DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
-----	)	ISCR Case No. 17-00790
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

02/01/2018

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On October 26, 2015, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application. On June 15, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *National Security Adjudicative Guidelines* (AG) established by Directive 4 of the Security Executive Agent (SEAD 4) (December 10, 2016), effective June 8, 2017.

The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD adjudicators were unable to find 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.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a sworn statement, dated July 25, 2017, Applicant responded to the SOR 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 mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on September 1, 2017, 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. In addition to the FORM, Applicant was furnished a copy of the Directive. Applicant received the FORM on September 11, 2017. Applicant's response was due on October 11, 2017. Applicant chose not to submit any response to the FORM. The case was assigned to me on January 26, 2018.

Findings of Fact

In his Answer to the SOR, Applicant admitted with comments two of the factual allegations pertaining to financial considerations (¶¶ 1.a. and 1.b.) of the SOR. Applicant's admissions and comments are incorporated herein as findings 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 46-year-old employee of a defense contractor. He has served as a merchant seaman with his employer since August 1996. He received a General Educational Development (GED) diploma in 1997. Applicant has never served in the U.S. military. He was granted a secret security clearance at some point in his career, but he does not recall when it was granted. Applicant was married in 1992 and divorced in 1999. He has two children, born in 1991 and 1993.

Financial Considerations[1]

Applicant has a lengthy history of financial problems, starting in 1999, which he attributed to "misguidance and lack of tax knowledge regarding state tax liability as a mariner", and because he was a "victim of false and deceptive advertising whereas [a tax resolution company] did not resolve [Applicant's] tax debt as advertised and has never returned money paid for services not rendered."[2] He said that when he first started his job, he was advised by coworkers that if he was aboard a ship for six months he did not have to pay state income taxes. In around 2008, he began to receive letters from various states regarding taxes he purportedly owed. At some point in 2010 or 2011, he contacted

[1] General source information pertaining to the financial accounts discussed below can be found in the following exhibits: Item 2 (e-QIP, dated October 26, 2015); Item 3 (Personal Subject Interview, dated October 25, 2016); Item 1 (Answer to the SOR, dated July 25, 2017); Item 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated November 14, 2015); and Item 5 (Equifax Credit Report, dated February 15, 2017).

[2] Item 1, *supra* note 1, at 1.

a company specializing in tax issues, and he sought the company's assistance in resolving his tax problems. The company was to help him file back taxes and set up repayment plans. He paid the company $4,000. While awaiting a consolidation plan, he was advised that the money was only the cost of the start-up process. The company took no further action on Applicant's behalf. Twelve months later, what Applicant characterized as "a class-action lawsuit" was filed against the company.[3] Applicant failed to submit any documents to support his contentions that he had a business relationship with the company or that he had made any payments to it.

In October 2016, Applicant informed an investigator from the U.S. Office of Personnel Management (OPM) that he was trying to obtain a home equity loan to enable him to pay off his tax bills, and he hoped to be able to have repayment plans in place or have the bills paid by February 2017. He also noted that for the past four years, one half of his federal income tax refunds were automatically applied to the delinquent state taxes. He anticipated that the amount would be increased to the entire federal refund.[4] In his Answer to the SOR, Applicant repeated his assertion that he had applied for a home equity loan. He failed to submit any documentation, such as correspondence or an application for a home equity loan, or statements regarding state tax payments or federal tax refunds, to support his contentions.

The SOR identified two state tax liens and four allegedly delinquent accounts that had been placed for collection or charged off, as generally reflected by Applicant's November 2015 credit report or his February 2017 credit report. Those debts total approximately $26,341. The current status of those six debts, according to the credit reports, other evidence submitted by the Government and Applicant, and Applicant's comments regarding same, is as follows:

(SOR ¶ 1.a.): a state tax lien entered against him in 2011 in the amount of $16,183.[5] In the absence of documentation described above, I must conclude that the lien has not been resolved.

(SOR ¶ 1.b.): a state tax lien entered against him in 2012 in the amount of $7,566.[6] In the absence of documentation described above, I must conclude that the lien has not been resolved.

[3] Item 3, *supra* note 1, at 9. In fact, one state attorney general obtained a settlement order with the company requiring a lengthy list of new business practices in order for the company to continue to do business, and a substantial fund was to be distributed to former customers. Another state attorney general soon followed up with a nearly $200,000,000 judgment against the company for deceptive business practices. Shortly thereafter, the company filed for bankruptcy. See https://texasattorneygeneral.gov/oagnews/release.php?id=4020

[4] Item 3, *supra* note 1, at 9.

[5] Item 4, *supra* note 1, at 5; Item 5, *supra* note 1, at 3; Item 6 ([State] Judgment and Lien Filings, undated).

[6] Item 4, *supra* note 1, at 5; Item 5, *supra* note 1, at 3; Item 6 ([State] Judgment and Lien Filings, undated).

(SOR ¶ 1.c.): a bank credit card with a $2,000 credit limit and an unpaid balance of $1,579, of which $628 was past due. An unspecified amount was charged off.[7] On April 19, 2017, Applicant settled the account with a payment of $394.78, and the collection agent considered the account closed with a zero balance.[8] The account has been resolved.

(SOR ¶ 1.d.): an automobile loan with a high credit of $16,718 and an unpaid and past-due balance of $482 that was charged off in December 2014.[9] Applicant contended the vehicle was stolen and considered a total loss in 2009, and that the insurance company paid off the remainder of the loan. In his Answer to the SOR, Applicant said he was in the process of disputing the debt with the credit bureaus because "proof of this debt has never been presented to [him] in writing."[10] Applicant failed to submit any documentation, such as a police report, insurance documents, letters between Applicant and the creditor, or copies of the disputes, to support his contentions. In the absence of those documents, I have concluded that the account has not been resolved.

(SOR ¶ 1.e.): a furniture store account with an unpaid balance of $472. During his OPM interview, Applicant claimed he had never missed a payment and had no idea why there was a delinquent balance. In his Answer to the SOR, he said he was in the process of disputing the debt with the credit bureaus because "proof of this debt has never been presented to [him] in writing."[11] Applicant failed to submit any documentation, such as an account statement, letters between Applicant and the creditor, canceled checks, or copies of the disputes, to support his contentions. In the absence of those documents, I have concluded that the account has not been resolved.

(SOR ¶ 1.f.): a medical account with an unpaid balance of $59.[12] Applicant paid the creditor $59 on August 22, 2016,[13] ten months before the SOR was issued. The account has been resolved.

It is not known what Applicant's financial resources may be because he did not submit a Personal Financial Statement to reflect his net monthly income; monthly expenses; and any monthly remainder that might be available for discretionary spending or savings. There is no evidence of a budget or any financial counseling. Applicant failed to prove that his financial situation is now under control.

[7] Item 4, *supra* note 1, at 6; Item 5, *supra* note 1, at 2.

[8] Letter, dated April 19, 2017, attached to Applicant's Answer to the SOR.

[9] Item 4, *supra* note 1, at 6-7.

[10] Item 1, *supra* note 1, at 2.

[11] Item 1, *supra* note 1, at 2.

[12] Item 4, *supra* note 1, at 12.

[13] Single Patient Ledger, dated July 21, 2017, attached to Applicant's Answer to the SOR.

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."[14] 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."[15]

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines 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 the 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."[16] 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.[17]

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

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

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

[16] "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).

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

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."[18]

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."[19] 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 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability to satisfy debts*"* is potentially disqualifying. In addition, AG ¶ 19(b) may apply if there is an "unwillingness to satisfy debts regardless of the ability to do

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

[19] *See* Exec. Or. 10865 § 7.

so." Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations*"* may raise concerns. In addition, AG ¶ 19(f) may apply for "failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required." Applicant failed to timely file his state income tax returns for a multi-year period, as required. As a result, he incurred indebtedness and tax liens (filed in 2011 and 2012) to two different states totaling approximately $23,749. Other delinquent debts brought the entire total to $26,341. AG ¶¶ 19(a), 19(b), 19(c), and 19(f) 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."[20] 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances." Evidence that "the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and 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 and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts."[21] In addition, AG ¶ 20(e) may apply if "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue." Under AG ¶ 20(g), it is potentially mitigating if "the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements."

[20] A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

[21] 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 he 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)).

AG ¶ 20(c) minimally applies, but none of the remaining mitigating conditions apply. The nature, frequency, and recency of Applicant's continuing financial difficulties since at least 2011, when the first tax lien was filed, or before, make it difficult to conclude that it occurred "so long ago" or "was so infrequent," or that it is "unlikely to recur." Applicant acknowledged that he was following some inaccurate tax advice from fellow mariners, and he failed to file his state income tax returns as required. He is credited with resolving two rather minor accounts, but any additional resolution efforts associated with his state taxes and other accounts simply because "proof of this debt has never been presented to [him] in writing," does not reflect any efforts on his behalf to resolve those accounts since he learned of them. While Applicant referred to engaging a company to assist him with his taxes, since becoming disenchanted with their performance, it appears that he simply took no further action with respect to the liens. As for the remaining unpaid debts, claims of action, without documentation to support the claims, are not persuasive. There is insufficient evidence to show that Applicant has recently attempted to address his state tax liens.

Clearance decisions are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. They are not a debt-collection procedure. The guidelines do not require an applicant to establish resolution of each and every debt alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant immediately resolve or make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in an SOR be paid first. Rather, a reasonable plan and concomitant conduct in furtherance of the plan may provide for the payment of such debts one at a time. Mere promises to pay debts in the future, without further confirmed action, are insufficient.

There is little evidence of an ongoing good-faith effort by Applicant to contact the two state revenue departments to resolve Applicant's tax liens.[22] There is little evidence that the conditions that may have resulted in the financial issues between 2011 and the present were largely beyond Applicant's control. There is no evidence of financial counseling, a budget, or any disputes. Applicant offered no evidence to indicate that his financial situation is now under control. Equally as important, there is no evidence that Applicant acted responsibly under the circumstances, and that failure to do so continues to cast doubt on his current reliability, trustworthiness, and good judgment.[23]

[22] "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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

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 SEAD 4, App. A, ¶ 2(d):

> (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 SEAD 4, App. A, ¶ 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. 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.[24]

There is some evidence mitigating Applicant's conduct. Applicant is a 46-year-old merchant seaman who has worked for his employer since August 1996. He contended that he made efforts to resolve his debts, either by engaging professional assistance to do so, or by filing disputes, and he managed to resolve two relatively minor debts.

The disqualifying evidence under the whole-person concept is simply more substantial. Applicant failed to timely file his state income tax returns over a lengthy multi-year period, and in 2011 and 2012, two states filed tax liens against him. Although he claimed to have tried to resolve those two liens, aside from his comments, he failed to submit any documentation to reflect actions purportedly taken by the company or by him. In October 2016, Applicant said he was trying to obtain a home equity loan to enable him to pay off his tax bills, and he hoped to be able to have repayment plans in place or have the bills paid by February 2017. He also noted that for the past four years, one half of his federal income tax refunds were automatically applied to the delinquent state taxes. He anticipated that the amount would be increased to the entire federal refund. In his Answer to the SOR, Applicant repeated his assertion that he had applied for a home equity loan. He failed to submit any documentation, such as correspondence or an application for a home equity loan, or statements regarding state tax payments or federal tax refunds, to support his contentions. There is no documentary evidence of disputes having been filed.

Considering Applicant's multiple failures to resolve his state tax liens from 2011 and 2012, or the accounts which he claimed he was disputing, the lack of documentary

[24] *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).

evidence regarding his current finances, and the absence of character evidence regarding Applicant's honesty, integrity, and trustworthiness, I am unable to reach a positive conclusion pertaining to Applicant's eligibility for a security clearance.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:[25]

> In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has ". . . established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan." The Judge can reasonably consider the entirety of an applicant's financial situation and his [or her] actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. *See* Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Applicant has demonstrated a poor track record of debt reduction and elimination efforts. He failed to fulfill his promises to take timely corrective actions. Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations. *See* SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a. and 1.b.:	Against Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
Subparagraph 1.f.:	For Applicant

[25] ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

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.

_____
ROBERT ROBINSON GALES
Administrative Judge