



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-03779

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel

For Applicant: *Pro se*

05/17/2018

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. He provided a reasonable explanation to justify omission of delinquent financial accounts from his May 2016 security clearance application. 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 May 9, 2016.¹ This document is commonly known as a security clearance application. Thereafter, on November 16, 2017, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent

¹ Exhibit 2.

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. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct.

Applicant answered the SOR on December 8, 2017. He requested a decision based on the written record in lieu of a hearing. He did not submit supporting documentation with his answer, although he did provide a two-page memorandum in explanation.

On January 3, 2018, 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 January 26, 2018. He did not reply within 30 days of receipt of the FORM. The case was assigned to me on May 10, 2018.

Procedural Matters

The FORM includes Exhibit 3, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the 2017 background investigation. The ROI is not authenticated by a witness, as required under ¶ E3.1.20 of the Directive.² 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.³ 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

² 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.).

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

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

In addition to Exhibit 3 of the FORM, I have also excluded Exhibit 7, which is document known as an Investigative Request for Employment Data and Supervisor Information (OPM INV Form 41). The document was completed by a former employer of Applicant. Exhibit 7 is excluded under ¶ E3.1.22 of the Directive, because it constitutes a third-party statement adverse to Applicant on a controverted issue.

Findings of Fact

Applicant is a 39-year-old employee who requires a security clearance for his job as a software engineer for a federal contractor. He has been so employed since May 2016. His educational background includes an associate's degree awarded in 2001 and graduate-level work during 2010-2012.

Applicant's employment history, as reflected in his security clearance application, includes a lengthy period of unemployment of at least two years that ended in March 2014. He also had two periods of unemployment, each about six months in duration, during 2014-2015 and 2015-2016. His employment history does not include military service.

The SOR alleges a history of financial problems or difficulties consisting of six charged-off or collection accounts for a total of about \$34,712. The delinquent accounts are established by Applicant's admissions in his answer to the SOR as well as credit reports from 2016, 2017, or 2018.⁴

Applicant omitted the six delinquent debts when he responded to various questions about his financial record in Section 26 of his security clearance application. In his answer to the SOR, he stated that it was never his intention to withhold information and he did not realize that he had selected the "no" response to the questions in Section 26. He further stated that answering "no" was an honest mistake that he did not notice or catch before submitting his security clearance application. In addition, he pointed to his willingness to discuss his finances and a credit report during the August 2017 background investigation.

In his answer to the SOR, Applicant explained that the six delinquent accounts were the result of the lengthy period of unemployment that ended in March 2014. He described it as a difficult situation and he never anticipated being unemployed for such a lengthy period. He further stated that he paid the \$306 collection account for a cable

⁴ Exhibits 4, 5, and 6.

television account, but otherwise not paid the other accounts because they had been charged off (he used the term discharged) and could not repay them.⁵

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, 2017.⁶

It is well-established law that no one has a right to a security clearance.⁷ 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.”⁸ 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.⁹ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁰

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹¹ An

⁵ Applicant’s statement reflects a common misunderstanding of a charged-off debt. The term “charge off” means a creditor has given up collection of an unpaid debt and it considers the remaining balance to be bad debt. The creditor is simply charging or writing off the debt as a loss for accounting purposes. Having a debt charged off by a creditor does not mean that the debt is paid, cancelled, forgiven, or is no longer collectable. A debtor is still liable to repay the money unless the matter is settled or the relevant statute of limitations has been reached.

⁶ The 2017 AG are available at <http://ogc.osd.mil/doha>.

⁷ *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 (10th Cir. 2002) (no right to a security clearance).

⁸ 484 U.S. at 531.

⁹ 484 U.S. at 531.

¹⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹¹ Directive, ¶ 3.2.

unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹²

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹³ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁴ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁵ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁶

Discussion

Under Guideline E for personal conduct, the concern is that “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 concern is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.”¹⁷ A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Concerning the falsification allegation here, I am not persuaded that Applicant’s failure to disclose the six delinquent accounts when responding to questions in Section 26 of his security clearance application was deliberate. His explanation that he made an honest mistake due to inattention is reasonable. His credibility on that point is bolstered by his apparent willingness to discuss his finances, with the aid of a credit report, during the August 2017 background investigation.

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

¹² Directive, ¶ 3.2.

¹³ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁴ Directive, Enclosure 3, ¶ E3.1.14.

¹⁵ Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ AG ¶ 15.

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. . . .¹⁸

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 or sensitive 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 ¶ 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

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 a problematic financial history sufficient to raise a security concern under Guideline F. There is no reliable documentary evidence that Applicant has made any forward progress in resolving the six charged-off or collection accounts for more than \$34,000. 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 initiated and is adhering to a good-faith effort to pay the delinquent debts. Although his financial problems are connected to a lengthy period of unemployment that ended in 2014, 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

¹⁸ AG ¶ 18.

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.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a – 1.f	Against Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge