



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



In the matter of:)
)
-----) ISCR Case No. 08-04149
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro Se*

December 23, 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, DoD Directive, and Revised Guidelines,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on August 20, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for the

¹ 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 to the Executive Order and Directive, this case is also adjudicated 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 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter. The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

action. The issues in this case fall under Guideline F for financial considerations based on a history of financial problems.

Applicant's response to the SOR was received by DOHA on September 2, 2008, and he requested a hearing. It took place as scheduled pursuant to written notice on November 20, 2008. The transcript (Tr.) was received November 26, 2008. For the reasons discussed below, this case is decided for Applicant.

Findings of Fact

Under Guideline F, the SOR alleges that Applicant owes 13 different creditors the total sum of approximately \$135,000 in delinquent debt based on credit card accounts. In his Answer to the SOR, Applicant admitted the debts except for the debt alleged in SOR ¶ 1.m, to which he admitted owing a lesser amount. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 53-year-old project manager for a federal contractor, and he is seeking to obtain a security clearance for this employment. He has worked for his current employer since October 2007. His annual salary is about \$84,000. He has been married since 1982, and he and his wife have an adult son. They have lived at the same address since 1995. His wife has been unable to work during their marriage due to a seizure disorder.

His wife, in addition to her seizure disorder, has experienced other serious medical problems (Tr. 40–42). She broke her hip in August 2001, and was hospitalized or in rehabilitation until January 2002. A hip replacement operation was followed by physical therapy that resulted in her fracturing the upper part of her femur during a therapy session. Another operation was required for another hip replacement and to repair her femur. The multiple operations likely contributed to a staph infection. Treating the infection required removing the hip apparatus. She went without a hip for about 15 to 16 months; according to Applicant, "her leg literally just hung there" (Tr. 42). She had another hip replacement operation in 2003, the result of which is one leg is shorter than the other, and she now has difficulty moving without the assistance of a walker. Although Applicant has medical insurance as a military retiree, his wife's medical problems resulted in out-of-pocket expenses for items not covered by insurance (Tr. 43).

His employment history includes military service in the U.S. Navy and the U.S. Air Force for a combined total of more than 20 years. He served six years as an enlisted Sailor from 1973 to 1979. He then obtained a college degree in architecture. Thereafter, from 1984 to 1999, he served nearly 15 years as a commissioned Air Force officer working in the field of civil engineering where he managed construction projects. He furthered his education while in the Air Force by obtaining a master's degree in management. He held a security clearance, to include up to the top-secret level, while in the Air Force. He retired from the Air Force in 1999 at the grade of major. His DD Form 214 describes the character of his service as honorable and it reveals that he served in

the 1990–1991 Gulf War (Tr. 65–67; Exhibit A). He receives retired pay of about \$24,000 annually (Tr. 50).

Applicant has a history of financial problems, which he does not dispute (Exhibits 1, 2, 3, and 4). When he completed his security-clearance application in October 2007, he reported, by name, amount, and account number, 19 credit card accounts that were past due or delinquent (Exhibit 1). Also, he made his employer aware of his financial situation when he was hired. He acknowledged his financial problems and explained the surrounding circumstances during an official interview in January 2008 and in response to interrogatories in June 2008 (Exhibits 2 and 3). To date, Applicant has not paid, settled, or otherwise resolved any of the debts in the SOR.

A chronology of events is helpful in understanding Applicant's financial problems. The relevant events are as follows:

1. After retiring from the Air Force, from 1999 to about July 2006, Applicant worked as an inspector and project manager for private construction or building companies. He was earning about \$75,000 annually.
2. In about mid-2006, Applicant began working as a self-employed general contractor with his own construction company. He did so with the encouragement of a former employer who indicated he would direct business to Applicant, but that proved to be a false promise. Applicant had about \$30,000 to \$40,000 in personal debt when he began the business, but none of the debt was delinquent. Given these circumstances, he was comfortable taking the calculated risk of starting his own business.
3. In late September 2006, Applicant slipped-and-fell off a ladder while at work. The fall shattered or fractured his elbow. The work-related injury required surgery and he was unable to work at full capacity for the next two to three months.
4. He had a second surgery on his elbow in February 2007. Again, he was unable to work at full capacity for the next couple of months.
5. Applicant's income declined during this period. His retired pay was not enough to cover personal and business expenses. He used credit cards to keep his construction company going and to pay for personal expenses. He fell behind on the credit card accounts and on his home mortgage loan.
6. In early 2007, Applicant attempted to refinance his home, in which he had home equity. The idea was to use the proceeds to pay the credit card accounts. The refinancing looked promising at first, but it did not go to conclusion.
7. In March 2007, Applicant obtained the services of a law firm specializing in debt settlement (Exhibit 3). He entered into a legal services contract wherein he agreed to pay a 33% contingency fee upon settlement of a debt. The contingency fee was in addition to a one-time retainer fee. He also agreed to make monthly deposits of \$1,257 into the firm's trust account and the firm in turn agreed to negotiate in an attempt to settle Applicant's debts with unsecured creditors.
8. Applicant made the monthly deposits and by March 2008, the firm was successful in settling one debt (Exhibit 3). The firm settled a \$9,473 debt for \$2,368, which resulted in a settlement fee of \$2,344 for the firm.

9. In about May or June 2008, Applicant and his wife became dissatisfied with the process and its expense. They also felt misled about the nature of the services and terminated their relationship with the firm.
10. At this point, Applicant had been earning a regular salary since October 2007 and decided to consult a bankruptcy attorney for advice. They determined a Chapter 13 bankruptcy with a court-approved repayment plan was the best option. They obtained the required credit counseling in July 2008 (Exhibits B and C).
11. In August 2008, Applicant received the SOR and decided to delay the bankruptcy case pending the outcome of this case.
12. All these events took place during his wife's chronic unemployment.

Assuming he retains his current job and salary, Applicant and his wife intend to pursue a Chapter 13 bankruptcy case so they can repay their debts via a court-approved plan over a period of years.

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.² 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."³ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁴ 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.⁵ 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.⁶ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁷ An

² *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.").

³ *Egan*, 484 U.S. at 531.

⁴ Directive, ¶ 3.2.

⁵ Directive, ¶ 3.2.

⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁷ Directive, Enclosure 3, ¶ E3.1.14.

applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁰ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹¹

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.¹² 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,¹³ 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."¹⁴ 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

⁸ Directive, Enclosure 3, ¶ E3.1.15.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ *Egan*, 484 U.S. at 531.

¹¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹² Executive Order 10865, § 7.

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

¹⁴ Revised Guidelines at 13.

indicates inability (not unwillingness) to satisfy debts¹⁵ and a history of not meeting financial obligations¹⁶ within the meaning of Guideline F. The record evidence is 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 the most pertinent here is MC 2, which concerns events or circumstances largely beyond a person's control. Another is MC 4, which concerns initiating a good-faith effort to repay. Each is discussed below.

Applicant receives credit in mitigation under MC 2 because his financial problems resulted from events or circumstances largely beyond his control. The primary event or circumstance was his work-related injury and resulting fall in income, which took place under the umbrella of his wife's chronic unemployment due to her inability to work. Taken together, these events or circumstances had a snowball or cumulative effect, the consequences of which Applicant is still experiencing. It is more likely than not that

¹⁵ DC 1 is "inability or unwillingness to satisfy debts."

¹⁶ DC 3 is "a history of not meeting financial obligations."

Applicant's financial problems would not have occurred but for these events or circumstances.

In addition, Applicant has acted responsibly under the circumstances. He seized the opportunity to return to full-time employment in October 2007. The job allowed him to earn a regular salary and put him in a position to do something about his debts. He disclosed his financial problems to the government and his employer. Although a court-approved repayment plan under Chapter 13 is less than ideal and should be considered a last resort, it is a lawful and realistic solution to his financial problems. Given the particular facts of this case, Applicant is the definition of an "honest but unfortunate debtor"¹⁷ who has acted responsibly under difficult circumstances.

Applicant also receives credit under MC 4 due to his efforts to repay creditors. He first attempted to repay the debts by refinancing his mortgage loan, but was unsuccessful. He then employed the services of the law firm to settle the debts. Although the process produced only one settlement, Applicant paid several thousand dollars to the firm,¹⁸ and those payments were made in a good-faith effort to settle his debts. Unfortunately, the fees likely undercut those efforts and Applicant ultimately decided that this was not the best solution. Nevertheless, Applicant deserves credit (although not full credit) in mitigation for his efforts.

Under the whole-person concept, an administrative judge must evaluate a person's eligibility for a security clearance by considering the totality of the person's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed in the Revised Guidelines as follows: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.¹⁹

To sum up under the whole-person concept, this case presents both disqualifying and mitigating circumstances, which requires thoughtful balancing. First, Applicant is 53 years old and sufficiently mature to make prudent decisions about his finances. Second, Applicant is in a difficult spot. But having had the opportunity to listen to his testimony (which I found credible) and observe his demeanor, I am persuaded that Applicant has the intention, maturity, and self-discipline to follow through and resolve his delinquent debts. Repaying his creditors will take substantial time, but given his wife's chronic

¹⁷ See generally *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

¹⁸ Applicant estimates he paid the firm about \$18,000 in total (Tr. 20, 51).

¹⁹ Revised Guidelines at 1-2.

unemployment and her medical problems, I am also persuaded that he is highly motivated to keep his current job and comply with all security requirements so that he can support and care for his wife. Third, Applicant has two decades of successful and honorable military service to his credit. This circumstance strongly suggests that he has the requisite self-control, good judgment, reliability, trustworthiness, and ability to properly handle and safeguard 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 overcome 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:	For Applicant
Subparagraphs 1.a–1.m:	For Applicant

Conclusion

In light of all 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