DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Name redacted]	)	ISCR Case No. 18-02009
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kelly M. Folks, Esq., Department Counsel
For Applicant: Harris S. Ammerman, Esq.

05/12/2020

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Decision

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Katauskas, Philip J., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on July 1, 2009, in which he disclosed that he owed federal and state income taxes. He received a security clearance in August 2009. On September 9, 2016, his employer, a federal contractor, reported through the Joint Adjudication Processing System (JPAS) that it had received a notice of a federal tax levy on Applicant's wages. His employer requested that he submit another security clearance application, which he did on October 4, 2016. On August 17, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on September 6, 2018, and requested a hearing before an administrative judge. He neither admitted nor denied any of the allegations, but stated that he demanded "strict proof." At the hearing, the parties agreed to treat his responses as denials. (Tr. 12.) Department Counsel was ready to proceed on October 12, 2018, and the case was assigned to me on January 16, 2019. On April 15, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 15, 2019. I convened the hearing as scheduled. Government Exhibits (GE) 1 through 8 were admitted in evidence without objection. (The government exhibits were marked as Items 1 through 8 but have been redesignated as GE 1 through 8.) Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AE) 1 through 16, which were admitted without objection. DOHA received the transcript (Tr.) on June 3, 2019.

Findings of Fact

Applicant is a 42-year-old senior business analyst employed by federal contractors since July 2009. He received a bachelor's degree in business in 1989. (Tr. 62.) He married in August 1996 and has an adult son. He was employed as an administrative coordinator for a university from November 1992 to June 2009 and retired from that position.

Applicant's spouse has a bachelor's degree in business administration. She worked for a real estate firm and a title company before being hired by a federal contractor, for whom she worked for about 16 years. In January 2006, the federal contractor started downsizing, and Applicant's spouse began working as an independent consultant in human resources for various small business, working mostly from her home. Applicant was not involved in her consulting business. Her gross income while working independently was ranged from about $60,000 to about $150,000. In November 2016, her primary client sold his business. She had no other clients, and she closed her consulting business. She was unemployed until she found employment in the private sector in July 2018. (Tr. 15-19, 53-54.)

Applicant's spouse testified that she had spent most of her working life as an employee and was unfamiliar with the tax requirements for self-employed workers. Her income fluctuated, and she consistently owed substantial federal and state income taxes for each year, plus penalties for making inadequate payments of estimated taxes. She and Applicant twice refinanced the mortgage loan on their home to make monthly payments of taxes due. She started looking for tax help after the year she earned $150,000 and was confronted with a large tax liability and penalties. She did not hire an accountant or tax professional, but instead she relied on self-employed friends for tax advice. Among other things, she was advised to ask Applicant to maximize his tax withholding at the zero-exemption rate. (Tr. 37.) Applicant complied with her request. (Tr. 64.)

At about the same time that Applicant's spouse began having tax problems, her father had a heart attack and died suddenly. Her mother had a heart attack and moved in

with them, increasing their living expenses. Her three sisters encountered significant medical problems, all of which kept her from giving full attention to her tax problems.

Applicant and his spouse kept their professional lives separate. His spouse testified that he is "extremely private" about his job. She does not know what he does, does not know his work telephone number, and has never contacted him at work. (Tr. 48.)

Applicant's wife testified that when Applicant asked about her tax problems, she told him that she was working on them and had contacted tax professionals for assistance. In June 2009, Applicant's wife sought help from a tax negotiation and mediation service that she had learned about from an infomercial. (AE 6 at 2; Tr. 33.) She worked with this service until it "sort of dropped the ball," and she then sought out a professional tax service. (Tr. 20-23, 58-59.) Applicant did not deal with either of these services directly, but relied on his spouse to keep him informed. (Tr. 66.)

Applicant's spouse managed the house finances until 2017. Applicant was not aware of the extent of their financial problems until he started gathering documents for a possible bankruptcy petition. When he reviewed his credit report, he first learned about the amounts of the federal and state tax liens as well as other delinquent debts that he did not recognize, and he decided that they needed to talk to a lawyer. (Tr. 68-69.)

Applicant's state of residence obtained tax liens against Applicant and his spouse for $2,707 in December 2007; $5,294 in November 2010; $11,463 in October 2011; $13,126 in December 2012; $2,016 in August 2014; $7,208 in January 2015; $14,334 in April 2015; $9,809 in July 2015; $8,878 in December 2017. (GE 7.) The state tax liens are alleged in SOR ¶ 1.b.

The IRS obtained tax liens against Applicant and his spouse for $93,749 in December 2013, another tax lien for $45,406 in May 2015, and a tax lien for $39,508 in August 2016. (GE 6.) The tax levy in September 2016 was for a total of $208,835 for tax years 2004, and tax years 2006 through 2012. (GE 2.) The federal tax debt is alleged in SOR ¶ 1.a to be about $273,098.

In about 2014, Applicant and his wife hired a tax professional, who determined that their tax problems arose from the failure of Applicant's wife to make estimated quarterly payments. (Tr. 56; AE 5.)

From November 2016 to June 2017, Applicant and his spouse made $300 estimated tax payments to the IRS every month except May 2017. They made $250 payments to the state tax authority in January, February, March, and May 2018. In 2018, Applicant took over the family finances.

In addition to Applicant's federal and state income tax debts, credit reports from February 2018 and January 2017 (GE 4 and 5) reflected five delinquent debts: an automobile loan for $46,089, past due for $760 (SOR ¶ 1.c); a mortgage loan for

$544,000, past due for $3,271, with a balance of $359,424 (SOR ¶ 1.d); a credit-card account charged off for $2,165 (SOR ¶ 1.e); and two medical bills referred for collection of $882 (SOR ¶ 1.f) and $85 (SOR ¶ 1.g).

On September 6, 2018, Applicant and his wife filed a joint Chapter 13 bankruptcy petition, having completed the financial counseling required by the bankruptcy court. Their petition included all the delinquent debts alleged in the SOR. Applicant reported monthly gross income of $9,166 and his spouse reported $1,122. Their joint disposable income was calculated to be $3,026. They listed assets of $479,881 and liabilities of $542,118. (GE 8.) Their payment plan was confirmed in March 2019 and provided for monthly payments of $3,100 for 23 months followed by $3,605 for 27 months. The plan required that Applicant and his wife surrender the automobile that was the collateral for the debt alleged in SOR ¶ 1.c and pay the mortgage lender alleged in SOR ¶ 1.d directly outside the plan.

As of the date of the hearing, Applicant and his spouse had paid $21,700 into the payment plan, of which $17,918 had been disbursed, and had made the first five monthly payments under the plan. (AE 12; AE 13; AE 15.) Applicant testified that the payments on the mortgage loan alleged in SOR ¶ 1.d were current as of September 2018, when he filed his bankruptcy petition. (Tr. 97-98.)

Applicant summarized his attitude about the bankruptcy by equating it to buying a new car. He testified,

> I want to do my 60 months, pay what I have to pay, pay when I have to pay, do what the trustee tells me I need to do, follow [his lawyer's] instructions. And at the end of the 60 months I want a document that says, Mr. [Applicant], you've satisfied everything that was required of you via the Federal Government, and you can go on with your life and don't do it again.

(Tr. 93.)

Applicant's financial manager has known him for about ten years. She regards him as a person of good moral character who operates with integrity, works hard and "never has a bad word to say about anyone." She believes he is efficient, detail-oriented, and extremely competent. He is well organized, never misses a deadline, or forgets an assignment. (GE 14 at 1.)

One of Applicant's co-workers, who has known him for about three years, considers him intelligent, capable, and dedicated. He has observed that he is always "quick on his feet," with sensible reactions in various situations requiring decisive action, and he demonstrates high morals and integrity in everything he does. (GE 14 at 2.)

Policies

"[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is set out in AG ¶ 18:

> 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. . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. *See* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The evidence presented by the parties at the hearing establishes the following disqualifying conditions under this guideline: AG ¶ 19(a) ("inability to satisfy debts"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and AG ¶ 19(f) ("failure to . . . pay annual Federal, state, or local income tax as required"). The following mitigating conditions are potentially applicable:

> 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(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;

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

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.

AG ¶ 20(a) is partially established. Applicant's delinquent debts are recent and numerous, but they were incurred as a result of his spouse's ignorance about the tax laws applicable to self-employed taxpayers, which is not likely to recur. His spouse has learned the consequences of her tax derelictions, she is no longer self-employed, and she is not likely to return to self-employment in the foreseeable future.

AG ¶ 20(b) is established. Applicant's financial problems were caused by his spouse's failure to follow the tax laws for her business and her efforts to conceal the tax problems from Applicant by repeatedly telling him that she was taking care of the problem. His initial conduct was not responsible, because he failed to adequately determine why they were repeatedly incurring high taxes and penalties while they were filing joint returns. However, once his pay was garnished and he realized the severity of the problem, he took decisive action by contacting an attorney and filing a Chapter 13 bankruptcy petition that included the delinquent federal and state income taxes.

AG ¶ 20(c) is established. Applicant received financial counseling as part of the bankruptcy process, and the problem is being resolved through the Chapter 13 payment plan.

AG ¶ 20(d) is established. The degree to which a Chapter 13 bankruptcy plan makes an applicant's creditors whole is a factor that an administrative judge may consider when evaluating whether an applicant is acting reasonably to rectify his financial difficulties. ISCR Case No. 15-00682 (App. Bd. Jul. 13, 2016). In this case, Applicant's creditors, including the federal and state tax authorities, have agreed to the Chapter 13 payment plan and Applicant is complying with it.

AG ¶ 20(g) is established. Applicant's Chapter 13 payment plan provides for paying the federal and state tax authorities, and Applicant is complying with the plan. Although Applicant had been making the monthly payments for only about five months at the time of the hearing, he had paid $21,700 into the plan, resolved the past-due payments on the mortgage loan and automobile loan outside the plan, and he made it clear that he is determined to put his tax problems behind him. He knows that he needs to comply with the Chapter 13 plan in order to keep his clearance and his job.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment. Applicant has worked for federal contractors and held a security clearance since 2009. He is highly respected for his dedication, integrity, and hard work. He was candid, sincere, and credible at the hearing. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his delinquent debts.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.g: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

Philip J. Katauskas
Administrative Judge