



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



In the matter of: )  
 )  
----- ) ISCR Case No. 07-13547  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel

For Applicant: Alan V. Edmunds, Esq.

September 16, 2009

**Decision**

LEONARD, Michael H., Administrative Judge:

This is a security clearance case in which Applicant contests the Defense Department’s intent to revoke his eligibility for an industrial security clearance. The action is based on psychological conditions, security violations, and foreign influence security concerns. The security violations and foreign influence concerns are resolved in Applicant’s favor. For the psychological conditions, it is undisputed that Applicant suffers from bipolar disorder, and he has been under the care of a psychiatrist since 2005. Applicant did not meet his burden to present sufficient evidence to explain, extenuate, or mitigate the security concerns raised by his bipolar disorder. Accordingly, as explained in more detail below, this case is decided against Applicant.

## Statement of the Case

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) to Applicant on December 17, 2008. The SOR is equivalent to a complaint and it details the factual basis for the action. The SOR alleged security concerns under Guideline I for psychological conditions, Guideline K for handling protected information, and Guideline B for foreign influence. The SOR also recommended submitting the case to an administrative judge for a determination to deny or revoke Applicant's security-clearance eligibility.

Applicant answered the SOR on January 13, 2009, and requested a hearing. The case was assigned to another administrative judge on April 14, 2009, and a hearing was scheduled for May 19, 2009. The hearing was cancelled and the case was reassigned to me on May 5, 2009. The hearing then took place as scheduled on June 16, 2009. The hearing transcript (Tr.) was received June 24, 2009.

## Procedural Matters

Administrative or official notice was taken of certain facts concerning the country of Malaysia as set forth in Department Counsel's written request.<sup>2</sup> Also, administrative or official notice was taken of certain facts from the DSM-IV-R.<sup>3</sup>

## Findings of Fact

In his Answer to the SOR, Applicant admitted, with explanations, the allegations except for the allegation in SOR ¶ 3.b. His admissions are incorporated herein as findings of fact. Based on the record as a whole, the following facts are established by substantial evidence.

Applicant is a 50-year-old software engineer. He has worked in the defense industry, initially as a government employee and then as a defense contractor, since 1984. He has worked for the same company since 1998. His educational background includes a master's degree in electrical engineering. He is married to his second wife; his first wife is deceased. He has two minor children from his current marriage.

---

<sup>1</sup> This case is adjudicated under 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). In addition, because the SOR was issued after September 1, 2006, the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005, then made effective within the Defense Department on September 1, 2006, apply to this case. They supersede or replace the guidelines published in Enclosure 2 to the Directive.

<sup>2</sup> Exhibit 6.

<sup>3</sup> Exhibit 7.

Applicant has held a security clearance since about 1984. To retain a clearance, he completed a security-clearance application in February 2007.<sup>4</sup> In doing so, he reported, among other things, (1) his involvement in a 2006 security incident, and (2) that he was under the care of a psychiatrist for bipolar disorder since 2005.

In addition to those matters, Applicant disclosed during the security-clearance process that his mother-in-law, sister-in-law, and nephew are citizens of Malaysia. His wife was born in Malaysia, and she became a U.S. citizen in 1991. His mother-in-law now lives in Malaysia, she is in her 70s, and Applicant describes her as “completely illiterate” who has no connections to any Malaysian governmental agency.<sup>5</sup> Applicant and his wife do not provide financial support to her. Applicant’s sister-in-law is now married to a U.S. citizen and lives in the U.S.<sup>6</sup> His sister-in-law has no connections to any Malaysian governmental agency. Applicant’s nephew is a citizen of and a resident in Malaysia.<sup>7</sup> Applicant and his wife stay in contact with the nephew because he is an orphan, but their contact is limited. Applicant has not seen the nephew since 1995, when he was eight years old. The communication is typically via e-mail on birthdays and holidays. Applicant has no other connections with individuals in Malaysia, and he has no business, financial, or property interests in Malaysia.

Turning back to the 2006 security incident, the best evidence of this matter is the disciplinary paperwork generated by Applicant's employer.<sup>8</sup> In summary, the employer found Applicant, who was the area information system security officer (ISSO), culpable of a security violation because he performed an unauthorized electronic download and subsequently removed classified data from a secure system and area. Initially, it was believed that there was no classified data contained in the file. Later, it was determined that the file did contain data that was classified. As alleged in the SOR and admitted by Applicant, this matter involved two separate incidents. The first was when Applicant connected a stand-alone unapproved PC to an approved stand-alone classified system without permission. The second was when Applicant connected an uncertified PC to a classified system without permission. As a result, the employer suspended Applicant without pay for five days and warned him that any additional violations would result in further disciplinary action, to include termination. The disciplinary paperwork indicates no previous disciplinary actions, and the record contains no evidence of any other security violation by Applicant.

---

<sup>4</sup> Exhibit 1.

<sup>5</sup> Tr. 66.

<sup>6</sup> Tr. 68.

<sup>7</sup> Tr. 67.

<sup>8</sup> Exhibit 5.

Concerning bipolar disorder,<sup>9</sup> Applicant was first diagnosed with this condition in 2005, when he sought help and treatment from a psychiatrist. The Agency referred Applicant for an independent psychiatric evaluation in August 2008. The psychiatrist did not appear as a witness, and so the facts below are derived from the written report.<sup>10</sup> In addition, a curriculum vitae or resume was not attached to the report or otherwise offered as evidence, and so specific details about the doctor's knowledge, skill, experience, training, or education in the field of psychiatry in general and in treating bipolar disorder are unknown.

The diagnosis was bipolar I mixed moderate, and the Agency's psychiatrist also observed that Applicant was cutting his 500-mg medication in half and suggested Applicant take the medication in three 250-mg pills to obtain the full benefit from the medicine. The psychiatrist opined that Applicant was not stable so long as he continued to cut the medicine, but this could be cured by taking the medicine properly (three 250-mg pills). The psychiatrist also opined that Applicant's bipolar disorder (1) was not causing now or in the future a significant defect in judgment or reliability, and (2) was not causing now or in the future a significant defect in psychological, social, or occupational functioning.<sup>11</sup> The prognosis was to continue seeing his psychiatrist.

Applicant remains under the care of his psychiatrist, and he sees the doctor about once every three months.<sup>12</sup> The doctor did not appear as a witness, and so the facts below are derived from a one-page letter, dated June 15, 2009.<sup>13</sup> The letterhead indicates the doctor is associated with the American Board of Psychiatry and Neurology, but otherwise specific details about the doctor's knowledge, skill, experience, training, or education in the field of psychiatry in general and in treating bipolar disorder are unknown; again, a curriculum vitae or resume was not attached to the letter or otherwise offered as evidence. The psychiatrist's letter is addressed to whom it may concern and consists of five sentences in two paragraphs as follows:

I have been following [Applicant] since June 10, 2005, for a diagnosis of Bipolar disorder. His current medication is [medicine] 750 mg daily and his most recent [medicine] level was 57 on February 11, 2009.

My last appointment with [Applicant] was on May 1, 2009, and he was doing very well, with overall mood, sleep and thought processes. He has

---

<sup>9</sup> See Exhibit 7 for information on bipolar disorder.

<sup>10</sup> Exhibit 4.

<sup>11</sup> Exhibit 4, p. 7.

<sup>12</sup> Tr. 129–132.

<sup>13</sup> Exhibit AA.

been compliant with his treatment regimen and keeps appointments regularly. Currently, his prognosis is good.<sup>14</sup>

Applicant has been on the three 250-mg pills daily regimen since about October 2008.<sup>15</sup> He has taken the medication consistently without exception.<sup>16</sup> Applicant understands that the course of his treatment will be staying on bipolar medication for the rest of his life.<sup>17</sup>

## Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, the only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information.

It is well-established law that no one has a right to a security clearance.<sup>18</sup> As noted by the Supreme Court 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.”<sup>19</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>20</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>21</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>22</sup> The government has the burden of presenting

---

<sup>14</sup> Exhibit AA.

<sup>15</sup> Tr. 85.

<sup>16</sup> Tr. 89.

<sup>17</sup> Tr. 130.

<sup>18</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>19</sup> 484 U.S. at 531.

<sup>20</sup> Directive, ¶ 3.2.

<sup>21</sup> Directive, ¶ 3.2.

<sup>22</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.<sup>23</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>24</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>25</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>26</sup> The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>27</sup>

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 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.<sup>28</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

### **Analysis**

The gravamen of this case is whether Applicant's suitability for access to classified information is questioned or put into doubt due to his ongoing mental-health condition of bipolar disorder. But before addressing that issue, it is necessary to address the other guidelines set forth in the SOR.

Concerning foreign influence under Guideline B,<sup>29</sup> Applicant does have family ties, via his marriage, to Malaysia that fall within the scope of the guideline as potentially disqualifying matters. But based on this record, coupled with Applicant's longstanding ties and faithful service to the U.S., his family ties to Malaysia are rather bland and

---

<sup>23</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>24</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>25</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>26</sup> *Egan*, 484 U.S. at 531.

<sup>27</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>28</sup> Executive Order 10865, § 7.

<sup>29</sup> Revised Guidelines, ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

benign and do not create a heightened risk of exploitation due to foreign influence. Accordingly, Guideline B is decided for Applicant.

Concerning handling protected information under Guideline K,<sup>30</sup> Applicant's security incident in October 2006, which was based on two separate incidents, falls within the scope of the guideline as potentially disqualifying matters. The record shows this was a serious matter as reflected by the employer-imposed punishment. The record also shows Applicant is no longer serving as the ISSO, he has a favorable (if not hyper-sensitive) attitude toward security responsibilities, and there are no other similar incidents in his background. Taken together, these two security violations in the same month during a 25-year career in the defense industry are not so singularly egregious that Applicant should be disqualified on this basis. Accordingly, Guideline K is decided for Applicant.

Under Guideline I,<sup>31</sup> the suitability of an applicant may be questioned or put into doubt due to an applicant's psychological conditions. The overall concern under the guideline is that:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this guideline may be raised solely on the basis of seeking mental health counseling.<sup>32</sup>

The guideline provides for three conditions that could raise security concerns and may be disqualifying. The three conditions are as follows:

Behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior;

An opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness; and

---

<sup>30</sup> Revised Guidelines, ¶¶ 33, 34, and 35 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>31</sup> Revised Guidelines, ¶¶ 27, 28, and 29 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>32</sup> Revised Guidelines, ¶ 27.

The individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g., failure to take prescribed medication.<sup>33</sup>

In SOR ¶¶ 1.c and 1.d, the Agency alleged and Applicant admitted behavior that appears somewhat odd or strange. Because Applicant admitted the behavior, it was not addressed in detail in the findings of fact. It was not alleged in the SOR, but it was certainly implied or suggested by the Agency's case at hearing that the behavior was a manifestation of or related to Applicant's bipolar disorder. The record does not persuade me that is the case despite that the behavior in question was odd or strange. The Agency's psychiatrist did not address this behavior in the evaluation.<sup>34</sup> And no other evidence (for example, expert witness testimony) was produced to show that the behavior in question was a manifestation of or related to Applicant's bipolar disorder, and I cannot assume it to be the case. Accordingly, on this basis, the first DC concerning paranoid or bizarre behavior does not apply against Applicant.

But both the second and third DC apply against Applicant. They apply because, as I read the evaluation in its entirety, the Agency's psychiatrist found Applicant was unstable in August 2008 due to cutting his prescribed medication.<sup>35</sup> Given these circumstances, security concerns about Applicant's judgment, reliability, or trustworthiness are justified.

The guideline also provides the certain facts and circumstances may mitigate security concerns. The five mitigating conditions under the guideline are:

The identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

The individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

Recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

---

<sup>33</sup> Revised Guidelines, ¶ 28 (a) – (c).

<sup>34</sup> Exhibit 4.

<sup>35</sup> Exhibit 4.



The past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability; and

There is no indication of a current problem.<sup>36</sup>

The record supports application of the first, second, and third mitigating conditions in Applicant's favor. Based on this record, however, I am not persuaded that Applicant's condition of bipolar disorder is wholly mitigated and no longer an ongoing security concern. What is missing here is persuasive and convincing evidence that Applicant's condition is under control and will remain so for the foreseeable future.

In his opening statement, Applicant's Counsel described Applicant's psychiatrist's letter<sup>37</sup> as "the most cogent exhibit" for the Guideline I issues.<sup>38</sup> That would be the case had the letter contained enough detail and context to be helpful. As written, it is of little value and receives limited weight. Besides its lack of comprehensiveness, the key defect is that—although the psychiatrist opined that Applicant's prognosis was good—I have no idea *why* the psychiatrist came to that opinion because the letter does not provide the bases of the opinion.<sup>39</sup> The facts or data that the psychiatrist relied upon may have provided the context for the prognosis. Also, it may have demonstrated that the prognosis was thoughtful, reasonable, and valid, which is the type of prognosis a clearance decision may be based upon. This type of evidence is typically provided through expert witness testimony or a comprehensive report or both. The five-sentence letter raises as many questions as it appears to answer. And given the clearly-consistent standard, coupled with Applicant's chronic condition, the five-sentence letter is not sufficient evidence to satisfy Applicant's burden. Accordingly, Guideline I is decided against Applicant. In reaching this conclusion, I gave due consideration to Applicant's favorable evidence, to include the character witness and Exhibits A–AA, and I also considered the nine-factor whole-person concept.<sup>40</sup> Although much of this information is helpful to Applicant, it is insufficient to meet his burden.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the security concerns under Guideline I. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

---

<sup>36</sup> Revised Guidelines, ¶ 29 (a) – (e).

<sup>37</sup> Exhibit AA.

<sup>38</sup> Tr. 16.

<sup>39</sup> See Fed. R. Evid. 703 (Bases of Opinion Testimony by Experts).

<sup>40</sup> Revised Guidelines, ¶ 2 (a)(1) – (9).

## Formal Findings

The formal findings on the SOR allegations, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline I:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline K:	For Applicant
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline B:	For Applicant
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For Applicant

## Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard  
Administrative Judge