



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-00082

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel

For Applicant: Bruce R. Heurlin, Esq.

02/14/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He failed to file state and federal individual income tax returns on a timely basis for tax years 2007-2013, and only recently filed those returns in April 2015. He owes nothing to the state, but he owes the IRS about \$13,000 in interest and penalties, which he started repayment of in October 2016 at the rate of \$185 monthly. His 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 July 28, 2014. This document is commonly known as a security clearance application. Thereafter, on November 2, 2015, 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.¹ 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 December 15, 2015, and he requested a hearing.

The case was assigned to an administrative judge on April 1, 2016, reassigned to another judge in June 2016, and then reassigned to me on June 17, 2016. The hearing was held as scheduled on September 8, 2016. Department Counsel offered Exhibits 1-5, and they were admitted. Applicant testified on his own behalf and offered Exhibits A-M, and they were admitted. The transcript of hearing (Tr.) was received on September 16, 2016.

The record was kept open to allow Applicant to present additional documentation. On October 7, 2017, Applicant's counsel submitted additional documentation marked as Supplemental Exhibits 1-29. Those matters are admitted, without objection, collectively as Exhibit N.

Findings of Fact

Applicant is a 60-year-old employee who requires a security clearance for his job as a senior systems engineer (with a specialty in software safety) for a company doing business in the defense industry. He has worked for this company or its predecessors-in-interest since 1983. He has held a security clearance for many years while working in the defense industry. He has a good record of employment.² His employment history includes honorable service in the U.S. military, both on active duty and in a state national guard. He earned a bachelor's degree in information systems in 1991. His current annual salary is about \$111,000, while his spouse earns about \$40,000 annually as a public school teacher.

Under Guideline F for financial considerations, the SOR allegations concern four items: (1) Applicant filed for a Chapter 7 bankruptcy in 1999 and was granted a discharge in 2000; (2) indebtedness to the IRS for back taxes, interest, and penalties for tax years 2007-2013 in the amount of about \$27,000; (3) an unpaid \$6,262 charged-off consumer account; and (4) an unpaid \$260 medical collection account.³ He admitted

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (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).

² Exhibits B, C, D, E, F, G, and M.

³ The Chapter 7 bankruptcy case and the two delinquent accounts are decided in Applicant's favor for the following reasons. The Chapter 7 bankruptcy case was related to Applicant's separation and divorce, and it is now more than 15 years in the distant past. The \$6,262 charged-off account was incurred years ago in about 2006, and it is now essentially uncollectable as Applicant cannot find the owner of the debt. Tr. 59-65. Applicant provided detailed testimony to persuade me that the \$260 medical collection account was paid. Tr. 65-66.

that he failed to timely file state and federal individual income tax returns for multiple tax years, 2007—2013, and failed to pay state and federal income taxes when due during those years.⁴ To date, Applicant filed the late state and federal tax returns in April 2015; he paid about \$784 to resolve his total indebtedness to the state tax authority over the course of several months in 2015; he paid about \$21,562 in back taxes owed to the IRS in April 2015; and he entered into an installment agreement with the IRS in September 2016 to make \$185 monthly payments to resolve approximately \$13,000 in interest and penalties.⁵ His history of tax problems is discussed further below.

Applicant traces his history of tax problems back to early 2008, when he realized that he did not have sufficient funds to pay federal income taxes due for tax year 2007.⁶ As a result, he did not file returns for tax year 2007. He hoped to remedy the situation in tax year 2008, but that did not occur, and the failure to file and the failure to pay persisted through tax year 2013. At the time this started, Applicant and his wife had four teenage boys under their care, their own two sons and two others (brothers) who they took in during Christmas 2007 and remained in their household through about 2010, for a total of about two years. The increased size of his household was a factor in his inability to pay the income taxes when due.

In early 2015, Applicant began taking action to address his tax problems by retaining the services of a certified public accountant (CPA) – tax attorney.⁷ With professional assistance, Applicant filed the late state and federal returns in April 2015. He obtained a loan from his 401(k) account, and he used the proceeds to pay the back taxes owed to the IRS, the total indebtedness owed to the state, the fee for the professional services, and some money was used for home repair.⁸ In addition, he timely filed returns for tax year 2014 and paid all taxes due. Thereafter, in September 2016, he entered into the installment agreement, noted above, with the IRS. Although the agreement calls for payments over a period of many months, his plan is to pay off the total indebtedness by obtaining another loan from his 401(k) account in January 2017.⁹

⁴ Although the SOR allegation is limited to indebtedness to the IRS, Applicant, with the assistance of experienced counsel, had a full and fair opportunity to litigate the timely failure to file and timely failure to pay income taxes matters. I considered the uncharged matters in order to put Applicant's history of tax problems in context, because the failure to file and failure to pay for multiple tax years are relevant circumstances surrounding the allegation of his indebtedness to the IRS. I also considered those matters to evaluate his evidence in explanation, extenuation, mitigation, or changed circumstances, and whether he demonstrated reform and rehabilitation. To do otherwise would result in a highly artificial piece-meal analysis of the record evidence. See ISCR Case No. 12-11375 (App. Bd. Jun. 17, 2016).

⁵ Exhibits I and N.

⁶ Tr. 48-51, 85-87.

⁷ Exhibit L.

⁸ Tr. 89-90.

⁹ Tr. 55.

Applicant had a financial counseling session in April 2016 for the purpose of reviewing his current income, living expenses, and assets and liabilities to assist him in evaluating his financial situation.¹⁰ He found the session useful because it gave him some insight into his financial situation and gave him confidence in his overall plan to address his financial problems.¹¹ The paperwork from the counseling session indicates a positive monthly net remainder of about \$975 and a net worth of \$34,188. The paperwork is also largely consistent with a monthly budget he and his spouse use.¹²

Applicant made a good impression on me during the hearing. He was serious, contrite, and respectful of the process. Overall, I found him credible.

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 the 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 clearance 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

¹⁰ Exhibit H.

¹¹ Tr. 66-67.

¹² Exhibit J.

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 (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.

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 evidence.²¹ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²²

Discussion

Under Guideline F for financial considerations,²³ 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:

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 a [person's] reliability, trustworthiness, and ability to protect classified information.²⁴

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 the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent:

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

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

AG ¶ 20(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

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).

²³ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²⁴ AG ¶ 18.

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

The evidence here supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. I have serious concerns about Applicant's history of tax problems. Those matters have improved substantially from the past several years, but they are still not wholly resolved as he is at the beginning stage of paying off more than \$13,000 in interest and penalties owed to the IRS. His history of tax problems requires close examination. Indeed, his ongoing indebtedness to the IRS and the relevant circumstances surrounding the indebtedness suggest that he 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 tax problems, and his efforts are not insubstantial. He filed all the late state and federal returns in April 2015, which was before the SOR was issued to him in November 2015. Likewise, he paid the state tax debt and the back taxes owed to the IRS before the SOR was issued to him. He also implemented an installment agreement with IRS in September 2016 to repay the rest of his indebtedness over time, with the hope of paying it off early in January 2017. 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 lawful tax obligations. I assess the situation as one in which Applicant exercised very 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 with tax year 2007 and then snowballed over the years to a major problem, which he is still working to resolve. To sum up, Applicant's tax problems are too much, went on too long, and are too recent to justify a favorable clearance decision.

Applicant's history of tax problems creates doubt about his 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*. In doing so, I gave substantial weight to Applicant's many years of work in the defense industry and his honorable military service. 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:

Paragraph 1, Guideline F:	Against Applicant
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Subparagraph 1.d:

For Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge