DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 16-02839
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

12/17/2018

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F (Financial Considerations). Given the nature and seriousness of Applicant's failure to timely file Federal and state income tax returns for numerous years, his significant outstanding tax delinquencies and unresolved promissory note, and the length of time they have been unresolved, Applicant's eligibility for a security clearance is denied.

Statement of the Case

On February 5, 2015, Applicant submitted a security clearance application (SCA). On May 23, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006. On June 8, 2017, new AGs were implemented and are effective for decisions issued after that date.[1]

[1] I considered the previous AGs, effective September 1, 2006, as well as the new AGs, effective June 8, 2017. My decision would be the same if the case was considered under the previous AGs.

On September 21, 2017, Applicant responded to the SOR, and requested a hearing. On March 28, 2018, the case was assigned to me. On June 28, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 25, 2018. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered seven exhibits, Government Exhibit (GE) 1-7, and Applicant offered ten exhibits, Applicant Exhibit (AE) A-J. There were no objections, and all proffered exhibits were admitted into evidence. On August 2, 2018, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's SOR response, he denied all eight allegations set forth in SOR ¶¶ 1.a through 1.h.

Applicant is a 57-year-old licensed attorney. He honorably served in the U.S. Air Force on active duty from 1986 through 1992. Applicant earned a bachelor's degree in 1985, a master's degree in 1987, and a juris doctorate in 2003. He is married and has one adult child. He is sponsored for national security eligibility by a DOD contractor, for which Applicant is the Chief Executive Officer. (CEO) (Tr. 8-9; GE 1)

Financial Considerations

The SOR alleges that Applicant failed to timely file state and Federal income tax returns for multiple years. He owes three state tax debts, three Federal tax debts, and he has an unsatisfied judgment. The combined total of Applicant's delinquent indebtedness is approximately $802,288. The record establishes the status of Applicant's unpaid accounts and untimely tax returns as follows:

SOR ¶ 1.a alleges Applicant failed to file state and Federal income tax returns for tax years 2003, 2004, 2005, 2006, 2007, 2008, 2011, and 2012. He denied this allegation in his SOR response because he has since filed all of his state and Federal income tax returns. The testimony and evidence at the hearing showed that Applicant did not timely file his state and Federal income tax returns for tax years 2003, 2004, 2005, 2006, 2007, 2008, 2011, and 2012, as required. The income tax returns for tax year 2003 was filed in 2006, and the income tax returns for tax years 2004 through 2008 were filed in 2009. Tax years 2011 and 2012 income tax returns were filed in May 2014. (Tr. 10 -13, 49, 55, 89-91)

SOR ¶¶ 1.b, c, and d allege Applicant had two state tax liens entered against him in 2013, and another state tax lien entered against him in 2016, in the combined total amount of $37,097. Applicant denied these allegations in his response to the SOR. The testimony and evidence at the hearing showed that Applicant's state tax liens are unpaid and unresolved. (Tr. 15, 50, 72)

SOR ¶¶ 1.e, and f allege Applicant had a Federal tax lien entered against him in 2009, and another Federal tax lien entered against him in 2016, in the combined total

amount of $654,148. Applicant denied these allegations in his response to the SOR. The testimony and evidence at the hearing showed that Applicant's Federal tax liens are unpaid and unresolved. (Tr. 15, 50, 72)

SOR ¶ 1.g alleges Applicant is indebted to the Federal Government for delinquent 2005 income taxes in the amount of $20,225. He denied this allegation in his response to the SOR. The testimony and evidence at the hearing showed that the Federal Government is currently claiming approximately $860,000 for Applicant's combined delinquent Federal taxes. Applicant initiated a one-year repayment agreement to pay $500 per month to the Internal Revenue Service (IRS) four weeks before his hearing. At the time of his hearing, Applicant had not yet made any payments to the IRS for resolution of these delinquent taxes. (Tr. 15, 50, 72, 88, 92-93, 95; AE H; AE J)

SOR ¶ 1.h alleges Applicant owes on a bank promissory note in the amount of $90,818. The bank filed a lawsuit against him in October 2014 to collect this debt. He denied this allegation in his response to the SOR. The testimony and evidence at the hearing showed that this case is still pending litigation and the debt is unresolved. Applicant believes that he has repaid this debt in full and possibly overpaid the debt, but he failed to provide evidence at the hearing showing his history of payments on this account. Applicant claimed that he never received any statements from the bank and the payments on this note were automatically deducted from his bank account for years. He called his law partner as a witness since she represented Applicant during the litigation of the alleged promissory note, now valued at approximately $150,000. (Tr. 39) She testified that the lawsuit was pending, and if she filed a motion to dismiss the case, she believed it would most likely be granted by the court. As of the date of the hearing, Applicant's attorney had not filed a motion to dismiss the case, and there was no evidence presented of Applicant's claimed payments on this account. This debt is unresolved. (Tr. 20-21, 25-31, 33-35, 40, 77-78; AE A - G)

Applicant stated that his financial problems stem from a catastrophic, million-dollar loss from a fire that damaged his rental property in 2003. He received a letter from his insurance company the very day the fire occurred advising him that the insurance company would no longer insure his rental properties. Applicant suffered a heart attack shortly thereafter. He was financially ruined, and he borrowed $60,000 from his friends to survive. Applicant reported that he has repaid all that borrowed money to his friends. (Tr. 10, 92)

Applicant's office also burned in the fire, and he lost all business records. He did not timely file state or Federal income tax returns for 2003, but he eventually filed those income tax returns. He did not file his state and Federal income tax returns for tax year 2004 because he was depressed, and he was on the verge of financial ruin. Applicant eventually hired a certified public accountant (CPA). The CPA took Applicant's tax records and money, and made an appearance on his behalf before the IRS. About a year and a half later, the CPA kept the money, returned the tax records to Applicant, and told him he could not help Applicant with his tax issues. (Tr. 10-11)

Applicant hired a second CPA in about 2005, and he immediately noticed that his income tax returns were finally being filed. The IRS requested to do an audit of Applicant's filed 2009 and 2010 income tax returns. Applicant testified that he and his CPA met with an IRS representative. The IRS representative had Applicant sign a Power of Attorney (POA) for his CPA, and then she advised him that she would reschedule the audit. Applicant claimed the **IRS representative instructed him not to open his mail from the IRS because it would only upset him.** He thought that the IRS representative would send the notices of the audits to Applicant and Applicant's tax representative(s), the CPA and eventually Applicant's sister, who is an IRS enrolled agent and was also added to Applicant's POA. (Tr. 11-13, 65-66, 84-85, 90)

After an extended period of time, Applicant contacted his CPA to determine his current tax status. The IRS audits for tax years 2009-2010 and 2012-2013 had already occurred when Applicant learned that the IRS failed to provide any notices of the audits to his tax representative(s). Applicant admitted that he had received an envelope from the IRS that contained the audit notice for both of his audits. He did not open any mail from the IRS based on the advice he received from the IRS representative. Since no one appeared at the hearing for Applicant's Federal tax audits, all expenses reported on Applicant's 2009-2010, and 2012-2013 income tax returns were disallowed by the IRS for tax write-offs. (Tr. 12-13, 44, 64-70; AE I)

Applicant's sister, who is a tax expert, testified as a witness. She stated that the IRS agent's letter (AE I) pointed out that Applicant's CPA would not have been provided a notice of the tax audit since her name was added to the POA in about 2016, which essentially cancelled the CPA on the POA. She also stated that, at one point in time, the CPA and she were both listed on the POA, but in late 2016 Applicant took action to have the CPA's name removed from the POA. She believed Applicant's two audits, for tax years 2009-2010 and 2012-2013, took place prior to her name being added on the POA, so she would not have received any of the audit notices. She did state that Applicant's CPA would have received these audit notices prior 2016. (Tr. 53) She testified that her brother had talked with his CPA about the audit hearings and the CPA said he had it handled. The CPA had obviously received the audit notices but he was not appearing at the audit hearings, as he told her brother.[2] (Tr. 58-59, 61) The audit for 2009-2010 tax years would have most likely taken place in 2011 or 2012, and the audit for 2012-2013 would have most likely taken place in 2014 or 2015. Applicant's sister filed Applicant's 2016 and 2017 income tax returns. She stated that her brother owed taxes for both of those tax years, but he did not pay the Federal taxes owed because he did not have the funds. (Tr. 62) She submitted a request for an audit reconsideration in September 2017 but, as of the date of the hearing, the IRS had not yet responded to that request. (Tr. 42-47, 52-55, 58-63, 72; AE H; AE I)

[2] Applicant's sister's testimony conflicts with Applicant's testimony that his CPA did not receive any audit notices from the IRS. Applicant claimed that after the audits were over and no one appeared, he then received information from the IRS that showed he owed a horrendous amount of Federal taxes for those audited tax years. He admitted that he received the audit notices from the IRS. Applicant stated that his sister's testimony was in error. (Tr. 64-68, 73-74)

Applicant stated that the total amount of Federal and state delinquent taxes were merely unrealistic numbers due to his disallowed expenses. Applicant wishes to have his tax issues resolved so he can pay the actual tax money that is owed and be in complete compliance. His most recent notice from the IRS disclosed that he currently owes approximately $860,000 for Federal tax liabilities. (Tr. 15, 50, 72) Applicant recently set-up a one-year repayment plan with the IRS covering tax years 2005, 2008, 2009, 2010, 2012, 2013, 2014, 2015, 2016, and 2017, which includes all of the tax years with delinquent Federal taxes owed. As of the date of his hearing, he had not yet made any payments on the one-year repayment plan. He noted that the state tax authority relies on the Federal Government to determine an individual's tax liability. Once the Federal tax numbers are correctly calculated, the state tax authority will then reset his state taxes, interest, and penalties numbers. He has not yet made any payments on his outstanding state taxes. (Tr. 13-15, 48-51; 61-62, 71, 76, 87-88; AE H, J)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely based on whether the applicant has met the strict guidelines the

President, Secretary of Defense, and Security Executive Agent have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline F: Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

> Failure 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following are potentially applicable:

(a) inability to satisfy debts;

(b) unwillingness to satisfy debts regardless of the ability to do so;

(c) a history of not meeting financial obligations; and

> (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.

The evidence shows that Applicant did not timely file his Federal and state income tax returns for tax years 2003, 2004, 2005, 2006, 2007, 2008, 2011, and 2012. The evidence also shows that he owes over $800,000 for delinquent taxes and an unresolved promissory note pending litigation. The above disqualifying conditions apply.

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012), as follows:

> This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

> (a) the behavior happened so long ago,[3] 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;
>
> (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;
>
> (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
>
> (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

[3] A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

(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.

Applicant has not resolved his significant delinquent tax debt; nor has he paid, settled, or resolved the bank promissory note pending litigation. He just recently entered into a one-year repayment agreement with the IRS but has not yet started making his monthly payments. Although he provided mitigating evidence of a fire and health concerns during the 2003-2004 time period, which were circumstances beyond his control, he does not have a reasonable explanation as to why he has been unable to resolve his tax issues during the past 14 years. Given the heavy burden generated by his failure to timely file income tax returns or pay income taxes, the length of time the taxes have been outstanding, and Applicant's unsubstantiated promise to resolve his debts, I cannot conclude that he has mitigated any of the financial considerations security concerns. There are no indications that his tax and other financial problems are under control, and I find it probable that future issues are likely to occur. Mitigation under AG ¶¶ 20(a), (b), (c), (d) and 20(g) was not established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall common sense judgment based upon careful consideration of the guidelines and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Looking at the totality of Applicant's tax history and circumstances, the evidence clearly shows that he does not possess the requisite good judgment, responsibility, and trustworthiness required by individuals entrusted with protecting our nation's secrets. Applicant is a licensed attorney and should be expected to know and comply with his obligations under Federal and state tax laws. His self-serving explanation that he did not open any mail from the IRS, to include important notices of his pending IRS audits, based

on an unsubstantiated and implausible claim concerning IRS representative's bad advice is purely irresponsible and unreasonable.

Given the nature and seriousness of Applicant's failure to timely file Federal and state income tax returns for numerous years, his significant outstanding tax and bank loan delinquencies, and the length of time they have been unresolved, I conclude Applicant has not mitigated the financial considerations security concerns.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.h:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or reinstate Applicant's eligibility for a security clearance. National security eligibility for access to classified information is denied.

PAMELA C. BENSON
Administrative Judge