



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-05620
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

09/26/2012

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant was a tax protestor who has since reformed and brought himself into compliance with the IRS. He filed federal tax returns, and he entered into an installment agreement to pay back taxes owed to the IRS. Two federal tax liens for multiple tax years, filed in 2010 and 2011, respectively, were released by the IRS in September 2012. Applicant presented sufficient evidence to mitigate the security concerns stemming from his unfavorable financial history. Accordingly, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on or about April 18, 2012, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guideline known as Guideline F for financial considerations.

Applicant timely answered the SOR and requested a hearing. The hearing took place July 10, 2012. The transcript (Tr.) was received July 26, 2012. At the hearing, the record was kept open until September 15, 2012, to allow Applicant time to present additional information. Applicant made a timely submission, and those several matters are collectively admitted, without objections, as Exhibit L.

Findings of Fact

The SOR alleged that Applicant was indebted to the IRS based on two federal tax liens in amounts of \$131,889 and \$165,719. Applicant admitted, with circumstances, these allegations in his answer to the SOR. His admissions are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 58-year-old employee who is being sponsored for a security clearance by a federal contractor. He has been employed by the same federal contractor from 2002 to present, where he has a good employment record.² His employment history includes honorable service in the U.S. military during 1973–1981.

About 15 years ago, Applicant, along with his father and then wife became involved with a tax protestor group. Applicant described it as tax advocate group consisting of very charismatic people. He then deliberately failed to file federal tax returns with the IRS for many years. The IRS filed two federal tax liens against Applicant as follows: (1) a lien for a total of \$165,719.70 for tax years 1991, 1992, 1993, 1994, 1995, 1999, 2000, 2001, 2002, 2003, and 2005, filed in June 2010; and (2) a lien for a total of \$31,889.47 for tax years 2007, 2008, 2009, and 2010, filed in August

¹ 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 DoD 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.

² Exhibit K.

2011.³ These amounts are taken from the notices of the federal tax liens. The total amount of the 2011 lien is inconsistent with the SOR allegation of \$131,889, which is based on a 2012 credit report.⁴ I resolve this factual dispute by finding the notice of the federal tax lien to be more reliable than the credit report.⁵ Accordingly, the IRS filed liens against Applicant in 2010 and 2011 covering multiple tax years for a total of about \$197,609.

In about 2010 or 2011, Applicant changed his mind and then began the process of complying with the IRS. He hired a specialized firm to assist him in reaching a settlement with the IRS. He then filed federal tax returns in April 2011.⁶ A few months later in August 2011 he entered into an installment agreement, agreeing to pay \$1,580 monthly.⁷ The installment agreement covered tax years 1999–2010 (excepting 2004) for a total of \$134,120, which included taxes owed, interest charges, and a failure-to-pay penalty.⁸ As of April 2012, the same month the SOR was issued, the tax Applicant owed was \$100,485, the failure-to-pay penalty was \$2,020, and the interest charges were \$24,808, for a grand total of \$127,313.⁹

In June 2012, Applicant obtained assistance from a local office of the Taxpayer Advocate Service, which is a governmental office that operates independently of any other IRS office and reports directly to Congress through the National Taxpayer Advocate.¹⁰ With the assistance from that office, Applicant obtained releases of both federal tax liens on September 12, 2012.¹¹ In addition, in early August 2012, the terms of the installment agreement were revised to lower the monthly payment from \$1,580 to \$1,281 beginning August 28, 2012.¹² As of August 2012, the tax Applicant owed was \$94,165, the failure-to-pay penalty was \$2,431, and the interest charges were \$26,023,

³ Exhibit A.

⁴ Exhibit 3.

⁵ It appears most likely that the credit report mistakenly described the 2011 lien as \$131,889 when the correct amount is \$31,889, a difference of \$100,000 accounted for by adding the digit 1.

⁶ Exhibit 2.

⁷ Exhibits 2, E, and F.

⁸ Exhibit 2.

⁹ Exhibit G.

¹⁰ Exhibit H.

¹¹ Exhibit L.

¹² Exhibit L.

for a total of \$122,620, or about \$11,500 less than when he began making payments in August 2011.¹³

At the hearing, Applicant appeared contrite and expressed a strong desire to follow through on the installment agreement. Based on my opportunity to listen to his testimony and observe his demeanor, I found Applicant's testimony to be credible and worthy of belief.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁴ 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."¹⁵ 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.¹⁶ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁷

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁸ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²¹ In *Egan*, the Supreme

¹³ Exhibit L.

¹⁴ *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).

¹⁵ 484 U.S. at 531.

¹⁶ Directive, ¶ 3.2.

¹⁷ Directive, ¶ 3.2.

¹⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁹ Directive, Enclosure 3, ¶ E3.1.14.

²⁰ Directive, Enclosure 3, ¶ E3.1.15.

²¹ Directive, Enclosure 3, ¶ E3.1.15.

Court stated that the burden of proof is less than a preponderance of the evidence.²² The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²³

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.²⁴ 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,²⁵ 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.²⁶ The overall concern under Guideline F 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.²⁷

²² *Egan*, 484 U.S. at 531.

²³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁴ Executive Order 10865, § 7.

²⁵ AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁶ 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).

²⁷ AG ¶ 18.

Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

The evidence supports a conclusion that Applicant has a history of financial problems or difficulties. His unfavorable financial history indicates inability or unwillingness to satisfy debts,²⁸ a history of not meeting financial obligations,²⁹ and a deceptive or illegal financial practice as show by his deliberate failure to file federal income tax returns over a period of years.³⁰ The facts are more than sufficient to establish these disqualifying conditions.

There are six mitigating conditions to consider under Guideline F. Any of the following may mitigate security concerns:

AG ¶ 20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;³¹

AG ¶ 20(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides

²⁸ AG ¶ 19(a).

²⁹ AG ¶ 19(c).

³⁰ AG ¶ 19(d) and (e).

³¹ ISCR Case No. 99-0201 (App. Bd. Oct. 12, 1999) (“[T]he concept of ‘good faith’ requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Such standards are consistent with the level of conduct that must be expected of persons granted a security clearance.”) (citations omitted); ISCR Case No. 02-30304 (App. Bd. Apr. 20, 2004) (relying on a legally available option, such as Chapter 7 bankruptcy, is not a good-faith effort) (citations omitted); ISCR Case No. 99-9020 (App. Bd. Jun. 4, 2001) (relying on the running of a statute of limitations to avoid paying a debt is not a good-faith effort).

documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; or

AG ¶ 20(f) the affluence resulted from a legal source of income.

I have considered all the mitigating conditions and the most pertinent here are AG ¶¶ 20(c) and (d). As explained by Applicant and confirmed by reliable documentary evidence, the evidence shows Applicant was a tax protestor who has since reformed and brought himself into compliance with the IRS. In 2011, he filed federal tax returns and he entered into an installment agreement to pay back taxes owed to the IRS. The installment agreement was recently revised to make it more affordable for Applicant. He has made monthly payments since August 2011, reducing the balance owed by more than \$11,000. The two federal tax liens, filed in 2010 and 2011, respectively, were released by the IRS in September 2012. Taken together, these matters are a clear indication that the problem is being resolved by Applicant's good-faith efforts working with the IRS. The same matters demonstrate a positive upward trend, which can be relied upon to make the predictive judgment that the likelihood of continuation or recurrence of similar problems is low.³²

Under *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's fitness or suitability for a security clearance. 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.³³ Having done so, I conclude that Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a–1.b:	For Applicant

³² AG ¶ 2(a)(9).

³³ AG ¶ 2(a)(1)–(9).

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge