



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



Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: John V. Berry, Esq.

03/31/2025

Decision

LAFAYE, Gatha, Administrative Judge:

Applicant provided sufficient evidence to mitigate security concerns raised under Guidelines E (personal conduct) and J (criminal conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 26, 2022. On May 16, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines E and J. The DOD acted under Executive Order (EO) 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 (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on June 2, 2023, and requested a hearing before an administrative judge. On August 28, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for September 24, 2024. The hearing was convened as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and GE 2, which were admitted in evidence without objection. Applicant offered Applicant Exhibits (AE) A through AE L, which were also admitted in evidence without objection. Applicant and his two character witnesses testified. DOHA received the hearing transcript (Tr.) on October 3, 2024.

Findings of Fact

In his Answer, Applicant admitted all allegations in the SOR. His admissions are incorporated in my findings of fact. After careful review of the evidence, I make the following additional findings of fact.

Applicant is 57 years old. He received his high school diploma in 1985, and enlisted in the Navy in 1989 as a Seaman Recruit. In 2002, he completed his bachelor's degree and was commissioned as a Naval Officer the same year. After 24 years of honorable service, in February 2014, Applicant retired from the Navy at the rank of Lieutenant (O3E). He married in 1994 and he has two children, ages 25 and 27. (GE 1; Tr. 38-46; AE B, C)

Applicant has worked as a senior systems engineer for a defense contractor since December 2013. He has held an active secret security clearance since 1991, granted during his first enlistment in the Navy. He completed his most recent SCA in October 2022 where he disclosed being detained for shoplifting in about June 2022, and later being arrested for the same and related offenses in September 2022, after he failed to appear for his arraignment. (GE 1; Tr. at 9)

Under Guideline E, the SOR alleged in ¶ 1.a, that Applicant shoplifted at a retail store (MERC) on multiple occasions in June and July 2022. This allegation was cross-alleged under Guideline J, in SOR ¶ 2.a, and finally, SOR ¶ 2.b alleged Applicant pled guilty in October 2022 to two counts of shoplifting and was sentenced to 12 months' imprisonment (suspended 11 months, 18 days); 12 months' probation; and ordered to pay restitution for about \$250. Applicant admitted all allegations and provided evidence in mitigation. (SOR Answer; AE A, I, J, K)

Applicant was a frequent shopper at MERC, and on average, he purchased goods totaling several hundred dollars each month. Like many modern stores, MERC had adapted the practice of encouraging customers to use the self-checkout registers. There were fewer clerks available in check-out lines to help customers complete purchases, and sometimes there were no clerks available at all to help. (Tr. 58-60)

In July 2022, Applicant arrived in the early morning hours at MERC. He used a self-checkout scanner and register to purchase his goods because no clerks were available to assist him with completing his purchases. His cart was filled with numerous goods needed for his household, and he said he believed he properly scanned and paid for all of them. (GE 1 at 33-40; GE 2; Tr. 47-61)

After completing the transaction, Applicant headed towards the exit, and was stopped by the MERC loss prevention officer (LPO), who invited him to a separate room to audit his purchases. After the audit, the LPO determined Applicant had not paid for about four items, which totaled about \$28. The LPO informed Applicant that the MERC policy required him to summon the Sheriff's department (Sheriff) for stolen goods totaling \$25 or more. (GE 1 at 33-40, GE 2; Tr. 47-56; AE A)

The Sheriff arrived and issued Applicant a summons to appear in court for arraignment in August 2022. Applicant immediately hired a lawyer (ESQ1) to represent him in the matter. About a week later, he met with ESQ1, informed him that he had paid for an international vacation to start in August 2022, and that his arraignment hearing would conflict with his vacation plans. ESQ1 told Applicant to proceed as planned with vacation, and that he would register with the court and make an appearance on Applicant's behalf for the arraignment. (GE 2; Tr. 48-50; AE G)

Applicant proceeded with his vacation as planned, but unbeknownst to him, ESQ1 did not register as his counsel or make an appearance for the arraignment. The court issued a warrant for Applicant's arrest, and a short time after he returned from vacation, the Sheriff arrived at his home and arrested him for failure to appear for his arraignment. Applicant fired ESQ1 and recouped his attorney's fee. (GE 1,2; Tr. 50-52; AE H)

Applicant sought a second lawyer (ESQ2) to represent him in the matter. He had a previous relationship with ESQ2, who prepared his Will and estate planning documents. ESQ2 informed Applicant she was experienced in criminal law and competent to handle his case. He hired ESQ2 and over time she negotiated a plea agreement with the prosecutor that Applicant found satisfactory to conclude the matter. (GE 1,2; Tr. 51-62)

In September 2022, the Sheriff arrested Applicant again based on a warrant alleging additional charges for shoplifting at MERC. Applicant was unaware of the new allegations. He later learned the local MERC operated as a regional training center for loss prevention, and as part of training, was able to retrieve videos of past purchases by name and credit card number. They found three previous instances of Applicant making similar errors while purchasing goods using self-checkout registers. ESQ2 was given video evidence of Applicant making purchases using MERC self-checkout registers on June 9, June 12, and June 18, and noted scanning errors, which had formed the basis of his arrest in September. The stolen goods altogether totaled about \$117. Applicant reported his criminal shoplifting charges to his supervisors and facility security officer (FSO), who were unaware of the charges before his disclosure. (GE 2; Tr. 51-70; AE I)

In October 2022, Applicant said he pled guilty to two counts of misdemeanor shoplifting as negotiated by ESQ2. There is conflicting evidence in the record that suggests he pled "nolo contendere," was found guilty, and sentenced. (AE G, I). The hand-written notes in AE G and AE I are difficult to decipher and not entirely clear on this point. Applicant said his comments to the judge during his guilty plea were very brief. He told the judge he did not intend to steal the goods, but that he failed to scan them correctly by mistake. He also told the judge that he took responsibility for his inattention to detail

and accepted the consequences of his actions, which resulted in him taking goods from MERC that he did not pay for. The judge accepted his explanation of the events, found him guilty of two misdemeanor shoplifting charges, and sentenced him in accordance with the terms of his plea agreement. (Tr. 50-65; AE A, AE G-J) Though a copy of the plea agreement was not offered in evidence and is not in the record, Applicant testified to the terms of the plea agreement, which is supported by information in AE G, AE I, AE J, and AE K, as detailed below.

- Convicted of misdemeanor shoplifting, two counts;
- Jail sentence of 12 months imposed; 11 months 18 days suspended;
- Serve jail sentence beginning October 21, 2022, on weekends only;
- On probation for local community-based probation agency;
- Restitution order for \$235.59; conditioned on suspended sentence;
- Other: banned from MERC for 12 months;
- No drugs, no marijuana, no CBDs.

Applicant made significant positive changes to his life after his arrest and conviction for misdemeanor shoplifting. He successfully completed all the above actions in compliance with the court's order, without problems, and provided proof of the same. He completed a shoplifting course, and also decided to go above and beyond the court's requirements by participating in seven mental health counseling sessions with a licensed psychologist to help him better understand why he made these mistakes, and to develop skills to avoid similar mistakes in the future. He also avoids using self-checkout registers. (Tr. 60-67; AE A)

Applicant presented proof of his outstanding professional performance of duties in the Navy and beyond. He is a valued member of the defense contractor team, as evidenced by 10 pay.raises in 11 years, and annual bonuses. His senior-level supervisor, also the Vice President of the company, testified favorably about his technical proficiency in his field, his honesty and commitment to mission success; and highly recommended him for a security clearance. Applicant's wife of 30 years testified favorably about his honesty, integrity, technical excellence, dependability, and commitment to the defense mission and family. Applicant also submitted letters of support, which included his current supervisor. All persons expressed their awareness of his misdemeanor shoplifting conviction, commented favorably on his initiative, dependability, and honesty, and favored his application for a security clearance. (Tr. 19-35; AE B-F, L)

Policies

"[N]o 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 applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." EO 10865 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." EO 10865 § 7. Thus, a decision to deny a security clearance 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." Department of the Navy *v. Egan*, 484 U.S. 518, 531 (1988); see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The security concern under this guideline is described 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 or sensitive 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 conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's admissions and the evidence in this case are sufficient to establish the disqualifying condition in AG ¶ 16(e).

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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;

AG ¶ 17(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶¶ 17(c), 17(d), and 17(e) are established. Applicant's misdemeanor shoplifting incidents happened under unique circumstances that are unlikely to recur and does not cast doubt on his reliability, trustworthiness, or judgment. This case involved one incident where a purchase discrepancy of \$28 was found. MERC, a regional training center for loss prevention, researched Applicant's historical purchases using his name and credit card number and found three prior incidents of shoplifting. There were no subsequent incidents of him being stopped, and his purchases audited. He reported his criminal shoplifting charges to his supervisors, FSO, and family. He took full responsibility for his actions, satisfied the court's requirements, and voluntarily participated in counseling to avoid making similar mistakes in the future. He also avoids using self-checkout registers.

No basis for coercion, exploitation, or duress exists as a result of this matter. Applicant has mitigated personal conduct security concerns.

Guideline J, Criminal Conduct

The security concern for criminal conduct is described in AG ¶ 30:

Criminal activity creates doubt about an Appellant'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 admissions and the evidence in the case establish the following disqualifying condition under AG ¶ 31.

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) and 32(d) are established. The analysis under Guideline E applies equally here. Applicant's misdemeanor shoplifting incidents happened over 33 months ago, under unusual circumstances that are unlikely to recur. Applicant admitted his responsibility for the incidents, accepted his punishment, and completed all the court's requirements. He also went above and beyond the court's requirements by voluntarily participating in counseling to understand his mistake, and to develop skills to avoid making a similar mistake in the future. He also avoids using self-checkout registers. Applicant has mitigated criminal conduct security concerns.

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(d):

- (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 E and J in my whole-person analysis. Many of the factors in AG ¶ 2(d) were addressed under these guidelines, but some warrant additional comment.

I had the opportunity to observe Appellant's demeanor during the hearing and found him credible. I weighed the favorable evidence, including the testimony of his senior-level supervisor, who strongly supports his application for a security clearance. His current supervisor also wrote a strong letter of support, and both attested to his honesty, integrity, dependability, and technical proficiency in his field. I considered the number of shoplifting incidents at MERC as a whole, which was a single incident that led to the discovery of other prior incidents of making the same errors. Weighing these facts against Applicant's 33-year history of success holding a security clearance without an issue, his strong employment record in the Navy and beyond; his dependability at work and at home; his commitment to the defense mission, and his demonstrated diligence in completing all the courts requirements, and going beyond those requirements to help avoid similar mistakes in the future. He no longer uses self-checkout registers.

Overall, I have determined the evidence favors granting a security clearance. Applicant successfully mitigated security concerns under Guidelines E and J.

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: **FOR APPLICANT**

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline J: **FOR APPLICANT**

Subparagraph 2.a, 2.b: For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Gatha LaFaye
Administrative Judge