



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-01555
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

September 5, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on February 7, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The SOR alleges security concerns under Guideline J for criminal conduct. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective

¹ Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's Answer to the SOR was received by DOHA on March 3, 2008, and he elected a decision without a hearing. Accordingly, the case will be decided based on the written record in lieu of a hearing.

On March 21, 2008, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM)³ was mailed to Applicant on March 26, 2008, and it was received by him on April 22, 2008. He replied to the FORM within the allowed 30-day period, and his reply consists of a letter from him as well as eight letters of recommendation. Those matters are admitted as Exhibit A. The case was assigned to another administrative judge on July 22, 2008, and it was reassigned to me on September 2, 2008.

Findings of Fact

The SOR alleges five incidents of criminal conduct during the period 1990–2005. In his Answer, Applicant admits four of the five allegations. He denies the allegation in SOR ¶ 1.b. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 41-year-old employee of a federal contractor. He has worked for his current employer since 2004. His current position or job title is help desk technician. The eight letters of recommendation are highly favorable to Applicant and express the overall opinion that Applicant is a suitable candidate for a security clearance (Exhibit A).

Applicant has a history of criminal conduct. The five incidents alleged in the SOR and admitted to by Applicant (except as otherwise noted) are summarized as follows:

- 1990–arrested and charged with grand theft, receiving stolen property, and carrying a loaded firearm in a public place; all charges were dismissed.
- 1991–arrested and charged with driving under the influence of alcohol or drugs, driving a vehicle while having a .08% or higher blood alcohol, and carrying a concealed weapon in a vehicle.

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

³ The government's brief includes several attachments referred to as items. They are referred to as exhibits herein.

- 2002—arrested and charged with driving under the influence of alcohol or drugs, driving while having a .08% or higher blood alcohol, and a later charge of failure to appear. He pleaded guilty to the DUI and the other charges were dismissed.
- 2002—charged with driving with a suspended license and an unlicensed driver. Found guilty of the second charge and ordered to pay a fine, fees, and placed on summary probation for 24 months.
- 2005—arrested and charged with three offenses related to domestic violence.

The 1991 and 2005 incidents are discussed below.

The one-page court record concerning the 1991 incident indicates the defendant failed to appear in court and an arrest warrant was issued in June 1991 (Exhibit 8 at 9). The court record does not indicate the disposition of the charges or the arrest warrant. The government did not present any record evidence showing the disposition of the charges or the warrant. And the 1991 incident is not reported in Applicant's FBI identification record (Exhibit 6).

In his Answer, Applicant denied the 1991 incident alleged in SOR ¶ 1.b and explained that it concerned someone else:

This is the first time ever hearing about this. I believe someone else was using my identity. Prior to this date, it was brought to my attention by the [police department] that someone else was using my [state] driver license number [----123]. I immediately saw investigators at the [local] DMV, and found out an employee from there had issued my license number to another person (name unknown). I received a new [state] driver license number [----456], which is current today.

Applicant did not present any documentary information to support his explanation, but he also denied this incident during his background interview (Exhibit 7 at 3).

The most recent incident happened in 2005 when Applicant was arrested and charged with three offenses relating to domestic violence: (1) battery against a former spouse/fiancee; (2) willful cruelty to a child; and (3) willful cruelty to a child. The charges stemmed from an argument between Applicant and his wife that took place in the presence of children. Applicant explained that his wife slapped him during an argument and he defended himself by holding up his arms and pushing back (Exhibit 7 at 2). The police were called and Applicant was arrested based on his wife's report. In June 2007, after several court appearances, the charges against Applicant were dismissed based on his successful completion of a diversion program that required Applicant to satisfy certain conditions, including completing 45 classes in a certified domestic violence program and attending 20 meetings of Alcoholics Anonymous (Exhibit 8).

In his reply letter to the FORM, Applicant states the following: (1) that he deeply regrets the negative experiences of his life; (2) that he looks forward to moving past those experiences and toward upward mobility for his life, family, and career; (3) that he

and his wife have gone through their share of disagreements, but they have now learned how to disagree and still respect each other, and that they have reconciled; and (4) that he is a loyal and committed employee who desires to obtain a bachelor's degree and move to a higher-level position with the company.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.⁴ As noted by the Supreme Court in 1988 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.”⁵ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁶ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.⁷ 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.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁸ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹¹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹²

⁴ *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) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

⁵ *Egan*, 484 U.S. at 531.

⁶ Directive, ¶ 3.2.

⁷ Directive, ¶ 3.2.

⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁹ Directive, Enclosure 3, ¶ E3.1.14.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

¹² *Egan*, 484 U.S. at 531.

The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹³

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. 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.¹⁴ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

Analysis

Under Guideline J for criminal conduct,¹⁵ the 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."¹⁶

In general, a security concern is raised by Applicant's pattern of criminal conduct. In particular, DC 1¹⁷ and DC 3¹⁸ apply against Applicant as evidenced by his multiple arrests, charges, and convictions, the most recent of which took place in 2005 and was resolved in June 2007 when the charges were dismissed. Applicant's involvement in criminal conduct over a period of years calls into question his judgment, reliability, and trustworthiness.

In reaching this conclusion, however, I find for Applicant on the allegation in SOR ¶ 1.b for the 1991 incident. The evidence supporting this allegation is a one-page court record. Applicant has rebutted this by his plausible explanation that he was not involved in this incident. In addition, if the incident was genuine, one would think that it would

¹³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁴ Executive Order 10865, § 7.

¹⁵ Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁶ Revised Guidelines at 21.

¹⁷ DC 1 is "a single serious crime or multiple lesser offenses."

¹⁸ DC 3 is the "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

have surfaced and been addressed during one of Applicant's post-1991 arrests. And it is not reported in the FBI record. Given these circumstances, I am not persuaded that Applicant was arrested and charged as outlined in SOR ¶ 1.b.

The guideline also contains several conditions that could mitigate security concerns. The most pertinent is MC 4, which concerns successful evidence of reform and rehabilitation.¹⁹ Applicant receives credit for complying with the conditions of the diversion program. As a result, the state court dismissed the domestic violence charges in June 2007. Likewise, he and his wife have reconciled, and he reports that their relationship is now more stable. Nevertheless, these events are relatively recent developments and it is too soon to tell if Applicant can establish a long-term record as a law-abiding citizen. At this time, his four incidents of involvement in criminal conduct—the most recent of which was resolved last year—mitigate against a successful case in reform and rehabilitation. Accordingly, Guideline J is decided against Applicant.

Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept, to include Applicant's favorable evidence, was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a, c, d, e:	Against Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances, 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

¹⁹ DC 4 is "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."