



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



In the matter of:)
)
 -----) ISCR Case No. 15-04397
)
 Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

08/31/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny her eligibility for access to classified information. Applicant failed to mitigate the security concern raised by her problematic financial history. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on April 21, 2014. This document is commonly known as a security clearance application. On March 29, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant her eligibility for access to classified information.¹ The SOR detailed the factual

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (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 June 8, 2017, apply here. The AG were published in the Federal

reasons for the action under the security guideline known as Guideline F for financial considerations. Applicant answered the SOR on June 27, 2016, and requested a decision based on the written record without a hearing.

On August 31, 2016, Department Counsel submitted a file of relevant material (FORM).² The FORM was mailed to Applicant on that same day. She was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on October 4, 2016.³ Applicant did not respond to the FORM. The case was assigned to me on August 8, 2017.

Procedural Matters

Included in the FORM were six items of evidence, which are marked as Government Exhibits (GE) 1 through 5.⁴ Exhibits 1, and 3 through 5 are admitted into evidence. Exhibit 2 is a report of investigation (ROI) summarizing Applicant's interview that took place during the June 2014 background investigation. The ROI is not authenticated, as required under ¶ E3.1.20 of the Directive.⁵ Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, I am not persuaded that a *pro se* applicant's failure to respond to the FORM, which response is optional, equates to a knowing and voluntary waiver of the authentication requirement. The record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, Exhibit 2 is inadmissible, and I have not considered the information in the ROI.

Register and codified in 32 C.F.R. § 154, Appendix H (2016). In this case, the SOR was issued under Adjudicative Guidelines effective within the Defense Department on September 1, 2006. My Decision and Formal Findings under the revised Guideline F would not be different under the 2006 Guideline F.

² The file of relevant material consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision.

³ The Defense Office of Hearings and Appeals' (DOHA) transmittal letter is dated August 31, 2016, and Applicant's receipt is dated October 4, 2016. The DOHA transmittal letter informed Applicant that she had 30 days after receiving it to submit information.

⁴ The first item in the FORM is the SOR, and the second item is Applicant's Answer. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 3 through 7 are marked as Exhibits 1 through 5.

⁵ See *generally* ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process in security clearance cases. Judge Ra'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

Findings of Fact

Applicant is 54 years old, married, with two adult children of her own and two adult stepchildren. Since November 2010 she has been employed by a defense contractor. In June 2009 she was laid off and remained unemployed until June 2010, when she found part-time employment before taking the job with the defense contractor.⁶

The SOR alleges five delinquent debts totaling \$17,716, \$17,077 of which is a charged-off (in October 2011) installment account.⁷ Three of the debts are for medical accounts totaling \$546. Applicant admits all of the SOR debts except for the last debt alleged (\$93) owed to an electronics company, which Applicant claims she never heard of. In her answer she cites her lengthy period of unemployment as part of the reason for her indebtedness. In addition, she explained that in June 2014, her spouse was laid off when his company relocated to another state. He collected unemployment until he found work at a Walmart distribution center in March 2015. In January 2016, he was injured at work and began collecting workers' compensation. At the time of Applicant's answer, her spouse was still unemployed and in the care of his doctors.

Law and Policies

It is well-established law that no one has a right to a security clearance.⁸ As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁹ 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.¹⁰ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹¹

⁶ GE 1.

⁷ GE 3. In her answer, Applicant calls this her "spouse's debt." The credit report, however, describes this debt as a joint account. GE 3.

⁸ *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).

⁹ 484 U.S. at 531.

¹⁰ Directive, ¶ 3.2.

¹¹ Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹² The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹³ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁵

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁶ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁷

Discussion

Under Guideline F for financial considerations,¹⁸ 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. The overall concern is:

Failure 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 or sensitive information.¹⁹

The concern is broader than the possibility that a person might knowingly compromise classified information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

¹² ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹³ Directive, Enclosure 3, ¶ E3.1.14.

¹⁴ Directive, Enclosure 3, ¶ E3.1.15.

¹⁵ Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ *Egan*, 484 U.S. at 531.

¹⁷ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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

¹⁹ AG ¶ 18.

AG ¶ 19(a) inability to satisfy debts;

AG ¶ 19(b) unwillingness to satisfy debts regardless of the ability to do so;

AG ¶ 19(c) a history of not meeting financial obligations;

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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and,

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

The evidence supports a conclusion that Applicant has had a problematic financial history since 2011. This raises security concerns under AG ¶¶ 19(a) and (c).

The next inquiry is whether any mitigating conditions apply. The Government correctly observes that the multiple periods of unemployment Applicant and her spouse have confronted are circumstances largely beyond Applicant's control under AG ¶ 20(b). I agree. The next inquiry is whether Applicant acted responsibly under those adverse circumstances. The single largest delinquent debt was the charge-off in October 2011. There is nothing in the record showing any efforts by Applicant to address that delinquency. For example, there is no evidence of Applicant making any good-faith efforts to pay some of that debt, by payment plan, or otherwise. There is no evidence that Applicant sought or received any financial counseling about resolving that delinquency. Unfortunately, on this record I cannot find that Applicant acted responsibly as to that delinquency. AG ¶ 20(b) does not apply. Nor do any of the other potentially mitigating conditions apply.²⁰

The record raises doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I

²⁰ The three medical debts that Applicant admitted and the one consumer debt she denied total \$639. That amount is *de minimis* and does not raise security concerns.

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.²¹ Accordingly, I conclude that Applicant did not meet her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline F:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-e:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge

²¹ AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).