorable service in the Army, and her partial payment of restitution. However, I also considered that Applicant's actions involved aspects of dishonesty (embezzlement and false statements). Applicant was in a position of trust with her former employer and abused that trust. Someone who abuses an employer's trust is not the type of person who can be trusted with classified information. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline J, Criminal Conduct and Guideline E, 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 J:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant



Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant

### **Conclusion**

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

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Robert E. Coacher  
Administrative Judge