



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



In the matter of:	)	
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	)	ISCR Case No. 12-08830
Applicant for Security Clearance	)	

**Appearances**

For Government: Adrienne Strzelczyk, Esq., Department Counsel  
For Applicant: *Pro se*

03/15/2016

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for access to classified information. Applicant presented sufficient evidence to explain and mitigate the concern stemming from a spousal-support arrearage. He also presented sufficient information to establish that he did not deliberately omit that he had a security clearance revoked in 2005, when he submitted his most recent security clearance application in 2012. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on January 27, 2012.<sup>1</sup> More than three years later on March 23, 2015, after reviewing the application and information gathered during a background

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<sup>1</sup> Exhibit 2 (this document is commonly known as a security clearance application).

investigation, the Department of Defense (DOD)<sup>2</sup> sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.<sup>3</sup> The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct. Applicant answered the SOR on April 13, 2015, with a two-page memorandum and two enclosures consisting of court records.

Neither Applicant nor Department Counsel requested a hearing, and so the case will be decided on the written record.<sup>4</sup> On May 14, 2015, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>5</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who received it on June 3, 2015. He did not reply within the 30-day period from receipt of the FORM. The case was assigned to me on March 2, 2016.

### **Rulings on Procedure and Evidence**

The falsification allegation in SOR ¶ 2.a is amended to conform to the evidence. The allegation specified a date of November 29, 2011, as when Applicant completed and submitted the relevant security clearance application, but the correct date is January 27, 2012.<sup>6</sup> This amendment is without prejudice or harm to Applicant because, based on a review of the written record, it is evident that Applicant understood the falsification allegation and was able to respond to it.

The FORM includes Exhibit 3, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the March 2012 background investigation. The summary, Exhibit 3, is not authenticated as required under ¶ E3.1.20 of the Directive. Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may

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<sup>2</sup> The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

<sup>3</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>4</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>5</sup> The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

<sup>6</sup> Exhibit 2.

constitute a waiver of the authentication requirement. Nevertheless, a *pro se* applicant's failure to respond to the FORM does not equate to a waiver of the authentication requirement.<sup>7</sup> The written record does not demonstrate that Applicant, a layman who works as a laborer in a shipyard, understood the legal concepts of authentication, waiver, and admissibility. It also does not establish that he understood the implications of waiving an objection to the admissibility the summary. Accordingly, Exhibit 3 is inadmissible and I have not considered it.

The FORM also contains Exhibit 4, which is Applicant's 2005 clearance adjudication records from a military department. The exhibit is incomplete because it limited to the paperwork (similar to the SOR) setting forth the basis for the military department's intention to revoke Applicant's security clearance. The exhibit does not contain the paperwork (e.g., the letter of determination) setting forth the decision of the military department. But the exhibit does contain a cover sheet stating that an unfavorable personnel security determination was made. Accordingly, Exhibit 4 is not excluded under the rule of completeness,<sup>8</sup> because the written record shows that Applicant has admitted that his clearance was revoked in 2005, and so admission of the incomplete clearance adjudication records is not unfair or misleading.

Applicant's answer to the SOR contains two enclosures consisting of court records. Those documents are admitted as Exhibit A, which is an order confirming a mediated agreement and the memorandum of agreement in Applicant's then pending divorce in 2003; and Exhibit B, which is a 2011 order of support modifying Applicant's obligation to pay child support and spousal support.

### **Findings of Fact**

Applicant is a 46-year-old employee who is seeking to obtain a security clearance. He is employed as a brush painter at a shipyard. He has been so employed since July 2011. Before that, he was unemployed from October 2010 to July 2011. Before the period of unemployment, he was on active military duty for 20 years, which concluded with his retirement in October 2010. He held a security clearance while serving in the military, although, as discussed below, it was revoked in 2005. He was divorced in 2005, and he has two minor children and one adult child.

Under Guideline F, the SOR has a single allegation of indebtedness consisting of a child-support arrearage of approximately \$19,907. That allegation is supported by credit reports submitted by Department Counsel. A February 2012 credit report shows a \$28,693 collection account owed to a state child support enforcement agency.<sup>9</sup> And a

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<sup>7</sup> See *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9<sup>th</sup> ed., West 2009), for a definition of waiver.

<sup>8</sup> See Fed. R. Evid. 106.

<sup>9</sup> Exhibit 6.

September 2014 credit report shows a past-due balance of \$19,907 owed for child support.<sup>10</sup>

In his answer to the SOR, Applicant clarified and explained that the arrearage is for spousal support, not child support. He explained that while he has always paid child support, he stopped paying spousal support in about December 2005, after his divorce was final, because he understood the spousal support was a temporary order as described in the mediation agreement.<sup>11</sup> The mediation agreement shows he was required to pay a total of \$1,000 monthly, consisting of \$516 in spousal support and \$484 in child support.

After his retirement from military service and during his period of unemployment in 2010–2011, Applicant sought to lower his child-support payment. During that process, he learned the spousal-support order was not temporary and that he owed a substantial arrearage. The court modified his monthly payment to \$750 in total, consisting of \$349 for child support, \$116 for spousal support, and \$285 for a spousal-support arrearage of \$28,756.<sup>12</sup>

Applicant stated in his answer to the SOR that he has not missed a \$750 payment since they began in 2011. The credit reports corroborate his statement. The February 2012 credit report shows a balance due of \$28,693. The September 2014 credit report shows a balance due of \$19,907, a decrease of nearly \$9,000.

Under Guideline E, the SOR alleged that Applicant falsified material facts in response to a certain question on his January 2012 security clearance application. It alleged that Applicant deliberately failed to disclose that his security clearance was revoked in October 2005. Applicant admitted that he provided an incorrect answer to the question, but his answer of “No” was not a deliberate falsification. In his answer to the SOR, he explained that he was required to provide a hard copy or paper copy of his security clearance application to the shipyard’s security office, which would in turn enter the information in the electronic format. He also explained that he indicated on the hard copy that he had a clearance revoked in 2005. He further explained he had the benefit of assistance from his fiancée, who is a special security officer, in completing the hard copy, and he informed her that his clearance had been previously revoked.

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<sup>10</sup> Exhibit 5.

<sup>11</sup> Exhibit A.

<sup>12</sup> Exhibit B.

## Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>13</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>14</sup> 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>15</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>16</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>17</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>18</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>19</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>20</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>21</sup> The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>22</sup>

The AG set forth the relevant standards to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense

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<sup>13</sup> *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 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>14</sup> 484 U.S. at 531.

<sup>15</sup> Directive, ¶ 3.2.

<sup>16</sup> Directive, ¶ 3.2.

<sup>17</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>18</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>19</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>20</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>21</sup> *Egan*, 484 U.S. at 531.

<sup>22</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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.<sup>23</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

### Discussion

Under Guideline F for financial considerations,<sup>24</sup> the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties.<sup>25</sup> The overall concern is:

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.<sup>26</sup>

The concern is broader than the possibility that a person might knowingly compromise classified information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

The evidence supports a conclusion that Applicant has a problematic financial history within the meaning of Guideline F.<sup>27</sup> I reach that conclusion based on Applicant's failure to pay court-ordered spousal support for several years, although his failure appears to be due to a misunderstanding or simple negligence, not a refusal to pay.

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<sup>23</sup> Executive Order 10865, § 7.

<sup>24</sup> AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

<sup>25</sup> ISCR Case No. 95-0611 (App. Bd. May 2, 1996) (It is well settled that "the security suitability of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties.") (citation omitted); and see ISCR Case No. 07-09966 (App. Bd. Jun. 25, 2008) (In security clearance cases, "the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.") (citation omitted).

<sup>26</sup> AG ¶ 18.

<sup>27</sup> AG ¶ 19(c).

In mitigation, I have considered the six mitigating conditions under Guideline F,<sup>28</sup> and conclude that Applicant has presented sufficient information to explain and mitigate the concern. The totality of the written record (e.g., court records and credit reports) support Applicant's statement that he has been making the required monthly support payment since 2011. Indeed, the credit reports reflect a substantial decrease in the arrearage of nearly \$9,000 from February 2012 to September 2014. Those matters are sufficient to demonstrate mitigation under AG ¶ 20(c), the problem is being resolved or is under control, and AG ¶ 20(d), making a good-faith effort to repay.

Personal conduct under Guideline E<sup>29</sup> is a concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly handle and safeguard classified information. The suitability of an applicant may be questioned or put into doubt when an applicant engages in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with the rules and regulations. And "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."<sup>30</sup>

The deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the information did not need to be reported.

Applicant denied the falsification allegation in SOR ¶ 2.a, which alleged that he deliberately failed to report a 2005 clearance revocation in his most recent security clearance application. He provided a detailed explanation for the omission in his answer to the SOR. His explanation is not fanciful, disingenuous, or incredible on its face. I conclude his omission was not deliberate, but was due to mistake or oversight or both during the processing of his security clearance application.

The concern over Applicant's financial history does not create doubt about his current reliability, trustworthiness, good judgment, and ability to protect classified information. Although he did not present a flawless case (he should have presented current documentation from the state agency that collects the support payment), he presented sufficient evidence to resolve the concern. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-

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<sup>28</sup> AG ¶ 20(a)-(f).

<sup>29</sup> AG ¶¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

<sup>30</sup> AG ¶ 15.

person concept.<sup>31</sup> Accordingly, I conclude that he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard  
Administrative Judge

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<sup>31</sup> AG ¶ 2(a)(1)–(9).