DATE: May 31, 2002

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In re:

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SSN: ----------

Applicant for Security Clearance

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ISCR Case No. 01-12429

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

William S. Fields, Department Counsel

**FOR APPLICANT**

Arnold S. Schickler, Esq.

**SYNOPSIS**

While associated as the secretary-treasurer and comptroller of a defense contractor (Company A), Applicant was indicted (along with the defense contractor and other officers) for inflating labor claims on terminated subcontracts to be reimbursed. Applicant and the other defendants were also made defendants in a number of civil suits arising out of the same conduct covered in the indictment. By virtue of a global settlement reached in June 1998 between the Government and the defendants, Company A (a company of about 800 employees) pleaded guilty to one count of violating 18 U.S.C. Sec. 1001 (a felony) and agreed to pay a fine, reimburse the Government for the costs of its investigation and settle the civil claims with a $6.5 million payment. The criminal charges and civil claims against Applicant and the other individual defendants were, in turn, dismissed with prejudice. The settlement agreement didn't foreclose the AF from processing debarment and suspension actions, which it did (for five years ending in December 1998). Neither Applicant nor any of his fellow defendants were found by the AF's inspector general to have been implicated in any wrongdoing associated with the acts covered by the indictment and civil suits.

Based on the reports of the company insurance carriers disbursing reimbursement checks to discharge the agreed claims in the global settlement, no acts of wrongdoing can be attributed to Applicant or any of the other covered members of Company A's director and officer insurance policies. No active involvement or culpable knowledge can be attributed either to Applicant arising out of the subject matter covered in the indictment and the civil suits based on a thorough review of the entire record presented. Trustworthiness endorsements of Applicant come from company colleagues, representatives of both Government and private customers.

Company A demonstrates considerable rehabilitation as an active Government contractor. Not only has Company A continued to accept work on DoD contracts under waivers since the issuance of the indictments, but it has since returned to regular Government contracting, all indicative of the company's rehabilitation. Considering all of the evidence in the record, Applicant exhibits himself to be reliable and trustworthy and free of any implicated wrongdoing in any of his company's concluded criminal and civil actions. Clearance is granted.

## STATEMENT OF CASE

On October 2, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on October 26, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 18, 2001, and was scheduled for hearing on January 2, 2002. A hearing was convened on February 11, 2002, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of four exhibits; Applicant relied on two witnesses (including himself) and seventeen exhibits. The transcript (R.T.) of the proceedings was received on February 20, 2002.

## PROCEDURAL ISSUES

During the hearing, Government moved to amend sub-paragraph 1.d of the SOR to delete Applicant and the other Company A officers as individuals debarred by the AF in October 1998 and, as such, conform to the evidence. There being no objections from Applicant, and good cause being demonstrated the amendment motion was granted. Applicant, in turn, amended his answer to deny his ever being formally debarred by the AF.

Prior to the close of the hearing, Applicant requested leave for the record to be kept open to permit him the opportunity to supplement the record. There being no objections, and good cause being shown, Applicant was granted an additional seven (7) days in which to supplement the record. Government was granted three (3) days to respond. Within the time permitted, Applicant supplemented the record with Company A's annual reports for the years 1989 through1994, an October 1, 1994 memorandum from Company B's subcontract manager and a November 27, 1995 deposition of Company B's subcontractor manager. Government's offering no objections to these submitted exhibits, and good cause being shown, Applicant's submissions are admitted as exhibits Y through AA.

## STATEMENT OF FACTS

Applicant is a 55-year old former secretary/treasurer/comptroller of his defense contractor (Company A) who seeks restoration of his security clearance.

**Summary of Allegations and Responses**

Applicant is alleged, at all times relevant, to have been an employee and officer (corporate secretary/treasurer /comptroller) of Company A since approximately August 1979, and an officer of the company when a Government investigation was initiated in late 1989, following reported allegations he and other employee/officers of Company A caused labor records to be falsified to support inflated claims on terminated sub-contracts, for which he was to be reimbursed. Allegations ensue that these investigated claims resulted in significant Government losses in the amount of at least $12 million dollars. Applicant's Company A, himself and others are further alleged to have been indicted in November 1993 by a grand jury, after which he was arrested and released on bond. The indictment allegedly charged defendants (including Applicant) with conspiracy to defraud the Government, four counts of major fraud against the Government, and 13 counts of false statements to the Government, all violations of Title 18 of the US Code. Allegedly, a superceding indictment issued in April 1994, adding another count. Allegedly, a plea agreement was entered into in June 1998, wherein Company A entered a guilty plea for violating one count of 18 U.S.C. Sec. 1001 (false statements), a class C felony. For its guilty plea, Company A was fined in the amount of $400,000.00, assessed a statutory penalty of $200.00, and required to reimburse the Government for its cost of litigation in the amount of $1.1 million, and pay the sum of $6,500,000.00 to settle other civil actions. Applicant and the other named defendants in the indictment were allegedly dismissed with prejudice.

Additionally, Company A, Applicant and the other named defendants allegedly were suspended in December 1993 from

doing business on Government contracts with the AF, following their indictment the previous month. Allegedly, Applicant had his security clearance suspended in March 1994. Alleged is the failure of Company A and the other defendants (inclusive of Applicant) to obtain a lifting of the Government contracting suspension from the AF, and their ensuing failure to obtain a preliminary injunction from a local federal court overturning the AF's doing business on government contracts suspension, with the AF obtaining a summary judgment in its favor in March 1997.

Alleged indictment-related civil complaints brought against Applicant, Company A and other officers of the company include one filed in July 1995 by the Government claiming Company A submissions of false claims on Navy and AF contracts and ensuing damages attributable to these false claims, and two other civil suits pending against him and/or Company A that had not been been resolved.

Applicant, along with Company A and two other officers in the company's employ, were allegedly debarred by the AF in October 1998 from doing business on Government contracts for a period of five years: the period of debarment was retroactive (to December 1993) and thus expired in December 1998.

For his response to the SOR, Applicant admitted the alleged indictments of Company A and the named officers in 1993. He admitted the AF's suspension of Company A and the four named officers from doing business on Government contracts with the former, and to having his own security clearance suspended in arch 1994. He admitted a qui tam action (the G action) being filed against him and later dismissed with prejudice as to himself and the other defendants: exoneration he claims. He admitted, too, to being debarred by the AF in October 1998. And he admitted to two other actions being brought against Company A, himself and others (derivative litigations) by Company A shareholders but dismissed as to himself in May 1995 and to Company A and the other defendants in October 2000.

Applicant denied, however, engaging in conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, or unwillingness to comply with rules and regulations that could indicate that he could not properly safeguard classified information. He denied

any of the indictments or suits filed against him constituted evidence he could not be trusted to safeguard classified litigation.

In mitigation, Applicant claimed to have been an instrumental officer of Company A, who provided precision quartz and atomic timing systems for virtually all of the Country's satellites and space probes, in addition to producing technology for an essential part of DoD's communication and satellite systems and basically guiding the Nation's satellites across unchartered oceans of space and home again. He claims never to have been cited for not properly safeguarding classified information. He disclaims any wrongdoing or responsibility for the Global Settlement Stipulation and cites to provisions in the Global Settlement that confirm the absence of any finding of wrongdoing by Applicant and the other dismissed defendants: a principal inducement for his accepting Company A's claimed cost-benefit rationale for buying Company A's peace with a plea agreement with the Government.

**Relevant and material factual findings**

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

**Background of Applicant and Company A**

With considerable experience with public accounting firms and a major apparel company as a divisional comptroller, Applicant joined Company A as its secretary treasurer in 1979 (R.T., at 114-15). As secretary of the company, Applicant was responsible for attending board meetings, preparing the corporate minutes, and maintaining the corporate minute books. As treasurer, Applicant was responsible for all accounting functions of the company: payment of bills, collection of revenue, maintenance of financial records, and preparation of financial reports for filing with the SEC and the banks (*see* R.T., at 116). Applicant's sphere of responsibility did not include bids, work order preparations, labor time claims, or anything related to the administration of Company A's contracts and sub-contracts with the company's customers (R.T., at 121-24). Such contract-related functions were the responsibility of the company's program manager (R.T., at 123-24), and Applicant rarely got involved in this side of the company's divisional separation.

From 1988 through the present, Company A was principally devoted to the business of manufacturing certain electronic devices for end use by the US in its satellite and space exploration programs. Company A was known as the principal supplier of precision quartz and atomic timing systems for US satellites and Government space probes. Company A also produced key technology for many military missile communications and satellite systems, including missile system clocks, for DoD. During Applicant's tenure as Company A's secretary-treasurer, he was privy to his company's production of thousands of time and frequency control components and systems for use in missiles, satellites and deep space exploration, with many of the programs being classified. Applicant estimates that during the late eighties, almost 90 per cent of Company A's output was connected with Government end use products: its sub-contract work involved both classified and special access programs with some of the country's preeminent prime defense contractors (*see* exs. R, S and T; R.T., at 118-20). In recognition of Company A's significant military and space contributions, it has received over 50 awards and letters of recognition from its Government customers.

**DoD's investigation of Company A overcharges on Sub-contracts with Company B**

Following up on reports of Company A's overcharging of DoD on the former's numerous Government sub-contracts with Company B, three front-line investigative agencies (*viz.,* Air force Office of Special Investigations (AFOSI), the Naval Criminal Investigative Service (NCIS) and the FBI initiated a joint investigation in December 1989. Investigation disclosed that Company A had overcharged DoD on the subcontracts Company A had with Company B, in addition to tendering defective pricing to DoD on several advanced missile contracts and certain standards contracts (*see* ex. 3).

As a part of the joint investigation, search warrants were issued covering all aspects of the terminated subcontracts at issue. Contemporaneously with the issuance of these warrants, current and former interfacing employees of Company B and the other concerned prime contractors, in addition to sub-contract personnel of the other programs Company A was involved in, were interviewed by agents of the AF's inspector general.

A grand jury was impaneled in 1989 to investigate overcharges submitted by Company A and its officers (inclusive of Applicant) on its sub-contracts with Company B, as well as on its missile program and cesium standards contracts.

**Returned indictments, suspensions and suits against Company A and its officers**

As the result of the joint investigation, Company A and four of its principals were indicted on 18 counts, including major fraud claims. When the indictment was issued, Government also filed a civil complaint requesting damages based on the acts contained in the indictment. A superceding indictment was, in turn, filed in June 1994, which added a count to the original counts, which were incorporated anew.

The indictment and superceding indictment charged Company A, Applicant and other Company A officers, including its president and program manager, with one count of conspiracy to defraud the Government by obtaining the payment of false, fictitious and fraudulent claims, four counts of major fraud against the Government, and thirteen counts of false statements to the Government, in violation of 18 U.S.C. Sec. 1001.

Following the issued indictments against Company A and the other defendants, the AF suspended (in December 1993) Company A and the other indicted officers/employees (Applicant included) from doing business on Government contracts (*see* ex. 4). In March 1994, Applicant's DoD security clearance was also suspended by the AF. Several meetings and discussions ensued between the AF and Company A to see if an agreement could be reached to terminate the suspensions, but to no avail due to ongoing AF concerns (ex. 4). Company A went to court to seek a preliminary injunction and declaratory relief re: the AF's suspension of the indicted defendants from doing business with the AF. The district court, however, upheld the suspension, citing in a lengthy opinion the security needs of the AF in maintaining the suspension pending the outcome of the indictments (*see* ex. 3). The district court granted summary judgment in the AF's favor in March 1997.

**Civil suits initiated against Company A and its officers/employees**

While the criminal indictments were still pending, the Government filed (in July 1995) a civil complaint against Company A and other officers and employees of the company (Applicant included), claiming Company A, aided by the

other named defendants, submitted false claims on Navy and AF contracts covering a classified missile program over a five-year period spanning 1988 to 1993. According to the Government's complaint filed in November 1993, the defendants falsely stated production costs and submitted false claims and statements concerning Company A's estimated costs (primarily labor costs) related to the manufacture and sale of electronic components and devices utilized in space satellites. By submitting inflated estimated costs instead in connection with its terminated sub-contracts, the complaint claimed Company A, aided by the other named defendants, not only falsified its estimated project costs, but impaired any meaningful negotiations between the company, the prime contractor and the AF over the amount of cost reimbursement Company A was reasonably entitled to.

Other civil actions ensued against Company A, Applicant and other officers and employees of the company as an outgrowth of the criminal indictments. Two *qui tam* actions were filed against Company A and certain of the company's officers alleging fraud under the false claims act and related theories by civil complainants M and G. Only the G action named Applicant, however, as a defendant. Filed in October 1993, this action specifically claimed that the named defendants (Applicant included) created and utilized false cost data in order to justify Company A's cost estimates on bid packages submitted to contractors, which inflated the prices and fees Company A charged for replacing parts in identified classified space programs (*see* ex. S-2). This case was stayed by the federal district court presiding over the action in April 1997, pending resolution of the criminal matter affecting some of the named civil defendants (*see* ex. B).

Besides the G action, stockholders of Company A filed derivative actions against the company and its officers and directors (Applicant included) seeking money damages for misconduct arising out of the claimed actions in the criminal indictment of the same defendants in November 1993.

After receiving notice of the above civil complaints, Applicant and the other named defendants made claim for their defense and reimbursement if warranted under their D & O insurance policies (*see* exs. R-1 and S-1).

**The global settlement agreement**

In June 1998, Company A entered into a plea agreement with the Government: Under the plea agreement, Company A pleaded guilty to violating one count of 18 U.S.C. Sec. 1001 (a class C felony). Besides pleading guilty to a false claim count, Company A agreed to an order directing it to pay (a) a criminal fine in the amount of $400,000.00, plus a statutory assessment of $200.00, (b) payment of $1,100,000.00 in reimbursement of the cost of the Government's investigation, and ©) payment of separate sums of $5,000,000.00 and $1,500,000.00 to settle other civil actions: the Government's own civil fraud action and the certain qui tam action (the G action), in which the Government had intervened in, for a total of $6,500,000.00 in civil settlement payments.

The global settlement agreement also provided for dismissal of the indictments against the other named defendants (Applicant included), but only after the terms and conditions imposed on Company A had been satisfied. The global settlement made no effort to disturb the AF's suspension and debarment actions against Company A and the dismissed defendants. This being said, the settlement agreement contains no incriminating admissions or acknowledgments by any of the dismissed defendants, Applicant included. The agreement concludes by affirming that "nothing in this agreement nor any payment made pursuant hereto constitutes evidence of an admission of liability by any person or entity and shall not be construed to be an admission by any person or entity with respect to any issue of law or fact," save for what is covered with respect to Company A's guilty plea (*see* plea agreement in ex. 3).

Following execution of the global agreement, the Government stipulated it had no intentions of instituting any other actions civil fraud actions against Company A (*see* ex. C).

**Settlement of other civil complaints and reimbursement agreements**

After notifying the carriers of the pending criminal and civil claims against them, Applicant and his fellow directors and officers of Company A, along with Company A, provided their insurance companies copies of all of the relevant pleadings, documents and information relative to the pending litigation, along with their associated claims for reimbursement. The seeking indemnities (Applicant included) filed reimbursement claims against their carriers (X and Y, respectively). Amicable negotiations produced an overall settlement of filed claims against carrier X in November 1998, following the concluded global settlement with the Government and the other civil claims, that included full

policy limits reimbursement from one carrier in the amount of $4.5 million for the coverage provided for the years spanning 1989 and 1990, and 1990 and 1991, respectively (*see* exs. 3, M-1/M2, and R-2).

Negotiations with carrier Y over Company A's reimbursement claims were more protracted, though, and did not produce a settlement of the pending criminal and civil claims covering the two remaining years of coverage (spanning 1991 and 1993) until February 2001following initiated reimbursement suit against the carrier: this for $3 million for the covered 1991 to 1993 insured years (*see* exs. 3, M-1/M2 and S-2). Each settlement (*i.e.,* with both the X and Y carriers) was reciprocated by general releases and hold harmless commitments from each of the settling claimants (Applicant included) and dismissal of the suits against them.

**Post-settlement debarment of Company A and individual officers**

Because neither the global settlement agreement nor the district court's decision precluded the AF from initiating and maintaining debarment and suspensions (inclusive of security clearances) against Company A and its dismissed officers (inclusive of Applicant), the AF went forward with its debarment action, but limited its formal debarment to Company A only, while keeping its clearance suspensions in place for the duration of the debarment action.

In October 1998, the AF debarred Company A and its four dismissed officers (inclusive of Applicant) from doing business on Government contracts for a period of five years (*see* ex. K). The period of debarment credited the affected parties with the period of contract suspensions already completed. As a result, the debarment order expired on December 12, 1998, as to all of the covered parties.

**Evidence affecting Applicant's reliability and trustworthiness**

The language of the global settlement agreement itself contains no incriminating or exonerating language that can either detract or aid a trustworthiness showing. Expressly contained in the agreement is a provision that none of the conditions or payments agreed to may be considered as evidence of guilt as to any of the defendants. DoD was afforded access to the Justice Department's evidence under the terms and conditions of the plea agreement, and did make some use of the plea agreement in crafting its own internal investigation (*see* ex.3). Inspector general reports produced as a part of Government's exhibit 3 provide really nothing incriminating as to Applicant or any of the other defendants, for that matter. The inspector general's September 1998 report in fact goes so far as to confirm that "No management control deficiencies were identified during the course of this investigation" (ex. 3, at 79).

Afforded an opportunity in the global settlement agreement for allocution, Company A's successor CEO at the time (a retired military officer, Mr. C) described the history of the subcontracts at issue in the settled indictment claims. Under the terms of Company A's subcontract with Company B (the prime contractor), Company A was entitled to compensation for hours worked by Company A employees on a covered classified project, plus a percentage added to that amount representing overhead and general administrative costs. Mr. C went on to describe how Company A's program office submitted its reimbursement claims on a document referred to as "the form 1435" (ex. 3). Acknowledging that Company A knowingly and wilfully falsified the number of labor hours and costs it estimated in the Form 1435, Mr. C affirmed also that the Form 1435 misstatements were material, because they deprived the Government and Company B auditors from properly reviewing and negotiating Company A's reimbursement claim (*see* R.T., at 105).

At hearing, Mr. C elaborated on the inflated labor costs included in Company A's Form 1435 submission that was the subject of the indictments: Essentially, the classified contract specifically covered by the Form 1435 was one of many classified projects under sub-contract with Company B and the AF (*compare* exs. R, S and T). In the form submission, the Company's contract division pro rated a disproportionate number of hours from other contracts as a best estimate allocation on what was considered by Company A to be a fixed contract (*compare* ex. V with R.T., at 103-05), and to this extent inflated the actual number of hours devoted to the project covered by the Form 1435 under scrutiny. Because this mis-allocation hampered the auditing and negotiating abilities of the AF and Company A with respect to Company A's claims, it constituted a fraud on the Government (*see* R.T., at 103-05), to which the company pleaded guilty and stands by. Still, there is nothing in Mr.C's allocution that could be considered incriminating in any way to Applicant.

While insufficient to avert inferences of fraud attributable to its filing of false claims, a post-indictment independent

engineering audit performed by a credentialed outside program manager affiliated with a prominent defense contractor validated the Government received full value on the impacted contracts covered by the indictment (*see* exs. V and W).

Joined by Mr. W (a long time employee of Company A with knowledge of Applicant's business practices with the company), Mr.C strongly vouchsafes for Applicant's trustworthiness and reliability, while assuring that his company's internal investigation produced no evidence of any Applicant complicity or knowledge of the covered overcharge claims submitted by Company A (*compare* ex. P; R.T., at 95-96). Mr.C joined Company A in 1990 following a distinguished military career, and a brief period of business consulting overseas after his military retirement in 1987 (R.T., at 83-86). After becoming a member of Company A's board, he soon learned of the ongoing criminal investigation into Company A's claims submissions. Relying in part on his own military experience, he and others on the Board formed an oversight committee to look at the internal and outside audits.

Finding no obvious irregularities in the company's unqualified outside audits (*see* R.T., at 117-18), Mr. C and his board turned to undertaking a review of the Company's ethics training with a view to improving the way they present and document their programs with the AF (*see* R.T., at 92). With the formed investigative committee, the company also engaged a credentialed outside program specialist affiliated with a prominent defense contractor to undertake an independent engineering audit. The audit validated the company's claims the Government received full value on the sub-contracts covered by the indictment (*see* exs. V and W).

When the indictments were returned in November 1993 and Company A's chief executive officer and Applicant took leaves of absence from their executive duties with the company (documented by the minutes of the company's convened December 1993 special board meeting), Mr. C accepted Company A's chairmanship (*see* ex. T). And for the next several years, he devoted his energies to navigating the company's suspensions and debarments, while at the same tome steadying its commercial business side. By all accounts, his efforts have been successful in rehabilitating Company A (both with its Government contract business and its commercial efforts). He added that he has since returned Applicant to his former post as secretary of the company with direct reporting responsibilities to him (*see* R.T., at 94-95).

Under Mr. C's post-indictment stewardship, some structural changes were made in Company A's engineering division, but none in its financial division previously administered by Applicant (R.T., at 98-99). Basically, he (relying in part on the reported clean audits of his company's outside auditors who audited the years in issue) found no glitches or compiling and reporting deficiencies in the way the company's inside and outside financial data was assembled and reported out (both internally and externally) by the financial division headed by Applicant (*see* R.T., at 99-100).

Applicant's personal life has been marked by praiseworthy achievements that bear positively on his overall honesty and trustworthiness. He is credited with being a valued member of his temple for many years where he has been responsible for supervising all aspects of the temple's finances and other significant matters relating to the temple's business affairs. By all accounts, he has tended to his assigned responsibilities in a conscientious and reliable manner and draws rich praise for his volunteer efforts in behalf of his temple. Trustworthy endorsements of Applicant come from several end use Government customers.

**Company A's demonstrated rehabilitation**

Company A continued to receive waivers from the AF following its 1993 indictment to continue to produce critical components on classified projects in subcontractor roles with the DoD's certified general contractors (*see* ex. D). The company has continued to provide work for DoD and the Country's space programs on classified projects since its contract suspension was lifted in 1998 and by all accounts is well regarded in both its classified work with the Government and its non-classified commercial operations.

## POLICIES

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these

factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

**Personal Conduct**

Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

**Disqualifying Conditions:**

DC 1 Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.

DC 6 Associations with persons involved in criminal activity.

**Mitigating conditions:**

MC 1 The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

MC 7 Association with persons involved in criminal activities has ceased.

**Burden of Proof**

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of

an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## CONCLUSIONS

Applicant comes to these proceedings with a long and meritorious record of contribution to his defense contractor (a major contributor to the Nation's missile and satellite programs), but with alleged involvement with his defense contractor in overcharging the Government in a series of cost estimates submitted for reimbursement. While the extensive allegations contained in the SOR address Applicant' involvement in criminal indictment and civil fraud

claims, they are framed in personal conduct theory covered by Guideline E, and do not, as such, incorporate the criminal guidelines of Guideline J. The SOR in this case alleged no actual or constructive knowledge by Applicant of any of the underlying conduct subject to the various indicted offenses and related civil law suits and suspension actions, and no suggested application of criminal conduct to any of the covered actions. Government's allegations were not only pursued exclusively in personal conduct theory, but were reaffirmed by Department Counsel in closing summation.

Still, security concerns are raised about Applicant's association with his employer (Company A) who pleaded guilty to one count of filing a false statement in violation of 18 U.S.C. Sec. 1001, who was (along with Applicant) suspended from doing business on Government contracts for a five-year period spanning 1993 and 1998, and was formally debarred (Company A only) in addition to being named in several related suits.

Corporate liability for the criminal and civil actions of individual officers, employees and agents found to have been committed while exercising authorized powers in its behalf is entrenched in American jurisprudence and where applicable requires no proof that the officer, employee or agent was expressly authorized by the corporation to act. *Cf. New York C & H R.R. Co. v. United States,* 212 U.S. 481 (1908); *United States v. Richmond,* 700 F.2d 1183, 1195n.9 (8th Cir. 1983); *United States v. Cincinatti,* 689 F.2d 238, 241-42 (lst Cir. 1982); *United States v. Dye Const. Co.,* 510 F.2d 78, 82 (10th Cir. 1975). Conversely, criminal misconduct affixed to the corporation may be imputed to individual officers, employees and agents, provided they can be shown to have participated in, knew of , or had reason to know of the misconduct. *Cf. Harkin v. Brundage,* 276 U.S. 36, 52 (1928). These principles of corporate imputation provide the cornerstone of the AF's contract procurement and administration regulations (*see* FAR 9.407-5(a); FAR 9.406-5(a); FAR 9.407-2 ©).

For any attribution of involvement or material knowledge of corporate criminal wrongdoing to be made to a high ranking corporate officer, the evidence at the very minimum must be sufficient to attribute enough actual or constructive knowledge to the subject officer to justify his taking corrective steps himself, alerting others in his chain of command, or failing either, to promptly disassociate himself from the corporate organization. Neither strict liability nor rebuttable presumption finds any place in accepted principles of corporate responsibility and accountability: criminally or civilly.

That Applicant in the present case was neither convicted, debarred, nor found civilly liable or accountable for any wrongdoing arising out of Company A's pleaded wrongs covered by the global settlement is, for sure, not dispositive of his own claimed innocence. Nothing in either the global settlement agreement or any of the other underlying documentation prevented the AF or DoD from pursuing suspension against Applicant for any found individual wrongdoing arising out of his associations with Company A and the conduct ascribed to the latter. But this takes evidence of attributable wrongdoing, which neither the AF's inspector general nor the Government can document in this case.

The only probative facts relating to any Applicant involvement or culpable knowledge of the misconduct covered by the indictments, suits and AF suspension actions are limited to the AF's findings relative to its preliminary suspensions in December 1993. These preliminary findings are predicated on charges and allegations covered in the indictments and civil suits filed, which the AF reviewed, and not on the basis of any independent witness accounts or documents that can be culled and gleaned from the record. These preliminary findings were, in turn, superceded in part by the global settlement later consummated between the parties. True, the AF's entitlement to proceed with suspensions and debarment were not affected by the global settlement, but these actions were lifted in December 1998 (suspension only as to Applicant) free of any lingering issues, and with credit extended for the past time served under the suspensions.

Neither the AF's inspector general report nor the produced outside audits of Company A covering the five-year period spanning 1989-1994 make reference to any individual wrongdoing by either Company A or Applicant. Because, however, Company A did plead guilty to one felony count of 18 U.S.C. Sec. 1001 as the result of its submission of a Form 1435 to the Government and the prime contractor containing false statements relative to its estimated costs incurred on the covered classified project, Government may invoke two of the disqualifying conditions of the Adjudicative Guidelines for personal conduct: DC 1 (reliable unfavorable information) and DC 6 (association with persons involved with criminal activity).

Applicant has consistently denied any individual wrongdoing associated with his activities with Company A. He draws

considerable corroboration of his assurances, not only from the absence of probative evidence to the contrary, but by a rich confluence of corroborative evidence supporting his own assurances: influential vouchsafing of trust by not only Mr. C who supervised his own internal investigation after assuming the reins of Company A in the wake of the indictments, but by a Company A manager (Mr. W) who interfaced with Applicant at all relevant times; indemnity of settlement sums paid to the settling civil complainants by the D & O insurance carriers covering Company A and its directors and officers (unlikely were any knowing and wilful wrongdoing by the covered directors and officers found), the absence of any noted individual wrongdoing by Applicant or any of his fellow officers in the produced outside audits covering the five-year period spanning 1989-1994, the AF's finding of no management deficiencies in its inspector general's report, and the Government's resumed contracting with Company A following the AF's lifting of its suspension bar against the contractor in 1998.

Company A, moreover, has been credibly shown to have rehabilitated itself with the aid of ethics training oversight and engineering restructuring, regained its role as a contractor doing business with the Government, and experienced no repeat of conduct that could be characterized as either of a criminal or unethical nature. Applicant not only refutes any Government concerns of his being involved in any culpable conduct in connection with his Company A duties, but he has manifestly avoided any tangible misconduct of any kind. As a rehabilitated corporate entity, Company A can no longer be considered as a person associated with criminal activity, and Applicant may rightfully take full advantage of two of the mitigating conditions of the Adjudicative Guidelines for personal conduct (MC): MC 1 (information not substantiated or pertinent to trustworthiness assessment) and MC 7 (association with persons involved in criminal activity has ceased).

Considering the record as a whole, Applicant carries his evidentiary burden in establishing his security eligibility. He not only refutes the Government's security-related concerns of his involvement or material knowledge of any criminal conduct involving Company A that could raise judgment and trust questions about himself, but he mitigates security concerns associated with his employment as a high level officer with Company A during the period of Company A's admitted false statements. Favorable conclusions warrant, accordingly, with respect to sub-paragraphs 1.a through 1.e of Guideline E.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

## FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

## DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge