



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 15-08515

**Appearances**

For Government: Ross Hymans, Esq., Department Counsel

For Applicant: *Pro se*

08/08/2017

**Decision**

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. Applicant failed to mitigate security concerns raised by his problematic financial history and his personal conduct. 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 August 20, 2014. This document is commonly known as a security clearance application. On April 1, 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.<sup>1</sup> The SOR is similar to a complaint in a civil court

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<sup>1</sup> 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

case. It detailed the factual reasons for the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct. Applicant answered the SOR on July 20, 2016, and requested a decision based on the written record without a hearing.

On August 16, 2016, Department Counsel submitted a file of relevant material (FORM).<sup>2</sup> The FORM was mailed to Applicant on August 23, 2016. 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 August 31, 2016.<sup>3</sup> Applicant did not respond to the FORM. The case was assigned to me on July 1, 2017.

### **Procedural Matters**

Included in the FORM were seven items of evidence, which are marked as Government Exhibits 1 through 4.<sup>4</sup> Exhibits 1, 3, and 4 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.<sup>5</sup> 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.

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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 Register and codified in 32 C.F.R. § 154, Appendix H (2016).

<sup>2</sup> 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.

<sup>3</sup> The Defense Office of Hearings and Appeals' (DOHA) transmittal letter is dated August 23, 2016, and Applicant's receipt is dated August 31, 2016. The DOHA transmittal letter informed Applicant that he had 30 days after receiving it to submit information.

<sup>4</sup> The first three items in the FORM are the SOR, the SOR transmittal letter, and Applicant's Answer, respectively. Because the SOR, the SOR transmittal letter, and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 4 through 7 are marked as Exhibits 1 through 4.

<sup>5</sup> 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 38 years old, divorced with no children. Since January 2012, he has worked for a defense contractor.<sup>6</sup>

Under Guideline F, the SOR alleged that Applicant (1) failed to file state and federal income tax returns for 2010 through 2013, and (2) has six delinquent debts totaling approximately \$6,805. Under Guideline E, the SOR alleged that Applicant deliberately failed to disclose those debts in his security clearance application. Applicant admitted all allegations in the SOR.<sup>7</sup>

## Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup> An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>11</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>12</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>13</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

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<sup>6</sup> Exhibit 1.

<sup>7</sup> Applicant submitted no extenuating documents with his answer to the SOR, and as noted, he did not respond to the FORM.

<sup>8</sup> *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 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>9</sup> 484 U.S. at 531.

<sup>10</sup> Directive, ¶ 3.2.

<sup>11</sup> Directive, ¶ 3.2.

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

<sup>13</sup> Directive, ¶ E3.1.14.

facts that have been admitted or proven.<sup>14</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>15</sup>

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

## **Discussion**

### **Guideline F - Financial Considerations**

Under Guideline F for financial considerations,<sup>18</sup> 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.<sup>19</sup>

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

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

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<sup>14</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>15</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>16</sup> *Egan*, 484 U.S. at 531.

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

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

<sup>19</sup> AG ¶ 18.

AG ¶ 19(f) failure to file...annual Federal [or] state income tax return as required;

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;

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

AG ¶ 20(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The evidence supports a conclusion that Applicant has had a problematic financial history and has failed to file federal and state income tax returns, as alleged.<sup>20</sup> This raises security concerns under AG ¶¶ 19(a), (b), (c) and (f).

The next inquiry is whether any potentially mitigating conditions apply. After a careful review of the record, I find that none of the potentially mitigating conditions cited above apply in this case.

### **Guideline E - Personal Conduct**

In assessing an allegation of deliberate falsification, I consider not only the allegation and applicant's answer but all relevant circumstances.<sup>21</sup> Under Guideline E for

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<sup>20</sup> Facts admitted by an applicant in an answer to a SOR require no further proof by the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) ("any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof"); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) ("[a]n applicant's admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge's findings").

<sup>21</sup> AG ¶¶ 2(a) and (d)(1)-(9) (explaining the "whole-person" concept and factors).

personal conduct, the concern is that “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.”<sup>22</sup> A statement is false or dishonest when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if, for example, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, reasonably did not know the information, or genuinely thought the information did not need to be reported.

In this case, the SOR alleged that Applicant falsified his security clearance application by deliberately failing to disclose the indebtedness alleged under Guideline F. Applicant answered, “I admit,” to that allegation. His answer was not qualified or explained in any fashion. Applicant did not provide any additional circumstances for me to examine, and I am not aware of any. Therefore, in light of Applicant’s unqualified admission, the Government needs no further proof.<sup>23</sup> The burden shifts to Applicant to mitigate any security concern.<sup>24</sup> He has not carried that burden.

The record evidence on Applicant’s financial condition and his personal conduct raises 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.<sup>25</sup> Accordingly, I conclude that Applicant has not met 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.<sup>26</sup>

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<sup>22</sup> AG ¶ 15.

<sup>23</sup> See note 20, *supra*.

<sup>24</sup> ISCR Case No. 94-0966 at 4, n. 4 (App. Bd. Jul. 21, 1995).

<sup>25</sup> AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

<sup>26</sup> 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 Guidelines F and E would not be different under the 2006 Guidelines.

### **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
Subparagraphs 1.a-1.g:	Against Applicant
Paragraph 2, Guideline E	Against Applicant
Subparagraph 2.a.	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.

Philip J. Katauskas  
Administrative Judge