DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 12-10912
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

05/12/2017

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Applicant erroneously concluded that the Internal Revenue Service (IRS) was misapplying the tax laws and did not file or pay his Federal taxes for several years, which resulted in multiple tax liens filed against him. However, he has since recognized his error, filed and paid all requisite taxes, and satisfied the liens. He will continue to comply with all Federal tax requirements. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on May 21, 2012. On April 10, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. The DOD acted under Executive Order (Ex. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20,

1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on April 25, 2016, and requested a decision on the record without a hearing. On June 29, 2016, pursuant to the Directive, Department Counsel requested a hearing before an administrative judge, and notified Applicant of this action. Department Counsel was ready to proceed on August 1, 2016, and the case was assigned to me on September 26, 2016. On December 20, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for January 10, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Department Counsel also offered three documents for Administrative Notice (AN), which were admitted without objection. Applicant testified and submitted Applicant's Exhibit (AX) A and B, which were admitted without objection. I kept the record open until January 24, 2017, to enable him to submit additional documentary evidence. He timely submitted three documents, which I have collectively admitted as AX C without objection. DOHA received the transcript (Tr.) on January 19, 2017.

Findings of Fact

Based on the administrative notice documents, I find the following: Applicant was required by law to file tax returns for tax years 1999 through 2004; and, Applicant's specific contentions for why he was not required to file or pay taxes have been previously adjudicated and rejected as meritless.

The SOR alleges that: Applicant failed to file his Federal income tax returns for tax years 1999 through 2004; between 2008 and 2012 five Federal tax liens totaling $221,405 were filed against Applicant; and, Applicant's wages were garnished to satisfy several of the liens. In his Answer, Applicant admits these allegations and explains the circumstances giving rise to his failure to file his returns and states that all liens were satisfied and released by November 2012. His admissions are incorporated in my findings of fact. The delinquent accounts are corroborated by the July 2015 and May 2014 credit bureau reports (CBR) (GX 4; GX 2.)

Applicant is a 59-year-old systems engineer employed by a federal contractor since 2001, and employed in the defense industry since 1983. He served honorably on active duty in the U.S. Navy from December 1974 to April 1983, and in the Navy Reserve from April 1983 until April 1985. He was granted a security clearance in 1976 while in the military and has maintained various levels of clearances since then. (GX 1; Tr. 35; Tr. 39-40.) He received a bachelor's of science degree in June 1983. He and his wife married in 1980, and they have two adult children. (GX 1.)

In 1995, Applicant was contacted by a friend who was planning on not filing his federal tax return and asked for Applicant's assistance in interpreting the proper application of the tax statutes. In researching these issues, Applicant erroneously concluded that the tax statutes were being misapplied to a class of people of which he was included. (Tr. 44.) He continued to research these issues, and determined that he was not required to pay taxes on money he received in exchange for his labor, and that he could not sign his tax returns without committing perjury. Because of these conclusions, he did not file his Federal tax returns in 2000 for tax year 1999. He continued this practice through tax year 2004. Between 1995 and 2000, Applicant sent numerous letters to the IRS requesting clarification of the tax statutes but never received any return correspondence. He also attempted to consult with several tax attorneys, but none was willing to meet with him. (GX 2; Answer; Tr. 36-37; Tr. 51; Tr. 75.)

Applicant continued his research, including communicating with a number of people via the internet and reading several relevant books, and in 2006 found what he believed to be a correct way to file his tax returns without committing perjury. He timely filed his 2005 tax return as well as his returns for 1999 through 2004. (Tr. 60.) It was also in 2006 that Applicant received his first letter from the IRS stating that it had no record of Applicant filing tax returns for tax years 1999 through 2004. (Tr. 53.)

At some point in 2008, Applicant received a letter from the IRS confirming that his 1999 through 2005 returns were correctly filed. However, several months later, he received another letter from the IRS that stated his returns were not correctly filed. Soon thereafter, in September 2008, Applicant received notice of a Federal tax lien filed against him which encompassed tax years 1999 through 2005 in the amount of $146,486. Applicant promptly reported the lien to his facility security officer. (GX 3; GX 4; Tr. 63.)

After receiving notice of the lien, Applicant mistakenly thought that he would have an opportunity to contest the lien and present his position on the proper application of the tax statutes in court, and took no action on the lien, (Tr. 37.) Applicant timely filed his 2006 through 2009 tax returns in the same manner in which he filed his 1999 through 2005 returns. (GX 1; GX 2.)

In April 2010, the IRS served Applicant with a notice of lien for tax years 2005 and 2006 in the amount of $47,955. (GX 3.) In May 2010, the IRS seized Applicant's wife's vehicle from Applicant's driveway, and began garnishing Applicant's wages. The garnishment continued until January 2011, with the IRS collecting $22,576 from Applicant's pay. The IRS also seized money from Applicant's bank accounts. (GX 1; GX 2.) Shortly after Applicant's wife's car was seized, Applicant retained a tax attorney. The attorney assisted Applicant in filing new returns for tax years 1999 through 2009, instructed Applicant on how to properly file his tax returns going forward, enlightened Applicant about the applicability of the tax laws, and orchestrated the return of Applicant's wife's vehicle. (GX 2; GX 1; Tr. 76; Tr. 65.)

In December 2010, the IRS filed a lien against Applicant for tax year 2009 for $9,897. In April 2012, it filed a lien for tax years 2007 and 2008 for $7,067, and another for tax years 2008 and 2009 for $10,000. (GX3; GX 2.) Between May 2010 and August 2012, Applicant paid all monies owed to the IRS, and all the liens were released between May 2012 and October 2012. (GX 3; GX 2.) Applicant disclosed his tax-related issues on his 2012 e-QIP and candidly discussed them with the investigator during his interview. (GX 1; GX 2.)

Applicant has properly filed his returns and paid his taxes without incident since tax year 2009. (Tr. 76-78; AX C.) Applicant, in part due to the influence of his tax attorney, although not immediately, has "had a change of heart regarding the matter." (Tr. 66.) He admits that he reached "an erroneous conclusion that the law was being misapplied," categorizes his actions as a mistake, continues to comply with all tax requirements, and vows to comply in the future. (Tr. 44; Tr. 79.)

Applicant has held a security clearance for over 40 years, and there is nothing in the record that suggests he has ever mishandled classified information. He worked for his previous federal-contractor employer for 18 years, and has worked for his current employer since 2001. His 2016 performance evaluation shows that he met or exceeded expectations in five areas and that he was rated expert in four areas. It also noted that Applicant was awarded three U.S. patents. (AX B.) Applicant's testimony was straight-forward and sincere.

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's 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 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 testimony, corroborated by the record evidence, establishes three 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 . . . income tax returns as required"). The following mitigating conditions under this guideline 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(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.

Applicant erroneously determined that the tax laws were misapplied to him and he was not legally required to file or pay his taxes. The IRS did not agree with this position, and filed liens against him in 2008, 2010, and 2012. Applicant promptly reported the liens to his security officer, and disclosed his tax-related issues during his background investigation. After the IRS began seizing his assets in 2010, Applicant engaged the services of a tax attorney. Not only did the attorney assist Applicant in properly filing and paying his back taxes, but the attorney also instructed Applicant on how to properly handle his future taxes, and advised him about the applicability of the tax laws. Applicant has timely filed all his returns and paid all his taxes since 2009. He satisfied all the tax liens by October 2012. He sincerely recognizes that his conclusions about the applicability of the tax laws were wrong, and will continue to comply with all IRS requirements. Applicant's prior tax-related financial concerns do not cast doubt on his current reliability, trustworthiness, or good judgment. AG ¶¶ 20(a), 20(c), and 20(d) apply.

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 I have also considered the following:

Applicant served honorably in the military for almost 11 years, and continues to serve the defense industry. He has continuously held a security clearance for more than 40 years. He was straight-forward and sincere in his testimony. I am confident that Applicant has learned from his mistakes and will continue to comply with the tax laws.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his failure to file and pay taxes. Accordingly, I conclude he has 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

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

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

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Stephanie C. Hess
Administrative Judge