



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



In the matter of:)
)
-----) ISCR Case No. 14-03248
)
Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: Sean M. Bigley and Jacob Ranish, Esq.

02/20/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges Applicant pleaded guilty to conspiracy to steal government property and structuring money transactions. He was sentenced to 21 months imprisonment and restitution of more than \$140,000. He has been making payments to address the restitution. Applicant disclosed sufficient facts on his March 15, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) about his background for the Government to assess his worthiness to be entrusted with access to classified information. Financial considerations and personal conduct concerns are mitigated; however, criminal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 15, 2013, Applicant signed an SF 86. (GE 1) On October 10, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to him, alleging security concerns under Guidelines J (criminal conduct), F (financial considerations), and E (personal conduct). (Hearing Exhibit (HE) 2) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG), which became effective on September 1, 2006.

Based on information available to the Government, DOD adjudicators could not make the affirmative finding that it is clearly consistent with national security to grant or continue Applicant's security clearance, and they recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked. (HE 2)

On October 24, 2014, Applicant responded to the SOR and requested a hearing. (HE 3) On December 15, 2014, Department Counsel was prepared to proceed. On December 18, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On January 7, 2015, DOHA issued a hearing notice, setting the hearing for January 15, 2015. (HE 1) The hearing was held as scheduled using video teleconference. Applicant waived his right to 15 days of notice of the date, time, and place of the hearing. (Tr. 11-12) I received some documents concerning restitution. (pg. 138-144) On January 19, 2014, I received three additional exhibits. (pg. 145-148) Applicant and four witnesses made statements during his hearing. I received the transcript of the hearing on January 26, 2015.

Procedural Issues

Department Counsel proffered five exhibits, and four of the five exhibits were admitted without objection. (Tr. 24-25; GE 1-2, 4-5) Applicant objected to consideration of GE 3, a letter from Applicant's former employer, asserting it was not properly authenticated. (Tr. 12-16) I sustained the objection to the letter. *Id.*

Applicant offered 12 documents into evidence at his hearing (Tr. 25-30; AE A-L; pg. 1-144). Department Counsel objected to consideration of some of Applicant's documents because they made statements about Applicant's innocence or pertained to his criminal trial. (Tr. 16-17) Applicant countered that the exhibits show context and extenuation and mitigation of his conduct during the offense, trial, and post-trial. (Tr. 16-17) I overruled Department Counsel's objection. (Tr. 17)

Applicant agreed that he would not be contesting his guilt of the criminal offenses to which he pleaded guilty; however, he would be presenting extenuating and mitigating evidence and evidence to show the context of the offenses. (Tr. 18-19; HE 4)

Findings of Fact¹

Applicant's SOR response denied the SOR allegations. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 43 years old, and he is seeking employment from a defense contractor to enable him to continue his work in aviation. (Tr. 122) In 1994, he was awarded a bachelor of science degree in aero technology. (Tr. 123-124) In 1995, he

¹To protect Applicant and his family's privacy, the facts in this decision do not specifically describe employment, names of witnesses, and names of other groups or locations. The cited sources contain more specific information.

married, and he has two living children, who are 7 and 13 years old. (Tr. 39-41, 122-123)

Applicant joined the Marine Corps, was commissioned, and became a pilot. (Tr. 32-33) He served on active duty from 1992 to 2004, and thereafter in the Navy Reserve. (Tr. 39, 83) He received several awards for his aviation and leadership skills; he graduated on the Commandant's list from an important training course; and in 2003, he was designed instructor pilot of the year for his squadron. (Tr. 33-34; pg. 56) He was involved in numerous military exercises between 1997 and 2004. (Tr. 33) He received two Navy and Marine Corps Commendation Medals and two National Defense Service Medals. (Tr. 34; pg. 55-56) He had access to classified information; he never violated security rules; and there were no allegations of security violations. (Tr. 35) He was involuntarily separated from the Marine Corps for failure to be promoted from the rank of captain. (Tr. 83; pg. 53) He received an honorable discharge in 2004, which indicates it is provided "as a testimonial of Honest and Faithful Service," and he received more than \$60,000 in separation pay. (Tr. 35, 83-84; pg. 53)

Several months before leaving active duty, Applicant noted in a physical evaluation that he had no hearing loss; however, he did so to maintain his flight status and to avoid being grounded for medical reasons. (Tr. 84, 85-86) Applicant's separation physical described medical issues involving injury or illness regarding his foot, back, arm, and hearing. (Tr. 36) His hearing loss was due to being around loud aircraft engine noises. (Tr. 36) The same day Applicant separated from active duty, he also applied for benefits from the Department of Veterans Affairs (VA). (Tr. 37; pg. 64-67) The VA conducted a medical evaluation; however, the VA did not conduct a hearing examination. (Tr. 38, 85) In November 2004, the VA denied his claim for disability benefits. (Tr. 38, 85) Some delay in the processing of his claim was caused when the VA lost Applicant's claim or medical records. (Tr. 52, 88) In early 2005, Applicant appealed his VA disability denial and started his employment as an airline commercial pilot. (Tr. 87) Applicant did not report any hearing loss to the airline that employed him or to the Department of Transportation. (Tr. 100) He passed several hearing tests from 2006 to 2008. (Tr. 101)

Applicant's spouse had four miscarriages; one daughter died at birth in August 2000; his youngest daughter was born prematurely; and his daughter spent seven weeks in the neonatal intensive care unit. (Tr. 41-43, 53-54; pg. 145-147) Applicant was under substantial stress due to his heavy airline flight schedule, his spouse's medical history, time spent with his daughter in the hospital, and the welfare of his family. *Id.* In August 2005, Hurricane Katrina struck the Gulf Coast and New Orleans. (Tr. 87) Applicant worked diligently in the relief efforts after Hurricane Katrina. (Tr. 48-49) His residence was seriously damaged during Hurricane Katrina by a tornado. (Tr. 49-50) Applicant and his family moved to a different state to be closer to his spouse's family. (Tr. 51, 53) These stressful circumstances may have affected Applicant's judgment and ability to make appropriate choices. (Tr. 41-43, 51-54; pg. 145-147)

In 2008, Applicant was arrested in connection with his role in a scheme involving fraudulent claims made to the VA for disability benefits. (Tr. 54) Applicant was adamant

during the process awaiting trial that he intended to plead not guilty and contest the charges. (Tr. 55) On the third day of trial, Applicant's attorney convinced him that he should change his plea to guilty. (Tr. 56) He pleaded guilty because he wanted to be able to take care of his family. (Tr. 57) Applicant said pleading guilty "devastated" him. "It broke [his] heart because [he] believed in [his] innocence." (Tr. 58) He provided numerous letters describing the impact on his mental state from the investigation, trial, and guilty plea. While he was in prison, Applicant worked as a GED instructor for the other prisoners. (Tr. 59)

Criminal Conduct

Two individuals with access to VA records (P and M) entered into a conspiracy with VA-eligible disability claimants (VA claimants) to alter VA records, improperly obtain benefits, and then receive kickbacks from the VA claimants and their dependents. (Tr. 90-92; HE 5 at 2) P and Applicant became acquainted; Applicant told P about his difficulties with his VA disability claim; and P told Applicant that he could obtain a disability rating for Applicant in return for a kickback to P, who would alter his records concerning his VA claim for hearing disability payments. (Tr. 93; HE 5 at 2) In August 2007, the VA tested Applicant's hearing; however, P submitted a different report to the VA that showed Applicant had significant hearing loss. (Tr. 90-96; HE 5 at 2) P removed other documents from Applicant's VA file. *Id.*

Applicant emphasized that P altered, removed, and substituted Applicant's VA records, and that Applicant did not personally take these actions. (Tr. 97) Nevertheless, Applicant and P were both beneficiaries of P's conduct, as P's conduct caused the VA to pay Applicant funds to which he was not entitled, and P received a kickback from Applicant. (Tr. 97)

In October 2007, the VA approved Applicant's disability claim and paid him over \$90,000 in benefits, based on the date he filed his initial VA claim. *Id.* He also began receiving monthly payments of \$2,500. *Id.* In November 2007, he withdrew funds in three increments of \$10,000, and he paid P his kickback, using a check. *Id.* Applicant told the bank that P was repairing and upgrading his residence. (HE 5 at 2-3) Later, Applicant made additional payments to P until he had paid P a total of more than \$60,000. (HE 5 at 3)² Applicant told federal law enforcement officials that his payments to P were charitable contributions.³ *Id.* Applicant was charged with nine counts of

²Applicant stated in his closing argument that he had "no malicious intent. Everything was internally handled by [P] and accomplished without my knowledge." (Tr. 186) This statement is inconsistent with his guilty plea to conspiracy to steal VA funds, and a closing argument is not evidence.

