



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



In the matter of:)
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SSN: -----) ISCR Case No. 07-10867
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Greg D. McCormack, Esquire

July 10, 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 December 19, 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 E for personal conduct. 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's Answer to the SOR was received on January 25, 2008, and he requested a hearing. The case was assigned to me on March 7, 2008. At the request of Applicant's counsel, the hearing took place on June 3, 2008. The transcript (Tr.) was received on June 13, 2008. A corrected version of the transcript was received on July, 7, 2008.³ Citations to the transcript refer to the corrected version.

Findings of Fact

Under Guideline E, the SOR alleges a single allegation based on a dispute between Applicant and a former employer, and it is summarized as follows:

In August 2005, you were sued in federal district court by Company A, your employer from April 2005 to August 2005, for breach of contract, conversion, and breach of fiduciary duty. The lawsuit was settled before trial when you agreed to pay Company A \$55,000, to show where files were stored on the company's server, to allow examination of your personal computer, to not work at three military facilities for two years, and to not work on the contract you had been working on at Company A.

In his Answer, Applicant admits the allegation, and the allegation is likewise established by the record evidence. In addition, the following facts are established by substantial evidence.

Applicant is a 61-year-old employee of a federal contractor. He has worked for his current employer since August 2005. His current position or job title is director of business development. He has been married to the same woman for nearly 40 years, and he and his spouse have two adult children.

He is seeking to obtain an industrial security clearance for his current employment. He completed a security-clearance application in December 2005 (Exhibit 1). In doing so, he disclosed the lawsuit brought by his former employer. He explained that part of the lawsuit had been dismissed and other allegations were pending resolution. The lawsuit stemmed from his four-month period of employment with Company A in 2005.

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).

³ The corrected version of the transcript identifies the administrative judge by the correct name.

On March 14, 2005, Applicant was hired to fill the position of program director for a particular contract of Company A. He was hired as an at-will employee, meaning that he could resign at any time with or without notice or cause, and his employment could be discontinued at any time with or without notice or cause (Exhibit F–part 1). On March 15, 2005, he signed an employment agreement that included non-competition and non-solicitation clauses (Exhibit F–part 2).

He started work the following month. He reported directly to the company president/CEO and he understood he would have reasonable access to the CEO for that purpose. He found it difficult to establish a working relationship with the CEO, as he had limited access or communication with the CEO. For example, Applicant does not recall the CEO ever answering an e-mail. In short, he soon found his new position to be a disappointment.

In late July and early August 2005, Applicant was offered and accepted his current position. On about August 3rd, he informed the CEO of his decision to resign. The discussion ended with some animosity when the CEO learned Applicant had accepted a job with his current employer. The CEO told Applicant he was to depart that day and the CEO escorted him to the door (Applicant had offered notice of two weeks). Upon his departure, Applicant recalls the CEO telling him “I wish the blessings of Jesus on you, but my lawyer is going to hunt you down and I’m going to sue you” or words to that effect (Tr. 79).

A few weeks later on August 25th, Company A brought a civil action against Applicant in federal district court (Exhibit 2–complaint). The lawsuit alleged that after Applicant’s resignation, Company A discovered that Applicant had removed confidential files, deleted confidential electronic files and e-mails, and electronically transferred confidential files and e-mails to his personal e-mail account. Based on these matters, the lawsuit alleged three causes of action: (1) breach of contract by violating terms of an employment contract; (2) conversion by wrongfully exercising control of the company’s documentation concerning a particular program; and (3) breach of fiduciary duty to his employer. The lawsuit sought to obtain, among other things, \$500,000 in compensatory damages and \$500,000 in punitive damages. Applicant denied the claims and filed a counterclaim alleging entitlement to unpaid salary and expenses.

According to the company president of Applicant’s current employer, the position offered to Applicant was not related to the contract he had worked on for Company A (Exhibit B–president’s statement). Nevertheless, the lawsuit was heavily litigated with Applicant’s current employer paying the litigation costs, estimated at about \$75,000. The firm’s chief operating officer and general counsel characterized the allegations against Applicant as “totally baseless, abusive, and bordered on ludicrous” (Exhibit B–general counsel’s statement).

In November 2005, the court granted Applicant’s partial motion to dismiss the breach of contract claim that was based on the non-competition and non-solicitation clauses of the employment agreement (Exhibit A–memorandum opinion and order). The

court granted the motion to dismiss because the non-competition and non-solicitation clauses were overbroad and unreasonable, and therefore not enforceable against Applicant. In addition, the court dismissed Company A's request for injunctive relief requesting Applicant be prohibited from accepting employment with a competitor of Company A.

In time, Applicant's employer decided to no longer pay the litigation costs and Applicant would have to cover that expense, which was estimated at another \$100,000 to bring the case to trial (Exhibit B—general counsel's statement; Tr. 71–73). Applicant decided the best course of action was to settle the case to minimize the damage (Tr. 73). In the opinion of the general counsel, settlement had nothing to do with the merits of the lawsuit, but was a way to end the “senseless litigation” pursued by Company A (Exhibit B—general counsel's statement).

The lawsuit was settled in February 2006 (Exhibit A—settlement agreement). Applicant agreed to pay Company A \$55,000 and abide by other terms. The case was settled without an admission of liability by either Applicant or Company A. Accordingly, the court ordered that the case be dismissed with prejudice as settled (Exhibit A—final order). Applicant has complied with the terms of the settlement agreement, to include paying the \$55,000.

Applicant's new job resulted in a salary decrease of about \$20,000 annually (Tr. 115–116). He is now earning about \$12,000 less per year than when he was employed by Company A.

Applicant's employment history includes approximately 31 years of military service, including about 25 years on active duty in the Army (Exhibit D). His service includes a 12-month tour of duty in Vietnam during 1968–69 when he participated in more than 25 aerial missions over hostile territory as a helicopter pilot. He also served in Panama and was involved in the operational planning for Operation Just Cause. His documentary exhibits reflect a successful and distinguished career as a military officer that ended with his retirement as a colonel (Exhibit D). He held a security clearance, at various levels, during his military service (Tr. 34–35). In addition to his military service, Applicant presented several character statements vouching his suitability for a security clearance (Exhibit C).

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.⁴ As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, “the

⁴ *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.”).

clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁶ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.⁷ 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.⁸ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹¹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹² The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹³

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

⁵ *Egan*, 484 U.S. at 531.

⁶ Directive, ¶ 3.2.

⁷ Directive, ¶ 3.2.

⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁹ Directive, Enclosure 3, ¶ E3.1.14.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

¹² *Egan*, 484 U.S. at 531.

¹³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

clearance is not a determination of an applicant's loyalty.¹⁴ 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

Personal conduct under Guideline E¹⁵ 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 truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.¹⁶

The gravamen of the SOR is an employment dispute between Applicant and Company A. The dispute resulted in Company A bringing a federal lawsuit and Applicant responding with denials of wrongdoing and a counterclaim. The parties settled the case with Applicant agreeing to pay \$55,000 as contrasted with the \$1 million in damages sought by Company A. In settling the case, neither Applicant nor Company A admitted liability. These circumstances raise a potential security concern under Guideline E's DC 4, which provides as follows:

Credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; and, (4) evidence

¹⁴ Executive Order 10865, § 7.

¹⁵ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁶ Revised Guidelines at 10.

of significant misuse of Government or other employer's time or resources.¹⁷

Given the substantial-evidence standard, the totality of facts and circumstances surrounding the lawsuit raise concerns about Applicant's judgment, trustworthiness, and reliability. Because the case was settled without an admission of liability, the lawsuit did not establish if Applicant breached a duty to Company A, it did not establish if Applicant released propriety or sensitive corporate information, and it did not establish if Applicant violated the terms of the non-competition and non-solicitation clauses, which the federal court ruled were overbroad and unenforceable. Nevertheless, Applicant's resignation and the resulting lawsuit justify scrutiny of his security suitability.

All of the MC under Guideline E have been reviewed and given due consideration. The most pertinent is MC 3, which provides as follows:

The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.¹⁸

MC 3 applies in Applicant's favor for several reasons.

First, it applies because this dispute stems from Applicant's employment with Company A during April–August 2005, about three years ago, and the lawsuit was settled in February 2006, more than two years ago. Although it is not ancient history at this point, it is sufficiently in the past to be considered not recent. Second, it applies because this dispute is the only blemish on what is otherwise an outstanding military and employment record. On that basis, it is considered an infrequent or isolated incident. Third, it applies because the dispute happened under the unique circumstances of Applicant's employment with Company A and it is unlikely to recur. Indeed, nothing in his military or employment record suggests otherwise. Fourth, it applies because the dispute no longer casts doubt on Applicant's reliability, trustworthiness, or good judgment. The dispute was resolved more than two years ago when the parties agreed to settle the case without a trial on the merits and without an admission of liability, and the lawsuit was dismissed with prejudice. Accordingly, the current security significance of the dispute is diminished.

This case presents both unfavorable and favorable evidence, which requires thoughtful balancing in light of the whole–person concept and the clearly-consistent standard. I have considered the totality of facts and circumstances and conclude the favorable evidence is persuasive. In reaching this conclusion, I gave due consideration to Applicant's record of honorable military service as a highly professional and

¹⁷ Revised Guidelines at 11.

¹⁸ Revised Guidelines at 11.

successful Army officer. This circumstance suggests that he has the requisite self-control, good judgment, reliability, trustworthiness, and ability to protect classified information.

To conclude, Applicant presented 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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