



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



In the matter of:)
)
-----) ISCR Case No. 14-06820
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

05/25/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He met his burden to present sufficient evidence to explain and mitigate the concern stemming from his failure to timely file state and federal individual income tax returns. In addition, the evidence shows he has made an overall good-faith effort to repay back taxes. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on October 1, 2012.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense

¹ Exhibit 1 (this document is commonly known as a security clearance application).

(DOD),² on July 27, 2015, sent 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.³ The SOR is similar to a complaint. It detailed the reasons for the action under the security guideline known as Guideline F for financial considerations. He answered the SOR in writing on August 26, 2015, and requested a hearing.

The case was assigned to me on December 1, 2015. The hearing was held as scheduled on January 8, 2016. The transcript of the hearing (Tr.) was received on January 14, 2016.

Post-hearing Matters

The record was kept open to allow Applicant to submit additional documentation concerning his tax problem with the IRS. It was kept open until January 25, 2016, then extended for an additional week, and matters were timely received. Subsequently, on May 4, 2016, Applicant requested that the record be reopened for submission of additional matters, and that request was granted without objections.

Upon further review, it became apparent that Applicant's last submission omitted one of three attachments. On May 17, 2016, I requested Applicant's counsel submit the missing attachment, which he did on the same day, along with two additional documents.

Altogether, Applicant's post-hearing documentation consists of the following eight items:

- Exhibit N–IRS notices for payment of installment agreement for November and December 2015 (eight pages).
- Exhibit O–IRS account transcript for tax years 2009 and 2010 (six pages).
- Exhibit P–Declaration of Applicant, dated January 30, 2016 (one page).
- Exhibit Q–IRS notice for payment of installment agreement for March 2016 (two pages).
- Exhibit R–IRS notice of application of overpayment for tax year 2015 to an amount owed for tax year 2010, dated April 25, 2016 (two pages).

² The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

³ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

- Exhibit S—Applicant’s request for abatement (IRS Form 843) for tax year 2009 (one page).
- Exhibit T—IRS letter acknowledging receipt on March 7, 2016, dated April 8, 2016 (two pages).
- Exhibit U—IRS letter denying request for abatement for tax year 2009, dated May 9, 2016 (two pages).

Although Department Counsel, graciously, did not object to any of the post-hearing documentation, she did submit additional argument for my consideration. Her three-page memorandum is made part of the record as Appellate Exhibit I.

Findings of Fact

Applicant is a 57-year-old editor for an organization that does research and development for the federal government.⁴ He is an experienced researcher, editor, and writer.⁵ His education includes a bachelor’s degree and a master’s degree, both in the liberal arts, from two prominent universities. He married for the first time in 2003, separated in 2006, and divorced in 2007. He married for the second time in late 2012. Outside of work, he and his spouse are active in various volunteer or community service organizations.

Applicant’s spouse is a full-time employee of an international organization. She testified persuasively that (1) she was aware of her husband’s tax problems before they married; (2) they have filed joint tax returns annually since tax year 2012; (3) she insisted that they file the returns in a timely fashion, and they have used a professional tax preparer to do so; (4) she described herself as “very frugal”; (5) she uses a spending tracker to monitor their expenses; and (6) she is in charge of the household finances, which are paid from a joint household account, although they each have an individual account.⁶

Applicant has worked for his current employer since July 2012.⁷ Before that, he worked as an editor for a professional association from November 2007 to July 2012. He was unemployed during October–November 2007. Before that, he worked as an editor for an institute during 1995–2007. During April–September 2007, his employment status was restructured from an employee to a self-employed contractor under a nonrenewable six-month contract.

⁴ Exhibit 1.

⁵ Exhibit A.

⁶ Tr. 17–34.

⁷ Exhibit 1.

Applicant presented substantial evidence of a good employment record as well as his good character and suitability for a security clearance.⁸ For 2016, he received a pay raise as a result of the 2015 performance evaluation. His current annual salary is about \$84,750. His spouse earns about \$48,000 annually, which is tax-free based on her employment status.⁹ He estimated their net worth at about \$100,000.¹⁰ He and his spouse bought a home for \$430,000 in 2014, and they are current and in good standing with the mortgage loan. Besides three paid collection accounts to the same telecommunications company, credit reports from 2012, 2014, and 2015 show no delinquent or past-due accounts.¹¹ Applicant presented a December 2015 credit report, which includes a credit score of 701, which is considered good.¹²

Under Guideline F, the SOR alleges that Applicant owed the IRS \$17,239 in back taxes for tax years 2008 through 2010; that he failed to timely file an individual federal income tax return for tax year 2011; and that he failed to timely file individual state income tax returns for tax years 2007 through 2010. He disclosed all of these matters in response to questions in Section 26 of his security clearance application.¹³ Currently, the documentary evidence shows Applicant has repaid the back taxes to the IRS and he has filed the delinquent federal and state returns. The details are discussed below.

Applicant was candid and forthcoming in completing his security clearance application. In Section 24 of the application, he disclosed he was an active alcoholic from 1996 to March 2007, describing himself as a daily maintenance drinker resulting in his life becoming increasingly unmanageable.¹⁴ His alcohol problem progressed to the point where his first wife asked him to leave and she filed for divorce. He also stated that he believes his drinking contributed to his loss of employment with the institute in 2007.

By way of explanation, Applicant stated that 2007 was a difficult year for him financially.¹⁵ He became a self-employed contractor for six months, was unemployed for about two months, and then was employed at a lower level of compensation. He went

⁸ Exhibits B, K, L, and M.

⁹ Tr. 20.

¹⁰ Exhibit C.

¹¹ Exhibits 2, 3, and D.

¹² Exhibit D.

¹³ Exhibit 1 at 32–36.

¹⁴ Applicant's alcohol problem was not alleged in the SOR (it was presumably mitigated based on several years of abstinence), but I have considered these matters for the limited purpose of understanding the sequence of events leading up to his tax problems.

¹⁵ Tr. 41–43.

from earning an annual salary of \$80,000 at the beginning of 2007 to earning an annual salary of \$60,000 in 2008. His adjusted gross income for 2008 was \$58,680.¹⁶ In addition, he had a 5 percent reduction in pay in 2008 or 2009 due to the financial crisis. Before 2007, his first wife had assumed responsibility for filing of income tax returns. Due to his self-employment status for six months in 2007, income taxes were not withheld from his salary. He was also carrying debt that he had incurred during his marriage and on his own, and he disclosed those debts in his security clearance application.¹⁷

Applicant obtained two loans from his 401(k) or 403(b) retirement account to resolve his indebtedness.¹⁸ The combined monthly payment on the two loans was unmanageable, and he defaulted. The loans were then considered premature withdrawals and thus taxable income. The result was his adjusted gross income increased to \$107,944 and \$84,334 for 2009 and 2010, respectively.¹⁹ His income returned to normal in 2011 with an adjusted gross income of \$57,241.²⁰ He estimated owing the IRS \$17,239 for tax year 2009 and \$1,687 for tax year 2010.²¹

Turning to the matters in the SOR, Applicant failed to timely file federal and state returns for tax year 2007.²² He delayed filing the federal return because of complications caused by his self-employment income and unemployment compensation. He delayed filing the state return because he first needed to verify his federal tax liability. From this point forward, things appear to have snowballed, and he failed to timely file federal returns for 2008, 2009, and 2011, and he failed to timely file state returns for 2008, 2009, and 2010.²³ A review of IRS account transcripts shows the following: (1) he filed the 2008 return in November 2010 after obtaining an extension of time to file in October 2009, and he was assessed a penalty for the late filing; (2) he filed the 2009 return in July 2010, and he was assessed a penalty for the late filing; (3) he timely filed the 2010 return; and (4) he filed the 2011 return in July 2013 after obtaining an extension of time to file in October 2012, and he was assessed a penalty for the late filing.²⁴

¹⁶ Exhibit E.

¹⁷ Exhibit 1 at 37–43.

¹⁸ Exhibit 1 at 41–43.

¹⁹ Exhibit F and G.

²⁰ Exhibit I.

²¹ Exhibit 1 at 34–35.

²² Exhibit 1 at 32–33.

²³ Exhibit 1 at 33–36, and Exhibits E, F, G, I, and J.

²⁴ Exhibits E, F, G, and I.

Applicant addressed his tax problem through an installment agreement with the IRS in November 2010.²⁵ He agreed to resolve his account for tax years 2007 and 2009 by making a monthly payment of \$500 beginning in December 2010. The installment agreement was revised or modified in May 2012. The revised agreement was for tax years 2008, 2009, and 2010, and the monthly payment was reduced to \$326.

IRS records establish that account balances were reduced through a combination of payments by Applicant and application of overpayment of taxes from subsequent tax years (the refund was intercepted and used to pay down back taxes). As of January 2014, tax years 2008 and 2011 had account balances of \$0.²⁶ In February 2014, a \$5,519 refund from his 2013 return was applied to 2009, which reduced the account balance to \$15,644.²⁷ In March 2014, a \$4,351 refund from his 2012 return was applied to 2009, which reduced the account balance to \$11,183.²⁸ An annual installment agreement statement for the period of July 2014 to July 2015 shows Applicant made 12 monthly payments of \$326 or \$400 for total payments of \$4,578, which reduced the account balance for 2009 to \$9,621, while the account balance for 2010 was \$4,897.²⁹ He continued to make the monthly payments during July–December 2015.³⁰ As of October 2015, the 2009 account balance was \$4,366, and the 2010 account balance was \$5,231, for a total of \$9,597.³¹

Applicant's post-hearing documentation establishes that the account balances for tax years 2009 and 2010 are now \$0.³² The account balances were paid off through a combination of payments by Applicant, an abatement of \$1,716 in penalties for tax year 2007, and an application of overpayment of \$4,969 in taxes for tax year 2015, all of which were used to pay off the back taxes, penalties, and interest.

Applicant has also resolved the outstanding tax matters with the state.³³ He filed tax returns for 2007, 2008, 2009, and 2010 in December 2012. The returns were processed by the state in January 2013. The state tax department then issued assessments. By October 2015, he had paid the following total amounts to resolve the

²⁵ Exhibit H.

²⁶ Exhibit E and I.

²⁷ Exhibit H.

²⁸ Exhibit H.

²⁹ Exhibit H.

³⁰ Exhibit H.

³¹ Exhibits F and G.

³² Exhibits N, O, P, Q, and R.

³³ Exhibit J.

back taxes, penalties, and interest: (1) \$2,469 for 2007; (2) \$209 for 2008; (3) \$3,750 for 2009; (4) \$644 for 2010; and (5) the accounts balances were \$0.

Law and Policies

It is well-established law that no one has a right to a security clearance.³⁴ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”³⁵ 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.³⁶ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.³⁷

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.³⁸ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.³⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁴⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁴¹

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.⁴² The DOHA Appeal Board has followed the Court’s

³⁴ *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).

³⁵ 484 U.S. at 531.

³⁶ Directive, ¶ 3.2.

³⁷ Directive, ¶ 3.2.

³⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

³⁹ Directive, Enclosure 3, ¶ E3.1.14.

⁴⁰ Directive, Enclosure 3, ¶ E3.1.15.

⁴¹ Directive, Enclosure 3, ¶ E3.1.15.

⁴² *Egan*, 484 U.S. at 531.

reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.⁴³

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁴⁴ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

Under Guideline F for financial considerations,⁴⁵ 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.⁴⁶ 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 unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.⁴⁷

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.

⁴³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁴⁴ Executive Order 10865, § 7.

⁴⁵ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

⁴⁶ ISCR Case No. 95-0611 (App. Bd. May 2, 1996) (It is well settled that "the security suitability of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties.") (citation omitted); and see ISCR Case No. 07-09966 (App. Bd. Jun. 25, 2008) (In security clearance cases, "the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.") (citation omitted).

⁴⁷ AG ¶ 18.

The evidence supports a conclusion that Applicant has a history of not meeting his tax obligations as required by law.⁴⁸ Likewise, the evidence supports a conclusion that Applicant failed to file annual state and federal income tax returns for a number of years, which is a serious matter.⁴⁹

In mitigation, I have considered the six mitigating conditions under Guideline F.⁵⁰ And the following mitigating conditions are most pertinent:

AG ¶ 20(c) [t]here are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant has provided sufficient evidence to explain and mitigate his failure to meet his tax obligations. I reach that conclusion for the following reasons. First, he self-reported the information about his tax problems and he has been truthful and complete during the security-clearance process. Second, Applicant has been working on resolving his tax problems since 2010, when he first entered into an installment agreement with the IRS. His efforts began well before he knew he would be applying for a security clearance in 2012. This circumstance indicates he was acting in good faith and not merely for his own self interests in obtaining a security clearance. Third, his efforts continued over a period of years until he filed all the belated returns and repaid the state in 2015 and the IRS in 2016. Fourth, Applicant has learned his lesson and the likelihood of recurrence is acceptably low. I reach that conclusion based on the active role his spouse is playing in their household finances, their use of a professional tax preparer, and the timely filing of joint returns since tax year 2012. Applicant's spouse was an impressive witness, and it was clear to see that she has a firm grasp on their household finances. Fifth, Applicant's overall financial situation is stable. Together, he and his spouse have an annual gross income of about \$130,000, they were able to obtain a sizeable mortgage loan in 2014 to purchase their home, and they have a positive net worth of about \$100,000. Those circumstances provide the type of financial stability that will allow Applicant to prosper financially, as opposed to struggling with indebtedness, which appears to have been the genesis of his tax problems. Accordingly, I conclude that there are clear indications that Applicant's tax problems are resolved and under control, and that he made a good-faith effort to repay the back taxes.

Applicant's history of not meeting his tax obligations as required by law no longer creates doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole

⁴⁸ AG ¶ 19(a) and (c).

⁴⁹ AG ¶ 19(g).

⁵⁰ AG ¶ 20(a)–(f).

and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.⁵¹ Accordingly, I conclude that he met 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 as follows:

Paragraph 1, Guideline F:	For Applicant
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Subparagraphs 1.a–1.c:	For Applicant
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Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

⁵¹ AG ¶ 2(a)(1)–(9).