



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



In the matter of:)
)
-----) ISCR Case No. 07-04181
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

May 29, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke her 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 December 13, 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 under Guideline E for personal conduct based on workplace misconduct. For the reasons discussed below, this case is decided for 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 two Answers were received in January and February 2008, and she requested a hearing. The case was assigned to me on March 7, 2008. The hearing took place as scheduled on April 17, 2008. The transcript (Tr.) was received on April 25, 2008.

The record was kept open until May 2, 2008, to allow Applicant an opportunity to submit additional documentary evidence. She timely submitted post-hearing matters, which were forwarded by department counsel without objections. The post-hearing matters are admitted as follows: (1) Exhibit B—HUD settlement statement; and (2) Exhibit L—cover letter with two receipts.

Procedural Rulings

At the close of the evidence, the government moved to withdraw the allegation in SOR ¶ 1.j, which concerns the garnishment for the state tax debt because it was related to the allegation in SOR ¶ 1.i, which concerns the lien for the state tax debt (Tr. 106–107). The motion was granted without objections, and the matters will be addressed together.

Findings of Fact

Under Guideline F, the SOR alleges a history of financial problems as follows: (1) a 1994 Chapter 13 bankruptcy case, which was successfully completed and discharged in 1999; (2) a 2003 Chapter 13 bankruptcy case, which is ongoing under a five-year plan; (3) five collection accounts in amounts ranging from \$16 to \$208 for a total of \$419; (4) a 2004 garnishment by her employer for \$2,000; and (5) a state tax debt of \$934, which was satisfied in 2000 and the lien was released in 2001. Under Guideline E, the SOR alleges workplace misconduct in 2005 by using a company credit card for personal use. Applicant's Answer was mixed. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 44-year-old employee of a federal contractor. She has worked for the same company for about the last 20 years (Exhibit H). Her current job title is product data management specialist (Exhibit I). She is seeking to retain an industrial security clearance that she has held for many years.

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).

Applicant married in 1990, but she and her husband separated in 1993. A divorce was not finalized until 1997. Applicant is the mother of a nine-year-old son whom she is now adopting via the legal process. The child's birth mother is a relative who was unable to care for the child. Applicant has had physical custody of the child since a few days after his birth and has raised the child as her own. Applicant does not receive any child support for her son.

Applicant has a history of financial problems, which she does not dispute (Exhibits 1, 2, 3, 4, 5, and 6). The matters alleged in the SOR are established by Applicant's admissions and the admitted documentary evidence. The Guideline F allegations can be organized into five areas or items of concern and each is addressed below.

The first item of concern is the 1994 Chapter 13 bankruptcy case (SOR ¶ 1.b) (Exhibit 6). This event stemmed from Applicant's separation in 1993. The case commenced in August 1994, the plan was confirmed in December 1994, and the case was concluded to the satisfaction of the court in December 1999. Excluding court costs and legal fees, Applicant paid about \$31,462 to the trustee for the benefit of creditors in the plan.

The second item of concern is the 2003 Chapter 13 bankruptcy case (SOR ¶ 1.a) (Exhibits 2, 3, D, E, F, and G). This event stemmed from Applicant falling behind on some payments (for example, a car loan) as well as a recommendation from an investigating agent who suggested she consider bankruptcy (Tr. 76–79). The plan was commenced in July 2003 and confirmed in October 2003. The five-year plan calls for Applicant to pay \$134 biweekly for the benefit of several creditors. As of January 2, 2008, Applicant had paid a total of \$15,410 toward the plan, and it appears she is on track to complete the plan in about October 2008 (Exhibit G).

Next are the five collection accounts (SOR ¶¶ 1.c–1.g). In general, Applicant believes she resolved these accounts when she bought and closed on a home in July 2007.

The debts in SOR ¶¶ 1.c, 1.d, and 1.f are medical accounts for \$48, \$16, and \$87. Applicant maintains she has paid these debts (Tr. 56–59, 61–63). All three appear as collection accounts in a July 2006 credit report (Exhibit 5). The \$48 and \$16 debts appear as collection accounts in a November 2007 credit report (Exhibit 4). And none of the debts appear in the most recent December 2007 credit report (Exhibit C). Applicant also submitted proof-of-payment for \$48 and \$16 debts (Exhibit L). Accordingly, I find these three debts are resolved.

