



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



In the matter of:)
)
-----) ISCR Case No. 18-03020
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

09/02/2020

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. Although he is now in compliance with federal and state tax authorities, his income-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 June 3, 2016. (Exhibit 1) This document is commonly known as a security clearance application. He was interviewed as part of a background investigation in May 2018. (Exhibit 2) He replied to written interrogatories in March 2019. (Exhibit 2). Thereafter, on July 26, 2019, 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 August 20, 2019. In a one-page memorandum, he admitted the allegations concerning failure to timely file state and federal income tax returns for tax years 2012-2017. He also admitted failure to timely pay federal and state income taxes for the same tax years as well as an indebtedness to both federal and state tax authorities. And he requested a hearing before an administrative judge.

The case was assigned to me on September 30, 2019. The hearing took place as scheduled on December 3, 2019. Applicant appeared without counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1-6. Applicant offered documentary exhibits, which were admitted as Exhibits A-B. Other than Applicant, no witnesses were called. The hearing transcript (Tr.) was received on December 13, 2019.

The record was kept open until December 31, 2019, to provide Applicant an opportunity to present additional documentation. Those matters were timely received and they (along with the accompanying e-mails) are admitted without objections as Exhibits C-E.

Findings of Fact

Applicant is a 40-year-old employee who is seeking to retain a security clearance. (Tr. 5) He is employed as a manufacturing technician for a large company in the defense industry. He was initially hired as a custodian and was subsequently promoted to his current job. He has worked for this company since 2009. He expected to earn a gross income of about \$55,000 for 2019. (Tr. 38-39) He has a good employment record and is considered a skilled and reliable employee per three letters of recommendation. (Exhibit E) He has held a security clearance without incident since 2009. His educational background includes a high school diploma and some college. He has never married, but he lives with the mother of his child.

The SOR concerns a history of income-tax problems as follows: (1) failure to timely file state and federal income tax returns for tax years 2012-2017; (2) failure to timely pay state and federal income tax for tax years 2012-2017; (3) back taxes owed to the IRS in the amount of \$18,440; and (4) back taxes owed to the state tax authority in the amount of \$2,776. Applicant does not dispute or contest the allegations. He disclosed his income-tax problems when he completed his 2016 security clearance application, and he provided additional information during the security clearance process. (Exhibits 1 and 2)

Applicant attributed his income-tax problems to being “young and dumb” and relying on information he received from a friend of a friend of a friend during a social event sometime in 2012. (Tr. 30-35) He explained this person showed him and others a document that purported to state that then President Obama had declared that any taxpayer who earned less than \$50,000 annually no longer had an obligation to file a tax

return. Applicant believed the document was authentic and thought it was a good deal. Accordingly, although he had previously filed tax returns, he decided to not file federal or state income tax returns beginning with tax year 2012. He assumed the presidential declaration applied to state income-tax matters too.

After the conclusion of tax year 2015 (early 2016), Applicant was earning more than \$50,000, he realized that he owed a lot in tax, he panicked, and he failed to take any remedial action. Although he disclosed his income-tax problems in his June 2016 security clearance application, he did not take remedial action because he was scared. (Tr. 43) He reported (by telephone) his income-tax problems to his company's facility security officer (FSO) sometime in 2016 after completing his security clearance application. (Tr. 53-55)

Applicant is now in compliance with both federal and state tax authorities. He met with an attorney to address the matter, but decided that avenue was too expensive. Tr. 45) With the assistance of an accountant, he filed federal and state income tax returns for tax years 2012-2018 in March 2019. Going forward, he intends to continue using the services of the accountant, who spent about a half an hour yelling at and scolding him. (Tr. 57-58)

Concerning the state income-tax indebtedness, Applicant entered into a payment plan to pay the delinquent tax liabilities on July 2, 2019, and satisfied the plan on August 12, 2019. (Exhibit A) He borrowed money from family and friends to do so, and he is in the process of repaying those people. (Tr. 56-57) He is in receipt of a certificate of good standing from the state tax authority verifying that he has filed and paid all taxes due. (Exhibit D)

Concerning the federal income-tax indebtedness, in August 2019, Applicant entered into an installment agreement with the IRS to have a monthly payment of \$400 automatically deducted from his checking account beginning October 10, 2019. (Exhibit B) The installment agreement covers back taxes for tax years 2012-2018. Applicant estimated he owed the IRS about \$18,440 in his response to written interrogatories. (Exhibit 2) At hearing, his estimate was \$25,000 to \$30,000, which includes interest and penalties. (Tr. 46-47, 55) In addition to the installment agreement, Applicant has had maximum withholding of federal income tax (zero deductions) from his wages since February 2019, and he expected the IRS to withhold his 2019 tax refund. (Tr. 47-48)

At hearing, Applicant took complete responsibility for his income-tax problems, and he did not attempt to minimize the issue. I found his testimony to be heartfelt and sincere. He acknowledged past mistakes, but believes that he has changed due to his obligation to set a good example for his 11-year-old son. He loves his job, feels great embarrassment due to his income-tax problems, and pledged that similar problems will not recur.

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.¹ 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.”² 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.³ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁵ 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.⁶

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:

¹ *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).

² 484 U.S. at 531.

³ 484 U.S. at 531.

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

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

⁶ Directive, Enclosure 3, ¶¶ E3.1.14 and E3.1.15.

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

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 has made progress in resolving the income-tax matters, and he is now in compliance with both federal and state tax authorities. That means he filed all tax returns, as required; he paid all taxes due to the state tax authority, as required; and he entered into an installment agreement with the IRS to pay back taxes owed for multiple tax years, with the first payment in October 2019. He did a decent 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 income-tax problems and the timing of his remedial action. Both are questions of fact that must be addressed.

Applicant failed to timely file state and federal income tax returns for six tax years. He did so by relying on bogus information received from a person he met on a single occasion at a social event. He then compounded the problem a few years later by panicking and neglecting to take remedial action. Although I am persuaded that Applicant was not a tax protestor nor tax defiant, he was exceptionally gullible, naïve, and lax concerning his income-tax obligations.

To his credit, Applicant disclosed his income-tax problems in his 2016 security clearance application, and he provided additional information during the security clearance process. He finally took remedial action in 2019, beginning with the filing of tax returns in March 2019. He has been in compliance for a relatively brief period of time compared with the time of noncompliance. He's in the beginning stages of an installment agreement with the IRS. He owes a sizeable sum of back taxes that will take several years to repay. Considering the totality of facts and circumstances, it is far too soon to tell if he will continue to meet his income-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.d:	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