



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 16-03677

Appearances

For Government: Charles C. Hale, Esq., Department Counsel

For Applicant: *Pro se*

10/14/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, or mitigate the security concerns stemming from his current financial status and his ties to the country of the Philippines. 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 December 2, 2015. This document is commonly known as a security clearance application. On January 18, 2017, 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 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*

the action under the security guidelines known as Guidelines F and B for financial considerations and foreign preference, respectively. Applicant answered the SOR on February 2, 2017, and requested a decision based on the written record without a hearing.

On February 28, 2017, Department Counsel submitted a file of relevant material (FORM).² The FORM was mailed to Applicant on March 2, 2017. 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 March 8, 2017.³ He responded to the FORM on March 31, 2017, and submitted documents that are marked Applicant's Exhibits (AE) A through H and are admitted into evidence without objection. The case was assigned to me on October 1, 2017.

Procedural Matters

Included in the FORM were ten items of evidence, eight of which are marked as Government Exhibits (GE) 1 through 8.⁴ Exhibits 1, 3 through 6, and 8 are admitted into evidence without objection. GE 2 and GE 7 are reports of investigations (ROI) summarizing Applicant's interviews that took place during the May 2016 and February 2013 background investigation. The ROIs are not authenticated as required under ¶ E3.1.20 of the Directive.⁵ Department Counsel's written brief includes a footnote advising Applicant that the summaries were 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 GE 2 or GE 7. GE 2 and GE 7 are, therefore, admitted into evidence.⁶

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), 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 Guidelines F and B would not be different under the 2006 Guidelines.

² The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

⁴ Items 1 and 2 are the SOR and Applicant's Answer, respectively. Because the SOR and the Answer are the pleadings in this case, they are not marked as exhibits. Items 3 through 10 of the FORM are marked as Exhibits 1 through 8.

⁵ 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.).

⁶ This is consistent with a recent Appeal Board Decision. ISCR Case No. 15-05047 at 4 (Nov. 8, 2017) (ROI is admissible where applicant's response to a FORM did not object to the admission of the ROI).

Findings of Fact

Applicant is 43 years old and married with a son and a daughter (ages 4 and 7, respectively) and two stepsons (ages 15 and 17). He is a high school graduate who successfully completed technical training after high school. He served honorably in the U.S. Marine Corps from 1994 until 1999.⁷ During that service, Applicant was awarded certificates in aviation maintenance and technology, his areas of specialization. He also received numerous medals, awards, and citations.⁸ In his response to the FORM, Applicant provided character references from his current supervisor, his previous supervisor, co-workers, and previous co-workers. Applicant is uniformly characterized as dedicated, and a consummate professional with high standards of integrity and reliability.⁹ With the exception of a two-month period of unemployment, since June 2005, he has worked in the defense industry.¹⁰

Under Guideline F, the SOR alleges that Applicant (1) has three delinquent consumer debts totaling over \$11,000; (2) failed to file his federal income tax returns for 2013 and 2014; and (3) owes the IRS \$1,438 for tax year 2012. Applicant admits the three consumer debts. As to the first consumer debt (SOR ¶ 1.a), he claims to have reached out to the creditor to settle the debt and has provided documentation to that effect. He also explained that the workers at his company went on strike in 2012 for ten weeks, and because he was not receiving a paycheck, he needed to use that credit card to pay his bills.¹¹ As to the second debt, a delinquent student loan (SOR ¶ 1.b), Applicant claims to be in the process of bringing the account current with an automatic payment plan but has provided no supporting documentation.¹² Applicant has paid off the third consumer debt (SOR ¶ 1.c).¹³

Applicant denied his failure to file his 2013 and 2014 federal income tax returns and provided copies of those returns.¹⁴ Applicant denies that he is indebted to the IRS for tax year 2012. In his response to the FORM, however, Applicant established that since September 2016 (before the SOR was issued) he has kept current on a monthly payment

⁷ GE 1.

⁸ AE A and B.

⁹ AE F.

¹⁰ GE 1; AE G.

¹¹ Answer ¶ 1.a; AE E.

¹² Answer ¶ 1.b; AE A.

¹³ Answer ¶ 1.c; AE C.

¹⁴ Answer ¶ 1.d. Department Counsel notes correctly that these returns were filed just 15 days before Applicant's background interview.

plan to retire his indebtedness to the IRS for tax year 2013.¹⁵ Applicant disclosed his tax and consumer debt problems in his security clearance application and discussed them at length during his background investigations. Although he has had federal tax problems in the past, he has been addressing those problems since December 2011 and February 2012, when he had three federal tax liens released by paying the amounts due.¹⁶ In addition, he is working with a credit counseling agency to resolve outstanding indebtedness.¹⁷

Under Guideline B, the SOR alleges that: (1) Applicant's spouse owns a home in the Philippines valued at about \$80,000; (2) Applicant's spouse owns property in the Philippines valued at about \$10,000; and (3) Applicant co-owns property with his spouse valued at about \$20,000. Although not alleged in the SOR, Applicant's spouse is a citizen and resident of the Philippines.¹⁸

Applicant admitted the first two allegations and denied the third, all with explanations. The first two properties are in his wife's name only, for two reasons. First, his wife needed the first property as a principal residence for herself and their children. She purchased the property while Applicant was deployed to the Middle East. Second, Applicant claims that under Philippine law, he cannot own real property. On a broader basis, Applicant and his spouse decided that they would live and raise their children in the Philippines, which was more accessible from where Applicant would be deployed. They also liked the America-like style of education, the health-care system, and the low cost of living.¹⁹

As to the third property alleged, Applicant explained that he listed that on his security clearance application, because at the time his spouse was in the process of purchasing that property. Since that time the seller terminated the negotiations, and the sale never went through.²⁰

Administrative Notice (Philippines)

In response to the Government's request, to which Applicant did not object, I have taken administrative notice of the following relevant facts about the Philippines:

¹⁵ Answer ¶ 1.e; AE D. The IRS Notice is dated September 26, 2016, and refers to tax year 2013 with an amount due of \$12,316. The first payment receipt, however, is dated August 30, 2016, and refers to tax year 2012. The remaining receipts refer to tax year 2013. It is possible that Applicant's payment plan with the IRS included any 2012 deficiency. SOR ¶ 1.e alleged a \$1,438 deficiency for 2012. AE D, pp. 16-24.

¹⁶ GE 2; GE 7.

¹⁷ GE 1 and 2.

¹⁸ GE 1.

¹⁹ Answer ¶¶ 2.a and 2.b.

²⁰ Answer ¶ 2.c.

- The Philippines is a multi-party, constitutional republic with a bicameral legislature. However, dynastic political families continue to monopolize elective offices at the national and local level. There is widespread official corruption and abuse of power. Authorities fail at times to maintain effective control over the security forces. Security forces commit human rights abuses to include extrajudicial killings and enforced disappearances.
- Other human rights problems include allegations of prisoner and detainee torture and abuse by security forces; violence and harassment against human rights activists by local security forces; warrantless arrests; lengthy pretrial detentions; overcrowded and inadequate prison conditions; killings and harassment of journalists; violence against women; abuse and sexual exploitation of children; and trafficking in persons. The government continues to investigate and prosecute only a limited number of reported human rights abuses, and concerns about impunity persist.
- Long-running Muslim separatists and communist insurgencies continue to result in the displacement of civilians and the killing of soldiers and police in armed clashes. Terrorist organizations such as Abu Sayyaf Group (ASG), Jemaah Islamiya (JI), and the New People's Army (NPA), as well as elements associated with the separatist Moro Islamic Liberation Front (MILF), continue to kill security forces, local government officials, and other civilians. Although Philippines counterterrorism efforts sustained pressure on terrorist organizations, its members are suspected to have carried out attacks against government, public, and private facilities, primarily in the central and western areas of Mindanao; others were linked to extortion operations in other parts of the country.
- U.S. citizens contemplating travel to the Philippines should carefully consider the risks to their safety and security while there, including the risk of terrorism.
- None of the source documents submitted by the Government reflects that the Philippines engages in economic or military intelligence activity directed toward the United States.

Law and Policies

It is well-established law that no one has a right to a security clearance.²¹ 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.”²² Under *Egan*, Executive Order 10865, and the Directive, any doubt about

²¹ *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).

²² 484 U.S. at 531.

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.²³ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁸

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²⁹ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.³⁰

Discussion

Guideline F (Financial Considerations)

Under Guideline F for financial considerations,³¹ 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

²³ Directive, ¶ 3.2.

²⁴ Directive, ¶ 3.2.

²⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁶ Directive, Enclosure 3, ¶ E3.1.14.

²⁷ Directive, Enclosure 3, ¶ E3.1.15.

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

²⁹ *Egan*, 484 U.S. at 531.

³⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

³¹ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

questions about a [person's] reliability, trustworthiness, and ability to protect classified or sensitive information.³²

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 potentially disqualifying conditions:

AG ¶ 19(a) inability to satisfy debts;

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

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.

In analyzing the facts of this case, I considered the following potentially mitigating conditions:

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) there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d) the individual initiated 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.

³² AG ¶ 18.

The evidence shows that Applicant has had a problematic financial history and has failed in the past to file his federal income tax returns, as required. This evidence triggers AG ¶¶ 19(a), (c), and (f). The next inquiry is whether any mitigating conditions apply.

Applicant's delinquent debts fall into two categories, consumer debt and tax debt. His three consumer debts (which includes his student loan) total \$10,130. In addressing those debts, Applicant has paid one debt in collection (for \$615). For the credit card debt, Applicant has reached out in writing to the creditor to negotiate either a settlement or a payment plan. He attributes this delinquency to a ten-week strike in 2012, when he was not receiving a paycheck. For a breadwinner with a spouse and then three children to support for two-and-a-half months without pay, it is understandable that Applicant fell behind in his finances. For the educational loan, the plan is for Applicant to become current on his payment plan. For these two remaining debts, Applicant is working with a credit counseling agency. I find that Applicant's indebtedness was caused by circumstances largely beyond his control and that he has acted responsibly under the circumstances he faced. AG ¶¶ 20(b), (c), and (d) apply.

The remaining debt is Applicant's delinquent federal income taxes. The SOR alleged a delinquency for 2012 for \$1,438. We know now, however, from Applicant's response to the FORM that since September 2016 he has been making monthly payments to the IRS to retire a 2013 delinquency (\$12,316) (and a portion of a 2012 delinquency, which likely relates to the amount alleged in the SOR). This is by far the single largest debt Applicant has been confronting. And it appears that he has been addressing his federal tax issues since 2011 and 2012, when he resolved several liens.³³ AG ¶ 20(g) applies.

In conclusion, an applicant is not required to show that every debt in the SOR has been paid. Rather, an applicant is required to demonstrate that he or she has "established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan."³⁴ Applicant here has made such a showing.

Guideline B (Foreign Influence)

The security concern under Guideline B (Foreign Influence) is set out in AG ¶ 6, as follows:

³³ Applicant mitigated his failure to file his 2013 and 2014 federal income tax returns by filing them on April 25, 2016. Department Counsel is correct that this filing was shortly before the May 2016 background interview. Although that militates for giving those filings less mitigating weight, it does not wholly outweigh the mitigating effect. It is not uncommon for applicants who learn of financial issues during the clearance process to take steps to mitigate those issues. What matters is that Applicant is now current on his federal income tax filings and his payment plan (and as to the latter, he has been current since September 2016).

³⁴ ISCR Case No. 07-06482 at 2 (App. Bd. May 21, 2008). See also ISCR Case No. 14-00504 at 3 (Aug. 4, 2014).

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

Three potentially disqualifying conditions under this Guideline are relevant:

AG ¶ 7(a): contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

AG ¶ 7(f): a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, that could subject the individual to heightened risk of foreign influence or exploitation or personal conflict of interest.

Two potentially mitigating conditions under this Guideline are relevant:

AG ¶ 8(a): the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States; and,

AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

This case is a bit unusual, because Applicant and his wife made a personal decision to live and raise their children in the Philippines, where Applicant's wife was born. Their reasons for doing so are quite understandable. Applicant's job in the defense industry puts his workplaces overseas, and the Philippines is more accessible to him for visits to his wife and family. In addition, Applicant and his wife found attractive the education and health-systems of the Philippines, and the cost of living there is less than other places they might have located. As a result of this family decision, it was normal that a home and other property be purchased. These purchases were solely in the name of Applicant's spouse.³⁵ These are the normal indicia of living as a family in a foreign country. Notwithstanding those routine indicia, Applicant's contacts and connections to the Philippines coupled with the terrorist threat bring AG ¶¶ 7(a) and (b) into play. The next question is whether any mitigating conditions apply.

There is no evidence that Applicant's role as a father and husband to his family in the Philippines would subject him to a heightened risk of foreign influence or a personal conflict of interest. The Philippines is not known to be a country that engages in economic or military intelligence aimed the United States. There is no evidence that Applicant's spouse has any connections to the Philippine government or military. In addition to his five years of honorable service in the United States Marines, Applicant has spent the last 12 years employed in the U.S. defense industry, which speaks to his dedication. His awards and character references depict a person of admirable character, one who is deeply loyal to America and would not compromise its security. Applicant has deep and longstanding relationships and loyalties to America, such that he would resolve any conflicts of interest in favor of the United States. Adjudications of security clearances are held to a commonsense standard.³⁶ Applying that standard to this case, I find that AG ¶ 8(b) applies.

The record does not create 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.³⁷ Accordingly, I conclude that Applicant 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.

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
---------------------------	---------------

³⁵ One prospective property purchase did not go through.

³⁶ See ISCR Case No. 00-0628 (App. Bd. Feb. 24, 2003).

³⁷ AG ¶ 2(a)(1)-(9).

Subparagraph 1.a-1.e: For Applicant

Paragraph 2, Guideline B: For Applicant

Subparagraphs 2.a-2c: 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