



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



In the matter of:	)	
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	)	ISCR Case No. 11-10725
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
For Applicant: *Pro se*

05/29/2013

**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 he has a history of financial problems that is ongoing. In addition, he has a history of multiple criminal offenses during 1992–2009. He did not present sufficient evidence to mitigate the security concerns. Accordingly, this case is decided against Applicant.

**Statement of the Case**

On December 27, 2012, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant or continue access to classified

information.<sup>1</sup> 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 on January 25, 2013. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.<sup>2</sup>

On or about March 11, 2013, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>3</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who received it March 21, 2013. He did not reply to the FORM within the 30-day period allowed under the Directive. The case was assigned to me May 8, 2013.

### **Ruling on Procedure**

Citing Guideline E for personal conduct, SOR ¶ 2 alleged six incidents of criminal conduct during the period 1992–2009.<sup>4</sup> These matters are more properly adjudicated under Guideline J, which specifically concerns criminal conduct. Accordingly, SOR ¶ 2 is amended *sua sponte* by changing the relevant security guideline from Guideline E to Guideline J, because doing so renders SOR ¶ 2 in conformity with the evidence.<sup>5</sup>

This amendment is without notice to Applicant, but it is also without prejudicial harm to him. As noted below, he admitted the six incidents of criminal conduct and those facts remain unchanged. Moreover, the six incidents of criminal conduct were discussed at length in Department Counsel’s brief. Indeed, Department Counsel labeled Applicant as a “drug dealer” during the period 1993–1999, which is a term of art usually

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<sup>1</sup> 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 Department of Defense 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.

<sup>2</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>3</sup> The file of relevant material consists of Department Counsel’s written brief and supporting documents, some of which may be identified as evidentiary exhibits in this decision.

<sup>4</sup> The seventh item alleged, in SOR ¶ 2.c, that Applicant’s driver’s license was suspended due to failure to satisfy a civil judgment alleged in SOR ¶ 1.a. This is not criminal conduct; it is a result or consequence of a properly alleged matter under Guideline F. A result or consequence of any particular act or omission does not have independent security significance. Accordingly, SOR ¶ 2.c is decided for Applicant.

<sup>5</sup> Directive, Enclosure 3, ¶ E3.17.

reserved for the criminal courts.<sup>6</sup> Given these circumstances, Applicant would hardly be surprised to see that his extensive and well-documented record of criminal conduct is, in fact, being reviewed and analyzed as criminal conduct. Finally, amending the SOR in this way is consistent with a central principle of the Directive—which is making commonsense decisions.

### **Findings of Fact**

Applicant admits the SOR allegations under both Guidelines F and J except for four delinquent debts, in which he claims full or partial payment. His admissions are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 42-year-old employee of a federal contractor. He has worked as an insulator for a shipbuilding company since 2006. Before that, he worked as a meat packer for a month or so in 2006; he worked as a tiler for a few months in 2006; he worked an assembly-line job during for about three months in 2006; and he worked in a warehouse during 2004–2006. He is seeking a security clearance for the first time, and he completed a security clearance application in April 2011.<sup>7</sup>

Applicant has a history of financial problems that is ongoing. It includes \$11,000 in back taxes owed to the IRS, two unpaid civil judgments, a child support arrearage, and nine collection or charged-off accounts. Altogether, nearly \$26,000 of delinquent debt is set forth in the SOR, and these matters are established by the available documentary evidence.<sup>8</sup>

Although Applicant claims full or partial payment of four debts, he has not provided reliable documentary evidence that he has paid, settled, entered into repayment agreements, disputed, or otherwise resolved any of the delinquent debts set forth in the SOR. He did not provide documentary information when responding to written interrogatories about the financial matters or in his answer to the SOR. And he did not take advantage of the opportunity to reply to the FORM.

In addition to his history of financial problems, Applicant has a history of serious criminal conduct. Beginning in 1992, Applicant was arrested and charged with the felony offense of abduction.<sup>9</sup> His arrest stemmed from a woman's report that he, his twin brother, and their friends pulled the woman into a car and drove away. The charge was dismissed when the accuser failed to appear in court.

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<sup>6</sup> Department Counsel's Brief at 7.

<sup>7</sup> Exhibit 5.

<sup>8</sup> Exhibits 6, 7, 8, 9, and 10.

<sup>9</sup> Exhibit 6 at 15; Exhibit 11 at 3.

During the period 1993–1999, Applicant was involved with the buying and selling of marijuana on a daily basis; he also used marijuana frequently.<sup>10</sup> It was during this period in 1995 that he was arrested and charged with possession of stolen property (a firearm), a misdemeanor offense. He appeared in court a few months later and the court dismissed the charge.<sup>11</sup>

He was arrested for a third time in 2000 and charged with multiple offenses: (1) three counts of assault and battery on a law officer; (2) two counts of possession of cocaine; (3) possession of marijuana; and (4) driving under revocation or suspension.<sup>12</sup> He was held in jail for about four months until he posted bond and was released.

About ten days after his release in February 2001, he was stopped by the police for a traffic violation. The result of the stop was his fourth arrest, again for multiple offenses: (1) possession of a Schedule II controlled substance (cocaine); (2) eluding police; (3) obstruction of justice; and (4) driving under revocation or suspension. After seven or eight months in jail, Applicant entered into a plea bargain wherein he agreed to plead guilty to possession of a Schedule II controlled substance, a felony offense, and was sentenced to five years of incarceration, suspended.<sup>13</sup> He was placed in a first-offenders program for two years and placed on supervised probation for one year. He also received drug treatment during this time.

He was arrested for a fifth and sixth time in 2005 and 2009, respectively, for driving on a suspended or revoked license. In 2005, he was sentenced to 90 days in jail with 80 days suspended.<sup>14</sup> As of December 2012, he was past due in paying the fine and costs for the 2005 offense.<sup>15</sup>

### **Law and Policies**

It is well-established law that no one has a right to a security clearance.<sup>16</sup> 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

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<sup>10</sup> Exhibit 6.

<sup>11</sup> Exhibit 6 at 15.

<sup>12</sup> Exhibits 11 and 12.

<sup>13</sup> Exhibit 13.

<sup>14</sup> Exhibit 14.

<sup>15</sup> Exhibit 14.

<sup>16</sup> *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 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

side of denials.”<sup>17</sup> 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.<sup>18</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>19</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>20</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>21</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>22</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>23</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>24</sup> The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>25</sup>

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.<sup>26</sup> Instead, it

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<sup>17</sup> 484 U.S. at 531.

<sup>18</sup> Directive, ¶ 3.2.

<sup>19</sup> Directive, ¶ 3.2.

<sup>20</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>22</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>23</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>24</sup> *Egan*, 484 U.S. at 531.

<sup>25</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>26</sup> Executive Order 10865, § 7.

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,<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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. His unfavorable financial history indicates inability or unwillingness to satisfy debts<sup>30</sup> and a history of not meeting financial obligations.<sup>31</sup> The facts are more than sufficient to establish these disqualifying conditions.

There are six mitigating conditions to consider under Guideline F.<sup>32</sup> Based on the evidence before me, none of the mitigating conditions are sufficient to fully mitigate the security concern. Applicant has presented scant evidence to mitigate his history of financial problems. The evidence does not support a conclusion that Applicant has established a plan and taken actions to implement that plan sufficient to mitigate the security concern.

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<sup>27</sup> AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>28</sup> 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).

<sup>29</sup> AG ¶ 18.

<sup>30</sup> AG ¶ 19(a).

<sup>31</sup> AG ¶ 19(c).

<sup>32</sup> AG ¶¶ 20(a)–(f).

Under Guideline J for criminal conduct,<sup>33</sup> the security concern is that criminal activity creates doubt 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.

Applicant admits the six incidents of criminal conduct resulting in arrests, charges, and convictions. These matters, and the surrounding facts and circumstances, establish two disqualifying conditions under Guideline J as follows:

AG ¶ 31(a) a single serious crime or multiple lesser offenses; and

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

Guideline J also contains certain conditions that may mitigate security concerns. Based on the evidence before me, none of the mitigating conditions are sufficient to fully mitigate the security concern. With that said, Applicant receives credit for his steady employment for a shipbuilding company since 2006. That is some evidence of reform and rehabilitation, and it suggests a favorable trend. Nevertheless, the evidence in disqualification is more persuasive. The evidence shows Applicant has a history of criminal conduct involving multiple arrests, charges, and convictions over a period of many years. His history of criminal conduct is both substantial and significant, and it cannot be mitigated or explained away by the passage of time since his last offense.

Taken together, Applicant's history of financial problems and criminal conduct raise serious doubt about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve that doubt 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 also gave due consideration to the whole-person concept.<sup>34</sup> Having done so, I conclude that 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.m:	Against Applicant

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<sup>33</sup> AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>34</sup> AG ¶ 2(a)(1)–(9).

Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a–2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraphs 2.d–2.g:	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