DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: Robert L. Markovits, Esq.

February 26, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a security clearance application (e-QIP) on December 1, 2008. On July 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, which are effective for SORs issued after September 1, 2006. Applicant received the SOR on July 20, 2009.

In his September 15, 2009, response, Applicant admitted four of the five allegations set forth in the SOR and requested a hearing. DOHA assigned the case to me on October 30, 2009. The parties agreed to a hearing date of November 19, 2009. A notice of hearing was issued to that effect on November 3, 2009. The hearing was convened as scheduled. Department Counsel introduced six documents, which were accepted into the record without objection as exhibits (Exs.) 1-6. Applicant gave testimony and offered nine documents, admitted into the record without objection as Ex.

A-I. Without objection, one witness informally assisted Applicant with testimony regarding financial matters.[1] Applicant was given until December 1, 2009, to supplement the record with any additional documents. The transcript (Tr.) of the proceeding was received on November 24, 2009. No additional documents were submitted and the record was closed on December 5, 2009. Based on a thorough review of the testimony, submissions, and exhibits, I find Applicant met his burden regarding the financial considerations security concerns raised. Security clearance is granted.

Findings of Fact

Applicant is a 60-year-old chairman, president, and chief executive officer of a corporation which has a consulting agreement with a defense contractor. He has been the president and chief executive officer of his company since 2002. Applicant is well respected. He has significant past experience in various scientific disciplines and holds multiple patents for his research. Applicant has earned both a bachelor's degree and a master's degree. He has been married for over 40 years and has two adult children. At issue in SOR allegations ¶¶ 1.a-1.e are a state tax judgment for approximately $62,223, and five federal tax liens for $56,032, $564,000, $616,000, and $11,810, respectively.

Between 1990 and 2002, Applicant worked for a multi-tiered corporation. He was the president and chief operating officer of a tertiary entity organized under a corporate subsidy.[2] Toward the end of his tenure with the corporation, he was also named to the subsidiary company's board of holdings.[3] Future projects were highly promising for the tertiary entity toward the end of the 1990s, but working capital was low. A block of the majority shareholders insisted that management "keep the doors open, no matter what."[4] Applicant and other employees infused personal capital into the enterprise, but the effort was insufficient. Consequently, between 1998 and late 2001, they "used the funds that [the entity] had to pay salaries to retain employees" to sustain operations, and did not "pay the withholding trust fund tax on it, always intending that we would."[5] In effect, the entity used "money that the employee[s] earned [that] was being withheld by the employer to be paid to the IRS and to the State to . . . satisfy their income tax withholding obligations."[6] Applicant did not object to this maneuver.

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[1] Tr. 79.

[2] Ex. F (Resume).

[3] When the entity was dissolved, Applicant was an officer in the business and a member of the parent company's board of holdings, although no evidence indicates the time of his appointment. He had owned about 8% to 10% of the subsidiary company's stock. Tr. 19.

[4] Tr. 37, 60. Applicant and his two associates were minority shareholders as well as members of the ownership and management. Tr. 60-61.

[5] Tr. 37, 54.

[6] Tr. 38. Applicant noted that "it was a borrowing game that we were playing. And it [w]as a bad one." Tr. 37. This ploy, which was utilized during four intermittent quarters during the period at issue, culminated in the federal tax liens at issue. Tr. 39-53, 76-77; *compare* SOR allegations ¶ 1.b – ¶ 1.e.

Applicant does not recall legal counsel being consulted regarding this arrangement.[7] The number of employees affected by this scheme ranged from about 12 to 60, depending on the year at issue.[8] Few, if any, of the employees ever knew about the plan and the IRS held the employees harmless. The employees assumed that the company had paid their share of their taxes.[9] At the time, only the company was deemed liable by the IRS, which, for at least a majority of the time at issue, was aware that the entity was using the fund as a "revenue stream." The IRS worked with the business in its endeavors.[10] Despite these attempts, however, the business failed.

Prior to the entity's dissolution in the autumn of 2002, Applicant was courted by an attorney who invested in various ventures with other peoples' funds. A transaction was commenced to take over the business, which would include acquisition of the entity's assets and liabilities, including mortgage,[11] a state tax debt, and an IRS trust fund liability then valued at approximately $617,000.[12] The attorney signed the agreement, but the arrangement was ultimately breached.[13] Applicant and his associates hired a bankruptcy lawyer who, in September 2002, advised them to resign from the entity in the event the attorney was perpetrating a fraud.[14] They resigned before the entity was dissolved, then started Applicant's current business in 2003.

At Applicant's present company, which exists under an umbrella corporation, efforts are expended on well-regarded research and development projects of interest to the government. Applicant declined a salary until 2009, when the new business accomplished its goals, the government issued the business an exceptionally lucrative contract, and the government made its initial multimillion dollar payment.[15] In sum, between 2003 and 2006, Applicant accrued approximately $560,000 in unpaid salary, of which about $221,450 was ultimately paid against accrual in June 2009, after the entity's primary project neared completion and the government made a multimillion

[7] Tr. 55.

[8] Tr. 55-56, 61.

[9] Tr. 57-58. None of the employees were penalized for the company's actions.

[10] Tr. 77-78. ("Subsequently,. . . the IRS agent in charge was changed . . . [and] the liens were put in place. [Applicant] was talking with the new agent and she said to [him], the most important job she had to do was the assessment. . . . evaluating what we owed, so liens could be put in place against those things. . . . Her comment was that paying [the fund debt] off was irrelevant to her. That only doing the assessment was what was important to her. Which was hard for [him] to understand." *Id.)*

[11] Applicant was not a guarantor on the mortgage. Tr. 67.

[12] Tr. 22, 28.

[13] Tr. 62-63.

[14] *Id.*

[15] Tr. 25, 27-28.

dollar payment.[16] While information regarding Applicant's actual annual income between 2003 and 2009 is incomplete, Applicant's 2007 total adjusted gross income was $99,916; in 2008, his adjusted gross income was $130,573.[17] In the interim, he was supported by his wife, who maintains a "reasonably good job."[18]

With the failure of the 2002 acquisition, Applicant and two of his partners, as former owners and managers, were deemed liable by the IRS for the monies owed the federal withholding trust fund.[19] None of the three had sufficient assets to satisfy the debt while foregoing a salary.[20] The IRS worked with them and tentatively closed the case in August 2007 for being temporarily uncollectable.[21] Applicant was given the impression that as long as they were temporarily foregoing income while their project was being completed, the IRS "had no real concern . . . that there wasn't going to be any issue there."[22] When Applicant received the approximately $221,500 in back pay in June 2009, he expended "virtually all of the back salary that [he had] accumulated over the last five years" to resolve his remaining tax debt.[23] Today, Applicant no longer involves himself directly in financial matters. He generally defers such matters to his "number guy."[24] All of the tax liens, both state and federal, were satisfied. A state release noting that the state lien (SOR ¶ 1.a) was in the process of being satisfied was issued on July 31, 2009, following regular payments made between 2004 and 2009.[25] The final IRS releases (SOR ¶¶ 1.b-1.e) were issued in September 2009.[26]

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[16] Tr. 26-27, 70-71; Ex. H (Pay schedule 2003 through Nov. 15, 2009).

[17] Exs. D-E (Tax records).

[18] Tr. 68.

[19] Tr. 28, 58-61. (The three individuals "were held . . . individually and severably responsible"). Applicant remains unclear of all of the technicalities the scheme and IRS process involved. He regularly defers to one of his associates, who appeared at the hearing to clarify his interpretation of events. *See, e.g.*, Tr. 27.

[20] Tr. 68.

[21] Ex. G (IRS letter, dated Aug. 20, 2007).

[22] *Id.*

[23] Tr. 30; Ex. C (State lien release, dated Jul. 31, 2009), Ex. G, *supra*, note 20.

[24] Tr. 27.

[25] Ex. C, *supra*, note 22.

[26] The documents evidencing the liens' satisfaction were nearly eligible. The government stipulated that the releases proffered by Applicant represented the tax lien obligations referenced in SOR allegations ¶ 1.a – ¶ 1.e. Tr. 53.-54. No payment history was provided, but satisfaction of the liens was demonstrated.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ."[27] The burden of proof is something less than a preponderance of evidence.[28] The ultimate burden of persuasion is on the applicant.[29]

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). "The clearly consistent standard

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[27] *See also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

[28] *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

[29] ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

indicates that security clearance determinations should err, if they must, on the side of denials."[30] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[31]

Based upon consideration of the evidence, Guideline F (Financial Considerations) is the most pertinent to this case. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Under Guideline F, "failure or an inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or an 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 Directive sets out several potentially disqualifying conditions under this guideline. Here, Applicant's participation in a corporate capitalization maneuver ultimately left him personally liable for tax liens imposed between 2002 and 2006 for approximately $1,310,000. They remained unsatisfied until 2009. Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts) and FC DC AG ¶ 9(c) (a history of not meeting financial obligations) apply. With such conditions raised, the burden shifts to Applicant to overcome the case against him and mitigate security concerns.

Based on an ill-conceived capitalization scheme executed by a business entity between 1998 and late 2001, Applicant, as an owner and part of the management team, became jointly and severally liable for the amount at issue after the business was dissolved. Those liens were imposed in the early to mid 2000s. Applicant now recognizes that the scheme was ill-advised. He made regular payments toward his state tax lien until it was ready for formal satisfaction and, in compliance with the parameters set forth by the IRS, satisfied his federal tax liens. Those debts have been satisfied. FC MC 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) applies.

As noted, the liens at issue were created when Applicant's former employer reallocated funds from the employees' tax withholding fund to sustain the business through rough economic times. While the measure was dubious, at best, the IRS did not pursue criminal action against the business, the entity's leadership, or the Applicant, who was part of the ownership and management team. Instead, it ultimately worked

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[30] *Id*.

[31] *Id*.

[32] AG ¶ 18, which also notes, "An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds."

with the business until the entity was dissolved. Once dissolved and Applicant was deemed jointly and severally liable for the federal liens at issue, it is arguable that superior responsibility might have been displayed had he demanded contemporaneous compensation from his new employer, although such payment would most likely have hampered his current enterprise's own capitalization and further delayed his ability to make significant payments on his debts, or sought alternative employment elsewhere, where he could have earned sufficient wages to start making an impact toward his debt. The IRS, however, worked closely with Applicant and his associates. It actively chose to temporarily close the case in light of the fact Applicant and his associates then lacked the funds to make immediate repayment on the liens. It liberally provided Applicant and his associates time to make their current enterprise pay off and receive payments that could enable them to satisfy their debt. The IRS has considerable expertise in such areas and its methodology proved effective. The federal tax liens were ultimately satisfied as soon as Applicant had sufficient funds to satisfy his debt in full. As for the smaller state lien at issue, Applicant diligently made regular, affordable payments on that debt over the past several years. Although Applicant could have approached his debts in any one of a variety of manners, his actions, particularly given the acquiesence of the IRS, were not unreasonable. This is particularly true given the fact that ultimately, the liabilities were satisfied. Therefore, FC MC AG ¶ 20(b) (the conditions that resulted in the behavior 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) applies.

Applicant started making payments on his state lien in the early 2000s. He worked closely with the IRS regarding the federal liens at issue, never ignoring the fact that he was responsible for the sums at issue. Working with the IRS, he ultimately satisfied the debts at issue. Consequently, FC MC ¶ 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 FC MC ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) apply.

Applicant was not personally or individually responsible for the maneuver giving rise to the tax liens at issue and liens that survived the dissolution of the business. He did, however, shoulder responsibility for their satisfaction. While that satisfaction was not immediate, it was within the loose time frame permitted by the IRS and within the payment schedule put forth by the state. With those debts no longer outstanding, financial considerations security concerns are mitigated.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole person" factors. Applicant is a mature and highly credible witness. The record shows that he is a gifted and well-educated scientist. The projects on which he works are well regarded by the government and he takes pride in his efforts for the Defense industry.

When the decision was made to use funds from the employee withholding trust funds, Applicant, a seasoned scientist, was initially unaware that the scheme might be later viewed as untoward, although he now recognizes the measure as a poorly devised "borrowing game" implemented to "keep the doors" of the business open.[33] The methodology was employed intermittently between 1998 and 2001, with the last of four quarterly fund transfers taking place nearly a decade ago.[34] There is no evidence that he or any of his businesses have ever been involved in any other questionable practices, and it is clear he now relies on the advice of others in financial matters.[35] There is no evidence he will again insert himself or his projects into such business strategies.[36] When the company was dissolved and Applicant was deemed financial liable, he accepted the obligation and actively worked with state and federal officials to make restitution on behalf of the entity.[37] When the July 2009 SOR was issued, Applicant had nearly satisfied his state tax lien debt and had just received significant back pay time from his current employer. Given the fact that federal lien releases were executed in September 2009, it may be fairly assumed that those obligations were already satisfied or in preparation for final satisfaction when the SOR was received. Today, the financial obligations at issue have all been satisfied.

The facts in this case and the sums involved are unique for an action under Guideline F. The case contains allegations of tax liabilities to the federal government and to a state government of a very significant dollar amount. The facts demand more consideration than that contemplated by the mitigating conditions described above, which primarily address rehabilitative efforts on the part of an applicant.

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[33] AG ¶ 2(a)(1), (2), and (7).

[34] AG ¶ 2(a)(3).

[35] AG ¶ 2(a)(6).

[36] AG ¶ 2(a)(9).

[37] AG ¶ 2(a)(2), (6), (8), and (9).

The fact that the majority of funds at issue were owed to the very government from which Applicant is seeking a security clearance poses a significant concern. This is particularly true since those funds were technically held in trust, with the company acting as a fiduciary with regard to those funds. Whether the scheme involved succeeded or failed in floating the business is irrelevant. The government did not halt the practice that ultimately created the debt at issue. Liability ensued and it was ultimately assumed by Applicant in a personal capacity. All of these genuine concerns have been thoroughly weighed and considered in light of the evidence and highly credible testimony.

The rules of business are not finite and Applicant was not the mastermind behind the decision to manipulate the trust funds. While the practice employed here was dubious, it apparently continued to be practiced with, if not the blessing, then the acquiesence of the government. Moreover, the conflicting and often vicariously attributed fiduciary duties owed to investors and company employees in a business context cannot be easily analogized with the strict and direct fiduciary duty owed to the government by one seeking a security clearance. Those duties are highly distinct, technical, and controlled by different rules. Furthermore, none of the employees were financially harmed or put at risk. The IRS was consistently present to ultimately assure that appropriate liability would be assessed and restitution made. No criminal prosecutions were pursued and there is no indication any of those involved have been debarred from participation in government transactions. Any permanent or potential harm to the American taxpayer was obviated by the satisfaction of the lien through a process designed by, and under the auspices of, the government. Clearance is granted.

Formal Findings

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

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraph 1.a – 1.e For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge