



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 14-04190

**Appearances**

For Government: Carroll Connelley, Esquire

For Applicant: Bruce N. DeSimone, Esquire

10/25/2016

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

**Statement of the Case**

On December 22, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct), Guideline J (Criminal Conduct), and Guideline F (Financial Considerations).<sup>1</sup> In response, on January 14, 2015, Applicant admitted all allegations under Guideline E and substantially agreed to the facts underlying the allegations set forth under Guideline J and Guideline F. He also requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

This case was assigned to me on April 12, 2016. On July 18, 2016, a notice was issued setting the hearing for July 27, 2016. Applicant posed no objection with regard to the DOHA 15-day notice requirement. The hearing was convened as scheduled.

The Government offered six documents, which were accepted without objection as exhibits (Exs.) 1-6. The SOR allegation set forth under Guideline E at ¶ 1.c was withdrawn. Applicant offered testimony and 11 documents, which were accepted into

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<sup>1</sup> The action was taken 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) effective within the DOD on September 1, 2006.

the record without objection as Exs. A-K. The transcript (Tr.) of the proceeding was received on August 4, 2016. The record was then closed.

### **Findings of Fact**

Applicant is a 51-year-old deputy program manager with a specialty in the area of telecommunications. He has worked at the same agency for various defense contractors since 2009, working his way up in seniority with that employer to his present level. He is respected in his current position, where he earns about \$98,000 a year. (Tr. 26, 36) Applicant completed two years of college. The father of three children, he is presently married for the second time, to a government contractor who earns approximately \$150,000 to \$160,000 a year.

In approximately 2000, Applicant started working at his previous place of employment. In 2002, he discovered his now-former wife had engaged in a series of affairs. The ensuing argument resulted in his being charged with Assault and Battery, for which he pled guilty and was sentenced to 90 days in jail (suspended). (Tr. 32-34) In both 2004 and in 2005, he was charged with Driving Under Revocation/Suspension, misdemeanors in the state at issue. He pled guilty both times. In 2007, he was formally disciplined at work for failing to comply with standards and violating internal regulations with regard to the proper submission of customer loan-related paperwork. (Tr. 32)

By 2008, Applicant was managing a one-man office for a credit union branch located within a secure facility. The main credit union headquarters was based in another state. Facility employees who were credit union members utilized this office for obtaining loans, conducting financial planning, and monitoring their accounts. Applicant's position did not give him direct access to transactions with or by customers, but he did have access to the office's Automated Teller Machine (ATM).

In about 2008, Applicant faced financial difficulties, particularly with regard to his mortgage payments. He did not confide in his wife with regard to his financial concerns, and was unaware their combined income might have been used to meet their \$4,000 a month mortgage payment obligation (Tr. 42) Too proud to seek his wife's counsel or work with the mortgage company, he used the company ATM machine to deposit checks made out to cash, then had cashier's checks issued to himself. (Tr. 44) In turn, he deposited the cashier's checks into his own account to pay his mortgage. (Tr. 30) This occurred between about April 2008 and January 2009. In sum, he extracted about \$52,000 from the credit union, of which he was ultimately required to repay approximately \$14,000.<sup>2</sup> (Tr. 44-46) He believes the sum of \$14,000 was derived from the sum he had not yet covertly replaced within the credit union's system. (Tr. 45-46)

In January 2009, Applicant's thefts ended after he was asked to join his direct manager and a security team member at a nearby hotel before proceeding to lunch. Once he arrived, he was invited to a room. Applicant was unaware of the real purpose

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<sup>2</sup> The record reflects varying amounts for the restitution, ranging from \$14,000 to \$14,263.

of this visit. In the room, financial paperwork was laid out before him and he was asked questions about his involvement with missing sums of money. Applicant stated: "Initially, they kind of led me down a path of questions that I didn't understand what they were doing, but when they confronted me, I immediately confessed." (Tr. 19)

A few weeks later, Applicant was interviewed by federal investigators. He reiterated his confession to stealing the funds at issue. Consequently, he was charged with Embezzlement/Misappropriation of Funds, a felony, and Theft Scheme Over \$500, a felony. As a result, he was terminated from his position for employee fraud and misappropriation of funds. He was also barred by the National Credit Union Administration (NCUA) from ever again being employed by a federally-insured financial institution. He then sought therapy for failing himself with his "foolish decision." (Tr. 27). He later found employment at his present workplace, albeit at a lower wage. (Tr. 43-44)

In the interim, Applicant met with a prosecuting attorney. In exchange for his cooperation and his payment of restitution to the credit union, the attorney did not seek active jail time for Applicant and agreed to not oppose Applicant's future request for probation before judgment (PBJ). Applicant did not have a trial or a preliminary hearing. Rather, he went to court in October 2009, pled guilty to the charge of Theft Scheme Over \$500, and was sentenced to five years of probation.<sup>3</sup> (Tr. 20) In about two-and-a-half years, he completed the probation and satisfied the required restitution.<sup>4</sup> With his probation requirements completed, he then requested PBJ determination.<sup>5</sup> (Tr. 21) It was granted in 2012. Later, on May 10, 2013, Applicant completed a security clearance application (SCA). In response to Section 13A, he mentioned his theft of money from his prior employer, but noted that his departure from the credit union was by "mutual agreement following charges or allegations or misconduct."<sup>6</sup>

Last year, in 2015, Applicant's request to have his record expunged regarding the credit union theft was granted. (Tr. 23) Today, Applicant's mortgage payments are lower and he lives within his means. (Tr. 46) He now accepts his wife's financial contributions to their household. Applicant maintains a budget and utilizes a financial advisor, but has not received formal counseling. (Tr. 48)

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<sup>3</sup> A sentence of four years of imprisonment was apparently suspended. (Tr. 20)

<sup>4</sup> A retirement account settlement from another employer helped Applicant pay restitution early. (Tr. 47)

<sup>5</sup> See [http://www.courts.state.\[XX\].us/reference/glossary.html](http://www.courts.state.[XX].us/reference/glossary.html) (as of September 30, 2016), which defines the PBJ as a conditional avoidance of imposition of sentence after conviction. (The state's abbreviation in this citation is obscured ([XX]) for purposes of anonymity.) Compare Applicant testified that it is his understanding that a PBJ means that he is no longer convicted of the crime at issue. (Tr. 22)

<sup>6</sup> Consideration of such issues is highly relevant in these matters. It is axiomatic that if an applicant cannot be trusted to provide full and truthful answers to questions on the SCA, it is extremely difficult to trust the applicant with classified national security information. In signing an SCA, an applicant certifies one's answers, statement, and attachments are true, complete, and correct to the best of the applicant's knowledge and belief, and that they are made in good faith. A knowing and willfully false statement on the SCA can be punished by fine, imprisonment, or both. (18 U.S.C. §1001)

## **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." All available, reliable information about the person, past and present, favorable and unfavorable, must be considered 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 the applicant may deliberately or inadvertently fail to safeguard 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).

## **Analysis**

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are applicable in this case with regard to the following guidelines:

## Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, where the significance of conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations is defined (“[p]ersonal conduct 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.

Here, Applicant has admitted breaking laws and rules related to driving and the workplace, assault and battery, stealing from his employer for personal gain, and demonstrating conduct sufficient to subject him to being permanently barred by the NCUA from ever again being employed by a federally-insured financial institution. In addition, Applicant’s 2013 SCA answer regarding his departure from the credit union position, while true regarding his admission of theft, is troubling. This is due to the question of whether his termination was truly by mutual agreement, or by an involuntary, unilateral corporate action. I note this only because intentional obfuscation of relevant facts undermines the required and essential vetting of those seeking a security clearance, and, when deliberate, can be punished under the law. The most applicable disqualifying conditions that could raise security concerns under these circumstances are 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*, and AG ¶ 16(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, and other characteristics indicating that the person may not properly safeguard protected information*.

The following mitigating conditions under Guideline E ¶ 17 could potentially apply to Applicant’s conduct: AG ¶ 17(a) *the individual made prompt, good-faith effort to correct the omission, concealment, or falsification before being confronted with the facts*; AG ¶ 17(c) *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment*; and AG ¶ (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*.

In this matter, Applicant’s behavior with regard to his theft of funds and its repercussions, as well as his SCA answer, raise genuine security concerns. He did not report his theft of funds before being called into a meeting and confronted by materials related to his acts. Only after this confrontation did he admit his conduct. His theft of a

substantial amount of money from his workplace to meet his own financial needs is a serious violation of trust, particularly given his position at the time. That conduct occurred within the 2008-2009 time period, but he was not released from probation and did not receive a formal PBJ for the matter until 2012.

In the interim, Applicant was permanently barred by the NCUA from again working for a federally-insured financial institution. While this timeframe is not recent, it is not notably remote given the severity of the conduct. Moreover, while it is unlikely he will again be in a position where he has ready access to cash, the information and materials potentially available to one holding a security clearance can often be more coveted and far more valuable than legal tender. Listing that his subsequent involuntary termination was the result of mutual agreement seems, at first blush, to be patently false. With the concession that he stole from that employer, however, Applicant gave sufficient notice as to the conduct that led to his departure. Therefore, while AG ¶ 17(a) does not apply, AG ¶ 17(c) applies in part.

Applicant sought counseling with regard to his reckless, illegal behavior and his subsequent remorse. He admits his crime and he now states that he takes responsibility for his actions. Moreover, he now works with his wife to resolve their financial issues. Furthermore, he acknowledges and fully understands the adverse personal and professional repercussions that he faced in the wake of his illegal acts. While this is no surety against future illegal activities should money again become an issue in the future, it could be sufficient to raise AG ¶ 17(d) in part.

## **Guideline J, Criminal Conduct**

The security concern regarding criminal conduct is explained at AG ¶ 30. 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. Applicant's 2002 assault and battery, 2004 and 2005 driving under a revoked or suspended license, 2008-2009 misappropriation of funds from his employer, and guilty plea for his theft from the workplace combine to trigger application of the following Guideline J disqualifying conditions:<sup>7</sup> 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*.

The guideline also sets forth a number of conditions that may mitigate the criminal conduct concern. Under AG ¶ 32, there are three conditions that may apply: AG ¶ 32(a): *so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; AG ¶ 32(c): *evidence that the person did not commit the offense*; and AG ¶ 32(d): *there is evidence of successful*

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<sup>7</sup> While it is noted that the state court later granted Applicant's request for a PBJ and expunged Applicant's record regarding his theft scheme as a matter of law, it does not nullify or dismiss either his acts or his admissions as matters of fact for the purposes of this inquiry and the AG.

*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 development.*

I note that Applicant received an early release from his probation in 2012, as well as his attempts at rehabilitation, counseling, and subsequent good work efforts. The egregious nature of his theft, his motive, and the NCUA debarment, however, remain troubling. With the passage of less than five years since he completed his probation and receive his requested PBJ determination, however, I find none of the criminal conduct mitigating conditions apply under these facts.

## **Guideline F, Financial Considerations**

Under Guideline F, AG ¶ 18 sets forth that the security concern under this guideline is that 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 engaging in illegal acts to generate funds. Here, the Government introduced credible evidence showing Applicant resorted to theft in order to meet his monthly mortgage obligations. This is sufficient to invoke financial considerations disqualifying conditions: AG ¶ 19(a): *inability or unwillingness to satisfy debts*, and AG ¶ 19(d): *deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.*

Six conditions are available toward mitigation of finance related security concerns: AG ¶ 20(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*; AG ¶ 20(b): *the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances*; AG ¶ 20(c): *the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control*; AG ¶ 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*; AG ¶ 20(e): *the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue*; and AG ¶ 20(f): *the affluence resulted from a legal source of income.*

Applicant's period of multiple, ongoing thefts from his employer ended only when he was confronted with his activity in January 2009. This was in response to his inability to meet his financial obligations. Applicant knew that his theft was an extraordinary breach of the fiduciary trust extended to him by his former employer. He has been

debarred from ever again working for a federally-insured financial institution. To his benefit, he timely paid the financial restitution ordered as part of his probation and sought counseling. He understands that the professional stigma related to his workplace theft and abuse of trust may continue as long as his NCUA debarment. Moreover, he now works with his wife, who earns a substantial salary, to address their household financial issues. Given these latter considerations, I find AG ¶ 20(c) applies, in part.

### **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). 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 incorporated my comments under the three guidelines at issue in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature and experienced government contractor. The father of three children, he has completed some collegiate courses. He has found success in both his former field, rising to the manager of a one-man credit union branch, and again in his current job. Despite an acrimonious marital breakup years ago, his financial and legal troubles have apparently led to a more open and productive relationship with his current spouse in terms of sharing their economic responsibilities.

While the assault and battery incident involving Applicant's first wife in 2002 is worrisome due to its very nature, the couple has since divorced. Applicant's 2004 and 2005 driving offenses regarding a revoked or suspended license appear to be somewhat minor examples of neglect. His 2007 formal workplace disciplinary actions, however, begin a series of incidents reflecting poorly on his workplace conduct and judgment. Such behavior climaxes between 2008 and 2009, when he covertly stole over \$50,000 from his trusting employer. This led to his abrupt termination and departure from that workplace, and to his being debarred by the NCUA from future employment by a federally-insured financial institution. It also led to his being charged with both embezzlement/misappropriation of funds and theft scheme over \$500. He pled guilty to the latter charge, ultimately receiving a PBJ determination after completing his probation requirements early.

Given his position, the nature of the trust extended to him from his employing financial institution, and his access to a company ATM, Applicant's theft to honor his personal debts is particularly worrisome. Sufficient time is needed to demonstrate a clean and demonstrated record reflecting genuine rehabilitation. Despite his expression



of contrition, counseling, and recent work record, less than five years since his probation ended is insufficient time to mitigate personal conduct, criminal conduct, and financial considerations security concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a-1.h: <sup>8</sup>	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraph 3.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 national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Arthur E. Marshall, Jr.  
Administrative Judge

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<sup>8</sup> It is noted that allegations 1.a, 1.b, and 1.d all relate to Applicant's misappropriation of funds from his employer. Each allegation, however, notes varying and independent issues of concerns. (e.g., debarment by the NCUA, involuntary termination based on criminal conduct, and the criminal charges, guilty plea, and sentencing related to the theft)