



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



In the matter of:)
)
-----) ISCR Case No. 17-04233
)
Applicant for Security Clearance)

Appearances

For the Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

08/21/2018

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 refusal to complete required Federal income tax forms and for his failure to satisfy seven state income tax liens. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted Questionnaires for National Security Positions (SF 86 format) on October 16, 2008, and May 5, 2016. These documents are commonly known as a security clearance applications. On January 17, 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

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

factual reasons for the action under the security guideline known as Guideline F for financial considerations. Applicant answered the SOR on February 15, 2018, and requested a decision based on the written record without a hearing.

On April 12, 2018, Department Counsel submitted a file of relevant material (FORM).² The FORM was mailed to Applicant on April 19, 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 April 26, 2018. He responded to the FORM on May 29, 2018, and submitted one document that I have marked as Applicant's Exhibit (AE). It is admitted into evidence without objection. The case was assigned to me on July 26, 2018.

Procedural Matters

Included in the FORM were 13 items of evidence. Items 1 and 2 are the SOR and Applicant's Answer, respectively. Because they are the pleadings, I have not marked them as exhibits. I have marked Items 3 through 13 as Government Exhibits (GE) 1 through 11. GE 1 and 2 and GE 5 through 11 are admitted into evidence without objection.

GE 3 and 4 are reports of investigation (ROI) summarizing Applicant's interviews that took place in February 2011 and July 2016 during background investigations. The ROI are 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. The ROI (GE 3 and 4) are, therefore, admitted into evidence.⁴

addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), 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 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.).

⁴ This is consistent with recent Appeal Board decisions. ADP Case No. 17-03252 at 2-3 (Aug. 13, 2018) (ROI admitted where applicant failed to object to the ROI in his response to the FORM); 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 36 years old, a college graduate, has never married, and has no children. Since September 2012, he has worked full-time for a defense contractor.⁵

The SOR alleges that Applicant was terminated by his employer in 2008 for refusing to complete Federal income tax forms and that he has seven unsatisfied state tax liens totaling \$39,712.⁶ Applicant admits that his failure to complete a Federal tax form was the reason his then employer gave for terminating him in 2008, but he claims that he did complete all required Federal tax forms.⁷ I interpret that as a denial. The record evidence, however, supports the SOR allegation. The December 15, 2008 termination letter from Applicant's then employer stated that he was being terminated due to his "refusal to fully complete required forms, i.e. the Federal W-4 tax form."⁸ Applicant had just been hired, on December 1, 2008, at a starting salary of \$80,017 per year.⁹ Applicant also denied the tax liens, claimed they are "unfounded," and that he has "repeatedly requested specifics (how is the obligation created . . .) . . . but [has] been met by silence at every turn."¹⁰ The tax liens are, however, supported by the record.¹¹

Law and Policies

It is well-established law that no one has a right to a security clearance.¹² 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."¹³ 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.

⁵ GE 2.

⁶ SOR ¶¶ 1.a-h.

⁷ Answer ¶ 1.a.

⁸ GE 8, p. 1; GE 7 (noting that Applicant cited Supreme Court cases and the Bible to justify his refusal to complete the income tax withholding forms).

⁹ GE 6, p. 2.

¹⁰ Answer ¶¶ 1.b-h.

¹¹ GE 8, pp. 1-7; GE 9, pp. 5-6; GE 10, pp. 2-3.

¹² *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).

¹³ 484 U.S. at 531

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁴ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁹

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²⁰ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²¹

Discussion

Under Guideline F for financial considerations,²² 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 information²³

¹⁴ Directive, ¶ 3.2.

¹⁵ Directive, ¶ 3.2.

¹⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁷ Directive, Enclosure 3, ¶ E3.1.14.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ *Egan*, 484 U.S. at 531.

²¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²² AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²³ AG ¶ 18.

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;

AG ¶ 19(c) a history of not meeting financial obligations; and

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.

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(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 had a problematic financial history when it comes to his state income tax obligations and those financial problems continue to this day. Security concerns are raised under AG ¶¶ 19(a), (b), (c), and (f). The next inquiry is whether any mitigating conditions apply.

Although the state income tax debts became delinquent as far back as 2011, they remain unsatisfied to this day. Moreover, the liens are as recent as 2015. AG ¶ 20(a) does

not apply. There is no evidence that Applicant's failure to satisfy his state income tax obligations was caused by conditions largely beyond his control. Nor is there any evidence that he has initiated and adhered to any good-faith efforts to satisfy those tax obligations. Finally, there is no evidence that Applicant has made arrangements with the appropriate tax authority to pay off the state tax liens. Therefore, AG ¶¶ 20(b), (d), and (g) do not apply. No other mitigating conditions are applicable.

Applicant was terminated from his employment in December 2008 for refusing to fulfill one of the most rudimentary requirements expected by any employer of a new-hire salaried employee, that is, to complete a W-4 form. Applicant's refusal was based on frivolous reasons. I find against Applicant on SOR ¶ 1.a.

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.h: 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).

