DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: Marvin Liss, Esq.

04/29/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain and mitigate the concern stemming from his history of financial problems. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on April 23, 2012.[1] Thereafter, on May 19, 2015, after reviewing the application and information gathered during a background investigation, the Department of Defense (DOD)[2] sent Applicant a statement of reasons (SOR),

[1] Exhibit 1 (this document is commonly known as a security clearance application).

[2] The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.[3] The SOR is similar to a complaint. 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 before an administrative judge.

In August 2015, Department Counsel amended the SOR by adding ¶¶ 1.d, 1.e, and 1.f. Applicant timely answered the amended SOR.

The SOR, as amended, contains the following allegations: (1) a charged-off loan account for $233,281; (2) a charged-off credit card account for $15,529; (3) a pending Chapter 7 bankruptcy case filed in April 2014; (4) a pending Chapter 13 bankruptcy case filed in April 2015; (5) a failure to file individual federal income tax returns for tax years 2012 and 2013 and back taxes of about $88,718 for those years as well as 2014; and (6) a failure to file individual state income tax returns for tax years 2012 and 2013 and back taxes of about $22,864 for those tax years.

The case was assigned to me on September 18, 2015. The hearing was held as scheduled on November 12, 2015. Department Counsel offered Exhibits 1–7, and they were admitted. Applicant offered Exhibits A–K, and they were admitted. The hearing transcript (Tr.) was received on November 23, 2015.

The record was kept open to allow Applicant to submit additional documentation. Applicant made timely submissions on November 13 and 17. Those matters are admitted as Exhibits L, M, N, and O.

Findings of Fact

Applicant is a 56-year-old executive-level employee who is seeking to retain a security clearance that he has held for many years. He has a history of financial problems, which is related to a dispute over a business transaction from the time when he was a principal and chief technical officer of a company during 2001–2007. The company was acquired in 2007, and he assumed the role of an employee working as an engineer during 2007–2011. He began working for his current employer in about September 2011, initially as an independent contractor and then as an employee from 2014 to present.

In 2006, Applicant participated in a business transaction to purchase a commercial building outside of a military installation. The purchase was made by a joint

[3] 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 Department of Defense 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.

venture (JV) consisting of Applicant's then company (Company A), an engineering firm (Company B), and an individual investor. To finance the transaction, each of the three parties invested $140,000. The balance was covered by a loan obtained by Applicant and the principal of Company B, who acted as guarantors for the loan. The JV, itself a limited liability company, was intended to be the business entity that had ownership of the property and responsibility for the loan.

Consistent with the business plan, in August 2006, Applicant and the principal of Company B transferred any interest they had in the property to the JV via a quit-claim deed, subject to a mortgage recorded in April 2006 in county property records.[4] Applicant understood from communicating with Company A's legal counsel that the transfer of ownership to the JV included the assumption of the loan by the JV. It was never intended that Applicant would have ongoing financial responsibility for the loan or the building. And Applicant never made a payment on the loan; never received an invoice for payment; never received account statements on the loan; never received tax records on the loan; and so on.

About one year later in August 2007, Company B bought the assets of Company A. The JV is mentioned in the official documentation (Form 8-K) that Company B filed with the Securities and Exchange Commission (SEC).[5] Subsequently, Company B assumed repayment of the loan.

At some point in late 2010, Applicant learned for the first time that he had not been released from the loan. He described himself as completely blindsided by that revelation. At the same time, Company B had stopped making the loan payments. Applicant worked with the lender bank and Company B, which resulted in Company B reinstating payments on the loan. Applicant believed the matter was resolved.

Also in 2010, it was disclosed that Company C, a large aerospace company, was to purchase Company B. Then in June 2011, apparently before the transaction was completed, attorneys for Company B informed the lender bank that Company B would discontinue making payments on the loan in July 2011.[6] Company B took the position that although they had acquired certain assets, including interests in the JV, it did not assume any obligation on the loan, explaining that it had been making payments on the loan as a voluntary accommodation to the JV. As a result, the loan went into default for nonpayment. About the same time in September 2011, Applicant began working for his current employer as a consultant.

The lender bank brought legal action against Applicant in 2012 to foreclose on the property. In December 2012, Applicant appeared, without counsel, in the state court

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[4] Exhibit A.

[5] Exhibit K.

[6] Exhibit B.

and contested the case on the following grounds: (1) he had no ownership interest in the property having signed the quit-claim deed in 2006, and thus he was prohibited from listing the building for sale, repairing the building, or entering the building; (2) he was to be taken off of or released from the loan, and that omission was a gross oversight; (3) he enjoyed no financial gain or benefit from the property; and (4) those that had historically made payments on the loan were responsible for the loan. He did not dispute that he had signed the loan documentation, and he did not contend there was any fraud in the inducement. He did not prevail, and the state court granted a judgment against him in the amount of nearly $1.8 million in January 2013.

After extensive review of the situation and consultation with a bankruptcy attorney, Applicant concluded his only course of action was to seek relief in bankruptcy court, which began in 2014 and is ongoing.[7] For purposes of this security clearance case, it is unnecessary to go into great detail on the bankruptcy proceedings or expound on the nuances and complexities of bankruptcy law. Nevertheless, the process started with a non-consumer Chapter 7 bankruptcy case in April 2014, because most of the debt was business debt (or non-consumer debt), consisting of the nearly $1.8 million business loan. In addition, the unsecured credit card account in SOR ¶ 1.b was pulled into the Chapter 7 case due to the requirements of bankruptcy law. The Chapter 7 case concluded with a discharge in February 2015.[8]

The Chapter 7 case included, on Schedule E, $66,232 in state and federal back taxes for tax years 2012 and 2013.[9] The back taxes came into existence during the two years when Applicant was working as a consultant as opposed to an employee and was not having income taxes withheld from his pay. By the time the matter became apparent to Applicant, which was about October 2013, because he had received an extension to file 2012 tax returns, he was dealing with the fallout from the judgment. So, it made sense to deal with the tax issues in the soon-to-be-filed bankruptcy case. Applicant has since filed the necessary tax returns. And he made a lump-sum payment of $72,000 to fully settle and resolve the back taxes as part of the Chapter 7 case during September–November 2015.[10]

It was necessary to return to bankruptcy court in April 2015, albeit under Chapter 13, due to the complexities and circumstances of Applicant's case.[11] The lender bank filed its claim in July 2015 for $730,233 as an unsecured claim stemming from a deficiency on a commercial loan. As I understand it, the ceiling for the amount owed to

[7] Exhibits 6,7, C, D, E, F, G, H, I, J, L, and N.

[8] Exhibit D.

[9] Exhibit C.

[10] Exhibits I, J, M, and O.

[11] Exhibit E.

the lender bank is limited to the assets in the Chapter 7 estate.[12] The Chapter 13 payment plan calls for Applicant to pay the sum of about $53,000 over a period of 48 months,[13] and he is making the required monthly payments.[14] He has sufficient income and cash flow to adhere to the payment plan.[15] In addition, Applicant has a second home that may be subject to a claim by the Chapter 7 trustee and if sold there may be net proceeds paid into the plan. The intention is to sell the second home, which has a market value of about $234,000, to repay the lender bank.[16]

Applicant has been candid and up-front about these matters throughout the security clearance process. He disclosed his adverse financial situation in his 2012 security clearance application, and he provided an extensive response to written interrogatories in 2014.[17] He readily acknowledged his unusual financial situation and understands why concerns were raised, but he states that he is the same person who has held a security clearance for many years without problems. He described his situation as "one of those business situations that I didn't see coming. I sort of characterized it as I stepped in a pile of poo"; and "this isn't a normal financial [situation] - - it is a little nuts."[18] Overall, I found Applicant's hearing 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.[19] 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."[20] 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.

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[12] Tr. 133–135.

[13] Exhibit F.

[14] Tr. 85–87.

[15] Exhibit L.

[16] Tr. 87–89.

[17] Exhibits 1 and 2.

[18] Tr. 103.

[19] *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).

[20] 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[21] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[22]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[23] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[24] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[25] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[26] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[27] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[28]

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.[29] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

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[21] Directive, ¶ 3.2.

[22] Directive, ¶ 3.2.

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

[24] Directive, Enclosure 3, ¶ E3.1.14.

[25] Directive, Enclosure 3, ¶ E3.1.15.

[26] Directive, Enclosure 3, ¶ E3.1.15.

[27] *Egan*, 484 U.S. at 531.

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

[29] Executive Order 10865, § 7.

Discussion

Under Guideline F for financial considerations,[30] 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.[31] The overall concern 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.[32]

The concern is broader than the possibility that a person might knowingly compromise classified 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 information.

In analyzing the facts and circumstances of Applicant's case, I have considered the following disqualifying conditions (AG ¶ 19) and mitigating conditions (AG ¶ 20):

> AG ¶ 19(a) inability or unwillingness to satisfy debts;
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> AG ¶ 19(c) a history of not meeting financial obligations;
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> AG ¶ 19(g) failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same;
>
> AG ¶ 20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that is unlikely to recur and does not cast doubt on the [person's] 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 [person] acted responsibly under the circumstances;

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[30] AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

[31] 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).

[32] AG ¶ 18.

AG ¶ 20(c) . . . there are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Given the substantial-evidence standard, there is sufficient evidence to raise a concern under Guideline F as well as the disqualifying conditions mentioned above. With that said, a business transaction that goes awry does not necessarily rise to the level of revoking an applicant's eligibility for access to classified information. That is especially so in a case like this one where the totality of facts and circumstances show that Applicant was acting in good faith and reliance on others when he was involved in the 2006 business transaction. It is simply unrealistic to think that Applicant transferred ownership interests in the commercial property and knowingly accepted ongoing personal liability for the business loan. The worst thing I can say about Applicant is that he should have exercised more due diligence and caution before agreeing to the 2006 business transaction. For example, obtaining legal advice from a private attorney, independent from Company A, with a duty to act solely in Applicant's best interests may well have been the more prudent course of action.

Applicant incurred substantial indebtedness due to an unexpected dispute over a business transaction that took place about ten years ago. There is no evidence that he incurred delinquent debt due to frivolous or irresponsible spending, consistent spending beyond his means, or other issues of security concern. A similar problem is unlikely to recur because he is no longer in an ownership position as principal of a company. He is resolving the indebtedness through bankruptcy court proceedings, which includes a 48-month payment plan and the probable sale of a second home. It will take time to come to a final resolution, but given the complexities of Applicant's bankruptcy case, the time period is not unreasonable. In addition, he made a lump-sum payment of $72,000 to settle the state and federal back taxes. Viewing the evidence as a whole, there are clear indications that Applicant's financial problems are being resolved and under control.

The concerns over Applicant's problematic financial history do not create doubt about his current reliability, trustworthiness, good judgment, 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.[33] Accordingly, I conclude that he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

[33] AG ¶ 2(a)(1)–(9).

Formal Findings

The formal findings on the SOR allegations are:

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

Conclusion

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

Michael H. Leonard
Administrative Judge