DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 15-06177
	)	
Applicant for Security Clearance	)	

Appearances

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

05/12/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke her eligibility for access to classified information. Applicant mitigated the security concern raised by her 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 February 28, 2015. This document is commonly known as a security clearance application. On April 15, 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 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),

It detailed the factual reasons for the action under the security guideline known as Guideline F for financial consideration. Applicant answered the SOR on April 28, 2016, and requested a decision based on the written record without a hearing.

On June 25, 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 August 2, 2016.[3] Applicant responded to the FORM on August 23, 2016. Applicant's response to the FORM including its attached documents is marked as Applicant's Exhibit A. The case was assigned to me on April 7, 2017.

Procedural Matters

Included in the FORM were four items of evidence, which are marked as Government Exhibits 1 through 4.[4] Exhibits 1 through 4 are admitted into evidence. Exhibit 2 is a report of investigation (ROI) summarizing Applicant's interview that took place during the April 2015 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. The footnote is prominently prefaced with a bolded, upper-case notice to Applicant flagging the importance of the footnote, which then explains the concepts of authentication and waiver. In a case such as this, where Applicant has responded to the FORM, it is fair to conclude that Applicant read the footnote, understood it, and chose not to object to the ROI. The ROI is, therefore, admissible.

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).

[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 July 28, 2016, and Applicant's receipt is dated August 2, 2016. The DOHA transmittal letter informed Applicant that she had 30 days after receiving it to submit information.

[4] The first and second items in the FORM are the SOR and Applicant's Answer, respectively. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 3 through 6 are marked as Exhibits 1 through 4.

[5] *See generally* ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016). (In a concurring opinion in that case, 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 51 years old and has bachelor's and master's degrees.[6] She is divorced (in 2010) with two children, a son 16 and a daughter 19. From January 1986 until September 1991, she served on active duty in the U.S. Air Force, and from September 1991 until September 1993, she served in the U.S. Air Force Reserve. She was honorably discharged from both services.[7] Since October 2001, she has been employed by a defense contractor.[8]

The SOR alleges three delinquent debts totaling $18,803, and that Applicant filed a Chapter 7 bankruptcy in August 2005 that was discharged in November 2005. Applicant admitted the first debt alleged, a charge off for $1,304, stating that it would be paid in May 2016. That debt was shown as being delinquent as of March 2016.[9] Applicant provided no document showing that this debt has been paid. She denied the second debt alleged, a charge off for $406. There is record support for this debt.[10]

The third debt alleged, the bulk of the delinquent debt ($17,093), is a charge off. Applicant admitted that debt but stated that she believed that she had that account cancelled.[11] In her interview, Applicant explained that this was for a timeshare she purchased in 2008 or 2009. She made payments on this account for four to five months but then asked the creditor to let her out of the contract. The creditor informed her that the account would be closed, and she would not be responsible for any further payments. She was not aware that this account was shown in a credit report as being delinquent. After her interview, she retained counsel and successfully disputed this debt, which the creditor said had been cancelled in November 2011.[12] Although this account was shown as delinquent in March 2015, it was no longer shown as delinquent as of March 2016.[13]

Applicant admitted that she filed for bankruptcy in August 2005, which was discharged in November 2005. In her interview, Applicant explained that she filed for bankruptcy protection, because her then spouse was "financially irresponsible," could not

[6] Exhibits 1 and 2.

[7] Exhibits 1 and 2.

[8] Exhibit 1.

[9] Exhibit 4.

[10] Exhibits 3 and 4.

[11] Answer ¶¶ 1.a-1.c.

[12] Exhibits 2 and A.

[13] Exhibits 3 and 4.

hold a job, "ran up their accounts," and had no reliable income. As a result, she could not meet all of her financial obligations.[14]

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 the 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 clearance 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]

[14] Exhibit 2.

[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 (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.

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[23] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[24]

Discussion

Under Guideline F for financial considerations,[25] 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 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 a [person's] reliability, trustworthiness, and ability to protect classified information.[26]

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 or unwillingness to satisfy debts;
>
> 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 problems 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 [person] acted responsibly under the circumstances;

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

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

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

[26] AG ¶ 18.

> AG ¶ 20(c) [t]here are clear indications that the problem is being resolved or is under control;
>
> AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and,
>
> AG ¶ 20(e) the [person] 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.

The evidence supports a conclusion that as of March 2016 the timeshare account was shown as a delinquent charge off. Given the significant amount of the charge off, the Government was correct to see it as raising a security concern. Hence, it was alleged in the SOR, because AG ¶¶ 19(a) and (c) applied.

The next inquiry is whether any mitigating conditions apply to this debt. In Applicant's answer to the SOR, she stated that she believed this account had been cancelled. She elaborated in her interview that after four or five months, she asked that the account be cancelled, and the creditor agreed to cancel it and informed her that she would not be responsible for any future payments. When she learned in her interview that this account was still being shown as delinquent, she retained counsel, who successfully disputed this account with the timeshare creditor. Applicant provided information that she had a reasonable basis to dispute this debt, and she provided documented proof to substantiate the basis for the dispute and that the dispute was resolved in her favor. Therefore, AG ¶ 20(e) applies.[27]

The final inquiry is whether any mitigating conditions apply to Applicant's filing for bankruptcy protection in 2005. The unrebutted evidence is that at the time Applicant's then spouse was an irresponsible spendthrift, who could not keep a job, and could not provide a stable income. As a result, Applicant could not keep up with her financial obligations. I find those circumstances to be largely beyond her control under AG ¶ 20(b). The next question is whether under AG ¶ 20(b) filing a Chapter 7 petition was responsible under the adverse circumstances. If bankruptcy seemed like a reasonable alternative to Applicant, she faced the choice between a Chapter 7 (a discharge and a "fresh start") or Chapter 13 (a wage earner's plan). Although Chapter 13 is generally more attractive to creditors, because they at least receive something on their accounts, it requires that a petitioner adhere to a court-established payment plan. That in turn requires a petitioner to have a stable income and in an amount that could satisfy the plan payments. It is fair to surmise that given the financial unreliability of Applicant's spouse, she may have concluded that she could not commit to a Chapter 13 plan, and a Chapter 7 "fresh start" was the more prudent choice. Applicant's choice of a Chapter 7 was responsible, under the circumstances. In addition, the bankruptcy was filed almost 12 years ago, at a time when her then spouse was running up bills and could not be counted on to provide for

[27] The two other debts alleged in the SOR are not in amounts significant enough to raise a security concern.

household expenses. She divorced him in 2010. The circumstances that caused Applicant to file for bankruptcy are unlikely to recur. I find that AG ¶¶ 20(a) and (b) apply.

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.[28] Accordingly, I conclude that Applicant met 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:	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] AG ¶ 2(a)(1)-(9).