



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



In the matter of:)	
)	
-----)	ISCR Case No. 06-25062
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro Se*

April 3, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on October 18, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline F for financial considerations based on a history of financial problems and Guideline E for personal conduct based on falsification of a security-clearance application. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's reply to the SOR was received by DOHA on November 21, 2007, and he requested a hearing. The case was assigned to me on January 9, 2008. The hearing took place as scheduled on March 12, 2008, and the transcript (Tr.) was received on March 20, 2008.

Procedural and Evidentiary Rulings

Applicant objected to Exhibit 3, which consists primarily of an interview of Applicant that was recorded in a report of investigation (ROI) prepared by the U.S. Office of Personnel Management (Tr. 28–35). His objection was based on the general rule that a background ROI may not be received and considered by an administrative judge.³ The exception to the general rule is “[a]n ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence.”⁴ In light of the objection, I deferred ruling and indicated department counsel would have an opportunity to lay a foundation for the exhibit (Tr. 35, 38). Thereafter, the exhibit was not offered into evidence again. Accordingly, it was not admitted and it has not been considered.

Findings of Fact

Under Guideline F, the SOR alleges ten delinquent debts (¶ 1.a–¶ 1.j) ranging from \$10 to \$6,328 for about \$15,556 in total. He admitted all the debts in his response to the SOR. Under Guideline E, he denies the two allegations that he made deliberately false statements when answering two questions about his financial record on a security-clearance application. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 50-year-old HVAC installer who works as a contract employee for a company that provides services to the State Department.⁵ During 2005, he worked for

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

³ See Directive, Enclosure 3, ¶ 3.1.20.

⁴ *Id.*

⁵ Directive, ¶ 2.2 (By mutual agreement, the Directive extends to other federal agencies, to include the State Department).

this company overseas installing an HVAC system in an embassy. He did this with the benefit of an interim security clearance. Currently, he has a contingent-employment relationship with the company to work at another overseas embassy, and this relationship is the basis to process Applicant's security-clearance application (Exhibit C). In addition, Applicant's employment status, which is the jurisdictional basis for the case, was addressed at the start of the hearing (Tr. 17–21).

Applicant has been married since 1979. His wife is now 50 years old. They currently have an adult son living with them. His wife has been employed for many years at a utility company and she continues working there today. In about 1997 or 1998, his wife was required to undergo a hysterectomy and was out of work for about eight weeks or so (Exhibit 2). Applicant's employment situation at the time was unstable; he worked for an aircraft company where he experienced periodic layoffs and a months-long strike. Overwhelmed, Applicant started drinking heavily and using illegal drugs. Months later he went into treatment and he has not used alcohol or drugs since 1998. Applicant points to this period as the start of his financial problems.

Applicant's history of financial problems is well documented (Exhibits 2, 4 and 5). For example, a June 2005 credit report shows 15 accounts (some with zero balances) in the collections section of the report (Exhibit 4). In total, the balance due for the collection accounts is about \$3,726.

The delinquent debts in the SOR are established by Applicant's admissions and the admitted documentary evidence. He has not paid, settled, or resolved any of the debts in the SOR. He does not intend to pay these debts because doing so would "be like opening up a can of worms, so to speak," and he is financially unable to pay them (Tr. 56–57). Instead, he is focused on his current accounts and moving forward.

Applicant has resolved an outstanding debt owed to a state department of industrial relations (Exhibits A and 2). The debt was due to an overpayment to Applicant. The \$2,805 debt, which was reduced to a judgment in May 2003, was satisfied in early 2007.

In his testimony, he estimated having about \$81 in the bank. He explained that he lived week-to-week. In general, Applicant was unaware of the details of his overall financial situation because his wife handles all such matters.

Applicant presented a September 2007 credit report from one of the major credit reporting agencies (Exhibit B). Although it contains the \$2,804 judgment mentioned above, the report otherwise shows Applicant is in good shape. The report lists a total of eight accounts, two of which are closed, and all eight accounts are described as pays as agreed and in good standing.

Applicant completed a security-clearance application in 2004, and then it was signed again by him in May 2005 (Exhibit 1). When signing the application, he certified that his statements were true, complete, and correct to the best of his knowledge and

belief and were made in good faith, and he acknowledged that a knowing and willful false statement could be punished under federal law. In particular, he answered two questions about his financial record as follows:

- Question 37—asking if in the last seven years he had any unpaid judgments against him that had not been paid, to which he replied “no” and did not disclose any unpaid judgments.
- Question 38—asking if in the last seven years he had been over 180-days delinquent on any debts, to which he replied “no” and did not disclose any debts.

But he disclosed a delinquent credit card account for \$1,877 in response to another question. His negative answers to Questions 37 and 38 were the result of honest mistakes in completing the paperwork (Tr. 65–67).

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.⁶ As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁷ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁸ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.⁹ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁰ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

⁶ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

⁷ *Egan*, 484 U.S. at 531.

⁸ Directive, ¶ 3.2.

⁹ Directive, ¶ 3.2.

¹⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹¹ Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.¹² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁴ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁵

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹⁶ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

Analysis

Under Guideline F for financial considerations,¹⁷ a security concern typically exists due to significant unpaid debts. "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."¹⁸ Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

The record evidence supports a conclusion that Applicant has a history of financial problems. His history of financial problems is a security concern because it

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ *Egan*, 484 U.S. at 531.

¹⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁶ Executive Order 10865, § 7.

¹⁷ Revised Guidelines at pp. 13–14 (setting forth the security concern and the disqualifying and mitigating conditions under Guideline F).

¹⁸ Revised Guidelines at p. 13.

indicates inability to satisfy debts¹⁹ and a history of not meeting financial obligations²⁰ within the meaning of Guideline F. The record evidence is more than sufficient to establish these two disqualifying conditions.

All of the mitigating conditions under Guideline F have been considered and none apply. Two deserve discussion. First, MC 2—conditions largely beyond a person’s control—does not apply.²¹ No doubt the various circumstances that Applicant and his wife experienced during 1997–1998 contributed to the financial problems and strained the family budget. But so much time has passed since then that it is unreasonable to point to that period as a factor in mitigation.

Second, a potential mitigating condition is MC 4, which requires a person to initiate a good-faith effort to repay overdue creditors or otherwise resolve debts.²² He has taken some positive steps to resolve his financial problems as evidenced by paying off the \$2,803 judgment. But his efforts, in light of the remaining unaddressed financial problems, are not enough to qualify as a good-faith effort.

Applicant has done little to demonstrate an intent to clean up his financial house. Concerning his past delinquent debts, what is missing here is: (1) a realistic and workable plan; (2) documented actions taken in furtherance of the plan; and (3) a measurable improvement to the situation. Although his current financial situation looks like it has improved (Exhibit B), his past delinquent debts cannot be overlooked in assessing his overall financial situation and how it relates to his current security suitability. At this point, it is likely that the financial problems will continue or recur. Accordingly, Guideline F is decided against Applicant.

Personal conduct under Guideline E²³ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. Of special interest is any

¹⁹ DC 1 is “inability or unwillingness to satisfy debts.”

²⁰ DC 3 is “a history of not meeting financial obligations.”

²¹ MC 2 is “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.”

²² MC 4 is “ the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”

²³ Revised Guidelines at pp. 10–12 (setting forth the security concern and the disqualifying and mitigating conditions under Guideline E).

failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.”²⁴

The SOR alleges that Applicant made false statements when providing answers to two questions about his financial record. He denied giving false answers in his reply to the SOR, and he explained in his hearing testimony that his incorrect answers were due to mistakes made in completing the security-clearance application. His explanation is credible. Coupled with his disclosure of a delinquent credit card account in response to another question, the record evidence is not sufficient to prove that Applicant was trying to hide his financial problems. In light of this failure of proof, Guideline E is decided for Applicant.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

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 F:	Against Applicant
Subparagraphs 1.a–1j:	Against Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2.a–2.b:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge

²⁴ Revised Guidelines at p. 10.