



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



In the matter of: )  
)  
) ISCR Case No. 18-01699  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrea Corrales, Esq., Department Counsel  
For Applicant: Bradley Moss, Esq.

05/31/2019

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**Decision**

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LYNCH, Noreen A., Administrative Judge:

Applicant has not mitigated the security concerns under the guidelines for criminal conduct and personal conduct. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 26, 2018, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines J and E. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

Applicant answered the SOR on July 16, 2018, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on January 16, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 6, 2019, scheduling the hearing for March 28, 2019. The hearing was

convened as scheduled. The Government offered Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified on his own behalf and presented three witnesses. Applicant submitted nine exhibits, marked Applicant Exhibit (AX) A through I, which were admitted without objection. I held the record open for the final exhibit, AE J, which is admitted without objection. The record then closed. DOHA received the transcript of the hearing (Tr.) on April 11, 2019.

### **Findings of Fact**

Applicant admitted all allegations in SOR ¶¶ 1 and 2, although he indicated they are not consistent with his current character. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

### **Financial**

The SOR alleges in (1.a) under Guideline J, an October 2007 guilty plea to felony charges of mail fraud and aiding and abetting and willfully causing an act to be done. It further alleges a June 2008 sentencing of 12 months and 1 day of imprisonment and 5 years of supervised release. Applicant was ordered to pay restitution to his former employer in the amount of \$913,000. It cross alleges under Guideline E, the same information (2.a). Applicant admitted both allegations.

Applicant is a 64-year-old security engineer for a defense contractor. He is married and has three adult children and four grandchildren. He received his undergraduate degree in 1975, master's degree in 1977, and his doctorate in 1990. His doctorate is in artificial intelligence, statistics, and computer science. Applicant has been with his current employer since April 2013.

Applicant began a career in the academic world in approximately 1990. He was a lecturer at various universities and worked for a school system, and became the director of information systems and instructional technology until 1997. Because of his great success in the school system in implementing technology, he was invited by a board member to join the corporate world. (Tr. 77)

Applicant accepted a position with a bank and used his impressive skills to completely restructure the bank's information system so that it could efficiently service its customers with faster service. He was given six months to accomplish this enormous task. (Tr. 81) He was quite successful in that environment.

At one point in 1998, he began a "trek down a slippery slope". He was given materials for free and then charged by a contractor for billable hours. He knew this was not quite right. (Tr. 93) He stated that he thought it was "kind of fraudulent." He stated that the environment at the bank presented various opportunities on different levels to scam money from the bank. (Tr. 95) He was asked to note things that were not an employee expense on invoices. He was asked to set up personal "point of sale technology" and charge it to the bank. Applicant saw that a cycle of behavior had begun that was not legal. He admits that he should have stopped at that point, and he regrets

that he did not. He admits that he had never been tempted like that before. He saw that it became easier and easier to continue down the illegal path. (Tr. 98) He began receiving gifts in 1998, such as a car for his illegal acts. He continued engaging in criminal conduct and in 2002 he learned about "soft dollars." (Tr. 103) In essence, every market trade made on every dollar produced a kickback. (Tr. 104-105)

Applicant used some of the money that he illegally made to remodel his house or help his family. (Tr.108) He felt conflicted about his behavior, but he continued. A shell corporation came into existence. At this point Applicant had about \$400,000 of money that was gained illegally. (Tr. 118) He did not document the money for tax purposes. He knew he was scamming at that point or basically stealing money. (Tr.119) In about late 2003 or 2004, an investigation occurred and the bank's managing partner told Applicant if he resigned, he would get six month's severance pay. (Tr. 124)

In 2006, Applicant was investigated by the SEC for his misappropriation of funds. (GE 3) Applicant pled guilty to the felony charges of mail fraud and aiding and abetting. (GE 2) He was sentenced to prison in 2008, as described in the SOR. He had five years of supervised release. He was ordered to pay restitution to his former employer in the amount of \$913,000. (GE 4)

Applicant completed his sentence without incident. His supervised release was terminated in 2011. (AE H) He used his time to help other inmates obtain a GED and he became a trusted prisoner. He testified at the hearing that he has no idea why he committed the crimes. His mother and father died in part due to his sentencing. He is sincerely remorseful and he cannot justify the behavior. (Tr. 134) He tutors children in the local community. Applicant received an award from one employer in 2015 for group achievement. (AE I)

Applicant's probation was decreased from five years to two. He is making contributions to his community. He has been paying the restitution. (GE 5) He has paid \$250 a month since 2011. He owes about \$800,000. (GE 5, AE J)

Applicant presented three witnesses who testified that he is worthy of a security clearance despite the criminal behavior. His current employer stated that he told her immediately at the interview about the criminal conviction. She believes he is forthright and has valuable technical credentials. (Tr. 18) He has no authority over any funds. In his current position. (Tr. 20) A former employee of the bank testified that he worked with Applicant from 1999 to 2004. Applicant was a respected boss and empowered his employees to accomplish things. There was a memo from the bank that Applicant just resigned. (AE F) He was not aware of the criminal behavior that ensued at the bank with Applicant. He saw Applicant after his release from prison and saw that he was depressed and remorseful. (Tr. 42) This witness has no concerns about future criminal behavior on Applicant's part. (Tr. 46) A third witness testified on Applicant's behalf, but did not know the particulars of the criminal behavior. (Tr. 52)

Applicant presented six written affidavits from various people who know him as a patriot and a good man. His sister and wife attest that he was wrong for what he did but

he has paid a dear price. His cousin states that Applicant has turned his life around and deserves a chance. A friend who has known Applicant since 2007, and holds a security clearance, understands the nature of the criminal activity but believes that Applicant would not compromise any sensitive information. A longtime friend of Applicant's states that Applicant is deserving of a second chance. (AE A-E)

## **Personal Conduct**

During Applicant's 2017 investigative interview, he did not disclose his criminal behavior, but rather stated that he resigned his job from the bank rather than be fired. (GE 4) He also did not disclose that he quit his employment with his bank in his 2005 security clearance application. (GE 3) After he left the bank, he did not tell anyone about his criminal behavior (except his attorneys). Applicant was given a polygraphs in 2005 and 2006, during which he initially denied criminal involvement with the bank. (GE 3, Tr. 155) Applicant also failed to disclose his criminal activity to a subsequent employer because he feared that he would not get hired. (Tr. 159) In his latest security clearance application, he inaccurately stated the reason for leaving the bank. When cross examined at the hearing, Applicant explained that he did not read everything correctly and that he really did not understand the questions.

Applicant submitted five letters of recommendation. Each reference from a former employer knew Applicant for at least two years and described him as honest with a positive attitude. Applicant has exceptional organization and communication skills. He is reliable and motivated. One letter of recommendation commended Applicant for his ability to encourage students and build self-esteem. He attends church and is a member of his church community.

## **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, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the 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.

Directive ¶ E3.1.14, requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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.

Section 7 of Executive Order 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J: Criminal Conduct**

AG ¶ 30 sets forth the security concerns 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 conditions that could raise a security concern and may be disqualifying in this case:

(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;

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of

whether the person was formally charged, formally prosecuted or convicted.

Applicant was convicted and sentenced for a felony charge in 2007 and 2008. He served a year and a day in prison with five years of supervised release. He was ordered to pay restitution to his employer in the amount of \$913,000. The evidence establishes the disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

(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

(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.

While Applicant's involvement in the above seems to have been an isolated event from his work with the bank, the recency and severity of the behavior reduces mitigation. He is an educated man and yet from the beginning of his employment and for about seven years he engaged in directing false invoices for payment and other illegal activities. He does not dispute this. He received a significant amount of illegal money and he knew it was wrong but did not stop. He did not tell the bank. He completed his sentence, and has sincere remorse for the criminal behavior. He has excellent recommendations and affidavits. He works in the community, but given the fact that he used incredibly poor judgment for so many years, he has not met his burden in this case. His seven year pattern of engaging in illegal behaviors raised significant concerns regarding his judgment, discretion, honesty, trustworthiness, and reliability. The evidence does not establish mitigation under either of the above conditions.

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

The concern under this guideline is 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security

clearance action, or cancellation of further processing for national security eligibility:

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Based on Applicant's , the following disqualifying condition could apply:

AG ¶ 16 (e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or distress by a foreign intelligence entity or other individual or group. Such conduct includes;

(1) Engaging in activities which, if known, could affect the persons' personal, professional, or community standing.

Applicant admitted the security concerns under personal conduct in his answer to the SOR, however he was initially dishonest with security representatives regarding his involvement in these activities. His lack of candor during his investigations and polygraphs are noteworthy. He admitted that he did not disclose the full story either in writing to his employer or during two investigations. He is an educated man of 64 years. He was involved in fraudulent activities for many years and admits that he knew he should have stopped but did not until he was caught.

In this instance, it is clear from Applicant's testimony that he was initially embarrassed and humiliated by his behavior and hoped his crimes would not be discovered during his investigation. As a consequence he omitted relevant information on three separate occasions. He still owes about \$800,000 in restitution. I find substantial evidence of concealment of facts from his bank employer and the government. Therefore, AG ¶ 16(e) is established.

Applicant did not make prompt or good-faith efforts to correct his concealment. He spoke to two investigators and did not reveal the criminal activity until confronted. He failed two polygraphs. Applicant has not persuaded me that similar lapses in judgment are unlikely to recur.

AG 17(c) does not apply because the offense is not minor. None of the other mitigating conditions apply.

### **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 considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and E, in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant on three different occasions failed to disclose that he had a criminal conviction for a serious crime. He used incredibly poor judgment for almost seven years while he was engaging in the crimes. He has provided some mitigation, but it does not outweigh the serious security concerns. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the personal conduct, and criminal conduct security concerns.

### **Formal Findings**

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant



## **Conclusion**

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

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Noreen A. Lynch  
Administrative Judge