



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



In the matter of: )  
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----- ) ISCR Case No. 16-04076  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel  
For Applicant: *Pro se*

12/08/2017

**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 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 28, 2015. This document is commonly known as a security clearance application. On April 14, 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 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 June 3, 2017, and requested a decision based on the written record without a hearing.

On July 10, 2017, Department Counsel submitted a file of relevant material (FORM).<sup>2</sup> The FORM was mailed to Applicant July 10, 2017. He was given 30 days to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on July 19, 2017. Applicant did not respond to the FORM. The case was assigned to me on November 27, 2017.

### **Procedural Matters**

Included in the FORM were eight items of evidence, which are marked as Government Exhibits (GE) 1 through 8. GE 1 through 7 are admitted into evidence without objection. GE 8 is a report of investigation (ROI) summarizing Applicant's interviews that took place in March and May 2016 during the background investigation. The ROI is not authenticated, as required under ¶ E3.1.20 of the Directive.<sup>3</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 8 is inadmissible, and I have not considered it.

### **Findings of Fact**

Applicant is 40 years old and a college graduate who is married with a son age 13. Since March 2013, he has worked for a defense contractor. From April 2012 to March 2013, Applicant was unemployed due to illness and hospitalization.<sup>4</sup>

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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> 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.).

<sup>4</sup> Item 4. The Government notes that Applicant has a chronic medical condition that requires regular treatment. Government Brief, p. 5.

The SOR alleges that Applicant failed to file federal and state income tax returns for tax years 2007 through 2015. The SOR also alleges 35 delinquent debts totaling over \$42,000.<sup>5</sup> Of those 35 debts, there are 11 delinquent medical accounts totaling \$13,411. Applicant admits 32 of the SOR debts totaling about \$37,000. He disputes three of the SOR debts.<sup>6</sup>

Applicant claims that he has filed his back federal income tax returns for tax years 2007 through 2015. Documentation he provided shows that Applicant filed those returns in April 2014, and in March, April, and June 2016, long before the SOR was issued.<sup>7</sup> He has, however, provided no documentary evidence that he has filed his overdue state income tax returns.<sup>8</sup> Applicant's explanation for why he failed to timely file his income tax returns is found in his security clearance application, where he stated that "W2 was lost in apartment fire." He makes this explanation for tax years 2008 through 2012.<sup>9</sup>

Applicant has enlisted the services of a credit counseling and consolidation firm. In the debt management agreement (which is unsigned) with that firm, he enrolled 23 delinquent debts to be managed totaling just under \$14,000. Some, but not all, SOR debts are enrolled.<sup>10</sup> Applicant is to make 26 monthly payments of \$586 starting June 27, 2017. Applicant has not provided any evidence that he signed the debt management agreement or that he made any of the monthly payments.

One of the SOR debts not enrolled in the debt management agreement is a federal student loan.<sup>11</sup> As noted, Applicant is a college graduate. In a Declaration for Federal Employment dated March 21, 2013, Applicant disclosed that in September 2001 he had deferred student loans totaling \$55,000 and on March 11, 2013, he set up a plan to pay \$50 per month.<sup>12</sup> There is no evidence that Applicant made any payments under that plan. In his March 2015 security clearance application, Applicant indicated that he was

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<sup>5</sup> Item 1.

<sup>6</sup> Item 3, p. 1 (disputed debts are SOR ¶¶ 1.b (\$4,008), 1.r (\$651), and 1.s. (\$201).

<sup>7</sup> Item 3, pp. 3, 5, 8, 11, and 16-17.

<sup>8</sup> Usually taxpayers file their state income tax returns first, so that they can take a deduction on their federal income tax returns for any income tax paid to the state.

<sup>9</sup> Item 4, pp. 36-38. Department Counsel is correct that it is unclear when the fire occurred. It would seem, however, that as Applicant first offers this explanation as to his 2008 taxes, the fire occurred in early 2009, since that would be the time when his employer would issue its IRS Forms W-2 for 2008 wages. If my surmise is correct that the fire occurred in early 2009, it is passing strange that it took Applicant until 2014 and 2016 to file his back federal income tax returns.

<sup>10</sup> Those are SOR ¶¶ 1.v, z, aa-hh, and jj.

<sup>11</sup> SOR ¶ 1.q.

<sup>12</sup> Item 7, p. 2.

working with a credit counseling service to remove his student loans from default status.<sup>13</sup> As of November 2015, Applicant's federal student loan was in collection.<sup>14</sup> As of December 2016, however, his student loan was marked: "ACCOUNT PAID; STUDENT LOAN."<sup>15</sup> Apparently, Applicant resolved his federal student loan account between November 2015 and December 2016.

### **Law and Policies**

It is well-established law that no one has a right to a security clearance.<sup>16</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>17</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>18</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>19</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>20</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>21</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>22</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>23</sup>

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<sup>13</sup> Item 4, pp. 38-39.

<sup>14</sup> Item 6, p. 4.

<sup>15</sup> Item 5, p.3.

<sup>16</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>17</sup> 484 U.S. at 531

<sup>18</sup> Directive, ¶ 3.2.

<sup>19</sup> Directive, ¶ 3.2.

<sup>20</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>22</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>23</sup> Directive, Enclosure 3, ¶ E3.1.15.

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>24</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>25</sup>

### **Discussion**

Under Guideline F for financial considerations,<sup>26</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>27</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 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; and

AG ¶ 19(f) failure to file...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 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

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<sup>24</sup> *Egan*, 484 U.S. at 531.

<sup>25</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>26</sup> AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

<sup>27</sup> AG ¶ 18.

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 his financial problems continue to this day. Security concerns are raised under AG ¶¶ 19(a), (b), (c), and (f). The next inquiry is whether any mitigating conditions apply.

Because Applicant has provided documentation that in 2014 and 2016 (pre-SOR) he filed his federal income tax returns for 2007 through 2015, the failure-to-file federal income tax returns for those years has been mitigated under AG ¶ 20(g). I will find in favor of Applicant on those SOR allegations. I will, however, find against Applicant for failure-to-file state income tax returns for those years, because there is no evidence that he has cured those failures.

Because the record shows that by December 2016 Applicant had paid his federal student loan, that debt has been mitigated under AG ¶ 20(d).

Applicant's financial woes appear to date back to about 2009, and they persist to this day. And his indebtedness was not infrequent. AG ¶ 20(a) does not apply.

Applicant was unemployed for almost a year (from April 2012 to March 2013), due to illness and hospitalization. His level of medical debt (over \$13,000) is evidence of the severity of his illness. Being unemployed due to illness and hospitalization is certainly a circumstance largely, if not wholly, beyond Applicant's control. Thus, he gets partial credit under AG ¶ 20(b). The next inquiry, however, is whether he acted responsibly in light of those circumstances. Retaining a credit counseling and consolidation firm was a responsible first step, as was enrolling almost \$14,000 of his delinquent debts in a

payment program. The problem is that the record has no evidence that he finalized the debt management agreement or that he has made any payments under it. Without such evidence, I cannot conclude that AG ¶¶ 20(b) and (c) fully apply. Nor is there evidence that AG ¶ 20(d) applies.

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>28</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.

### **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.p:	Against Applicant
Subparagraph 1.q:	For Applicant
Subparagraphs 1.r-1.jj:	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

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<sup>28</sup> AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

