



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



In the matter of:)
)
) ISCR Case No. 17-04350
)
Applicant for Security Clearance)

Appearances

For the Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

09/25/2018

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 April 22, 2016. This document is commonly known as a security clearance application. On February 15, 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 guideline known as Guideline F for financial considerations. Applicant answered the SOR on May 4, 2018, and requested a decision based on the written record without a hearing.

On May 30, 2018, Department Counsel submitted a file of relevant material (FORM).² The FORM was mailed to Applicant on June 4, 2018. He was given 45 days to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on June 11, 2018. Applicant did not respond to the FORM. The case was assigned to me on September 12, 2018.

Procedural Matters

Included in the FORM were seven items of evidence. Items 1 and 3 are the SOR and Applicant's Answer, respectively. Because they are the pleadings, I have not marked them as exhibits.³ I have marked Items 3 through 7 as Government Exhibits (GE) 1 through 4. GE 1, 3, and 4 are admitted into evidence without objection.

GE 2 is a report of investigation (ROI) summarizing Applicant's interview that took place in December 2016 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. 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 2 is inadmissible, and I have not considered the information in the ROI.

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

³ Item 2 is the SOR transmittal letter, which has no substantive value and, therefore, is not marked as an exhibit.

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.).

Findings of Fact

Applicant is 48 years old, a high school graduate, who is married with three sons (ages 13, 21, and 22), and a daughter (age 18). After high school, he enlisted in the U. S. Marine Corps in May 1989 and served on active duty until he was honorably discharged in September 1992. Since March 2004, he has worked full time for a defense contractor.⁵

The SOR alleges four delinquent debts totaling \$146,977.⁶ Applicant admitted those allegations and attached documents purporting to show the current status of those debts.⁷ The first SOR debt is a charge-off for \$40,574.⁸ The June 2016 credit report describes it as “Banking” and that it is a “Secured Credit Line.” In that report, Applicant was more than 120 days past due. The January 2018 credit report describes it as a home equity loan.⁹ Applicant stated that he is adhering to a good-faith effort to repay this creditor.¹⁰ Applicant did not, however, provide any documentation supporting that claim.

The second SOR debt is a collection account placed by an academic institution for \$10,630.¹¹ Applicant stated that he has contacted that institution and has made a first payment of \$10 to start a payment plan. He attached one document showing that first payment.¹²

The third SOR debt is a home mortgage that is past due in the amount of \$1,273, with a balance due of \$92,855.¹³ Applicant stated that he has brought this account current, and he attached a document showing his monthly payments from June 2016 through February 16, 2018. On a couple of occasions it appears he may have been late, but since March 15, 2017, through February 16, 2018, Applicant has not missed any monthly payments.¹⁴

⁵ GE 1.

⁶ SOR ¶¶ 1.a-1.d.

⁷ Answer ¶¶ 1.a-1.d. (and attachments).

⁸ SOR ¶ 1.a.

⁹ GE 3, p. 5; GE 4, Trade Line 9 (date of last payment was July 2017).

¹⁰ Answer, p. 1.

¹¹ SOR ¶ 1.b.

¹² Answer, pp. 1-2. I note that this debt is not reported on the two credit reports submitted by the Government. GE 3; GE 4.

¹³ SOR ¶ 1.c.

¹⁴ Answer, pp. 1, 3. The June 2016 credit report listed this account as “Pay as agreed.” GE 3, p. 8.

The fourth SOR debt is a credit union account past due in the amount of \$325.¹⁵ On the June 2016 credit report, this account was “Pays as agreed.” On the January 2018 credit report, it was reported as \$325 past due.¹⁶ Applicant stated that he has brought this account current and submitted a document he claims supports that assertion. The document shows two automatic withdrawal payments on this account in January 2018 and a declining balance.¹⁷

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁸ 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.”¹⁹ 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.²⁰ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²¹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²² The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²³ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

¹⁵ SOR ¶ 1.d.

¹⁶ GE 3, p. 7; GE 4, Trade Line 1.

¹⁷ Answer, pp. 1, 4.

¹⁸ *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).

¹⁹ 484 U.S. at 531.

²⁰ Directive, ¶ 3.2.

²¹ Directive, ¶ 3.2.

²² ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²³ Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.²⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁵

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²⁶ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁷

Discussion

Under Guideline F for financial considerations,²⁸ 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 information²⁹

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:

²⁴ Directive, Enclosure 3, ¶ E3.1.15.

²⁵ Directive, Enclosure 3, ¶ E3.1.15.

²⁶ *Egan*, 484 U.S. at 531.

²⁷ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁸ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²⁹ AG ¶ 18.

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

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Facts admitted by an applicant in an answer to a SOR require no further proof by the Government.³⁰ Applicant admitted all the SOR allegations. And significant delinquencies persist to this day. The evidence supports a conclusion that Applicant has had a problematic financial history. Security concerns are raised under AG ¶¶ 19(a), (b), and (c). The next inquiry is whether any mitigating conditions apply.

Because significant delinquencies continue to this day, AG ¶ 20(a) does not apply. Applicant has not pointed to any conditions largely beyond his control that contributed to his delinquencies. Therefore, AG ¶ 20(b) does not apply.

Applicant claims that SOR ¶¶ 1.a and 1.b are being resolved by his good-faith efforts to repay his creditors. He did not, however, submit sufficient documentation to support that contention. The Appeal Board has previously noted that it is reasonable for an administrative judge to expect applicants to present documentation about the satisfaction or other resolution of individual debts.³¹ Applicant has failed on that score.³² Accordingly, I find against Applicant on SOR ¶¶ 1.a and 1.b.

SOR ¶¶ 1.c and 1.d are on a different footing. Applicant provided documents showing that he has been making payments on those accounts before the SOR was

³⁰ 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").

³¹ See, e.g., ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008); ISCR Case No. 06-17520 at 2 (App. Bd. Sep. 20, 2007).

³² Applicant produced a document showing one payment on a plan to pay SOR ¶ 1.b. That is insufficient to show a "track record" as required by the Appeal Board. The Appeal Board has held that intentions to resolve debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. See ISCR Case No. 11-14570 at 3 (App. Bd. Oct. 23, 2013).

issued. That evidences good-faith efforts to repay those debts. Thus, they are mitigated under AG ¶ 20(d).

In sum, Applicant has mitigated \$95,773 of the SOR debts (SOR ¶¶ 1.c. and 1.d), but he has not provided sufficient evidence to mitigate the remaining SOR debts of \$51,204 (SOR ¶¶ 1.a and 1.d.)

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.³³ 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
Subparagraphs 1.c-1.d:	For 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

³³ AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

