



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



In the matter of:)
)
) ISCR Case No. 17-01755
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

05/02/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. Applicant mitigated the security concern raised by his problematic financial history. He did not mitigate the security concerns raised by his criminal conduct, and his personal conduct. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant submitted a Questionnaire for National Security Positions (SF 86 format) on March 11, 2016. This document is commonly known as a security clearance application. On August 8, 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 the action under

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 security guidelines known as Guideline F for financial considerations, Guideline J for criminal conduct, and Guideline E for personal conduct. Applicant answered the SOR on August 31, 2017, and requested a decision based on the written record without a hearing.

On November 6, 2017, Department Counsel submitted a file of relevant material (FORM).² The FORM was mailed to Applicant on the same day. 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 November 17, 2017. Applicant responded to the FORM on December 13 and 18, 2017, and submitted two documents, that I have marked as Applicant's Exhibits (AE) A and B, and which are admitted into evidence without objection. The case was assigned to me on February 14, 2018.

Procedural Matters

Included in the FORM were 15 items of evidence, which are marked as Government Exhibits (GE) 1 through 15. GE 1 through 12 are admitted into evidence without objection. GE 13 through 15 are reports of investigation (ROI) summarizing Applicant's interviews that took place in February, September, and October 2010, in December 2016, and in February 2017, during the background investigation. The ROI is not authenticated, as required under ¶ E3.1.20 of the Directive.³ 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. GE 13 through 15, therefore, are admitted into evidence.⁴

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.

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

³ 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.).

⁴ This is consistent with recent Appeal Board decisions. ISCR Case No. 16-03126 at 2 (Jan. 24, 2018) (ROI admitted where applicant's response to the FORM failed to object to the ROI or indicate that it was inaccurate); ISCR Case No. 15-05047 at 4 (Nov. 8, 2017) (ROI admitted where applicant failed to object to the ROI in his response to the FORM).

Findings of Fact

Applicant is 43 years old, has a bachelor's degree, has never married, and has a son, age eight. He served in the U.S. Air Force on active duty from July 1992 until August 1995 and in the inactive Reserve from August 1995 until June 1997.⁵ Applicant was separated from the service involuntarily for unacceptable conduct and given a general discharge under honorable conditions.⁶

Under Guideline F, the SOR alleged that Applicant: (1) has five delinquent debts totaling \$13,491 (one a \$10,178 state tax lien); (2) filed Chapter 13 proceedings in 2010 and 2012, both of which were dismissed for failure to make plan payments; and (3) failed to timely file his state and federal income tax returns for 2011.⁷

Applicant admitted the 2010 Chapter 13 case, with the explanation that his mother had recently died, leaving his ailing father living in another state. Applicant and his two brothers took turns caring for their father. The expenses of traveling and taking time off of work to care for his father drained his finances, and the lawyer he retained recommended a Chapter 13 to stop the foreclosure of Applicant's home.⁸

Applicant admitted the 2012 Chapter 13. He explained that he had been laid off and was unemployed for over seven months and fell behind on his mortgage payments. The mortgage company refused to do a loan modification. The bankruptcy filing delayed the foreclosure of his home until after he regained employment in the spring of 2012.⁹ The SOR does not allege any delinquent mortgage deficiencies.

Applicant admitted SOR ¶ 1.c. (\$862) and stated that he intended to pay it. He admitted SOR ¶ 1.e (\$1,421) but has disputed the amount owed with the creditor. Applicant admitted SOR ¶ 1.f (\$620) but disputed the amount and claims that the debt is a duplicate of SOR ¶ (g) (\$410), the latter of which Applicant stated is the correct amount. He also documented that he has been paying this debt down under a plan.¹⁰

⁵ GE 5.

⁶ Answer, p. 18.

⁷ SOR ¶ 1.

⁸ Answer ¶ 1.a.

⁹ Answer ¶ 1.b. Applicant reported that he was unemployed from September 2011 until April 2012. GE 5.

¹⁰ Answer ¶¶ 1.c, e, f, g, and pp. 10-11.

Applicant denied SOR ¶ 1.d, the state tax lien, stating that it was caused by an error in the state's tax system. Applicant provided documentation from the state withdrawing the lien and stating that it is not enforceable.¹¹

Applicant admitted that he failed to file his federal and state income tax returns for 2011. He explained that his Forms W-2 and "other household tax information was lost during [his] moving."¹²

In sum, of the total debts alleged of \$13,491, Applicant resolved SOR ¶¶ 1.d, f, and g. totaling \$11,208.

Under Guideline J, the SOR alleged 13 incidents of criminal arrests of Applicant from April 2008 to as recently as January 2016. The criminal activities have a wide range: probation violation; simple battery; criminal trespass; narcotic possession; driving on a suspended or revoked license; altering a license plate; contempt of court; operating an unregistered vehicle; reckless conduct with a child; driving under the influence; operating a vehicle with an expired license; tampering; and theft of public utilities.¹³ With explanations, Applicant admitted all allegations, except for the tampering and theft of public utilities arrests, which he denied.¹⁴

In Applicant's answer to the SOR, he included a state court dismissal order dated February 23, 2015. In his handwritten note on the dismissal order, Applicant stated that the order pertained to SOR ¶¶ 2.i and 2.j.¹⁵ Those allegations involved an April 2012 arrest for deprivation of a child and reckless conduct, and a March 2012 arrest for driving under the influence. The order, however, dismissed 2014 charges for possession of drug-related objects and possession of a controlled substance. SOR ¶ 2.d alleged a 2014 arrest for possession of a narcotic and drug-related equipment. I have concluded that Applicant's note referring to SOR ¶¶ 2.i and 2.j was an error and that the dismissal order relates to SOR ¶ 2.d, and I have given it the appropriate weight.

In Applicant's response to the form, he included a December 4, 2017, email from a probation officer stating that Applicant had successfully completed all requirements of

¹¹ Answer ¶ 1.d; AE A.

¹² Answer ¶¶ 1. h, and i. Applicant reported that he moved his residence from one town to another town in the same state in November 2012. GE 5. Applicant should have filed his 2011 state and federal income tax returns no later than April 2012 (without any extension). The record does not show Applicant having moved his residence between January and April 2012.

¹³ SOR ¶¶ 2.a-m.

¹⁴ Answer ¶¶ 2.a-k. Applicant denied SOR ¶¶ 2.l and m. Answer ¶¶ 2.l and m. The Government has taken the position that it will not be submitting any evidence to support the two denied allegations and that it, therefore, has not met its burden of proof as to those allegations. Government Brief, p. 6.

¹⁵ Answer, p. 16.

his probation and is no longer on probation.¹⁶ I find that this letter pertains to SOR ¶ 2.b, which alleged a December 2015 arrest for simple battery with a sentence of probation until September 2017.

Under Guideline E, the SOR incorporated by reference SOR ¶¶ 2.a-k. The SOR also alleged that Applicant received Non-Judicial Punishment knowingly fraternizing with enlisted females and conduct unbecoming of an officer.¹⁷ Applicant admitted those allegations referring to his responses to the Guideline J allegations and noting that he was given a general discharge under honorable conditions.¹⁸

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁹ 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.”²⁰ 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.²¹ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²²

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²³ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁴ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

¹⁶ AE B.

¹⁷ SOR ¶¶ 3.a-b.

¹⁸ Answer ¶¶ 3.a-b.

¹⁹ *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).

²⁰ 484 U.S. at 531

²¹ Directive, ¶ 3.2.

²² Directive, ¶ 3.2.

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

²⁴ Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.²⁵ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁶

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²⁷ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁸

Discussion

Under Guideline F for financial considerations,²⁹ 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....³⁰

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(c): a history of not meeting financial obligations; and

AG ¶ 19(f): failure to file . . . annual Federal, state, or local income tax returns . . . as required.

²⁵ Directive, Enclosure 3, ¶ E3.1.15.

²⁶ Directive, Enclosure 3, ¶ E3.1.15.

²⁷ *Egan*, 484 U.S. at 531.

²⁸ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁹ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

³⁰ 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(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; 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.

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

Applicant attributed his 2010 bankruptcy to the death of his mother, which compelled him and his brothers to care for their ailing father. Applicant incurred the expenses of travel to and from his father's home. In addition, Applicant had to take time off of work to care for his father. This adversely affected his finances and put his home at risk of foreclosure. On advice of counsel, he filed for bankruptcy to protect his home.

Applicant attributed his 2012 bankruptcy to having been unemployed for over seven months, which put him in default of his home mortgage. He filed for bankruptcy to protect his home from foreclosure until he could regain employment.

I conclude that the death of Applicant's mother and the resultant need for Applicant to help care for his father and his lengthy period of unemployment are circumstances largely beyond his control that caused financial problems. I also conclude that under those circumstances filing for bankruptcy protection to stave off foreclosure was responsible conduct. SOR ¶¶ 1.a and b are mitigated under AG ¶ 20(b).

The lion's share of Applicant's indebtedness is the \$10,178 state tax lien. Applicant documented that the lien was erroneously imposed and had been withdrawn. SOR ¶ 1.d is mitigated under AG ¶ 20(e).

SOR ¶¶ 1.g and f are duplicates, the latter of which is being paid under a payment plan. Those debts are mitigated under AG ¶ 20(d).³¹

Applicant failed to file federal and state income tax returns for 2011 due to having lost his tax information for that year. There is no evidence that Applicant has any tax obligations for that year to the federal or state government. His failure to file happened seven years ago and under circumstance that are unlikely to recur. SOR ¶¶ 1.h and i are mitigated under AG ¶ 20(a).

Guideline J, Criminal Conduct

Applicant's history of criminal arrests raises a criminal conduct security concern, which is detailed in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

I have considered the disqualifying conditions under AG ¶ 31, and the following apply:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant's admissions of his 11 arrests trigger security concerns under AG ¶¶ 31(a) and (b). The question is whether Applicant has mitigated the security concerns raised by his criminal conduct.

The potentially mitigating conditions are set forth in AG ¶ 32 as follows:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

³¹ Applicant intends to pay the debt alleged in SOR ¶ 1.c. and has disputed the amount of debt alleged in SOR ¶ 1.e. The total of those two debts (\$2,283) does not raise security concerns.

(c) no reliable evidence to support that the individual committed the offense;
and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

I have carefully reviewed the four mitigating conditions set forth in AG ¶ 32. I find that none of them apply. Applicant's arrest record stretches from 2011 to 2016, just over two years ago, with his most recent probation ending in 2017. There is no evidence that he was coerced into committing the acts for which he was arrested. And there has been insufficient passage of time since his latest arrest to conclude that he has been rehabilitated.³²

Guideline E, Personal Conduct

Guideline E states the personal conduct that can raise security concerns:

Conduct 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility.

The following are potentially applicable disqualifying conditions under AG ¶ 16(d):

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive . . . or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations.

The SOR pleads by incorporation under Guideline E the allegations of criminal conduct under Guideline J. For the same reasoning set forth under Guideline J, I find that security concerns under Guideline E are raised by that conduct. That conduct was

³² I took into account that Applicant successfully completed his probation sentence imposed for the December 2015 arrest for simple battery. Because Applicant admitted the 11 arrests, AG ¶ 32(c) cannot apply.

untrustworthy, inappropriate, and involved violations of rules, conduct contemplated by AG ¶ 16(d).

What remains is the allegation of SOR ¶ 3.b that Applicant received non-judicial punishment for fraternizing with enlisted female service members and that he was discharged for unacceptable conduct. Applicant admitted those allegations. I find that Applicant's conduct that led to his non-judicial punishment and discharge for unacceptable conduct triggers security concerns under Guideline E. I also find that none of the mitigating conditions under Guideline E 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:	For Applicant
Subparagraphs 1.a-1.i:	For Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a-k:	Against Applicant
Subparagraphs 2.l-m:	For Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraphs 3a.-b:	Against Applicant

³³ AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

Conclusion

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge