



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 15-04452

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel

For Applicant: *Pro se*

10/24/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny her eligibility for access to classified information. Applicant mitigated security concerns raised by her problematic financial history and her personal conduct. 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 October 6, 2014. This document is commonly known as a security clearance application. On November 21, 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 It detailed the factual reasons for

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

the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct. Applicant answered the SOR on January 9, 2017, and requested a decision based on the written record without a hearing.

On February 24, 2017, Department Counsel submitted a file of relevant material (FORM).² Applicant responded to the FORM on April 14, 2017, and submitted four documents that I have marked as Applicant's Exhibits (AE) A through D. They are admitted into evidence without objection. The case was assigned to me on October 1, 2017.

Procedural Matters

Included in the FORM were six items of evidence, which are marked as Government Exhibits (GE) 1 through 4.³ Exhibits 1, 2, and 4 are admitted into evidence. Exhibit 3 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.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. The footnote is prominently prefaced with a bolded, upper-case notice to Applicant and flagging for Applicant 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.

Findings of Fact

Applicant is 52 years old and is divorced with three adult children. She is a high school graduate with some college credits. She served on active duty with the U.S. Air

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). 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 are made under the revised Guidelines F and E.

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. 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 GE 1 through 4.

⁴ 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.).

Force from 1984 until her honorable discharge in 2007. Since March 2014, she has been employed by a defense contractor.⁵

Under Guideline F, the SOR alleged two delinquent debts, a cable account for \$1,309 and a home equity loan for \$25,196. Under Guideline E, the SOR alleged that Applicant deliberately falsified her security clearance application by failing to disclose those two delinquent debts.⁶

Applicant denied those allegations with explanations. She denied that she had any knowledge of the delinquent cable account until she received the SOR, and she has disputed that debt. Her answer is consistent with her December 2014 background interview, in which she claimed to have no knowledge of that account. In her response to the FORM, she stated that the cable debt was due to her failure to return cable equipment, which she claimed she had returned but could not locate the receipt for that return. She also provided documentation that she paid this account in full in March 2017, notwithstanding continuing her dispute.⁷

Applicant explained that the home equity loan was secured by a home that she and her spouse purchased in May 2006. The primary lender on that loan subsequently sold that loan to another lender between May 2006 and August 2008. Applicant lived in the house while her husband, a member of the armed services, was on active duty in another state. In August 2008, Applicant and her spouse separated, and she moved to another state. In June 2009, she filed for divorce and in doing so learned that the home was being foreclosed due to the tenants' failure to pay rent to her spouse. She had been under the impression that her spouse was making the home equity loan payments. In 2009, Applicant and her spouse contacted the primary home equity lender, because they had been told at the time of taking the loan that the primary lender would manage the account for the life of the loan and not sell the loan to another lender. The primary lender agreed, but it was too late to stop the foreclosure. In light of the lender's agreement, in December 2014 the lender issued Applicant an IRS Form 1099-C discharging the loan in the amount of \$25,196, the amount alleged in the SOR. That document also stated that Applicant was not personally liable for the repayment of the debt. At the time of her December 2014 background interview, Applicant explained that the lender did not hold her personally liable on the loan.⁸

⁵ GE 1; GE 3.

⁶ SOR ¶¶ 1 and 2.

⁷ Answer ¶ 1.a. AE A and AE C. GE 3.

⁸ Answer ¶ 1.b. AE A and AE B.

Law and Policies

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

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹² The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹³ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁵

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

⁹ *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).

¹⁰ 484 U.S. at 531.

¹¹ Directive, ¶ 3.2.

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

¹³ Directive, ¶ E3.1.14.

¹⁴ Directive, Enclosure 3, ¶ E3.1.15.

¹⁵ Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ *Egan*, 484 U.S. at 531.

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

Discussion

Guideline F - Financial Considerations

Under Guideline F for financial considerations,¹⁸ 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.¹⁹

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 ¶ 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; and ,

AG ¶ 20(e) the individual 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.

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

¹⁹ AG ¶ 18.

The nub of this case is the delinquent home equity loan. That delinquency raises security concerns under AG ¶¶ 19(a) and (b).²⁰ The next inquiry is whether any potentially mitigating conditions apply.

The evidence shows that Applicant and her husband took out a home equity loan in May 2006. She lived in the home until she and her spouse separated, and Applicant moved to another state. It was not until Applicant filed for divorce in June 2009 that she learned that the home was in foreclosure. She also learned then that contrary to what she had always believed, her spouse had not been making the loan payments. Applicant and her spouse disputed the home equity debt with the primary lender, on the grounds that the lender promised at the outset that it would not sell the loan to another lender which, contrary to that promise, it had done. The lender agreed. As a result, the lender issued Applicant an IRS Form 1099-C discharging Applicant from all liability on that loan.

The home equity loan delinquency and foreclosure proceedings were discovered by Applicant in June 2009, when she filed for divorce. She and her spouse successfully disputed that delinquency with the primary lender. The behavior happened in June 2009, was a one-time instance under unusual circumstances, is unlikely to recur, and, at the time, Applicant was going through a divorce. AG ¶¶ 20(a), (b), and (e) apply.

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.²¹ Under Guideline E for 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."²² 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 her security clearance application by deliberately failing to disclose the indebtedness alleged under Guideline F. Applicant denied that she deliberately falsified her clearance application. As to the cable account, Applicant answered that she was not aware of that delinquency until her December 2014 background interview. Applicant completed her security clearance application in October 2014 and did not disclose any home equity loan delinquency. By

²⁰ The \$1,309 delinquent cable account is of *de minimis* security concern, and in any event Applicant has paid that debt while continuing to dispute it. I find in favor of Applicant on that allegation.

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

²² AG ¶ 15.

that time, Applicant and her spouse had successfully disputed their liability under that loan with the primary lender, which issued an IRS Form 1099-C in December 2014 discharging the debt. As a result, at the time Applicant completed her security clearance application in October 2014, it is credible that she did not believe that the debt had to be disclosed. I find that Applicant did not deliberately falsify her security clearance application.

The evidence on Applicant's financial condition and her personal conduct does not raise doubts 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 gave due consideration to the whole-person concept.²³ Accordingly, I conclude that Applicant has 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.²⁴

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.b:	For Applicant
Paragraph 2, Guideline E	For Applicant
Subparagraph 2.a.	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

²³ AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

