



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



In the matter of: )  
 )  
----- ) ISCR Case No. 13-01137  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff A. Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

07/23/2014

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him a security clearance to work in the defense industry. A 69-year-old linguist, Applicant has a history of financial problems that are no longer a concern. In 2010–2011, he was charged with the fourth-degree sexual assault of an employee of his fast-food franchise, and he has not provided reliable documentary evidence showing the disposition of the criminal conduct. He did not present sufficient evidence to explain and mitigate the criminal conduct security concern. Accordingly, this case is decided against Applicant.

**Statement of the Case**

On December 6, 2013, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant or continue access to classified

information.<sup>1</sup> The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline F for financial considerations and Guideline J for criminal conduct.

The case was assigned to me April 11, 2014, to conduct a hearing requested by Applicant. The hearing was held May 27, 2014. At the hearing, Department Counsel presented Exhibits 1–8, which were admitted. Likewise, Applicant presented Exhibits A–H, which were admitted. Applicant as well as his 26-year-old son testified. The transcript (Tr.) was received June 5, 2014.

### **Post-hearing Matters**

The record was kept open to allow Applicant an opportunity to present additional documentary matters. On the day after the hearing, May 28, Applicant's son delivered documentary matters mentioned during the hearing but for which copies were not then available. Those matters are admitted as Exhibits I and J.

Additional time was granted to obtain and present documentation concerning the disposition or final outcome of the fourth-degree sexual assault charge against Applicant in 2010–2011. On June 20, 2014, more than three weeks after the hearing, neither I nor Department Counsel had heard from Applicant or his son, who was assisting him with these matters. Accordingly, I sent a last-chance letter with a July 15, 2014 deadline to submit additional matters.<sup>2</sup> The letter was delivered June 23, 2014.<sup>3</sup> To date, there was no response to the June 20, 2014 last-chance letter.

### **Findings of Fact**

Applicant is a 69-year-old employee of a federal contractor. A native of Afghanistan, he came to the United States in 1996 for a business trip and sought political asylum, which was granted in 1997.<sup>4</sup> He became a naturalized U.S. citizen in 2011.<sup>5</sup> He is employed as a linguist working in support of the U.S. military in Afghanistan. He has held this job since mid-2013. He has a good record of employment

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<sup>1</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>2</sup> Appellate Exhibit I.

<sup>3</sup> Appellate Exhibit II.

<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 1.

with his current employer as shown by several letters of recommendation and four certificates of appreciation, merit, or achievement.<sup>6</sup>

The SOR alleges and there is substantial evidence to show that Applicant has a history of financial problems or difficulties consisting of: (1) four collection or charged-off accounts for a total of approximately \$6,194; (2) unpaid business taxes of approximately \$5,784; and (3) unpaid rent of approximately \$9,746, which resulted in the landlord suing for nonpayment of the debt. The unpaid business taxes and rent stem from Applicant's period of self-employment when he owned and managed a fast-food franchise.

The four collection or charged-off accounts are resolved. Applicant presented testimony and documentary evidence that in January 2014 those accounts were settled for lesser amounts totaling about \$2,930.<sup>7</sup>

The unpaid business taxes of \$5,784 for tax years 2010, 2011, and 2012 are largely unresolved.<sup>8</sup> Applicant or his son have been in contact with the relevant tax office.<sup>9</sup> In March 2014, a \$400 payment was made for tax year 2010, which now has a balance due of about \$746.<sup>10</sup> For the balances owed for 2011 and 2012 (and potentially 2013), the plan is to address them when additional income becomes available.

The unpaid rent of approximately \$9,746 and the resulting lawsuit are the fallout from the failure of Applicant's fast-food franchise.<sup>11</sup> The landlord locked the store's door and evicted the tenant in September 2013. A lawsuit for nonpayment of rent was brought, but there is no documentary evidence showing that the lawsuit ended in a judgment, dismissal, or some other disposition.

Before his business failed, in about January 2010, Applicant was charged with the fourth-degree sexual assault of a female employee of his fast-food franchise.<sup>12</sup> Applicant testified that the charge stemmed from a misunderstanding of his minor physical contact (a tap on the shoulder) with the employee.<sup>13</sup> He also testified that in 2011 he was found guilty of the offense, paid a fine, and was required to undergo a

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<sup>6</sup> Exhibits A–G, and J.

<sup>7</sup> Tr. 41–51, and Exhibit H.

<sup>8</sup> Exhibit 5.

<sup>9</sup> Tr. 51–57.

<sup>10</sup> Exhibit I.

<sup>11</sup> Tr. 57–63.

<sup>12</sup> Exhibit 3.

<sup>13</sup> Tr. 100-101.

mental-health evaluation.<sup>14</sup> As previously discussed, Applicant did not present any documentary information concerning the criminal case.

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>15</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>16</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>17</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>18</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>19</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>20</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>21</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>22</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>23</sup>

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<sup>14</sup> Tr. 101–102.

<sup>15</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>16</sup> 484 U.S. at 531.

<sup>17</sup> Directive, ¶ 3.2.

<sup>18</sup> Directive, ¶ 3.2.

<sup>19</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>20</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>22</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>23</sup> *Egan*, 484 U.S. at 531.

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>24</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 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>25</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>26</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>27</sup> The overall concern under Guideline F 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>28</sup>

Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

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<sup>24</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>25</sup> Executive Order 10865, § 7.

<sup>26</sup> AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>27</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>28</sup> AG ¶ 18.

There is substantial evidence that Applicant has a history of financial problems or difficulties. His unfavorable financial history indicates inability or unwillingness to satisfy debts<sup>29</sup> and a history of not meeting financial obligations.<sup>30</sup> The facts are more than sufficient to establish these two disqualifying conditions. With that said, Applicant is able to overcome those matters because: (1) he made a good-faith effort to resolve the four consumer debts by settling them for lesser amounts; and (2) the unpaid business taxes and unpaid rent are both related to a business failure, which was a circumstance largely beyond Applicant's control and unlikely to recur in the future. For these reasons, Applicant's history of financial problems are no longer a concern.

But the criminal conduct is another matter. The fourth-degree sexual assault charge against Applicant is disqualifying under Guideline J for criminal conduct.<sup>31</sup> Without reliable documentary evidence to support his explanation, I cannot conclude that the incident was minor or caused by a misunderstanding. It seems rather odd or unlikely that Applicant was convicted of fourth-degree sexual assault based on a mere tap on the shoulder of a female employee. And it should be obvious, but it is nonetheless stated here, that an applicant who is unwilling or unable to produce and present relevant documentation concerning a criminal charge is not a good candidate for a security clearance. For these reasons, Applicant's history of criminal conduct cannot be mitigated and it remains a legitimate concern.

Applicant's history of criminal conduct raises doubt about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve that doubt in favor of protecting national security. 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-person concept.<sup>32</sup> In doing so, I considered Applicant's good employment record while working in a combat zone in support of the U.S. military. Nonetheless, the favorable matters are not enough to justify a conclusion that he met his ultimate burden of persuasion to obtain a favorable clearance decision.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a–1.f:	For Applicant

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<sup>29</sup> AG ¶ 19(a).

<sup>30</sup> AG ¶ 19(c).

<sup>31</sup> AG ¶ 31(c).

<sup>32</sup> AG ¶ 2(a)(1)–(9).

