



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



In the matter of:)
)
) ISCR Case No. 11-00110
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

November 4, 2011

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate security concerns under Guidelines E (Personal Conduct) and F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 14, 2010. On April 8, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines E and F. DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On May 5, 2011, Applicant answered the SOR and waived his right to a hearing. Department Counsel converted the case to a hearing within the prescribed time period. The case was assigned to me on August 9, 2011. DOHA issued a notice of hearing on August 24, 2011, and the hearing was convened as scheduled on September 15, 2011. The Government offered exhibits (GE) 1 through 3 that were admitted into evidence without objection. Department Counsel's list of exhibits was marked hearing exhibit (HE) 1. Applicant testified and offered exhibits (AE) A and B that were admitted into evidence without objection. The record was held open until October 6, 2011, for Applicant to submit additional information. Applicant timely submitted AE C through H that were admitted into evidence without objection. Department Counsel's email forwarding Applicant's post-hearing submission was marked HE 2. DOHA received the hearing transcript (Tr.) on September 23, 2011.

Findings of Fact

Applicant is a 54-year-old employee of a defense contractor. He served in the U.S. Air Force from 1976 to 1996 and retired in the grade of E-6. He was awarded a bachelor's degree in 1994. He is not currently married. He has been divorced three times and has four children, ages 26, 23, and twins 21. He has held a security clearance while in the military and while working for defense contractors.¹

In the SOR, the sole Guideline E allegation asserted that, in February 2008, Applicant was terminated from a job for theft and misappropriation of approximately \$14,000.00 of golf event proceeds that were entrusted to him as Treasurer of the [Company X] Employees Golf Association. The Guideline E allegation was cross-alleged in a Guideline F allegation. In his Answer, Applicant admitted the Guideline E allegation, but denied the Guideline F allegation. His admission to the Guideline E allegation is incorporated herein as a finding of fact.²

Applicant's Testimony

In 1997, Applicant started working for a company that eventually merged with Company X. After the merger, he worked for Company X. In 2005, he was asked to serve as the Treasurer of the [Company X] Employees Golf Association. The golf association maintained a checking account at a bank. As treasurer of the golf association, Applicant could write checks on that account as well as make deposits and withdrawals. He would write checks on the account to pay for the golf association's operating expenses and for prizes awarded at golf tournaments.³

¹ Tr. 6-8, 18, 55; GE 1; AE A.

² SOR; Applicant's Answer to the SOR.

³ Tr. 26-29; GE 2, 3.

When Applicant became treasurer, there was approximately \$5,000 in the golf association's bank account. At that time, he was informed that the bank account had a \$10,000 cap. He believed that, if the amount of money in the account exceeded \$10,000, the bank would impose charges or fees. He never discussed how the cap worked with the bank.⁴

As time passed, the amount of money in the golf association's bank account grew. He testified that, in about 2006, he informed the president of the golf association that he was placing some of the association's funds in his personal account to avoid the \$10,000 cap fees and the president gave him permission to do so. He also would temporarily place golf association funds in his safe at home pending their deposit in either his or the golf association's bank accounts. He testified that he maintained records of the golf association funds that he retained in his account or at his home and, in doing so, tried to keep the golf association's funds separate from his funds. During his Office of Personnel Management (OPM) interview, however, he reportedly indicated that he did not keep records to show the amount of golf association funds in his account. He also testified that he spoke to a representative of the company's Human Resources (HR) Department about opening another bank account for the golf association. The HR representative informed him that the company would not obtain another Tax ID Number to create a new account. The HR representative recommended he open another account using his name and social security number, but he declined to open such an account.⁵

Applicant indicated that the transferring of golf association funds into his account was a common practice that he engaged in while serving as its treasurer. He claimed that he never intended to use the golf association's funds for his personal purposes. By depositing golf association funds in his personal account, he recognized, however, that he could have used some of the golf association's funds for personal purposes.⁶

In late June or early July 2007, Applicant and his second wife divorced. At that time, he went on a business trip and allowed her to reside in his house. When he returned from that trip, he learned some of the checks written on the golf association's bank account bounced because he forgot to transfer money into the golf association's bank account. Prior to her departure, his ex-wife took money that belonged to the golf association from his personal bank account and from the safe. He noted that his ex-wife had access to the automatic teller machine (ATM) card and personal identification number (PIN) for his personal account. He indicated that she also wrote some checks on his personal account.⁷

⁴ Tr. 27-29; GE 2, 3.

⁵ Tr. 33-35, 43-50, 53; GE 2, 3.

⁶ Tr. 37-40, 42-52, 61; GE 2.

⁷ Tr. 29-35, 37-40, 42, 50-55; GE 1, 2, 3.

Due to the bounced checks, the board of directors of the golf association examined its bank account. It was determined that approximately \$12,000 was missing from the account. Applicant was given a month to repay the missing funds. He repaid \$8,800 within that time period, but was unable to repay about \$3,100. The board of directors of the golf association asked him to resign as treasurer. He resigned in September or October 2007. Company X was informed of the missing funds and conducted an investigation. Applicant stated that he cooperated with the investigation and made records available to the investigators.⁸

Applicant claimed that all the money that belonged to the golf association has been repaid. He indicated that he repaid the missing \$3,100 in December 2007 and January 2008, but provided no documents to prove he made those payments. He also indicated that he was never charged with any criminal offenses because he repaid the money. In his post-hearing submission, he provided a credit report that showed he was meeting his current financial obligations.⁹

Company X's Investigation

Company X partially funded the golf association. Because its funds were involved, Company X conducted an investigation into Applicant's handling of the golf association's funds. Pertinent findings of the investigation include:¹⁰

a. The HR employee who was responsible for overseeing the finances of the company's eight recreation clubs was interviewed. She reportedly told the investigator that Applicant advised her that he only moved \$3,000 into his personal account, only owed \$2,000, and was unable to repay the funds at that time. She also reportedly indicated that Applicant had been very defensive when board members asked to "see the books" and in some cases he refused.¹¹

b. There was only one bank fee that applied to the \$10,000 cap. The bank would charge 70 cents on deposits when the account's balance exceeded \$10,000. The investigative report stated:

[Applicant] said he never contacted [the bank] to independently verify the particular limits of the account nor any caps associated with it. [Applicant] was shown [golf association bank] account records from 2003, 2004, 2005, 2006 and 2007, where an in depth month to month audit was

⁸ Tr. 29-39, 47-57; GE 2.

⁹ Tr. 29-35, 37-40, 48, 55-61, 63-64; GE 2.

¹⁰ Applicant's Answer to the SOR; GE 3 at 7.

¹¹ Applicant's Answer to the SOR; GE 3 at 8.

conducted with him with the help of investigators. The bank records indicated there were numerous instances over these years where the [golf association's] account had exceeded a \$10,000.00 balance. [Applicant] was unable to offer an explanation as to why during these times when the account was over the proposed limit the bank records indicated no obvious incurred fees or penalties which he had suggested were in place. In addition to there being no fees associated to the times the account exceeded the limit, there was also no record that any funds were withdrawn from the account by any employee including [Applicant] to reduce the balance to under the \$10,000.00 mark during the previous years. In fact there were numerous times prior to 2007 that the account remained above \$10,000.00 dollars. [Applicant] stated during his interview that during his time as Treasurer he balanced the [golf association's] account on a monthly basis when he received the bank statements, and also prepared the required year end audit reports to [Company X]; but admittedly said he never once subtracted any fees or penalties associated with the account as it pertained to the claimed \$10,000.00 dollar cap. Investigators found the statement to be odd that during the previous years of account reconciliation and year end audits that the Club Treasurer [Applicant], who prepared these reports, never deducted fees or had to account for line item audits associated with cap limit fees. When asked this direct question [Applicant] could offer no explanation. [Applicant] also offered no explanation as to why only the 2007 year budget was the only year money was needed to be withdrawn to maintain the integrity of the cap as he explained it.¹²

c. Applicant provided his personal bank account records to the investigator. In February 2007, the beginning balance of Applicant's personal bank account was a negative amount, *i.e.*, -\$37.34. On February 13 and 20, 2007, he transferred a total of \$7,000 of the golf association's funds into his personal account. For the three weeks following those deposits, he wrote several checks for personal purposes that reduced his account's balance to \$20.96. During that period, Applicant made no personal deposits to his account and none of the expended funds were used for golf association purposes.¹³

d. In 2007, Applicant also transferred golf association funds into his personal account in February (\$7,000), March (\$300), April (\$275), May (\$300), June (\$2,100), and July (\$2,000). The June 2007 transfers apparently included Applicant cashing a counter check for \$1,800 from the golf association's account and depositing that money into a separate joint bank account that he maintained with his ex-wife. During 2007, the transfers from the golf association's account into his personal accounts totaled \$11,975.

¹² Applicant's Answer to the SOR; GE 3 at 9.

¹³ *Id.*

While he did provide investigators records from his personal account, records from the joint account were not made available to investigators.¹⁴

e. By the time the investigation was completed, Applicant made seven repayments of golf association funds in 2007. These repayments included three in August (\$1,700, \$300, and \$2,000), two in September (\$2,500 and \$1,500), and two in October (\$400 and \$400). These repayments totaled \$8,800, leaving a balance owed of \$3,175. The repayments were made after the golf association account received “insufficient fund” notifications and the board of directors inquiries.¹⁵

f. During the investigation, Applicant provided a written statement. It stated in part:

. . . I never received nor did I ask for direction from other board members as to how to deal with the account once it reached the \$10,000.00 dollar mark.

During 2007, I began to have financial difficulties due to a strained marriage that ultimately ended in June 2007. During this time I used money that was taken from the [golf association’s] account to help me through the financial difficulties with the intentions of paying the money back. I have thoroughly reviewed the records with Investigator [D]. On Feb 13th I deposited \$5,000 dollars from the [golf association’s] account and then another \$2,000 dollars on February 20, 2007 to my above listed personal . . . bank account. I used the money (\$7,000) to pay personal bills to include: [specific companies] and other retail purchases. I distinctly remember during this month of one payment I made on Feb 27, 2007 from this account using [golf association] money to [his personal bank/credit card company] in the amount of \$4,700 dollars. Throughout 2007, I made withdrawals from the [golf association] account and placed them in my [bank] account. On June 29, 2007, after my divorce, I wrote a counter check from the [golf association’s] account at [the bank’s location] for \$1,800 dollars, which I deposited into the joint [bank] account that I have. This again was done not to steal money, but to help during a financial crisis with the intention of paying the money back to the account.¹⁶

g. During the investigation, the president, former president, and another officer of the golf association were interviewed. Nothing was uncovered during those interviews that lead investigators to believe those officers knew or concurred in Applicant’s transfer of golf association funds into his personal accounts. The investigation noted, “This was

¹⁴ *Id.*

¹⁵ Applicant’s Answer to the SOR; GE 3 at 10.

¹⁶ Applicant’s Answer to the SOR; GE 3 at 10.

substantiated during [Applicant's] interview by him stating that none of the club officers (former or current) knew that he was transferring money from the [golf association's] account to his personal account ."¹⁷

h. On February 11, 2008, Applicant was discharged from Company X. The personnel action documenting his termination indicated, "Theft at [Company X] will not be tolerated and as a result your employment is being terminated." At the time of his termination, Company X records reflected that he still owed \$3,175.¹⁸

Character Evidence and Work Performance

While serving in the Air Force, Applicant was awarded the Meritorious Service Medal, Air Force Commendation Medal with two oak leaf clusters, Air Force Achievement Medal, and Good Conduct Medal with one silver cluster. His annual performance review dated March 14, 2011, reflected that he received "Exceeds Expectations" or "Outstanding" grades for all evaluated categories. In a character letter, a coworker stated Applicant is "very honest, process-oriented, always acting in the best interest of the program, and extremely conscientious of the quality of the work he delivers." Another former coworker described him as a great employee and wonderful person.¹⁹

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative

¹⁷ Applicant's Answer to the SOR; GE 3 at 14.

¹⁸ Applicant's Answer to the SOR; GE 3 at 1.

¹⁹ AE A, B, E, F, H.

judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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.

AG ¶ 16 describes conditions that could raise security concerns and may be disqualifying in this case:

(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 evidence 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. . .;

* * *

(3) a pattern of dishonesty or rule violations;

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

As Treasurer of the [Company X] Employees Golf Association, Applicant was entrusted with golf association funds. He violated that trust by depositing golf association funds in his personal accounts and using those funds for personal purposes.

Company X's investigation contradicted several key aspects of Applicant's testimony. Those contradictions include:

a. Applicant testified that, in about 2006, he informed the president of the golf association that he was placing golf association funds in his personal account to avoid bank fees. During the investigation, however, he reportedly stated that he never received or asked for direction from other board members on how to deal with the \$10,000 cap. The former and current president and other board members of the golf association were interviewed during the investigation and nothing was uncovered during those interviews to lead the investigator to conclude that they knew or concurred in Applicant's transferring of golf association funds into his personal account.

b. Applicant testified that the transfer of golf association funds into his personal account was a common practice he engaged in while serving as its treasurer. In contrast, the investigation revealed that an in depth audit of the golf association's account from 2003 to 2007 found no transfers of this nature occurred until 2007 even though the account's balance exceeded \$10,000 on numerous occasions before 2007.

c. Applicant testified that he never intended to use golf association funds for his personal purposes. During the investigation, he admitted that he was having financial problems and that he used money taken from the golf association's account to help him through that difficult time with the intention of repaying it. In February 2007, he used about \$7,000 of the golf association's funds for his personal purposes.

Company X's investigation does not support Applicant's contention that he transferred golf association funds into his account merely to avoid the \$10,000 cap fees. I find that Applicant knowingly and intentionally misappropriated golf association funds for his personal purposes even though he may have intended to repay that money eventually. By engaging in that conduct, he breached his fiduciary duty. AG ¶¶16(c) and 16(d) apply.

AG ¶ 17 lists two personal conduct mitigating conditions that are potentially applicable:

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's misappropriation of funds was not an isolated event, but occurred over a number of months. Although he was going through a divorce and experiencing financial difficulties when he misappropriated the funds, such circumstances do not mitigate his misconduct. This was a serious breach of trust that casts doubt on his reliability, trustworthiness, and good judgment. At the hearing, he claimed he placed the golf association funds in his account to avoid the \$10,000 cap fees. Company X's investigation contradicts that claim and establishes that he took the funds for his personal purposes. This variance between his testimony and the investigation's findings show that he has failed to accepted full responsibility for his misconduct, which raises questions about his reform and rehabilitation. Although his misconduct occurred over four years ago (February to July 2007), sufficient time has not passed to conclude his misconduct is unlikely to recur in the future. AG ¶¶ 17(c) and 17(d) do not apply

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18 as follows:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other financial breaches of trust.

Company X's investigation reflected that Applicant misappropriated \$11,975 of the golf association's funds. After this issue was uncovered by the board of directors, he repaid \$8,800 of those funds from August to October 2007. Company X terminated his employment in February 2008. Company X's records documenting his termination reflected that he still owed the remaining money (\$3,175). At the hearing, he claimed that he repaid the remaining money and no criminal charges were brought against him because he repaid all of the money. Applicant's claim is plausible. I find that AG ¶¶ 19(a) and 19(c) do not apply, but that AG ¶ 19(d) does apply.

One mitigating condition under AG ¶¶ 20 is potentially applicable in this case:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

Applicant is meeting his current financial obligations. Here, the financial concern does not arise from delinquent debts, but arises from a breach of financial trust, i.e., Applicant's misappropriation of golf association funds. For the reasons set forth in the discussion above under Guideline E, Applicant also has failed to mitigate the security concerns under Guideline F. I find that AG ¶ 20(a) 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 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 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 F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Appellant served twenty years in the military and retired with an honorable discharge. He had held a security clearance while in the military and while working for defense contractors. His recent performance appraisal reflected that he received "Exceeds Expectations" or "Outstanding" grades in each performance category. Coworkers also speak highly of him. Nevertheless, Appellant has failed to meet his burden of persuasion. His misappropriation of funds entrusted to him raises significant security concerns that have not been mitigated. From his testimony, it is apparent that he has not accepted full responsibility for his misconduct, but has attempted to minimize his wrongdoing. Overall, the record evidence leaves me with questions and doubts about his eligibility and suitability for a security clearance. Therefore, I conclude Appellant has not mitigated the security concerns arising under the guidelines for Personal Conduct and Financial Considerations.

Formal Findings

Formal findings 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 |

Paragraph 2, Guideline F:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

Decision

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

James F. Duffy
Administrative Judge