



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



In the matter of:)
)
-----) ISCR Case No. 19-00520
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

12/11/2019

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. Applicant experienced a business downturn and eventual business failure that concluded with selling the business in late 2011. The resulting financial problems included bankruptcy court proceedings, foreclosure of his personal residence, and tax problems with state and federal tax authorities. Pursuant to federal tax liens, he still owes the IRS about \$66,000 for a civil penalty for multiple tax periods. Although the conditions that resulted in his financial problems were largely beyond his control, his tax problems with the IRS have gone on for too many years to justify complete mitigation. 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 April 15, 2018. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on March 11, 2019, 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 April 7, 2019. In a six-page memorandum, he largely admitted the factual allegations and provided information in explanation and mitigation. He also requested a hearing before an administrative judge.

The case was assigned to two other judges, on July 10, 2019, and August 8, 2019, before it was assigned to me on August 27, 2019. The hearing took place as scheduled on September 23, 2019. Applicant appeared without counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1-9. Applicant offered documentary exhibits, which were admitted as Exhibits A-J. Other than Applicant, no witnesses were called. The hearing transcript (Tr.) was received on October 2, 2019.

The record was kept open until September 30, 2019, to provide Applicant an opportunity to present additional documentation concerning his tax problems. Those matters were timely received on September 24, 2019, and are admitted without objections as Exhibit K. In addition, in a December 1, 2019 e-mail, Applicant provided an update on the status of his case with the IRS, which is admitted without objections as Exhibit L.

Findings of Fact

Applicant is a 60-year-old employee who is seeking to obtain a security clearance, although he has held a clearance in the past. He is employed as a contracts manager for a large company in the defense industry. His annual salary is about \$140,000, the highest it's been for some time. He has been so employed since February 2019. His educational background includes a bachelor's degree in business administration. He has been married since 1984. His employment history includes: (1) full-time subcontracts specialist for a defense contractor from November 2017 to February 2019; (2) full-time flatbed truck driver from September 2017 to November 2017; (3) full-time self-employment as a consultant from December 2013 to September 2017; (4) full-time senior subcontracts manager for a defense contractor from December 2011 to November 2013, with duty in Afghanistan; and (5) full-time self-employment as owner and operator of a franchise restaurant business from October 2001 to November 2011.

The SOR concerns a history of financial problems that related to a downturn in business and eventual failure of Applicant's business. Beginning in 2001, Applicant and his spouse purchased their first franchise and over a period of years built the business to three or four separate restaurants in the local community. At its peak, the business had about 135 employees, mostly college students, and Applicant stated they had a good business with a good reputation. (Tr. 39) The business was hit hard in 2008 by the

recession and resulting downturn in discretionary spending and in the overall economy. (Tr. 38-40) At the time, Applicant and his spouse thought they had sufficient financing to operate the business for 12 to 18 months, which they thought would carry them through a short-term, regular recession. They took remedial actions, including taking a \$165,000 line of credit secured by their home and closed one of the restaurants. (Tr. 40) By 2009, it was evident that the business was struggling. (Tr. 40-41) The business had one restaurant with about 45 employees at the time of sale in 2011. (Tr. 41-42)

The franchisor found a buyer, a person already in the restaurant business, for Applicant, and the business was sold in December 2011. (Tr. 42, Exhibits B, G, H, and I) Applicant acted as the lender in the transaction, making a short-term loan of \$16,000 payable within ten days in December 2011, and making a balloon-payment promissory note for \$64,000 with \$1,000 monthly installments for a period of about two years during 2012-2014, and a balloon payment due on January 1, 2014. The buyer timely paid the short-term loan of \$16,000, but defaulted on the promissory note, as his business failed and the buyer was seeking relief in bankruptcy. (Exhibit J)

After selling the business, Applicant obtained employment as a full-time senior subcontracts manager for a defense contractor. He lived and worked in Afghanistan from December 2011 to November 2013, when he elected to return due to his wife having serious health problems. He has since continued to work full-time in an effort to recover from and address his financial problems, although his employment history was a bit uneven without a steady, good-paying job like he has now.

Applicant incurred tax indebtedness with both state and federal tax authorities when his business did not make sufficient withholding and then forward the payroll taxes withheld of behalf of employees. (Tr. 58-59) Such cases are often referred to as 100% penalty assessment cases, the penalty is civil not criminal, and it is sometimes called the Civil Penalty (or "CIV-PEN"). In 2012, the IRS filed a notice of federal tax lien against Applicant's spouse in the total amount of \$49,811 for six tax periods (quarters) during 2009-2010. (Exhibit 3) In 2014, the IRS filed a notice of federal tax lien against Applicant's spouse in the total amount of \$16,208 for three tax periods (quarters) in 2011. (Exhibit 4) He does not owe the IRS for the most recent tax years of 2014-2018. (Exhibit D) The state tax authority also filed two tax liens against Applicant or his spouse or both in amounts of \$1,935 and \$1,042.

Applicant was in and out of bankruptcy court during 2016-2018. (Tr. 45-50; Exhibits 5-7) He filed two Chapter 13 bankruptcy cases in 2016 and 2017, respectively, in an effort to reorganize his finances, pay off his creditors per a court-approved plan, and prevent foreclosure of his residence. In both cases, Applicant elected to have the cases dismissed before starting the payment plans due to circumstances at the time. By 2018, Applicant and his spouse concluded that a Chapter 7 bankruptcy case was the best course of action. The petition was filed in February 2018 and a discharge was granted by the bankruptcy court in June 2018. They reaffirmed the debt stemming from the line of credit secured by their house, but their other debts were discharged. Their liabilities included \$72,650 in priority unsecured claims and \$101,531 in nonpriority

unsecured debts. (Exhibit 7) After the bankruptcy was completed, they lost the home in foreclosure in about October 2018. (Tr. 46-48)

Applicant stated that he has made payments to both the state and federal tax authorities over the last several years. He did not present any documentation of a purely voluntary payment (e.g., check, money order, etc.). In May 2019, the IRS applied \$7,935 of Applicant's 2018 income tax refund to the tax period ending September 30, 2009. (Exhibit K at 3). In June 2019, the state tax authority sent his 2018 state income tax refund of \$4,035 to the IRS. (Exhibit K at 2) In September 2019, the state tax authority acknowledged receipt of funds that were sufficient to pay in the full the tax liability, and indicated that the two state tax liens were in the process of being released. (Exhibit K at 4) Accordingly, I specifically find the state tax liens are paid and resolved.

Applicant contacted the IRS in July 2019, which was about four months after the SOR was issued to him. (Exhibit C) The IRS accepted his proposal to pay the amount he owes, which was \$66,514 including penalty and interest, by November 7, 2019. He explained at the hearing that he intended to make a lump-sum payment to resolve the tax indebtedness with the IRS by using proceeds from the sale of a parcel of land. (Exhibits E and F) The parcel of land, which is mountain property, is a five-and-a-half acre corner lot with a market value of about \$125,000 to \$150,000, and he intends to list it at \$100,000 to promote a quick sale. (Tr. 59-60) Selling the land has been delayed due to various circumstances largely beyond his control (e.g., road closure and state fire ban) (Tr. 53-54) As a result, as of December 1, 2019, the land was unsold, and the tax debt with the IRS remained unresolved, although it appears the IRS is working with him so he can remain current. (Exhibit K at 1 and Exhibit L). Accordingly, I specifically find the federal tax liens are unpaid and not released.

Applicant described the loss of business and his home as very humbling and sobering events. (Tr. 74) As a result, he believes he will not make similar mistakes in the future.

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

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).

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 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:

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).

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

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(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;

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 Chapter 7 bankruptcy in 2018 discharged a sizeable amount of unsecured debt, and the tax indebtedness with the state and federal tax authorities are long-standing matters. The disqualifying conditions noted above apply to this case except for the disqualifying condition at AG ¶ 19(f), because it concerns matters limited to income tax, which are not part of this case.

Applicant is certainly not the only person to experience serious financial difficulties due to the so-called Great Recession, which in the United States was a severe financial crisis combined with a deep recession that occurred during 2007-2009. Even after the recession ended, it took many years for the economy to recover to pre-crisis levels. The business downturn and eventual business failure Applicant experienced were clearly circumstances largely beyond his control. The same goes for the health problems experienced by Applicant's spouse and Applicant's uneven employment history since the business failure. Frankly, a bankruptcy to resolve the indebtedness connected to or associated with Applicant's business seems like a reasonable approach given the financial difficulties he faced. Accordingly, the mitigating condition at AG ¶ 20(b) applies, in part, to the three bankruptcy cases during 2016-2018, as they were closely connected to the business failure. I did not apply AG ¶ 20(b) to the IRS tax problems for the reasons discussed below.

In addressing mitigation, I note that an applicant's failure to comply with tax laws bears close examination and is a matter of serious concern to the federal government. The DOHA Appeal Board has made it clear that an applicant who fails repeatedly to fulfill their legal obligations, such as filing tax returns and paying tax when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See ISCR Case No. 15-06707 at 3 (App. Bd. Aug. 15, 2017).

Here, I am concerned about the duration of Applicant's tax problems and the timing of his remedial action, especially the amount owed to the IRS since it is much larger than the amount owed to the state tax authority. With that said, the two state tax liens were for less than \$2,000 each, and they are paid in full. Accordingly, those matters are decided for Applicant.

The IRS filed the tax liens against Applicant in 2012 and 2014, which is now several years ago. There is no documentary evidence of voluntary payments to the IRS. The most recent payments to the IRS were interceptions of income tax refunds for tax year 2018. Applicant's plan to make a lump-sum payment to the IRS was proposed and agreed to in July 2019, after he received the SOR in this case. The plan is reasonable, but it has been delayed due to difficulties in getting the land ready to sell. One wonders why Applicant did not make an effort to sell the land sooner, years ago, to resolve the IRS matters. Considering the totality of facts and circumstances, it is too soon to tell if Applicant will resolve the two federal tax liens and then continue to meet his tax obligations on a timely basis. Accordingly, the mitigating condition at AG ¶ 20(g) applies in part because he has made an arrangement with the IRS. Nevertheless, the evidence is not sufficient to mitigate his long-standing and unresolved tax liens due to the civil penalty. His tax problems with the IRS have gone on for too many years to justify complete mitigation under AG ¶ 20(b).

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.c:	For Applicant
Subparagraphs 1.d -- 1.f:	Against Applicant
Subparagraphs 1.g -- 1.h:	For 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