



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



In the matter of:

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ISCR Case No. 15-01099

Applicant for Security Clearance

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: *Pro se*

09/21/2016

**DECISION**

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the Guideline J (criminal conduct) and Guideline F (financial considerations) security concerns arising from his 2009 federal court felony conviction. Clearance is denied.

**History of the Case**

Applicant submitted a security clearance application (SCA) on September 26, 2013. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant a clearance. On August 28, 2015, the DOD Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (financial considerations) and Guideline J (criminal conduct).<sup>1</sup> Applicant answered the SOR on September 10, 2015, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on April 28, 2016. The DOHA issued a notice of hearing on April 19, 2016, scheduling the hearing for April 29, 2016. Applicant's hearing

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<sup>1</sup> DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

was held as scheduled. During the hearing, Department Counsel offered five exhibits (GE 1-5); and Applicant offered 10 exhibits (AE 1-10). AE 9 and 10 were received post-hearing. All exhibits were admitted into evidence without objection. DOHA received a copy of the transcript of the hearing on May 9, 2016.

### **Procedural Issue**

Applicant affirmatively waived his right to 15 days advance notice of the date, time, and place of his hearing. He had sufficient time to prepare and was ready to proceed at the time his hearing was held. (Tr. 16)

### **Findings of Fact**

In Applicant's SOR response, he admitted that he was convicted in federal court of conspiracy to commit wire fraud in 2009 (SOR ¶ 1.a), and that he is indebted to the federal Government because of a 2009 restitution order for \$1,207,527 (SOR ¶ 2.a). Applicant's SOR and hearing admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 57-year-old technical writer employed with a defense contractor. He married in 1986, and as of his hearing date he was separated from his wife, but seeking reconciliation. He and his wife have four adult children. Applicant graduated from high school in 1977, and completed a bachelor's degree in aero-mechanical engineering. Applicant enlisted in the U.S. Navy in 1977. He honorably served four years on active duty and almost four additional years in the Navy Reserve. He was honorably discharged with the rank of E-5 (second class petty officer). He believed he had access to confidential information during his service.

Applicant's employment record shows that he worked for a federal contractor from December 1984 to March 2010. He was granted a secret clearance in 1985. His clearance was terminated when he resigned after his 2009 conviction. He was unemployed from December 2012 to March 2013. He was hired by his current employer, a federal contractor, in March 2013.

Applicant explained that between 2003-2009, he was employed by a defense contractor, and at the same time he had a personal business providing Internet services through kiosks. Applicant also worked as a phone reference for the company that sold the Internet kiosks and received \$20 per phone call he answered from prospective investors. During the period in question he was paid over \$50,000. The Internet kiosks company and Applicant were the subjects of a wire fraud federal investigation. In November 2009, he was convicted of conspiracy to commit wire fraud. He was sentenced to 42 months' imprisonment, of which he served 32 months, until about December 2012. After his release, he was placed on supervised probation, which ended in April 2016. (Tr. 66-67) Additionally, he was ordered to pay restitution of \$1,207,527, at a rate of 10 percent of his monthly earnings. He is joint and severally liable with other co-accused for the \$1.2 million judgment.

In 2009, Applicant disclosed to his then facility security officer (FSO) that he was under criminal investigation. (AE 5) At the time, his clearance was under periodic review for renewal. Notwithstanding the investigation, his clearance was continued because of his performance, reputation, and disclosure of the investigation to his company FSO. Applicant disclosed his conviction and sentence in his 2013 SCA (Section 22 – Police Record), as well as in response to financial questions in Section 26 (Financial Record). Applicant has been making monthly payments on his criminal monetary penalties from 2010 to present. He testified he has missed no payments. (AE 1, 9, and 10; Tr. 43) He intends to continue making the payments, but plans to appeal the criminal monetary penalties to have them readjusted, modified, or set aside. (Tr. 42)

Applicant was considered by the federal prosecutor to be “a victim turned co-conspirator” who “played a role that most accurately considers him a minor participant in criminal activity.” (AE 8) Applicant pleaded guilty to the offense and accepted personal responsibility for his criminal conduct in court and at his hearing.

While in jail, Applicant took correspondence courses, trained aid-dogs for the handicapped, taught American history to help other inmates get their GEDs, worked as an air conditioner technician in the detention facility, and made wood toys for children. Applicant is required to pay 10 percent of his gross income toward his restitution debt. Based on the evidence, Applicant is paying his judgment and maintaining his financial responsibility.

Applicant presented the testimony of two witnesses, a performance appraisal, and three reference letters. The first witness retired from the Reserve after close to 30 years of combined active duty and reserve service. He supervised Applicant for about 12 years, and was his supervisor when Applicant was under criminal investigation and indicted in 2009. He commended Applicant for immediately disclosing to his FSO that he was under investigation, charged, and convicted. Applicant continued to work during his criminal investigation and his clearance was continued because of his knowledge, performance, and trustworthiness. Applicant is considered to be an honest, trustworthy, responsible professional, and valuable employee. Applicant’s reference indicated that his company would like to hire Applicant again, but Applicant needs a clearance to be hired.

Applicant’s second witness is a retired Navy command master chief. He is the owner of the company where Applicant currently works. He was aware of Applicant’s conviction when he interviewed him for his current job. He believed Applicant deserved a second chance. He considers Applicant to be a top-notch performer, dependable, reliable, and loyal. Applicant received accolades from his customers, works well with others, and is always willing to help. The Chief Executive Officer of Applicant’s company has known Applicant since March 2014. She believes Applicant is a dedicated employee who has demonstrated judgment and high morals. All references endorsed Applicant’s eligibility for a clearance.

Applicant expressed sincere remorse and embarrassment for his actions. He would like to continue making contributions to our nation by working for defense contractors. Throughout the years, he worked in many high-technology programs testing

and evaluating the survivability of many military aircraft. He would like to continue using his expertise to save the lives of our military personnel.

## **Policies**

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

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

Under Guideline J, the concern is that 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 ¶ 30.

In August 2009, Applicant was convicted in federal court of conspiracy to commit wire fraud, a felony. He was sentenced to 42 months' imprisonment, out of which he served about 32 months. He then was placed on supervised probation until April 2016. He also was ordered to pay criminal monetary penalties (joint and several with other co-accused) totaling \$1.2 million. His criminal behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶ 32 lists two conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) and (d) apply in part, but do not fully mitigate the criminal conduct security concerns. Applicant's criminal behavior occurred between 2003 and 2009, and he was convicted of a felony offense by a federal court in 2009. Applicant was sentenced to 42 months' confinement (served 32 months) and was released around December 2012. He then was placed in supervised probation until April 2016.

Applicant presented some evidence showing that he is on the right track to establish his successful rehabilitation. He cooperated with the federal prosecutor and pleaded guilty of the offense. He appears to be sincerely remorseful and embarrassed for his past criminal behavior. There is no evidence of any further criminal misconduct, and he is making restitution as ordered by the federal court. Additionally, Applicant's witnesses and character evidence show he has an excellent employment record and is considered to be dependable, reliable, trustworthy, and to display good judgment.

Notwithstanding, I find that Applicant's criminal behavior occurred under normal circumstances. Considering the period of the criminal enterprise, the number of victims, Applicant's earnings resulting from his criminal behavior, the length of his sentence (including his probation period), his requirement to make restitution, and his recent release from probation, I find the passage of time so far is insufficient for Applicant to establish his successful rehabilitation. Additional time without recurrence of criminal activity and his completion of the restitution is necessary for Applicant to establish his successful rehabilitation and his reliability, trustworthiness, and judgment.

## Financial Considerations

Under Guideline F, the security concern is that failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. (AG ¶ 18)

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

Applicant's financial concerns are partially based on the \$1.2 million criminal monetary penalty imposed on him and his co-conspirators (joint and several liability) as a result of his federal conviction. Moreover, there are the concerns that he engaged in deceptive or illegal financial practices, a financial breach of trust, and criminal conduct to raise money. AG ¶ 19 provide disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" (d) "deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional breaches of trust;" and (f) "financial problems that are linked to drug abuse, alcoholism, gambling problems, and other issues of security concern."

Applicant has been fulfilling his financial obligation as required by the federal court. There is no evidence of him having a history of not meeting his financial obligations or having financial problems. Applicant has been paying restitution at the rate of 10% of his monthly gross earnings as required. The disqualifying condition under AG ¶ 19(a) was not established by the evidence and it is not applicable. However, the disqualifying conditions under AG ¶¶ 19(d) and 19(f) are fully established by the evidence and are applicable to Applicant.

I carefully considered the mitigating conditions outlined under AG ¶ 20(a)-(f). For the same reasons discussed under Guideline J above, incorporated herein, I find that Applicant's evidence is insufficient to mitigate the disqualifying conditions in AG ¶¶ 19(d) and 19(f). The passage of time so far is insufficient for Applicant to establish his self-control, good judgment, and his willingness to abide by rules and regulations. Additional time without recurrence of criminal activity and his completion of the restitution is necessary for Applicant to establish his reliability, trustworthiness, and ability to protect classified information.

## **Whole-Person Concept**

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

Applicant is a 57-year-old employee of a federal contractor. He honorably served in the Navy between 1977 and 1985 (four years on active duty). He worked for a federal contractor from December 1984 to March 2010, and held a secret clearance during most of that period. In 1999, Applicant disclosed to his then FSO that he was under criminal investigation and then his conviction. He also disclosed his conviction and sentence in his 2013 SCA. Applicant has been making monthly payments on his criminal monetary penalties from 2010 to present. He was hired by his current employer, a federal contractor, in March 2013.

Applicant was considered by the federal prosecutor “a victim turned co-conspirator” who “played a role that most accurately considers him a minor participant in criminal activity.” (AE 8) Applicant pleaded guilty to the offense, accepted personal responsibility for his criminal conduct in court and at his hearing. While in jail, Applicant took correspondence courses, trained aid-dogs for the handicapped, taught American history to help other inmates get their GEDs, worked as an air conditioner technician in the detention facility, and made wood toys for children.

Applicant references consider him to be technically knowledgeable, reliable, trustworthy, and a valuable employee. Applicant was lauded for his honesty, dependability, and professional behavior. All references endorsed Applicant’s eligibility for a clearance. Applicant expressed sincere remorse and embarrassment for his actions.

It is well settled that once a concern arises regarding an Applicant’s eligibility for a security clearance, there is a strong presumption against the grant or renewal of a security clearance. Unmitigated security concerns lead me to conclude that grant or reinstatement of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a security clearance in the future. With more time and continued good behavior, he may well be able to demonstrate persuasive evidence of his worthiness for access to classified information.

For the above stated reasons, I find that the financial considerations and criminal conduct security concerns are not mitigated.

## **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline F:	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 national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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JUAN J. RIVERA  
Administrative Judge