DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 14-04458
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

11/16/2016

Decision

Harvey, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges security concerns under Guidelines M (use of information technology systems), F (financial considerations), and E (personal conduct). Guideline M security concerns are mitigated; however, Guidelines F and E security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 25, 2011, Applicant signed and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86) (SCA). (GE 1) On August 19, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue Applicant's access to classified

information and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2)

On August 31, 2015, Applicant responded to the SOR and requested a hearing. (HE 3) On May 19, 2016, Department Counsel was ready to proceed. On July 18, 2016, the case was assigned to me. On August 9, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for September 1, 2016. Applicant's hearing was held as scheduled. Department Counsel offered five exhibits into evidence; Applicant offered 22 exhibits into evidence; and all exhibits were admitted without objection. (Tr. 35-40, 57-60; Government Exhibits (GE) 1-5; Applicant Exhibits (AE) 1-22) On September 12, 2016, DOHA received the transcript of the hearing.

After the hearing, Applicant provided three exhibits, and Department Counsel provided two exhibits. (AE 23-AE 26; GE 6, GE 7) Applicant objected to the accuracy of the content of Department Counsel's post-hearing evidence. (AE 25) Some of the Findings of Fact sustain Applicant's factual objections, and some of the Findings of Fact overrule her factual objections. The record closed on September 16, 2016. (Tr. 111, 136; AE 25)

Findings of Fact[1]

In Applicant's SOR response, she admitted the allegation in SOR ¶ 1.a, and she denied the allegations in SOR ¶¶ 2.a and 3.a. (HE 3) She also provided extenuating and mitigating information. (HE 3) Applicant's admissions are accepted as findings of fact.

Applicant is a 50-year-old facility security officer (FSO). (Tr. 6) She has worked as an FSO since 2001. (Tr. 62-63) In 1984, she graduated from high school, and she attended college for a total of about three years; however, she did not receive a degree. (Tr. 6-7) She has never served in the U.S. military. In 1993, she married. (Tr. 7; GE 1) Her four children are ages 20, 21, 22, and 27. (Tr. 8)

Financial Considerations and Personal Conduct[2]

SOR ¶ 2.a alleges that on or about August 8, 2011, Applicant was terminated from employment with Company A for using government contract funds without authorization for personal gain in the form of unauthorized personal loans and salary advances, and for misuse of the company credit card. SOR ¶ 3.a cross-alleges the same conduct as alleged in SOR ¶ 2.a.

[1]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[2]I accepted the parties' agreement that Applicant's opening statement (Tr. 23-35) was to be considered as substantive evidence. (Tr. 61-62)

In 2007, a portion of a larger company was purchased by a holding company, and a new company was established, Company A. (Tr. 24) Company A was a wholly-owned subsidiary of a holding company controlled by three people (XYZ), who constituted Company A's board of directors. (Tr. 24, 64) Applicant said Company A was organized and controlled by foreign nationals Directors X and Y and some foreign national financial supporters. (Tr. 24-25) Director Z[3] was brought into Company A because Directors X and Y were foreign nationals and did not have security clearances. (Tr. 43-44) Director Z received a salary; however, he was not significantly involved in operational aspects of Company A. (Tr. 43-44, 53-54)

Applicant was hired at Company A as an FSO because Company A needed help with compliance with security rules. (Tr. 24) Applicant became concerned that Company A was in violation of foreign ownership, control or influence restrictions (FOCI),[4] and she disclosed the FOCI problem as well as other security issues to the DSS, Federal Bureau of Investigation (FBI), and the federal agency administering Company A's overseas contracts. (Tr. 24-26; AE 3-AE 5; AE 7-AE 13)

In May 2010, Applicant became the general manager and FSO for Company A. (Tr. 65, 67; GE 5 at 8) Applicant's annual salary increased from $80,000 to $200,000 when she became Company A's general manager. (Tr. 82) Director X left the company in 2010, and Y and Z constituted the board of managers. (Tr. 65) She did not have a written employment contract. (Tr. 107) She did not receive a written benefit package. (Tr. 107) She was verbally advised that she had comprehensive health insurance. (Tr. 107)

Company A had three large fixed price government construction contracts for buildings in foreign countries. (Tr. 102-104) Before May 2010, a federal agency terminated Company A for default on a $43 million overseas construction contract. (Tr. 102-103) Director Y was concerned about termination of Company A from the $60 million and $128 million construction projects. (Tr. 102-103) Applicant became Company A's general manager to improve the prospects of completion of the $60 million construction project, which was supposed to be completed before significant work on the $128 million contract.

[3]Director Z was a witness at Applicant's hearing. He had little substantive knowledge of Company A's operations. In 2011, the Federal Bureau of Investigation (FBI) interviewed Z about Company A's operations. (Tr. 44) The FBI did not conduct follow-up interviews of Z, and Z had no knowledge of any grand jury proceedings involving Company A. (Tr. 49-51) Around 2011, Z resigned from Company A because he was nervous and suspicious about what the other owners were doing. (Tr. 44-45, 53; GE 5 at 175) About one year ago, Z received a request from a law firm to preserve records for a possible federal agency lawsuit against Company A.

[4]*See* Defense Security Service (DSS) website, (stating "A Company is considered to be operating under FOCI whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts."), http://www.dss.mil/isp/foci/foci_info.html.

Applicant told the government agency receiving the benefit of the $60 million contract that she would completely take over Company A and take the foreign owners out of management. (Tr. 27) In July 2010, the three directors offered to sell Company A to Applicant for $100; however, the offer required negotiations over some material aspects of the sale before the sale would be final. (Tr. 68; GE 5 at 74-75, 80) Applicant hired a forensic accountant to review Company A's finances, and he advised Applicant that $3 million was paid to Director X; however, those payments were not properly documented. (Tr. 30; AE 20) She contacted Director X and told him that she had to "adjust the [Company A] taxes," and file proper tax and bank documentation to reflect his receipt of the $3 million. (Tr. 30) She did not want to accept ownership of Company A unless the documentation was corrected to reflect the payments to Director X. (Tr. 30-31)

Applicant brought the $60 million project much closer to completion. (Tr. 28) When Company A was close to completion of the $60 million contract, Applicant concluded about $2 million of additional funding was needed to complete the project. (Tr. 29, 104) The federal agency receiving the building under construction decided to give Company A the additional $2 million even though Applicant told the agency that a large amount of Company A money had been paid or misappropriated by Director X. (Tr. 29, 105) On July 14, 2011, the government agency approved the additional $2 million to complete the project, and on July 15, 2011, Applicant was notified that she was terminated from Company A. (Tr. 29; GE 5 at 167, 175-176) Applicant believed she was terminated for the following reasons: Director Y discovered she was providing inside information about Company A to the DSS and the FBI; she intended to disclose the funds received by Director X to tax collection officials; and she was acting to remove the FOCI from Company A. (Tr. 29-31)

Applicant wrote the Company A employee handbook, which was published in 2009. (Tr. 66; GE 5 at 47, 48, 61, 72) On October 28, 2009, Applicant signed the employee handbook acknowledging "I understand the terms outlined and agree to abide by these policies and or requirements while I am employed by" Company A. (GE 5 at 72) One purpose of the employee handbook was to bring some financial accountability to Company A, especially to Director X, who received $5,000 to $10,000 in cash before he traveled on behalf of Company A. (Tr. 66) Director X bought an expensive vehicle on a credit card when he was outside the United States and charged the purchase to Company A, even though Company A had no contracts in the country where the vehicle was purchased. (Tr. 66-67) Once Applicant became Company A's general manager, she had authority to write checks on behalf of Company A. (Tr. 67) All of Company A's payroll and accounting personnel reported to Applicant. (Tr. 67-68) Applicant did not believe the employee handbook applied to her because she was the general manager and she "was in complete control of the company." (Tr. 91) She emphasized that she "reported to no one except the [government agency] of course, and [she] ran the company." (Tr. 27)

Applicant used her control of Company A's funds to pay for her expenses and to obtain advance salary payments. Applicant's daughter needed double hip surgery; Applicant did not have insurance; and she used a cash advance on her salary at

Company A to pay the medical bill in May or July 2010. (Tr. 26, 72-73) The Company A employee handbook indicates that full-time employees are eligible for health insurance coverage, and Company A "will pay 100% of the plan cost for the employees and their dependents." (GE 5 at 54) She estimated the medical bill was about $58,000. (Tr. 107)[5] She blamed one of her employees for making a mistake on her Company A medical insurance. (Tr. 24, 73; GE 2 at 17) She authorized Company A to reimburse her for her daughter's medical expenses, and then Company A objected to the payment after she was terminated. (Tr. 27, 73, 75-76; GE 5 at 87, 90, 104) Applicant indicated she subsequently received reimbursement of $21,784 by check. (GE 2 at 17) She authorized Company A to reimburse her for her daily commute from home to work. (Tr. 73) She used her "work vehicle" for personal use. (Tr. 74) In August 2010, she billed repairs for $2,390 for her truck to Company A. (Tr. 75; GE 5 at 146-148) In August 2010, she received an $11,474 payment and a $10,309 payment, and handwritten notes on the invoices indicate $500 per pay period should be deducted from her pay. (GE 5 at 91-92, 104-109) In September 2010, she authorized Company A to pay her $19,000 for personal expenses; however, she could not remember the reason for the expenditures. (Tr. 76)

In November 2010, Applicant received an $8,158 advance. (Tr. 77; GE 5 at 101, 106) Applicant could not remember the reason for the advance in November 2010. (Tr. 77-78) In February 2011, she received a $40,000 advance on her salary to purchase a show horse. (Tr. 77; GE 5 at 98-99; GE 2 at 17) In April 2011, she received a $50,000 advance that she used to purchase a horse for her son. (Tr. 78, 84; GE 2 at 17; GE 5 at 97) Records show in May 2011, she received a $50,000 advance on her salary. (AE 5 at 96) Applicant said she disputed her receipt of the May 2011 $50,000 advance because she did not have an account in Bank A where the money was deposited by Company A. (GE 2 at 18) According to the wire transfer records, both $50,000 advances went to Bank C, and not to Bank A where Applicant said she did not have an account. (GE 5 at 96-97) In June 2011, records show she received a $4,041 advance on her salary (which went to Bank C); however, she disputed her receipt of the $4,041 advance. (Tr. 84; GE 2 at 18; GE 5 at 95) In July 2011, she used a Company A account to spend $7,000 to ship a horse from overseas. (Tr. 85; GE 5 at 135, 138) In July 2011, she received a $20,000 pay advance from Company A; however, she did not remember the reason for the advance. (Tr. 86; GE 5 at 94) In total, she received cash advances in 2011 of more than $150,000. (Tr. 86) Applicant sold the horse she purchased for $50,000 for $150,000. (Tr. 93)

Applicant repaid part of the advance payments out of her monthly Company A salary. (AE 16) In 2010, she repaid $8,391 in advance pay, including $5,844 prior to July 2010, when the letter of intent (LOI) to transfer Company A to Applicant's ownership was signed. (AE 16, November 5, 2010 pay statement, year to date misc. column; AE 23, July 16, 2010 pay statement, year to date misc. column; GE 2 at 19) Her pay statements indicated she repaid $26,678 in 2011 as follows: January 28, 2011

[5]Applicant's employer did not seek repayment for any advance pay she received prior to August 2010. (GE 5 at 182) The advance pays received in 2010 were $10,310 and $11,474 in August 2010; and $8,158 in November 2010. (GE 5 at 182)

($500); February 11, 2011 ($500); February 25, 2011 ($548); March 25, 2011 ($1,000); April 8, 2011 ($1,000); April 22, 2011 ($1,000); May 6, 2011 ($1,000); May 20, 2011 ($1,000); July 1, 2011 ($5,041); July 15, 2011 ($2,000); and July 29, 2011 ($5,449). (AE 16) Company A withheld her entire July 29, 2011 (final) paycheck. A consolidated spreadsheet shows Applicant received $211,423 in advance pay and payments for personal charges or expenses from Company A; Applicant repaid $31,186, and Applicant owed a remaining debt of $180,236 to Company A. (GE 5 at 182) The $211,423 includes her truck repairs in August 2010, pay advances, and about $1,000 in miscellaneous charges; however, it does not include payment of medical treatment for Applicant's daughter. (GE 5 at 182)

Applicant did not seek the approval of the managing board directors (Y or Z) for her advance pays or claims for expenses that were possibly personal because she had "total authority over the entire company," and she "could do whatever [she] wanted." (Tr. 78) She believed that it was sufficient for her to sign for the funds she received from Company A. (Tr. 78-79) She contended that her LOI to purchase Company A and her general manager position enabled her to allocate large sums of company funds to herself as advance pay. (Tr. 78-79) She acknowledged that she did not own Company A, and she did not want to inform the managing directors of her large cash advances because Director X took three million dollars from Company A. (Tr. 78-80) She did not exercise her option to take over Company A because of liabilities relating to missing funds and taxes. (Tr. 81) She claimed she had no obligation to inform the managing directors of her advance pay or expenses. (Tr. 82)

On July 15, 2011, Applicant was removed from her position at Company A, with a termination date of August 15, 2011. (Tr. 87; GE 5 at 167, 175-176) On July 20, 2011, counsel for the sole managing director (Director Y) wrote asking Applicant to repay the $170,759 in advance pay Applicant received. (GE 5 at 167-168) Applicant responded that she was fired for disclosing information about Company A to law enforcement. On July 26, 2011, Director Y wrote Applicant's counsel and corrected the amount owed to $178,835. (GE 5 at 175-176) Director Y also indicated the managing directors were unaware that she had made any allegations against them to law enforcement or other authorities. (GE 5 at 176) Applicant said the $178,835 claim was inflated because it included the cost for her daughter's surgery and some of her travel expenses. (Tr. 88-89) Shortly after Applicant left Company A, a federal government law enforcement agency shut down Company A. (Tr. 93) On November 1, 2011, the government agency terminated the contract for the $128 million contract for cause and advised Company A that damages were going to be sought. (AE 12)

Company A filed a lawsuit seeking restitution and punitive damages from Applicant. (Tr. 89; AE 22) The lawsuit alleged Applicant committed: constructive fraud including expenditures without authority; deceit including taking advance payments and misuse of credit cards; breach of fiduciary duty; breach of implied employment contract; breach of contract including violation of the requirements in the employment handbook by misusing fund and credit cards; and unjust enrichment. (AE 22) Company A sought $194,000 in restitution and punitive damages. (AE 22) Applicant counter sued and sought documentation from Company A. (Tr. 89; AE 22) Applicant also alleged she was

not an employee of Company A and had no duty to report to the owners or board because of the LOI. (AE 22) Company A responded that the documentation Applicant sought was not available. (Tr. 90) In May 2013, Company A and Applicant settled the lawsuit, and Company A paid Applicant $30,000 to reimburse her attorney fees. (Tr. 32, 90; AE 24) The settlement agreement included an order limiting her communications to a federal agency. (Tr. 90; AE 24)

Applicant contended that the stated rationale for her termination, taking unwarranted advance pays and charges, was false and that the real reason for her termination is that the managing director learned she was providing information to federal law enforcement and a federal agency about Company A's business practices. (Tr. 100-101) She considers herself to be a whistle blower. (Tr. 32)

Applicant had the funds to repay Company A for her advance pays and personal expenses (truck repairs); however, she believed she should not because she was fired. (Tr. 106) She understood that the federal agency had to make up the $2 million shortage on the $60 million fixed price construction project, and she elected not to pay the federal agency. (Tr. 106)

Use of Information Technology Systems and Personal Conduct

SOR ¶ 1.a alleges that while Applicant was the FSO for Company M, she improperly used her Corporation G Joint Personnel Adjudication System (JPAS) account to process personnel security clearances for at least three Company M employees. SOR ¶ 3.a cross-alleges the same conduct as alleged in SOR ¶ 1.a.

A DSS report indicates, Applicant "has violated [National Industrial Security Program (NISPOM) Operating Manual, DOD 5220.52-M,] provision 2-200d by processing personnel clearances outside of contractual obligations." (GE 3) NISPOM paragraph 2-200d reads:

> 2-200d. The contractor shall limit requests for [personnel (security) clearances (PCLs)] to the minimal number of employees necessary for operational efficiency, consistent with contractual obligations and other requirements of this Manual. Requests for PCLs shall not be made to establish "pools" of cleared employees.
>
> In addition, the NISPOM paragraph 2-105 reads:
>
> 2-105. PCLs Concurrent with the [facility clearance (FCL)].[6] Contractors may designate employees who require access to classified information during the negotiation of a contract or the preparation of a bid or quotation pertaining to a prime contract or a subcontract to be processed for PCLs

[6]A facility clearance "is an administrative determination that a company is eligible for access to classified information or award of a classified contract." NISPOM, paragraph 2-100.

concurrent with the FCL. The granting of an FCL is not dependent on the clearance of such employees.

NISPOM paragraph 2-205 reads:

> 2-205. Pre-employment Clearance Action. If access to classified information is required by a potential employee immediately upon commencement of their employment, a PCL application may be submitted to the CSA by the contractor prior to the date of employment provided a written commitment for employment has been made by the contractor, and the candidate has accepted the offer in writing. The commitment for employment will indicate that employment shall commence within 30 days of the granting of eligibility for a PCL.

Applicant completed numerous security-related training courses over the previous 15 years, including use of JPAS. (Tr. 63; SOR response, Ex. 15) She is exceptionally knowledgeable about security clearance procedures.

Company M was a large business entity with $2 billion in annual income, and Corporation G was a small business entity that was struggling to obtain business and complete contracts. (Tr. 33) Applicant was the FSO for Corporation G from February 2012 through March 2014. (Tr. 94-95; SOR response, Applicant's July 1, 2014 letter at 1; SOR response, Ex. 16) She was employed at Company M after April 2014. (SOR response, Ex. 16) She continued to work part time at Corporation G after she went to work at Company M. (Tr. 96) Applicant provided parts of two documents dated December 2012 and March 2013 between Company M and Corporation G establishing teaming agreements to facilitate bids on government construction contracts. (SOR response, Applicant's July 1, 2014 letter at 1; SOR response, Ex. 2) Under the teaming agreements, Corporation G was supposed to be the prime contractor, and Company M was a subcontractor. (SOR response, Ex. 2)

On August 1, 2013, Corporation G submitted a proposal for an overseas construction project. That proposal indicated Company M and Corporation G would be working together on the contract, and the proposal included contractor access to classified information. (SOR response, Applicant's July 1, 2014 letter at 1-2; SOR response, Ex. 2) In September 2013, Company M possessed a facility clearance. (SOR response, Applicant's July 1, 2014 letter at 2) On September 13, 2013, the DSS issued Company M a 30-day notice of termination of its facility clearance since it did not have an active contract requiring access to classified information. (SOR response, Ex. 6)

On September 26, 2013, on behalf of Corporation G, Applicant requested that a federal agency issue a DD Form 254[7] to sponsor Company M, a subcontractor, for a facility clearance, and Applicant's letter indicates "Facility Clearance Level: Secret DSS

[7]A DD Form 254 is filed by a company or other business entity to establish DoD Contract Security Classification Specification or facility clearance. See "A Guide for the Preparation of a DD Form 254 DoD Contract Security Classification Specification," http://www.cdse.edu/documents/cdse/DD254.pdf. (HE 4)

approved storage required: Yes" on a classified federal agency contract. (SOR response, Applicant's July 1, 2014 letter at 2; SOR response, Ex. 7) On February 28, 2014, Applicant again requested on Corporation G letterhead that the federal agency issue "subcontractor draft DD Form(s) 254 (for a facility sponsorship) to [Company M] who will be performing as a subcontractor to Company G on our contract." (AE 26) Applicant did not provide a copy of a draft or approved DD Form 254 indicating Company M had received a facility clearance.

Applicant said that a representative of the federal agency for whom the classified construction would be done advised her that Corporation G's September 26, 2013 request would soon be approved. Based on her belief that Company M would soon have a facility clearance, in November 2013, Applicant submitted three Company M employees for a security clearance using her Corporation G JPAS account. (SOR response, Applicant's July 1, 2014 letter at 2)

The DSS incident report indicates one of the employees Applicant sponsored submitted his May 5, 2014 e-QIP and indicated his employment was as a consultant with Corporation G. (GE 3) One of the other employees was listed as having security access under Corporation G with a person category of "Contractor" and the other was listed as "Consultant." (GE 3)

On October 28, 2013, the DSS terminated Company M's clearance status in accordance with a September 13, 2013 letter. (SOR response, Applicant's July 1, 2014 letter at 2; SOR response, Ex. 9) Applicant said she was unaware of the DSS termination of Company M's clearance. (SOR response, Applicant's July 1, 2014 letter at 2) Applicant was not the FSO of Company M in October 2013. (SOR response, Applicant's July 1, 2014 letter at 2)

DSS asked Corporation G's FSO whether the three Company M employees were employees of Corporation G or consultants for Corporation G, and the Corporation G FSO advised DSS that they were not and never had been Corporation G employees or consultants. (SOR response, Applicant's July 1, 2014 letter at 2; GE 3 at 2) On May 21, 2014, in an email, DSS told Corporation G to remove the three Company M employees from JPAS, which terminated their clearances. (SOR response, Applicant's July 1, 2014 letter at 3; SOR response, Ex. 10) On May 21, 2014, Applicant, writing on behalf of Company M, asked for immediate issuance of the DD Form 254 for Company M. (SOR response, Ex. 10)

On May 22, 2014, the Defense Manpower Data Center (DMDC) informed Applicant that her JPAS access was suspended for "processing personnel for security clearances who were not employees or consultants of the sponsoring facility." (SOR response, Ex. 11) In Applicant's May 22, 2014 email response to the DMDC suspension, Applicant indicated she maintained her Corporation G JPAS account after leaving her FSO position in Corporation G and going to work for Company M because she was working closely with Corporation G under the teaming agreement and someone at Corporation G asked her to maintain her JPAS account. (SOR response, Ex. 12) She said, "I was working with [Corporation G], and I was working with [Company

M]. I had two roles. I was still consulting with [Corporation G] as an FSO when I was over at [Company M]. They were working on joint contracts together." (Tr. 34) She continued to work with Corporation G after going to work for Company M because Corporation G was a small entity. (SOR response, Ex. 12) She did not indicate whether she was a paid consultant for Corporation G while working for Company M or whether DSS had approved her continued JPAS access on Corporation G's account after going to work for Company M.[8]

Applicant said Corporation G "decided to sponsor" Company M for a security clearance as Corporation G lacked manpower and because they were joint bidders on construction projects. (SOR response, Ex. 12) However, Applicant also said that Corporation G was reluctant to sponsor Company M employees as consultants because of bonding issues. (SOR response, Ex. 12)

A June 19, 2014 email from a government agency to Applicant states "if [Corporation G] still intends to use [Company M] as a subcontractor for TSS services, you can ask [Corporation G] FSO to send us a new request for subcontract DD Form 254 for [Company M] under [Corporation G's] IDIQ." (SOR response, Ex. 14)[9]

A DSS agent suggested "It would seem that [Applicant] was attempting to get a head start on having investigations done on the key management personnel for [Company M] (new facility attempting to be granted a FCL) and inappropriately used [Corporation G's] account to do so." (GE 6)

At her hearing, Applicant claimed the three Company M employees were working "as consultants" with Corporation G. (Tr. 96, 135) They were assisting Corporation G in bidding for federal construction contracts. (Tr. 96-97) Their security files were at Corporation G, including their Standard Form 312, Classified Information Nondisclosure Agreements. (Tr. 128) Applicant conceded the three Company M employees did not have employment contracts with Corporation G, and Corporation G never paid them anything. (Tr. 97, 109) She said there were visit authorization letters for the three employees when they made site visits indicating they were consultants for Corporation G. (Tr. 128) She believed DSS never interviewed the three employees; however, two of the three employees were interviewed. (Tr. 128)[10]

[8]For purposes of this decision, we will assume that DSS was aware of Applicant's roles at Company M and Corporation G and DSS did not find that these roles raised a security concern under Guideline M. (Tr. 34-35)

[9]Indefinite delivery, indefinite quantity (IDIQ) contracts provide for an indefinite quantity of services for a fixed time.

[10] As part of the security violation investigation process, two of the three employees were interviewed, and those two employees said they "were both were working for [Company M] NOT [Corporation G]." (GE 6) Further details about their relationships with Corporation G were not provided.

Character Evidence

K had a lengthy distinguished career in intelligence and government service beginning in the early 1960s as an Army infantry officer and continuing through service in Iraq during Operation Iraqi Freedom in 2003. (Tr. 46-47) After obtaining a law degree in the 1960s, he worked in a sensitive national security position on Capitol Hill. (Tr. 46-47) He also served in multiple sensitive State Department positions. (Tr. 47) Director Z described Applicant as the best security officer he had ever met over his decades of involvement with classified information. (Tr. 46-48) He described her as 100 percent honest, highly professional, and deserving of a security clearance. (Tr. 52) Z was not aware of the allegations in the SOR. (Tr. 52) He did not hear any criticism of Applicant from the other owners of Company A for misuse of funds or about the lawsuit to recover funds from Applicant. (Tr. 55)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant 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 therein 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

Use of Information Technology Systems

AG ¶ 39 depicts the security concern for use of information technology systems:

> Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

AG ¶ 40 reads, "[c]onditions that could raise a security concern and may be disqualifying include:"

> (a) illegal or unauthorized entry into any information technology system or component thereof;
>
> (b) illegal or unauthorized modification, destruction, manipulation or denial of access to information, software, firmware, or hardware in an information technology system;
>
> (c) use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;

(d) downloading, storing, or transmitting classified information on or to any unauthorized software, hardware, or information technology system;

(e) unauthorized use of a government or other information technology system;

(f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations;

(g) negligence or lax security habits in handling information technology that persist despite counseling by management; and

(h) any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.

AG ¶ 40(c) applies. In May 2014, Applicant improperly used her Corporation G JPAS account to process personnel security clearances for three Company M employees without ensuring Corporation G management required the Company M employees to have access to classified information during the negotiation of a contract or the preparation of a bid or quotation pertaining to a prime contract or a subcontract. *See* NISPOM, paragraphs 2-105 and 2-200d. The three personnel Applicant placed into JPAS thereby potentially had inappropriate access to classified information.

AG ¶ 41 lists three conditions that could mitigate security concerns including:

(a) so much time has elapsed since the 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 misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available; and

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

AG ¶ 41(a) and 41(b) apply. Applicant put the three Company M personnel into JPAS because they were unpaid consultants on bids to obtain classified contracts that Company M and Corporation G were going to complete as partners or as a team. She believed Corporation G would soon sponsor Company M to receive a facility clearance. Because of bonding and control issues, the sponsorship apparently did not occur. If management in Corporation G had indicated that the three Company M personnel were "required" for the classified bids and had authorized Applicant as FSO to submit them

for security clearances, then there would be no Guideline M security concern. Applicant had the burden of providing any evidence that management of Corporation G had approved the consultant arrangement and necessity for access to classified information for the three Company M personnel, and no such evidence was presented. However, there is no evidence that the three Company M personnel ever received classified information, and under all the circumstances, Applicant's JPAS mistake was minor. It is evident that Applicant's JPAS actions happened under such unusual circumstances, that they are unlikely to recur and do not cast doubt on her reliability, trustworthiness, or good judgment. Use of information technology systems security concerns are mitigated.

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

> 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.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying 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 intentional financial breaches of trust."

SOR ¶ 2.a alleges and the record establishes that Applicant spent several thousand dollars to repair her truck and then charged these expenses to Company A. Her actions to obtain Company A funds to pay her personal expenses establishes AG ¶ 19(d). Applicant obtained advance pay from Company A that she did not repay after she left employment with Company A. She did not inform the owners of Company A of the charges or receipt of the advance pay. Her financial decisions about her pay and claims showed poor financial judgment. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five mitigating conditions under AG ¶ 20 are potentially applicable:

> (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;
>
> (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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;[11] and

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. Applicant contended that she should not be required to repay Company A for her advance pay and her personal expenses charged to Company A (vehicle repair) because she was wrongfully terminated from her

[11]The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

> In order to qualify for application of [the good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the good-faith mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

employment with Company A; she was a whistle blower; Manager X wrongfully received $3 million; and Company A's lawsuit for restitution and punitive damages was settled with a $30,000 payment to Applicant for attorney fees.

In ISCR Case No. 09-08394 at 6 (App. Bd. Jan. 16, 2013), the Appeal Board stated:

> [A] settlement does not, in and of itself, suggest that the underlying lawsuit was groundless. *See, e.g., Ford Motor Company v. Mustangs Unlimited, Inc.*, 487 F.3d. 465, 469-470 (6th Cir. 2007) for a discussion of the strong public policy in favor of settlement, in the interests of justice to the parties, economy of judicial resources, and the saving of tax dollars. *See also Ismert and Associates, Inc., v. New England Mutual Life Insurance Co.*, 801 F.2d 536 (1st Cir. 1986).

Applicant failed to establish that Company A's management was aware that Applicant was informing the DSS and FBI about Company A's questionable behavior on contracts overseas before she was terminated from employment at Company A. She did not establish that she was terminated from employment at Company A to retaliate because she was a whistle blower. She did not prove that she was terminated from employment at Company A for any reason other than her improper claim for reimbursement of personal expenses and for taking excessive advance pay.

Applicant admitted that she received over $150,000 in advance pay in 2011. For example, she used $50,000 in advance pay to purchase a horse, and then she sold the horse for $150,000 and did not repay the $50,000 in advance pay. She did not claim she was unable to repay Company A after she was terminated from employment with Company A. Her settlement of the debt was not based on evidence that she did not owe the debt. She did not prove that her termination from employment was inappropriate. Her pattern of taking excessive advance pays without informing the owners or directors of Company A provides a reasonable basis for her termination. Moreover, she admitted that the $60 million contract needed $2 million to complete the contract, which may have contributed to the owner's decision to terminate her employment. Her arguments about Director X's receipt of $3 million, her absolute control of Company A's expenditures, her willingness while employed at Company A to repay the advance pays, and other arguments do not constitute a "reasonable basis to dispute the legitimacy of the past-due debt" under AG ¶ 20(e).

Applicant failed to meet her burden of establishing mitigation under AG ¶ 20. There is no assurance that her financial problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, she failed to establish that financial considerations security concerns are mitigated.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes three conditions that could raise a security concern 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; 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; 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 ¶¶ 16(c) and 16(d) do not apply because Applicant's claim for reimbursement for repairs for her truck and her advance pays are covered under Guideline F, *supra*. AG ¶ 16(e) applies because her conduct as the manager of Company A adversely affects her "personal, professional, or community standing."

The allegation under Guideline M is cross alleged under Guideline E. For the reasons stated in the Guideline E section, this portion of the Guideline E allegations is mitigated.

AG ¶ 17 provides four conditions that could mitigate security concerns in this case as follows:

> (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; and
>
> (f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions fully apply. Applicant failed to establish that her termination from Company A was improper or unwarranted. She did not repay the advance pay she received or personal charges she made to Company A. Her financial actions as manager of Company A where she received unwarranted funds from Company A and failed to repay those funds after she was terminated from Company A employment cast doubt on her reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

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 have incorporated my comments under Guideline M, F, and E 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 50-year-old FSO, and she has worked as an FSO since 2001. Applicant completed numerous security-related training courses over the previous 15 years, including use of JPAS. She is exceptionally knowledgeable about security clearance procedures. She attended college for a total of about three years. From May 2010 to August 2011, she managed Company A and she was able to bring the $60 million construction contract closer to completion. She cooperated with federal law enforcement and the government agency in the investigation and litigation against Company A.

Director Z described Applicant as the best security officer he had ever met over his decades of involvement with classified information. He described her as 100 percent honest, highly professional, and deserving of a security clearance. He did not hear any criticism of Applicant from the other owners of Company A for misuse of funds or about the lawsuit to recover funds from Applicant.

The disqualifying evidence is more persuasive. Applicant received more than $150,000 in advance pay from Company A, and she received several thousand dollars for personal expenses. She had the funds available to repay Company A, and she did not repay Company A after Company A terminated her employment. Her failure to pay her debt to Company A shows lack of financial responsibility and judgment, and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. *See* AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations and personal conduct security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With a track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her security clearance worthiness.

I have carefully applied the law, as set forth in *Egan,* Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole

person. I conclude use of information technology systems security concerns are mitigated; however, financial considerations and personal conduct security concerns are not mitigated. It is not clearly consistent with the national interest to grant or reinstate Applicant's security clearance eligibility at this time.

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 M:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	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 or reinstate Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
MARK HARVEY
Administrative Judge