



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



In the matter of:)	
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)	ISCR Case No. 14-03618
Applicant for Security Clearance)	

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

05/26/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him a security clearance to work in the defense industry. He has a history of financial problems or difficulties consisting of federal income tax problems and collection accounts. He did not produce sufficient evidence to rebut, extenuate, mitigate, or explain his unresolved federal income tax problems. 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 April 11, 2013.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense

¹ Exhibit 4 (this document is commonly known as a security clearance application).

(DOD),² on October 17, 2014, 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.³ The SOR is similar to a complaint. It detailed the reasons for the action under the security guideline known as Guideline F for financial considerations. Applicant answered the SOR in an undated response wherein he admitted the SOR allegations and provided a one-page memorandum explaining his admissions. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.⁴

On February 26, 2015, Department Counsel submitted all relevant and material information that could be adduced at a hearing.⁵ This so-called file of relevant material (FORM) was mailed to Applicant, who received it on March 31, 2015. Applicant did not reply within 30 days from receipt of the FORM. The case was assigned to me on May 21, 2015.

Ruling on Evidence

Exhibit 3 is a report of investigation (ROI) from the background investigation of Applicant. The document is a summary of an interview of Applicant conducted on May 7, 2013. An ROI may be received and considered as evidence when it is authenticated by a witness.⁶ Here, Exhibit 3 is not authenticated in any way. Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. With that said, it is evident that Department Counsel is acting in good faith, having highlighted the issue in their brief.⁷ Nevertheless, Applicant's lack of response to

² The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

³ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

⁴ Directive, Enclosure 3, ¶ E3.1.7.

⁵ The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

⁶ Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing caselaw that a properly authenticated report of investigation is admissible).

⁷ Department Counsel Brief at 2, n. 1.

the FORM does not amount to a knowing waiver of the rule.⁸ Accordingly, Exhibit 3 is not admissible and I have not considered it.

Findings of Fact

Applicant is a 50-year-old employee who is seeking to obtain a security clearance. He is employed by a federal contractor, and he is working at a U.S. military installation in Japan. Before that, he was unemployed from December 2009 until he began his current job in 2013. Before that, he was employed as a track mechanic for a federal contractor from November 2003 to December 2009; his work location was South Korea. And before that, he was employed as a track mechanic for a federal contractor from June 2000 to November 2003; his work location was Kuwait. His employment history also includes honorable military service in the U.S. Army during 1986–1994.

Applicant has a history of financial problems, which he does not dispute. In disclosing those financial problems in his 2013 security clearance application, he stated that he needed to get back to work to take care of his financial obligations. An April 19, 2013 credit report,⁹ which was obtained during the background investigation, confirms those financial problems as follows: (1) a state tax lien for \$1,775 filed in December 2001 and subsequently paid and released in July 2006; (2) a federal tax lien for \$6,978 filed in May 2003 and not yet released; (3) a state tax lien for \$1,679 filed in March 2010 and subsequently paid and released in June 2011; (4) an unpaid collection account for \$90; (5) an unpaid medical collection account for \$1,736; and (6) an unpaid medical collection account for \$40. A more recent credit report from February 2015 shows (1) the state tax lien filed in 2010 and released in 2011, (2) an unpaid \$239 collection account, and (3) an unpaid \$40 medical collection account.¹⁰

The SOR limited itself to four allegations as follows: (1) the May 2003 federal tax lien for \$6,978; (2) \$6,497 in back taxes owed to the IRS for tax year 2006; (3) failure to file federal income tax returns for tax years 2001, 2003, 2006, and 2010; and (4) the unpaid medical collection account for \$1,736. In his answer to the SOR, Applicant admitted these matters, but he did provide any documentation showing that they are paid, settled, in repayment, forgiven, cancelled, in dispute, or otherwise resolved. Concerning the federal income tax matters, he explained he was working on the problem, and he believed he was in a tax-free status while he was working in Kuwait and South Korea. Concerning the unpaid medical collection account, he stated that he thought it had been paid, and he intended to resolve it by the end of November 2014. To date, he has not submitted any documentation showing that his federal income tax

⁸ Wavier means “[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” *Black’s Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

⁹ Exhibit 5.

¹⁰ Exhibit 4.

matters are resolved or in the process of being resolved, and the same goes for the unpaid medical collection account.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹¹ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹² 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.

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 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 In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁹ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁰

¹¹ *Department of 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).

¹² 484 U.S. at 531.

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 *Egan*, 484 U.S. at 531.

²⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.²¹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

Under Guideline F for financial considerations,²² 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.²³ 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 information.²⁴

The concern is broader than the possibility that a person might knowingly compromise classified 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.

The evidence supports a conclusion that Applicant has a history of financial problems or difficulties. Taken together, the evidence indicates inability or unwillingness

²¹ Executive Order 10865, § 7.

²² AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²³ ISCR Case No. 95-0611 (App. Bd. May 2, 1996) (It is well settled that "the security suitability of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties.") (citation omitted); and see ISCR Case No. 07-09966 (App. Bd. Jun. 25, 2008) (In security clearance cases, "the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.") (citation omitted).

²⁴ AG ¶ 18.

to satisfy debts²⁵ and a history of not meeting financial obligations²⁶ within the meaning of Guideline F. In addition, his failure to file federal income tax returns is disqualifying.²⁷

In mitigation, I have considered six mitigating conditions under Guideline F,²⁸ and I have especially considered the following as most pertinent:

AG ¶ 20(b) the conditions that resulted in the financial problems were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or death, divorce, or separation), and the [person] acted responsibly under the circumstances; and

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant has a history of financial problems or difficulties, some of which are likely related to his period of unemployment from the end of 2009 to sometime in 2013, when he started his current job. For example, it appears the unpaid medical collection account for \$1,736 was incurred during this period, and so, SOR ¶ 1.d is decided for Applicant.²⁹ He is also entitled to some credit in mitigation by resolving the state tax liens as reflected in the two credit reports.³⁰

But other than failing to file the 2010 federal income tax return, his federal income tax problems were incurred before his period of unemployment. Moreover, he seems to be relying on a misunderstanding of federal tax law that his overseas employment in Kuwait during 2000–2003 and South Korea during 2003–2009 placed him in a tax-free status. He is mistaken, because if a person is a U.S. citizen or resident alien living abroad, that person is taxed on their worldwide income, although they may qualify for the foreign earned income and foreign housing exclusions and the foreign housing deduction.³¹ Applicant has not submitted any documentation showing progress, or even a plan (e.g., hiring a CPA, a tax attorney, or other tax professional to assist him

²⁵ AG ¶ 19(a).

²⁶ AG ¶ 19(c).

²⁷ AG ¶ 19(g).

²⁸ AG ¶ 20(a)–(f).

²⁹ Exhibit 5.

³⁰ Exhibits 4 and 5.

³¹ See www.irs.gov (Foreign Earned Income Exclusion). Notwithstanding the application of any exclusions or deductions, when income exceeds certain thresholds, a tax return must be filed with the IRS. And it is necessary to file a return to claim an exclusion or deduction.

would be a good start), in resolving his tax problems with the IRS, and those matters are considered to be wholly unresolved.

Of course, the purpose of this case is not aimed at collecting debts or enforcing tax laws.³² Rather, the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the guidelines in the Directive. In evaluating Guideline F cases, the Appeal Board has established the following standard:

The Board has previously noted that the concept of a meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payments of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.³³

Here, the evidence does not support a conclusion that Applicant has established a plan and taken steps to implement that plan sufficient to mitigate the concern. Actions speak louder than words, and Applicant has not taken documented actions to resolve his federal income tax problems.

Because Applicant chose to have his case decided without a hearing, I am unable to evaluate his demeanor. Limited to the written record, I am unable to assess his sincerity, candor, or truthfulness. He also chose not to respond to the FORM with relevant and material facts about his circumstances, which may have helped to explain, extenuate, or mitigate the security concern.

Given those circumstances, Applicant's history of financial problems 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 gave due consideration to the whole-person concept.³⁴ Accordingly, I

³² ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

³³ ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (citations and quotations omitted).

³⁴ AG ¶ 2(a)(1)–(9).

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.c:	Against Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge