



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



In the matter of:)
)
-----) ISCR Case No. 07-16710
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: Ray Nichols, Esq.

December 3, 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 23, 2008. 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.

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 response to the SOR was received by DOHA on June 30, 2008, and he requested a hearing. The case was assigned to me on August 22, 2008. The hearing took place as scheduled on September 24, 2008. The transcript (Tr.) was received on October 2, 2008.

The record was kept open until October 8, 2008, to provide Applicant an opportunity to submit additional documentary evidence. He did so, and those matters were forwarded to me by department counsel who raised no objections. Accordingly, Applicant's resume or CV is admitted as Exhibit K.

Findings of Fact

Under Guideline F, the SOR alleges 23 delinquent debts in various amounts for a total of about \$23,022. It also alleges that Applicant filed for Chapter 7 bankruptcy in 1996, although the case was dismissed due to failure to file the required schedules. And it alleges that the IRS filed a federal tax lien against Applicant in 2007 for \$32,029. In a detailed six-page Answer, Applicant admitted all the allegations except for the debts in SOR ¶¶ 1.d, 1.n, and 1.o, and he provided explanations for his situation in general and for each debt. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 36-year-old engineer. He has worked for his current employer since December 2005, and he has received two promotions in pay grade in the last three years. His annual gross income is approximately \$100,000. He is assigned to a department that works on advanced systems and technology, and he serves as a technical lead for the company on various Defense Department programs. His work has included filing 22 provisional patents in the last 24 months. His wife, whom he married in June 2008, is employed as an engineer by the same company. Together, they have a gross income of more than \$200,000 per year.

His employment history includes military service in the U.S. Army, which ended in an honorable discharge in 1996. Thereafter, his primary occupation was student, as he earned a B.S. in physics in 2000 with a GPA of 3.81 on a 4.0 scale. He continued his studies earning a Ph.D. in physics in 2004 with a GPA of 3.96 on a 4.0 scale. In addition

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).

to his studies, Applicant worked as a research scientist for the same university during 1999–2005.

His personal history includes three marriages with the first two ending in divorce. He has a child from his first marriage, and he pays \$900 per month in child support and is current with that obligation.

His first marriage from May 1993 to about June 1995 coincided with his service as an enlisted soldier in the Army that ended in 1996. Young and in debt from the marriage, Applicant sought relief by filing a Chapter 7 bankruptcy case in June 1996 (Exhibit 6). The bankruptcy court dismissed his case a few months later due to failure to file the required schedules. Applicant explained he elected to allow this to happen because he decided to resolve the debts himself rather than through bankruptcy.

During 2003–2005, he became involved as a founding scientist for a startup company. It did not succeed and ceased operations in about October 2005. As founding scientist, Applicant was essentially self-employed as a consultant for the company. In turn, this resulted in the IRS tax debt when Applicant did not pay the required self-employment taxes. In September 2007, the IRS took collection action against Applicant for tax-period 2005 via a federal tax lien for \$32,029 (Exhibits 7 and H). Sometime thereafter, Applicant entered into an installment payment agreement with the IRS at the rate of \$400 per month. As of July 2, 2008, the current balance was \$34,345, which includes penalty and interest. Applicant wants to pay this off sooner than scheduled by making additional payments.

He married his second wife in 2001 when he was a graduate student. They lived in apartments until they bought a home in about July 2005. The debt for \$5,079 alleged in SOR ¶ 1.d stems from an apartment they lived in from March 2003 to July 2005. Applicant denies this debt and maintains the apartment was clean and without damage when they departed. He has attempted to resolve the debt via calls and letters without success (Exhibit A). He is willing to pay the debt if the company can provide an accounting to justify it. Otherwise, he does not intend to pay this debt.

Applicant's second marriage ended in 2006, a few months after he completed his security-clearance application (Exhibit 1) and about a year after they bought the home. Applicant never saw it coming and was taken by surprise by this circumstance. He was left with a mortgage loan and a car loan, both based on a two-income household, and his child-support obligation. As a result, Applicant became delinquent on many bills as he admits in response to the SOR.

The two small debts alleged in SOR ¶¶ 1.n and 1.o, which Applicant denied, are included in the IRS tax debt in SOR ¶ 1.x. Otherwise, Applicant has paid or settled the other debts alleged in the SOR except as otherwise noted. He established this by his testimony (which I found credible) and his documentary evidence (Exhibits B, C, D, E, F, G, I, and J).

Two exceptions are the debts alleged in SOR ¶¶ 1.m and 1.t. The debt in ¶ 1.m is for \$1,100, and Applicant is attempting to determine the status of the account, to include the current creditor. He is willing and able to pay it once he confirms the account (Answer; Tr. 53, 61). The \$1,621 debt alleged in ¶ 1.t stems from a car loan Applicant had several years ago (Answer; Tr. 63). He contacted the creditor and has been informed he does not owe any money. This debt does not appear on recent credit reports (Exhibits 3 and 4).

The third exception is the debt alleged in SOR ¶ 1.p, which alleges Applicant was past due on the mortgage loan for the house from his second marriage. The mortgage loan had an adjustable interest rate and Applicant fell behind when the rate adjusted higher. The mortgage loan is now current (Tr. 62, 75–76). Applicant is now renting this home as he relocated in connection with his job and third marriage in June 2008.

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

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.

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.

The record evidence supports a conclusion that Applicant has a history of financial problems. His history of financial problems is a security concern because it

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).

¹⁵ Revised Guidelines at 13.

indicates inability (not unwillingness) to satisfy debts¹⁶ and a history of not meeting financial obligations¹⁷ within the meaning of Guideline F. The bankruptcy case, the federal tax lien, and the other delinquent debts are more than sufficient to establish these two disqualifying conditions.

The guideline also provides that certain conditions may mitigate security concerns:

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; or

MC 6—the affluence resulted from a legal source of income.

All the mitigating conditions have been considered and three justify discussion.

First, Applicant receives credit in mitigation under MC 2 because his financial problems, in large part, resulted from his divorces in 1996 and 2006, and he has acted responsibly under the circumstances. For the first divorce in 1996, Applicant acted responsibly by deciding not to pursue the Chapter 7 bankruptcy to conclusion and instead resolved the debt himself. For the second divorce in 2006, Applicant acted responsibly by taking on most of the marital debt, to include the mortgage loan and car loan.

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

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

Second, Applicant receives credit under MC 4. Financially, Applicant is a bit scattered or haphazard. He would be wise to spend more time and brain power (of which he has plenty) staying on top of money matters and learning about the subject of personal finance, which would provide him an opportunity to achieve financial success. Nevertheless, his efforts to pay his creditors and enter into an installment payment agreement with the IRS is sufficient to qualify as initiating a good-faith effort within the meaning of the guideline.

Third, Applicant receives credit under MC 5. He disputes the \$5,079 debt with a former landlord and has provided documented proof to establish the basis for the dispute (Exhibit A).

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns under Guideline F. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept¹⁸ was given due consideration and that analysis supports a favorable decision. Applicant appears to be a highly educated and successful engineer with the potential to increase his income as he has already done with his current employer. He has sufficient financial means (a household gross income of more than \$200,000 per year) to resolve any remaining delinquent debts should they be established, adhere to his agreement with the IRS, and remain current on his bills and expenses. Likewise, with such income, the potential for pressure, coercion, exploitation, or duress in the context of classified information is remote. 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:	For Applicant
Subparagraphs 1.a–1.y:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge

¹⁸ Revised Guidelines at 1–2 (listing nine factors to consider under the whole-person concept).