DATE: December 13, 2007

In re:	)	
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----------	)	ISCR Case No. 07-00532
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT
Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Federal and state tax authorities are pursuing Applicant for nearly $200,000 in deficiency amounts for tax years 2002, 2003, and 2004. In an audit in 2007, the IRS concluded that Applicant's horse business is a hobby or not-for-profit business and determined he was not entitled to claim business expenses for those three years. Applicant disagrees and contends that his horse business is a viable, for-profit business. He is making a good-faith effort to resolve the tax problem by appealing under the process authorized by law. If he does not prevail, he believes he can repay the tax deficiencies by selling off the assets of the horse business. Applicant is not a tax protestor, he is not tax defiant, and he is not engaged in tax evasion or fraud. The potential for pressure, coercion, exploitation, or duress in a security-clearance context is remote. Clearance is granted.

STATEMENT OF THE CASE

This is a security clearance case. Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on June 7, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline F for financial considerations based on federal and state tax deficiencies and three delinquent debts for less than $700 in total.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.[2] The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

On June 18, 2007, Applicant replied to the SOR and indicated he did not wish to have a hearing. Subsequently, Applicant changed his mind and requested a hearing on August 6, 2007. The hearing took place on November 13, 2007, and the transcript was received on November 21, 2007.

The record was left open until November 30th to allow Applicant to submit additional items of documentary evidence. Those items were timely received and are admitted without objections as follows: (1) Exhibit E–DD Form 214 and related paperwork; (2) Exhibit F–IRS letter; and (3) Exhibit G–letter from tax advisor.

FINDINGS OF FACT

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, and 1.c, and he denies the allegations in ¶¶ 1.d, 1.e, and 1.f. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 63-year-old executive who works in the defense industry. He holds both a bachelor's degree and an MBA. He is a retired Navy captain (pay grade 06) having served approximately 26 years of active and reserve duty. He is active in a local chapter of the Navy League. In the past, he has held a security clearance issued by the Navy. In August 2006, he submitted a security-clearance application seeking to obtain an industrial security clearance (Exhibit 1).

This case stems from Applicant's horse business—which is separate from his employment in the defense industry—and an ongoing tax dispute. The business breeds, raises, trains, competes,

[1] Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

[2] *See* Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

and sells reining horses and working cow horses, and it currently has approximately 25 horses available for sale (Exhibit B). Applicant estimates that he has invested approximately $600,000 of his own money into the business (R. 32). The business did not show a profit for 2002, 2003, and 2004, the tax years in question. It had a profit of less than $10,000 in 2006, and Applicant expects to show a larger profit in 2007.

Federal and state tax authorities are pursuing Applicant for nearly $200,000 in deficiency amounts for tax years 2002–2004. In 2004, the IRS placed a federal tax lien against Applicant for $64,822 (Exhibit 6). The state tax authority followed suit in 2006 and 2007 when it placed tax liens against Applicant for $2,847 and $27,539 (Exhibits 7 and 8). The state's action essentially piggybacks on the IRS action. The most recent information from the IRS indicates the federal tax deficiency is about $145,863 in total (Exhibit F). Likewise, the state tax deficiency is now approximately $52,317 in total (Exhibit 10 and R. 57).

After an audit in May–June 2007, the IRS concluded that Applicant's horse business is a hobby or not-for-profit business and determined he was not entitled to claim Schedule F business expenses for those three years (Exhibits F and G). The IRS notified Applicant of its decision by letter in July 2007 (Exhibit F).

Applicant disagrees with the IRS's decision. He contends that his horse business is a viable, for-profit business, and he is appealing under the process authorized by law. His case was received for consideration by the local IRS Appeals Office in September 2007 (Exhibit D). The tax advisory firm who prepares Applicant's tax returns, to include his horse business, has been retained to represent him in the appeal with the IRS (Exhibit G). According to the president of the firm, an enrolled agent, the normal time line for an appeal is 18 to 30 months and Applicant's appeal will be decided sometime in 2009 (Exhibit G). If Applicant does not win his appeal to the IRS Appeals Office, he intends to take his case to U.S. Tax Court. Ultimately, if he does not prevail, he believes he can repay the tax deficiencies by selling off the assets of the horse business (R. 52–54).

In addition to the tax deficiencies, the SOR alleges three delinquent debts for less than $700 in total. Two of the debts are for medical bills for $277 and $181. The other debt is a collection account for $171. Applicant agrees that these are his accounts, but contends he does not owe any money on the accounts. He disputes liability for the medical accounts because he believes the matters were covered by insurance (he has both Tricare as a retired military officer and insurance via his employer). He has given the medical service providers his insurance information and told them to resolve it with the insurance provider. He disputes liability for the collection account because of a disagreement over telephone services or equipment. He did not provide any paperwork to document his disputes for these three accounts.

GENERAL PRINCIPLES OF LAW AND POLICIES

No one has a right to a security clearance.[3] 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."[4] A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[5] An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.[6] 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.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[7] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[8] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[9] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[10] *In Egan*, the Supreme Court said that the burden of proof is less than the preponderance of the evidence.[11] The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[12]

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. 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

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[3] *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) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

[4] *Egan*, 484 U.S. at 531.

[5] Directive, Enclosure 3, ¶ 3.2.

[6] Directive, Enclosure 3, ¶ 3.2.

[7] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[8] Directive, Enclosure 3, ¶ E3.1.14.

[9] Directive, Enclosure 3, ¶ E3.1.15.

[10] Directive, Enclosure 3, ¶ E3.1.15.

[11] *Egan*, 484 U.S. at 531.

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

of an applicant's loyalty.[13] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

CONCLUSIONS

Under Guideline F for financial considerations,[14] a security concern typically exists due to significant unpaid debts. "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. An individual who is finally overextended is at risk of having to engage in illegal acts to generate funds."[15] Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Starting with the matters in SOR ¶¶ 1.d, 1.e, and 1.f, the three delinquent debts for less than $700 in total are not of particular security concern. Viewed individually, in the aggregate, and in conjunction with the tax problem, these three debts do not rise to the level of a bonafide security concern. First, the amounts are minor if not *de minimis*.[16] Second, it is highly unlikely that these three debts could interfere with Applicant's ability to properly handle and safeguard classified information. Third, the two unpaid medical debts in particular have negligible security value. Experience in the ways of the world teaches that medical billing can be problematic, even when a consumer is covered by insurance. Confusion and disputes between consumers, doctors and hospitals, and insurers are not uncommon. A dispute over a couple of minor medical debts is not generally reflective of a person's ability or willingness to repay or of a person's financial responsibility. To sum up, the two unpaid medical debts and the collection account suggest that Applicant is a typical consumer who has a few disputed accounts, and the three accounts do not suggest that Applicant is an unsuitable or high-risk candidate for a security clearance.

Turning next to the gravamen of the SOR, which is Applicant's tax problem as set forth in SOR ¶¶ 1.a, 1.b, and 1.c. The record evidence supports a conclusion that Applicant has a history of financial problems. The state and federal tax liens and tax deficiencies (now approaching $200,000 in total) establish a history of not meeting financial obligations[17] and raise a security concern within the meaning of Guideline F.

All of the mitigating conditions under Guideline F have been considered and two deserve discussion. The two applicable MC are:

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[13] Executive Order 10865, § 7.

[14] Revised Guidelines at pp. 13–14 (setting forth the disqualifying and mitigating conditions).

[15] Revised Guidelines at p. 13.

[16] *De minimis* is a shortened form of the Latin maxim *de minimis non curat lex* (= the law does not concern itself with trifles)." Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995) at p. 263.

[17] DC 3 is "a history of not meeting financial obligations."

> MC2: [T]he 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances; and
>
> MC 4: [T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve the debts.

First, MC 2 applies because Applicant's ongoing tax problem is due to an unexpected business problem. He did not incur the tax problem by frivolous or irresponsible spending on a credit-card binge, deceptive or illegal financial practices, failure to file income-tax returns or fraudulent filing of the same, or some other misfeasance or malfeasance. Instead, the facts and circumstances show that Applicant has a complicated business problem on his hands. He has acted responsibly under the circumstances by going through the IRS audit and appealing the audit's result.

Second, MC 4 applies under a similar rationale. He is taking steps to resolve the ongoing tax problem by retaining representation and appealing under the process allowed by law. His actions are wholly lawful, and they are the actions of a reasonable businessperson in the same or similar situation. If unsuccessful, Applicant believes he could resolve the tax problem by selling the assets of his horse business and using the proceeds to repay (R. 52–54). On this point, Applicant testified that the horses have an average value of $12,000 to $13,000 each. A sale would produce a gross amount of $312,500 if Applicant sold all 25 horses at an average of $12,500 each. Given these circumstances, Applicant's actions are sufficient to qualify as a good-faith effort within the meaning of Guideline F.

To sum up under the whole-person concept, this case presents both disqualifying and mitigating information, which requires thoughtful balancing. First, Applicant is 63 years old and sufficiently mature to make prudent decisions about his finances, money-management practices, and horse business. Second, he is in the middle of an ongoing tax dispute. He may or may not prevail. If he does, the tax liens and tax deficiencies will go away. If not, he will be required to repay the tax deficiencies and it appears he may have sufficient assets to do so. Third, the evidence shows that Applicant is not a tax protestor, he is not tax defiant, and he is not engaged in tax evasion or fraud. Fourth, Applicant has years of honorable military service and retired as a Navy captain. This circumstance strongly suggests that Applicant has the requisite self-control, good judgment, reliability, trustworthiness, and ability to protect classified information. And fifth, the potential for pressure, coercion, exploitation, or duress in a security-clearance context is remote. The chances of federal or state tax authorities using the ongoing tax dispute as leverage or blackmail material against Applicant to obtain classified information are approximately zero. Likewise, it is highly improbable that a third party would first discover and then attempt to use the ongoing tax dispute as leverage against Applicant. Neither scenario is realistic.

Finally, this clearance decision should not be construed as addressing the legitimacy, substance, or merit of Applicant's tax dispute. It does not. Those matters are beyond the scope and jurisdiction of this administrative proceeding, which is limited to determining Applicant's eligibility for a security clearance.

After weighing the record evidence as a whole, Applicant has successfully explained, extenuated, or mitigated the financial considerations security concern. And Applicant has overcome the case against him and satisfied his ultimate burden of persuasion to obtain a favorable clearance decision. Accordingly, Guideline F is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1–Guideline F: For Applicant

Subparagraphs a–f: For Applicant

DECISION

In light of all the circumstances, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

Michael H. Leonard
Administrative Judge