DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF SHEARINGS AND APPEALS

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

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

02/29/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On November 17, 2010, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).[1] On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on July 12, 2011.[2] On September 15, 2011, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative*

[1] Item 4 (SF 86), dated November 17, 2010.

[2] Item 5 (Applicant's Answers to Interrogatories, dated July 12, 2011).

Guidelines for Determining Eligibility For Access to Classified Information (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on September 21, 2011. In a sworn statement, dated October 11, 2011,[3] Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on January 3, 2012, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on January 13, 2012, but as of February 12, 2012, he had not submitted any further documents or other information. The case was assigned to me on February 27, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted only one (¶ 1.a.) of the factual allegations pertaining to financial considerations of the SOR. He denied the remaining allegations (¶¶ 1.b. and 1.c.) of the SOR. Applicant's admission is incorporated herein as a finding of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 68-year-old employee of a defense contractor who, since August 1990, has been serving as an analyst. He has held a Top Secret security clearance since January 1964.[4] He enlisted in the U.S. Navy in July 1960, and served on active duty until July 1990, when he retired with an honorable discharge.[5] No other information regarding Applicant's military service was provided. Information regarding Applicant's education, other than the fact that he does not have a college degree,[6] was not furnished.

Applicant was married in July 1966, and divorced in February 1977.[7] He married his second wife in February 1977.[8] He has four children, born in July 1974, October 1977, July 1980, and October 1982, respectively.[9]

[3] Item 3 (Applicant's Answer to the SOR, dated October 11, 2011).

[4] Item 4, *supra* note 1, at 43.

[5] *Id.* at 14-15.

[6] Personal Subject Interview, dated December 6, 2010, at 1, attached to Applicant's Answers to Interrogatories, *supra* note 2.

[7] Item 4, at 20.

Financial Considerations

It is unclear when Applicant first started to experience financial difficulties, but it appears that they may have commenced sometime between 1996 and 2000.[10] Two federal tax liens were filed against him in 1996, totaling $33,143,[11] and a state tax lien was filed against him in 1996, in the amount of $12,693.[12] The smaller of the two federal tax liens was satisfied in November 1996.[13] Applicant acknowledged that he had not filed federal or state income taxes since around 2000.[14] A federal tax lien was filed against him in 2003, in the amount of $12,623.[15] That lien was satisfied in September 2007.[16] Another federal tax lien was filed against him in 2005, in the amount of $28,634.[17] That lien was satisfied in May 2008.[18] An additional federal tax lien (SOR ¶ 1.a.) was filed against him in 2010, in the amount of $159,854.[19] In November 2007, a civil judgment was awarded against Applicant for default on a time-share agreement, and a lien was filed, in the amount of $6,792 (SOR ¶ 1.c.).[20] That lien was satisfied in April 2010.[21]

Applicant also had a mortgage and several credit cards become delinquent throughout the years.[22] He claimed the accounts became delinquent and the tax returns were not filed because he did not have sufficient funds to pay them,[23] but he never

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[8] *Id.* at 19.

[9] *Id.* at 23-25.

[10] Personal Subject Interview, *supra* note 6, at 1; Item 6 (Combined Experian, TransUnion, and Equifax Credit Report, dated November 27, 2010), at 5-6.

[11] Item 8 ([State] Judgment and Lien Filings, dated May 21, 1996), in the amount of $4,027; Item 9 ([State] Judgment and Lien Filings, dated May 21, 1996), in the amount of $29,116.

[12] Item 10 ([State] Judgment and Lien Filings, dated July 30, 1996).

[13] Item 8, *supra* note 11.

[14] Personal Subject Interview, *supra* note 6, at 1.

[15] Item 11 ([State] Judgment and Lien Filings, dated November 26, 2003).

[16] *Id.*

[17] Item 12 ([State] Judgment and Lien Filings, dated January 12, 2005).

[18] *Id.*

[19] Item 14 ([State] Judgment and Lien Filings, dated November 3, 2010).

[20] Personal Subject Interview, *supra* note 6, at 2; Item 13 ([State] Judgment and Lien Filings, dated November 26, 2007).

[21] *Id.* Item 13.

[22] Personal Subject Interview, *supra* note 6, at 2.

[23] *Id.* at 2-3.

described any conditions beyond his control that might have led to his financial difficulties. In about 2005, the Internal Revenue Service (IRS) placed a garnishment on his salary, and took approximately $3,500 per month. The process ended in about 2008, by which time the IRS had garnished about $60,000.[24] In about 2007, the state placed a garnishment on his salary, and took approximately $200 per month.[25] As of December 2010, he contends the balance owed was reduced to around $5,000,[26] but he offered no documentation to support his contention.

In July 2011, Applicant submitted a personal financial statement reflecting a total annual net income of $154,970, including his salary, his spouse's salary, his military retirement, and his social security benefits.[27] He claimed $3,200 in monthly expenses, as well as $5,104 in other financial obligations, including debt payments, tax consultant fees, and mortgage payments.[28] Using his numbers, he should have approximately $4,610 left over each month for discretionary spending or savings.

In mid-2010, Applicant engaged the services of a tax consultant firm to negotiate with the IRS in an effort to obtain a settlement of about $120,000.[29] As of March 2011, he had paid his tax consultants approximately $4,200.[30] However, it is unclear if that amount is for payment of professional services or for actually reducing Applicant's IRS liability. Applicant also claimed that he had hired a tax service to file his 2001 through 2010 tax returns, but he has offered no documentary evidence to support his claim of any such activity. In July 2010, despite his financial delinquencies, Applicant and his wife took a cruise through the Inside Passage of Canada and Alaska.[31]

The SOR identified three purportedly continuing delinquencies, totaling approximately $172,707. Those delinquencies are a federal tax lien, a state tax lien, and a judgment. The federal tax lien is not resolved; the state tax lien is purportedly in the process of being resolved through garnishment; and the judgment has been resolved.

Despite Applicant's claims that he has hired both a tax consultant and a tax service, he has offered no evidence to indicate that he has ever received financial counseling in money management, debt management, debt repayment, or budgeting.

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[24] *Id.* at 1.

[25] *Id.* at 2.

[26] *Id.* It should be noted, however, that on March 18, 2011, a collection agency for the state reflected an unpaid balance of $6,914.69, and that a withdrawal of $200 would take place on March 27, 2011. See Letter from collection agent, dated March 18, 2011, attached to Applicant's Answers to Interrogatories, *supra* note 2.

[27] Personal Financial Statement, undated, attached to Applicant's Answers to Interrogatories, *supra* note 2.

[28] *Id.*

[29] Item 5, *supra* note 2, at 5.

[30] *Id.* at 7 (Statement, dated March 23, 2011).

[31] Personal Subject Interview, *supra* note 6, at 1.

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."[32] 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[33]

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view tshe guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. The entire 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[34] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[35]

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

[32] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[33] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[34] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

[35] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[36]

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."[37] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations 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. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "*inability or unwillingness to satisfy debts*" is potentially disqualifying. Similarly, under AG ¶ 19(c), "*a history of not meeting financial obligations*" may raise security concerns. In addition, under AG ¶ 19(g), "*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*," is also potentially disqualifying. As noted above, on numerous occasions between 1996 and 2010, Applicant failed to file federal or state income tax returns, and both the IRS and the state were forced to file tax liens and take garnishment actions in order to obtain the

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

[37] *See* Exec. Or. 10865 § 7.

delinquent balances. In fact, the payment of taxes is separate and apart from the requirement that income tax returns be filed annually, something Applicant routinely failed to do. In addition, several accounts, including a mortgage, became delinquent, and a judgment and resulting lien were filed against Applicant by another creditor. AG ¶¶ 19(a), 19(c), and 19(g) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "*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*." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "*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*." Evidence that "*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*" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*."[38]

AG ¶ 20(a) does not apply. The nature, frequency, and relative recency of Applicant's continuing financial difficulties and failures to file federal and state income tax returns between 1996 and 2010 make it difficult to conclude that it occurred "so long ago" or "was so infrequent." Applicant offered only a generic comment about "insufficient funds" causing his inability to file his tax returns. In light of his lengthy period of continuing financial problems, and still owing the IRS nearly $160,000, it is unlikely that they will be resolved in the short term, and they are likely to recur. Accordingly, Applicant failed to mitigate his financial situation, and under the circumstances, his actions do cast doubt on his current reliability, trustworthiness, and good judgment.[39]

AG ¶¶ 20(b) and 20(c) do not apply because there is no evidence that Appellant's financial situation was, in any way, caused by circumstances that were

[38] The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

> In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that she or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

[39] *See* ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

beyond his control. His sole explanation was that he had insufficient funds, but he never explained how or why that condition existed. Also, there is no evidence to indicate Applicant has ever received counseling in money management, debt management, debt repayment, or budgeting.

AG ¶ 20(d) partially applies. Applicant had his salary garnished by the IRS and the state government, but those actions do not qualify as "good-faith" efforts. His federal tax lien, in the amount of $159,000, is still pending, and Applicant's only effort regarding resolution occurred in mid-2010, when Applicant engaged the services of a tax consultant firm to negotiate with the IRS in an effort to obtain a settlement of about $120,000. He offered no documentary evidence to support his claim, other than a statement for unspecified services. In this regard, Applicant's statements regarding his efforts or future intent to resolve his IRS lien and his promise to file his delinquent tax returns, without corroborating documentary evidence, are entitled to little weight.[40] The civil judgment against him in November 2007, as well as the lien against him for default on a time-share agreement, in the amount of $6,792, were finally satisfied in April 2010, and his eventual resolution of that account, after three years, does qualify as a "good-faith" effort.

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(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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[41]

There is some evidence in favor of mitigating Applicant's conduct: Although he had not filed federal or state income tax during the period 1996 through 2010, he did

[40] *See* ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008).

[41] *See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

eventually resolve some of the tax liens filed against him. He also resolved the civil judgment and lien against him for default on a time-share agreement. His state tax lien is being paid by garnishment.

The disqualifying evidence under the whole-person concept is more substantial. Applicant has a long history of not filing federal or state income tax returns and generating other financial delinquencies. He seemingly does not pay his accounts, but prefers to have the legal system do so for him by way of liens and garnishments. His claims of "insufficient funds" are unsubstantiated, and given his recent cruise and substantial monthly remainder for discretionary spending, Applicant could have made some efforts to resolve his accounts in a more timely fashion. Applicant's actions indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which raise questions about his reliability, trustworthiness and ability to protect classified information. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES
Administrative Judge