³Applicant's SOR does not allege that he lied to federal law enforcement officials when confronted about the improper payments from the VA and that he is currently on supervised probation. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of

various violations of Title 18. *Id.* Three days into trial, Applicant and the Government reached a plea agreement. Applicant pleaded guilty to conspiring to steal Government property and structuring multiple banking transactions to evade reporting requirements. *Id.* Applicant was under great pressure when he pleaded guilty because of concerns about his family and the increase in magnitude of the penalty if he was convicted of more than two counts. (Tr. 105-106) He said he was also concerned that the Government might prosecute his spouse as a co-conspirator. (Tr. 106) However, he did not explain what facts about his spouse's conduct supported his belief that his spouse may have had co-conspirator liability.

Applicant was sentenced to 21 months of imprisonment followed by two years of supervised release. (HE 5 at 3-4) He served one year in prison. (Tr. 169-170) Applicant will continue to be on federal probation until May 2015. (Tr. 65, 172) Applicant's probation reports indicate he is compliant with all probation rules. (Tr. 65) Applicant is not required to report to his probation officer. (Tr. 65) After his trial, Applicant attempted to withdraw his guilty plea; however, the trial and appellate court declined to grant his request. (Tr. 104; HE 5)

Financial Considerations

When Applicant learned he was under investigation, he attempted to stop the VA from sending him additional monthly VA disability checks. (Tr. 60-61) Applicant and his attorney placed VA payment totaling \$31,000 into an escrow account. (Tr. 61) Applicant signed the funds over to his attorney to use for Applicant's legal defense. (Tr. 62) Applicant complained to the state bar association because he believed his attorney wrongfully appropriate the VA funds.

Applicant's 2010 restitution agreement stipulated that he would make regular payments until he repaid more than \$140,000 that he wrongfully received from the VA. (Tr. 63; SOR ¶ 2.a) There was no time limit or term for the repayment, and the interest rate is zero percent. (Tr. 63-64) Applicant initially paid \$10 monthly when he was unemployed, and now he pays \$50 a month. (Tr. 63) The court's restitution order also requires one of his convicted co-conspirators to pay restitution towards the \$140,000 debt. (Tr. 63-64) Applicant has paid \$3,500 to \$4,000 in restitution, and he still owes over \$140,000. (Tr. 125; pg. 140) His current base salary is \$71,000. (Tr. 125)

Personal Conduct

One of Applicant's spouse's relatives hired Applicant to recruit employees for firms, universities, and other entities following his release from imprisonment and a

the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). Applicant's false statement to federal law enforcement officials is not recent, and it will not be considered for any purpose, except in the whole-person discussion. Applicant's status as being on supervised probation will be considered in connection with assessing whether his Guideline J conduct is mitigated and under the whole-person concept.

halfway house. (Tr. 67) Applicant's employment options were limited at that time because of his felony conviction, and he accepted the job, even though he had never worked in recruiting. His successes were inconsistent and sporadic. (Tr. 68) He accused his fellow employees of timecard fraud, and was ostracized by his coworkers. (Tr. 70-73, 108-109) When Applicant showed initiative, he was criticized. (Tr. 73-74, 107-108) Nevertheless, he received a positive performance evaluation. (Tr. 75-77) Some other employees took credit for his successes, and he was not happy with his employment situation. (Tr. 70-77) In February 2013, his boss suggested that "it's best that we just part ways" and promised not to do anything that would "obstruct any [of Applicant's] future employment opportunities." (Tr. 77, 111) Applicant collected his personal property from his desk and departed the building. (Tr. 78)

Applicant's March 15, 2013 SF 86 in Section 13A asked whether he "left by mutual agreement following charges or allegations of misconduct" or "left by mutual agreement following notice of unsatisfactory performance." (GE 1) Applicant said, "no" to these two questions and explained in the section designated for providing the reason for leaving that employment, "I am family so my employer provided a job position to help provide financially for my family. I have over 20 years in the aviation field, and this was a new direction that in the end was not working." (GE 1) Applicant provided accurate contact information to enable the Office of Personnel Management (OPM) to verify his reason for leaving his employment. (GE 1) Applicant disclosed his felony-level conviction on this SF 86.

Applicant conceded that he erroneously answered that he was not fired on his March 15, 2013 SF 86 when he was terminated from his airline employment as a result of his felony conviction. (Tr. 113) He did not intend to deceive anyone on his SF 86. (Tr. 113, 120-121) The SOR did not allege the falsification of his SF 86 in connection with the termination of his airline employment.

Character Evidence

Applicant described himself as a "stellar" airline employee, who received laudatory praise from his supervisors. (Tr. 79) Applicant had numerous flight certifications and licenses from his airline, the Federal Aviation Administration, and the Navy and Marine Corps. (Tr. 80-81; pg. 52) He received excellent evaluations from the airline employing him after he left active duty. (Tr. 46-47; pg. 8-43) Applicant has never had an accident while flying where someone was injured. (Tr. 82) He volunteered for and participated in a special federal program to protect aircraft and passengers. (Tr. 183) He received numerous letters and certificates of training, appreciation, or commendation.

A Navy flight surgeon with more than 20 years of medical and Navy experience, served with Applicant from 2001 to 2004 and has known him for many years. (Tr. 128-134) The owner of an airline and flight school has employed Applicant and worked closely with him since early 2012. (Tr. 143-145) An airline pilot with more than 15 years flight experience has flown on numerous occasions with Applicant as his copilot over a five-year period. (Tr. 151-161) A Navy pilot, who recently retired from the Navy Reserve

as a commander, has known Applicant since 2004 or 2005. (Tr. 163-165) Applicant provided numerous letters attesting to his leadership, solid performance, and contributions to his employers. (pg. 44-51, 78-137) They described him as trustworthy, reliable, loyal, patriotic, honest, honorable, a devoted family man, having integrity, a model pilot, and a gifted aviator, and they recommended reinstatement of his security clearance. (Tr. 128-168; pg. 44-51, 78-137)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v.*

Washington Metro. Area Transit Auth., 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes one condition that could raise a security concern and may be disqualifying in this case, "(a) a single serious crime or multiple lesser offenses." AG ¶ 31(a) applies. Applicant pleaded guilty to two felonies: conspiracy to steal government property and structuring money transactions. He was sentenced to 21 months in prison and restitution of more than \$140,000.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Although none of the mitigating conditions fully apply, there are important mitigating factors. Applicant's most recent offense occurred in November 2007, and is not particularly recent. He complied with all the terms of his probation. He has been continuously employed. He expressed regret and remorse concerning his offenses.

Significant factors weighing against mitigating criminal conduct concerns remain. Applicant has not fully come to terms with his criminal conduct. See, e.g., note 2, *supra*. He engaged in a conspiracy with P resulting in the theft of more than \$140,000 from the VA. P used a false claim in Applicant's name for disability benefits to obtain these funds. Applicant engaged in a post-theft scheme to kickback P's share by withdrawing \$10,000 blocks of funds from his account to avoid disclosure to federal banking officials. Applicant is well educated and trained as a Marine Corps officer. For 12 years he was steeped in the Marine Corps ethos and ethics. He knew it was wrong to steal from the VA. This crime was not a momentary lapse of judgment. It was a calculated plan that caused the VA to wrongfully pay over \$140,000 in benefits to Applicant.

Applicant is on supervised probation. See note 3, *supra*. The federal court has determined that the passage of more time under the limitations of probation is necessary to protect society and establish rehabilitation. More time must elapse before there is enough assurance that criminal conduct and other behavior raising security concerns is unlikely to recur. Applicant is not ready to be entrusted with access to classified information at this time.

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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 ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” Applicant’s SOR alleges that he has a debt of over \$140,000 owed to the federal government as restitution for money he wrongfully received from the VA. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;⁴ and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

⁴The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the good-faith mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

AG ¶ 20(c) applies because “there are clear indications that the problem is being resolved or is under control.” Applicant has a payment plan to address his debt of over \$140,000 owed to the Government for restitution. Over \$60,000 of the stolen funds went to P as a kickback and over \$30,000 went to Applicant’s counsel. P is jointly responsible for payment of this restitution. Applicant is currently paying \$600 a year, and at that rate he will never pay this debt. Nevertheless, the Department of Justice has not taken any action to obtain greater payments, and there is no evidence that the Government is dissatisfied with his payment arrangements. Applicant’s efforts are sufficient to fully mitigate financial considerations security concerns.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case, “(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . .”

Applicant’s March 15, 2013 SF 86 asked whether he “left by mutual agreement following charges or allegations of misconduct” or “left by mutual agreement following notice of unsatisfactory performance.” (GE 1) Applicant said, “no” to these two questions and explained in the section designated for providing the reason for leaving that employment, “I am family so my employer provided a job position to help provide financially for my family. I have over 20 years in the aviation field, and this was a new direction that in the end was not working.” (GE 1) Applicant provided accurate contact information to enable the OPM to verify his employment. Applicant disclosed his felony-level conviction on this SF 86.

Applicant gave sufficient information for the OPM investigator and DOD adjudicators to realize he was having problems in his employment and had a felony-level conviction. Applicant disclosed the most important disqualifying information in his background, and any failure to more clearly describe other situations in his life were not designed to deceive the Government about his worthiness to have access to classified information. The allegations of intentional falsification of his 2013 SF 86, including the allegation that he lied about being terminated from his airline employment, are unsubstantiated because I do not believe he intended to deceive the Government about his employment history.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines J, F, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting Applicant's continued access to classified information; however, this evidence is not sufficient to mitigate security concerns. Applicant is 43 years old, and he is seeking employment from a defense contractor to enable him to continue his work in aviation. In 1994, he was awarded a bachelor of science degree in aero technology. He honorably served in the Marine Corps from 1992 to 2004, including duty as a pilot and instructor pilot, and thereafter in the Navy Reserve. He received several awards for his aviation and leadership skills; he graduated on the Commandant's list from an important training course; and in 2003, he was designated instructor pilot of the year for his squadron. He was involved in numerous military exercises between 1997 and 2004; he received two Navy and Marine Corps Commendation Medals and two National Defense Service Medals; and there were no allegations of security violations.

Applicant received laudatory praise from his supervisors and colleagues in the Marine Corps and while working for an airline. He earned numerous flight certifications and licenses from his airline, the Federal Aviation Administration, and the Navy and Marine Corps. He received excellent evaluations from the airline employing him after he left active duty. He has never had an accident while flying where someone was injured. He volunteered for and participated in a special federal program to protect aircraft and passengers. He provided numerous letters and certificates of training, appreciation, or commendation.

Four witnesses and numerous letters attest to his leadership, performance, and contributions to his employers. They described him as trustworthy, reliable, loyal,

patriotic, honest, honorable, a devoted family man, having integrity, a model pilot, and a gifted aviator, and they recommended reinstatement of his security clearance.

Applicant was not the primary conspirator in the plan to defraud the VA. He pleaded guilty, which is often called an important step on the road to rehabilitation. He served one year of imprisonment, and he was a model prisoner, who helped other inmates with their basic education (studying for their GED). He has not violated probation, and he has complied with the Government's payment plan for restitution.

The factors weighing towards reinstatement of Applicant's security clearance are less substantial than the factors weighing against its reinstatement. Applicant's background and experience as a Marine Corps commissioned officer and aviator provided more than a decade of training, instruction, and inculcation of values including integrity, fidelity, and honor. He was under significant family stress due to his daughter's premature birth, concerns about his spouse's health, damage to their residence from a tornado, and a heavy work schedule. Although these stressful conditions may have affected his decision-making process, they do not excuse his conduct. In 2007, Applicant and P conspired to commit theft from the VA, and Applicant wrongfully received over \$140,000 from the VA. Although he had some hearing loss, he was well aware that his hearing loss was not significant enough to warrant such a large disability payment from the VA. He structured his bank transactions to conceal his \$60,000 in kickback payments that he made to P. Applicant lied to federal law enforcement officials when he said his more than \$60,000 kickback to P was a charitable contribution. He has two felony-level convictions, one for each count to which he pleaded guilty. He is currently on unsupervised probation. These are serious betrayals of the federal government and of other veterans. He showed very poor judgment and his access to classified information is not warranted.

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 criminal conduct concerns lead me to conclude that 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. At some future date, he may well be able to demonstrate persuasive evidence of his worthiness for a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations and personal conduct concerns are mitigated; however, Applicant has not carried his burden and criminal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

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: Subparagraph 1.a:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline F: Subparagraph 2.a:	FOR APPLICANT For Applicant
Paragraph 3, Guideline E: Subparagraphs 3.a and 3.b:	FOR APPLICANT For 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge