



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



In the matter of:)
)
-----) ISCR Case No. 07-08792
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

April 15, 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 16, 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 and Guideline E for personal conduct (falsification). 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

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).

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 replied to the SOR on November 23, 2007, and he requested a hearing. The case was assigned to me on January 17, 2008. The hearing took place as scheduled on March 12, 2008. The transcript (Tr.) was received on March 20, 2008.

Findings of Fact

Under Guideline F, the SOR alleges Applicant has a history of financial problems as follows: (1) he pleaded guilty in 1996 in state court to a charge of willful failure to file and/or pay withholding tax, and he was sentenced to two years of probation; (2) his software company filed for Chapter 11 bankruptcy in 1996, and the case was terminated in 1997; (3) he filed for Chapter 13 bankruptcy in 1997, and he received a discharge in 2002; and (4) he owes a large IRS debt. In his Answer, he admitted the allegations with explanations. Under Guideline E, the SOR alleges Applicant made a false statement about his employment with a government agency during the Chapter 11 bankruptcy case. He denied this allegation with an explanation. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 59-year-old senior software engineer for a company engaged in defense contracting (Exhibits 1 and B). His educational background includes a master's degree in electrical engineering. He has worked in this job from October 1996 to present. He has held a security clearance in the past, and he understands that his current application is for a top-secret security clearance.

In October 1997, Applicant completed a security-clearance application for his employment with his current employer (Exhibit D). In doing so, he disclosed his overlapping or dual employment with the government agency and his self-employment during the 1989–1996 period. He disclosed his guilty plea to the tax offense. And he disclosed several financial problems (bankruptcy, tax liens, etc.). He completed his current security-clearance application in November 2006 (Exhibit 1). In doing so, he disclosed a federal tax lien, which he described as a 100% penalty that the IRS was not actively pursuing. He also stated that he had saved and invested sufficiently to pay off the debt and intended to do so in the near future.

His relevant employment history is set forth in his Answer and Exhibits 1 and D. He worked as an engineer for a federal governmental agency from March 1989 to March 1995. While working for the government, he was also self-employed running his

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).

software company until it went out of business. Since October 1996, he has worked in his current job. Concerning the self-employment, in about 1986 he started work to develop computer installation software. In 1989, he incorporated and ran the company out of his house, assisted by his wife. The company grew, and in 1990 he moved it into a commercial office building and had as many as 12 full-time employees. In March 1995, he left his government job to work in the company.

The company encountered problems that resulted in negative cash flow (Exhibit 2). The result was an inability to service the company's debt. In turn, Applicant used personal guarantees of loans and personal credit cards to keep the company afloat. His efforts were unsuccessful, and he ended up in state criminal court and federal bankruptcy court.

In June 1996, Applicant was charged with willful failure to file and/or pay withholding tax for his company (Exhibit 7). Applicant pleaded guilty in state court and was sentenced to a \$10 fine or fee, 30 days in jail (suspended), and probation for two years. He served the probation without a violation.

In November 1996 (a month after he started his current job), the company sought relief in bankruptcy court under Chapter 11, which provides for reorganization of business debt (Exhibit 4). In April 1997, a plan of reorganization was submitted and it included a disclosure statement that Applicant signed (Exhibit 6). Under the subheading for company history, the disclosure statement described Applicant's employment history, in relevant part, as follows: "In 1989, [Applicant] went to work for [the government agency], leaving in 1990 to form the [company]." The statement is factually incorrect, because he did not leave his government job until March 1995. Although Applicant signed the disclosure statement, he did not prepare it and he did not intend to deceive or misrepresent his employment history in the bankruptcy case (Tr. 49–57).

In April 1997, Applicant sought relief in bankruptcy court under Chapter 13, which provides an individual debtor an opportunity to repay creditors under a court-approved plan (Exhibits 5 and 6). The Chapter 13 case was a companion case with the Chapter 11 case (Exhibit 4). The Chapter 13 paperwork described Applicant as an employee with a defense contractor for the last seven months (and is still his employer today) (Exhibits 5 and 6–Schedule I). In June 1997, the bankruptcy court confirmed the Chapter 13 repayment plan with \$750 monthly payments for 60 months (Exhibit 5).

A few months later in August 1997, the bankruptcy court confirmed the Chapter 11 reorganization plan (Exhibit 4). It appears that the debts followed Applicant to the Chapter 13 plan (See Exhibits 2, 4, and 5–Exhibit A to confirmation order). Thereafter, Applicant made the required \$750 monthly payments while working for his current employer, and upon completion of the Chapter 13 plan he received a discharge in bankruptcy in July 2002.

The business failure also resulted in debts to state and federal tax authorities. Those debts are now resolved. His plan to pay off the IRS debt was to withdraw the

necessary funds from retirement accounts (Answer). But that did not happen, and Applicant presented documentary evidence and credible testimony that the IRS debt was otherwise resolved (Exhibits A and C, Tr. 46-49, 52, 63-64). In particular, the IRS, by letter, informed Applicant that his federal income taxes are paid in full as of March 4, 2008 (Exhibit A). In summary, it appears the federal tax lien(s) expired or self-released (or both), the IRS did not re-file, and the IRS did not seek collection through other means. Indeed, a federal tax lien is not reported in a March 2008 credit report; also, the same report shows the state tax liens were paid and released (Exhibit C—Transunion credit report).

Applicant earns an annual salary of \$82,000, and his wife earns about \$42,000 working as an office manager. He now has a good credit history, as reflected in the March 2008 credit reports (Exhibit C). He has no derogatory, unsatisfactory, delinquent, or past-due accounts; he has a credit score of 794 on a scale of 330-830, which means that 99% of the U.S. credit active population has a lower score (Exhibit C—Experian credit report).

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

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).

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.

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.

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.

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.

The record evidence supports a conclusion that Applicant has a history of financial problems. His history raises security concerns because it indicates inability to satisfy debts¹⁶ and a history of not meeting financial obligations¹⁷ within the meaning of Guideline F. In addition, his 1996 guilty plea to a state tax offense also raises a concern.¹⁸ 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.¹⁹

Based on the record evidence as a whole, MC 1 through MC 4 apply in Applicant's favor; MC 5 and MC 6 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 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 financial breaches of trust."

¹⁹ Revised Guidelines at 14.

MC 1 applies because the underlying behavior that led to the financial problems took place years ago when the business failed. Those circumstances are unlikely to repeat because Applicant is no longer operating the same or a similar business and has no plans to do so again. It does not cast doubt on his current reliability, trustworthiness, or good judgment because he has addressed and resolved the financial problems.

MC 2 applies because Applicant's financial problems resulted from a failed business, which was largely beyond his control. He acted as a reasonable businessperson should under the circumstances by seeking relief in bankruptcy court, first in Chapter 11 proceedings and then in Chapter 13 proceedings. And he satisfied the Chapter 13 repayment plan by paying \$45,000 per the five-year plan.

MC 3 applies because there are clear indications that the problems are resolved and under control. He successfully completed the Chapter 13 repayment plan and paid his state tax debt. The IRS debt has been resolved. His current financial condition is stable and under control as evidenced by the six-figure household income and a vastly improved credit history.

MC 4 applies because he took positive steps to resolve his financial problems. He successfully completed the Chapter 13 repayment plan and paid off his state tax debt. He was prepared and willing to pay off the IRS debt and took action to do so only to discover it was resolved. And there is no indication that he calculated or manipulated to obtain this result. Taken together, these circumstances fall within the meaning of a good-faith effort.

To sum up, Applicant experienced serious financial problems directly related to his small business. When it failed, he took a job with a defense contractor and used that income to make his Chapter 13 payments and meet his other financial obligations. And he resolved his tax debts. All of these matters are substantial evidence in mitigation. In addition, the likelihood that similar financial problems will recur is remote. Accordingly, for all these reasons, Guideline F is decided for Applicant.

Personal conduct under Guideline E²⁰ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide

²⁰ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions under Guideline E).

truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.²¹

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if it is the result of an honest mistake, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

At issue here is the truthfulness of Applicant's employment history (the dates of employment) with a government agency as recited in a disclosure statement for the Chapter 11 bankruptcy case (SOR ¶ 2.a). Applicant denied an intent to deceive or misrepresent his employment history in the document. His denial and explanation are credible. The disclosure statement is the type of legal document typically prepared by a bankruptcy attorney, paralegal, or clerk or all three. The incorrect information resulted from an oversight by Applicant when he reviewed and signed the disclosure statement. He should have caught the error, but it was nothing more than an honest mistake. Experience in the ways of the world and the practice of law suggest that he was not the first client (nor will he be the last) to have to account for a mistake attributable to his lawyer. To sum up, Applicant refuted the falsification allegation. In light of this failure of proof, Guideline E is decided for Applicant.

To conclude, Applicant did present sufficient evidence to rebut, explain, extenuate, or 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:

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|---------------------------|---------------|
| Paragraph 1, Guideline F: | For Applicant |
| Subparagraphs 1.a–1d: | For Applicant |
| Paragraph 2, Guideline E: | For Applicant |
| Subparagraph 2.a: | For Applicant |

²¹ Revised Guidelines at 10.

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