



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



In the matter of:)	
)	
)	ISCR Case No. 12-09638
Applicant for Security Clearance)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

04/29/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He did not present sufficient documentary evidence to mitigate the concern stemming from his failure to file state and federal individual income tax returns for the period 2003–2013. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on March 9, 2012.¹ About three years later on January 20, 2015, after reviewing the application and information gathered during a background

¹ Exhibit 3 (this document is commonly known as a security clearance application).

investigation, the Department of Defense (DOD)² 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. Applicant answered the SOR on March 18, 2015.

Neither Applicant nor Department Counsel requested a hearing, and so the case will be decided on the written record.⁴ On July 27, 2015, Department Counsel submitted all relevant and material information that could be adduced at a hearing.⁵ On November 17, 2015, this file of relevant material (FORM) was mailed to Applicant, who received it on January 5, 2016. He replied within the 30-day period from receipt of the FORM. His reply consists of a two-page handwritten memorandum with three attachments. Those documents are made part of the record as Exhibit A. The case was assigned to me on April 27, 2016.

Procedural Matters

The FORM includes Exhibit 4, which is a set of interrogatories answered by Applicant in June 2014. It includes a report of investigation (ROI) summarizing Applicant's interview during the 2012 background investigation. The summary appears to be properly authenticated via Applicant's answers to the interrogatories as required under ¶ E3.1.20 of the Directive. Accordingly, the summary and the remainder of Exhibit 4 are admissible.

Findings of Fact

Applicant is a 59-year-old employee who is seeking to retain a security clearance for his job as a designer working in the shipbuilding industry. He has been so employed since 2008. He has worked in the shipbuilding industry since at least 2001. His

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). The AG replace the guidelines in Enclosure 2 to the Directive.

⁴ Directive, Enclosure 3, ¶ E3.1.7.

⁵ The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

educational background includes an associate's degree awarded in 1978. He has been married and divorced twice. He has two adult children.

Under Guideline F, the SOR alleges that Applicant failed to file state and federal individual income tax returns for tax years 2003–2013. In Section 26 of his security clearance application, he disclosed failing to file state and federal returns for tax years 2004–2011.⁶ Subsequently, he admitted failing to file returns for tax years 2003 to present during his May 2012 background investigation.⁷ By way of explanation, he stated that he experienced difficulties and delays in working with his tax preparer, who then passed away in 2009, and he was working to recover from that situation.

Applicant was asked to provide updated information about his tax problems in 2014, when the DOD issued written interrogatories to him.⁸ He did not provide any documentation showing he had filed returns in response to the interrogatories. But he made the following statements: (1) he had yet to file federal returns for tax years 2005–2013, but had, as of July 16, 2014, filed returns for tax years 2003 and 2004; (2) he estimated owing the sum of about \$13,000, plus interest, to the IRS for tax years 2005–2013; (3) he anticipated filing federal returns for tax years 2007–2010 within a few weeks; (4) he had, as of July 16, 2014, filed state returns (in two different states) for all tax years; and (5) he owed no back taxes to state tax authorities.

In response to the FORM, Applicant provided documentation that he had paid fees for filing overdue returns with the two state tax authorities.⁹ First, the documentation shows that as of February 20, 2015, he owed \$1,997.75 for a penalty or fee for tax years 2010 and 2012 in State M.¹⁰ Second, the documentation shows that in January 2016 he received State M income tax refunds of \$721 and \$621 for tax years 2010 and 2012, respectively.¹¹ Third, the documentation shows that in January 2016 he paid \$200 (\$50 per year) for a late filing penalty to State A for tax years 2003, 2004, 2005, and 2007.¹² Otherwise, he provided no other documentation concerning his state and federal returns. He further stated that now that he had paid the necessary late fees to state tax authorities, he would be able to put forth all his effort on resolving his federal tax issues.

⁶ Exhibit 3.

⁷ Exhibit 4.

⁸ Exhibit 4.

⁹ Exhibit A.

¹⁰ Exhibit A at Attachment 1.

¹¹ Exhibit A at Attachment 2.

¹² Exhibit A at Attachment 3.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹³ 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.”¹⁴ 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.¹⁵ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁶

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁷ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²¹ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²²

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

¹³ *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).

¹⁴ 484 U.S. at 531.

¹⁵ Directive, ¶ 3.2.

¹⁶ Directive, ¶ 3.2.

¹⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁸ Directive, Enclosure 3, ¶ E3.1.14.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ Directive, Enclosure 3, ¶ E3.1.15.

²¹ *Egan*, 484 U.S. at 531.

²² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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.²³ 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,²⁴ 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.²⁵ 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.²⁶

The concern under Guideline F 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.

The evidence supports a conclusion that Applicant has a problematic financial history within the meaning of Guideline F.²⁷ I reach that conclusion based on the findings of fact that show Applicant failed to file state and federal individual income tax returns for tax years 2003–2013. For the state returns, he presented incomplete

²³ Executive Order 10865, § 7.

²⁴ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²⁵ 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).

²⁶ AG ¶ 18.

²⁷ AG ¶ 19(g) (failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same).

documentation that suggests he filed returns for some of the tax years.²⁸ It follows logically that a taxpayer would not normally be assessed a late filing penalty or receive a refund unless a return was filed. But he did not present the best evidence to prove that he filed the returns and that he is now in compliance with state tax authorities. The best evidence would include items such as (1) copies of the tax returns along with proof of mailing or delivery, or (2) a tax account transcript from the state tax authorities. For the federal returns, he presented no documentation (e.g., copies of the returns, an IRS tax account transcript, a letter from a tax preparer, etc.) to prove that he filed the overdue returns. Likewise, he presented no documentation to establish what he is doing to repay the back taxes owed to the IRS.

I have considered the six mitigating conditions under Guideline F,²⁹ and conclude that Applicant has not presented sufficient information to rebut, explain, extenuate, or mitigate the facts proven by the written record. He has not presented a reasonable plan to resolve his tax problems, nor has he demonstrated a firm commitment to adhering to that plan. The facts do not support application of AG ¶ 20(c), the problem is being resolved or is under control, or AG ¶ 20(d), making a good-faith effort to repay. Simply put, Applicant has known since at least 2012 that his tax problems were a concern in the security clearance process, he has had ample time and opportunity to resolve his tax problems, and yet he is still far short of the mark. His inability or unwillingness or procrastination in dealing with his tax problems raises concerns and doubts about his judgment and willingness to follow rules and regulations.

The concern over Applicant's problematic financial history creates doubt about his current reliability, trustworthiness, good judgment, and ability to protect classified 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 gave due consideration to the whole-person concept.³⁰ Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his 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

²⁸ Exhibit A at Attachments 1, 2, and 3.

²⁹ AG ¶ 20(a)–(f).

³⁰ AG ¶ 2(a)(1)–(9).

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge