



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



In the matter of:)
)
-----) ISCR Case No. 11-09919
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: C. Brent Dishman, Esq.

03/15/2013

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. The evidence shows he has a longstanding history of state and federal tax problems. He failed to file state and federal tax returns for several years, and he owes back taxes to state and federal tax authorities. He is now in compliance with the tax authorities, he has repayment agreements in place to repay the back taxes, and he is adhering to those agreements. Applicant produced sufficient evidence to mitigate the security concerns. Accordingly, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and Directive,¹ on December 14, 2012, the Department of Defense (DOD) 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 guidelines known as Guideline F for financial considerations and Guideline E for personal conduct.²

Applicant timely answered the SOR and requested a hearing. The hearing took place February 21, 2013. The transcript (Tr.) was received March 4, 2013.

The record was kept open until March 7, 2013, to allow Applicant to submit additional documentary exhibits. Applicant made a timely post-hearing submission, and those matters are admitted, without objections, as Exhibits E, F, G, H, and I.

Findings of Fact

As alleged in the SOR, Applicant admits the following: (1) owing back taxes to the IRS for approximately \$112,000 for tax years 2003–2011 as reflected in a federal tax lien filed in July 2012; (2) failing to file federal income tax returns for tax years 2004–2009; (3) owing back taxes to his state of residence for approximately \$18,264 for tax years 2003–2009 as reflected in a state tax lien filed in December 2011; and (4) failing to file state income tax returns for tax years 2004–2009. 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 50-year-old employee for a company engaged in defense contracting. He works as a simulation technician; he is a shift supervisor for three flight simulators used by the military; and he has had this job since 2008. He is seeking to retain a security clearance, and he completed a security clearance application in January 2011 as part of a periodic reinvestigation.³

Applicant's employment history includes nearly 25 years of honorable service in the U.S. Navy, from which he retired in 2007 as a senior chief petty officer. He has held

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 The sole allegation under Guideline E is a cross-reference to the four allegations under Guideline F.

³ Exhibit 1.

a security clearance since about 1986, and he has held a top-secret clearance with access to sensitive compartmented information for many years. His first marriage was relatively brief and ended in divorce in 1986. He married his current spouse in 1991. Together, they had an adjusted gross income of about \$166,000 for 2012 consisting of his annual salary, her annual salary, and military retiree benefits for each, as his spouse is a retired Navy chief petty officer.

Applicant has a longstanding history of state and federal tax problems, which he does not dispute. Indeed, he admits not living by the standards he would expect of others, and he described his tax problems as “the biggest mistake I’ve ever made in my adult life.”⁴ His tax problems are confirmed by the documentary exhibits.⁵

Applicant traces the beginning of his tax problems to several years ago when a company his spouse was then working for went bankrupt. As a result, she did not receive a Form W-2 for that tax year. Applicant did not know how to proceed with filing tax returns without the form. What followed then was several years of inaction and procrastination. Also during the same time, Applicant and his spouse dealt with a serious illness of his mother-in-law that ended with her death as well as a mental-health problem for a stepson. Both these matters, as well as a heavy travel schedule when he was serving in the Navy, distracted Applicant and his spouse from addressing their taxes.

Finally in about November 2010, Applicant concluded enough was enough. At the time, he had received correspondence from the IRS. In December 2010, he started looking for a tax attorney for help and was able to retain one within a month or so. At about the same time, he received a request to submit a security clearance application for a periodic reinvestigation. He completed the application in January 2011, disclosing that he owed approximately \$20,000 in back taxes to the IRS, which he was working to resolve.⁶ He explained at the hearing that \$20,000 was a best-guess estimate, and that he was shocked when he learned the full extent of his back taxes.⁷

With the assistance of counsel, Applicant and his spouse are now in compliance with state and federal tax authorities, the necessary returns have been filed, and they are adhering to repayment agreements for the back taxes.⁸ For his state of residence, a repayment agreement was established in August 2012. It requires him to pay \$1,100 monthly, and it includes all outstanding liabilities from 2003 to present. As of August 2012, he owed about \$20,321 in taxes and collection fees without including penalties

⁴ Tr. 29.

⁵ Exhibits 1–5; Exhibits A–I.

⁶ Exhibit 1 at 36 of 38.

⁷ Tr. 28–29.

⁸ Exhibits A–I.

and interest. Once he has made the final payment on the taxes and collection fees, he will request a waiver of penalties and interest. For the IRS, a repayment agreement was established in about May 2012. It requires him to pay \$1,000 monthly beginning in July 2012, on \$101,428 in taxes owed as of May 2012, plus penalties and interest. Then in July 2014, the monthly payment will increase from \$1,000 to \$1,900.

In addition to the repayment agreements, Applicant is now taking a far more proactive approach to his tax obligations and personal finances. State and federal income tax returns have already been filed for tax year 2012 with taxes due to the IRS and a refund due from the state.⁹ He was able to pay the federal taxes with money he saved for that purpose during the last half of 2012. In addition, he is saving \$750 monthly for the sole purpose of paying taxes for tax year 2013. And he intends to make quarterly payments of \$1,750 to the IRS to prepay 2013 income taxes.¹⁰ Describing this situation as “a kick in the pants,”¹¹ Applicant acknowledged that he and his spouse lived a carefree lifestyle for many years and were fiscally irresponsible.¹² They are now living on a budget and have adjusted their lifestyle to meet their state and federal tax obligations. His major financial goal is to be debt-free, to include credit card debt, which he is also actively working on eliminating.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹³ 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.”¹⁴ 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.¹⁵ An

⁹ Exhibits C and D.

¹⁰ Exhibit C.

¹¹ Tr. 52.

¹² Tr. 52–53.

¹³ *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).

¹⁴ 484 U.S. at 531.

¹⁵ Directive, ¶ 3.2.

unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁶

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁷ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²¹ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²²

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.²³ 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,²⁴ the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive

¹⁶ Directive, ¶ 3.2.

¹⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁸ Directive, Enclosure 3, ¶ E3.1.14.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ Directive, Enclosure 3, ¶ E3.1.15.

²¹ *Egan*, 484 U.S. at 531.

²² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²³ Executive Order 10865, § 7.

²⁴ AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

indebtedness or financial problems or difficulties.²⁵ 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.²⁶

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 tax problems, which indicates inability or unwillingness to satisfy debts²⁷ and a history of not meeting financial obligations.²⁸ The facts are more than sufficient to establish these disqualifying conditions. In addition, his failure to file state and federal tax returns for many years is of serious concern.²⁹

There are six mitigating conditions to consider under Guideline F.³⁰ Based on the evidence before me, the most pertinent are AG ¶¶ 20(c) and (d). AG ¶ 20(c) applies because there are clear indications that his tax problems are in the process of being resolved and are under control. And AG ¶ 20(d) applies because, by coming into compliance with state and federal tax authorities and entering into repayment agreements, Applicant has demonstrated a good-faith effort to resolve his tax problems.³¹

²⁵ 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).

²⁶ AG ¶ 18.

²⁷ AG ¶ 19(a).

²⁸ AG ¶ 19(c).

²⁹ AG ¶ 19(g).

³⁰ AG ¶¶ 20(a)–(f).

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.

Of course, a security clearance 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 security 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 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 shows that Applicant established repayment agreements for the back taxes, and he is adhering to those agreements. Moreover, he is in compliance with state and federal tax authorities, and he has filed returns for tax year 2012. He is saving money for future tax payments, and he intends to make quarterly payments to the IRS to prepay taxes for the current tax year. He also realizes that he made a major mistake, he is suffering the consequences, and he is determined not to repeat his mistake. Given these circumstances, he has established a track record of remedial actions sufficient to mitigate the security concerns under the Appeal Board's standard.

Under Guideline E for personal conduct,³⁴ conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about a person's reliability, trustworthiness, and ability to protect classified information. Here, Applicant's history of tax problems suggests an unwillingness to comply with rules and regulations, which is unacceptable in a classified workplace. Frankly, his conduct is, in many ways, inexplicable. Given his level of experience, he knew he was neglecting his legal obligations, which calls into question his good judgment. Accordingly, his history of tax problems falls under the disqualifying

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).

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 ¶¶ 15, 16, and 17 (setting forth the security concern as well as disqualifying and mitigating conditions).

condition found at AG ¶ 16(e). With that said, as explained above in the Guideline F discussion, Applicant has made a good-faith effort to put his fiscal house in order. By doing so, he has taken positive steps to reduce or eliminate any potential vulnerability to exploitation, manipulation, or duress within the meaning of the mitigating condition found at AG ¶ 17(e).

Based on the record before me, I have no doubts or concerns about Applicant's judgment, reliability, trustworthiness, 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.³⁵ In doing so, I gave weight to his nearly 25 years of honorable military service, which includes holding a security clearance for many years. He is acutely aware of his security responsibilities. Although he certainly failed to meet his tax obligations for several years, I am persuaded that he can be relied on to fulfill his security responsibilities going forward. Moreover, he is now displaying the type of fiscal discipline that supports a conclusion that similar conduct will not continue or recur in the future. Accordingly, 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.d:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

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

³⁵ AG ¶ 2(a)(1)–(9).