



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



In the matter of:)
)
-----) ISCR Case No. 10-07393
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Julian Roberts, Esq., Daniela Jansen, Esq.

February 16, 2012

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke her eligibility for a security clearance to work in the defense industry. The evidence shows that Applicant bought a second home as a future retirement home located near her elderly father. In the meantime, she used it as rental property. As a landlord, she had problematic tenants and the rental property never produced a positive cash flow. Her attempts to modify or refinance the mortgage loans on the rental property were unsuccessful, and the property foreclosed in mid-2011. Any deficiency balance is likely not collectable under the state’s antideficiency statute since both loans were used to purchase the rental property. She incurred additional delinquent debt, but those three debts, for relatively small amounts, are now resolved or in repayment. There are now clear indications that her financial problems are being resolved or are under control, and she has initiated a good-faith effort to repay her 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 July 12, 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 hearing. 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 five delinquent debts consisting of a (1) a \$55 medical collection account, (2) \$1,408 a charged-off consumer account, (3) a \$3,824 past-due consumer account, (4) a charged-off home-equity loan for \$51,084,² and (5) a mortgage loan of \$209,458 in foreclosure. In her Answer, Applicant admitted the SOR allegations with explanations. Her 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 51-year-old employee of a federal contractor. She works as a senior analyst in the fields of configuration management and data management. She has been employed by the same large company engaged in defense contracting since 1980. She has a good employment record, as verified by written performance assessments from 2006–2009 and performance awards from 2009–2010.³ Her current annual salary is about \$84,000. She is seeking to retain a security clearance at the secret level, which she has held for many years.

Applicant is not married and has no children, but she has a longtime boyfriend with whom she cohabits. Under joint tenancy or tenancy in common, she and her

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 All three credit reports describe this loan as a second mortgage. Exhibits 2, 3, and 6. According, it is found to be a second mortgage loan as opposed to a home-equity loan.

³ Exhibits L and M.

longtime boyfriend bought a home in 2003, and they divide the mortgage loan payment and the household bills equally.

In about 2007, Applicant, in her individual capacity, bought a small two-bedroom, one-bathroom house in a community about 55 miles from her residence in the same state. She bought the house as a future retirement home because it was located near her elderly father. Until she retired, she planned to use the house as rental property. She made no down payment and financed the purchase with a mortgage loan of \$205,176 and a second mortgage loan of \$51,294.⁴ Both loans were with the same mortgage lender. The house required a considerable amount of work and repairs. In addition, as a landlord, she had problematic tenants and the rental property never produced a positive cash flow. She had no tenants at times, requiring her to cover both mortgage loans.

By May 2010, both loans were late more than 120 days and she had past-due balances.⁵ She attempted to work with the mortgage lender to modify or refinance the loans, a process she described as “a nightmare.”⁶ Having no success with the mortgage lender, she hired a lawyer to assist her, but that was unsuccessful as well. In 2010, the mortgage lender placed her on a trial period with increased monthly payments, she made payments for a few months, but by about July 2010 she was no longer able to make the payments. By March 2011, the second mortgage loan was still past due and the first mortgage loan was in foreclosure.⁷ And by June 2011, the month before the SOR was issued, the second mortgage loan was described as a charged-off account and the first mortgage loan was in foreclosure.⁸ The foreclosure was completed, and the house was sold in May 2011 for \$66,298,⁹ which was substantially less than the purchase price of more than \$250,000. The steep drop in market value is generally consistent with the fact that the rental property is located in one of the states hardest hit by the bursting of the real estate bubble.¹⁰

Applicant has not received any type of notice or paperwork from the mortgage lender stating that she owes a deficiency balance on either mortgage loan. She resides in a nonrecourse state that has an antideficiency statute.¹¹ This means that the

⁴ Exhibit 2.

⁵ Exhibit 2.

⁶ Tr. 58.

⁷ Exhibit 3.

⁸ Exhibit 6.

⁹ Exhibit K.

¹⁰ I took administrative notice of this well-known fact.

¹¹ I took administrative notice of this fact.

mortgage lender is not permitted to come after a borrower's other assets and income if the borrower defaults on original loans used to purchase the property.

Applicant presented documentary information for each of the three other delinquent debts. She paid the \$55 medical collection account.¹² She settled the \$1,408 charged-off consumer account for \$880.¹³ And the \$3,824 past-due consumer account is enrolled in a repayment plan with the creditor and is in good standing.¹⁴

Applicant's current financial situation appears to be stable. She has two other credit card accounts, both of which are in good standing.¹⁵ Her tax preparer since 2004 examined the history of returns prepared for Applicant, and there was no indication of extraordinary financial problems or income.¹⁶ Of note, Applicant files as head of household claiming her father as a qualifying person under the law that allows a taxpayer to claim that status when the taxpayer provides a home for a parent who does not live with her. In addition to assisting her elderly father, Applicant also provides financial assistance to a disabled adult nephew who is living in an assisted-care facility. Her nephew is the son of her brother, who passed away suddenly within the last few years. His death placed an additional financial strain on Applicant as she was the family member who paid the funeral expenses.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁷ 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."¹⁸ 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.

¹² Exhibit A.

¹³ Exhibit G.

¹⁴ Exhibit B and H.

¹⁵ Exhibits I and J.

¹⁶ Exhibit E.

¹⁷ *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).

¹⁸ 484 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.¹⁹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁰

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²¹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²² An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²³ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁴ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁵ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁶

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.²⁷ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

¹⁹ Directive, ¶ 3.2.

²⁰ Directive, ¶ 3.2.

²¹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²² Directive, Enclosure 3, ¶ E3.1.14.

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ Directive, Enclosure 3, ¶ E3.1.15.

²⁵ *Egan*, 484 U.S. at 531.

²⁶ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁷ Executive Order 10865, § 7.

Discussion

Under Guideline F for financial considerations,²⁸ 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.²⁹ 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.³⁰

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

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 debts³¹ and a history of not meeting financial obligations³² 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

²⁸ AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁹ 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).

³⁰ AG ¶ 18.

³¹ AG ¶ 19(a).

³² AG ¶ 19(c).

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;³³

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.

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 bought a second house as a future retirement home and then used it as rental property pending retirement. Her experience as a landlord was difficult, and she eventually defaulted on both the first and second mortgage loans, which resulted in foreclosure. It is most probable that she owes nothing more on the loans under the state's antideficiency statute. Her three other delinquent accounts, which were delinquent due to inability to pay, are now resolved, with one account paid, another settled, and the third in a repayment plan. Given these circumstances, there are now clear indications that Applicant's financial problems are being resolved or are under control, and she has initiated a good-faith effort to repay her creditors. Her overall financial situation appears to be stable, thus making a repeat of her past financial problems unlikely.

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

³³ 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).

whole-person concept.³⁴ Having done so, I conclude that Applicant met her 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 are as follows:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a–1.e:	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

³⁴ AG ¶ 2(a)(1)–(9).