



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



In the matter of: )  
)  
) ISCR Case No. 11-07625  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Kathryn D. MacKinnon, Esq., Department Counsel  
For Applicant: *Pro se*

06/28/2013

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant deliberately falsified his 2010 security clearance application (SCA) and made false statements to investigators in 2010 and 2011 to minimize and conceal his 1990 and 2004 felony embezzlement charges that were later amended to misdemeanor offenses. Clearance is denied.

**Statement of the Case**

Applicant submitted his SCA on December 1, 2010. On December 14, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct).<sup>1</sup> Applicant answered the SOR on January 7, 2013, and requested a hearing before an administrative judge.

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<sup>1</sup> DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

The case was assigned to me on April 2, 2013. The Defense Office of Hearings and Appeals (DOHA) issued the first notice of hearing on April 17, 2013, scheduling a hearing for May 1, 2013. Applicant requested a delay, and a second notice of hearing was issued on April 24, 2013, scheduling a hearing for May 13, 2013.

At the hearing, the Government offered exhibits (GE) 1 through 16. GE 15 was offered for me to take administrative notice of certain statutes. GE 16 was offered as a demonstrative evidence exhibit. As such, both were marked and considered by me, but not admitted into evidence. Applicant testified and submitted exhibits (AE) 1 through 8. DOHA received the hearing transcript (Tr.) on May 21, 2013.

### **Procedural Issue**

On May 7, 2013 (seven days prior to the hearing), Department Counsel moved to amend the SOR. The undated motion was marked Appellate Exhibit (App.E) 1, and made part of the record. Applicant received it either May 8 or May 9, 2013. Applicant did not object to the motion. He stated he had sufficient time to prepare for his hearing and was ready to proceed. He affirmatively waived his right to 15 days advance notice of the allegations against him. I granted the written motion as requested. (Tr. 13-22)

At the hearing, Department Counsel moved to further amend SOR ¶ 1.d by adding the date "February 22, 2011" after the date December 29, 2010. I denied this motion. (Tr. 21-22)

### **Findings of Fact**

Applicant admitted the SOR allegations under ¶¶ 1.a, 1.b, 1.d through 1.f, and 2.a. He denied the SOR allegations under ¶¶ 1.c, 1.d, and 2.b through 2.f. After a thorough review of all the evidence, including his testimony and demeanor while testifying, I make the following findings of fact:

Applicant is a 54-year-old employee of a government contractor. After graduating from high school, he attended college and accumulated approximately 70 college credits, but did not complete a degree. He served in the U.S. Navy from 1985 to 1988. During his service, Applicant had access to classified information at the secret level. His service was characterized as under honorable conditions, and he received a general discharge. Applicant married his first wife in 1981, and they divorced in 1983. He married his second wife in 1988, and they divorced in February 2013. He has two children, ages 23 and 22. He was hired by his current employer in November 2010. This is his first SCA since he was discharged from the Navy in 1988.

In 1990, at age 31-32, Applicant was charged with felony embezzlement. He pled guilty to an amended charge of misdemeanor petit larceny in 1991. In 2004, at age 45, Applicant was charged again with felony embezzlement. In 2006, he pled guilty to an amended charge of misdemeanor petit larceny. On both occasions, he was fined, ordered to pay restitution, and sentenced to 12 months of imprisonment (suspended).

Section 22 (Police Record) of Applicant's December 2010 SCA, asked him to disclose whether he had ever been charged with any felony offense. He answered "No" and denied he had ever been charged with any felony offense. He disclosed; however, that in August 2004, he and three fellow employees were charged with conspiring to embezzle from his then employer through a number of different schemes. He stated that although he was indicted on a conspiracy to embezzle, "the verdict was a misdemeanor" – that he "accepted a reduced charge of one misdemeanor." (SCA Section 13A (Employment/Unemployment Information), Section 13C (Employment Record), and Section 22 (Police Record).

Applicant was interviewed by a government investigator in December 2010. When asked why he did not disclose he was charged with a felony embezzlement charge in 2004, he explained he pled guilty in 2006 to an amended misdemeanor charge. He believed that because the original felony charge was amended, the only remaining charge was the amended misdemeanor.

Applicant was also asked whether he had any additional past arrests or criminal charges. He answered "No," and deliberately failed to disclose his 1990 felony embezzlement charge. When asked why he failed to disclose his 1990 felony embezzlement charge, Applicant claimed he misread the question, and he believed he only had to disclose criminal activity within a ten year scope.

During December 29, 2010 and February 22, 2011 interviews with government investigators, Applicant was asked to discuss the 2004 felony embezzlement charge against him. Applicant denied any criminal misconduct and stated that he was unfairly accused of stealing gas, for possessing and using an unauthorized gas card, and for stealing blank checks and money from his employer. Applicant failed to disclose he was also accused of stealing software, paying repairs to his truck with company money, paying improvements to his home with company funds, and paying for personal service contracts using company funds.

Applicant considers himself to be an honest, truthful, and upstanding individual. He claimed he always tries to do his best, and to make the correct decisions. His friends and coworkers believe him to be a hard worker who receives excellent performance reviews, and exceeds expectations. Because of his outstanding performance he was recently nominated to receive a company award.

Applicant claimed he never tried to falsify or to mislead the Government with his answers to the SCA. He testified his answers were based on the knowledge he had at the time he answered the questions. He attributed his false answers to a misunderstanding. He believed that when he pled guilty in 2006 to an amended charge, the original felony charge no longer existed and he did not have to disclose the felony charge. Considering Applicant's age at the time of both offenses, his experiences with the criminal justice system, his demeanor while testifying, and his testimony in light of

the substantial evidence available, Applicant's claims of a misunderstanding and lack of knowledge are not credible.

Applicant testified he took the Mensa test and qualified to be a member of the Mensa organization. He also contributed to his community through his involvement in the leadership of the Boys Scouts of America.

### **Policies**

Eligibility for access to classified information may be granted "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).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## Analysis

### Guideline J, Criminal Conduct

Under Guideline J, the Government's concern is that 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 ¶ 30.

In 1990, Applicant was charged with a felony embezzlement offense. In 1991, he pled guilty to a reduced charge of misdemeanor petit larceny. In 2004, Applicant was charged with a felony embezzlement offense. In 2005, he pled guilty to a reduced charge of misdemeanor petit larceny. He deliberately falsified his December 2010 SCA when he failed to disclose he was charged with felony embezzlement offenses in 1990 and 2004. He made false statements to government investigators in December 2010, when he sought to conceal his 1990 felony charge, and when he tried to minimize his 2004 criminal conduct. He also attempted to minimize his criminal conduct, and concealed the 2004 criminal allegations against him during a February 2011 interview with a government investigator. Applicant's behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (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.

Considering the evidence as a whole, I find that none of the Guideline J mitigating conditions apply. Applicant's 1990 offense occurred 23 years ago, and his 2004 offense is nine years old. Notwithstanding the passage of time, his offenses, in conjunction with his current false statements, cast doubt on Applicant's reliability,

trustworthiness, and judgment. Applicant falsified his 2010 SCA and misrepresented facts during his 2010 and 2011 interviews to minimize his criminal behavior. He was less than candid and forthcoming during his interviews discussing the criminal allegations against him. Instead, he minimized his criminal behavior.

Applicant failed to present convincing evidence of successful rehabilitation. He expressed no remorse for his criminal behavior in 1990 or in 2004. To the contrary, Applicant continues to argue that he was the victim of a misunderstanding, and had legal authority for his misappropriation of funds, property, and for the payment of personal services using company funds.

Considering Applicant's demeanor while testifying, and his testimony in light of the evidence as a whole, I find that the criminal incidents and falsifications, continue to cast serious doubt on Applicant's current reliability, trustworthiness, judgment, and on his ability to follow the law.

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

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

The SOR cross alleges under Guideline E, in substance, the same factual allegations discussed above under Guideline J. For the sake of brevity, the discussion under Guideline J, whenever relevant, is incorporated herein.

Applicant deliberately falsified his December 2010 SCA when he failed to disclose he was charged with felony embezzlement offenses in 1990 and 2004. He made false statements to a government investigator in December 2010, when he sought to conceal his 1990 felony charge, and when he tried to minimize his 2004 criminal conduct, and concealed the allegations against him. He also attempted to minimize his criminal conduct, and concealed the 2004 criminal allegations against him during a February 2011 interview with a government investigator.

Applicant's behavior triggers the applicability of the following disqualifying conditions under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(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

(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.

AG ¶ 17 provides seven conditions that could mitigate the personal conduct 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.

Considering the record as a whole, I find that none of the Guideline E mitigating conditions apply. Applicant's 1990 and 2004 felony charges and his subsequent guilty pleas to misdemeanor petit larceny offenses occurred many years ago. Notwithstanding, his falsification to the 2010 SCA and his 2010 and 2011 false statements to government investigators are recent. These falsifications and false statements bring to the forefront the 1990 and 2004 offenses. Applicant falsifications constitute felony offenses in violation of 18 U.S.C. Section 1001. His actions and criminal conduct continue to raise serious questions about his judgment, trustworthiness, reliability, and his ability to protect classified information.

Regarding SOR ¶ 2.b, I find the evidence presented insufficient to establish Applicant violated company rules and regulations concerning the accessing of pornographic materials using his office computer.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant, 54, served in the Navy three years and his service was characterized as under honorable conditions. He has been working for a government contractor since November 2010. He considers himself to be an honest, hardworking, and productive employee. His references and performance appraisals indicate he is a valuable employee, a dedicated father, a long-term Boy Scout leader, and a member of Mensa. Notwithstanding, Applicant's criminal conduct and falsifications cast serious doubt on his current reliability, trustworthiness, judgment, and on his ability to follow the law.

### **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.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a, 2.c-2.f:	Against Applicant
Subparagraph 2.b:	For Applicant



## **Conclusion**

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

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JUAN J. RIVERA  
Administrative Judge