



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-08681

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel

For Applicant: *Pro se*

07/20/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke her eligibility for access to classified information. She failed to present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from a history of financial problems, which includes a 2009 Chapter 7 bankruptcy case and unreleased federal tax liens filed in September 2011 and March 2014 for \$34,899 and \$24,121, respectively. 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 April 15, 2015. This document is commonly known as a security clearance application. Thereafter, on June 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 her eligibility for access to classified

information. 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 August 26, 2016. She requested a decision based on the written record in lieu of a hearing. Her response included a one-page memorandum in which she explains her financial problems.

On October 25, 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 November 4, 2016. She did not reply within 30 days from receipt of the information as required. The case was assigned to me July 3, 2017.

Procedural Matters

Department Counsel's FORM includes Exhibit 4, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the September 2015 background investigation. The ROI is not authenticated by a witness, which is required under ¶ E3.1.20 of the Directive.¹ Likewise, Section 5(a) of Executive Order 10865 prohibits receipt and consideration of "investigative reports" without authenticating witnesses. 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 written record does not demonstrate that Applicant, who has not replied to the FORM, understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that she understood the implications of waiving an objection. Accordingly, given the lack of an authenticating witness, I have not considered the ROI in reaching my decision.

Findings of Fact

Applicant is a 43-year-old employee who requires a security clearance for her employment as a federal contractor. She has worked as a technical writer and editor since September 2013. Before that, she was unemployed for about four months. Before that, she worked for a federal contractor as a self-employed consultant and research analyst from April 2003 to April 2013. She married in 1993 and divorced in 1997. She has two adult children and one minor child.

¹ 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.).

In her April 2015 security clearance application, Applicant disclosed a number of financial issues as follows: (1) a 2009 Chapter 7 bankruptcy case; (2) failure to pay an estimated \$60,000 in federal income tax stemming from her period of self-employment; and (3) a repossession of an automobile.² She explained the repossession stemmed from an accumulation of medical bills during a period when she did not have medical insurance.

The SOR alleges a history of financial problems consisting of 15 items as follows: (1) the 2009 Chapter 7 bankruptcy; (2) two unreleased federal tax liens, filed in September 2011 and March 2014, for \$34,899 and \$24,121, respectively; and (3) 12 collection, past-due, or charged-off accounts for a total of about \$26,204. Three of the 12 delinquent accounts appear to be medical collection accounts for a total of about \$836. All 15 items are established by credit reports from May 2013, December 2015, and October 2016.³ There is no documentation in the written record to establish that the federal tax liens are in a payment arrangement with the IRS. Nor is there documentation showing that the 12 delinquent accounts were paid, settled, in a payment arrangement, cancelled, forgiven, or otherwise resolved.

In her answer to the SOR, Applicant explained the following circumstances surrounding her financial problems:

In 2008, I was working but unable to get health insurance because of a minor pre-existing condition. That year, I was diagnosed with cancer (Melanoma). I was raising three boys and provided the only household income. I had to pay taxes for my consulting income and fell behind. The expenses for treatment led me to declare bankruptcy in 2009.

A year after the cancer was gone, I started getting sick again. It took years and many specialists to diagnosis the autoimmune disease. In 2012, the day after my son graduated from high school, I moved to a part of the country where the cost of living was lower. It wasn't until mid-2013 that I got a job with [the employer] and was offered health benefits, but unfortunately my expenses continued to exceed my income.

I spoke with a lawyer, and bankruptcy again seems like the only option, but it is too soon to file so I just do what I can in the meantime.

Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review*

² Exhibit 3.

³ Exhibits 5, 6, and 7.

Program (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.⁴

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 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

⁴ The 2017 AG are available at <http://ogc.osd.mil/doha>.

⁵ *Department of the 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.

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).

Discussion

Under Guideline F for financial considerations, 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 or sensitive information.¹⁵

The concern is broader than the possibility that a person might knowingly compromise classified or sensitive 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(c) a history of not meeting financial obligations;

AG ¶ 19(f) . . . failure to pay annual federal, state, or local income tax as required;

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; 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 here supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. To start, she is indebted to the IRS based on two tax liens for a total of \$59,020. With accrual of interest and the possibility of penalties, it is likely she owes even more in back taxes. Failure to pay income tax as required by law bears close examination and is a matter of serious

¹⁵ AG ¶ 18.

concern.¹⁶ Second, she is also indebted on 12 delinquent accounts for about \$26,000. Although it appears Applicant has had serious medical issues over the years, which are circumstances beyond her control, only 3 of the 12 delinquent debts are medical collection accounts for less than \$1,000 in total. All 12 of the delinquent debts are unresolved.

What's missing here is documentation that Applicant initiated and is adhering to a good-faith effort to pay or settle what she owes to her various creditors. Also missing is documentation that she has made a payment arrangement with the IRS to resolve the two tax liens and that she is in compliance with the arrangement. Without such documentation, I can only conclude that Applicant has not met her burden of production because she did not present sufficient documentation showing she is taking affirmative steps to resolve her financial problems. Based on her answer to the SOR, it appears she is simply waiting until she can discharge her debts via another Chapter 7 bankruptcy case, which is not indicative of good faith, and which will not provide her any relief from the federal tax liens.

Applicant's history of financial problems creates doubt about her 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 she did not meet 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

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a – 1.o:	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

¹⁶ The General Accountability Office (GAO) expressed serious concern over the relationship between tax delinquents and clearance holders in its July 28, 2014 report, *Security Clearances: Tax Debts Owed by DOD Employees and Contractors*, <http://www.gao.gov/assets/670/665052.pdf>.