



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



In the matter of:)
)
-----) ISCR Case No. 14-06948
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: Molly Schmidt-Nowara, Esq.

10/25/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He failed to file federal individual income tax returns on a timely basis for tax years 2005–2012, and only recently filed returns for the last six tax years in April 2015. He estimates owing the IRS about \$43,000 in back taxes, of which about \$19,000 is for the most recent tax year of 2015. His federal tax problems are too much, went on too long, and are too recent to justify a favorable clearance decision. 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 February 25, 2014.¹ Thereafter, on May 28, 2015, after reviewing the application and information gathered during a background investigation,

¹ Exhibit 1 (commonly known as a security clearance application).

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 factual reasons for the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct. He answered the SOR on June 8, 2015, and requested a hearing.

The case was assigned to me on February 22, 2016. The hearing was held as scheduled on May 25, 2016. Department Counsel offered Exhibits 1–7, and they were admitted. Applicant testified on his own behalf, presented one character witness, and offered Exhibits A–G, and they were admitted. The transcript of the hearing (Tr.) was received on June 6, 2016.

The record was kept open for about 30 days until June 27, 2016, to allow Applicant to submit additional documentation.⁴ His post-hearing documentation is admitted without objections as follows: Exhibit H—signed copies of federal individual income tax returns for tax years 2010–2015; Exhibit I—IRS Form 433-A, signed January 14, 2016; and Exhibit J—a May 8, 2015 release of state tax lien.

Procedural Matters

Under Guideline E for personal conduct, SOR ¶ 2.a cross-alleged the failure to file federal income tax returns, as alleged under Guideline F for financial considerations in SOR ¶ 1.b. Department Counsel withdrew the Guideline E matters at the start of the hearing.⁵

Findings of Fact

Applicant is a 54-year-old employee who requires a security clearance for his job as a senior mechanical engineer with a company doing business in the defense industry. He has worked for this company since September 2014.⁶ He previously held a

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).

⁴ Tr. 110–113.

⁵ Tr. 11.

⁶ Tr. 36.

security clearance during 2008–2014, when he was working for another company, but he understands the clearance lapsed.⁷ His employment history reflects that he has worked as a lead engineer, project manager, or senior mechanical engineer for many years.⁸ In addition, he owed and operated three companies, although their business activities have declined to a low level at present. His educational background includes a bachelor's degree in mechanical engineering. He married in 1986 and divorced about 16 years later in 2002. He has two adult sons from that marriage, both of whom have lived with him, although only the youngest son does so now. His second marriage was brief, less than one year during the course of 2014.

Under Guideline F, the SOR allegations concern four items: (1) a state tax lien filed against Applicant in September 2013 for \$8,699; (2) failure to file federal individual income tax returns for tax years 2005–2012; (3) approximately \$70,000 in back taxes owed to the IRS for the same tax years; and (4) a past-due mortgage loan for \$330,252 and in foreclosure with a total loan balance of about \$540,223. Applicant admitted the allegations, with detailed explanations, in his answer to the SOR. The first and fourth items can be discussed relatively briefly, while the federal tax matters require more discussion.

Along with not filing federal tax turns, Applicant failed to file state income tax returns during the same tax years, although those matters were not alleged in the SOR. In time, this resulted in the state tax department placing a lien against Applicant in September 2013 for \$8,699. The lien was satisfied and released in May 2015 in conjunction with Applicant qualifying to purchase his current residence.⁹

The past-due mortgage loan in foreclosure status stems from the residence Applicant bought in 2003 after his divorce. This is the home in which Applicant lived from 2003 to 2014 and in which he raised his two sons. He refinanced the mortgage loan in August 2006 in the amount of \$540,750; it was an adjustable-rate balloon note with a two-year rate lock; and the initial payment was \$4,351 per month.¹⁰ After two years, the loan adjusted to a monthly payment of \$5,400, which took place in about September 2008. He recalls the loan increasing from \$3,600 to \$5,400 per month.¹¹ The last full payment accepted by the mortgage lender was in December 2008.¹²

⁷ Tr. 5–6.

⁸ Exhibit D.

⁹ Exhibits J and 7 at 1.

¹⁰ Exhibit B at 12.

¹¹ Tr. 54.

¹² Exhibit B at 3.

The mortgage lender brought a foreclosure lawsuit in November 2009.¹³ After substantial delay for an attempt at loss mitigation, the state court granted a summary judgment for the mortgage lender in August 2012 for \$741,499.¹⁴ He self-reported the foreclosure to his employer's security office in August 2012.¹⁵ He remained in the property until sometime in 2014, when he vacated the property after a series of attempts to qualify for a loan-rehabilitation program. The foreclosure case was reinstated to the state court's active docket in January 2016, because Applicant is attempting to have the court vacate the foreclosure judgment based on the mortgage lender's lack of standing to foreclose.¹⁶ In addition, in early February 2016, Applicant signed a quitclaim deed thereby granting any rights and interests in the property to a charity.¹⁷ The foreclosure case was pending in state court when the record closed here.

Applicant admits he failed to timely file federal individual income tax returns for tax years 2005–2012. He attributes his failure to a complex tax situation and trusting accountants to perform work as agreed and then failing to do so. Before his divorce, his wife handled the bookkeeping for his private companies. She ensured the necessary documentation was provided to an accountant to file the annual corporate returns for the companies, which were S corporations. It was necessary to complete and file corporate returns before individual returns could be filed. After the divorce, Applicant's mother, a retired secretary, took on the task. His longtime accountant (and good friend) was disgruntled over Applicant's divorce and refused to do any more work for him. Applicant then retained another accountant, worked directly with the IRS, hired a law firm at \$1,000 monthly to assist him working with the IRS, and then found another accountant who he worked with for several years. In an effort to get things back on track in December 2012, he took two weeks off from work and completed the corporate returns, wrote checks, and submitted both to the IRS.¹⁸ He understands he has been current and up to date with his corporate returns and taxes since 2012.¹⁹

Applicant had further delays during 2013–2015 working with his accountant to get the federal individual income tax returns completed and filed.²⁰ He quit working with that accountant in December 2015 or January 2016. He then contacted the IRS and worked directly with a case agent. He filed returns for the last six tax years (2010–2015)

¹³ Exhibit B at 3.

¹⁴ Exhibit B at 9.

¹⁵ Exhibit 4.

¹⁶ Exhibit E.

¹⁷ Exhibit A.

¹⁸ Tr. 47–48.

¹⁹ Tr. 47.

²⁰ Tr. 48.

on April 15, 2016, meaning that the 2015 return was filed timely while the other returns were past due.²¹ The returns show he owed no additional money for tax years 2010–2014, but he owes \$19,256 for tax year 2015 based on IRA distributions of \$102,303 (part of which was used to purchase his current residence). In total, he estimates he owes the IRS \$43,000 in back taxes, which includes the most recent tax year of 2015.²² He did not submit any documentation (e.g., a record of account transcript for the individual tax years) from the IRS showing how much he currently owes in back taxes.

In addition to filing returns for the last six tax years, in January 2016 Applicant submitted IRS Form 433-B.²³ It is a form the IRS uses to obtain current financial information about a person who owes federal income tax they cannot pay in full with a view toward resolving the matter through an installment agreement, offer in compromise, or placement in currently not collectible status. Applicant intends to pursue an installment agreement. His form shows he has a positive net remainder of about \$4,000 monthly, which suggests he has the means to pay an installment agreement.²⁴ Other than the Form 433-B, Applicant had no further information on the installment agreement.

Applicant agreed that he is the type of person who is interested in doing the substantive work and that he is not a good business manager.²⁵ He is currently handling his corporate tax returns and he intends to retain an accountant recommended by his employer for his individual returns.²⁶ He accepted responsibility for his tax problems, and he intends to keep his financial house in order moving forward. His employer supports his application for a security clearance as shown by the testimony of the character witness, the presence of a company executive during the hearing, and his employer's assistance to him for this proceeding.²⁷

²¹ Exhibit H. As I understand IRS practice and procedure, the IRS requires a taxpayer to go back and file returns for the last six tax years to get in their good graces, and then to make arrangements to pay what is owed. The six-year period for past-due returns is found in IRS Policy Statement 5-133 and Internal Revenue Manual 1.2.14.1.18.

²² Tr. 48–49.

²³ Exhibit I.

²⁴ Exhibit I at 4.

²⁵ Tr. 105.

²⁶ Tr. 98.

²⁷ Tr. 24–32; 36; 67.

Law and Policies

It is well-established law that no one has a right to a security clearance.²⁸ 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.”²⁹ 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.³⁰ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.³¹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.³² The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.³³ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.³⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³⁵

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.³⁶ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.³⁷

²⁸ *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).

²⁹ 484 U.S. at 531.

³⁰ Directive, ¶ 3.2.

³¹ Directive, ¶ 3.2.

³² ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

³³ Directive, Enclosure 3, ¶ E3.1.14.

³⁴ Directive, Enclosure 3, ¶ E3.1.15.

³⁵ Directive, Enclosure 3, ¶ E3.1.15.

³⁶ *Egan*, 484 U.S. at 531.

³⁷ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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 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.³⁸ 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,³⁹ 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.⁴⁰ 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.⁴¹

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.

In analyzing this case, I considered the following disqualifying and mitigating conditions under Guideline F as most pertinent:⁴²

³⁸ Executive Order 10865, § 7.

³⁹ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

⁴⁰ 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).

⁴¹ AG ¶ 18.

⁴² AG ¶ 20(a)–(f).

AG ¶ 19(a) inability or unwillingness to satisfy debts;

AG ¶ 19(c) a history of not meeting financial obligations;

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

AG ¶ 20(c) [t]here are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(e) the [person] has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provided documented proof to substantiate the basis of the dispute or provides evidence of actions taken to resolve the issue.

The evidence here supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. With that said, I am not concerned about the state tax lien because it was satisfied and released in May 2015, which is more than one year ago. Likewise, he provided sufficient documentation showing that he has a reasonable basis to dispute the foreclosure judgment, as that matter is in ongoing litigation in state court. Whether he prevails in the foreclosure case, of course, is a matter beyond the scope of this proceeding.

Nevertheless, I have concerns about Applicant's federal tax problems. Those matters have improved significantly from the past several years, but they are still unresolved. His federal tax problems require close examination. Indeed, failure to file tax returns and pay taxes on a timely basis suggest that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information.

I have considered Applicant's efforts to fix his federal tax problems. His efforts were not minimal, and he has finally reached the point where he can begin repaying the back taxes to the IRS. I considered the various circumstances that played a part, such as his divorce in 2002 and the loss of his wife's bookkeeping services, the problems he had with accountants, and the complexity of his tax situation. I also considered Applicant's motivation, and I have no concerns that he is a tax protestor, is tax defiant, or is otherwise opposed to meeting his tax obligations. I assess the overall situation as one in which Applicant exercised exceptionally poor judgment for a number of years due to neglect or procrastination or both. The result was a situation that began as a relatively minor problem and then snowballed over the years to a major problem, which he is still attempting to resolve. To sum up, Applicant's federal tax problems are too much, went on too long, and are too recent to justify a favorable clearance decision.

Applicant's ongoing federal tax problems 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.⁴³ 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 him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline F:	Against Applicant
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b–1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	Withdrawn
Subparagraph 2.a:	Withdrawn

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

⁴³ AG ¶ 2(a)(1)–(9).