



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-07321

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel

For Applicant: *Pro se*

06/09/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He failed to present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his 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 November 11, 2014. This document is commonly known as a security clearance application. Thereafter, on May 10, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified

information.¹ The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations.

Applicant answered the SOR on May 9, 2016. His response consisted of handwritten comments on the SOR, and his responses were mixed. His response did not include supporting documentation. He requested a decision based on the written record in lieu of a hearing.

On July 29, 2016, Department Counsel submitted all relevant and material information that could be adduced at a hearing. The file of relevant material (FORM) consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision. The FORM was mailed to Applicant, who received it August 25, 2016. He did not reply within 30 days from receipt of the information as required under the Directive. The case was assigned to me on June 2, 2017.

Procedural Matters

While this case was pending decision, Security Executive Agent Directive 4 was issued establishing the National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The 2017 AG supersede the AG implemented in September 2006, and they are effective for any adjudication made on or after June 8, 2017. Accordingly, I have decided Applicant's case under the 2017 AG. I also considered this case under the 2006 AG, and my decision is the same using either set of AG.

Department Counsel's FORM includes Exhibit 3, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the April 2015 background investigation. The ROI is not authenticated by a witness, which is required under ¶ E3.1.20 of the Directive.² The Directive provides no exception to the authentication requirement. Indeed, the authentication requirement is the exception to the general rule that prohibits consideration of an ROI.

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, the record does not demonstrate that Applicant, who has not replied to the FORM, understood the concepts of authentication,

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).

² 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.).

waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, given the lack of an authenticating witness, I have not considered the ROI in reaching my decision.

Findings of Fact

Applicant is a 50-year-old employee who requires a security clearance for his employment as a federal contractor. He has worked as a laborer for a shipbreaking company since 2013 in State #1. Before that, he was unemployed from December 2011 to February 2013. Before that, he lived and had full-time blue-collar jobs during 1994-2011 in State #2. He relocated to State #1 in 2011. He has never married. He has four children, ages 22, 20, 13, and 10. His 20-year-old child lives in State #2, while his other three children live in State #1.

In his November 2014 security clearance application, Applicant disclosed that he failed to file a federal individual income tax return for tax year 2014; he estimated owing about \$1,000 in taxes; and he indicated that he would file a return in 2015. His admission is nonsensical, because returns for tax year 2014 were not due until April 2015, several months after he completed the application. He reported no other adverse financial information, including delinquent accounts, in response to the various questions about his financial history.

Under Guideline F for financial considerations, the SOR alleges, in ¶ 1.a through ¶ 1.f, a history of financial problems or difficulties consisting of the following: (1) failure to file federal and State #1 income tax returns for tax years 2013-2015; (2) a child-support obligation in collection in State #2 along with an unpaid judgment without a specified amount or a specified date of entry of judgment; and (3) four collection accounts for a total of about \$14,000.³ The four collection accounts are proven and established by a November 2014 credit report.⁴ Applicant did not present any documentation showing that the four collection accounts were paid, settled, in a repayment arrangement, cancelled, forgiven, or otherwise resolved. The other two matters are discussed below.

In his answer to the SOR, Applicant denied failing to file federal income tax returns for tax years 2013-2015. His admission in his security clearance application is nonsensical, as explained above, and cannot be accepted as reliable evidence. And there is no other admissible evidence to prove he failed to file returns for tax years 2013-2015.

³ The state income tax returns are not discussed further because State #1 is one of nine states with no individual income tax. The nine states are Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. Both New Hampshire and Tennessee currently tax some dividends and interest. Accordingly, there was no requirement for Applicant to file an individual income tax return in State #1.

⁴ Exhibit 4.

In his answer to the SOR, Applicant stated that the child-support obligation was “under investigation.” There is no admissible evidence to prove that he has a child-support account that is currently in arrears, in collection, or has been reduced to a judgment. The November 2014 credit report shows the following: (1) four child-support accounts, one in State #1, his state of current residence, and three in State #2, his state of former residence; (2) the three accounts in State #2 are described as 30-days late or in collection, the accounts have balances of \$0 and no past-due balances, and the accounts were transferred or sold (presumably to State #1 under the Uniform Reciprocal Enforcement of Support Act, which concerns interstate cooperation in the collection of spousal and child support); and (3) the account in State #1 is described as pays as agreed, has a balance of \$47,599, and is not past due. In other words, the credit report does not establish that Applicant has a current child-support account in arrears or in collection, or that a judgment has been entered against him for child support.

Law and Policies

It is well-established law that no one has a right to a security clearance.⁵ 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.”⁶ 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.⁷ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁸

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁰ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

⁵ *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).

⁶ 484 U.S. at 531.

⁷ Directive, ¶ 3.2.

⁸ Directive, ¶ 3.2.

⁹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁰ Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.¹¹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹²

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹³ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁴

Discussion

Under Guideline F for financial considerations,¹⁵ 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 an individual's reliability, trustworthiness, and ability to protect classified information.¹⁶

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:

AG ¶ 19(a) inability to satisfy debts;

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

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

AG ¶ 19(f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income as required; and

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ *Egan*, 484 U.S. at 531.

¹⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁵ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

¹⁶ AG ¶ 18.

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.

The evidence here supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. Although the evidence is not sufficient to establish that Applicant failed to file federal income tax returns for tax years 2013-2015 or has a delinquent child-support obligation, those matters do not end the inquiry. Applicant did not present any documentation showing that he has taken affirmative action to resolve the four collection accounts totaling about \$14,000. I conclude that the collection accounts are unresolved and ongoing.

Based on the written record before me, I am unable to credit Applicant in explanation, extenuation, or mitigation of his problematic financial history. In reaching that conclusion, I note that his financial problems are likely connected to his unemployment during 2011-2013. That circumstance can certainly create a financial hardship for most people. But he has not demonstrated that he has acted responsibly since resuming full-time work in 2013. Since then, he has had both time and opportunity to initiate the process of putting his financial house in order and have supporting documentation showing he has in fact done so. Documentation is necessary because the DOD security-clearance process, like other large bureaucratic institutions (for example, banks, insurance companies, and universities), does not run on word-of-mouth; it runs on paperwork.¹⁷ It's the responsibility of the individual applicant to produce relevant documentation in support of their case.¹⁸ Here, Applicant has not met his burden of production because he did not present sufficient documentation showing he is making a good-faith effort to resolve the four collection accounts.

Applicant's history of financial problems creates doubt about his 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 considered the whole-person concept. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

¹⁷ See ISCR Case No. 09-07091 at 2 (App. Bd. Aug. 11, 2010) (it is reasonable to expect applicants to present documentation about the satisfaction of specific debts).

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.c:	For Applicant
Subparagraphs 1.d-1.f:	Against 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.

Michael H. Leonard
Administrative Judge