



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-04167
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Candace Le'i Garcia, Esq., Department Counsel  
For Applicant: Bradley P. Moss, Esq.

11/05/2013

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**Decision**

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NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the personal conduct concerns raised by the findings of a 2006 Army Criminal Investigation Command (CID) investigation. Clearance is denied.

**Statement of the Case**

On April 5, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the personal conduct guideline.<sup>1</sup> DOD adjudicators were unable to find that it is clearly consistent with the national interest to

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<sup>1</sup> This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

grant or continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on July 25, 2013. At the hearing, convened on August 22, 2013, I admitted Government's Exhibits (GE) 1 through 6. I admitted GE 5, over Applicant's objections.<sup>2</sup> Applicant offered exhibits (AE) A through E, which were admitted without objection. He also testified and presented the testimony of two witnesses. After the hearing, Applicant timely submitted<sup>3</sup> AE F through H, which were admitted without objection. I received the transcript (Tr.) on August 30, 2013.

### **Request for Administrative Notice**

Applicant requested that I take administrative notice of three federal statutes underlying the CID investigation: 18 U.S.C. § 371, Conspiracy to Defraud the United States; 18 U.S.C. § 641, Embezzlement of Government Property; and 18 U.S.C. § 208, Acts Affecting Personal Interests. Without objection from Department Counsel, I approved the request. The request and the attached documents are included in the record as Hearing Exhibits (HE) B through D.<sup>4</sup>

### **Findings of Fact**

Applicant, 56, is an employee of a federal contractor. He retired from the U.S. Army after 34 years of service as a chief warrant officer 4 (CW4). He held a security clearance from 1975 to August 2006. His professional expertise is in logistics. He is a graduate of the Defense Acquisition University's contract management course, the Federal Acquisition Institute Mentoring Program, and the Army's Senior Staff Course. Between February 2005 and August 2006, Applicant was a civilian employee of the Army, working as senior contracting officer at an overseas military base, with direct oversight and guidance of contractors providing lifecycle support services to the U.S. military. He also served on the Award Fee Board of a federal contractor, although he was not a voting member.<sup>5</sup>

In May 2006, based on a complaint from an unknown source,<sup>6</sup> CID began investigating Applicant and his wife for conspiracy, conflict of interest, and wrongful appropriation of U.S. Government property. The investigation was initially focused on

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<sup>2</sup> Applicant objected to GE 5, a redacted version of the CID investigation, citing the incompleteness of the document, which is missing a number of the attachments identified in the report.

<sup>3</sup> The record closed on September 6, 2013. (Tr. 252)

<sup>4</sup> HE A is an index of Applicant's exhibits.

<sup>5</sup> Tr. 88-91, 177-179; GE 1, GE 5.

<sup>6</sup> The identity of the complaining witness is redacted. (GE 5)

Applicant's relationship with the nail salon that operated on base, which was also the subject of a March 2006 Army Regulation (AR-15) investigation.<sup>7</sup> Applicant admitted that he and his wife, as a favor to the owners of the salon, purchased and received \$3,000 of supplies through the military mail system. The investigation also revealed that Applicant inserted himself, possibly at the request of the nail salon owners, into the interactions between the salon owners and the Army and Air Force Exchange Service (AAFES) manager. Ultimately, the investigation did not establish that Applicant had an ownership interest in the business. No further action was taken regarding Applicant's relationship with the nail salon or his use of the military mail system.<sup>8</sup>

However, the investigation did discover an outside business owned by Applicant and his wife. Applicant started the company in 1988, while he was stationed in Germany. The company, which cleaned vehicles and found used cars for people, operated until 1999, when Applicant was transferred to another duty station. The company lay dormant until January 2006, when he revived it as a logistics support business. Applicant re-launched the company by building and publishing a website. (Applicant claims that the website was not publicly available, but the CID investigators reviewed the website days before Applicant's initial interview.) He registered the company with the Central Contractor Registration System and the Dun & Bradstreet (D&B) federal contractor database. He created a profile for the company in each database and received a company-specific identification number from each. A Financial Crimes Enforcement Network (FINCEN) profile of the company, which pulled information from the D&B database, indicated that it held one million dollars in assets, and employed 17 people. Applicant and his wife prepared a proposal for a range support contract as well as job announcements for positions necessary to support the contract. Applicant explained to the CID investigators that he relied on his years of experience as a logistics specialist and publicly available information to complete the proposal. He also told the investigators that he had no plans to submit the proposal for consideration until he had an opportunity to have his lawyers review the document for possible conflicts of interest. At hearing, Applicant claimed that he was planning to submit the proposal to the staff judge advocate on base for a conflict of interest review.<sup>9</sup>

At the conclusion of the investigation, CID found probable cause to believe that Applicant and his wife's actions constituted wrongful appropriation of government property and conspiracy. Working together, the couple used a government-issued computer in government-assigned quarters to develop a website and a proposal for their private business. Applicant also used, albeit temporarily, a U.S. military phone number as the contact number on the company's website. CID further established probable cause to believe that Applicant and his wife's activities constituted a criminal conflict of interest when they authored a proposal for a contract that involved an area in which Applicant, as a senior contracting officer, exercised significant control. The investigation determined that the proposal contained information Applicant's wife gained

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<sup>7</sup> The AR-15 investigation is not alleged in the SOR.

<sup>8</sup> GE 5.

<sup>9</sup> Tr. 100-117; GE 5.

as a former employee on the incumbent support contract. CID recommended the case for prosecution, but the Department of Justice declined citing jurisdiction and venue issues.<sup>10</sup>

Applicant denies any criminal wrongdoing. At the time, he claims he was not aware that using his Army-issued computer for writing the proposal was not permitted. He believed, based on his experience and education, that his private business did not create a conflict of interest because the proposal offered services different from those provided by the incumbent range support contract. He also denied the range support contract fell within his sphere of influence. Applicant denies that the company was actually a going concern because, contrary to the FINCEN report, it did not have assets, employees, or contracts at the time of the CID investigation.<sup>11</sup>

Applicant believes the CID investigation was initiated by his former supervisor in retaliation against Applicant for personal issues between them. In August 2006, Applicant's command suspended his local access to classified information pending the resolution of the investigation. Applicant elected to take paid leave and returned to the United States. In October 2006, Applicant's command placed him in a leave-without-pay status. Upset with how the command handled the investigation, Applicant tendered his resignation in November 2006. He began a new job in the United States working for a private company the same month. In February 2007, Applicant's command decided to suspend him for five months. The suspension was applied retroactively. The command processed Applicant's resignation after the suspension was completed.<sup>12</sup>

In the seven years since the CID investigation, Applicant has continued to work as a contractor supporting lifecycle support and sustainment contracts at forward operating bases in Afghanistan. His coworkers, military members, civilian employees, and contractors alike, laud Applicant's work ethic and good character. In 2008, Applicant launched another logistics company, specifically dealing with transportation operations for private companies.<sup>13</sup>

## **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 AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an Applicant's eligibility for access to classified information.

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<sup>10</sup> Tr. 101-108; GE 5.

<sup>11</sup> Tr. 101-102, 110-111.

<sup>12</sup> Tr. 96-97, 108-109, 130-131, 141-155, 194-202, 203-208, 217-219; GE 1, GE 4; AE H.

<sup>13</sup> Tr. 19-41, 55-73, 190; AE A-G

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.” Under 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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**

The SOR alleges that Applicant received a five-month suspension while he was civilian employee of the Army. Not only did this ‘administrative punishment’ have no effect (it was imposed five months after Applicant tendered his resignation and moved on to other employment), it is not disqualifying under the Directive. However, the underlying conduct — Applicant and his wife conspiring to use government-issued property entrusted to Applicant, and information available to Applicant in the performance of his official duties for their personal gain — is potentially disqualifying and merits scrutiny. Although obtusely drafted, the SOR gave Applicant adequate notice of the reasons the government proposed for revoking his access to classified information and afforded him a reasonable opportunity to respond to the allegations and present a defense to the case against him as required under the Directive.<sup>14</sup>

### **Personal Conduct**

An applicant’s personal conduct becomes a security concern when he acts in a way that raises questions about his judgment or his ability to protect classified information.<sup>15</sup> The conduct identified in the CID investigative report is sufficient to establish the Government’s *prima facie* case against Applicant. The CID report contains

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<sup>14</sup> See Executive Order 10865, Section 3; Directive, Section 4.3.

<sup>15</sup> AG ¶ 15.

credible adverse information that is not sufficient for an adverse determination under a single guideline (criminal conduct).<sup>16</sup> It also contains credible adverse information that is not specifically covered by another guideline (wrongful appropriation of government property, conspiracy, and conflict of interest) that when considered as a whole supports an unfavorable whole-person assessment, raising concerns about Applicant's ability to properly safeguard classified information.<sup>17</sup> Applicant showed a willingness to place his pecuniary interests before his obligations as a civilian employee to avoid outside activities that may create a financial conflict of interest.

Applicant failed to meet his burden to mitigate identified concerns. While Applicant's supervisor's ill-will toward Applicant may have been the impetus for the CID investigation, it does not extenuate Applicant's misconduct or his financial motives. Also, given Applicant's 31-year career as a DOD employee (28 as a military member and 3 as a civilian employee in management positions) he knew or should have known of the constraints on his outside activities or use of government resources. Ultimately, Applicant failed to refute the CID findings that his private business fell within in his sphere of influence and created a conflict of interest. Accordingly, none of the personal conduct mitigating conditions apply. Applicant's actions are not minor. There is no such thing as an insignificant conflict of interest.<sup>18</sup> He misused his government resources and information he obtained in the performance of his duties to his benefit. Given his inability to identify and take responsibility for his misconduct, I find there is a risk he will engage in similar conduct in the future as he continues to engage in business opportunities outside of his employment as a federal contractor. Because this concern lingers, Applicant's conduct has not been mitigated by the passage of time.

Despite the favorable character information in the record, I have significant reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. The purpose of the security clearance adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk."<sup>19</sup> Applicant violated the ethical code of conduct that applies to all DOD personnel. His conduct, in turn, raises concerns about his ability to protect classified information that must be resolved in favor of the Government.

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<sup>16</sup> AG ¶ 16(c).

<sup>17</sup> AG ¶ 16(d).

<sup>18</sup> See HE D.

<sup>19</sup> AG ¶ 2(a).

