



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02166

Appearances

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

For Applicant: *Pro se*

01/05/2018

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny him eligibility for access to classified information. He failed to timely file a federal individual income tax return for tax year 2010 due to an honest mistake or simple negligence. He has since filed his past-due federal return, and he is otherwise in compliance with federal and state income tax authorities. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on July 31, 2015. This document is commonly known as a security clearance application. Thereafter, on November 8, 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

based on the sole allegation of failure to timely file a federal income tax return for tax year 2010.

Applicant answered the SOR on December 5, 2016. He admitted the allegation with a brief explanation. He included with his answer a certificate of compliance from his state tax authority, dated August 5, 2016, certifying that he had filed and paid all taxes due. He also requested a hearing before an administrative judge.

The case was assigned to me on February 16, 2017. The hearing took place as scheduled on April 27, 2017. Department Counsel called no witnesses and offered Exhibits 1 and 2. Applicant testified and offered Exhibits A, B, and C. All exhibits were admitted. In addition, on my own motion, I took administrative notice of IRS Booklet 1040 Instructions for 2010 concerning the filing requirements as reflected in Appellate Exhibit I. The hearing transcript was received on May 5, 2017.

Findings of Fact

Applicant is a 31-year-old senior field engineer for a federal contractor. He has worked for his current employer since June 2015. He earns an annual salary of about \$49,000. He has never married and has no children, although he is engaged to be married. His educational background includes an associate's degree awarded in 2006 and a bachelor's degree awarded in 2008. This is his initial application for a security clearance.

Applicant admits failing to timely file a federal individual income tax return for tax year 2010, although he recently filed the past-due return in February 2017.¹ He disclosed the failure to file in his 2015 security clearance application.² And during the 2015 background investigation, he explained the situation as follows: (1) he forgot to file his 2010 federal and state returns by the April 2011 due date; (2) he suffered a serious work-related injury in July 2011 and spent the rest of the year recovering, and so did not get around to filing the returns; (3) because his income in 2010 was so low, he believed he would have received refunds upon filing; and (4) he was never contacted by state or federal tax authorities concerning his 2010 returns.³ Subsequently, in response to interrogatories, he provided IRS account transcripts showing that he timely filed returns and had account balances of \$0.00 for tax years 2012, 2013, 2014, and 2015.⁴ He also provided a certificate of compliance from the state tax authority, dated August 5, 2016, certifying that he had filed and paid all taxes due.⁵

¹ Exhibits B and C.

² Exhibit 1.

³ Exhibit 2.

⁴ Exhibit 2.

⁵ Exhibit 2.

At the hearing, Applicant explained that he was unemployed during both 2009 and 2010, and his income was limited to unemployment compensation. He stated that because his income was so low, he thought filing a return was unnecessary.⁶ In addition, after a work-related injury in 2011, the issue of his 2010 tax returns slipped his mind.⁷ In support of his explanation, he presented documentation showing that in 2010 he received \$12,898 in unemployment compensation, had \$1,244 withheld for federal income tax withheld, and had \$104 withheld for state income tax.⁸ His 2010 federal return, which was untimely filed in February 2017, shows that he reported the unemployment compensation as income and claimed a refund of \$886.⁹ He has not received a response from the IRS as of the date of the hearing.

For 2010, the IRS required a taxpayer with a filing status of single under age 65 with a gross income of at least \$9,350 to file a return.¹⁰ Applicant was required to file a federal return for 2010 because he received more than \$12,000 in unemployment compensation.

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, 2017.¹¹

It is well-established law that no one has a right to a security clearance.¹² 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.”¹³ 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

⁶ Tr. 28-29.

⁷ Tr. 29.

⁸ Exhibit A.

⁹ Exhibit B.

¹⁰ Appellate Exhibit I at 8 (Chart A).

¹¹ The 2017 AG are available at <http://ogc.osd.mil/doha>.

¹² *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).

¹³ 484 U.S. at 531.

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

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁶ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁷

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁸ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²¹

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. . .²²

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

¹⁴ 484 U.S. at 531.

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

¹⁶ Directive, ¶ 3.2.

¹⁷ Directive, ¶ 3.2.

¹⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁹ Directive, Enclosure 3, ¶ E3.1.14.

²⁰ Directive, Enclosure 3, ¶ E3.1.15.

²¹ Directive, Enclosure 3, ¶ E3.1.15.

²² AG ¶ 18.

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(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.

The evidence supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. Applicant failed to timely file a federal income tax return for tax year 2010. Although unemployed in 2010, he was nevertheless required to file a federal return based on the amount of unemployment compensation he received. The failure to timely file tax returns bears close examination and is a matter of serious concern to the federal government.²³ The failure to file also suggests 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. 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.

Applicant presented sufficient evidence to explain and mitigate the security concern. First, he disclosed his failure to file when he completed his 2015 security clearance application. Second, he provided additional information about the matter during his 2015 background investigation. Third, he further cooperated by providing records from both the IRS and his state tax authority in response to interrogatories. Fourth, he subsequently filed the past-due 2010 federal return, which shows a refund due of less than \$1,000 (although the refund will be forfeited because the return was filed more than three years past due).²⁴ Fifth, the failure to file was infrequent and limited to a single tax year several years ago, and it has not recurred. Sixth, at the hearing, he was candid, straightforward, and took responsibility for his failure to file. Based on the record evidence as a whole, I conclude that he failed to file due to an

²³ 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>.

²⁴ As I understand IRS practice and procedure, for a taxpayer who has not filed a return in many years, which is not the case here, the IRS requires a taxpayer to go back and file returns for the last six tax years and then make arrangements to pay what is owed in order to be in compliance. 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.

honest mistake or simple negligence, and that he was not attempting to avoid, evade, or ignore his tax obligations. Indeed, the post-2010 federal and state tax records show that he is in compliance with his tax obligations.²⁵ And I further conclude that he has demonstrated positive changes in behavior and the likelihood of recurrence of similar conduct is low.

Following *Egan* and the clearly-consistent standard, I have no doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive 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 met 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:	For Applicant
Subparagraph 1.a:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge

²⁵ Exhibits 2, B, and C.