



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



In the matter of:)	
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)	ISCR Case No. 10-05706
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

February 7, 2012

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. The evidence shows that in 2006 Applicant and his wife purchased four town homes as a real estate investment. The investment failed due to a combination of a steep drop in market value, vacancy problems, reduced rental rates, maintenance costs, and vandalism costs. Applicant incurred a large amount of credit card debt in an effort to keep things afloat, but eventually decided bankruptcy was the best course of action. His initial Chapter 13 bankruptcy case was filed in late 2009 and dismissed before confirmation of a repayment plan in 2010. He filed a second Chapter 13 bankruptcy case about a month later in October 2010, and it is pending confirmation by the bankruptcy court. He has paid about \$27,000 under the proposed plan during the last year. There are now clear indications that his financial problems are being resolved or are under control, and he has initiated a good-faith effort to repay his creditors. For the reasons discussed below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on or about April 11, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guideline known as Guideline F for financial considerations.

Applicant timely answered the SOR and requested a decision without a hearing. Subsequently, he changed his mind and requested a hearing on July 26, 2011. The case was assigned to another judge on September 15, 2011, before it was assigned to me on October 14, 2011. The hearing took place November 1, 2011. The hearing transcript (Tr.) was received November 10, 2011.

Findings of Fact

The SOR alleged two Chapter 13 bankruptcy cases, the first filed in 2009 but dismissed before confirmation in 2010, and the second filed in 2010 and pending. It also alleged nine delinquent accounts, which included four mortgage loans, for a total of about \$380,000. In his Answer, Applicant admitted the SOR allegations with explanations. His admissions are accepted and adopted and incorporated herein as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 60-year-old employee of a federal contractor. He has been employed as a senior subcontracts administrator for a large company engaged in defense contracting since 2005. He is seeking to retain a security clearance at the secret level. His educational background includes a bachelor's degree. He has been married for 31 years, and he and his wife have a 16-year-old son. His gross annual salary is about \$121,000, while his wife earns a gross annual salary of about \$85,000 working as a public school teacher.² Their current monthly expenditures do not exceed their income and show a monthly net income or remainder of about \$1,669.³

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 here. 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 6 (Chapter 13 paperwork, Schedule I).

³ Exhibit 6 (Chapter 13 paperwork, Schedule J).

Applicant has had a uneven employment history over the years with job layoffs and periods of unemployment.⁴ He worked previously for his current employer for about 11 years during 1986–1997. More recently, he was unemployed from November 2002 to September 2005. It was during this period of unemployment that Applicant began taking courses and studying real estate investment. He took it a step further in 2005 by forming his own real estate investment company and operated the same for a few months until beginning his current job in November 2005.

Applicant made no real estate investments until 2006, when he was contacted by a firm with an offer to purchase rental town homes in a neighboring state. He traveled to that state, met with the seller, and inspected the proposed properties. After returning home and discussing it with his wife, he decided to purchase four town homes as rental properties. He made a \$5,000 down payment for each property and obtained mortgage loans to finance the balances. His investment quickly proved to be problematic. It failed due to a combination of a steep drop in market value, vacancy problems, reduced rental rates, maintenance costs, and vandalism costs. Indeed, the four town homes are located in one of the states hardest hit by the bursting of the real estate bubble.⁵ He incurred a large amount of credit card debt in an effort to keep things afloat, but eventually decided bankruptcy was the best course of action.

Applicant's initial Chapter 13 bankruptcy case was filed in late 2009, and it was dismissed before confirmation of a repayment plan in 2010. In February 2010, he self-reported his financial problems and pending bankruptcy case to his company's facility security officer.⁶ As a result, he was interviewed by an investigator in April 2010.⁷

Applicant filed a second Chapter 13 bankruptcy case in October 2010, and it was pending confirmation by the bankruptcy court at the time of the hearing. The details of the Chapter 13 bankruptcy case include ten creditors listed under Schedule F as unsecured nonpriority claims for a total of about \$326,802.⁸ Of those ten creditors, seven are for credit card accounts. The largest claim is related to Applicant's real estate investment; it is described as a cancellation of debt for \$239,449.

The pending Chapter 13 bankruptcy case proposed that Applicant enter into a 60-month repayment plan and pay \$2,000 for one month and \$1,600 monthly thereafter.⁹ At hearing, a plan was not yet confirmed by the bankruptcy court, but

⁴ Exhibit 1 (Employment Activities).

⁵ I took administrative notice of this well-known fact.

⁶ Exhibit 2.

⁷ Exhibit 5.

⁸ Exhibit 6 (Chapter 13 paperwork, Schedule F).

⁹ Exhibit B.

Applicant has made monthly payments to the bankruptcy trustee since November 2010.¹⁰ His initial payment was for \$2,000, and thereafter he has made monthly payments of \$2,300. As of November 1, 2011, he has paid about \$27,000 into the proposed plan.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹¹ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹² 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.¹³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁸ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁹

¹⁰ Exhibits A and B.

¹¹ *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).

¹² 484 U.S. at 531.

¹³ Directive, ¶ 3.2.

¹⁴ Directive, ¶ 3.2.

¹⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁶ Directive, Enclosure 3, ¶ E3.1.14.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ *Egan*, 484 U.S. at 531.

The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁰

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 and material information, 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.²¹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

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 or financial problems or difficulties.²³ The overall concern under Guideline F is:

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.²⁴

Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

²⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²¹ Executive Order 10865, § 7.

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

²³ 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); and see ISCR Case No. 07-09966 (App. Bd. Jun. 25, 2008) (In security clearance cases, "the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.") (citation omitted).

²⁴ AG ¶ 18.

The evidence supports a conclusion that Applicant has a history of financial problems or difficulties. The evidence also raises security concerns because it indicates an inability to satisfy debts²⁵ and a history of not meeting financial obligations²⁶ within the meaning of Guideline F. The facts are sufficient to establish these two disqualifying conditions.

There are six mitigating conditions to consider under Guideline F. Any of the following may mitigate security concerns:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;²⁷

AG ¶ 20(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

AG ¶ 20(f) the affluence resulted from a legal source of income.

²⁵ AG ¶ 19(a).

²⁶ AG ¶ 19(c).

²⁷ ISCR Case No. 99-0201 (App. Bd. Oct. 12, 1999) (“[T]he concept of ‘good faith’ requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Such standards are consistent with the level of conduct that must be expected of persons granted a security clearance.”) (citations omitted); ISCR Case No. 02-30304 (App. Bd. Apr. 20, 2004) (relying on a legally available option, such as Chapter 7 bankruptcy, is not a good-faith effort) (citations omitted); ISCR Case No. 99-9020 (App. Bd. Jun. 4, 2001) (relying on the running of a statute of limitations to avoid paying a debt is not a good-faith effort).

I considered all the mitigating conditions, and the most pertinent here are AG ¶¶ 20(c) and (d). Taken together, along with the other favorable evidence, they are sufficient to overcome and mitigate the security concerns.

The evidence shows Applicant speculated in the real estate market by buying four rental town homes in a neighboring state. The investment failed due to a combination of circumstances. He attempted to keep his investment afloat by incurring debt on credit card accounts until he decided the best course of action was to seek relief via Chapter 13 of the bankruptcy code. Unlike a Chapter 7 case that allows a debtor to discharge his indebtedness without repayment, a Chapter 13 case requires a debtor to repay creditors under a court-approved plan. Although such a plan was not yet confirmed in Applicant's case, he has nevertheless made monthly payments under the proposed plan since November 2010 for a total about \$27,000, which will be credited toward his plan upon confirmation. Given these circumstances, it is fair to conclude that there are now clear indications that Applicant's financial problems are being resolved or are under control, and he has initiated a good-faith effort to repay his creditors. His payment of about \$27,000 in monthly payments over the course of a year is substantial evidence that he will continue to make payments when the bankruptcy court approves the plan. This conclusion is bolstered by the fact that Applicant and his wife appear to have sufficient income to make the monthly payment.

In addition, Applicant, who is a current clearance holder, receives credit in mitigation for self-reporting his financial problems in February 2010.²⁸ As a result, he put the Government on notice of his problematic financial situation. He also cooperated with the investigation that resulted from his self-report. These circumstances demonstrate a willingness to follow the rules for properly handling and safeguarding classified information. In other words, by self-reporting his financial problems, and thereby subjecting himself to a formal investigation, he demonstrated a willingness to report a potential security infraction or violation even if doing so might jeopardize his job or his standing with his employer or some other personal interest. His willingness to subordinate his interests to that of the Government reflects well on his judgment, reliability, and trustworthiness.

Following *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's fitness or suitability for a security clearance. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²⁹ Having done so, I conclude that Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

²⁸ AG ¶ 2(e)(1).

²⁹ AG ¶ 2(a)(1)-(9).

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline F: For Applicant

Subparagraphs 1.a–1.k: 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