DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted	)	ISCR Case No. 13-00759
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

03/26/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on July 20, 2012. On August 12, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. DOD acted under Executive Order 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on August 19, 2013; answered it on September 3, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on November 4, 2013, and the case was assigned to me on November 12, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 19, 2013, scheduling the hearing for December 12,

2013. On December 11, 2013, Applicant requested that the hearing be postponed because he was ill. DOHA issued an amended notice of hearing on January 6, 2014, rescheduling the hearing for January 15, 2014. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Department Counsel also submitted a demonstrative exhibit summarizing the evidence, which is attached to the record as Hearing Exhibit (HX) I.

Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until February 18, 2014, to enable Applicant to submit additional documentary evidence. I extended the deadline to February 26, when the closing on the sale of his house was delayed. He timely submitted AX D through H, which were admitted without objection. Department Counsel's comments regarding AX D through H are attached to the record as HX II and III.

On February 26, 2013, Appellant advised that the closing was postponed again because of problems with the certificate of occupancy. (HX II.) On February 27, 2014, I extended the deadline to March 17, 2014, to enable him to provide updated information about the sale of his house. (HX IV.) He did not present any additional evidence. DOHA received the transcript (Tr.) on January 30, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 48-year-old plant manager for a federal contractor. He has worked for his current employer since October 2005. He received a security clearance in June 1999 and worked as an employee of a defense contractor from 1999 to 2002. His current job does not require a security clearance. He is applying for a security clearance in order to accept a position as the facility security officer.

Applicant married in September 1992. For many years, Applicant's wife took care of the family finances. They filed joint federal and state returns, using an accountant who was a friend of Applicant's wife, to prepare their returns. In mid-2010, Applicant was notified by his employer that his wages were being garnished for delinquent taxes. Upon investigation, he learned that he had signed the joint federal returns for 2007 through 2010, but his wife had not submitted them. (Tr. 21, 33-34)

Applicant obtained copies of the federal returns for 2007 through 2010 that were never submitted, along with documentation of income and deductions, and gave them to a certified public account (CPA). The CPA noted that the accountant employed by Applicant's wife had not entered accurate information for 2007 through 2010, but instead had merely entered the income and deductions from a previous year on the returns for all four years. (Tr. 22.) The CPA prepared corrected returns and Applicant submitted them. (Tr. 33-35.)

Based on the corrected returns prepared by the CPA, the Internal Revenue Service (IRS) determined that Applicant and his wife owed about $8,482 for 2007; $5,348 for 2008; $5,475 for 2009; and $2,100 for 2010. (GX 2 at 32-48.) His wife had timely filed the state returns for 2007-2010, and they received refunds of $1,700 for 2007; $606 for 2008; $3,482 for 2009; and $3,267 for 2010. The state refunds for 2008 and 2009 were seized by the IRS. (GX 2 at 49-50.)

In April or May 2012, Applicant also discovered that his wife had not been making the home mortgage loan payments. (Tr. 23.) His credit bureau report reflected that the payments for March, April, and May had not been made. (GX 4 at 5.) He confronted his wife about the delinquent payments, and she responded that they needed the money for other things. (Tr. 41.) He was able to obtain a loan modification in October 2012, and he brought the payments up to date. (GX 3 at 2.)

Applicant filed for divorce in June 2012. The property settlement was signed by Applicant and his wife on November 1, 2012. (Tr. 13.) Applicant received sole custody of their 19-year-old daughter, and his wife agreed to pay $200 per month in child support. Applicant and his ex-wife agreed that each would pay one-half of the federal taxes due for 2007 through 2010. They also agreed that the unpaid taxes would be satisfied by the proceeds from the sale of the marital home. (AX A.)

In response to DOHA interrogatories in April 2013, Applicant stated that he had made payments totaling $500 on the federal tax debt. (GX 2 at 5.) However, at the hearing, he testified that he made three $500 payments. (Tr. 49.) In his answer to the SOR, he stated that the CPA had notified the IRS that the delinquent tax debts would be paid in full as part of the divorce agreement. However, he did not provide any documentation of his CPA's correspondence with the IRS or evidence that the IRS agreed to his CPA's proposal. To the contrary, he testified that there was no payment agreement with the IRS. (Tr. 49.)

As part of the divorce agreement, Applicant and his wife also agreed that they would sign and file joint tax returns for 2011 and 2012, and separate returns for 2013 and thereafter. (AX A.) In February 2013, Applicant's CPA prepared joint federal and state tax returns for 2011 and 2012. (GX 2 at 54-102.) These returns reflect that Applicant and his wife owe the IRS $1,238 for 2011 and are entitled to a refund of $2,692 for 2012. They are entitled to state tax refunds of $642 for 2011 and $931 for 2012. (GX 2 at 55-56, 77-78.) Applicant's wife refused to sign the 2011 and 2012 returns until the property settlement was resolved. Applicant testified that she signed the 2011 and 2012 returns in early November 2013, and they were filed. (Tr. 48.)

Applicant incurred substantial legal fees connected to his divorce. He submitted evidence of $12,614 in legal fees (GX 2 at 22-23; AX B.) As a result, he fell behind on his mortgage payments on the marital home. After he filed for divorce in June 2012, he decided to not make any additional payments on the mortgage, because half of each payment was his wife's obligation. (Tr. 46-47, 50, 55 .) He testified that his attorney said: "[W]e can't give you this as legal advice, but since you didn't conclude the divorce

yet, any debt that you guys accrued during the marriage is considered marital—a marital asset or marital debt, so she just ran this up on you." (Tr. 46-47.) Applicant concluded that, since the mortgage debt was a marital debt that would be split as part of the divorce settlement, he would be saving his wife money by continuing to make payments on the mortgage loan. He testified, "Every dollar I spend towards the marital debt, I'm saving her fifty cents of it." (Tr. 50.) He decided to use the money allocated for the mortgage loan payments to pay his attorney fees, take care of his daughter's college expenses, and get the house ready to sell. He admitted that he intentionally defaulted on the mortgage, and that his decision probably was a mistake. (Tr. 46-47, 49.)

Applicant testified that he notified the lender that he would continue to pay the insurance and taxes but would not make any more payments on the loan until his marital issues were resolved. (Tr. 55.) The lender initiated foreclosure in January 2013. (GX 5 at 2.) Applicant's January 2014 credit report reflected that payments on the mortgage loan were past due in an amount of $44,319. (GX 5 at 2.)

In December 2013, Applicant accepted an offer to buy the home for $570,000. (AX G.) The balance of Applicant's loan is about $287,000, meaning that, if the sale is consummated, the profit on the sale of the home will cover the delinquent loan payments and the delinquent federal taxes. (GX 5 at 2.)

Closing on the sale was scheduled for February 6, 2014, but was postponed because of the bank's delay in providing a commitment letter to the buyer. (AX D.) It was rescheduled for February 26, but was postponed again because of problems with the occupancy permit. As of the date the record closed, the sale of the house had not been closed, no funds had been disbursed, and a new closing date had not been established.

In response to DOHA interrogatories, Applicant submitted a personal financial statement (PFS) in April 2013. His PFS reflects monthly net income of $7,174; net spousal income of $800; monthly expenses of $3,729; debt payments of $3,061; and a net remainder of $1,184. The spousal income is no longer included in the net family income. (GX 2 at 18.) The sale of the marital home would relieve Applicant of the monthly $2,705 mortgage payments, but will result in another undetermined expense for housing.

The executive director of the research center where Applicant is employed describes him as an employee with great initiative and conscientiousness. She states that his reliability and honesty that he has amply demonstrated attest to his suitability for the role of facility security officer. (AX E.)

Applicant has served for 25 years as a volunteer for an association devoted to helping special-needs children. The executive director of the association submitted a letter attesting to Applicant's active involvement in the association. (AX H.) A project

manager for the association commended him for his reliability, steadiness, caring attitude, and professionalism. (AX F.)

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, *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 AG. 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." *See* 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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; *see* AG ¶ 2(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges that Applicant owes delinquent federal taxes for tax years 2007 through 2011 (SOR ¶¶ 1.a-1.e), that his payments on his home mortgage loan are past due (SOR ¶ 1.f), and that, as of April 2013, he had not filed his federal income tax return for 2011 (SOR ¶ 1.g). The concern under this guideline is set out in AG ¶ 18:

> 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual 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).

Applicant's admissions and the evidence presented at the hearing establish the following disqualifying conditions under this guideline:

> AG ¶ 19(a): inability or unwillingness to satisfy debts;
>
> AG ¶ 19(c): a history of not meeting financial obligations; and
>
> AG ¶ 19(g): failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

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

AG ¶¶ 20(a) is established. Although Applicant's delinquent debts are numerous and recent, they occurred because his wife did not submit their tax returns after Applicant signed them, and she stopped making payments on their mortgage loan without informing Applicant. His debts arose from unusual circumstances making them unlikely to recur now that Applicant and his wife have separated and he no longer relies on her to file his tax returns and pay the household bills.

AG ¶ 20(b) is not fully established. The deceptive and irresponsible conduct of Appellant's wife and the marital breakup that followed were circumstances beyond his control. He initially acted responsibly, by obtaining a mortgage modification, hiring a CPA to resolve his tax debts, and making payments on his tax debt. However, he did not act responsibly when he stopped making payments on the tax debt and chose to default on the mortgage payments to force his estranged wife to pay half of the marital debts. While his desire to drive a hard bargain with his estranged wife is understandable, it does not show responsible conduct toward his creditors, who are not parties to his marital discord. He admitted at the hearing that, in hindsight, his decision to stop making payments on the mortgage loan was unwise.

AG ¶ 20(c) is not fully established. Applicant obtained the advice and assistance of a CPA and a lawyer, but the sale of the marital home, which is the key to resolving his financial problems, has not occurred.

AG ¶ 20(d) is not established. As of the date the record closed, Applicant had not presented any documentary evidence of payments on the debts alleged in the SOR or a payment agreement with the IRS. He was given additional time to submit evidence regarding the potential sale of his home, but he provided no additional evidence and did not request additional time to provide it. As of this date, the record reflects only a

promise to pay in the future, based on a contingency, *i.e.,* the sale of the marital home, but Applicant has been unable to consummate the sale or set a date on which it will be consummated. *See* ISCR Case No. 09-05390 (App. Bd. Oct. 22, 2010).

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(a):

> (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(a) were addressed under that guideline, but some warrant additional comment.

Applicant was sincere and credible at the hearing. He has a reputation for reliability and honesty. His financial situation arose from circumstances beyond his control. Although he has sufficient net income to make reasonable payments on the tax debt and the past-due payments on his home mortgage, he chose to default on the mortgage payments to force his estranged wife to pay half of the marital debts. If he is able to sell the marital home and use the proceeds of the sale to pay off his debts, the financial concerns that preclude granting him a clearance at this time may be resolved in the future. *See* Directive ¶¶ E3.1.37-E3.1.40 (reapplication authorized after one year).

After weighing the disqualifying and mitigating conditions under Guideline F, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a-1.f:	Against Applicant
Subparagraph 1.g:	For Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge