



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 06-25655
)	
Applicant for Security Clearance)	

Appearances

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

May 12, 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 November 3, 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 and Guideline F for financial considerations. 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 Answer to the SOR was received on December 26, 2007, and he 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 23, 2008.

The record was kept open until April 25, 2008, to allow Applicant an opportunity to submit a copy of his military discharge paperwork (DD Form 214). It was timely submitted and forwarded by department counsel without objections. The DD Form 214 is admitted as Applicant's Exhibit F.

Findings of Fact

Under Guideline J, the SOR alleges that in December 2005 Applicant pleaded guilty to the federal offense of conspiracy to commit fraud relating to the Department of Housing and Urban Development (HUD) in violation of 18 U.S.C. § 371, and he was sentenced to two years of probation and ordered to serve 100 hours of community service. Applicant admits this allegation. Under Guideline F, the SOR refers to the conspiracy offense alleged under Guideline J and alleges that in 2005 Applicant filed a Chapter 7 bankruptcy case, which was discharged in 2006. Applicant admits these allegations. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 60-year-old employee of a federal contractor. He works as a field engineer and is responsible for maintenance and repair of equipment in the field. He has worked for his current employer since 2004. He worked for another federal contractor from 1997 to 2004. In addition, his employment history includes more than two decades of military service in the U.S. Army (Tr. 51–54; Exhibit F). He retired as a senior noncommissioned officer (NCO) at the pay grade of E7. His discharge paperwork reflects a solid and successful career as an Army NCO who specialized in the repair of air defense artillery equipment (Exhibit F).

Applicant's wife is 59 years old, and they have been married since 1972. They have no children. She is now a partner in a used-car business.

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's federal conviction stems from a HUD housing fraud scheme. According to Applicant, in 2002 he and his wife entered into a business agreement with a trusted friend, and they formed a corporation to buy foreclosed properties (Exhibit E). The general idea was to buy houses from banks, finance companies, and the HUD, and then sell the houses after making any necessary repairs. Applicant maintains that the business partner was buying HUD homes via straw purchasers without his knowledge.

In May 2005, Applicant, his wife, and three others were indicted by a federal grand jury (Exhibit 5). Applicant was charged in Counts 1 and 3 of the indictment. In Count 1, he was charged with the conspiracy offense as well as engaging in fraud or making a false statement for a HUD transaction in violation of 18 U.S.C. § 1010. In Count 3, he was charged with a making a false statement to a federal agency in violation of 18 U.S.C. § 1001.

On December 1, 2005, Applicant pleaded guilty to Count 1 for conspiracy to commit fraud relating to the HUD in violation of 18 U.S.C. § 371 (Exhibit 4). The court dismissed Count 3 based on the prosecution's motion. The court sentenced Applicant to serve probation for 24 months. Also, he was required to serve 100 hours of community service as a condition of probation. He served the probation without incident or violation. In December 2007, he was released from court-ordered supervision and all supervision requirements (Exhibit A). Applicant has no other history of criminal conduct.

Applicant's wife pleaded guilty on the same day. She was sentenced to serve probation for 4 years or 48 months. She is currently serving probation and is scheduled to remain on probation until about December 1, 2009.

Recently, Applicant and his wife received notice from the HUD that they owed a debt related to the sale of houses (Tr. 63-65). They paid \$11,000 to settle the matter, and it is pending final resolution. Besides the HUD debt, Applicant is aware of no current collection activity against him (Tr. 63).

Before pleading guilty, Applicant and his wife spent a large sum of money on legal fees. Each had a defense attorney, and Applicant puts the figure at about \$55,000 for legal fees (Tr. 38). This expense, along with his wife's job loss, resulted in Applicant and his wife seeking protection by pursuing the Chapter 7 bankruptcy case in which they listed total assets of about \$261,010 and total liabilities of about \$316,792. The bankruptcy court granted a discharge in January 2006.

In addition to Applicant's income as a field engineer, he receives about \$1,575 per month for his military retirement pay. He has about \$2,200 in a checking account and about \$30,000 in a 401(k) account (Tr. 57). Applicant is meeting his financial obligations and able to save money (Tr. 57). Three credit reports were admitted into evidence and none reflect a past-due, collection, or charged-off account (Exhibits 2, 3, and D). The most recent credit report from April 2008 reports a credit score of 646, which is considered "fair" (Exhibit D). He has two sizeable car loans and a mortgage payment, which are current and in good standing.

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-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

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.

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).

(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.

Analysis

Under Guideline J for criminal conduct,¹⁴ the 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

In general, a security concern is raised by Applicant's 2005 federal conviction. In particular, DC 1¹⁶ and DC 3¹⁷ apply against Applicant based on the grand jury indictment for multiple offenses and his subsequent guilty plea to the conspiracy offense. Although the sentence was limited to probation and community service, the conspiracy offense was a felony with a maximum punishment of imprisonment for five years.¹⁸ He completed probation a few months ago in December 2007. To sum up, the criminal conduct calls into question Applicant's judgment and his ability or willingness to comply with laws, rules, and regulations.

¹³ Executive Order 10865, § 7.

¹⁴ Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at 21.

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

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

¹⁸ 18 U.S.C. § 371 ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.").

The guideline provides that certain conditions¹⁹ may mitigate security concerns. The four potentially applicable MCs are as follows:

MC 1—so 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;

MC 2—the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

MC 3—evidence that the person did not commit the offense; and

MC 4—there 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.

He was indicted in 2005 for criminal conduct in about 2002, he pleaded guilty in 2005, and he completed his sentence to probation a few months ago. Given these circumstances, the criminal behavior is relatively recent. In addition, although the circumstances were unusual, it continues to cast doubt on his reliability, trustworthiness, or good judgment in light of the nature of the offense (conspiracy to commit fraud). Accordingly, MC 1 does not apply in Applicant's favor.

There is no evidence suggesting Applicant was pressured or coerced. Accordingly, MC 2 does not apply in Applicant's favor.

Applicant seems to suggest that he and his wife were duped by a trusted friend (Exhibit E). Nevertheless, Applicant, who was represented by an attorney, elected not to contest the case against him when he pleaded guilty. Applicant's federal felony conviction precludes consideration of evidence that he did not commit the offense to which he pleaded guilty.²⁰ Accordingly, MC 3 does not apply in Applicant's favor.

MC 4 applies in Applicant's favor because there is some evidence of reform and rehabilitation. He served probation without incident or violation and was released from court-ordered supervision on about December 1, 2007 (Exhibit A). He remained employed during the entire period, and he appears to have a good employment record (Exhibits B and C). He is working to recover from the financial problems resulting from his criminal case and his credit history is improving (Exhibit D). Before the federal indictment in 2005, he had no history of criminal conduct, and he had enjoyed a successful career in the Army (Exhibit F).

¹⁹ Revised Guidelines at 21–22.

²⁰ See ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006) (addressing the collateral-estoppel doctrine).

The SOR also alleges security concerns under Guideline F for financial considerations,²¹ where 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.”²² Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Although not a typical Guideline F case, the record evidence supports a conclusion that Applicant has a history of financial problems. First, Applicant’s Chapter 7 bankruptcy case is substantial evidence of inability to satisfy debts²³ and a history of not meeting financial obligations²⁴ within the meaning of the guideline. Second, Applicant’s federal conviction is substantial evidence of a deceptive or illegal financial practice within the meaning of the guideline.²⁵ Taken together, these circumstances call into question Applicant’s judgment, reliability, and trustworthiness.

The guideline provides that certain conditions²⁶ may mitigate security concerns, and those 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;

²¹ Revised Guidelines at 13–14 (setting forth the security concern and the disqualifying and mitigating conditions under Guideline F).

²² Revised Guidelines at 13.

²³ DC 1 is “inability or unwillingness to satisfy debts.”

²⁴ DC 3 is “a history of not meeting financial obligations.”

²⁵ 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 financial trust.”

²⁶ Revised Guidelines at 14.

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.

Based on the record evidence as a whole, MC 3 is most pertinent; the others do not apply in Applicant's favor.

The federal conviction, as discussed above, is relatively recent. Likewise, the Chapter 7 bankruptcy case is relatively recent because it was discharged about two years ago in January 2006. In addition, although the circumstances were unusual, it continues to cast doubt on his reliability, trustworthiness, or good judgment in light of the nature of the offense (conspiracy to commit fraud). Accordingly, MC 1 does not apply in Applicant's favor.

There is insufficient evidence to show that the conditions that resulted in the financial problems were beyond Applicant's control. Accordingly, MC 2 does not apply in Applicant's favor.

There are indications that Applicant's financial problems are being resolved or are under control. His financial condition has improved since the bankruptcy. He has no current past-due, collection, or charged-off accounts, and he is current with his bills. He has money in the bank and in a retirement account. And he appears to be living within his means. Accordingly, Applicant receives some credit under MC 3.

Finally, MC 4, MC 5, and MC 6 are inapplicable based on the facts of this case.

To sum up under the whole-person concept, this case presents both disqualifying and mitigating circumstances, which requires thoughtful balancing. First, Applicant is 60 years old and sufficiently mature to make prudent decisions. In other words, he had sufficient experience in the ways of the world to know what he was doing when he engaged in the activity that led to his federal conviction. Second, viewed individually, his federal conviction and his Chapter 7 bankruptcy case each raise doubts about his judgment, reliability, and trustworthiness. And viewed collectively, these circumstances raise serious doubts about his suitability for access to classified information. Third, Applicant receives credit for his lengthy record of honorable military service, the absence of workplace misconduct, his good employment record, and his otherwise

good record as a law-abiding citizen. But those matters are not enough to overcome or outweigh the security concerns raised by his federal conviction and the Chapter 7 bankruptcy case. The nature of the criminal offense is of special concern because it involved a conspiracy to commit fraud related to a department of the federal government. Although an unfavorable clearance decision may have an adverse effect on Applicant, his family, or his employer, it should come as no surprise to Applicant that the same federal government that prosecuted him for conspiracy to commit fraud now has serious doubts about his fitness for a security clearance. Based on the record evidence as a whole, a commonsense decision militates against Applicant and in favor of protecting national security.

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. 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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline F:	Against Applicant
Subparagraphs 2.a–2b:	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