



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



In the matter of:)
)
-----) ISCR Case No. 07-01634
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Ronald C. Sykstus, Esquire

April 30, 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 May 29, 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. 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. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2

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).

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 replied to the SOR on June 22, 2007, and again on November 30, 2007, when he formally requested a hearing. The case was assigned to me on December 20, 2007. The hearing was originally scheduled for January 31, 2008, but was rescheduled at Applicant's request. The hearing took place on March 13, 2008. The transcript (Tr.) was received on March 21, 2008.

The record was left open until April 11, 2008, to allow Applicant an opportunity to provide additional documentary information. Those matters were timely received and department counsel had no objections to admissibility. The post-hearing matters are collectively admitted as Applicant's Exhibit M, with parts 1 – 5, which correspond to the paragraphs numbered 1 – 5 in the cover letter.

Findings of Fact

Under Guideline F, the SOR alleges Applicant has a history of financial problems based on an unpaid judgment for \$7,018 and delinquent consumer debts ranging from \$146 to \$7,268, for a combined total of about \$38,000. In his Answer to the SOR, he denied the debts on the basis that they were resolved to the best of his knowledge. Also, he provided a letter to explain the circumstances that led to the financial problems. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 48-year-old employee of a federal contractor. He was recently promoted to the position of branch manager supporting a missile defense program. His educational background includes a bachelor's degree in business administration (Exhibit C). He has worked in his current job since December 2006 (Exhibit D). His employment history includes more than two decades of active duty military service as an Army officer, which ended in retirement in 2004. His performance reviews, awards, and other documentation reflect a topnotch Army officer who was highly regarded by his superiors (Exhibits A and B). After retiring from the Army, he worked as a federal employee until relocating to his current state of residence to care for his father, who passed away in June 2006 (Exhibit M, part 5).

Applicant is married and the father of four children. Two children, young adults, are from his first marriage that ended in divorce in 1991, when he was awarded custody of the children. He married again in 1992. He and his wife also had two children. Currently, three of the children are living in his household.

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).

His financial problems stem from the 2001–2003 period when Applicant was the commanding officer of a contract agency on the west coast of the U.S. (his speciality was procurement and acquisition). This position, equivalent to a battalion command, required Applicant to work long duty hours and travel away from home, to include an overseas deployment for several months. During this period, Applicant's wife was diagnosed as suffering from depression (Tr. 80–83). The psychiatrist who diagnosed her treated her with medications such as lithium and a sleeping aid. In addition, she was taking muscle relaxers and pain pills due to back problems.

Like many military couples, Applicant's wife was primarily responsible for managing the family finances, to include bill paying, to allow Applicant to focus on his career and in light of the potential for deployment anywhere in the world. Depressed, she began to miss payments and overspend with credit cards. She was under the care of a psychiatrist and a psychologist until she left the west coast. She has since been off all medications and is no longer under medical care for depression.

Applicant began to learn of the financial problems when he was deployed overseas in 2002 or 2003 when a credit-card purchase was refused. But he did not discover the full extent of the situation until about April 2004 (Tr. 40-41, 87–88). By that time, he had completed the overseas deployment and his command tour, and he and his family had returned to the east coast of the U.S. Applicant, then serving as a lieutenant colonel, completed a security-clearance application in August 2003 (Exhibit 1). He disclosed no adverse or derogatory information in response to any of the several questions about his financial record. He later learned the full extent of his financial problems several months later in April 2004, when he was interviewed during the background investigation.

Applicant retired from the Army in about September 2004. He did so due to a history of back problems, which twice required surgery. The second surgery in December 2003 resulted in a prolonged recovery period when he was taking pain medication. He was still having problems walking in March 2004. His treating physician suggested it was best for him to retire and he followed that advice. He received a 40% VA disability rating based on his back problems.

His history of financial problems dates back to his time in the Army and is established by several credit reports (Exhibits 4, 5, 6, 7, 8, and 9). The debts alleged in the SOR are addressed below.

The first debt is a judgment for \$7,018 (SOR ¶ 1.a). The lawsuit was brought in January 2005, and a default judgment was obtained in March 2005 (Exhibit 3). Applicant and his wife believe they paid this debt (Tr. 43–44). But the documentary information is inconclusive. A payoff letter from the creditor (a collection agency), addresses a different account (Exhibit I). The series of bank payments, totaling about \$6,000, that were made to this creditor began in April 2004 and ended in May 2005, and all but two of the payments predate the judgment (Exhibit M, part 2). In addition, the judgment appears as unresolved on the most recent credit reports from 2007 and 2008

(Exhibits 7, 8, 9, and M, part 1). Accordingly, without a satisfaction or release of judgment, a payoff letter, or some other conclusive documentation, the judgment for \$7,018 is unresolved.

The second debt is for a collection account for \$212 (SOR ¶ 1.b). It stems from a medical account that was overlooked between moves. It was paid in June 2007 (Exhibits F and M, part 1 at 4). Accordingly, this debt is resolved.

The third debt is a bad debt for \$567 (SOR ¶ 1.c). A credit report indicates the bad debt is based on an overdraft charge or claim by a bank (Exhibit 5 at 7–8). Applicant's spouse believes the debt is based on personal property tax that was added to a car lease when the car was returned under the terms of the lease (Tr. 46–50). She is certain that it has been paid based on her conversations with the bank and due to the fact that she and Applicant have accounts with this bank (See Exhibit M, part 4). Accordingly, the debt is resolved.

The fourth debt is a bad debt for \$614 (SOR ¶ 1.d). Applicant cleared this account with the creditor/bank in January 2008 (Exhibit K). The account number identified in the letter appears to match the account number in the credit report (Exhibits K and 7 at 2). Accordingly, this debt is resolved.

The fifth debt is a collection account for \$1,527 (SOR ¶ 1.e). It was paid with a payment of \$2,073 in December 2007 or January 2008 (Exhibit J). Accordingly, this debt is resolved.

The sixth debt is a bad debt for \$2,664 (SOR ¶ 1.f). It appears to stem from a credit card account that was charged off (Exhibit 5 at 4; Exhibit 6 at 5). Applicant and his wife believe they paid this debt (Tr. 51–52). But the relevant document does not contain an account number that matches the account number in the credit reports (Tr. 67; Exhibit K). Accordingly, this debt is unresolved.

The seventh debt is a bad debt for \$146 (SOR ¶ 1.g). It appears to stem from a gas credit card that went into collection (Exhibit 5 at 5; Exhibit 6 at 5). Applicant's spouse is certain the debt was paid some time ago (Tr. 52, 67–68). It does not appear on the credit reports from 2007 and 2008 (Exhibits 7, 8, 9, and M, part 1). Accordingly, this debt is resolved.

The eighth debt is a bad debt for \$1,654 (SOR ¶ 1.h). It appears to stem from a credit card that was charged off (Exhibit 5 at 6; Exhibit 6 at 6). Applicant's spouse paid this through a collection agency (Tr. 53–54). It does not appear on the credit reports from 2007 and 2008 (Exhibits 7, 8, 9, and M, part 1). Accordingly, this debt is resolved.

The ninth debt is a bad debt for \$383 (SOR ¶ 1.i). It appears to stem from a credit card that was charged off (Exhibit 5 at 6; Exhibit 6 at 6). This account was paid with a \$5,678 payment to a collection agency in November 2007 (Exhibit H). Accordingly, this debt is resolved.

The tenth debt is a bad debt for \$613 (SOR ¶ 1.j). It appears to stem from a credit card account that was charged off (Exhibit 5 at 6; Exhibit 6 at 7). It was paid through a collection agency with a payment of \$1,789 in May 2004 (Tr. 54; Exhibit M, part 2). Accordingly, this debt is resolved.

The 11th debt is a bad debt for \$4,275 (SOR ¶ 1.k). It appears to stem from an account that was charged off (Exhibit 5 at 7; Exhibit 6 at 7–8; Exhibit M, part 1 at 3). According to the January 2008 credit report, the account was charged off as of June 2002 with \$4,275 written off when it was purchased by another lender (Exhibit M, part 1 at 3). The account was paid off in December 2007 or January 2008 (Exhibit I). The payoff letter from the collection agency contains an account number that matches the account number in the credit reports. The January 2008 credit report indicates the account was paid to a collection agency in settlement for less than the full balance (Exhibit M, part 1 at 5). Accordingly, this debt is resolved.

The 12th debt is a bad debt for \$7,268 (SOR ¶ 1.l). It was paid by a series of payments to a collection agency (Tr. 55–56). The series of payments, totaling about \$6,000, began in April 2004 and ended in May 2005 (Exhibit M, part 2). This debt does not appear on the credit reports from 2007 and 2008 (Exhibits 7, 8, 9, and M, part 1). Accordingly, this debt is resolved.

The 13th debt is a bad debt for \$6,860 (SOR ¶ 1.m). It appears to stem from a credit card that was charged off (Exhibits 7, 8, 9, and M, part 1). Applicant's spouse believes this was paid off in 2006 (Tr. 56), but Applicant did not present paperwork to support that belief (Tr. 70–71). The January 2008 credit report—it is the most recent, complete, and understandable credit report in evidence—indicates that the account was charged off with a past-due balance of \$6,860 as of January 2008 (Exhibit M, part 1 at 5). Accordingly, this debt is unresolved.

The 14th debt is a bad debt for \$4,412 (SOR ¶ 1.n). It appears to stem from a credit card that was charged off (Exhibits 7, 8, 9, and M, part 1). This account was with the same creditor as SOR ¶ 1.m. Applicant's spouse believes this debt stemmed from a truck loan that they refinanced with another company, and it was paid in about August 2007 (Tr. 56–57, 71, 83–86; Exhibit G). The documentary information does not establish payment of this account. Exhibit G is proof-of-payment for an auto loan, whereas the 2007 and 2008 credit reports identify this debt as a credit card account (Exhibits 7, 8, 9, and M, part 1). Indeed, the January 2008 credit report indicates the account was charged off with a past-due balance of \$5,114 as of January 2008 (Exhibit M, part 1 at 5). Accordingly, this debt is unresolved.

Applicant earns an annual salary of about \$106,000, which includes a pay raise from his recent promotion (Exhibits M and Exhibit M, part 3). His military retirement pay is about \$35,000 per year (Exhibit M, part 3). In addition, he receives VA disability pay of about \$7,640 per year (Exhibit M). In total, his 2008 annual income is estimated at \$148,640. Applicant had about \$45,000 in the bank, most of it in a savings account, as of April 7, 2008 (Exhibit M, part 4).

In addition to his income and cash in the bank, Applicant will inherit a sizeable sum from his father's estate (Tr. 133–135; Exhibits M and M, part 5). He, along with his two sisters, will receive a one-third share of the estate, which consists of a home, 150 acres of land, life insurance proceeds, certificates of deposit, and a couple of vehicles. His share could be anywhere from \$200,000 to \$300,000.

Applicant takes responsibility for the financial problems. He attributes the problems to being too detached, spending too much time on his career and his military duties and not enough time on his family responsibilities. He is now more involved with the family finances, as he and his wife are discussing bills as they arrive, putting money into a savings account, and planning on participating in a 401(k) account (Tr. 132–133).

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 and retention of any existing security clearance.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

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.

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.

Analysis

Under Guideline F for financial considerations,¹⁴ 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."¹⁵ 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. His history raises security concerns because it indicates inability to

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.

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

¹⁵ Revised Guidelines at 13.

satisfy debts¹⁶ and a history of not meeting financial obligations¹⁷ within the meaning of Guideline F. As a retired Army officer and former commanding officer, Applicant knows that he is ultimately responsible for his family's finances. While the mission is of key importance, living in the real world means real-world problems, including financial problems. Applicant was far too detached and irresponsible in his duty—as both a military officer and husband—to keep his financial house in good order. He is still a bit tone deaf in this regard, as evidenced by the four unresolved debts, the lack of complete documentation in this case, and by placing too much of the responsibility for the finances on his wife. Taken together, these circumstances call into question Applicant's judgment, reliability, and trustworthiness.

The guideline provides that certain conditions 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;

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.¹⁸

Based on the record evidence as a whole, MC 1, MC 3, and MC 4 apply in Applicant's favor; the others do not. The applicable MC are discussed below.

¹⁶ DC 1 is "inability or unwillingness to satisfy debts."

¹⁷ DC 3 is "a history of not meeting financial obligations."

¹⁸ Revised Guidelines at 14.

MC 1 applies because Applicant's financial problems began some years ago during 2001–2003 when Applicant's wife suffered from depression, mismanaged the family finances, and Applicant was too detached to be fully aware of the situation. Those circumstances are unlikely to repeat because Applicant is no longer serving in the Army with its demands, he is more involved in the family finances, and his wife is no longer suffering from depression. The financial problems do not cast doubt on his current reliability, trustworthiness, or good judgment because he has resolved 10 of the 14 debts. And he has more than sufficient means to resolve the four unresolved debts should additional payments be required.

MC 3 applies because there are clear indications that the problems are being resolved and are under control. He resolved 10 of the 14 debts. His current financial condition is stable and under control. He has a six-figure annual income, money in the bank, and more money to come via the inheritance. He is not overextended nor living beyond his means. His overall financial condition has measurably improved.

MC 4 applies because he took positive steps to resolve his financial problems by resolving 10 of the 14 debts. Although four debts are unresolved, his actions to date are sufficient to qualify as a good-faith effort.

To sum up under the whole-person concept, this case presents both disqualifying and mitigating circumstances, which requires thoughtful balancing. First, Applicant is 48 years old and sufficiently mature to make prudent decisions about his finances, bill paying, and money-management practices. Second, Applicant and his wife may believe they have resolved all the debts at issue in the SOR, but the record evidence is inconclusive. Resolving all the debts may require further payments or cleaning up a credit report, but work remains and it appears Applicant is motivated to do it. And third, Applicant has more than two decades of honorable military service as a topnotch Army officer (Exhibits A and B). This circumstance strongly suggests that he has the requisite self-control, good judgment, reliability, trustworthiness, and ability to protest classified information. In other words, the potential for pressure, coercion, exploitation, or duress in a security-clearance context is remote.

After weighing the record evidence as a whole, Applicant did present sufficient evidence to explain, extenuate, or mitigate the security concerns. He did not present a perfect case in mitigation, but it is sufficient to mitigate the security concerns. Applicant met his 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:
Subparagraphs 1.a–1.n:

For Applicant
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