



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-03792
	)	
Applicant for Security Clearance	)	

For Government: Pamela Benson, Esq., Department Counsel  
For Applicant: Ryan Nerney, Esq.

05/12/2016

**Decision**

DAM, Shari, Administrative Judge:

In 2005 Applicant was terminated by her employer for embezzling \$280. She failed to disclose that information in a 2013 security clearance application. She did not mitigate the criminal conduct or personal conduct security concerns. Based upon a review of the record evidence as a whole, eligibility for access to classified information is denied.

**Statement of the Case**

On August 15, 2015, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. The action was taken 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* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within DoD for SORs issued after September 1, 2006.

On November 10, 2015, Applicant answered the SOR in writing, and requested a hearing before an administrative judge (Answer). On February 12, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On February 16, 2016, DOHA issued a Notice of Hearing. The case was heard on March 2, 2016, as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through F into evidence without objection. DOHA received the hearing transcript on March 14, 2016.

### **Findings of Fact**

In her response to the SOR, Applicant admitted the three allegations contained in the SOR. Her admissions are incorporated into these findings of fact. (Answer.)

Applicant is 35 years old, single, and a 2002 college graduate. After graduation, she worked as a salesperson, flight attendant, bank teller, and branch manager. In June 2006 she began working for her current employer, a federal contractor. On occasion she has been sent overseas for her job. She has a dedicated attitude about performing well in her job and has accomplished numerous goals. She has never been disciplined by her employer nor had a security incident. (Tr. 27.)

Applicant's performance evaluations document a history of exceeding job expectations with her current employer. (AE D.) A past supervisor for eight years said that Applicant "was one of the finest directors that I have ever led." (AE E.) A readiness manager stated that Applicant is a successful leader. Applicant's immediate supervisor trusts her with confidential information and supports her request for a security clearance. A vice-president of her employer's company highly complimented Applicant's performance, character, and honesty. (AE E.) Applicant is also active in her community and is a successful fundraiser for cancer research, AIDS, and disabled veterans. (Tr. 50.) She has held a secret security clearance since January 2010. (GE 1.)

In July 2004 Applicant started a position as a bank teller. She was 24 years old. At the end of January 2005, she embezzled \$280 cash from the bank. She said she was having financial problems at the time. The next day she told her manager what she had done. The manager asked her to leave. Applicant later received a call from the company requesting that she report to headquarters that day. Applicant reported to the headquarters and returned the money. She was never charged criminally for her actions, nor did she receive a letter of termination. However, she clearly understood at that meeting with her employer that she would be terminated, if she did not leave. (Tr. 18-20, 40, 44.)

In April 2009 Applicant submitted her first security clearance application (SCA-2009). She was 28 years old. In response to questions in Section 13A of that SCA, inquiring about her employment history, Applicant listed the bank position, with employment dates from "7/2004 to 2/2005." (GE 2.) She did not disclose any information about the January 2005 theft under the section titled "Explanation/reason for

leaving.” (GE 2.) Section 13C of that SCA-2009 specifically inquired into reasons for leaving a position. Applicant did not disclose any information. (GE 2.) She admitted she should have disclosed that she “Left a job by mutual agreement following charges of misconduct.” (Tr. 36.) She attributed the non-disclosure to a “lapse of judgment.” (Tr. 25.) She subsequently received a security clearance.

In early August 2013, Applicant submitted a second security clearance application (SCA-2013) for purposes of upgrading her security clearance. (Tr. 42.) She was 32 years old. While completing the form, she stated that she did not think about disclosing the 2005 employment incident, but instead she simply updated information in it. (Tr. 27.) In response to the question inquiring about the reason for leaving her position at the bank, she wrote “pursuit of new opportunities.”<sup>1</sup> After submitting SCA-2013, an investigator interviewed Applicant later in August 2013 about her answers to questions in it. During this interview, she did not make an effort to disclose information related to the 2005 termination from the bank position.<sup>2</sup>

In March 2014 another investigator called Applicant to schedule a second interview. During that interview, the investigator specifically asked her three times whether she had any disciplinary actions while working at the bank. After the third time, Applicant disclosed the truth about the termination from the bank. (Tr. 38.) She told the investigator that she was embarrassed about the 2005 incident. (Tr. 39; GE 3.) In her Answer to the SOR, she admitted the 2013 falsification.

While testifying, Applicant expressed visible remorse and embarrassment over her misconduct. She realizes that her conduct was criminal and that she made a serious mistake when she stole money from the bank. (Tr. 21-23.) She said that her impulsive act was out-of-character. (Tr. 44-45.) She told her brother and one friend about the misconduct soon after it occurred. (Tr. 43.) None of her previous employers are aware of the 2005 incident, nor is her current employer. (Tr. 42.) Toward the end of the hearing, she said that she loves her job. She wants to continue supporting the DoD in its role in the world. (Tr. 49.)

## **Policies**

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

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<sup>1</sup> Although she was looking for a new job at the time, it was not the primary reason that she left the bank. (Tr. 29.)

<sup>2</sup> The SOR did not allege a falsification charge relating to Applicant’s non-disclosure of requested information in her 2009 security clearance application. Nor did the SOR allege misrepresentations of the truth during two investigative interviews. Hence, said information shall not be considered in an analysis of disqualifying conditions; however, it may be considered in the analysis of mitigating conditions and the whole-person section.

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 AG ¶ 2(a), describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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 ¶ 31 describes a condition that could raise a security concern and may be disqualifying in this case:

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Although not prosecuted, Applicant admitted that she engaged in criminal conduct when she embezzled \$280 from her employer in January 2005. The evidence raises the above disqualifying condition.

AG ¶ 32 provides a condition that could mitigate the security concerns in this case:

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant presented impressive evidence related to her employment performance since 2006. She admitted her criminal misconduct and exhibited remorse and embarrassment while testifying. She is active in her community and assists with fundraising for charitable organizations. These are positive factors of successful rehabilitation. Although there is no evidence of a similar crime since 2005, such as another theft, on at least four times between 2009 and 2014 she intentionally deceived the Government about the 2005 criminal incident. That deception is evidence of additional criminal activity and precludes a full finding of successful rehabilitation.

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

The security concerns pertaining to the personal conduct guideline are set out in AG ¶ 15:

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 two conditions that could raise security concerns and may be disqualifying in this case:

(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

(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.

Applicant admitted that she intentionally falsified her security clearance application in 2013, by not disclosing a criminal incident that occurred at her place of employment. Those actions could create a vulnerability to exploitation because said conduct, if known, could affect her personal and professional standing in the community. The evidence raises the above disqualifying conditions.

AG ¶ 17 includes four conditions that could mitigate security concerns arising under this guideline:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant did not make a good-faith effort to correct the falsification in her April 2009 security clearance application when she submitted her August 2013 security clearance application. Despite being asked about it during a second investigative interview in March 2014, she continued to deny it twice before admitting the incident. Up to that point her misconduct of deliberate non-disclosure spanned five years. AG ¶ 17(a) does not provide mitigation. The non-disclosure of an offense is not minor, and it continued until a persistent investigator repeatedly confronted her about the truth.

Applicant acknowledged the falsification in March 2014, but did not present evidence that she has taken positive steps to alleviate or understand the internal stressors, circumstances, or factors that underlie her initial behavior in 2005, and, more importantly, her subsequent pattern of non-disclosure. AG ¶ 17(d) does not apply. Although Applicant's brother and girlfriend are aware of the 2005 criminal misconduct,

there is no evidence that they or anyone else are aware of Applicant's intentional concealment of that information over the years, or that she has taken positive steps to reduce her vulnerability to exploitation based on those facts. The evidence does not establish mitigation under AG ¶ 17(e).

### **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). They include the following:

- (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 include 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 pertinent facts and circumstances surrounding this case. Applicant is a 35-year-old woman, who has successfully worked for a federal contractor since 2006. During that time she held a security clearance, and received impressive performance evaluations. She submitted letters from supervisors attesting to her impressive capabilities and trustworthiness. While that employment history is commendable, her decision to perpetuate a lie to the Government about a job termination for almost five years raises serious concerns about her ethics and current judgment.

After observing her demeanor and listening to her testimony, I believe she is mortified, remorseful, and relieved to no longer be emotionally burdened by her secret. However, given the extent and seriousness of the ongoing falsifications, which are criminal, she has not presented sufficient evidence to mitigate the security concerns raised by that conduct, beginning with the 2005 criminal incident, and concluding when she reluctantly disclosed the job termination during a 2014 investigative interview. She seemingly has been unable to accept and admit her early criminal conduct for nine years. While the 2005 incident is concerning, Applicant's denial of it for so many years is more concerning and at the core of this investigation. Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant did not mitigate the criminal conduct or personal conduct 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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SHARI DAM  
Administrative Judge