



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



In the matter of:)	
)	
-----)	ISCR Case No. 20-03370
)	
Applicant for Security Clearance)	

Appearances

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

04/09/2021

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. Although he now appears to be in compliance with the IRS, 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 January 23, 2020. (Exhibit 2) This document is commonly known as a security clearance application. He was interviewed as part of a background investigation in April 2020. (Exhibit 3) Thereafter, on December 18, 2020, 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 1, 2021. In a handwritten response, he admitted the sole allegation concerning failure to timely file federal income tax returns for tax years 2004-2019. He provided no explanatory information beyond his admission, nor did he provide supporting documentation. He requested a decision based on the written record in lieu of a hearing.

On January 22, 2021, Department Counsel submitted a file of relevant material (FORM), which consists of Department Counsel's written brief and supporting documentation. The FORM was mailed to Applicant, who received it February 21, 2021. He replied via e-mail on February 25, 2021, and followed up with the same reply via U.S. mail received on March 2, 2012. His reply includes supporting documentation consisting of copies of federal income tax records, which are collectively admitted as Exhibit A. The case was assigned to me on April 6, 2021.

Findings of Fact

Applicant is a 48-year-old employee who is seeking to obtain a security clearance for the first time. (Exhibit 2 at Section 25) He is employed as a mechanic for a company in the defense industry. He has been so employed since January 2020. He attended high school during 1986-1990 and obtained a GED in October 1990. He then attended technical college during 1991-1992 and obtained a certificate as a welder. He has never married and has no children.

The SOR concerns a history of income-tax problems consisting of Applicant's failure to timely file federal income tax returns for tax years 2004-2019. Applicant does not dispute or contest the SOR allegation. He disclosed his income-tax problems when he completed his 2020 security clearance application in which he reported failure to file federal income tax returns for tax years 2011-2018. (Exhibit 2 at Section 26) He provided additional information during the security clearance process. (Exhibit 3) He explained in his security clearance application that his failure to file was due to being away at a remote location in Alaska during tax season.

In his reply to the FORM, Applicant presented documentary proof that he obtained assistance of a tax professional and filed returns with the IRS for tax years 2012-2020 in about January-February 2021. (Exhibit A) The returns for tax years 2018-2020 were filed electronically and the older returns were filed via the U.S. mail. He explained that when he contacted the IRS they requested returns for tax years 2015 forward, but he elected to file the additional years (2012-2014) to show that he was due refunds for those years. His representation is consistent with IRS practice and procedure, which provides a general rule that a taxpayer must file six years of back tax returns to be in good standing with the IRS.¹ The returns for tax years 2012-2017 show that he overpaid tax and was due a refund for each of those tax years.

¹ IRS Policy Statement 5-133, Delinquent Returns—Enforcement of Filing Requirements.

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.² 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.”³ 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.⁴ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁶ 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.⁷

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:

² *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).

³ 484 U.S. at 531.

⁴ 484 U.S. at 531.

⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁷ 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 is now in compliance with the IRS, which means that he filed all tax returns, as required. His proof of filing is documented in Exhibit A, which shows he filed the returns during January or February 2021.

In addressing this issue, I note that an applicant's failure to timely file tax returns 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 federal income tax returns for more than a decade. He says he did so because he was away at a remote location during tax season, which does not explain why he did not seek an extension of time or simply filed the returns late upon his

return from the remote location. Although I am persuaded that Applicant was not a tax protestor nor tax defiant, he was exceptionally lax and neglectful.

To his credit, Applicant disclosed his income-tax problems in his 2020 security clearance application, and he provided additional information during the security clearance process. He finally took remedial action in early 2021, when he filed returns for tax years 2012-2020. His remedial action apparently occurred as a response to the security clearance process. He has been in compliance with the IRS for a relatively brief period of time compared with his time of noncompliance.

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
Subparagraph 1.a:	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