



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-02868

Appearances

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

For Applicant: Ryan C. Nerney, Esq.

03/16/2018

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He failed to timely file state income tax returns for tax years 2008 through 2014. He likewise failed to timely file federal income tax returns for tax years 2012, 2013, and 2014. Taken together, these matters reflect a recent or recurring pattern of irresponsibility, lack of judgment, or unwillingness to abide by rules and regulations. He filed the past-due returns with the IRS in April 2016 and with the state in April 2017, and he is now in compliance with both tax authorities. Nevertheless, it is too soon to tell if his long-standing pattern of behavior is a thing of the past or is a firmly established part of his character. 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 December 4, 2015.¹ This document is commonly known as

¹ Exhibit 1.

a security clearance application. Thereafter, on October 23, 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 November 16, 2016. He admitted that he had yet to file his state income tax returns, but had in fact filed his federal income tax returns for the various tax years in question. He requested a decision based on the written record in lieu of a hearing. Subsequently, in April 2017, he retained counsel and requested a hearing before an administrative judge.

The case was assigned to me on May 1, 2017. The hearing took place as scheduled on July 11, 2017. Applicant appeared with counsel. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Exhibits 1-2 and A-Y, respectively. The record was kept open to allow Applicant an opportunity to submit additional documentary matters, and those matters are admitted without objections as Exhibits Z and AA. The hearing transcript (Tr.) was received on July 19, 2017.

Findings of Fact

Applicant is a 58-year-old employee who is seeking to retain a security clearance previously granted to him in 2007. His educational background includes a master's degree in mechanical engineering.² He is employed as a principal manufacturing engineer for a large defense contractor, and his total compensation for 2017 was about \$132,000.³ His work involves bringing the latest automation technology to the company's factories and training engineers how to use it. He has a good employment record, which includes obtaining an U.S. patent.⁴ A co-worker appeared as a witness at the hearing and described Applicant as a person who is beyond reproach, who follows rules, who acts as a mentor and shares his knowledge, and who is the first person to arrive at work and the last to leave.

In his December 2015 security clearance application, Applicant disclosed that he had failed to timely file state income tax returns for tax years 2008 through 2014, and had failed to timely file federal income tax returns for tax years 2012, 2013, and 2014.⁵ He explained his failure was due to a series of life events (primarily, his wife's serious health problems), he usually withheld more than he owed in tax resulting in refund, and

² Exhibits J, K, and L.

³ Exhibit N.

⁴ Exhibits G, I, M, and N.

⁵ Exhibit 1.

he hoped that he would get caught up by the end of Christmas break (2015). He provided additional information about his tax problems during his July 2016 background investigation.⁶ He explained that the life events were a combination of work responsibilities and the demands of serving as the only caregiver to his wife, who was suffering with chronic and severe health problems. He noted that his wife had handled the tax matters in the past before her health problems arose. He stated that he had filed his past-due federal returns in March 2016 and planned to file the past-due state returns by October 2016.

At the hearing, Applicant provided additional detail about the health problems experienced by his wife over a number of years.⁷ They included chronic and debilitating migraine headaches, depression, and two heart attacks followed by bypass surgery. Her condition has improved, and she is now off all pain medication for the first time in years. Applicant acknowledged that he has been diagnosed with and is being treated for adult attention-deficit disorder, which may have a connection to his failure to timely file the tax returns.⁸ He further attributed his delay in filing to an inability to locate paperwork to support comprehensive returns. He finally resolved that issue when he decided to take the standard deduction and file the returns. He stated that he was previously unaware of the potential serious consequences of failure to timely file tax returns and is now highly motivated to make certain that he completes them on time.⁹ He is confident that this behavior will not recur because it's not a place he wants to be, he has made it a priority, and his wife's improved health is also a positive factor.¹⁰ In addition, he submitted a signed statement of intent wherein he pledged that he would never fail to pay his income taxes when due.¹¹

Applicant's documentation establishes that he resolved the federal tax problem in 2016. IRS account transcripts for the last five tax years show that he failed to timely file federal tax returns for 2012, 2013, and 2014, and that he timely filed returns for 2015 and 2016.¹² The past-due returns were filed in April 2016, and he received refunds of about \$2,700 for each tax year. The returns for 2015 and 2016 were timely filed in April 2016 and April 2017, and he received refunds of about \$2,700 for both years. The IRS account transcripts show \$0 balances for all five tax years.

⁶ Exhibit 2.

⁷ Tr. 35-38.

⁸ Tr. 63-66.

⁹ Tr. 50-52.

¹⁰ Tr. 52.

¹¹ Exhibit C.

¹² Exhibit W.

Applicant's documentation establishes that he resolved the state tax problem in 2017. He filed the past-due returns for tax years 2008 through 2014 in April 2017.¹³ He then discovered the option of entering into a voluntary disclosure agreement with the state tax authority to resolve outstanding tax matters.¹⁴ He entered into an agreement in June 2017 to address liability for tax years 2013, 2014, 2015, and 2016; the agreement did not require him to file income tax returns for tax years ending before 2013.¹⁵ Per the agreement, he paid \$4,253 in June 2017 for all tax liability.¹⁶ After that payment, on July 14, 2017, he paid \$245 for interest, and he received a certificate of compliance and letter of good standing establishing that he has filed all returns and paid all taxes due with the state tax authority as of August 10, 2017.¹⁷

Other than the tax problems, Applicant's overall financial situation appears to be stable.¹⁸ For example, a personal financial statement shows a monthly net remainder of about \$1,300, and he had more than \$22,000 in checking accounts.

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, 2017.¹⁹

It is well-established law that no one has a right to a security clearance.²⁰ 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."²¹ 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

¹³ Exhibit T.

¹⁴ Exhibits J, K, and L.

¹⁵ Exhibits R and S.

¹⁶ Exhibit U.

¹⁷ Exhibits Z and AA.

¹⁸ Exhibits D, F, H, P, and Q.

¹⁹ The 2017 AG are available at <http://ogc.osd.mil/doha>.

²⁰ *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).

²¹ 484 U.S. at 531.

the burden of proof is less than a preponderance of evidence.²² The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²³

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁴ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁹

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. . .³⁰

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

²² 484 U.S. at 531.

²³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁴ Directive, ¶ 3.2.

²⁵ Directive, ¶ 3.2.

²⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁷ Directive, Enclosure 3, ¶ E3.1.14.

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

²⁹ Directive, Enclosure 3, ¶ E3.1.15.

³⁰ AG ¶ 18.

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;

AG ¶ 20(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; 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. That history is established by his failure to timely file state and federal income tax returns for multiple tax years during 2008-2014. He is now in compliance with the state and federal tax authorities as of August 2017 and April 2016, respectively. Given these circumstances, the mitigating condition at AG ¶ 20(g) applies in Applicant's favor. In addition, I considered the mitigating condition at AG ¶ 20(b), but it does not apply in Applicant's favor because he has not acted responsibly under the circumstances. Without doubt, he faced a demanding situation. His preoccupation with work and caring for his wife is understandable and reasonable. Under these circumstances, I am usually inclined to grant anyone some leeway (e.g., one to two years) in meeting their tax obligations. But the problem here extended over many years because Applicant allowed it to snowball.

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.³¹ The nexus or security significance between Applicant's behavior and his eligibility for access to classified information was explained by the Appeal Board as follows:

Security requirements include consideration of a person's judgment, reliability, and a sense of [their] legal obligations. Failure to comply with

³¹ 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>.

federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information.³²

That is the situation here. Applicant did not voluntarily comply with his lawful obligation to timely file tax returns for a period of several years. He only recently came into compliance with the IRS in April 2016 and with the state tax authority in August 2017. His behavior is a serious concern because his needless delay or procrastination in the serious business of tax reporting may easily carry over into lapses in the serious business of properly handling and safeguarding classified information.

To sum up, the record evidence shows Applicant has a well-established history of failing to meet his lawful tax obligations. Although he is now in compliance with both federal and state tax authorities, it is too soon to tell if his long-standing pattern of behavior is a thing of the past or is a firmly established part of his character. Taken together, his tax problems reflect a recent or recurring pattern of irresponsibility, lack of judgment, or unwillingness to abide by rules and regulations. 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, I gave Applicant credit for voluntarily reporting the information about his tax problems. Applicant also 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 F:	Against Applicant
Subparagraphs 1.a and 1.b:	Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge

³² ISCR Case No. 14-00221 (App. Bd. Jun. 29, 2016) at 4 (citations omitted).