



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-08241

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel

For Applicant: *Pro se*

05/05/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. He did not 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 June 25, 2015. This document is commonly known as a security clearance application. On January 27, 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 him 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

It detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations. Applicant answered the SOR on February 24, 2016, and requested a decision based on the written record without a hearing.

On April 19, 2016, Department Counsel submitted a file of all relevant and material information (FORM).² The FORM was mailed to Applicant, who received it on April 28, 2016. Applicant did not respond to the FORM. The case was assigned to me on March 10, 2017.

Procedural Matters

Included in the FORM were four items of evidence, which are marked as Government Exhibits 1 through 4.³ Exhibits 1 through 3 are admitted into evidence. Exhibit 4 is a report of investigation (ROI) summarizing Applicant's interview that took place during the September 2015 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.⁴ 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 4 is inadmissible, and I have not considered the information in the ROI.

Findings of Fact

Applicant is 59 years old and is a college graduate. He has never married and has no children. Since June 2015, Applicant has been employed by a defense contractor. The SOR alleged that (1) Applicant failed to file federal and state income tax returns for tax years 2011 through 2014, as required, and (2) Applicant has seven delinquent debts totaling approximately \$83,243. Applicant admits that he failed to file tax returns for tax

addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), 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 first two items in the FORM are the SOR and Applicant's Answer, respectively. Because those items are the pleadings in this case, they are not marked as Exhibits. Items 3 through 6 are marked as Exhibits 1 through 4.

⁴ 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.).

years 2011, 2012 and 2014, as alleged. He states that he did not make enough income in 2013 to be required to file returns. He states that he was unemployed from 2010 until 2014, because his job was outsourced.⁵ As a result, he failed to file, because he did not have enough money to pay any back taxes. He also indicated that he is having a tax preparer file the overdue tax returns.⁶ In addition, he states that he intends to set up a payment plan to satisfy any back taxes.

The bulk of Applicant's indebtedness is attributable to a past-due first mortgage (\$52,517) and a charged-off second mortgage (\$27,941) on his home.⁷ Those mortgages went into default in November 2011 and January 2012, during the period of Applicant's unemployment.⁸ Applicant denies those two allegations and claims that his home went through foreclosure in February 2014, and that he believed that those mortgages were satisfied by the foreclosure. The January 2016 credit report, however, almost two years after the foreclosure, shows those mortgages with past-due balances (\$52,517 on the first mortgage and \$31,342 on the second mortgage).⁹ The remainder of the delinquent debt is made up of five consumer accounts totaling \$2,735.¹⁰ Applicant's Answer documented that three of those debts (totaling \$2,037) were resolved in February 2016.¹¹

Law and Policies

It is well-established law that no one has a right to a security clearance.¹² 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."¹³ 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.

⁵ The evidence shows that Applicant was unemployed from October 2010 until September 2014. Exhibit 1.

⁶ In support of that contention, included with his Answer is an email from the tax preparer dated February 24, 2016.

⁷ SOR ¶¶ 1.e and f.

⁸ Exhibit 2.

⁹ Exhibit 2.

¹⁰ SOR ¶¶ 1.c – d and 1.g – i.

¹¹ SOR ¶¶ 1.d, g and i. Applicant stated that SOR debts 1.c and 1.h were also paid, referring to "receipts" attached to his Answer. There were, however, no receipts or other documents evidencing those payments attached to the Answer.

¹² *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).

¹³ 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁴ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁹

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²⁰ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²¹

Discussion

Under Guideline F for financial considerations,²² 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.²³

¹⁴ Directive, ¶ 3.2.

¹⁵ Directive, ¶ 3.2.

¹⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁷ Directive, Enclosure 3, ¶ E3.1.14.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ *Egan*, 484 U.S. at 531.

²¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²² AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²³ AG ¶ 18.

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 ¶ 19(g) failure to file annual Federal, state, or local income tax returns as required of the fraudulent filing of same;

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;

AG ¶ 20(c) [t]here are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The evidence supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under AG ¶¶ 19(a), (c), and (g). The first cause for concern is Applicant's failure to file federal and state income tax returns for 2011, 2012, 2013 and 2014. That failure triggers disqualifying condition AG ¶ 19(g). Applicant's repeated failure to file his federal and state income tax returns in a timely manner does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015).

Applicant offers a number of excuses. He notes that he was unemployed from 2010 through most of 2014, because his job was outsourced. That is admittedly a circumstance largely beyond his control, under AG ¶ 20(b). That does not, however, end the inquiry. Applicant's conduct under those adverse circumstances must be responsible. Applicant's unemployment, however, is not a defense to his failure to **file** tax returns.²⁴ He next offers that because he was unemployed he did not have the money to pay any tax liability. That may have been true, but that does not excuse his failure to **file** tax

²⁴ Applicant claims that he did not make sufficient income in 2013 to be required to file returns. There is nothing in the record to rebut that contention. Accordingly, I find that Applicant mitigated the allegation that he failed to file returns for tax year 2013.

returns. In fact, failure to file returns can result in penalties and interest charges, thus aggravating any tax liability. Finally, he answered that he has directed a tax preparer to file the overdue returns, and, if necessary, Applicant will make payment arrangements for any tax liability. He gave those directions, however, in February 2016, only after the SOR had been issued, in January 2016. The timing of resolution of the financial problems is relevant in determining the extent to which an applicant has demonstrated mitigation. See, e.g., ISCR Case No. 09-07551 at 4 (App. Bd. Mar. 1, 2011). Taking action to resolve the delinquent tax filings well after the initiation of the security clearance process undercuts a determination that those actions constitute a good-faith effort to resolve the delinquencies.²⁵ I conclude that Applicant's failure to file income tax returns during his period of unemployment was not responsible conduct under AG ¶ 20(b). Nor do other Guideline F mitigating conditions apply.

Applicant's two delinquent mortgage accounts are the second cause for security concern. Those two mortgage accounts trigger disqualifying conditions AG ¶¶ 19(a) and (c). Those two mortgages went into default during the period of Applicant's unemployment, a circumstance largely beyond his control, under AG ¶ 20(b). Applicant's understanding is that those two mortgages were satisfied by the foreclosure. The credit report, however, shows that as recently as January 2016 those two mortgages are still reporting past-due balances.²⁶ Applicant has produced no documentation to support his belief. In fact, the evidence is to the contrary. The Appeal Board has repeatedly held that applicants must present documentation to support their claims that debts have been resolved.²⁷ I conclude that none of the Guideline F mitigating conditions apply.

The record creates doubt 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 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.

Formal Findings

The formal findings on the SOR allegations are:

²⁵ The same reasoning holds true for the three consumer debts Applicant resolved in February 2016, after the SOR had been issued, in January 2016. Nevertheless, those consumer debts, standing alone, would not be cause for security concerns. Accordingly, I find that those three debts have been mitigated. Because Applicant did not document that SOR debts 1.c and 1.h were paid, I cannot find that they have been mitigated. See, e.g., ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008) (it is reasonable for a judge to expect an applicant to present documentation about the satisfaction or other resolution of individual debts); ISCR Case No. 06-17520 at 2 (App. Bd. Sep. 20, 2007).

²⁶ Exhibit 2.

²⁷ See note 25, *supra*.

²⁸ AG ¶ 2(a)(1)-(9).

Paragraph 1, Guideline F:	Against Applicant
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Subparagraphs 1.a-c, e-f, h:	Against Applicant
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Subparagraphs 1.d, g, i:	For Applicant
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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