



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



In the matter of:)
)
) ISCR Case No. 17-03489
)
Applicant for Security Clearance)

Appearances

For the Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

05/30/2018

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 February 27, 2017. This document is commonly known as a security clearance application. On October 25, 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 addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG),

the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct. Applicant answered the SOR on November 14, 2017, and requested a decision based on the written record without a hearing.

On March 14, 2018, 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 March 22, 2018. He responded to the FORM on April 5, 2018, and submitted six documents that I have marked as Applicant's Exhibits (AE) A through F. They are admitted into evidence without objection. The case was assigned to me on May 18, 2018.

Procedural Matters

The Government withdrew the Guideline E allegation.³

Included in the FORM were four items of evidence. Item 1 included the SOR and Applicant's Answer. I have marked the SOR as Government Exhibit (GE) 1 and Applicant's Answer as GE 2. I have marked Item 2, Applicant's security clearance application, as GE 3, the Report of Investigation as GE 4, and the Credit Bureau Report as GE 5. GE 1 through 3, and GE 5 are admitted into evidence without objection.

GE 4 is a report of investigation (ROI) summarizing Applicant's interviews that took place in August 2017 during the background investigation. The ROI is not authenticated, as required under ¶ E3.1.20 of the Directive.⁴ 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. The ROI (GE 4) is, therefore, admitted into evidence.⁵

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).

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.

³ Government Brief, p. 2.

⁴ 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.).

⁵ 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

Findings of Fact

Applicant is 30 years old, a high school graduate with some college credits. He and his wife are separated. Applicant has two children, a son age 4, who lives with him, and a stepdaughter age 10, who does not live with him. Applicant reported two periods of unemployment, one from June 2012 to August 2012, and one from November 2011 to January 2012. From January 2007 until November 2011, he worked as a rehabilitation specialist. He was fired for negligence and criminal conduct. He attributed his financial problems to the loss of his job in November 2011.⁶ From May 2013 until February 2017, Applicant worked as a marine engineer but was fired for failing to meet certain professional deadlines.⁷ Neither of those employers were defense contractors. Since January 2014, he has been self-employed as a defense contractor.⁸

The SOR alleges seven delinquent debts totaling \$28,281.⁹ Applicant admitted all of the allegations except for SOR ¶ 1.d (\$423), which he said he paid.¹⁰ Applicant submitted a document establishing that payment.¹¹ Applicant attributed his financial problems to “unstable employment.”¹² In his response to the FORM, Applicant submitted documents establishing that he has voluntarily agreed to a wage garnishment that he claimed will pay off one of the larger debts by the end of calendar year 2018.¹³ After that debt is paid, he will begin paying the other SOR debts. The debts became delinquent between two to five years ago and were reported as continuing delinquencies in 2017.¹⁴

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).

⁶ GE 4.

⁷ GE 3; GE 4.

⁸ GE 3.

⁹ GE 1 ¶¶ 1.a through 1.g.

¹⁰ GE 2 ¶ 1.d.

¹¹ GE 2 ¶ 1.d (attachment).

¹² GE 2.

¹³ AE A through AE F (paying off SOR ¶ 1.e (\$8,988)). He submitted a document showing his first bi-monthly payment in March 2018. AE E.

¹⁴ GE 5.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁵ 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.”¹⁶ 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.¹⁷ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁸

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁰ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²¹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²²

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²³ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁴

¹⁵ *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).

¹⁶ 484 U.S. at 531

¹⁷ Directive, ¶ 3.2.

¹⁸ Directive, ¶ 3.2.

¹⁹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁰ Directive, Enclosure 3, ¶ E3.1.14.

²¹ Directive, Enclosure 3, ¶ E3.1.15.

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ *Egan*, 484 U.S. at 531.

²⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

Discussion

Under Guideline F for financial considerations,²⁵ 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 information²⁶

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.

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; and

²⁵ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²⁶ AG ¶ 18.

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

Although the debts became delinquent several years ago, they remain in default and unresolved to this day. AG ¶ 20(a) does not apply.

Applicant contended that his indebtedness was caused by unstable employment. The record, however, shows that any such instability was caused by Applicant being fired twice, once in November 2011 and again in February 2017, both for cause. Being terminated from employment twice for cause are not conditions largely beyond Applicant's control. AG ¶ 20(b) does not apply.

Applicant provided proof that he voluntarily submitted to garnishment of his wages to satisfy one of his major debts by the end of 2018 and has made his first bi-monthly payment. He plans to begin paying his other debts once this major debt has been satisfied. Paying off this one major debt in installments is a good start, even though he has just begun to do so. Thus, I will give him partial credit under AG ¶ 20(d). The remaining debts after that one being satisfied by garnishment will, however, total \$19,293, still a significant amount of delinquent debt. It is true that an applicant is not required to show that every debt in the SOR has been paid. Rather, an applicant must demonstrate that he has "established a plan to resolve his financial problems and has taken significant actions to implement that plan."²⁷ The Appeal Board also requires that an applicant show a "meaningful track record of repayment."²⁸ I cannot find that a plan to resolve one of six delinquent debts and showing only one bi-monthly payment is a "meaningful track record." Therefore, AG ¶ 20(d) does not fully 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.²⁹ 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.

²⁷ ISCR Case No. 07-06482 at 2 (App. Bd. May 21, 2008). See also ISCR Case No. 14-00504 at 3 (Aug. 4, 2014).

²⁸ ISCR Case No. 16-03994 at 2 (App. Bd. Apr. 27, 2018).

²⁹ AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

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.g:	Against Applicant
Paragraph 2, Guideline E	Withdrawn
Subparagraph 2.a:	Withdrawn

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