



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



In the matter of: )  
 )  
 ----- ) ISCR Case No. 16-02845  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Caroline E. Heintzelman, Esq., Department Counsel  
For Applicant: *Pro se*

10/01/2017  
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**Decision**  
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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 the security concern raised by 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 October 18, 2015. This document is commonly known as a security clearance application. On November 15, 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> It detailed the factual reasons for

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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 addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG),

the action under the security guideline known as Guideline F for financial considerations. Applicant answered the SOR on December 19, 2016, and requested a decision based on the written record without a hearing.

On February 1, 2017, Department Counsel submitted a file of relevant material (FORM).<sup>2</sup> The FORM was mailed to Applicant on February 2, 2017, and he received it on February 10, 2017. He was given 30 days to file objections and submit material to refute, extenuate, or mitigate the Government's evidence.<sup>3</sup> Applicant did not respond to the FORM. The case was assigned to me on October 1, 2017.

### **Procedural Matters**

Included in the FORM were seven items of evidence, which are marked as Government Exhibits (GE) 1 through 5.<sup>4</sup> Exhibits 1 and 3 through 5 are admitted into evidence without objection. GE 2 is a report of investigation (ROI) summarizing Applicant's interview that took place during the December 2015 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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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. My decision and formal findings under the revised Guideline F would not be different under the 2006 Guideline F.

<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 February 2, 2017, and Applicant's receipt is dated February 10, 2017. The DOHA transmittal letter informed Applicant that he had 30 days after receiving it to submit information.

<sup>4</sup> The first item in the FORM is the SOR, and the second item is Applicant's Answer. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 3 through 7 are marked as Exhibits 1 through 5.

<sup>5</sup> 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.).

## Findings of Fact

Applicant is 48 years old, a high school graduate, and is married. He has one adult stepson, an adult daughter, three sons (ages, 9, 13, and 15), and a daughter (age 7). Since September 2015, he has worked for a defense contractor. From November 1997 until September 2015, he was self-employed.<sup>6</sup>

The SOR alleged six delinquent debts totaling \$37,794, two of which are for delinquent state and federal income taxes. The SOR also alleges that Applicant failed to timely file his federal income tax returns for 2012 and 2013 and failed to file his state income tax returns for 2006 through 2008 and for 2010 through 2014.<sup>7</sup>

Applicant admitted all allegations. Applicant explained in his answer that he was a self-employed construction contractor at the time of the 2008 recession, and he was unable to keep current with his financial obligations. As to the tax allegations, he answered that he had filed all his state and federal income tax returns and that he had installment agreements with the IRS and the state. The only documents he attached were a December 14, 2016 billing notice from the IRS and a December 9, 2016 state payment agreement which shows the balance due and the outstanding income tax bills. Applicant did not provide any documents showing a record of actual payments made to the IRS or to the state. As to the non-tax debts, Applicant said that once he satisfies his tax obligations, he will pay those off “a little at a time.”<sup>8</sup>

## Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>9</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>10</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>11</sup> An

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<sup>6</sup> GE 1.

<sup>7</sup> SOR ¶¶ 1.a-1.h.

<sup>8</sup> Answer.

<sup>9</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>10</sup> 484 U.S. at 531

<sup>11</sup> Directive, ¶ 3.2.

unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>12</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>13</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>14</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>15</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>16</sup>

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>17</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>18</sup>

### Discussion

Under Guideline F for financial considerations,<sup>19</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>20</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.

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<sup>12</sup> Directive, ¶ 3.2.

<sup>13</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>14</sup> Directive, Enclosure 3, ¶ E3.1.14.

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

<sup>16</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>17</sup> *Egan*, 484 U.S. at 531.

<sup>18</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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

<sup>20</sup> AG ¶ 18.

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 the 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 tax 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 the conclusion that Applicant has a problematic financial history. AG ¶¶ 19(a), (b), (c), and (f) apply. The next inquiry is whether any of the mitigating conditions apply.

Applicant's failures to file federal and state income tax returns and to pay income taxes happened as recently as 2013 and 2014, and he failed to file from as early as 2006 through 2008. Also, he failed to file for at least seven years. The 2008 recession cannot conceivably explain his failures to file from 2006 through 2007, which preceded the recession. Applicant's substantial non-tax debts have been delinquent and remain so

since 2011. Applicant's behavior was neither infrequent, nor did it happen so long ago to mitigate the security concern. Thus, AG ¶ 20(a) does not apply.

I have expressed doubt above that the 2008 recession was the culprit for all of Applicant's SOR debts. Even if I credit that explanation for some of Applicant's debts as being a circumstance largely beyond his control, the next question is whether he acted responsibly under those circumstances. It appears that Applicant's efforts to enter into installment agreements with the IRS and the state began in December 2016, after the issuance of the SOR on November 15, 2016. A security clearance adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness.<sup>21</sup> The timing of Applicant's efforts to rectify his tax problems calls into question his good faith. Furthermore, Applicant has provided no documentation that he has adhered to those tax payment agreements. The Appeal Board has routinely held that to mitigate indebtedness an applicant must show evidence of a track record of repayments.<sup>22</sup> Applicant has not shown such evidence here. I cannot find that Applicant acted responsibly as to his SOR indebtedness. Thus, AG ¶¶ 20(b) and (g) do not apply.

There is no evidence that Applicant has received any financial counseling and that his debts are being resolved or are under control. Nor is there any evidence that Applicant has initiated and is adhering to a good-faith effort to repay his overdue creditors or otherwise resolve his debts. Thus, AG ¶¶ 20(c) and (d) do not apply. In fact, beyond a promise to repay his non-tax debts after he has satisfied his tax liabilities, Applicant has submitted no evidence mitigating those non-tax debts. The Appeal Board has long held that promises to pay delinquent debts in the future do not mitigate the security concerns raised by such debts.<sup>23</sup>

The record 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>24</sup> Accordingly, I conclude that Applicant failed to 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.

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<sup>21</sup> ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008).

<sup>22</sup> ISCR Case No. 14-04565 at 3 (App. Bd. Sep. 18, 2015); ISCR Case No. 14-03688 at 3 (App. Bd. Aug. 18, 2015). The Appeal Board has also held that it is reasonable to expect applicants to present documentation about the satisfaction or resolution of individual debts. See, e.g., ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008). Applicant has not submitted any such documentation.

<sup>23</sup> See, e.g., ISCR Case No. 14-04565 at 3 (App. Bd. Sep. 18, 2015); ISCR Case No. 14-03069 at 3 (App. Bd. Jul. 30, 2015).

<sup>24</sup> AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

### **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.h:                      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