



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-01317

Appearances

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

For Applicant: *Pro se*

07/31/2018

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 federal individual income tax returns for tax years 2011 through 2015. These matters are still outstanding, and although he may have good intentions, he has done little to rectify the situation. 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 July 15, 2016.¹ This document is commonly known as a security clearance application. Thereafter, on May 18, 2017, 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

¹ Exhibit 1.

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 July 12, 2017. He admitted the sole allegation in the SOR, and he requested a decision based on the written record in lieu of a hearing. He changed his mind in November 2017 and requested a hearing before an administrative judge.

The case was assigned to me on December 1, 2017. The hearing was scheduled to occur in January 2018, but did not due to a pending government shutdown. The hearing took place as rescheduled on April 18, 2018. Applicant appeared without counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1-3. Applicant offered documentary exhibits, which were admitted as Exhibits A-C. Applicant called one character witness and presented his own testimony. The record was kept open to allow Applicant to submit additional matters. He made a timely submission of a letter of recommendation, which is admitted as Exhibit D. The hearing transcript (Tr.) was received on May 3, 2018.

Findings of Fact

Applicant is a 47-year-old employee who is seeking to obtain a security clearance for the first time. He is employed as an engineering-production manager for a small company that manufactures a flight simulator for the Air National Guard and Air Force Reserve. He has never married and has no children. His formal education includes a bachelor's degree awarded in 1993, a master's degree in 1998, and a master's program during 2006-2008 without completing the thesis.

Applicant attended the master's program during 2006-2008 as part of changing his career field.² He has since been continuously employed except for an 18-month period of unemployment from March 2010 to October 2011. He was then self-employed as a handy man and in property management. He obtained his current job in November 2014. He now earns \$45 hourly, and he earned about \$90,000 in 2017.³

Applicant does not dispute his history of tax problems. In his July 2016 security clearance application, he disclosed both failing to file federal tax returns and pay income tax, as required, for tax years 2011-2015.⁴ He provided additional information about his tax problems during a December 2016 interview during his background investigation.⁵ He attributed his failure to unemployment and a fear that he would owe more than he could afford to pay. He stated that he intended on contacting and scheduling an

² Tr. 59-62.

³ Tr. 51-52.

⁴ Exhibit 1.

⁵ Exhibit 2.

appointment with a local IRS office to discuss his situation and obtain assistance with catching up on his federal tax obligations.

At the hearing, Applicant again admitted his failure to file federal returns for tax years 2011-2015 and that his failure extended through 2016, although he filed his 2017 federal return the day before the hearing.⁶ He does not know how much he owes the IRS in back taxes, penalties, and interest. Likewise, he disclosed that he had not filed state income tax returns for tax years 2011-2016, given their linkages to the federal returns. He does not know how much he owes the state tax authority in back taxes, penalties, and interest.⁷ He stated that he consulted with a couple of accountants and was advised to work with the IRS directly as their services would be cost prohibitive.⁸ He explained his delay in addressing his tax problems was due to addressing more pressing financial issues (e.g., credit card debt with 16 percent interest).⁹ He has yet to meet in person with the IRS, although he has tried to contact them, and has not made arrangements with the IRS to file the returns and pay the amount owed.

Applicant attributed his tax problems to his period of unemployment during 2010-2011 and the subsequent period of self-employment where he was essentially underemployed. He further explained that he decided to not file returns because he knew he would be penalized for a premature withdrawal from a Roth IRA account and did not have the money to pay what he expected he would owe.¹⁰ For example, he received a gross distribution of \$16,000 in 2012.¹¹ He acknowledged that his decision was “ill conceived,” but he made the choice at the time to work on the worst debt first while trying to maintain mortgage loan payments on his home.¹² For example, in April 2015 he was still repaying a credit card account with a balance of \$31,748 and a double-digit interest rate.¹³

Applicant presented substantial evidence of his good character. The company president, chief executive officer, and owner of the company strongly vouched for Applicant’s suitability for a security clearance. He sees no reason whatsoever to doubt Applicant’s trustworthiness. Applicant also presented a letter of recommendation from a close friend he has known since their college days together.¹⁴ It’s a thoughtful letter,

⁶ Tr. 45-47.

⁷ Tr. 63.

⁸ Tr. 47.

⁹ Tr. 47-48; Exhibit C.

¹⁰ Tr. 43-44.

¹¹ Exhibit B.

¹² Tr. 43.

¹³ Exhibit C.

¹⁴ Exhibit D.

and the friend wholeheartedly described Applicant as “a friend of the highest caliber” and recommended him without reservation.

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, 2017.¹⁵

It is well-established law that no one has a right to a security clearance.¹⁶ 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.”¹⁷ 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.¹⁸ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁹

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁰ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²¹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²² The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²³ An

¹⁵ The 2017 AG are available at <http://ogc.osd.mil/doha>.

¹⁶ *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).

¹⁷ 484 U.S. at 531.

¹⁸ 484 U.S. at 531.

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

²⁰ Directive, ¶ 3.2.

²¹ Directive, ¶ 3.2.

²² ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²³ Directive, Enclosure 3, ¶ E3.1.14.

applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁵

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. . .²⁶

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;

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.

²⁴ Directive, Enclosure 3, ¶ E3.1.15.

²⁵ Directive, Enclosure 3, ¶ E3.1.15.

²⁶ AG ¶ 18.

The evidence supports a conclusion that Applicant has a history of tax problems that is sufficient to raise a security concern under Guideline F. That history is well established by his failure to file federal individual income tax returns for tax years 2011-2015. In addition, the following matters were established during the hearing: (1) the failure to file extended through 2016; (2) he owes the IRS an unknown sum for back taxes, penalties, and interest; (3) he likewise failed to file state individual income tax returns for tax years 2011-2016; and (4) he owed the state tax authority an unknown sum for back taxes, penalties, and interest.²⁷

In mitigation, I have considered the totality of the evidence, and it is simply not possible to mitigate Applicant's conduct based on the record before me. To start, the mitigating condition at AG ¶ 20(g) does not apply in Applicant's favor because he is not in an arrangement with the IRS to file his past-due returns and pay what he owes in back taxes, penalties, and interest. He presented no documentation from the IRS concerning his situation, the matters are still outstanding, and he has done little to rectify the situation. The trend line here is not in Applicant's favor.

In addition, I considered the mitigating condition at AG ¶ 20(b), but it does not apply in Applicant's favor. Without doubt, periods of unemployment and underemployment created a difficult financial situation. He is entitled to some leeway until tax year 2014, which is when he began his current employment and his overall financial situation began to stabilize. But several years have since passed and he has done little to resolve his tax problems with the IRS. In other words, he did not act responsibly under the circumstances.

The failure to file tax returns or pay tax when due (or both) bears close examination and is a matter of serious concern to the federal government.²⁸ The nexus or security significance between Applicant's tax problems 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 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.²⁹

²⁷ Because the additional matters were not alleged in the SOR, I did not consider them for disqualification purposes. But I did consider them for the limited purpose of considering the nature, extent, and seriousness of Applicant's tax problems as well as the likelihood of continuation or recurrence of his tax problems.

²⁸ 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>.

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

That is the situation here. Applicant did not voluntarily comply with his lawful obligation to file federal tax returns when due for multiple tax years. Indeed, he essentially did so intentionally, for the purpose of delaying paying what he owed to the IRS so he could address other financial obligations that he considered more pressing or important. This is a serious concern because his failure to comply with federal tax law may easily carry over into lapses in the serious business of properly handling and safeguarding classified information.

To sum up, it is far too soon to tell if Applicant will be able to make any meaningful progress in addressing his tax problems. His history of tax problems reflects a 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. 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
Subparagraph 1.a:	Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge