



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 15-08385

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel

For Applicant: Ryan C. Nerney, Esq.

02/27/2018

**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 timely file state and federal income tax returns for tax years 2012, 2013, and 2015. He was also cited for three security infractions at the workplace during 2012-2014. More recently in 2016, he failed to properly lock the door to a secured laboratory. None of his conduct was deliberate, but was due to negligence, carelessness, or inattention. Taken together, these matters reflect a recent or recurring pattern of questionable judgment, irresponsibility, or trustworthiness that militate against 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 November 7, 2014.<sup>1</sup> This document is commonly known as

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<sup>1</sup> Exhibit 1.

a security clearance application. Thereafter, on September 20, 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 guidelines known as Guideline K for handling protected information and Guideline F for financial considerations.

Applicant answered the SOR on November 22, 2016. He admitted the factual allegations under Guideline K and he partially admitted and partially denied the allegations under Guideline F. He also requested a hearing before an administrative judge.

The case was assigned to me on March 15, 2017. The hearing took place as scheduled on April 27, 2017. Applicant appeared with counsel. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Exhibits 1-5 and A-P, respectively. The hearing transcript (Tr.) was received on May 8, 2017. The record was kept open to allow Applicant an opportunity to submit additional documentary matters, and those matters are admitted without objections as Exhibits Q and R.

### **Findings of Fact**

Applicant is a 60-year-old employee who is seeking to retain a security clearance. His educational background includes a bachelor's degree awarded in 1998.<sup>2</sup> He is employed by a large defense contractor as a senior software engineer. He has been so employed since 2005. His work involves software-configuration management, which includes performing trusted downloads on a regular basis. He has never married and has no children. His employment history includes active duty in the U.S. Air Force during 1980-1984, which concluded with an honorable discharge. He has a good employment record and is considered a trustworthy employee according to two character witnesses and four letters of recommendation submitted by co-workers.<sup>3</sup>

In his November 2014 security clearance application, Applicant disclosed that he failed to timely file state and federal income tax returns for tax years 2012 and 2013.<sup>4</sup> He explained his failure was due to his decision to quit using the services of an accountant and procrastination. He further stated he would not owe any back taxes and was due refunds. He provided additional information about his failures to file during his August 2015 background investigation.<sup>5</sup>

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<sup>2</sup> Exhibit A.

<sup>3</sup> Exhibits B and D; Tr. 6-23 and 43-57.

<sup>4</sup> Exhibit 1.

<sup>5</sup> Exhibit 2.

At the hearing, Applicant explained that he had used an accountant on an on-again, off-again basis because he was concerned about the expense.<sup>6</sup> He attributed his failure to file tax returns for tax years 2012 and 2013 to procrastination.<sup>7</sup> From tax year 2014 forward, he decided to use the services of an accountant.<sup>8</sup> In addition, he submitted a signed statement of intent wherein he pledged to never fail to pay his federal and state income taxes.<sup>9</sup>

Applicant's documentation includes IRS account transcripts for the last eight tax years (2009-2016), which show that he failed to timely file federal tax returns for 2012, 2013, and 2015.<sup>10</sup> He filed for 2012 and 2013 in May 2015. He was due refunds from the IRS for all eight tax years. Although he had the assistance of an accountant, he failed to timely file his federal and state tax returns for 2015. He filed the returns in March 2017, about a month before the hearing in this case, and he was due refunds.<sup>11</sup> Indeed, he presented a May 2017 certificate of compliance from his state tax authority showing that he is in good standing having filed and paid all taxes due.<sup>12</sup>

In addition to the tax matters, Applicant's employer cited him three times (once in 2012 and twice in 2014) for security infractions stemming from the failure to follow proper procedures while performing trusted downloads.<sup>13</sup> There was no indication that classified or sensitive information was compromised during any of the three incidents. Investigations also determined that both the second and third incidents were inadvertent.<sup>14</sup> After the second incident, he was directed to complete remedial training. After the third incident, he was directed to participate in one-on-one remedial training with a manager. He self-reported all three incidents.<sup>15</sup>

Applicant estimates that he has performed more than 1,000 trusted downloads since his employment commenced in 2005. He attributes the security infractions to honest mistakes made during the press of business. He has had no other issues with performing trusted downloads since the third incident in 2014. His lessons learned

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<sup>6</sup> Tr. 86.

<sup>7</sup> Tr. 87.

<sup>8</sup> Tr. 89.

<sup>9</sup> Exhibit F.

<sup>10</sup> Exhibit Q.

<sup>11</sup> Exhibit H.

<sup>12</sup> Exhibit R.

<sup>13</sup> Exhibits 3-5.

<sup>14</sup> Exhibits 4 and 5.

<sup>15</sup> Tr. 90-91.

include double-checking work, being paranoid in a healthy way, and not relying too much on the representations of others who he assists in performing trusted downloads.

More recently in 2016, Applicant failed to properly lock a door to a secured laboratory.<sup>16</sup> When informed by the lab manager, he was dumbfounded because this is a task he frequently performs. To address this issue, he has changed the process by which he closes the lab at the end of the day and locks the door.<sup>17</sup>

## 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.<sup>18</sup>

It is well-established law that no one has a right to a security clearance.<sup>19</sup> 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.”<sup>20</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. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>21</sup> The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>22</sup>

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>23</sup> An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>24</sup>

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<sup>16</sup> Tr. 80-85.

<sup>17</sup> Tr. 86-97.

<sup>18</sup> The 2017 AG are available at <http://ogc.osd.mil/doha>.

<sup>19</sup> *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 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>20</sup> 484 U.S. at 531.

<sup>21</sup> 484 U.S. at 531.

<sup>22</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>23</sup> Directive, ¶ 3.2.

<sup>24</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>25</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>26</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>27</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>28</sup>

## **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. . .<sup>29</sup>

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 or sensitive information.

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

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; 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.

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<sup>25</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>26</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>27</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>28</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>29</sup> AG ¶ 18.

The evidence supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. That history is established by the failure to timely file state and federal income tax returns for 2012, 2013, and 2015.<sup>30</sup> He is now in compliance with the state and federal tax authorities having filed the 2012 and 2013 returns in May 2015 and the 2015 returns in March 2017, and he does not owe back taxes. Given these circumstances, the mitigating condition at AG ¶ 20(g) applies in Applicant's favor.

Nevertheless, the failure to timely file tax returns and pay tax when due bears close examination and is a matter of serious concern to the federal government.<sup>31</sup> The failure to file returns when due suggests that an applicant has a problem with complying with well-established governmental rules and regulations. Voluntary compliance with such rules and systems is essential for protecting classified or sensitive information. An applicant who has a history of not fulfilling their tax obligations, which is the case here, may be said not to have demonstrated the high degree of judgment and reliability required for access to classified or sensitive information. My assessment is that Applicant's failures to file, while not willful or deliberate, were due to negligence, carelessness, or inattention resulting from procrastination.

Under Guideline K for handling protected information, the suitability of an applicant may be questioned or put into doubt when that applicant has a history of deliberate or negligent failure to comply with rules and regulations for handling protected information, which includes classified, sensitive, or proprietary information.<sup>32</sup> In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent:

AG ¶ 34(g) any failure to comply with rules for the protection of classified or sensitive information;

AG ¶ 34(h) negligence or lax security practices that persist despite counseling by management;

AG ¶ 35(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

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<sup>30</sup> The SOR allegations are limited to tax years 2012 and 2013. Because tax year 2015 was not alleged, it is uncharged conduct that I considered for the limited purpose of assessing the frequency and recency of the conduct as well as the likelihood of continuation or recurrence of the conduct.

<sup>31</sup> 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>.

<sup>32</sup> AG ¶ 33.

AG ¶ 35(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security requirements; and

AG ¶ 35(d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

The evidence supports a conclusion that Applicant has a problematic history of handling protected information. That history is established by the three security infractions he committed during 2012-2014 when he failed to follow proper procedures while performing trusted downloads. More recently in 2016, he failed to properly lock the door to a secured laboratory.<sup>33</sup> I have considered the mitigating conditions mentioned above and I conclude the following: (1) AG ¶ 35(a) applies in part but not fully, because the behavior occurred four times since 2012, which is not infrequent, and the latest incident was in 2016, which is recent; (2) AG ¶ 35(b) applies fully; and (3) AG ¶ 35(c) applies in part but not fully, because four security incidents since 2012 is indicative of a pattern. My overall assessment is that the security infractions, while not willful or deliberate, were due to negligence, carelessness, or inattention resulting from the press of business.

Although the SOR allegations involve different factual matters under different security guidelines, I have considered the tax matters and the security infractions together. It is my view that the common thread joining them is Applicant's negligence, carelessness, or inattention. Taken together, the tax matters and security infractions reflect a recent or recurring pattern of questionable judgment, irresponsibility, or trustworthiness that militate against a favorable clearance decision. 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. On that point, Applicant impressed me as a sincere, dedicated, and hard-working employee who enjoys his job. Nevertheless, 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 K:	Against Applicant
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline F:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant

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<sup>33</sup> The SOR allegations are limited to the three security infractions during 2012-2014. Because the 2016 incident was not alleged, it is uncharged conduct that I considered for the limited purpose of assessing the frequency and recency of the conduct as well as the likelihood of continuation or recurrence of the conduct.

## **Conclusion**

It is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard  
Administrative Judge