



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



In the matter of:)	
)	
-----)	
a/k/a/ ----- ¹)	ISCR Case No. 10-07544
)	
Applicant for Security Clearance)	

Appearances

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

January 13, 2012

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 evidence shows Applicant has a history of financial problems or difficulties because he overextended himself via a real estate investment venture that failed. He is now seeking to obtain a discharge of nearly \$900,000 in liabilities through a Chapter 7 bankruptcy case, which is pending in bankruptcy court. It is too soon to tell if or when he will resolve his financial problems. Applicant failed to present sufficient evidence to overcome the security concerns stemming from his problematic financial history. Accordingly, as discussed below, this case is decided against Applicant.

¹ The SOR was amended at hearing to reflect Applicant’s change of name that took place in 1994.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,² on or about June 15, 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 guidelines known as Guideline F for financial considerations and Guideline E for personal conduct.

Applicant 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 2, 2011. The hearing transcript (Tr.) was received November 10, 2011.

Procedural Matters

At the start of the hearing, Department Counsel moved to withdraw the single allegation under Guideline E that Applicant falsified his answer to a question, posed in an April 2010 security clearance application, about his financial record.³ Without objections, the motion was granted.

At the close of the evidence, I requested that Department Counsel obtain and submit, as Government Exhibits, records of Applicant's Chapter 7 bankruptcy case, as it was filed the day before the hearing.⁴ Applicant had no objections. Department Counsel submitted those matters on November 15, 2011, a copy of which was served upon Applicant. The bankruptcy case papers are marked and admitted as follows:

- Exhibit 6–Docket sheet from Chapter 7 bankruptcy case (1 page);
- Exhibit 7–Chapter 7 bankruptcy petition, dated November 1, 2011 (49 pages);
- Exhibit 8–Chapter 7 statement of current monthly income and means-test calculation (7 pages); and

² 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.

³ Tr. 16–18.

⁴ Exhibit D; Tr. 89–92.

- Exhibit 9–Notice of Chapter 7 bankruptcy case, meeting of creditors, and deadlines (7 pages).

Findings of Fact

The SOR alleged 14 delinquent accounts in amounts ranging from \$808 to \$600,000 for a total of about \$3.4 million. Thirteen of the accounts are related to a real estate investment venture and the other is a county tax lien for \$808. Applicant admitted the allegations in his reply to the SOR, except for two real estate debts. He presented proof of payment for the tax lien, and that matter will not be discussed further.⁵ 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 61-year-old employee of a federal contractor. He has been employed as an electrician and regional program manager for a company engaged in defense contracting since September 2009. He is seeking to obtain a security clearance for that job. His first marriage ended in divorce. He remarried in 1997, although he and his wife have lived separately for some time. He pays all expenses for both homes in the absence of a separation agreement or court order.

Applicant's employment history includes honorable service in the U.S. military that ended with retirement in 2000. He served on active duty as an enlisted soldier in the Army from 1970 to 1979. He joined the Army National Guard in 1981, and he received a commission as a second lieutenant in 1982. He transferred to the Army Reserve a few years later. He then served until about June 2000, when he retired as a major. He receives military retired pay as a result of his service. He also receives a state pension for his years of service as a correctional officer.

The 13 debts at issue are related to a real estate investment venture that failed. The 13 debts are supported and established by a May 2010 credit report and a March 2011 credit report.⁶ By way of explanation, Applicant has a background in construction, which led to him being approached with an opportunity to buy odd or smaller lots and build new homes to sell. This was part of a larger effort by the local municipality to remove dilapidated or older houses and replace them with new homes. In total, he bought about eight lots of land and built three or four homes before he was forced to stop due to financial problems. He self-financed the venture by obtaining a loan against his own home. Once the first home was built, he used it as collateral to obtain credit for the next. He followed this model to finance the balance of the construction. After building three or four homes, he found he was unable to sell the homes as the real estate market was declining and the market values of his newly built homes fell below the costs of construction. This situation was made more difficult because he lives in one of the states hardest hit by the bursting of the residential real estate market. As a result,

⁵ Exhibit C. Based on this proof of payment, SOR ¶ 1.h is decided for Applicant.

⁶ Exhibits 2 and 5.

the creditors foreclosed, and five foreclosures are included in the SOR, to which he admitted in his reply to the SOR.

At hearing, Applicant maintained that the \$3.4 million total amount for the 13 debts was inflated because he is only liable for deficiency claims after the foreclosures. After substantial consideration of his situation, he elected to pursue bankruptcy. He intended to file the bankruptcy case in February 2011 and anticipated obtaining a discharge by April or May 2011.⁷ That schedule apparently slipped as the Chapter 7 bankruptcy petition was filed the day before the hearing on November 1, 2011. A meeting of creditors was scheduled for December 6, 2011.⁸ Details of the bankruptcy case are discussed below.

Applicant's bankruptcy petition lists about \$1.5 million in liabilities and \$592,982 in assets.⁹ The assets consist largely of \$560,000 in real property, which are the two homes occupied by Applicant and his wife. The other assets consist of personal property and \$1,200 in checking accounts. The liabilities include the following: (1) \$626,286 for secured claims based on three mortgages and three lines of credit tied to Applicant's two homes; (2) \$2,500 for an unsecured priority claim by the IRS for back taxes for 2009;¹⁰ and (3) \$878,695 for 22 unsecured nonpriority claims. Of those 22 claims or debts, there are 10 deficiency claims, 2 judgments for a total of more than \$50,000 obtained by the local municipality, and 10 other claims. He intends to retain his two homes and continue to make payments on the related six loans.¹¹ Five foreclosures are listed in the bankruptcy petition; three foreclosures occurred in 2008 and two in 2010.¹²

The bankruptcy case papers also report Applicant's current income and expenditures.¹³ His monthly income includes \$4,338 in wages and \$4,925 in pension and retirement income for a total of \$9,263. That figure is largely consistent with what he disclosed in a personal financial statement.¹⁴ Deductions from income, such as

⁷ Exhibit E.

⁸ Exhibit 9.

⁹ Exhibit 7.

¹⁰ This may be inconsistent with Applicant's testimony that he was current on his federal taxes. Tr. 84–85. I have considered this matter, the back taxes, and two unpaid judgments noted above, none of which are alleged in the SOR, for limited purposes such as evaluating Applicant's claims of extenuation, mitigation, or changed circumstance, as well as weighing the information under the whole-person concept.

¹¹ Exhibit 7 at 38–40.

¹² Exhibit 7 at 32.

¹³ Exhibit 8.

¹⁴ Exhibit 4.

monthly living expenses and debt payment, amount to \$9,952. He has a negative monthly disposable income of about \$689.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁵ 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.”¹⁶ 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.¹⁷ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁸

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁰ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²¹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²² In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²³ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁴

¹⁵ *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).

¹⁶ 484 U.S. at 531.

¹⁷ Directive, ¶ 3.2.

¹⁸ Directive, ¶ 3.2.

¹⁹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁰ Directive, Enclosure 3, ¶ E3.1.14.

²¹ Directive, Enclosure 3, ¶ E3.1.15.

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ *Egan*, 484 U.S. at 531.

²⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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.²⁵ 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,²⁶ 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.²⁷ 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.²⁸

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 here supports a conclusion that Applicant has a history of financial problems or difficulties. The evidence raises security concerns and indicates inability or

²⁵ Executive Order 10865, § 7.

²⁶ AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁷ 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).

²⁸ AG ¶ 18.

unwillingness to satisfy debts²⁹ and a history of not meeting financial obligations³⁰ within the meaning of Guideline F. The facts are sufficient to establish these two disqualifying conditions, and the facts also suggest that Applicant's financial house is in disrepair.

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;³¹

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.

None of the mitigating conditions, individually or in combination, are sufficient to overcome and mitigate the security concerns. Three of the conditions are most pertinent and they are discussed below.

²⁹ AG ¶ 19(a).

³⁰ AG ¶ 19(c).

³¹ 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).

Concerning AG ¶ 20(b), I note that Applicant became immersed in a real estate investment venture that failed when a surging real estate market reversed course. This was a circumstance largely beyond his control. He does not receive full credit in mitigation, however, because he clearly overextended himself by using leverage to fund the venture, which was a plan fraught with risk. I also considered AG ¶ 20(c) based on Applicant's Chapter 7 bankruptcy case. Given that his bankruptcy case is at the initial stages, it is too soon to tell if there are clear indications that the problem is being resolved or is under control. Finally, he receives some credit under AG ¶ 20(d) based on payment of the tax lien. But he receives no credit based on the Chapter 7 bankruptcy case because it is well-established law that taking such action does not amount to a good-faith effort.

The evidence of Applicant's problematic financial history, which is ongoing, justifies 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 reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I gave due consideration to the whole-person concept³² and Applicant's favorable evidence, to include his many years of honorable military service. But Applicant is currently in the middle of a Chapter 7 bankruptcy case where he is seeking to discharge nearly \$900,000 in liabilities. Moreover, his bankruptcy case papers show he has a negative monthly cash flow. Given all the circumstances, it is far too soon to tell if or when Applicant will put his financial house in good order. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a–1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraphs 1.i–1.n:	Against Applicant
Paragraph 2, Guideline E:	Withdrawn
Subparagraph 2.a:	Withdrawn

³² AG ¶ 2(a)(1)–(9).

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