



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



In the matter of:)	
)	
-----)	ISCR Case No. 06-18416
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

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

March 24, 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 1, 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 J for criminal conduct.

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. 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

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).

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 replied to the SOR on October 17, 2007, and requested a hearing. The case was assigned to me on December 20, 2007. The hearing took place as scheduled on February 7, 2008, and the transcript (Tr.) was received on February 19, 2008.

The record was left open until February 21, 2008, to allow Applicant an opportunity to submit additional documentary exhibits. Those matters were timely submitted and forwarded by department counsel who had no objections. The post-hearing matters are admitted as follows: (1) Exhibit B—three character references; (2) Exhibit C—employee performance review; (3) Exhibit D—court record; and (4) Exhibit E—DD Form 214 (three pages). For the reasons discussed below, this case is decided against Applicant.

Findings of Fact

Under Guideline J, the SOR alleges Applicant was involved in three incidents of criminal conduct in 1998, 2003, and 2005, and the first two incidents resulted in the Army imposing nonjudicial punishment. In his Answer, Applicant admits the factual allegations in the SOR. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 43-year-old employee of a defense contractor. He works as a supply technician. He has worked for his current employer since retiring from the Army in October 2005.

Applicant has been married since 1985, although he and his spouse have lived separately since about February 2006. He has not sought to divorce her as of yet so that she has health insurance for medical problems.

Applicant served on active duty in the Army from 1985 to 2005 (Exhibit E). He served as a unit supply specialist, retiring as a sergeant (pay grade E5). His discharge paperwork indicates extensive military education as well as numerous decorations, medals, and badges, to include the following: (1) Army Achievement Medal (6th award), Army Commendation Medal (7th award), and Army Good Conduct Medal (6th award). He received an honorable discharge upon his retirement.

In 1998, Applicant was serving as a staff sergeant working in supply for a military police unit. He underwent a random urinalysis, which tested positive for the presence of cocaine. As a result, Applicant's command initiated nonjudicial punishment under Article

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).

15, Uniform Code of Military Justice (UCMJ). Applicant was found guilty of the offense of wrongful use of cocaine and the punishment included reduction from pay grade E6 to E5. Applicant maintains he did not use cocaine in the traditional way (snorting or smoking), but admits that he was involved in a sexual encounter with his wife that involved cocaine (salacious details omitted here).

In 2003, Applicant was serving in Iraq when, as a married man, he engaged in a sexual relationship with a female soldier. As a result, Applicant's command initiated nonjudicial punishment under Article 15, UCMJ. Applicant was found guilty of adultery, which is an offense under military law. The punishment included reduction from pay grade E5 to E4. Applicant was able to earn his sergeant's stripes back before his retirement in 2005, when he retired at the pay grade of E5. Applicant does not dispute this misconduct.

In 2005, state law enforcement officials arrested Applicant for money laundering (Exhibits A, D, 2, 3, and 5). He was accused of laundering \$1,200 of drug money for another individual. In February 2005, a state grand jury indicted Applicant and the other individual for one count of conspiracy to commit money laundering for conduct that took place in April 2004 (Exhibit 2). The case moved slowly and was finally disposed of in August 2007, when the court granted the district attorney's motion to retire the case from the court's docket (Exhibit D). The court record indicates the retirement was with Applicant's consent and it was conditioned on his good behavior for one year (August 2008). Retirement of a case is akin to a *nolle prosequi* or other termination of a prosecutorial action. Applicant maintains he was innocent of any wrongdoing and he simply got mixed up with the wrong individual.

Concerning his job performance, Applicant is a knowledgeable and solid performer (Exhibits B and C). Two Army noncommissioned officers and a warrant officer vouched for Applicant's character, good duty performance, and trustworthiness. He received a very high rating on a recent employee performance review, which described his performance as outstanding.

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.³ 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."⁴ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-

³ *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.").

⁴ *Egan*, 484 U.S. at 531.

secret information.⁵ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁶ 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.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹¹ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹²

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.¹³ 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.

⁵ Directive, ¶ 3.2.

⁶ Directive, ¶ 3.2.

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Executive Order 10865, § 7.

Analysis

Under Guideline J for criminal conduct,¹⁴ the security concern is that “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.”¹⁵

Turning to the criminal conduct disqualifying conditions, both DC 1¹⁶ and DC 3¹⁷ apply based on the two Article 15 proceedings in 1998 and 2003 as well as Applicant’s arrest and indictment for a state felony offense in 2005. The totality of the disqualifying information calls into question Applicant’s judgment as well as his ability or willingness to comply with laws, rules, and regulations.

The guideline also provides that certain conditions could mitigate the security concern. The potentially relevant MC are:

- [S]o 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;
- [T]he person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- [E]vidence that the person did not commit the offense; and
- [T]here 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 first MC applies, in part, to the two Article 15 proceedings. Applicant is no longer on active military duty, both offenses involved his wife, and they are now living separately with little chance of reconciliation. These circumstances suggest that similar incidents are unlikely to recur.

The second MC does not apply. There is no evidence of pressure or coercion in any of the three incidents.

¹⁴ Revised Guidelines at 21–22 (setting forth the security concern as well as the disqualifying and mitigating conditions for Guideline J).

¹⁵ Revised Guidelines at 21.

¹⁶ DC 1 is “a single serious crime or multiple lesser offenses.”

¹⁷ DC 3 is “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

The third MC applies, in part, because there is some evidence that Applicant is innocent of the money laundering charge. He maintained his innocence in the state court proceedings and here as well. Moreover, the fact that the district attorney was willing to retire the case, instead of prosecuting it, is some evidence that Applicant did not commit the crime.

The fourth MC applies, in part, because there is some evidence of successful rehabilitation. Applicant was able to recover from the Article 15 proceedings and retire from the Army with an honorable discharge. In addition, he has a good employment record with his current employer. And there have been no further incidents of criminal conduct since his arrest in 2005. Undercutting the credit in mitigation, however, is that the retirement of the state criminal case was conditioned on Applicant's good behavior until August 2008. Although this status is not the same as parole or probation, it indicates that the court kept open the possibility of restoring the case to the active docket for trial or further proceedings (Exhibit D).

I have considered the record evidence as a whole, both favorable and unfavorable, and conclude that Applicant's history of criminal conduct raises doubt about his suitability for a security clearance. In particular, the conditional retirement of the state criminal case militates against a favorable decision at this time. What's missing here is a long-term track record of Applicant as a law-abiding person. Once he completes the period of good behavior in August 2008, time will tell if he will be able to establish such a track record.

During the proceeding, Applicant relied on his 20 years of honorable military service as evidence of his suitability for a security clearance. I have given that circumstance due consideration and weight, but also note that good soldiers do not get involved with cocaine and good soldiers do not commit adultery. In other words, Applicant's military service is insufficient by itself to overcome the case against him.

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concern. 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a–1.c:	Against 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