



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



In the matter of:)
)
-----) ISCR Case No. 17-03647
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

07/31/2019

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. Although he is now in compliance with federal and state tax authorities, his tax problems went on for too many years to justify complete mitigation. He has also just begun repaying a charged-off student loan account that was delinquent for many years. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, on March 8, 2016. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on December 19, 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

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 February 7, 2018. He denied failure to timely file federal income tax returns for 2011 and 2012, because he was then a full-time student without earned income subject to taxation, but he admitted the remaining SOR allegations. He provided a two-page memorandum in explanation, and he included a number of attachments or enclosures, most of which were subsequently admitted as exhibits at the September 2018 hearing. He also requested a hearing before an administrative judge.

The case was assigned to another judge on May 15, 2018, and then reassigned to me on May 22, 2018. The hearing took place as scheduled on September 18, 2018. Applicant appeared without counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1-7. Applicant offered documentary exhibits, which were admitted as Exhibits A-L. Other than Applicant, no witnesses were called. The hearing transcript (Tr.) was received on September 25, 2018.

The record was kept open for approximately 30 days, until October 18, 2018, to provide Applicant an opportunity to present additional documentation concerning his tax problems. Those matters were timely received on October 1, 2018, and they are admitted without objections as Exhibits M-Q.

Findings of Fact

Applicant is a 28-year-old employee who is seeking to obtain a security clearance for the first time. He is employed as a manufacturing technician for a large company in the defense industry. He has been so employed since March 2016. He earns a wage of about \$17 per hour. His educational background includes attending a technical institute from September 2010 to December 2012, when he was awarded an associate's degree in electronics engineering. He married in 2016, and he and his spouse had a church wedding in July 2018. He has a ten-year-old stepdaughter. His spouse does not receive child support for her daughter. His spouse has a minimum-wage job as a school-bus monitor for children with special needs.

Before his current job, Applicant had a full-time job as an assembler from September 2014 to March 2016. Before that, he worked as a contractor from June 2014 to September 2014. Before that, he worked as an installer from March 2013 to June 2014. And before that, he was unemployed and a full-time student as noted above.

The SOR concerns a history of financial problems consisting of failure to timely file state income tax returns for tax years 2014 and 2016; failure to timely file federal income tax returns for tax years 2011, 2012, 2013, 2014, and 2016; \$668 in back taxes owed to the IRS for tax year 2015; and a delinquent student loan account charged-off in the amount of \$8,426. Department Counsel agreed that Applicant was not required to file tax returns for tax years 2011 and 2012, because Applicant was then a full-time student and did not have earned income subject to taxation. (Tr. 43-44) This fact was

also established by tax records for those years. (Exhibits A-D) Accordingly, tax years 2011 and 2012 are not discussed further herein. In both his answer to the SOR and in his hearing testimony, he attributed his tax problems to immaturity, ignorance, and apathy. (Tr. 32, 49) He attributed his charged-off student loan to an inability to obtain employment in the technology field after earning his degree in December 2012. He then worked a series of minimum-wage jobs that did not provide sufficient income to repay the loan.

Applicant is now in compliance with both federal and state tax authorities. Those matters are discussed below, beginning with the federal tax matters.

Applicant failed to timely file a federal income tax return for tax year 2013. (Exhibit E) He eventually filed a return on March 9, 2015; he was issued a refund of \$981; and he had an IRS account balance of \$0 as of April 2015.

Applicant failed to timely file a federal income tax return for tax year 2014. (Exhibits F and M) He eventually filed a return on December 5, 2017. He was assessed penalties for not pre-paying tax, for the past-due return, and for late payment of tax. An overpayment from tax year 2017 was applied to tax year 2014 in May 2018. He received a \$703 refund for tax year 2014. He had an IRS account balance of \$0 as of May 2018.

Applicant timely filed a federal income tax return for tax year 2015 on April 15, 2016. (Exhibits H and N) He was assessed penalties for late payment of tax. He had a past-due balance of \$668 as of November 2017. He made two payments, in June and September 2017, for a total of \$1,181. The IRS applied a \$520 refund due to an overpayment for tax year 2015 in September 2017. He had an IRS account balance of \$0 as of December 2017.

Applicant failed to timely file a federal income tax return for tax year 2016. (Exhibits I and O) He requested and received an extension to file on October 15, 2017. He eventually filed a return on December 5, 2017. He had a past-due balance of \$1,191 as of October 2017. He had an IRS account balance of \$0 as of May 2018.

Applicant timely filed a federal income tax return for tax year 2017, which was the most recent tax year as of the September 2018 hearing. (Exhibit P) He filed the return on April 15, 2018. He had an IRS account balance of \$0 as of May 2018.

Applicant wrote in his answer to the SOR that he eventually filed a state income tax return for tax year 2014 around November 22, 2017, which was untimely, and he learned that he owed \$586 in back taxes. He contacted the state tax authority in January 2018 and arranged a monthly payment of \$28 beginning in May 2018. He further wrote that he filed a state return for tax year 2016 around November 2017, which was also untimely, and he owed no further tax. He contacted the state tax authority in September 2018, and received confirmation by e-mail that the past-due balance for tax year 2014 was paid, and there was no balance due on his account. (Exhibit G) After the hearing, he provided a certificate of compliance/letter of good standing from the state

tax authority, dated September 26, 2018, which shows he has filed returns and paid all taxes due. (Exhibit Q)

Applicant has just started repaying the charged-off student loan for \$8,426. (Exhibit J) About a month before the hearing in August 2018, he entered into a payment arrangement with the lender to pay \$20 monthly on the 18th of every month. He had made one payment per the agreement at the time of the hearing. He also made a \$25 payment shortly after he received the SOR. (Tr. 41-42) Altogether, he estimated making less than \$500 in total payments on his total student loan obligations since he was awarded his degree in December 2012. (Tr. 41) A September 2018 credit report presented by Applicant shows he has several more student loan accounts (nine by my count) that are 120-days or more past due. (Exhibit L)

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.

It is well-established law that no one has a right to a security clearance.¹ 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.”² 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.³ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁵ Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted; (2) an applicant is responsible for

¹ *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).

² 484 U.S. at 531.

³ 484 U.S. at 531.

⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven; and (3) an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁶

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 set forth in AG ¶ 18 as follows:

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. . . .

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(a) inability to satisfy debts;

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(c) 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;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

⁶ Directive, Enclosure 3, ¶¶ E3.1.14 and E3.1.15.

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 history of financial problems that is sufficient to raise a security concern under Guideline F. The disqualifying conditions noted above apply to this case.

Turning to the matters in mitigation, it appears the genesis of Applicant's indebtedness was a series of minimum-wage jobs after completing his technical education in December 2012. That went on until he began his current job in 2016. The result was he lacked the means to service his student loan. Nevertheless, his under employment did not prevent him from timely filing state and federal income tax returns. Given these circumstances, the mitigating condition at AG ¶ 20(c) applies, but only in part, and Applicant receives some credit in mitigation.

Concerning the charged-off student loan for more than \$8,000, Applicant has not yet made "a good-faith effort" to resolve the debt. He defaulted on the account years ago and only made a payment arrangement with the lender shortly before the hearing. Doing so is the first step in the right direction, but it is too soon to tell if Applicant will adhere to the repayment arrangement. Given these circumstances, the mitigating condition at AG ¶ 20(d) does not apply.

Applicant made good progress in resolving the tax matters, and he is now in compliance with both federal and state tax authorities. That means he has filed all tax returns, as required, and he has paid all taxes due, as required. And he did a good job documenting his compliance.

In addressing this issue, I note that an applicant's 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. Here, I am concerned about the duration of Applicant's tax problems (multiple tax years) and the timing of his remedial action. Applicant failed to timely file state income tax returns for two tax years, and he failed to timely file federal income tax returns for three tax years. He has been in compliance since the December 2017-May 2018 timeframe, and he filed his federal return for tax year 2017 on a timely basis in April 2018. Still, it is too soon to tell if he will continue to meet his tax obligations on a timely basis. Given these circumstances, the mitigating condition at AG ¶ 20(g) applies, but the evidence is not sufficient to justify complete mitigation of his long-standing irresponsibility in failing to meet his lawful tax obligations.

Following *Egan* and the clearly consistent standard, I have doubts and concerns 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. I conclude that he has not 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: Against Applicant

Subparagraphs 1.a -- 1.d: Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge