



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 14-04709
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

08/31/2015

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate security concerns raised by his history of criminal conduct and the state of his finances. In 2009 and 2013, he was arrested for driving while under the influence of alcohol. In 2014, he was convicted of federal offenses related to his involvement in a criminal conspiracy that defrauded financial institutions of over 1.5 million dollars. He was ordered to pay restitution totaling over \$750,000. He has amassed delinquent debts totaling over one million dollars. He submitted no evidence that he has resolved any of his past-due debts, or paid the restitution. He failed to establish that he has reformed the behavior that led him to engage in criminal conduct. Clearance is denied.

**Procedural History**

On October 17, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant’s conduct and circumstances raised security concerns under the criminal conduct and financial considerations guidelines.<sup>1</sup> On

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<sup>1</sup> This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial*

November 8, 2014, Applicant answered the SOR, waived his right to a hearing, and requested a decision on the written record (Answer).

On April 16, 2015, Department Counsel prepared a file of relevant material (FORM) and sent it to Applicant. The FORM contains seven documentary exhibits that are admitted into evidence, without objection, as exhibits (Ex.) 1 – 7. Applicant did not submit a response to the FORM within the allotted 30-day period. See Hearing Exhibit (Hx.) I (Applicant acknowledges receipt of the FORM).

On August 4, 2015, I was assigned Applicant's case and contacted the parties to provide Applicant a final opportunity to submit a response. See Hx. II. Applicant elected not to submit a response, and the record closed on August 14, 2015.

### **Findings of Fact**

Applicant graduated high school in 1979. He then enlisted in the U.S. military. He served for a total of approximately 23 years in the U.S. military. He served as a noncommissioned officer with the reserves and the national guard from 2003 to 2013, when he retired from the military. He started working for his current employer in 1995, and is a senior network engineer. He is married and has two adult children. (Ex. 2)

Applicant was arrested in 2009 and 2013 for driving while under the influence of alcohol (DUI). He received non-judicial punishment from the military for the first DUI. He was given probation before judgment for the second DUI and placed on two years unsupervised probation. He also received a letter of reprimand from the military for the second alcohol-related incident. (Ex. 2 at 19, 41-42)

In 2014, Applicant was charged by the Federal Government for his role in a five-month criminal conspiracy that took place between November 2007 and March 2008. Applicant and his co-conspirators submitted false and deceptive information on mortgage loan applications, which resulted in several lending institutions providing them over 1.5 million dollars in the form of mortgage loans. Applicant and his co-conspirators used their ill-gotten gains to acquire seven investment properties and refinance a separate property. Applicant admitted in court documents, which were submitted as part of his plea agreement, that his criminal conduct was willful and knowing, "and with the specific intent to violate the law." Applicant further admitted that his actions were not a result of "accident, mistake, or with the belief that [he and his co-conspirators] did not violate the law." (Ex. 6, *Statement of Facts*, ¶ 12)

In February 2014, Applicant was convicted for his role in the criminal conspiracy. He was sentenced to seven months of home detention, three years of supervised release, and ordered to pay restitution of over \$750,000. (Ex. 7) Applicant, in his notarized Answer, admits that he was charged and convicted for his role in the criminal conspiracy. He further states:

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*Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

In regards to this case, I was affiliated with a woman who has now become a focal point of a bank fraud investigation. I have entered into a plea deal where I am completely cooperating with the prosecutor and have provided key information in regards to this woman's case. Once her case is adjudicated it is expected that all actions against me will be dropped.

Applicant did not provide any documentary evidence that his federal criminal conviction was set aside or that he has paid the restitution ordered by the court.

Applicant defaulted on the mortgage loans he fraudulently acquired. Of the eight properties Applicant bought or refinanced with the wrongfully acquired money, "six went into foreclosure and were ultimately sold for less [then] the value of the loans." (Ex. 6, *Statement of Facts*, ¶ 9) Applicant blames the collapse of the real estate market for his failure to repay the mortgage loans. He did not list any past-due debts on his security clearance application, but in the comment section states: "The United States financial crisis effected the investment company (LLC) that I started. Due to this, the homes purchased through the LLC were lost. There is no other financial problems effecting myself or my family. We are financially sound and stable." (Ex. 2)

The SOR lists 24 past-due debts totaling over one million dollars. Beyond the past-due mortgage debts that are related to Applicant's criminal conduct, the SOR lists collection accounts ranging in amounts from \$80 to \$916. Applicant submitted no documentation of having taken any action to resolve any of the SOR debts, or basis upon which to dispute any of the SOR debts. Each of the SOR debts is listed on at least one of the credit reports submitted by the Government. (Ex. 3 – 5)

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) ("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.").

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

## **Analysis**

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

The security concern regarding criminal conduct is explained at AG ¶ 30:

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.

Applicant's history of criminal conduct clearly establishes the security concern at issue. It also triggers application of the disqualifying conditions at AG ¶¶ 31(a), "a single serious crime or multiple lesser offenses;" and 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." Additionally, Applicant is currently on supervised release, which is not scheduled to end until 2017. This probationary/parole-type status implicates the disqualifying condition at AG ¶ 31(d), "individual is currently on parole or probation."<sup>2</sup>

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<sup>2</sup> As currently written, AG ¶ 31(d) does not include "supervised release" as a sentence that would trigger application of this specific disqualifying condition (DC). Arguably, the drafter's failure to include this probationary-type sentence leaves this DC inapplicable. However, reading this DC in such a restrictive manner would be inconsistent with the overall purpose of the security clearance process and the requirement to apply the guidelines in a common-sense manner. See ISCR Case No. 12-10404 at 4

I have considered all the applicable mitigating conditions and none apply. Applicant has engaged in a pattern of serious criminal conduct. His criminal behavior is neither isolated, nor did it occur under unusual circumstances. His recent federal criminal conviction occurred while he was on probation for his latest DUI. His criminal conduct continues to cast doubt about his judgment, reliability, and trustworthiness.

Furthermore, Applicant's statements during the course of the current security clearance review denote a lack of remorse, as well as recognition that his present circumstances were a direct result of his criminal conduct, not outside factors or other persons. In light of these statements, Applicant's guilty plea and subsequent cooperation with federal authorities are entitled to less weight in assessing his potential for reform and rehabilitation. Additionally, he submitted no evidence that he paid the restitution as required by his sentence. His criminal conduct remains a security concern.

### **Guideline F, Financial Considerations**

The security concern under this guideline is explained at AG ¶ 18:

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.

Applicant's accumulation of a significant amount of delinquent debt, a majority of which is related to his criminal conduct, establishes the financial considerations security concern. The record evidence also establishes the following disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(d): deceptive or illegal financial practices such as . . . filing deceptive loan statements, and other intentional financial breaches of trust; and

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(App. Bd. Mar. 13, 2015) ("To apply an overly restrictive interpretation of any of the Guidelines would result in clearance decisions being made on the basis of legal technicalities that have more purchase in other types of litigation, such as criminal trials, rather than on the basis of national security."). See *also* ISCR Case No. 13-01281 at 4 (App. Bd. Aug. 4, 2015) ("Furthermore, the DCs listed under any of the Guidelines are not exclusive. To the contrary, they are illustrative in nature, and, even when none of the DCs under a particular Guideline can be applied with literal preciseness, it is not improper for a Judge to conclude that an applicant's conduct sets forth concerns under that Guideline."); U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release*, July 2010, publicly available at [http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2FederalOffenders\\_Sentenced\\_to\\_Supervised\\_Release.pdf](http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2FederalOffenders_Sentenced_to_Supervised_Release.pdf), at 1-2 (discussing similarities and differences between supervised release and parole and probation).

AG ¶ 19(f): financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern.

I have considered all the mitigating conditions and none apply. Applicant presented no evidence of having taken any action to resolve his past-due debts, or that he has reformed the behavior that led him to engage in financially-motivated crimes. His past history suggests that he is willing to break rules and regulations for illicit financial gain. His financial situation remains a security concern.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>3</sup> I hereby incorporate my comments under Guidelines J and F. I gave due consideration to all the favorable factors in this case, including Applicant's military service. However, at the same time Applicant was serving as a non-commissioned officer in the military, he was knowingly participating in a criminal conspiracy that defrauded financial institutions of over 1.5 million dollars. He did not submit evidence that he paid the restitution ordered by the federal court, and over one million dollars in past-due debts remain unresolved. After weighing the favorable and unfavorable evidence, I conclude that Applicant failed to meet his burden in mitigating the security concerns at issue. Overall, the record evidence leaves me with serious doubts and questions about Applicant's eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations)	AGAINST APPLICANT
Subparagraphs 1.a – 1.y:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct)	AGAINST APPLICANT
Subparagraphs 2.a – 2.c:	Against Applicant

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<sup>3</sup> The non-exhaustive list of factors are: (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.

## **Conclusion**

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge