



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-05127

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel

For Applicant: *Pro se*

04/12/2017

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 federal individual income tax returns on a timely basis for tax years 2007, 2008, 2009, 2010, 2011, and 2013. He did not establish that he has filed the past-due returns and that he is otherwise in good standing with his federal income tax obligations. 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 August 22, 2014. This document is commonly known as a security clearance application. Thereafter, on February 16, 2016, 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 April 6, 2016; he admitted the three factual allegations; and he did not submit supporting documentation. He also requested a decision based on the written record in lieu of a hearing.

On May 31, 2016, Department Counsel submitted all relevant and material information that could be adduced at a hearing. The file of relevant material (FORM) consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision. The file of relevant material was mailed to Applicant, who received it June 20, 2016. To date, he has not replied. The case was assigned to me several months later on April 11, 2017.

Procedural Matters

Department Counsel's FORM includes Exhibit 3, which is a report of investigation (ROI) summarizing Applicant's interview that took place at an overseas location during the March 2015 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.² In addition, the Directive provides no exception to the authentication requirement. Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, the record does not demonstrate that Applicant, who has not replied to the FORM, understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, Exhibit 3 is inadmissible and I have not considered it.

Findings of Fact

Applicant is a 35-year-old employee who requires a security clearance for his employment with a company doing business in the defense industry. He has worked for this company since 2014. The Defense Department previously granted him a secret-level security clearance in 2002. He has never married and has no children.

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 See generally ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process in security clearance cases. Judge Ra'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

Under Guideline F for financial considerations, the SOR allegations concern three matters: (1) failure to file federal income tax returns on a timely basis for tax years 2007 through 2013, including that the 2013 return remained unfiled as of the date of the SOR (February 2016); (2) a charged-off account for \$2,915 stemming from an automobile loan; and (3) a charged-off account for \$73 stemming from an utility account. In his answer to the SOR, he admitted the three allegations and provided brief explanations, which will be noted below. In addition to his admissions, the three allegations are established by the information he disclosed in his security clearance application as well as an April 2015 credit report.³

Applicant's relevant employment history shows that from 2002 to present, he has worked in several jobs with various employers at overseas locations in support of the U.S. armed forces. He has also had short periods of unemployment and some self-employment. The particulars of his employment history include the following: (1) self-employment in a home-based coffee distribution business from December 2013 to present; (2) full-time employment as a federal contractor from 2014 to present; (3) a short period of unemployment from September to December 2013, due to a business failure; (4) full-time self-employment from April to September 2013; (5) a short period of unemployment from February to April 2013, due to returning from overseas employment; (5) full-time employment as a federal contractor from October 2010 to February 2013 in support of the U.S. armed forces in Afghanistan; (6) a short period of unemployment from May to October 2010, due to a medical condition; (7) full-time employment as a federal contractor from April 2009 to May 2010 in support of U.S. armed forces in Afghanistan; (8) full-time employment as a federal contractor from May 2007 to March 2008 in support of the U.S. armed forces in Iraq; (9) full-time employment as a federal contractor from October 2006 to April 2007 in support of the armed forces in Iraq; and (10) full-time employment as a federal contractor from November 2002 to October 2006 in support of the U.S. armed forces in Afghanistan.⁴

In his 2014 security clearance application, Applicant disclosed that he failed to file federal individual income tax returns for multiple tax years.⁵ He reported that he failed to file federal returns for tax years 2007, 2008, 2009, 2010, 2011, and 2013. For tax years 2007 through 2011, he stated that he was working overseas and that he had filed the returns in April 2013. For tax year 2013, he stated that he was still gathering the necessary documentation and was working with a CPA. He also disclosed a repossession of a Ford F-150 pickup truck in May 2014 with a balance due of \$3,215. He attributed the repossession to a business failure, and he stated that he had started a payment plan at the rate of \$300 monthly.

In his April 2016 answer to the SOR, Applicant provided the following explanations. For the tax matters, he explained that he was working overseas during

³ Exhibits 2 and 5.

⁴ Exhibit 2.

⁵ Exhibit 2.

2007 through 2012; he was in the process of gathering information for tax years 2013 and 2014; and he intended to file returns for tax years 2013, 2014, and 2015 by April 15, 2016. For the deficiency balance on the automobile loan, he explained that the original payment plan was discontinued, but he had established another payment plan at the rate of \$300 monthly. For the charged-off utility account for \$73, he stated that the account would be paid by April 15, 2016.

Applicant did not respond with documentation supporting his various statements and claims when he answered the SOR. Likewise, he did not reply to the FORM. He has not produced documented proof (for example, copies of returns, IRS tax account transcripts, a letter from his CPA, etc.) that he has filed any of the federal tax returns in question. Nor has he produced documented proof that the two charged-off accounts have been paid or settled, are in a payment plan, or were cancelled, forgiven, or otherwise resolved.

Law and Policies

It is well-established law that no one has a right to a security clearance.⁶ 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.”⁷ 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.⁸ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

⁶ *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).

⁷ 484 U.S. at 531.

⁸ Directive, ¶ 3.2.

⁹ Directive, ¶ 3.2.

¹⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹¹ Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.¹² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁴ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁵

Discussion

Under Guideline F for financial considerations,¹⁶ 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.¹⁷

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:

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;

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ *Egan*, 484 U.S. at 531.

¹⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁶ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

¹⁷ AG ¶ 18.

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

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. With that said, I have given little weight to the two charged-off accounts for a total of \$2,988. Viewed cumulatively or individually, they do not involve a significant or sizeable amount of money. And the largest charged-off account is apparently due to a business failure. Accordingly, the allegations in SOR ¶¶ 1.b and 1.c are decided for Applicant.

The same cannot be said for Applicant's history of tax problems. His repeated failure to file tax returns bears close examination and is a matter of serious concern to the federal government.¹⁸ The evidence shows he failed to file returns on a timely basis for tax years 2007, 2008, 2009, 2010, 2011, and 2013.¹⁹ Moreover, he has not established that he has now filed the past-due returns. As recently as April 2016, when he answered the SOR, he stated he was working on filing returns for 2013, 2014, and 2015, which means both the 2013 and 2014 returns were then past due.

Applicant's pattern of conduct is indicative of poor judgment and unreliability. His pattern of conduct also suggests 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. An applicant who has a history of not fulfilling their tax obligations may be said not to have demonstrated the high degree of judgment and reliability required for access to classified information.

Based on the written record before me, I am unable to credit Applicant in explanation, extenuation, or mitigation of his tax problems. He has had ample time and opportunity since submitting his security clearance application in 2014 to put his tax problems behind him and have supporting documentation showing he has in fact done so. Documentation is necessary because the DOD security-clearance process, like

¹⁸ The General Accountability Office (GAO) expressed serious concern over the relationship between tax delinquents and clearance holders in its July 28, 2014 report, *Security Clearances: Tax Debts Owed by DOD Employees and Contractors*, <http://www.gao.gov/assets/670/665052.pdf>.

¹⁹ In deciding this case, I consulted the Internal Revenue Manual, which is available online at the IRS website. As I understand federal income tax law, for a U.S. citizen or resident alien, the rules for filing income, estate, and gift returns and paying estimated tax are generally the same whether the taxpayer is in the United States or abroad, because worldwide income is subject to U.S. income tax, regardless of where a person resides. Applicant may have been eligible for an extension based on his status as a contractor employed by an organization directly supporting military operations and working in a combat zone. In any event, he certainly would have been required to file returns after returning to the United States in early 2013. I note that Applicant has not claimed he was entitled to an extension, and Department Counsel did not address this matter in his written brief. Accordingly, it is unnecessary to discuss this matter further.

other large bureaucratic institutions (for example, banks, insurance companies, and universities), does not run on word-of-mouth; it runs on paperwork. It's the responsibility of the individual applicant to produce relevant documentation in support of their case.²⁰ Here, Applicant has not met his burden of production because he did not present any supporting documentation. Applicant's tax problems are too much, went on too long, and are too recent to justify a favorable clearance decision. Accordingly, the allegation in SOR ¶ 1.a is decided against Applicant.

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 hazardous, overseas locations in support of the U.S. armed forces. 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:	Against Applicant
Subparagraphs 1.b-1.c:	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

²⁰ Directive, Enclosure 3, ¶ E3.1.15.