



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-08527

Appearances

For Government: Charles Hale, Esq., Department Counsel
For Applicant: Mathew R. Keller, Esq.

08/25/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant is a felon who took advantage of his position of trust to commit a crime against the Government. Considering the evidence as a whole, I find that Applicant's criminal behavior continues to cast serious doubt on his reliability, trustworthiness, and good judgment. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 20, 2015. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on March 21, 2016, issued him a Statement of Reasons (SOR) alleging security concerns under Guidelines J (criminal conduct) and E (personal conduct). Applicant answered the SOR on April 15, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA issued a notice of hearing on November 15, 2016, scheduling a hearing for January 11, 2017. DOHA initially assigned the case to another administrative judge and reassigned it to me on January 9, 2017. At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant testified, presented the testimony of one witness,

and submitted exhibits (AE) 1 through 11. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 19, 2017.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶ 1.a. He admitted in part, and denied in part, the allegations in SOR ¶ 2.a., and he denied the allegations in SOR ¶ 2.b. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 71-year-old owner of a company (working as key management personnel for his company) that handles or seeks federal contracts. He distinguished himself academically in high school, was involved in his community, and became an Eagle Scout. He received his bachelor's degree in 1967 and completed his master's degree in 1968, both from a prestigious U.S. institution. While at the institution, he received two academic scholarship awards and a leadership award. After five years working for a private company, Applicant received national recognition with two awards for innovative product development. He has been married and divorced twice, his last divorce was in 1999. He has three grown children, ages 37, 34, and 30.

Around 1973, Applicant became the vice-president of an engineering company where he spent close to 30 years and received an award for environmental innovation. Applicant possessed a secret clearance for about 26 years until it was revoked in 2009 because of the offenses alleged in the SOR.

Applicant acknowledged that he is a convicted felon. The criminal conduct alleged in the SOR occurred between June 2001 and December 2002, while he was president, chairman, and chief executive officer of his company. Applicant pled guilty to one count of participating in a conspiracy to suppress and eliminate competition by allocating customers, rigging bids, and fixing prices that resulted in government contracts being awarded at inflated prices. He orchestrated and supervised the criminal conspiracy. Because of his criminal conspiracy, his company increased its profits and he was able to sell about 75% of his company for about \$13.5 million. Apparently, his criminal misconduct ended in December 2002, when he sold a portion of his company.

In May 2005, an individual brought a civil lawsuit against Applicant, his company, and approximately 60 other defendants. It alleged the conspiracy described above. Applicant was added as a defendant in the lawsuit in June 2006. Because the lawsuit was filed under seal, Applicant was not notified of the existence of the civil lawsuit or of the ensuing criminal charges against him until May 2009. At the time Applicant submitted his 2007 SCA, he was not aware of either the lawsuit or the criminal charges against him. (Answer to the SOR, Exhibits A-D; Tr. 14-15)

In June 2009, Applicant pled guilty to one count of violation of the Sherman Act (conspiracy to suppress or eliminate competition, a felony), and cooperated with the

government. He was sentenced to 18 months of imprisonment at age 64, with one year of supervised release, and was fined \$100,000. He served his prison sentence from November 2009 to January 2011. He settled the civil lawsuit and paid a settlement of \$1,000,000.

Applicant claimed he took criminal responsibility for his company and the persons he supervised who engaged in the criminal conspiracy because he was the owner of the company and the individuals worked directly for him. (Tr. 43) Applicant minimized his involvement in the conspiracy by claiming he merely oversaw the operations of two of the companies involved in the crime, that he just failed to supervise his subordinates, and that he did not have direct involvement in the conspiracy. The federal criminal court documents in evidence prove otherwise. (GE 2-5) The federal government debarred Applicant for a period of three years.

Applicant strongly believes that he is fully rehabilitated. He noted his criminal behavior ended in 2002, about 15 years ago. He claimed that since 2002 he has been a law-abiding citizen. There is no evidence he has committed any other misconduct or criminal offenses since 2002. He cooperated with the government during his criminal prosecution, and paid some restitution in both the criminal and civil cases. He believes that his past criminal behavior does not cast doubt on his current reliability, trustworthiness, and judgment.

Applicant testified it is unlikely he would be involved in bid rigging or price fixing in the future because his company is a sole source supplier to the government. There are no competitors and prices are negotiated. He also stated that going to prison made him not want to do anything illegal again. He does volunteer work for a national park and is involved in his community.

Applicant's company continued to do business with the federal government while he was in prison and during the period of his debarment. He wants a clearance to continue working in his company. He believes he has a lot to give to his business with his 40 years of work and technical expertise.

Applicant's references included the executive director of a large charitable foundation, the director of a large national contractor, the chief executive officer of a well-known publishing company, an established business owner, the chairman of a health services company, and others who have known Applicant for many years. Some of his references have known Applicant for over 20 years. Some references recommend him for a security clearance.¹

Applicant was described as invariably honest, completely trustworthy, and as a man of principle and of high integrity. His references and friends assess him as loyal, conscientious, and responsible. He has an excellent reputation as an extremely hard-

¹ Answer to the SOR; Tr. 70-78; and AE 3.

working and accomplished businessman and a dedicated father. Applicant's references consider him a successful entrepreneur and business leader with unique skills. I note; however, that some of his references are not fully aware of the criminal conduct for which he was convicted. They are under the misconception that Applicant was not involved in criminal behavior, or believe that the criminal behavior was not due to Applicant's fault.

Policies

The SOR was issued under Executive Order (Exec. Or.) 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.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective 8 June 2017. I decided this case under the AGs implemented by SEAD 4.

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, § 2. 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 SEAD 4, App. A ¶¶ 2(d) and 2(f). 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; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 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.

Between June 2001 and December 2002, Applicant was president, chairman, and chief executive officer of his own company. He orchestrated, managed, and supervised a criminal conspiracy to suppress and eliminate competition by allocating customers, rigging bids, and fixing prices for government contracts. Because of this criminal conspiracy, his company increased its profits and he was able to sell 75% of his company for about \$13.5 million. He owned 56% of the company.

In June 2009, Applicant was found guilty of one count of violation of the Sherman Act (conspiracy to suppress or eliminate competition, a felony). He cooperated with the prosecution and was sentenced to 18 months of imprisonment at age 64, with one year of supervised release, and was fined \$100,000. He served his prison sentence from November 2009 to January 2011.

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

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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) and (d) apply in part, but do not fully mitigate the criminal conduct security concerns. Applicant's criminal behavior occurred between 2001 and 2002, about 15 years ago, and he was convicted of a felony offense by a federal court in 2009. Applicant served his sentence to 18 months of imprisonment with one year of supervised release, and paid his \$100,000 fine.

Applicant presented some evidence showing that he is on the right track to establish his successful rehabilitation. He pleaded guilty (the first step towards rehabilitation) and cooperated with the federal prosecutor. There is no evidence of any further criminal misconduct after 2002. Additionally, Applicant paid a \$1 million settlement in a civil lawsuit based on the same criminal misconduct. He noted that he has been involved in constructive community involvement, and volunteers at a national park. Applicant's references consider him to be dependable, reliable, trustworthy, honest, and to display good judgment. Some endorse his eligibility for a clearance.

Notwithstanding, the factors in support of the denial of Applicant's clearance are more substantial. Applicant had distinguished himself through his education, scientific accomplishments, awards received, his success as an entrepreneur and businessman, and his membership and leadership in prestigious business organizations. By all accounts, he was a pillar of the business community at the national level. He was 56-57 years old when he engaged in the criminal conspiracy. Considering his age, education, experience, knowledge, and his reputation, he knew better and was fully aware of the criminality of his actions.

Applicant held a clearance for approximately 26 years before he engaged in his criminal conspiracy. The government granted Applicant his clearance and with it placed a special trust and confidence on Applicant. It relied on Applicant and expected him to demonstrate his trustworthiness, character, honesty, and good judgment - to exercise the responsibility necessary to protect that trust. Applicant's criminal behavior destroyed that trust. Applicant took advantage of his position to break the law because of his greed and avarice. His criminal behavior showed unreliability, untrustworthiness, and lack of judgment.

Considering the extent and breath of the criminal conspiracy, that the government was the primary victim, and Applicant's earnings resulting from his criminal behavior, I find that the passage of time so far is insufficient for Applicant to establish his successful rehabilitation. I specifically considered that it has been 15 years since Applicant's criminal misconduct and that there is no evidence of any additional criminal activity.

Notwithstanding, at hearing Applicant minimized the extent of his criminal conduct and blamed subordinates. He portrayed himself as sacrificing himself by taking the criminal blame because his company could not go to jail, and because he failed to perform his duty to supervise his employees. Considering the information contained in the extracts of his criminal proceedings, Applicant's efforts to minimize his involvement in the criminal conspiracy he orchestrated are not credible. Moreover, his lack of credibility and his unwillingness to accept responsibility for his past criminal misconduct continue to raise serious questions and doubts about his rehabilitation. Applicant's evidence is insufficient to establish his successful rehabilitation, and more importantly, his reliability, trustworthiness, and judgment.

Guideline E, Personal Conduct

AG ¶ 15 articulates the security concern for personal conduct:

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. . . .

The Guideline E allegation is based substantially on the same facts and criminal misconduct discussed under Guideline J. For the sake of brevity, those facts and the pertinent discussions under Guideline J are incorporated herein. In substance, Applicant engaged in a conspiracy to suppress or eliminate competition by allocating customers, rigging contract bids, and price fixing that resulted in government contracts being awarded at inflated prices.

In May 2005, an individual brought a civil lawsuit against Applicant, his company, and approximately 60 other defendants. Applicant was added as a defendant in the lawsuit in June 2006. Because the lawsuit was filed under seal, Applicant was not notified of the existence of the civil lawsuit or of the criminal charges against him until May 2009. At the time Applicant submitted his 2007 SCA, he was not aware of either the lawsuit or the criminal charges against him. He settled the civil lawsuit and paid a settlement of \$1,000,000.

Applicant's criminal misconduct triggered the applicability the following disqualifying condition under AG ¶ 16:

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

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶ 17 lists three conditions that could potentially mitigate the personal conduct security concerns:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

For the same reasons discussed under Guideline J, I find that none of the personal conduct mitigating conditions are fully raised by the facts in this case. Applicant orchestrated, managed, and supervised a criminal conspiracy to suppress and eliminate competition by allocating customers, rigging bids, and fixing prices for government contracts. He committed a felony by taking advantage of his position, knowledge, and experience. Considering the evidence as a whole, I find that Applicant's personal conduct continues to cast serious doubt on his reliability, trustworthiness, and good judgement. His evidence is insufficient to mitigate the Guideline E security concerns.

The Government failed to establish SOR ¶ 2.b, that allegation is decided for Applicant.

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. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 71-year-old successful entrepreneur, accomplished businessman, and a leader with unique skills. His references consider him to be honest, trustworthy, and a man of principle and of high integrity. Some of his references endorsed his eligibility for a security clearance without reservations.

Notwithstanding, Applicant is a felon who took advantage of his position of trust to commit a crime against the government. Applicant's efforts to minimize his involvement in the criminal conspiracy he orchestrated are not credible. This lack of

credibility and his unwillingness to accept responsibility for his past criminal misconduct continue to raise serious questions and doubts about his rehabilitation. Considering the evidence as a whole, I find that Applicant's past criminal behavior continues to cast serious doubt on his current reliability, trustworthiness, and good judgment.

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 E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge