



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 17-02010

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel

For Applicant: *Pro se*

01/19/2018

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. He did not present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his history of financial problems or difficulties, which includes more than \$10,000 in back taxes owed to the IRS. 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 August 24, 2015.<sup>1</sup> This document is commonly known as a security clearance application. Thereafter, on June 22, 2017, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was

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<sup>1</sup> Exhibit 2.

clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations.

Applicant answered the SOR on July 28, 2017. His answers were mixed, with admissions and denials. He also included a one-page memorandum in which he explained the circumstances surrounding his financial problems. He requested a decision based on the written record in lieu of a hearing. He did not submit supporting documentation with his answer.

On September 5, 2017, Department Counsel submitted all relevant and material information that could be adduced at a hearing. The file of relevant material (FORM) consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision. The FORM was mailed to Applicant, who received it on September 12, 2017. He did not reply within 30 days of receipt of the FORM. The case was assigned to me on January 16, 2018.

### **Procedural Matters**

The FORM includes Exhibits 3 and 4, which are reports of investigation (ROI) summarizing Applicant's interviews that took place during the 2016 background investigation. The ROI are not authenticated by a witness, as required under ¶ E3.1.20 of the Directive.<sup>2</sup> Likewise, Section 5(a) of Executive Order 10865 prohibits receipt and consideration of "investigative reports" without authenticating witnesses. The Directive provides no exception to the authentication requirement. Indeed, the authentication requirement is the exception to the general rule that prohibits consideration of an ROI. Accordingly, given the lack of authentication, I have not considered the ROI in reaching my decision.

I also note that Department Counsel's written brief includes a footnote advising Applicant that the ROI was not authenticated and that failure to object may constitute a "waiver" of the authentication requirement. In my view, Department Counsel is misusing the term waiver, and this misuse may confuse an applicant.<sup>3</sup> In the law of evidence, errors are preserved by timely objections, and relief on appeal is granted from a preserved error unless it is harmless (the harmless-error doctrine). Waiver is the voluntary relinquishment or abandonment of a legal right or advantage. With a waiver, there is no error to correct on appeal and no relief to grant. On the other hand, failure to make a timely objection usually forfeits any error, and relief on appeal is appropriate from a forfeited error only upon a showing that the error was plain, obvious, and

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<sup>2</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>3</sup> See *United States v. Olano*, 507 U.S. 725 (1993) (in this opinion, the Supreme Court distinguishes between forfeiture and waiver).

prejudicial (the plain-error doctrine). This discussion highlights the complexity involved in expecting a layman applicant to understand the concepts of authentication, waiver, forfeiture, and admissibility, as those concepts are used in deciding a security clearance case based on the written record in lieu of a hearing.

### **Findings of Fact**

Applicant is a 52-year-old employee who requires a security clearance for his job as a cyber-security engineer for a federal contractor. He has been so employed since March 2014. His educational background includes an associate's degree awarded in 1996 and a bachelor's degree awarded in 2012.

Applicant's employment history, as reflected in his security clearance application, includes a period of unemployment from March 2009 through April 2010 due to a job layoff when his employer ceased operations and relocated overseas. His employment history also includes military service during 1983-1994, which ended with a bad-conduct discharge based on a court-martial conviction for writing bad checks.<sup>4</sup>

The SOR alleges a history of financial problems or difficulties consisting of the following matters: (1) \$11,356 in back taxes owed to the IRS for tax years 2008, 2009, 2012, and 2013; (2) three unpaid judgments for a total of \$4,960; (2) a past-due auto loan in the amount of \$1,368; and (4) 12 charged-off or collection accounts for a total of \$8,358. The delinquent accounts are established by Applicant's admissions in his answer to the SOR, and credit reports from September 2015 and April 2017.<sup>5</sup> Thirteen of the 16 delinquent debts are reflected in the earlier credit report.

Applicant disclosed the back taxes and some of the delinquent accounts in his security clearance application.<sup>6</sup> In doing so, he stated that he was working with a firm to improve his and his wife's credit scores so they could purchase a home; the back taxes were due to making premature withdrawals from his 401(k) account during his recent period of unemployment; and he was paying \$145 monthly to the IRS. He provided no documentation to establish that the back taxes or any of the delinquent accounts were paid, settled or compromised, in a payment arrangement, disputed, cancelled, forgiven, or otherwise resolved.

In his July 2017 answer to the SOR, Applicant explained the following about his history of financial problems:

- He admitted that some of the debts were his and he was still working on resolving them.

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<sup>4</sup> A bad-conduct discharge is a punitive discharge that a court-martial may give a member of the military as punishment as part of a lawful sentence.

<sup>5</sup> Exhibits 5 and 6.

<sup>6</sup> Exhibit 2.

- He attributed his financial problems to the 2009 job layoff and subsequent period of unemployment, which resulted in exhausting his 401(k) account.
- Since returning to work, he has cleaned up some of his debts and was able to qualify for a mortgage loan to purchase a home in late 2016.
- He stated that he was still working with the firm to improve his credit score, and was still working on getting completely out of debt.

As Applicant did not reply to the FORM, he did not take advantage of the opportunity to submit documentation in extenuation, mitigation, or explanation, as appropriate, in support of his case.

### **Law and Policies**

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.<sup>7</sup>

It is well-established law that no one has a right to a security clearance.<sup>8</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>9</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. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>10</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>11</sup>

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>12</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>13</sup>

<sup>7</sup> The 2017 AG are available at <http://ogc.osd.mil/doha>.

<sup>8</sup> *Department of the 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>9</sup> 484 U.S. at 531.

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

<sup>11</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>12</sup> Directive, ¶ 3.2.

<sup>13</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>14</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>15</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>16</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>17</sup>

## **Discussion**

Under Guideline F for financial considerations, 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 questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . .<sup>18</sup>

The concern is broader than the possibility that a person might knowingly compromise classified or sensitive 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 and mitigating conditions as most pertinent:

AG ¶ 19(a) inability to satisfy debts;

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(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business

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<sup>14</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>15</sup> Directive, Enclosure 3, ¶ E3.1.14.

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

<sup>17</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>18</sup> AG ¶ 18.

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(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 a problematic financial history sufficient to raise a security concern under Guideline F. There is no reliable documentary evidence that Applicant has made forward progress in resolving the back taxes owed to the IRS or the other delinquent debts. The failure to pay tax when due bears close examination and is a matter of serious concern to the federal government.<sup>19</sup> His problematic financial history suggests he may be irresponsible, unconcerned, or negligent in handling and safeguarding classified or sensitive information.

What is missing here is documentation in support of Applicant's case. There is no documentation to establish that he has made an arrangement (e.g., installment payment agreement) with the IRS to pay his back taxes and is in compliance with that arrangement. Likewise, there is no documentation to establish that he initiated and is adhering to a good-faith effort to pay his other delinquent debts. Although his financial problems are connected to his 2009 job layoff and subsequent period of unemployment, I cannot conclude that he has acted responsibly in the years since then given the state of the written record. It's the responsibility of the individual applicant to produce relevant documentation in support of their case. Here, Applicant has not met his burden of production because he did not present sufficient documentation showing that he is making some sort of effort to resolve his delinquent debts.

Applicant's history of financial problems or difficulties creates doubt about his 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 considered the whole-person concept. Accordingly, I conclude that he did not 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>19</sup> The General Accountability Office (GAO) expressed serious concern over the relationship between tax delinquents and clearance holders in its July 28, 2014 report, *Security Clearances: Tax Debts Owed by DOD Employees and Contractors*, which is publicly available on the GAO website at [www.gao.gov](http://www.gao.gov).

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	Against Applicant
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Subparagraphs 1.a – 1.q	Against Applicant
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### **Conclusion**

It is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard  
Administrative Judge