DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Adrienne Strzelczyk, Esq., Department Counsel
For Applicant: *Pro se*

06/12/2017

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Decision

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KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. Applicant mitigated the security concern raised by his problematic financial history. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on October 12, 2014. This document is commonly known as a security clearance application. On March 8, 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 his eligibility for access to classified information.[1] The SOR is similar to a complaint

[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),

in a civil court case. It detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations. Applicant answered the SOR on April 9, 2016, and requested a decision based on the written record without a hearing.

On June 1, 2016, Department Counsel submitted a file of relevant material (FORM).[2] The FORM was mailed to Applicant on that same day. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on June 10, 2016.[3] Applicant did not respond to the FORM. The case was assigned to me on May 4, 2017.

Procedural Matters

Included in the FORM were six items of evidence, which are marked as Government Exhibits 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 December 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.

effective within the Defense Department on June 8, 2017, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2016).

[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 June 2, 2016, and Applicant's receipt is dated June 10, 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 Applicant's Answer. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 2 through 6 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'anan 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'anan 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 53 years old and is a college graduate. He is married and has three adult children. He was laid off from August 2004 to January 2005.[6] Since October 2014, he has worked for a defense contractor.[7]

The SOR alleged a Chapter 7 Bankruptcy petition filed in September 2005, which was discharged in February 2006, and three delinquent accounts (two education loans totaling about $90,000, and a relatively minor credit card account for about $2,000).[8] Applicant admitted the bankruptcy filing but denied the delinquent debts. Applicant explained that two factors caused him to file for bankruptcy protection in 2005. The first was being unexpectedly laid off in August 2004 due to a downturn in the telecom industry. The second was becoming reemployed in January 2005 at only half of the compensation he was earning before being laid off. By the time of his reemployment, his finances were such that he needed the protection of bankruptcy. The bankruptcy discharge cleared his unsecured debt and placed the education loans in a deferred status.[9]

In the summer of 2011, Applicant was diagnosed with cancer and was given about two years to live. He underwent chemotherapy and surgery. As a result of his medical condition, he went on short-term disability that reduced his take-home pay which, when coupled with medical expenses, adversely affected his finances. At about the same time he was dealing with his illness, his educational loans came out of deferment. He communicated with the collection agent for the educational loans and underwent counseling with a loan recovery specialist. He was advised that in light of his unstable and reduced take-home pay, he should make an arrangement to make good-faith payments of a minimum amount, until his financial situation improved. He took that advice, and since October 1, 2014, he has made payments of $5 per month.[10] As of June 1, 2016, the record shows the educational loans to be in a collection status.[11] He also paid the credit card debt in April 2015.[12] His cancer is in remission, and he returned to work full time in October 2014.[13]

[6] Exhibit 1.

[7] Exhibit 1.

[8] SOR ¶¶ 1.a-d.

[9] Answer.

[10] Answer and Addenda A, B and C.

[11] Exhibit 3, Trade Lines entries 23 and 24.

[12] Answer, Addendum D. The credit card debt was $2,197. SOR ¶ 1.d. The evidence reports the payment of that credit card debt in April 2015. Exhibit 3, Trade Lines entry 7.

[13] Answer; Exhibit 1.

Law and Policies

It is well-established law that no one has a right to a security clearance.[14] 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."[15] 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.[16] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[17]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[18] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[19] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[20] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[21]

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[22] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[23]

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[14] *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).

[15] 484 U.S. at 531.

[16] Directive, ¶ 3.2.

[17] Directive, ¶ 3.2.

[18] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[19] Directive, Enclosure 3, ¶ E3.1.14.

[20] Directive, Enclosure 3, ¶ E3.1.15.

[21] Directive, Enclosure 3, ¶ E3.1.15.

[22] *Egan*, 484 U.S. at 531.

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

Discussion

Under Guideline F for financial considerations,[24] 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.[25]

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:

> AG ¶ 19(a) inability to satisfy debts;
>
> AG ¶ 19(c) a history of not meeting financial obligations;
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> 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,

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

[25] AG ¶ 18.

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 going back to his bankruptcy filing in September 2005. This raises security concerns under AG ¶¶ 19(a) and (c).

The next inquiry is whether any mitigating conditions apply. Turning first to Applicant's bankruptcy filing in September 2005, the narrower inquiry begins with what circumstances caused that filing. Applicant explained that he was unexpectedly laid off in August 2004, due to a downturn in the telecom industry. He remained unemployed for six months, until being reemployed in January 2005. Even though he regained employment in January 2005, his compensation was half of what he made before being laid off. Understandably, six months of unemployment had serious adverse effects on his financial situation. He opted for the protection of a Chapter 7 bankruptcy. This filing happened almost 12 years ago. I find that the filing happened so long ago, occurred under circumstances largely beyond Applicant's control, and that seeking bankruptcy protection was responsible under the adverse circumstances Applicant faced at that time. AG ¶¶ 20(a) and (b) apply.

The two educational loans are the nub of this case, constituting $91,060.[26] When his bankruptcy was discharged in February 2006, those loans were placed in a deferred status. In the summer of 2011, Applicant was diagnosed with cancer and was given about two years to live. Because he went on short term disability while receiving treatment, his take-home pay was reduced, and his medical expenses increased. Unfortunately, at about the same time, his educational loans came out of deferment. I find that Applicant's medical condition, the resulting adverse effect on his finances, and his loans coming out of deferment are circumstances largely beyond his control under AG ¶ 20(b).

The next inquiry is whether Applicant acted responsibly under those adverse circumstances. When his loans came out of deferment, Applicant had discussions with the collection agent for those loans and informed the agent of his difficult financial situation. He was referred to a loan recovery specialist, who recommended that Applicant agree to make good-faith, minimum payments until his financial circumstances improved. He made such an agreement, and the evidence shows that since October 2014 (notably, a year and a half before the SOR was issued), Applicant has paid $5 per month.

The Government argues that the loans are not being paid down with the minimum payments, and that the agreement is not a "realistic and meaningful repayment plan."[27] I respectfully disagree. The test under AG ¶ 20(b) is not whether the conduct is "realistic and meaningful." The test is whether Applicant acted "responsibly under the

[26] Applicant paid the credit card debt in April 2015, before the SOR was issued. I find that mitigating condition AG ¶ 20(d) applies.

[27] Government Brief, pp. 2-3.

circumstances." A security clearance adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness.[28] Likewise, a security clearance adjudication is not a forum for second-guessing payment arrangements between an applicant and a creditor. In this case, the payment arrangement was proposed by the creditor and accepted by Applicant. It was an arms-length transaction. Perhaps counsel for the creditor would have advised her client to require higher monthly payments, but our role is not to improve the position of the creditor. Our role is to assess whether Applicant's conduct was responsible under the circumstances. I find that faced with a serious medical condition, increased expenses, lower take-home pay, and non-deferred loans, Applicant acted responsibly in agreeing to the minimum payments plan.

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. 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.[29] Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.[30]

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:	For Applicant
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge

[28] ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008).

[29] AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

[30] In this case, the SOR was issued under Adjudicative Guidelines effective within the Defense Department on September 1, 2006. Revised Adjudicative Guidelines were issued on December 10, 2016, and became effective on June 8, 2017. My Decision and Formal Findings under the revised Guideline F would not be different under the 2006 Guideline F.