



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



In the matter of:)	
)	
-----)	ISCR Case No. 20-01648
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

11/04/2021

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information due to a long-standing history of income-tax problems. He failed to timely file federal and state income tax returns for tax years 2013-2017. Although he filed the past-due returns in 2019, he owes approximately \$157,000 in back taxes to the IRS and about \$30,000 to the state tax authority. It is far too soon to tell if he will succeed in making payment arrangements with the IRS or the state and then comply with those arrangements. 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 1, 2019. (Exhibit 1) The automated version of the SF 86 is the e-QIP. The SF 86 is commonly known as a security clearance application. He provided additional information when interviewed as part of a background investigation in 2019. (Exhibit 2) Thereafter, on November 27, 2020, after reviewing the available information, the DoD CAF, 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 in form and purpose to a complaint, which is the initial pleading that starts a civil action; in some states this pleading is known as a petition; and in criminal law it is a formal charge accusing a person of an offense. Here, the SOR detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations.

Applicant answered the SOR on December 31, 2020. He admitted the sole SOR allegation, which alleged failure to timely file federal and state income tax returns for tax years 2013-2017, although they were filed untimely in 2019; and he admitted owing approximately \$75,000 in total for back taxes owed to the IRS and the state tax authority. By combining all these various matters in the sole allegation pleaded, the SOR succeeded in being both duplicitous and ambiguous, which are practices to be avoided. He also requested an in-person hearing before an administrative judge.

The case was assigned to an administrative judge on March 3, 2021, and the case was scheduled for hearing on July 28, 2021. The case was reassigned to me on July 26, 2021, and I postponed the scheduled hearing because Applicant was recovering from a medical procedure. The hearing occurred as rescheduled on August 18, 2021. (Tr. 8-9) The hearing transcript (Tr.) was received on August 26, 2021.

The record was kept open for 30 days to allow Applicant an opportunity to submit documentary evidence, as he submitted nothing during the hearing. On September 16, 2021, I received a 14-page fax from a law firm that has been assisting Applicant with resolving his federal income tax issues since August 27, 2021. The 14-page fax is admitted without objection as Exhibit A. In addition, after the record closed, on October 5, 2021, I received an e-mail from the same law firm with an update on the status of Applicant's case with the IRS. The e-mail chain is admitted without objection as Exhibit B. I again closed the record at that point.

Findings of Fact

Applicant is a 48-year-old employee who is seeking to obtain a security clearance for the first time. (Tr. 6) He's a self-employed consultant working as a senior software engineer for a federal contractor. (Tr. 5-6, 21) He has worked as a self-employed consultant from 2010 to present. Before that, he worked as a senior software engineer for a federal contractor during 2008-2010. He has two-plus years of college education but not a degree. He is married, and he and his spouse have a teenager at home. He has a 21-year-old child from a previous relationship who does not live in his household.

The SOR concerns a history of income-tax problems consisting of Applicant's failure to timely file federal and state income tax returns for tax years 2013-2017, as well as back taxes owed to the IRS and the state tax authority. Applicant does not dispute or contest the SOR allegation. He disclosed his income-tax problems when he completed

his 2019 security clearance application in which he reported failure to file income tax returns for tax year 2013, and he estimated that he owed the IRS \$150,000. (Exhibit 1) He also stated that he filed the past-due returns in June 2019 and was working with the IRS to repay the back taxes.

During his 2019 background investigation, Applicant explained that he failed to file tax returns for tax year 2013 because he lacked sufficient funds to pay the amount due. (Exhibit 2 at 6-7) The situation then continued for tax years 2014, 2015, 2016, and 2017, until 2019, when he filed all the past-due tax returns as well as the returns for tax year 2018. He estimated owing about \$75,000 in back taxes. His tax returns were prepared and filed with the assistance of a CPA firm who was also assisting him in negotiating with the IRS and the state to address his tax indebtedness. (Exhibit 2 at 16; April 21, 2020 letter from CPA)

During his hearing, Applicant attributed his history of income-tax problems to a lack of sufficient funds to pay the amount due when he prepared the returns for tax year 2012 or 2013, and the problem snowballed over the next several years. (Tr. 25-26) His inability to pay was caused by a mistake he made when he incorporated his business, which resulted in more taxes owed than he anticipated. (Tr. 26, 36-41) He also had a total of about two years of unemployment during the period 2012-2019, and a child-support obligation for his oldest child who was then a minor.

Applicant also explained that he was no longer using the services of the CPA firm to negotiate with the IRS due to the high costs. (Tr. 29) Instead, he had contacted the IRS and had completed a financial history form to get the process started. (Tr. 29-30) He contacted the IRS in May 2021, which was sometime after he stopped using the services of the CPA firm. (Tr. 33) He estimated owing the IRS about \$157,000 in back taxes, interest, and penalties. (Tr. 31-32, 36) He estimated owing the state tax authority about \$30,000 in back taxes, interest, and penalties. (Tr. 70)

Applicant further explained that he was negotiating with the IRS to establish a payment arrangement wherein he would make several monthly payments (three to six) as a sign of good faith. (Tr. 68-70) At that point the IRS would release tax liens filed against his residential property. Applicant would then be able to refinance the mortgage loan and use home equity to make a lump-sum payment to the IRS.

Applicant's gross income was about \$135,000 for tax year 2020. (Tr. 70-72) His spouse had a gross income of about \$160,000 for the same period. Applicant and his spouse file tax returns as married filing separately, which is a tax status used by married couples who choose to record their incomes, exemptions, and deductions on separate tax returns. It is noted that separate tax returns may result in more tax with a higher tax rate, because the IRS extends several tax breaks (such as higher standard deduction) to those who file jointly. Applicant and his spouse have used this form of tax-filing status since 2015, which is the year they married.

Based on his post-hearing documentation, Applicant has now retained the services of a law firm to assist him in resolving his federal income tax issues. (Exhibit A)

He retained the firm on August 27, 2021, after the hearing in this case. The attorney letter explained the steps Applicant had taken to resolve the issue with the IRS, including his attempt to refinance his mortgage loan and use the equity in the asset to address his tax liability, but the option was unavailable due to the existence of the federal tax lien. In the attorney's October 5, 2021 e-mail, the attorney wrote that the IRS had tentatively agreed on the terms of a proposed installment agreement pending managerial approval, which could take a month or longer to obtain. (Exhibit B)

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

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.

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 in deciding this case:

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 here.

Applicant is now in partial compliance with the IRS, which means that he filed all tax returns, as required. His proof of filing is not documented here, but it is unnecessary because the IRS does not entertain negotiations with a taxpayer unless the taxpayer has filed all required tax returns. Of course, filing returns is only part of the story. Applicant owes a sizeable sum in back taxes, interest, and penalties to both the IRS and the state tax authority. He presented no documentation to establish those sums, and so his estimates of \$157,000 and \$30,000 owed to the IRS and the state, respectively, are accepted for the purpose of deciding this case. He may be near the point of making an arrangement with the IRS, but he has done nothing with the back taxes owed to the state tax authority, as he is waiting to see what the IRS does.

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 actions. Both are questions of fact that must be addressed. Applicant failed to timely file income tax returns and pay tax when due for five consecutive tax years (2013-2017). He says he did so due to a lack of sufficient funds to pay the amounts owed in 2013 and the problem then snowballed. He filed the past-due tax returns in 2019, but the tax indebtedness remains unresolved. Although I am persuaded that Applicant is not a tax protestor nor tax defiant, he was exceptionally lax and neglectful for a number of years.

To his credit, Applicant disclosed his income-tax problems in his 2019 security clearance application, and he provided additional information during the security clearance process. He has slowly been trying to take remedial action (since 2015 per Exhibit A), but has not made substantial progress in resolving the tax indebtedness. His efforts to reach an arrangement with the IRS have been hampered by the existence of a federal tax lien, which is not surprising given that he owes six-figures to the IRS. (A copy of the tax lien is not in evidence as neither party offered it.) With that said, it appears that he may be close to making an arrangement with the IRS based on his post-hearing documentation. (Exhibits A and B) But at this point the bottom line is that he owes a total of about \$190,000 to the IRS and the state tax authority, and he is yet to make a single payment toward that tax indebtedness.

Considering the totality of facts and circumstances, it is far too soon to tell if Applicant will succeed in making payment arrangements with the IRS or the state and then comply with those arrangements. Accordingly, the mitigating condition at AG ¶ 20(g) applies, in part, but the evidence is not sufficient to justify complete mitigation of his long-standing history of income-tax problems.

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. National security eligibility denied.

Michael H. Leonard
Administrative Judge