The debt in SOR ¶ 1.e is a telephone account for \$208. Applicant established this account for her sister, and her sister has paid it (Tr. 59–61). This debt appears as a collection account in the July 2006 credit report (Exhibit 5). But it does not appear in the more recent credit reports from 2007 (Exhibit 4 and C). Accordingly, I find this debt is resolved.

The debt is SOR ¶ 1.g is a collection account for \$60. It was paid when Applicant settled on her house in July 2007 (Exhibit B). Accordingly, I find this debt is resolved.

The fourth item of concern is a so-called garnishment³ of \$2,000 taken by Applicant's employer in 2004 (SOR ¶ 1.h). This allegation is inaccurate because it is based on Applicant's mistaken belief that her employer garnished her wages as she reported on her security-clearance application in response to Question 34 (Exhibit 1). Instead, what took place is her employer deducted money from her salary that it had advanced to pay for education when she did not earn the required grades (Tr. 63–65; Exhibit J). The so-called garnishment is not reflected in any of the credit reports. Accordingly, I find this debt was never a genuine garnishment and it is resolved.

The fifth item of concern is the state tax debt that resulted in a lien and a writ of garnishment (SOR ¶ 1.i). Applicant believes the tax debt goes back to 1993 or 1994 when she was going through her divorce (Tr. 65–68). The state obtained a judgment and filed a lien in 2000 and it was paid via a garnishment of Applicant's salary (Exhibit A). The 2006 credit report shows the lien was released in March 2001 (Exhibit 5). Neither the tax debt nor the lien is reflected in the credit reports from 2007 (Exhibits 4 and C). Accordingly, I find this debt is resolved.

Under Guideline E, the concern is the workplace misconduct in 2005 when she used a company credit card for personal use (SOR ¶ 2.a) (Tr. 80–88). As a result, she was suspended from work without pay for one week and placed her on probation for one year. She repaid the money, and she served the suspension and probation without incident. No similar incidents have taken place. She received an overall assessment of average (met expectations) in a December 2007 performance assessment (Exhibit I). And in March 2008, she received a salary increase from \$55,800 to \$58,100 (Exhibit K).

In addition to the pay raise, Applicant's overall financial condition is relatively stable. She qualified for a home loan and completed the transaction in July 2007 (Exhibit B). She is current with her monthly mortgage payments of \$1,143. To earn extra money, she sometimes works a part-time job making flower arrangements (Tr. 73). She has about \$1,400 in a savings account (Tr. 74). Her December 2007 credit report discloses five accounts, four of which are current. One account is an auto loan that is being addressed by the Chapter 13 payment plan. She has three credit card accounts, two with small balances and one with a zero balance. All three are current. A new collection account for \$113 opened in September 2007. Applicant believes this debt is for a medical bill and she is working to address it.

³ In general, a garnishment is usually a legal proceeding taken incident to a judgment obtained in a case and is used to obtain satisfaction of the judgment by reaching credits or property of the debtor. Ordinarily, an employer cannot garnish an employee's wages without a court order.

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.⁴ 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.”⁵ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁶ 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.⁷ 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.⁸ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹¹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹² The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹³

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions

⁴ *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.”).

⁵ *Egan*, 484 U.S. at 531.

⁶ Directive, ¶ 3.2.

⁷ Directive, ¶ 3.2.

⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁹ Directive, Enclosure 3, ¶ E3.1.14.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

¹² *Egan*, 484 U.S. at 531.

¹³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

(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.¹⁴ 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,¹⁵ 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."¹⁶ 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. Her history of financial problems is a security concern because it indicates inability to satisfy debts¹⁷ and a history of not meeting financial obligations¹⁸ within the meaning of Guideline F. The two Chapter 13 bankruptcy cases, the state tax debt, and the collection accounts are more than sufficient to establish these two disqualifying conditions. In addition, using the company credit card for personal use is a deceptive financial practice within the meaning of Guideline F.¹⁹ To sum up, the evidence as a whole supports a conclusion of financial irresponsibility.

¹⁴ Executive Order 10865, § 7.

¹⁵ Revised Guidelines at pp. 13–14 (setting forth the security concern and the disqualifying and mitigating conditions under Guideline F).

¹⁶ Revised Guidelines at p. 13.

¹⁷ DC 1 is "inability or unwillingness to satisfy debts."

¹⁸ DC 3 is "a history of not meeting financial obligations."

¹⁹ DC 4 is "deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional breaches of trust."

The guideline provides that certain conditions²⁰ may mitigate security concerns. The six mitigating conditions are as follows:

MC 1—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;

MC 2—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;

MC 3—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;

MC 4—the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

MC 5—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; and,

MC 6—the affluence resulted from a legal source of income.

MC 2 and MC 4 receive favorable consideration and are discussed below; the others do not apply to the facts and circumstances here.

MC 2—conditions largely beyond a person's control—applies in Applicant's favor. The separation and divorce were factors in Applicant's financial problems and were largely beyond her control. She has acted responsibly under the circumstances by paying off the state tax debt, by paying off the collection accounts, and by resolving her financial problems via Chapter 13 bankruptcy payment plans as opposed to walking away from her debts via a Chapter 7 bankruptcy. She completed the first Chapter 13 plan in 1999 after paying more than \$30,000 to creditors. In about October 2008, she is expected to complete the second Chapter 13 plan after paying about \$17,000 to creditors.

MC 4—good-faith effort to repay—applies in Applicant's favor. She paid the state tax debt several years ago. She resolved the collection accounts when she bought a home in 2007. She successfully completed the first Chapter 13 payment plan in 1999. She is on track to successfully complete the second in about October 2008, about five

²⁰ Revised Guidelines at 14.

months from now. Assuming she completes both Chapter 13 plans, she will have paid a total of about \$48,000 to creditors, a sizeable sum. She is not overextended as evidenced by a monthly mortgage payment of \$1,143, which is about 24% of her gross income, a figure that follows the rule-of-thumb that the total mortgage payment should not exceed 28% of pretax income. In addition, she is raising a son as a single parent without the benefit of child support. Her current financial situation is not pristine (for example, the recent \$113 collection account), but it is also clear that she is doing the best she can under challenging circumstances. Taken together, these circumstances are sufficient evidence of initiating a good-faith effort within the meaning of the guideline.

Personal conduct under Guideline E²¹ 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:

Conduct 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 failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.²²

At issue here is Applicant's 2005 workplace misconduct by using a company credit card for personal use. Although this matter is covered under Guideline F as a deceptive financial practice, it raises security concerns under Guideline E as well. In general, her workplace misconduct involves questionable judgment and dishonesty. In particular, when Applicant used the company credit card for personal use she violated an agreement between her and her employer within the meaning of Guideline E.²³

Since this event in 2005, she served her suspension and probation without incident. She has received a good performance assessment for 2007 and a pay raise in 2008. She has worked for this employer for 20 years and intends to continue working there. On balance, Applicant's workplace misconduct in 2005 was an aberration and it is mitigated by the passage of time without recurrence.²⁴

²¹ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

²² Revised Guidelines at 10.

²³ DC 6 is "violation of a written or recorded commitment made by the individual to the employer as a condition of employment."

²⁴ See MC 3 is "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."

To sum up under the whole-person concept, Applicant is a 44-year-old employee who has held a security clearance for about 20 years. She has a well-established history of financial problems and a related incident of workplace misconduct. Based on the evidence as a whole, she has: (1) cooperated and voluntarily reported the information; (2) been truthful and complete in responding to questions; (3) resolved or appears likely to resolve the financial problems soon by completing the Chapter 13 plan in 2008; and (4) demonstrated positive changes in her workplace behavior as evidenced by the 2007 performance assessment and the 2008 pay raise.²⁵ These circumstances are considered favorable to Applicant.

After weighing the evidence as a whole, I conclude the favorable evidence outweighs the unfavorable evidence. Although she did not present a perfect case in mitigation, Applicant presented sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant met her ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for 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:	For Applicant
Subparagraphs 1.a–1.i:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge

²⁵ See Revised Guidelines at 3.