



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



In the matter of:)
)
-----) ISCR Case No. 09-04991
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

July 7, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant has a history of financial problems or difficulties. Applicant and his spouse overextended themselves in the real estate market. As a result, Applicant and his spouse sought protection from their creditors under a Chapter 7 bankruptcy case in which a discharge was granted in November 2009. Given the recency of the bankruptcy case and the surrounding circumstances, it is too soon to tell if Applicant’s financial problems were purely situational, and it is too soon to determine if Applicant is now conducting his affairs in a financially responsible manner. Applicant did not provide full, frank, and candid answers to questions about his financial record during the security clearance process. 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 September 22, 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 F for financial considerations and Guideline E for personal conduct. 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 7, 2010. The hearing transcript (Tr.) was received April 14, 2010.

Findings of Fact

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

Applicant is a 35-year-old employee of a federal contractor. He is seeking to obtain a security clearance for his current employment as a senior network engineer. His educational background includes an associate's degree. He is married and has a four-year-old son.

Applicant has worked in the information technology (IT) field since at least 2000.² He worked as a network services manager for a software company from May 2000 to June 2005. He then worked as network services manager for a beverage distributor from June 2005 to June 2008, when he and his wife relocated to their current state of residence as part of a long-term plan to be closer to family and join a particular church. Applicant began employment as a head network engineer for a communications company at an annual salary of about \$90,000, about \$30,000 less than his previous job. He was unexpectedly laid off about five months later in October 2008. From November 2008 until he began his current job in March 2009, he worked two contractor

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 Exhibit 1.

jobs and had periods of unemployment for a total of six to eight weeks.³ His annual salary is now about \$75,000.

Applicant has a history of financial problems. The SOR alleged nine debts in some form of delinquency (for example, in collection, charged-off, past-due, or in foreclosure). The nine debts consisted of four medical accounts in collection, one charged-off credit card account, and four real estate accounts. The vast majority of the debt consists of the credit card and real estate accounts.

While living in their previous state of residence, Applicant and his spouse bought an expensive home (more than \$500,000) and also made a real estate investment (undeveloped land) in another state. They had enjoyed some success in the real estate market in the past. But due to the then declining and slowing real estate market, Applicant and his spouse decided to rent their former home when they relocated in June 2008. By October 2008, they were forced to take action to evict their tenants for failure to pay rent.⁴ This event took place about the same time Applicant was laid off from his employment. As a result, Applicant began falling behind on some of his financial obligations in late 2008 or early 2009. They sought the advice of a bankruptcy attorney in 2009, and they were advised to stop making payments in anticipation of filing for bankruptcy.

From about November 2008 to March 2009, Applicant depleted his available savings.⁵ He began his current job in March 2009, and he completed a security clearance application at the end of that month.⁶ In response to Question 26, a multi-part question about his financial record, Applicant answered in the negative to all questions. At hearing, Applicant explained that his spouse was responsible for bill paying and the family finances, and he asked her if they were late on any payments when he completed the application and was told that one account was 60 days late (the mortgage loan on the rental property).⁷ Accordingly, he answered all questions (including a question about defaulting on any type of loan) in the negative because 60 days was not within the scope of the question. But an April 2009 credit report shows a mortgage loan was already in foreclosure and had been 180 days past-due with a past-due balance of \$37,288.⁸ Applicant was unable to explain those circumstances.⁹ In addition, the same April 2009 credit report shows foreclosure proceedings were initiated

³ Tr. 114.

⁴ Exhibit B.

⁵ Tr. 86.

⁶ Exhibit 1.

⁷ Tr. 79–81.

⁸ Exhibit 4 at 14 (internal page number).

⁹ Tr. 81.

against a mortgage loan with a balance of \$188,900 for the investment property (undeveloped land) purchased by Applicant and his spouse.¹⁰

Applicant and his spouse filed their Chapter 7 bankruptcy petition in August 2009, and a discharge was granted in November 2009.¹¹ In the bankruptcy paperwork, Applicant and his spouse listed a gross income of \$135,737 for 2007, \$80,784 for 2008, and \$28,579 for 2009 year-to-date.¹² They also listed a foreclosure lawsuit resulting in a judgment; the case number, 2008-CA-#####, indicates the lawsuit was filed in calendar year 2008.¹³ In addition, they listed two properties (the rental property and the investment property) that had been through foreclosure within one year before the start of the Chapter 7 case.¹⁴

The Chapter 7 petition's summary of schedules shows \$348,629 in assets and \$397,481 in liabilities.¹⁵ The assets included real property (their current home) valued at \$296,400. The liabilities included \$295,481 for creditors holding secured claims (the mortgage loan on Applicant's current home) and \$102,000 for creditors holding unsecured nonpriority claims (unsecured debt listed on Schedule F). Many of the debts in the SOR were discharged in the bankruptcy case, and they are summarized in the table below.

<i>Debts</i>	<i>Status</i>
SOR ¶ 1.a—\$52 medical account in collection.	Not listed in bankruptcy case.
SOR ¶ 1.b—\$33 medical account in collection.	Not listed in bankruptcy case.
SOR ¶ 1.c—\$39 medical account in collection.	Not listed in bankruptcy case.
SOR ¶ 1.d—\$424 medical account in collection.	Included in bankruptcy. (Exhibit 2 at 29 of 50)
SOR ¶ 1.e—\$15,000 charged-off credit card account.	Included in bankruptcy. (Exhibit 2 at 28 of 50)

¹⁰ Exhibit 4 at 13 (internal page number).

¹¹ Exhibits 2 and A.

¹² Exhibit 2 at 36 of 50.

¹³ Exhibit 2 at 37 of 50.

¹⁴ Exhibit 2 at 38 of 50.

¹⁵ Exhibit 2 at 18 of 50.

SOR ¶ 1.f—\$55,000 home-equity loan or second mortgage.	Included in bankruptcy. (Exhibit 2 at 30 of 50)
SOR ¶ 1.g—\$25,000 loan on investment property.	Included in bankruptcy. (Exhibit 2 at 28 of 50)
SOR ¶ 1.h—\$37,288 past-due on mortgage loan with loan balance of \$650,853 in foreclosure.	Included in bankruptcy for possible deficiency balance on real estate. (Exhibit 2 at 29 of 50)
SOR ¶ 1.i—\$188,000 mortgage loan for investment property in foreclosure.	Included in bankruptcy for possible deficiency balance on undeveloped property. (Exhibit 2 at 30 of 50)

Applicant reports that his current mortgage loan, which he reaffirmed in the bankruptcy case,¹⁶ is paid as agreed. The April 2009 credit report shows this account was 30 days past-due on one occasion.¹⁷ A credit report from July 2009 shows this account was 30 days past-due on three occasions.¹⁸

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.¹⁹ 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.”²⁰ 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.

¹⁶ Exhibit 2 at 45 of 50.

¹⁷ Exhibit 4 at 8 (internal page number).

¹⁸ Exhibit 3 at 2.

¹⁹ *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).

²⁰ 484 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.²¹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²²

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²³ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁴ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁵ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁶ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁷ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁸

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.²⁹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

²¹ Directive, ¶ 3.2.

²² Directive, ¶ 3.2.

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

²⁴ Directive, Enclosure 3, ¶ E3.1.14.

²⁵ Directive, Enclosure 3, ¶ E3.1.15.

²⁶ Directive, Enclosure 3, ¶ E3.1.15.

²⁷ *Egan*, 484 U.S. at 531.

²⁸ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁹ Executive Order 10865, § 7.

Analysis

Under Guideline F for financial considerations,³⁰ the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties.³¹ 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.³²

Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information within the defense industry. Indeed, the practice of evaluating a person based on their record of financial responsibility (or lack thereof) is used in various industries. For example, the insurance industry uses credit-based insurance scores when determining insurance rates because the scores have been found to be effective in predicting future losses.

The record evidence 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 debts³³ and a history of not meeting financial obligations³⁴ within the meaning of Guideline F. The facts are sufficient to establish these two disqualifying conditions. In reaching this conclusion, the three medical debts for \$52, \$33, and \$39—taken individually or together, or combined with the other debts—are so minor that they are of little, if any, security significance. These debts are resolved for Applicant because they fall within the maxim *de minimis*.³⁵

³⁰ AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

³¹ See ISCR Case No. 95-0611 (App. Bd. May 2, 1996) (It is well settled that “the security suitability of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties.”) (citation omitted).

³² AG ¶ 18.

³³ AG ¶ 19(a).

³⁴ AG ¶ 19(c).

³⁵ See *Black's Law Dictionary* 496 (Bryan A. Garner ed., 9th ed., West 2009).

Under Guideline F, there are six conditions that may mitigate security concerns:³⁶

(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;

(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 is subparagraph (b). But the credit in mitigation is insufficient to overcome the security concerns. Applicant and his spouse incurred substantial indebtedness when they overextended themselves in the real estate market. Debt equals risk, and Applicant increased his risk when he moved to another state and changed jobs (at a lower salary) while still obligated on a large amount of mortgage loan debt. A nonpaying tenant made the situation worse. A job loss and a period of underemployment put Applicant in an untenable position. The Chapter 7 bankruptcy case was inevitable. Although the Chapter 7 discharge order eliminated Applicant's legal obligation to pay a debt that was discharged, it does not constitute a good-faith effort to resolve debts under subparagraph (d). Applicant now has the benefit of the fresh start provided by bankruptcy law. But given the recency of the bankruptcy case and the surrounding circumstances, it is too soon to tell if Applicant's financial problems were purely situational. And it is too soon to determine if Applicant is now conducting his affairs in a financially-responsible manner to avoid similar problems or difficulties in the future. Accordingly, Guideline F is decided against Applicant.

³⁶ AG ¶ 20 (a) – (f).

Turning to personal conduct under Guideline E,³⁷ it includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern is:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.³⁸

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The issue here is the truthfulness of Applicant's answers to questions about his financial record when he completed a security clearance application. The record supports a conclusion that Applicant did not give full, frank, and candid answers about his financial record when he completed his March 2009 security clearance application. As shown by the April 2009 credit report, two foreclosure actions had already been initiated and both mortgage loans were past-due. Moreover, Applicant's Chapter 7 bankruptcy petition, a document signed under penalty of perjury, shows a foreclosure lawsuit was filed in 2008, and it shows two properties were subject to foreclosure within the previous year. Given these circumstances, Applicant had to know the mortgage loans were in default, and he had to know about the foreclosures, when he completed his security clearance application in March 2009. His explanations to the contrary are not credible.

The established falsifications support application of two disqualifying conditions that address the deliberate falsification of relevant facts during the security clearance process.³⁹ I reviewed all the potential mitigating conditions under the guideline and conclude none apply. Making false or misleading statements to the federal government during the security clearance process is serious misconduct. It is not easily explained away, excused, or mitigated. Accordingly, Guideline E is decided against Applicant.

To conclude, the facts and circumstances surrounding Applicant's history of financial problems and his false statements, when taken together, justify current doubts about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In

³⁷ AG ¶¶ 15, 16, and 17 (setting forth the security concerns and the disqualifying and mitigating conditions).

³⁸ AG ¶ 15.

³⁹ AG ¶¶ 16(a) and (b).

reaching this conclusion, I gave due consideration to the whole-person concept⁴⁰ and Applicant's favorable evidence. Nevertheless, Applicant did not meet his 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 F:	Against Applicant
Subparagraphs 1.a–1.c:	For Applicant
Subparagraphs 1.d–1.i:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against 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

⁴⁰ AG ¶ 2(a)(1) – (9).