



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



In the matter of: )  
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----- ) ISCR Case No. 14-05402  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

08/01/2019

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. Although he is now in compliance with federal and state tax authorities, his tax problems went on for far too many years to justify complete mitigation. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, on March 17, 2014. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on December 12, 2014, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, 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. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations.

Applicant answered the SOR on January 16, 2015. He admitted all the allegations concerning failure to timely file state and federal income tax returns for a number of tax years. He also requested a decision based on the written record in lieu of a hearing before an administrative judge. The case was initially processed as a non-hearing case in about April 2015, but for reasons that are unclear the case was misplaced or not assigned to an administrative judge or both. (Tr. 15-17) The case resurfaced in 2018, Department Counsel contacted Applicant, and he indicated that he had changed his mind and wanted a hearing, which he confirmed in writing on July 9, 2018.

The case was assigned to me on July 12, 2018. The hearing took place as scheduled on September 20, 2018. Applicant appeared without counsel. Department Counsel offered a single documentary exhibit, which was admitted as Exhibit 1. Applicant offered documentary exhibits, which were admitted as Exhibits A-X. Other than Applicant, no witnesses were called. The hearing transcript (Tr.) was received on September 27, 2018.

The record was kept open until October 5, 2018, and then extended by ten days, to provide Applicant an opportunity to present additional documentation concerning his tax problems. Those matters were timely received on October 11, 2018, and it is admitted without objections as Exhibit Y.

### **Findings of Fact**

Applicant is a 54-year-old employee who is seeking to retain a security clearance. He is employed as a fabricator for a company in the defense industry. He has been so employed since 2002. He serves as the lead of a fabrication shop located on a U.S. military installation. His educational background includes a high school diploma and about two years of college. He has married and divorced twice, with the last divorce in 2005. He has two adult children from his marriages. His employment history include military service in the U.S. Army from 1981 to 1995. (Tr. 42-47) His service included a year-long deployment for Operations Desert Shield and Storm, as known as the Persian Gulf War or the First Gulf War.

The SOR concerns a history of financial problems consisting of failure to timely file state and federal income tax returns for tax years 2002 through 2013. Applicant does not dispute or contest the allegations. He disclosed that he failed to file state and federal income tax returns for tax year 2005, as a result of his second divorce, in his March 2014 security clearance application. (Exhibit 1) He attributed his tax problems to falling behind on his tax obligations, embarrassment, and inaction. (Tr. 30, 47-48) He described his situation as follows:

What happened at the time was I'd gotten behind in my taxes and owed almost \$2,000, which I could not afford and simply got behind in my taxes and then felt embarrassed to bring it current. And each year, not having a previous tax return, I just hoped it would not surface or anything. (Tr. 30)

He decided to take action to address his problematic tax situation after completing his March 2014 security clearance application. (Tr. 31-32)

Applicant is now in compliance with both federal and state tax authorities. Due to age, he was unable to file returns before tax year 2009, but he provided documentary proof of filing state and federal tax returns for tax years 2009 through 2017. (Exhibits A-Y). He explained that he filed the returns periodically due to the cost involved using a tax preparer and availability of funds. (Tr. 34-35; Exhibit A) Going forward, his plan is to stay current with his tax obligations and never get into a similar situation. (Tr. 36)

Concerning the federal income tax returns, Applicant filed returns as follows: (1) 2009 past due in April 2014; (2) 2010 past due in April 2014; (3) 2011 past due in January 2015; (4) 2012 past due in March 2015; (5) 2013 past due in April 2016; (6) 2014 timely in March 2015; (7) 2015 timely in April 2016; (8) 2016 past due in July 2018; and (9) 2017 filed past due in July 2018. (Exhibits G-O) IRS account transcripts for tax years 2015, 2016, and 2017 show account balances of \$0 for those three years. (Exhibits C-F)

Concerning the state income tax returns, Applicant filed returns as follows: (1) 2009 past due in April 2014; (2) 2011 past due in January 2015; (3) 2012 past due in March 2015; (4) 2013 past due in April 2016; (5) 2014 timely in March 2015; (6) 2015 timely in April 2016; (7) 2016 past due in July 2018; and (8) 2017 past due in July 2018. (Exhibits P-X) He received a \$512 refund from the state tax authority for tax year 2017. (Exhibit B; Tr. 21) The state tax authority issued Applicant a certificate of compliance/letter of good standing on September 26, 2018. (Exhibit Y)

### **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.

It is well-established law that no one has a right to a security clearance.<sup>1</sup> 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.”<sup>2</sup> 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

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<sup>1</sup> *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 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>2</sup> 484 U.S. at 531.

the burden of proof is less than a preponderance of evidence.<sup>3</sup> The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>4</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>5</sup> Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted; (2) an applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven; and (3) an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>6</sup>

### **Discussion**

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 set forth in AG ¶ 18 as follows:

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 or sensitive information. . . .

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(c) a history of not meeting financial obligations;

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; and

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<sup>3</sup> 484 U.S. at 531.

<sup>4</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>5</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>6</sup> Directive, Enclosure 3, ¶¶ E3.1.14 and E3.1.15.

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 a history of financial problems that is sufficient to raise a security concern under Guideline F. The disqualifying conditions noted above apply to this case.

Applicant made good progress in resolving the tax matters, and he is now in compliance with both federal and state tax authorities. That means he has filed all tax returns, as required, and he has paid all taxes due, as required. And he did a good job documenting his compliance.

In addressing this issue, I note that an applicant's failure to timely file tax returns and pay tax when due bears close examination and is a matter of serious concern to the federal government. The DOHA Appeal Board has made it clear that an applicant who fails repeatedly to fulfill their legal obligations, such as filing tax returns and paying tax when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See ISCR Case No. 15-06707 at 3 (App. Bd. Aug. 15, 2017).

Here, I am concerned about the duration of Applicant's tax problems and the timing of his remedial action. Applicant failed to timely file state and federal income tax returns for more than a decade. He has been in compliance for a relatively brief period of time compared with the time of his noncompliance. It is also noted that both his state and federal returns for the last two tax years, 2017 and 2018, were filed past the due date. Considering the totality of facts and circumstances, it is far too soon to tell if he will continue to meet his tax obligations on a timely basis. Accordingly, the mitigating condition at AG ¶ 20(g) applies, but the evidence is not sufficient to justify complete mitigation of his long-standing irresponsibility in failing to meet his legal obligations.

Following *Egan* and the clearly consistent standard, I have doubts and concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive 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 considered the whole-person concept. I conclude that he has not 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:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a -- 1.b:	Against Applicant

## **Conclusion**

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

Michael H. Leonard  
Administrative Judge