



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-06626

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel

For Applicant: *Pro se*

10/04/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. He failed to present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from a history of tax problems consisting of a repeated failure to timely file tax returns and approximately \$425,000 in back taxes, penalties, and interest owed to state and federal tax authorities. 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 September 2, 2014. This document is commonly known as a security clearance application. Thereafter, on August 22, 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. 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 October 19, 2016. He requested a decision based on the written record in lieu of a hearing. Her response consisted of handwritten responses on a copy of the SOR. He did not include any attachments or enclosures.

On November 28, 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 FORM was mailed to Applicant on December 9, 2016, who received it December 15, 2016. He did not reply within 30 days from receipt of the information as required. The case was assigned to me October 1, 2017.

Procedural Matters

Department Counsel's FORM includes Exhibit 4, which, in part, is a report of investigation (ROI) summarizing Applicant's interview that took place during the November 2014 background investigation. The ROI is not authenticated by a witness as required under ¶ E3.1.20 of the Directive.¹ In addition, the ROI is largely illegible. Accordingly, for both reasons, I have not considered the ROI in reaching my decision.

Findings of Fact

Applicant is a 46-year-old self-employed business owner who requires a security clearance. He was previously granted a security clearance at the secret level in 2004.² He has owned his small business since 2000. His educational background includes four brief periods of study for license renewal, at three-year intervals, at an electrical and technical school during 2005-2014. He married in 1995 and divorced in 2008.

In his August 2014 security clearance application, Applicant disclosed a minor tax problem consisting of failure to timely file tax returns in 1995 due to slow business, and he estimated that he owed \$100.³ Otherwise, he reported no derogatory financial information. The SOR, as amended by Department Counsel in their FORM, alleges a history of financial problems or difficulties consisting of the following: (1) failure to timely file state and federal income tax returns for tax years 2002-2015; (2) approximately \$159,990 in back taxes owed to the IRS for tax years 2008-2014; (3) approximately

¹ 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.).

² Exhibit 3 at 30-31.

³ Exhibit 3 at 31-32.

\$6,995 in back taxes owed to a state tax authority as reflected in a tax lien filed in 2005; (4) approximately \$134,000 in back taxes owed to the IRS as reflected in a tax lien filed in 2006; (5) approximately \$67,720 in back taxes owed to the IRS as reflected in a tax lien filed in March 2016; (6) approximately \$57,092 in back taxes owed to the IRS as reflected in a tax lien filed in February 2016; (7) a \$301 medical collection account; and (8) a past-due account in the amount of \$219 with an outstanding balance of \$1,758.

The eight items noted above are established by Applicant's admissions and the written record.⁴ There is no documentation in the written record to establish that the state or federal back taxes were paid, settled, in a payment arrangement, cancelled, forgiven, or otherwise resolved. In his response to written interrogatories, Applicant explained that his tax problems occurred because he "went through a tough time in [his] business [and] then went through a divorce, both caused [him] to fall behind."⁵ In his answer to the SOR, he stated that he filed the past-due tax returns through 2014, but he did not provide documentary proof of filing.

In addition to the failure to file returns and the back taxes, Applicant received a summons from the IRS in 2015 seeking documents and records about the income he received for tax years 2008-2014.⁶ He did not reply to the summons, and so the IRS brought an action in federal court to enforce the summons. The federal court scheduled an order to show cause hearing for January 6, 2016, but it did not take place because the Government voluntarily dismissed the case on January 4, 2016.⁷

Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.⁸

It is well-established law that no one has a right to a security clearance.⁹ As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent

⁴ Answer to SOR; Exhibits 4, 6, 7, and 8.

⁵ Exhibit 4 at 2.

⁶ Exhibit 4.

⁷ None of the matters in this paragraph were alleged in the SOR. I considered them for the limited purpose of assessing the nature, extent, and seriousness of Applicant's tax problems under the whole-person concept.

⁸ The 2017 AG are available at <http://ogc.osd.mil/doha>.

⁹ *Department of the 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).

standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ 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. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹¹ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹²

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹³ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁸

Discussion

Under Guideline F for financial considerations, 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 an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.¹⁹

¹⁰ 484 U.S. at 531.

¹¹ 484 U.S. at 531.

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Directive, ¶ 3.2.

¹⁴ Directive, ¶ 3.2.

¹⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁶ Directive, Enclosure 3, ¶ E3.1.14.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ AG ¶ 18.

The concern is broader than the possibility that a person might knowingly compromise classified or sensitive 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 to satisfy debts;

AG ¶ 19(b) unwillingness to satisfy debts regardless of ability to do so;

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

AG ¶ 19(f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The evidence supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. He failed to timely file state and federal tax returns over a period of many years; he is indebted for approximately \$425,000 for back taxes owed to state and federal tax authorities for multiple tax years; and both have filed tax liens against him. Indeed, this is one of the worst tax cases I have seen for some time. The repeated failure to file returns and to pay income taxes when due bears close examination and is a matter of serious concern to the federal government.²⁰ This 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.

What's missing here is documentation in support of Applicant's case. Although he claimed he filed tax returns through tax year 2014, he did not produce documentation to that effect. Moreover, there is no documentation showing that he is

²⁰ 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>.

making progress in reducing the mountain of back taxes, penalties, and interest he owes the state and the IRS. AG ¶ 20(d) does not apply in his favor. Likewise, he receives no credit in mitigation under AG ¶ 20(g), which requires an applicant to show that he has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements. The fact that the IRS was forced to issue a summons, and then initiate an action in federal court to enforce that summons, to obtain relevant taxpayer information from Applicant suggests he is not inclined to comply with tax authorities. At bottom, his well-established history of tax problems shows that Applicant is not an acceptable security risk.

Applicant's history of financial problems or difficulties 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*. I also considered the whole-person concept. 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
Subparagraphs 1.a-1.n:	Against 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