



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-06703
Applicant for Security Clearance	)	

**Appearances**

For Government: Stephanie C. Hess, Esq., Department Counsel  
For Applicant: Ryan C. Nerney, Esq.

02/10/2016

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for access to classified information via a security clearance. Applicant has addressed and resolved the concern over his failure to file state and federal income tax returns for tax years 2009, 2010, and 2011. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on May 17, 2012.<sup>1</sup> About three years later on July 13, 2015, after reviewing the application and information gathered during a background investigation, the Department of Defense (DOD)<sup>2</sup> sent Applicant a statement of reasons

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<sup>1</sup> Exhibit 4 (this document is commonly known as a security clearance application).

<sup>2</sup> 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.

(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.<sup>3</sup> 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 in an August 10, 2015 response consisting of a one-page memorandum.

Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.<sup>4</sup> On September 9, 2015, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>5</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who received it on September 21, 2015. Applicant replied in a timely manner and submitted a five-page memorandum along with Exhibits A–G, which are admitted without objections. The case was assigned to me on December 1, 2015.

### Findings of Fact

Applicant is a 60-year-old employee who is seeking to retain a security clearance, which he has held for many years. He is employed as a senior engineer, and he has worked in the defense industry for the same company or its successor-in-interest since 1983. His employment history includes honorable service in the U.S. Navy during 1973–1981. He is a widower with two adult children. He has lived at the same residential address since 1984.

In May 2012, when completing a security clearance application for a periodic reinvestigation, Applicant disclosed his failure to file state and federal income tax returns for tax years 2009, 2010, and 2011.<sup>6</sup> He also stated that his failure was due to missing papers, missing documents, and paperwork issues.<sup>7</sup> He also disclosed owing zero in back taxes to the state or federal tax authority.

Consistent with his disclosures, the SOR alleges that Applicant failed to file state and federal income tax returns for tax years 2009, 2010, and 2011, and that as of July

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<sup>3</sup> 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.

<sup>4</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>5</sup> 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.

<sup>6</sup> Exhibit 4.

<sup>7</sup> Exhibit 4 at 26.

2015, those returns remained unfiled. In his answer to the SOR, Applicant admitted the failures to file, and he explained that the returns would be filed no later than September 30, 2015.

Applicant has now provided sufficient documentary proof that he filed the tax returns in question on September 30, 2015.<sup>8</sup> In addition, Applicant provided the following explanation for his failure to file:

I did not purposely neglect my tax filings. I mistakenly overlooked the filing of my taxes due to additional responsibilities. I was accustomed to receiving [refunds] and did not realize the seriousness of the situation at the time. However, I have remedied this problem by filing all of my state and federal [tax returns] in question. Additionally, I am current on all tax filings and have filed all of my [tax returns] since this incident occurred from 2009–2011. Going forward I will ensure that all of my [tax returns] are filed in a timely manner. I have learned from this mistake.<sup>9</sup>

He also provided a written statement under penalty of perjury that he will never again fail to file his state and federal income tax returns, and he consented to the automatic revocation of his security clearance if he violates his statement of intent.<sup>10</sup>

Applicant's overall financial situation is established by a personal financial statement, dated October 9, 2015.<sup>11</sup> He reported a monthly gross salary of \$8,700, which is about \$104,000 annually. He has modest expenses and debt payments, resulting in a positive net remainder of \$3,097 monthly. He reported assets slightly greater than \$1 million.

Applicant has a good record of employment based on a review of performance evaluations from 2009–2014.<sup>12</sup> In addition, he has the strong support of four current or former co-workers who have trust and confidence in Applicant's fitness for a security clearance.<sup>13</sup>

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<sup>8</sup> Exhibit C.

<sup>9</sup> Supplemental Response to SOR and File of Relevant Material at 2.

<sup>10</sup> Exhibit G.

<sup>11</sup> Exhibit E.

<sup>12</sup> Exhibit F.

<sup>13</sup> Exhibit A.

## Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>14</sup> 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.”<sup>15</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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>16</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>17</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>18</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>19</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>20</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>21</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>22</sup> The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>23</sup>

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

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<sup>14</sup> *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 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>15</sup> 484 U.S. at 531.

<sup>16</sup> Directive, ¶ 3.2.

<sup>17</sup> Directive, ¶ 3.2.

<sup>18</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>19</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>20</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>22</sup> *Egan*, 484 U.S. at 531.

<sup>23</sup> 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.<sup>24</sup> 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,<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

The concern 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 history of not meeting financial obligations.<sup>28</sup> Likewise, the evidence supports a conclusion that Applicant failed to file annual state and federal income tax returns for three consecutive tax years, which is a serious matter.<sup>29</sup>

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<sup>24</sup> Executive Order 10865, § 7.

<sup>25</sup> AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

<sup>26</sup> 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).

<sup>27</sup> AG ¶ 18.

<sup>28</sup> AG ¶ 19(c).

<sup>29</sup> AG ¶ 19(g).

In mitigation, I have considered the six mitigating conditions under Guideline F.<sup>30</sup> And the following mitigating condition is most pertinent: AG ¶ 20(c) . . . there are clear indications that the problem is being resolved or is under control.

Applicant has provided sufficient evidence to explain and mitigate his failure to file the tax returns in question. I reach that conclusion for the following reasons. First, he self-reported the information about his failure to file tax returns and he has been truthful and complete during the security-clearance process. Second, he met his self-imposed deadline of September 30, 2015, to file the state and federal tax returns. Third, he acknowledged his failure to file was due to neglect and was unintentional. Fourth, he stated unequivocally that he will never again fail to file his state and federal income tax returns. Fifth, I am persuaded that Applicant has learned his lesson and the likelihood of recurrence is acceptably low. Sixth, he has a good record of employment and has strong character references who support his application for a security clearance. Seventh, Applicant's overall financial situation is stable and strong, he is not financially overextended, and there is no indication that his failure to file tax returns was linked to an issue of security concern, such as drug abuse, alcohol abuse, or gambling. Accordingly, based on those seven reasons, I conclude that there are clear indications that Applicant's tax problems are resolved and under control.

Applicant's history of not meeting his tax obligations by failing to file tax returns for three consecutive tax years does not create 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.<sup>31</sup> Accordingly, I conclude that he 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:	For Applicant
Subparagraphs 1.a & 1.b:	For Applicant

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<sup>30</sup> AG ¶ 20(a)–(f).

<sup>31</sup> AG ¶ 2(a)(1)–(9).

## **Conclusion**

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard  
Administrative Judge