



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



In the matter of:)
)
) ISCR Case No. 17-04116
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

07/02/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. Applicant failed to mitigate the security concerns raised by his problematic financial history and his personal conduct. 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 3, 2017. This document is commonly known as a security clearance application. On January 8, 2018, 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 E for personal conduct. Applicant answered the SOR on January 12, 2018, and requested a decision based on the written record without a hearing.

On March 12, 2018, Department Counsel submitted a file of relevant material (FORM).² The FORM was mailed to Applicant on March 13, 2018. 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 28, 2018. Applicant did not respond to the FORM.

Procedural Matters

Included in the FORM were six items of evidence, which are marked as Government Exhibits (GE) 1 through 4.³ GE 1 through 3 are admitted into evidence without objection. GE 4 is a report of investigation (ROI) summarizing Applicant's interview that took place in July 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. 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 4 is inadmissible, and I have not considered the information in the ROI.

Findings of Fact

Applicant is 24 years old and a high school graduate with some college credits. He has never married and has a daughter, age 2. Applicant served on active duty with the United States Marine Corps from August 2012 until November 2014. He received a

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, some of which are identified as evidentiary exhibits in this decision.

³ Items 1 and 2 are the SOR and Applicant's Answer, respectively. Because they are the pleadings, they are not marked as exhibits.

⁴ 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.).

General Discharge. Since August 2016, Applicant has been employed by a defense contractor.⁵

Under Guideline F, the SOR alleges two delinquent debts totaling \$12,479. The second debt is a charge-off with no balance due.⁶ Including the high credit makes the delinquent debt total \$14,028. Applicant admitted the first delinquent debt but denied the second debt. The second debt, however, is supported by the credit reports.⁷

Under Guideline E, the SOR alleges that during his background interview Applicant intentionally refused to cooperate and provide details of his disciplinary record while serving in the Marine Corps. The SOR also alleged that Applicant was discharged from the Marine Corps due to a pattern of misconduct and received nonjudicial punishment for: (1) operating an unregistered vehicle without a valid driver's license (2013); (2) disobeying an order and fraternization (2014); and (3) driving under the influence while operating a government vehicle (2014).⁸ Applicant admitted those allegations.⁹

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁰ 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."¹¹ 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.¹² An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹³

⁵ GE 1. Applicant described his discharge as General "other than honorable" due to a "pattern of misconduct." *Id.*

⁶ SOR ¶ 1; GE 2, p.2; GE 3, p. 5.

⁷ Answer ¶ 1; GE 2, p.2; GE 3, p. 5.

⁸ SOR ¶ 2.

⁹ Answer ¶ 2.

¹⁰ *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).

¹¹ 484 U.S. at 531

¹² Directive, ¶ 3.2.

¹³ Directive, ¶ 3.2.

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

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁸ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁹

Discussion

Guideline F – Financial Considerations

Under Guideline F for financial considerations,²⁰ 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....²¹

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.

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

¹⁵ Directive, Enclosure 3, ¶ E3.1.14.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ *Egan*, 484 U.S. at 531.

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

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

²¹ AG ¶ 18.

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 also 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.

Applicant admitted the first SOR debt. Facts admitted by an applicant in an answer to an SOR require no further proof by the Government.²² And the second delinquent debt is supported by the record. The evidence supports a conclusion that Applicant has had a problematic financial history, and that his 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.

²² ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) ("any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof"); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) ("[a]n applicant's admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge's findings").

Because Applicant's delinquencies are ongoing, AG ¶ 20(a) does not apply. Similarly, there is nothing in the record to support the establishment of mitigating factors under AG ¶¶ 20(b), (c), and (d).

Guideline E – Personal Conduct

AG ¶¶ 15(a) and (b) and AG ¶ 16(d)(3) set forth the specific concerns based on personal conduct that are applicable in this case:

15. 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:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required;

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination. . .

16. (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . . :

(3) a pattern of dishonesty or rule violations

Applicant admitted the Guideline E allegations. Thus, the factual predicate for security concerns has been established.²³ Applicant's intentional refusal to cooperate during the security clearance background interview triggers disqualifying conditions AG ¶¶ 15(a) and (b). In addition, Applicant's pattern of misconduct while serving in the Marine Corps triggers disqualifying condition AG ¶ 16(d)(3). I have carefully considered the mitigating conditions set forth in AG ¶ 17. None of them apply here.

²³ See note 22, *supra*.

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.²⁴ 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.b:	Against Applicant
Paragraph 2, Guideline E	Against Applicant
Subparagraphs 2.a-2.b:	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

²⁴ AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).