DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 17-00879
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

12/01/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. Applicant failed to mitigate the security concerns raised by his problematic financial history and his alcohol consumption. 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 March 9, 2016. This document is commonly known as a security clearance application. On April 20, 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.[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 G for alcohol consumption. Applicant answered the SOR on May 15, 2017, and requested a decision based on the written record without a hearing.

On July 12, 2017 Department Counsel submitted a file of relevant material (FORM).[2] The FORM was mailed to Applicant July 14, 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 21, 2017.[3] Applicant did not respond to the FORM. The case was assigned to me on November 27, 2017.

Procedural Matters

Included in the FORM were nine items of evidence, which are marked as Government Exhibits (GE) 1 through 7.[4] GE 1 and GE 3 through 7 are admitted into evidence without objection. GE 2 is a report of investigation (ROI) summarizing Applicant's interviews in August 2016 and November 2016. The ROI is not authenticated, as required under ¶ E3.1.20 of the Directive.[5] 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 it.

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 Guideline F and Guideline G would not be different under the 2006 Guidelines.

[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 Defense Office of Hearings and Appeals' (DOHA) transmittal letter is dated July 14, 2017, and Applicant's receipt is dated July 21, 2017. The DOHA transmittal letter informed Applicant that he had 30 days after receiving it to submit information.

[4] The first item in the FORM is the SOR, and 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 9 are marked as Exhibits 1 through 7.

[5] *See generally* ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anan 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'anan 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 49 years old, and married with two children. He holds a master's degree, and from September 1986 until his honorable discharge in October 1994, he served on active duty in the U.S. Air Force. Since October 2004, he has worked for a defense contractor.[6]

Under Guideline F, SOR alleges nine delinquent debts totaling about $161,318, of which about $63,790 is for student loans. Applicant denied three of the debts and admits the remaining six.[7] In his security clearance application, he reported that he incurred about $93,000 in delinquent credit card debt due to his mother's medical expenses and that he was in the process of filing for bankruptcy. Applicant did not detail when he shouldered his mother's medical expenses.[8] Notwithstanding Applicant's denials, all SOR debts are supported by the record.[9] His delinquencies go back to about mid-2014.[10]

Regarding SOR ¶ 1.a (which he denied), Applicant provided documentation from a collection agency showing a payment of $486 in April 2017, leaving an outstanding balance of $133,315. Applicant added a handwritten note on that document saying, "I have made the past 4 payments Jan., Feb., Mar., Apr., 2017." He did not submit any documentation memorializing those four payments.

Applicant stated that he will resolve the debts in SOR ¶¶ 1.b through 1.f. and 1.i through settlement offers or the sale of his home. He provided documentation showing the current value of his home ($343,482).

Applicant denied the admitted debt alleged in SOR ¶ 1.g and stated that he recently paid $2,400 toward it. Applicant provided documentation of that payment in March 2017 and an agreement to make 12 additional payments in satisfaction of the debt. He provided no documentation showing further payments under that agreement. He also denied the debt in SOR ¶ 1.h, but stated in his answer that he was unaware of it and will resolve it immediately. Applicant did not provide any documentation that he has resolved that debt.

Under Guideline G, the SOR alleges that Applicant was twice arrested for driving while intoxicated (DWI), in January 2010 and in April 2014.[11] Applicant admitted that he was arrested for DWI in both instances but notes that he was charged only with DWI – 2d

[6] GE 1.

[7] Answer ¶¶ 1.a, 1.g, and 1.h (denies); Answer ¶¶ 1.b through 1.f, and 1.i. (admits).

[8] GE 1.

[9] GE 3 and 4.

[10] GE 3.

[11] SOR ¶¶ 2.a-2.b.

offense in 2014 and not with an open container, as the SOR alleges.[12] Based on the supporting evidence, Applicant is correct.[13]

The April 2014 arrest was Applicant's second DWI. In both instances, he was stopped for speeding, failed a field sobriety test, and was subsequently convicted of DUI.[14] His 2014 conviction resulted in a $4,000 fine, plus court costs.[15] In his answer, Applicant stated that he accepted his punishment, paid the fine, completed community service, attended awareness classes, and AA meetings.[16]

Law and Policies

It is well-established law that no one has a right to a security clearance.[17] 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."[18] 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.[19] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[20]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[21] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[22] An

[12] Answer ¶¶ 2.a-2.b.

[13] GE 5, 6, and 7.

[14] GE 5 and 6.

[15] GE 6.

[16] Answer, p. 4.

[17] *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).

[18] 484 U.S. at 531

[19] Directive, ¶ 3.2.

[20] Directive, ¶ 3.2.

[21] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[22] Directive, Enclosure 3, ¶ E3.1.14.

applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[23] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[24]

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[25] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[26]

Discussion

Guideline F, Financial Considerations

Under Guideline F for financial considerations,[27] 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….[28]

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; and

AG ¶ 19(c) a history of not meeting financial obligations.

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[23] Directive, Enclosure 3, ¶ E3.1.15.

[24] Directive, Enclosure 3, ¶ E3.1.15.

[25] *Egan*, 484 U.S. at 531.

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

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

[28] AG ¶ 18.

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 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; and,
>
> AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

The evidence supports a conclusion that Applicant has had a problematic financial history going back to about 2014. Security concerns are raised under AG ¶¶ 19(a) and (c). The next inquiry is whether any mitigating conditions apply.

Although Applicant's financial woes appear to date back to about 2014, they persist to this day. Moreover, his delinquencies are not infrequent. AG ¶ 20(a) does not apply.

Looking at the record generously in Applicant's favor, I could find that some of his delinquencies resulted from his mother's illness, a circumstance largely beyond his control.[29] That, however, does not end the analysis. Applicant must have acted responsibly in confronting that circumstance. There is nothing in the record showing that Applicant acted responsibly in addressing the debts resulting from his mother's illness. Therefore, AG ¶ 20(b) does not apply. Similarly, there is nothing in the record showing that Applicant received or is receiving financial counseling. Therefore, AG ¶ 20(c) does not apply.

For SOR ¶ 1.a (a student loan), Applicant documented a one-time payment of $486 in April of 2017. He submitted no documents showing any further payments. Similarly, for SOR ¶ 1.g, he provided a document showing a one-time payment of $2,400 but no documents of any further payments. The Board has previously noted that it is reasonable for a Judge to expect applicants to present documentation about the satisfaction of

[29] In fact, the record does not provide any basis for identifying which SOR debts were related to his mother's illness.

individual debts.[30] The Board also has held that applicants must show a track record of debt repayments.[31] Thus, AG ¶ 20(d) does not apply to SOR ¶¶ 1.a or g.

For the remaining SOR debts, Applicant in his answer stated his intent to resolve them in the future by settlement offers or by selling his house. The Board has long held, however, that "promises to pay off debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner."[32] Thus, Applicant has not mitigated the remaining SOR debts.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

> Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable in this case:

> (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed with alcohol use disorder; and
>
> (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant's DWIs in 2010 and 2014 raise a security concern under AG ¶ 22(a).

I have also considered all of the mitigating conditions for alcohol consumption under AG ¶ 23 and found the following relevant:

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

[30] *See, e.g.*, ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008); ISCR Case No. 06-17520 at 2 (App. Bd. Sep. 20, 2007).

[31] ISCR Case No. 08-09704 at 2 (App. Bd. Mar. 31, 2010).

[32] ISCR Case No. 14-04-04565 at 3 (App. Bd. Sep. 18, 2015); ISCR Case No. 14-03069 at 3 (App. Bd. Jul. 30, 2015).

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has established a pattern of modified consumption or abstinence in accordance with treatment recommendations; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

In the absence of the 2014 DWI, the 2010 DWI standing alone likely would be mitigated under AG ¶ 23(a) due to the passage of time. The 2014 DWI, however, just over three years ago, elevates the security concern to the present day such that AG ¶ 23(a) does not apply. Although it would be an overstatement to conclude that those two DWIs create a pattern, Applicant needs to show a lengthier period of sobriety and the absence of any alcohol-related incidents for AG ¶¶ 23(b) and (d) to apply.

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.[33] 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.i:	Against Applicant
Paragraph 2, Guideline G	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant

Conclusion

[33] AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

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