



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



In the matter of:)
)
 -----) ISCR Case No. 09-02017
 SSN: -----)
)
 Applicant for Security Clearance)

Appearances

For Government: Michael Lyles, Esq., Department Counsel
 For Applicant: *Pro se*

June 25, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke her eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant has a history of financial problems that are ongoing. In addition, in 2008, she pleaded guilty to the felony offense of cocaine possession, although adjudication of guilt and sentencing were withheld based on her participation in a pretrial diversion program. She completed the program and the criminal case was dismissed in 2009. There is insufficient evidence to explain, extenuate, or mitigate the security concerns stemming from her financial problems and her relatively recent criminal history record. Accordingly, as explained in further detail below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on November 24, 2009, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline J for criminal conduct and Guideline F for financial considerations. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion and requested a hearing. The case was assigned to me January 25, 2010. The hearing took place April 6, 2010. The hearing transcript (Tr.) was received April 13, 2010.

Findings of Fact

Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 47-year-old employee of a federal contractor. She is seeking to obtain a security clearance for her current employment, which she began in April 2008, as an aviation life support technician. She is divorced and has two minor children in her household.

Applicant's employment history includes approximately 16 years of active duty military service in the U.S. Army. She was granted early retirement in 1997. She retired as a noncommissioned officer (pay grade E-6). She receives retired pay of about \$1,000 monthly.

In 2007, Applicant was involved with a man who was selling cocaine out of her home. Although she knew he was selling drugs, she did not know he was using her home to do so.² In September 2007, the police executed a search warrant on Applicant's home in which they found cocaine.³ Applicant was arrested and placed in jail until released on a bond. Subsequently, she was charged with possession of cocaine, a

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Tr. 46–50.

³ Exhibit 2.

class C felony in this particular state. In February 2008, she pleaded guilty per a plea bargain agreement that included a sentence of 23 months as well as her acceptance into a pretrial diversion program. As a result, adjudication of guilt and sentencing were withheld pending completion of the program. She successfully completed the program and the court dismissed the criminal case in February 2009.

Applicant has a history of financial problems that are ongoing.⁴ The SOR alleged 18 debts in some form of delinquency (for example, in collection, charged-off, past-due, or in foreclosure). In her answer to the SOR, Applicant admitted that all the debts were delinquent except for two, which were being paid as agreed via allotment from her military retired pay (SOR ¶¶ 2.m and 2.n). She explained that she was unable to maintain payments and support her family at the same time. She points to a separation in 2005 and divorce in 2007 as contributing circumstances. She also points to job loss in October 2007, when she was fired after the company discovered her arrest.

At hearing, Applicant presented sufficient evidence to establish that she paid nine debts, some of which are not alleged in the SOR, for a total of about \$1,475.⁵ She is also making monthly payments on the two accounts alleged to be past due in SOR ¶¶ 2.m and 2.n.⁶ She was able to repay the nine debts in 2010 after receiving a federal income tax refund of about \$6,000. From that money, she spent about \$1,475 on debt repayment; she spent \$2,000 on a necessary car repair; she gave \$600 to her mother; and she spent the balance on her family. The debts alleged in the SOR are summarized in the table below.

<i>Debts</i>	<i>Status</i>
SOR ¶ 2.a—\$205 collection account.	Paid in 2010. (Exhibit C)
SOR ¶ 2.b—\$24 collection account.	Unresolved.
SOR ¶ 2.c—\$92 collection account.	Unresolved.
SOR ¶ 2.d—\$160 collection account.	Paid in 2010. (Exhibit C)
SOR ¶ 2.e—\$433 collection account.	Unresolved.
SOR ¶ 2.f—\$45 collection account.	Paid in 2010. (Exhibit C)
SOR ¶ 2.g—\$1,036 charged-off account.	Unresolved.
SOR ¶ 2.h—\$1,040 collection account.	Unresolved.

⁴ Exhibits 3–7.

⁵ Exhibit C (This exhibit, together with Applicant’s testimony, has enough detailed information to constitute proof of payment).

⁶ Exhibits A and B.

SOR ¶ 2.i–\$33 collection account.	Same as SOR ¶ 2.f.
SOR ¶ 2.j–\$226 collection account.	Paid in 2010. (Exhibit C)
SOR ¶ 2.k–\$12,598 charged-off account (second mortgage).	Unresolved.
SOR ¶ 2.l–\$870 past-due student loan.	Unresolved.
SOR ¶¶ 2.m and 2.n–\$1,107 and \$1,331 past-due accounts.	Making monthly payments. (Exhibits A and B)
SOR ¶ 2.o–\$6,556 past-due mortgage loan.	Foreclosure; status unknown and unresolved.
SOR ¶ 2.p–\$727 collection account.	Unresolved.
SOR ¶ 2.q–\$625 state tax lien.	Unresolved.
SOR ¶ 2.r–\$74 collection account.	Paid in 2010. (Exhibit C)

The several debts were found to be unresolved because Applicant did not produce sufficient documentary evidence to determine their status.

Applicant earns a current salary of \$42,000. She has little money in the bank with less than \$20 in a savings account. She does not use or possess credit cards.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

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.

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.

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

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 DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁶

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

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.

⁹ Directive, ¶ 3.2.

¹⁰ Directive, ¶ 3.2.

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.

Analysis

Under Guideline J for criminal conduct,¹⁸ the suitability of an applicant may be questioned or put into doubt when that applicant has a criminal history record regardless of whether the criminal conduct at issue has been subject to prosecution and adjudication in a court of law. The overall concern under Guideline J is that:

Criminal activity creates doubts about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.¹⁹

The record here supports a conclusion that Applicant has a criminal history record. The evidence shows she was arrested for and charged with a felony-level drug offense. Via a plea bargain in which she pleaded guilty, she obtained a disposition through a pretrial diversion program. She successfully completed the program, and the criminal case was dismissed in 2009. Although she may not have a formal conviction under state law, her relatively recent criminal history record is of concern.²⁰

Under Guideline J, there are five conditions that may mitigate security concerns.²¹ Of those, the following were considered as applicable here:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal history record appears to be a one-time event that took place due to her involvement with a man with whom she no longer associates. Moreover, the event was handled through the criminal justice system, which deemed her suitable for a pretrial diversion program. She successfully completed the program in 2009, and there is no other evidence of criminal activity. Standing alone, I might be inclined to decide

¹⁸ AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁹ AG ¶ 30.

²⁰ AG ¶ 31(c) (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.).

²¹ AG ¶ 32(a) – (e).

this one-time event in Applicant's favor. But her criminal history record should be taken together with her record of financial problems.

Under Guideline F for financial considerations,²² 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:

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.²³

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

The record here supports a conclusion that Applicant has a history of financial problems or difficulties. This history raises concerns because it indicates inability or unwillingness to satisfy debts²⁴ and a history of not meeting financial obligations²⁵ within the meaning of Guideline F. The facts are sufficient to establish these two disqualifying conditions.

Under Guideline F, there are six conditions that may mitigate security concerns:²⁶

(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;

²² AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

²³ AG ¶ 18.

²⁴ AG ¶ 19(a).

²⁵ AG ¶ 19(c).

²⁶ AG ¶ 20 (a) – (f).

(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;

(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; and

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

Of those mitigating conditions, the most pertinent here are subparagraphs (b) and (d). But the credit in mitigation is insufficient to overcome the security concerns. Applicant is facing a large amount of delinquent debt that she has not addressed in any meaningful way. Although she paid nine debts for a total of \$1,475, she could have used more of her tax refund to repay debt; some of the small debts could have easily been repaid. In addition, Applicant has limited financial means with an annual income of about \$54,000 (salary plus retired pay). And she has essentially zero cash reserves, which suggests she is living paycheck-to-paycheck. These circumstances make it unlikely that she will be able to make forward progress in the near future without the benefit of another windfall. Although I am persuaded Applicant is sincere and genuinely wants to take care of her delinquent debts, the record is insufficient to make any safe predictive judgments that Applicant will resolve the remaining debts anytime soon.

To conclude, the facts and circumstances surrounding Applicant's ongoing financial problems and her relatively recent criminal history record, when taken together, justify current doubts about her judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, these doubts are resolved in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept²⁷ and Applicant's favorable evidence. Nevertheless, Applicant did not meet her ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J:	Against Applicant
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Subparagraph 1.a:	Against Applicant
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²⁷ AG ¶ 2(a)(1) – (9).

Paragraph 2, Guideline F:	Against Applicant
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b–2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	For Applicant
Subparagraphs 2.g–2.h:	Against Applicant
Subparagraph 2.i:	For Applicant
Subparagraph 2.j:	For Applicant
Subparagraphs 2.k–2.l:	Against Applicant
Subparagraphs 2.m–2.n:	For Applicant
Subparagraphs 2.o–2.q:	Against Applicant
Subparagraph 2.r:	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