



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-11765
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel

For Applicant: Albert A. Biel Jr., Esq.

December 4, 2009

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. The record shows Applicant has a history of financial problems or difficulties as shown by nine delinquent debts ranging in amounts from \$130 to \$8,536, for a total of approximately \$21,000. The record also shows he has paid or settled five debts, two debts are in repayment plans, the collection lawsuit for one debt should be dismissed soon, and one debt is a duplicate. The record contains sufficient evidence to explain, extenuate, or mitigate the security concerns. Accordingly, as explained below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) to Applicant on February 17, 2009. The SOR is similar to a complaint as it detailed the factual basis for the action under Guideline F for financial considerations. Also, the SOR recommended submitting the case to an administrative judge for a determination whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion, and he requested a hearing. The case was assigned to me August 5, 2009. The hearing took place September 23, 2009. The record was left open until October 14, 2009, to allow Applicant to submit additional documentary evidence. Applicant made a timely submission, and the post-hearing matters are marked and admitted, without objections, as follows: (1) Exhibit C—credit report, dated September 29, 2009; (2) Exhibit D—collection letter, dated April 20, 2009, and proof of payment, dated June 29, 2009; and (3) Exhibit E—notice of nonsuit, dated October 6, 2009, and proposed order of nonsuit. The transcript (Tr.) was received October 1, 2009.

Findings of Fact

Applicant is a 53-year-old employee of a federal contractor, and he works as an avionics technician. He began his current employment in May 2008, and he completed a security-clearance application in August 2008.² This is the first time he has applied for an industrial security clearance. The application required him to respond to questions about his background. In response to questions about his financial record, he disclosed a delinquent auto loan and a delinquent line of credit for his business. In addition, he disclosed a criminal matter (an NSF check) in 2005, when he withheld payment to a vendor due to a business dispute.

Applicant is married and has three children, one from his first marriage and two from his current marriage. His children, ages 30, 23, and 21, although not minors, still receive financial support from him. The 30-year-old and 21-year-old are attending college while the 23-year-old is employed. The two youngest children live with Applicant.

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, 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.

² Exhibits 1 and 1A.

His employment history includes a period of self-employment during 1994–2006, when he was the owner-operator of a small avionics company. In about mid-2005, Applicant sold the business to an employee. He sold it for personal reasons (e.g., deaths in the family) as opposed to business reasons as the company was then profitable. The terms of the sale were rather loose or informal; there was no written contract for sale, merely an oral agreement that the buyer would make monthly installment payments to Applicant once the business became profitable for the new owner. The idea was the installment payments would supplement Applicant’s income until he resumed full-time employment, which he did in April 2006, with another avionics company.

The new owner was unsuccessful, resulting in Applicant taking the business back in about February 2006. Thereafter, Applicant liquidated the business’s assets and closed the company. Altogether, Applicant estimates the business failure cost him \$60,000 in out-of-pocket expenses.³ The vast majority of the indebtedness alleged in the SOR is due to the business failure when Applicant personally guaranteed repayment of business debts, which the new owner had agreed to pay when he took over the business.

The SOR alleged nine delinquent debts ranging in amounts from \$130 to \$8,536, for a total of approximately \$21,000. In his answer, Applicant admitted all the debts except for the debt in SOR ¶ 1.d. The current status of those debts is summarized in the following table.

Debts	Status
SOR ¶ 1.a—\$268 collection account.	Paid—Exhibit D.
SOR ¶ 1.b—\$1,942 collection account.	In a repayment plan beginning Jul. 31, 2009—Exhibit B; Tr. 25–26.
SOR ¶ 1.c—\$130 collection account.	Settled for less than full amount—Exhibit B.
SOR ¶ 1.d—\$6,783 collection account.	Resolved. Collection lawsuit against Applicant is pending plaintiff’s motion for a nonsuit; ⁴ disputed and deleted from credit report—Exhibits A and E.
SOR ¶ 1.e—\$8,536 charged-off account.	Settled for less than full amount—Exhibit B.

³ Tr. 61–63.

⁴ Nonsuit means a “voluntary dismissal of a case or a defendant, without a decision on the merits.” *Black’s Law Dictionary* 1158 (Bryan A. Garner ed., 9th ed. West 2009).

SOR ¶ 1.f—\$764 past-due account.	Settled for less than full amount—Exhibit B.
SOR ¶ 1.g—\$421 collection account.	In repayment plan beginning Aug. 3, 2009—Exhibit B.
SOR ¶ 1.h—\$1,943 collection account.	Same account as SOR ¶ 1.b.
SOR ¶ 1.i—\$336 collection account.	Settled for less than full amount—Exhibit B.

Both Applicant and his wife have full-time jobs; his wife is employed as an executive secretary. He estimates their gross income for 2009 will be about \$89,000.⁵ In addition to his children’s college expenses, Applicant provides financial support for his mother (\$200 to \$300 monthly), and he estimates a positive cash flow of several hundred dollars monthly.⁶

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.⁷ 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.”⁸ 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.⁹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁰

⁵ Tr. 54–55.

⁶ Tr. 57–58.

⁷ *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) (no right to a security clearance).

⁸ 484 U.S. at 531.

⁹ Directive, ¶ 3.2.

¹⁰ Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹¹ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹² An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹³ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁴ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁵ The Agency's appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁶

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.¹⁷ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline F for financial considerations,¹⁸ the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness, financial problems or difficulties, or financial irresponsibility. A security concern typically exists due to significant unpaid debts. The overall concern under Guideline F is that:

¹¹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹² Directive, Enclosure 3, ¶ E3.1.14.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ Directive, Enclosure 3, ¶ E3.1.15.

¹⁵ *Egan*, 484 U.S. at 531.

¹⁶ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁷ Executive Order 10865, § 7.

¹⁸ Revised Guidelines, ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

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.¹⁹

Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

The record supports a conclusion that Applicant has a history of financial difficulties dating back several years. His history of financial difficulties raises concerns because it indicates inability or unwillingness to satisfy debts²⁰ and a history of not meeting financial obligations²¹ within the meaning of Guideline F. The facts are more than sufficient to establish these two disqualifying conditions, and they suggest some financial irresponsibility as well. In addition, Applicant had an NSF check in 2005 via a business dispute with a vendor, which raises the disqualifying condition concerning deceptive or illegal financial practices.²²

Under ¶ 20 of Guideline F, there are six conditions that may mitigate security concerns:²³

(a) 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;

(b) 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;

(c) 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;

¹⁹ Revised Guidelines, ¶ 18.

²⁰ Revised Guidelines, ¶ 19(a).

²¹ Revised Guidelines, ¶ 19(c).

²² Revised Guidelines, ¶ 19(d).

²³ Revised Guidelines, ¶ 20 (a) – (f) (setting forth six mitigating conditions).

(d) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) 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

(f) The affluence resulted from a legal source of income.

All of the mitigating conditions have been considered and three are most pertinent here. First, ¶ 20(a) applies because the indebtedness (to include the NSF check) occurred under the unique circumstances of Applicant's business operations during 2005–2006, and the business is now closed. Accordingly, these circumstances are unlikely to happen again.

Second, ¶ 20(b) applies because Applicant's business sale and then failure were circumstances largely beyond his control. He acted responsibly under the circumstances by taking back the business, liquidating its assets, closing the business, and addressing the indebtedness.

Third, ¶ 20(d) applies because Applicant has made substantial progress in resolving the nine debts alleged in the SOR. He paid or settled five debts, two debts are in repayment plans, the collection lawsuit for one debt should be dismissed soon, and one debt is a duplicate. Given these circumstances, I conclude Applicant initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Together with his wife, Applicant has sufficient household gross income (nearly \$90,000) and a positive cash flow to resolve the two debts in repayment plans in short order. In other words, Applicant is not now overextended. Looking forward, based on his track record of repayment and his available income, it is most likely that Applicant will resolve the outstanding delinquent debts in the near future and that additional financial problems will not recur.

To conclude, based on the record as a whole, I have no doubts or reservations about Applicant's suitability for a security clearance. In reaching this conclusion, I gave due consideration to the nine-factor whole-person concept.²⁴ Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

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

²⁴ Revised Guidelines, ¶ 2(a)(1) – (9).

Paragraph 1, Guideline F: For Applicant

Subparagraphs 1.a–1.i: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge