



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

)  
)  
)  
)  
)

ISCR Case No. 18-00685

Applicant for Security Clearance

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel

For Applicant: *Pro se*

02/08/2019

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant has a history of criminal behavior and other conduct of security concern. He owes about \$48,000 in delinquent child support. He filed his federal and state tax returns for tax years 2016 and 2017 after he received the statement of reasons (SOR). Guidelines D (sexual behavior), J (criminal conduct), F (financial considerations), and E (personal conduct) security concerns are not mitigated. Access to classified information is denied.

**Statement of the Case**

On May 13, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On May 21, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a

clearance should be granted, continued, denied, or revoked. (HE 2) Specifically, the SOR set forth security concerns arising under Guidelines D, J, F, and E.

On June 21, 2018, Applicant responded to the SOR, and he requested a hearing. (HE 3) On July 31, 2018, Department Counsel was ready to proceed. On September 27, 2018, the case was assigned to me. On October 10, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for November 15, 2018. (HE 1) The hearing was held as scheduled.

Department Counsel offered 11 exhibits; there were no objections to the documents; and they were admitted into evidence. (Tr. 19-21; Government Exhibit (GE) 1-11) Applicant did not offer any exhibits at his hearing. (Tr. 16) I received emails and documents after Applicant's hearing, which were admitted as Applicant Exhibits (AE) A-AE I. On December 7, 2018, DOHA received a copy of the transcript of the hearing.

### **Findings of Fact**

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.b, 1.c, 2.a, 2.b, 3.a, 3.c, and 4.a. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is 48 years old, and he is employed by a defense contractor as a cyber-security specialist and penetration tester. (Tr. 6, 24; GE 1) He has worked in this area for the defense contractor for three years. (Tr. 7) In 1988, he graduated from high school. (Tr. 6, 24) In 2005, he graduated from a university and received a bachelor's degree; however, the physical diploma was lost, and despite "back and forth" between Applicant and the university, he was unable to get another copy of the diploma. (Tr. 27-28) In December 2011, he received a technical information technology certification. (Tr. 25) He intends to complete another "year or so" of classes so he can receive another bachelor's degree. (Tr. 6; AE B; AE H) In 2007, he received an on-line master's degree; however, he later discovered the degree program was fraudulent, and his degree was "nullified." (Tr. 6, 30-32; AE A) He established a cyber-security business in 2010, and he received several awards. (Tr. 112)

Applicant served in the Army from August 1988 to August 1991. (Tr. 7) His Army military occupational specialty (MOS) was encrypted signal interceptor. (Tr. 7-8) While he was in the Army, he held a top secret clearance with access to sensitive compartmented information. (Tr. 8) He served in Panama during Operation Just Cause. (Tr. 113) In 1991, his security clearance was revoked. (Tr. 8)

Applicant has never married. (Tr. 32) His four children are ages 16, 17, 20, and 21. (Tr. 32-33, 109) In November 2018, his 22-year-old son was shot and killed. (Tr. 17, 33)

## Sexual Behavior

SOR ¶ 1.a alleges in April 1991, Applicant received nonjudicial punishment (NJP) for four acts of voyeurism, in violation of Article 134, Uniform Code of Military Justice (UCMJ). A military police report indicates a person generally fitting Applicant's description was inside the female shower area looking at female soldiers coming out of or inside the showers on four occasions from December 26, 1990, to January 17, 1991. (GE 11 at 5-7) He received company grade NJP of forfeiture of 7 days of pay, reduction from specialist to private first class, 14 days of restriction, and 14 days of extra duty. (GE 11 at 4) In May 1991, Applicant wrote a statement addressed to his company commander in which he admitted he had a problem with voyeurism; he traced his problem to sexual abuse when he was a child and unresolved anger; he wanted therapy; and he requested a discharge from the Army. (GE 11 at 2-3) At his hearing, he said he was outside someone's room looking in, and he viewed people inappropriately on two or three occasions. (Tr. 58) He said he was caught each time he did it. (Tr. 58) He received some therapy before he was discharged from the Army. (Tr. 60) In August 1991, he received a general discharge under honorable conditions for misconduct. After he was discharged from the Army and continuing until the middle of 1993, he received therapy to recognize and resist triggers for voyeurism. (Tr. 62) The triggers to his desire for voyeurism were emotional extremes such as becoming too angry, hungry, or lonely. (Tr. 62)

SOR ¶ 1.b alleges in April 1994, Applicant was arrested and charged with four counts of aggravated sexual battery. Applicant said that because he was angry about his life, particularly his lack of financial success and low-paying employment, he "graduated" from voyeurism to "frottage." (Tr. 63) According to the Merriam-Webster Dictionary, frottage is "the act of obtaining sexual stimulation by rubbing against a person or object." <https://www.merriam-webster.com/dictionary/frottage>. Applicant said he was in a club, and someone touched a woman inappropriately on her rear. (Tr. 64) He may have bumped her. (Tr. 64) She accused Applicant of touching her inappropriately, and he was arrested and charged with sexual assault. (Tr. 64) Applicant pleaded guilty to sexual assault. (Tr. 64) In his SOR response, he said, "Against my own desire, I touched a woman inappropriately in a public place." At his hearing, he denied that he touched her inappropriately. (Tr. 65) He subsequently admitted he touched one woman inappropriately; however, he denied that he touched the other three women. (Tr. 66) He said that "[o]ut of camaraderie, they all said that I did." (Tr. 66)<sup>1</sup> He conceded that he pleaded guilty to four counts of sexual assault on four women. (Tr. 67-68) He claimed he only touched one woman, and the touching was unintentional and not sexual. (Tr. 67-68) He pleaded guilty because the prosecutor reduced the four felony-level aggravated sexual battery charges to four misdemeanor-level sexual battery charges. (Tr. 68-69) He

---

<sup>1</sup> In his August 1, 2016 Officer of Personnel Management personal subject interview (OPM PSI), Applicant said in 1992 or 1995, he was walking on the street and touched a woman's breast. (GE 2 at 15) He did not realize he touched the woman's breast. (GE 2 at 15) In his November 15, 2016 OPM PSI, he said that the act was not intentional or conscious. (GE 2 at 21) He was arrested for sexual assault. (GE 2 at 15) A 1992 police report indicates Applicant was riding a bicycle and he reached out and grabbed a woman's breast. (GE 3) He was charged with sexual assault. (GE 3) The disposition of this allegation is unknown. It was not addressed during his hearing, and it was not alleged in the statement of reasons (SOR). No adverse inference is made against Applicant because of this allegation.

served 30 days for each misdemeanor-level conviction and paid a substantial fine (between \$1,000 and \$2,000). (Tr. 69-70) He was on probation for three years. (Tr. 70)

SOR ¶ 1.c alleges in September 2005, Applicant was arrested and charged with solicitation of prostitution. Applicant went with an undercover police woman to a motel, and when he arrived, some police came out of the bathroom and arrested him. (Tr. 74-76) He was found guilty of soliciting a prostitute and fined \$335. (Tr. 75) He denied that he offered the undercover police woman any money. (Tr. 75-76) The police report states, "The subject wanted to commit a sex act for \$30.00." (GE 5 at 3) He said he pleaded guilty without admitting that he offered her money for sex. (Tr. 75)

### **Criminal Conduct**

SOR ¶ 2.a cross-alleges the conduct in SOR ¶ 1. SOR ¶ 2.b alleges that in December 2005, Applicant was arrested and charged with petit larceny. (GE 4) An employee of a drug store said Applicant picked up two items and walked out of the store. (Tr. 80) The police accused Applicant of stealing. (Tr. 78) Applicant pleaded not guilty and told the judge he purchased the items earlier from a different store. (Tr. 79) The judge found him guilty of petty larceny, and Applicant believed he was convicted because he was unable to produce the receipts for the items. (Tr. 79) He was sentenced to 12 months in jail with 10 months suspended. (Tr. 81)

SOR ¶ 2.c alleges that in July 2010, Applicant was arrested and charged with petty theft. Applicant said he was in a store and someone left their wallet at the register. (Tr. 82) Applicant took the wallet and attempted to return it to its owner who was outside the store. (Tr. 83) The wallet was returned to the owner. (Tr. 83) The owner said \$200 was missing from his wallet. (Tr. 83) Applicant was convicted of "petty larceny." (Tr. 84-85) He received a \$200 fine and was required to pay \$150 in court costs. (Tr. 84)

### **Financial Considerations**

Applicant was unemployed from August 2012, to June 2014, and from November 2014 to December 2015. (Tr. 45-46, 49) He lived in a homeless shelter for two months, and he lived in his car for a time. (Tr. 48-49) He used the unemployment time to burnish his credentials and earn information technology certifications. (Tr. 46) He recently received several salary increases, and his current salary is around \$104,000. (Tr. 45, 100) He receives 30 percent disability pay (\$497 monthly) from the Department of Veterans Affairs. (Tr. 108)

Applicant's SOR alleges the following financial issues:

SOR ¶ 3.a alleges his student loan for \$2,272 was charged off. Applicant is currently enrolled in college, and he believed the correct loan status should be deferred. (Tr. 40) He has about \$12,000 in student loans that are not deferred because he "took a pause at school." (Tr. 73) He owes approximately \$46,000 in student loans and they are in deferment because he has been enrolled in a bachelor's degree program since 2016. (AE B) This debt is mitigated.

SOR ¶ 3.b alleges a collection debt for \$350. Applicant was unaware of the source of the debt, and he used a credit repair company to dispute his responsibility for it. (Tr. 42-43) This is the only SOR debt in collections. Applicant is credited with mitigating this debt.

SOR ¶ 3.c alleges a delinquent child-support debt for \$55,584 owed to a state department of social services. Applicant said he started paying child support in 1996 or 1997. (Tr. 36) He said he consistently made child-support payments for the past three years, and whenever possible he pays extra to reduce the arrearage. (Tr. 87) In his November 15, 2016 Officer of Personnel Management personal subject interview, Applicant said his child-support arrearage was \$46,715. (GE 2 at 21) His current arrearage is about \$48,000. (Tr. 72) In October 2018, he owed the following amounts for four children: \$22,613; \$9,988; \$3,900; and \$11,728, for a total of \$48,229. (Tr. 71; AE G) He currently pays \$475 through a wage withholding or garnishment<sup>2</sup> for one child and \$475 for his arrearage or a total of \$950 per two-week pay period. (Tr. 36-37, 100) He said this amounts to \$1,400 or \$1,400 monthly. (Tr. 100) He said he pays extra each month in addition to the wage withholding. (Tr. 38) His November 16, 2018 child-support statement indicated he paid \$760. (AE G) In June 2018, he ended the garnishment and is voluntarily paying his child-support debt. (AE A; AE G) This debt is not mitigated.

Applicant was unsure when he filed his federal income tax returns for tax years 2014 and 2015. (Tr. 114) He said he had not “completely” filed tax returns for the last five years. (Tr. 113, 115) He said, “I have not filed taxes for 2017 yet, but I have filed taxes for ’15 and ’14.” (Tr. 114) He said he filed his 2016 tax return. (Tr. 114) I asked him to provide his Internal Revenue Service Form 1040s for the previous three years. (Tr. 116) Applicant did not object to Department Counsel’s proposed amendment of the SOR to add SOR ¶¶ 3.d through 3.g.

SOR ¶¶ 3.d and 3.e allege Applicant failed to timely file his federal income tax returns for tax years 2016 and 2017. (Tr. 117) SOR ¶¶ 3.f and 3.g allege Applicant failed to timely file his state income tax return for tax years 2016 and 2017. (Tr. 117)

After Applicant’s hearing, he provided documentation depicted in the following table for tax years 2013, 2014, 2016, and 2017 (not 2015).

---

<sup>2</sup> Of course, Applicant loses some mitigating credit because his child support payments were made through garnishment of his salary even though his opportunity to establish a payment plan may have been limited at times because of unemployment, lack of income, and other financial commitments. Payment of a debt “though garnishment rather than a voluntary effort diminishes its mitigating force.” *Compare* ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) *with* ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns). *See also* ISCR Case No. 09-05700 at 4 (App. Bd. Feb. 24, 2011) (garnished payments towards delinquent tax debts is not mitigating information in light of other factors); ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) (remanding the case to the administrative judge and stating when addressing an Internal Revenue Service garnishment, “On its face, satisfaction of a debt through the involuntary establishment of a creditor’s garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor.”).

Tax Year	Date Filed	Adjusted Gross Income	Federal Income Tax Refund	Source
2013	Dec. 14, 2018	\$7,481 <sup>3</sup>	\$209	AE C, F
2014	Dec. 14, 2018	\$50,311	\$2,165	AE D, F
2016	Dec. 14, 2018	\$66,935		AE F
2017	Dec. 14, 2018	\$84,804	\$1,007	AE F

Applicant's state and federal income tax returns for tax years 2013, 2014, 2016, and 2017 did not indicate that he owed any federal or state income taxes. (AE C-AE F) Applicant said he did not need to file a tax return for tax year 2012 because his income was too low, and he said his tax preparation service said he did not need to file tax returns if it was more than six years ago. (AE A) If the IRS wants to pursue tax evasion or related charges, it must do this within six years from the date the unfiled return was due. This six-year time limit does not remove the requirement to file tax returns prior to 2012. No adverse inference is made about whether Applicant has failed to file or timely file tax returns other than those for tax years 2014, 2016, and 2017.

### Personal Conduct

SOR ¶ 4.a alleges that Applicant was terminated from his employment in January 2016 for viewing inappropriate material on a computer while at work. (Tr. 51-57) While at work, he was on a website where women do "silly things" such as "twerking" or "shaking their butts." (Tr. 53) He said not all of the videos on the website are sexually oriented. (Tr. 55) He was working at the front desk of a hotel, and another employee saw the inappropriate video and reported him to management. (Tr. 53) He said the problem was he walked away from the desk, and he failed to close out the video. (Tr. 53) The time he was caught on the website at work was not the first time he viewed material from that website at work. (Tr. 56-57) SOR ¶ 4.b cross-alleges the conduct alleged in SOR ¶¶ 1 and 2.

### Character Evidence

Applicant provided 19 pages of letters and emails positively describing his work and contributions to his community from 1996 to 2011. (AE I) The statements laud his integrity, responsibility, dependability, and intelligence. (AE I) He worked numerous hours as a volunteer and often helped others with computer problems. (AE H) He presented certificates and diplomas, dated from 1996 to 2015, documenting his training and education accomplishments.

---

<sup>3</sup> The income threshold for filing his 2013 tax return was \$10,000 (filing status single under age 65), and Applicant was not required to file a tax return for tax year 2013. See IRS Publication 501, Cat. No. 15000U, *Exemptions, Standard Deduction, and Filing Information For use in preparing 2013 Returns* at 2 (Dec 03, 2013), <https://www.irs.gov/pub/irs-prior/p501--2013.pdf>.

## 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.” *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 applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “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, nothing should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it

is clearly consistent with the national interest to grant or continue his or her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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**

### **Sexual Behavior**

AG ¶ 12 describes the security concern raised by sexual behavior as follows:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 provides conditions that could raise a security concern and may be disqualifying in this case including:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

In 1991, while Applicant was in the Army, he engaged in four acts of voyeurism, when he viewed female soldiers in showers. He received nonjudicial punishment and a general discharge under honorable conditions for misconduct. In 1994, Applicant touched four women in an inappropriate sexual manner. He was arrested and charged with four counts of aggravated sexual battery. He was convicted of four counts of misdemeanor-level sexual battery. In 2005, he solicited a sex act for money from an undercover police woman, and he was convicted of solicitation of prostitution. AG ¶¶ 13(a), 13(c), and 13(d) are established and consideration of potential mitigating conditions is required.

AG ¶ 14 describes four conditions that could mitigate security concerns including:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;



(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions fully apply; however, AG ¶¶ 14(b) and 14(c) partially apply. Applicant received some therapy in 1992 and 1993. He has a good understanding of emotions that may trigger sex crimes. His most recent conviction for a sex crime was in 2005, and his sex crimes are not recent. He provided multiple character letters attesting to his good behavior and contributions to his employer and community. Desire for self-improvement is exemplified by the numerous certifications and diplomas he earned. His good work performance is shown by a series of raises he has received from his current employer.

The evidence against mitigation is more persuasive. Additional sexual crimes occurred after he received therapy. There is a lingering concern that future criminal sexual behavior will occur because he committed multiple sexual offenses, and he failed to accept full responsibility at his hearing for his criminal conduct. He committed four voyeurism criminal offenses against female soldiers when he was in the Army, and after he left the Army, he received five misdemeanor-level convictions in civilian court (four sexual assaults and one solicitation of prostitution crimes). He essentially claimed that he was not criminally responsible for any of the offenses of which he was convicted. Sexual behavior security concerns are not mitigated.

## **Criminal Conduct**

AG ¶ 30 describes the security concern about criminal conduct, “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.”

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶¶ 31(a) and 31(b) are established for the reasons stated in the previous section. In addition, Applicant committed thefts in 2005 and 2010, and he was convicted of “petty larceny.”

AG ¶ 32 lists four conditions that could mitigate security concerns including:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant receives partial mitigation credit under AG ¶¶ 32(a) and 32(d) for the same reasons that AG ¶¶ 14(b) and 14(c) in the previous section partially apply. Criminal conduct security concerns are not mitigated as explained in the sexual behavior section.

## Personal Conduct

AG ¶ 15 describes the security concern about personal conduct as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 lists conditions that could raise a security concern and may be disqualifying as follows:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶¶ 16(d) and 16(e) are established for the reasons stated in the previous sexual behavior and criminal conduct sections. In addition, Applicant viewed inappropriate material on a computer at work and was terminated from his employment.

AG ¶ 17 lists conditions that could mitigate security concerns in this case as follows:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant receives partial mitigation credit under AG ¶¶ 17(c), 17(d), and 17(e) for the same reasons that AG ¶¶ 14(b) and 14(c) in the sexual behavior section partially apply. Personal conduct security concerns are not mitigated as explained in the sexual behavior section.

## **Financial Considerations**

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts"; "(c) a history of not meeting financial obligations"; and "(g) failure to file annual Federal, state, or local income tax returns as required . . . ." Applicant admitted that he failed to timely file his federal and state tax returns for tax years 2016 and 2017. He owes about \$48,000 in delinquent child support. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Seven mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;<sup>4</sup>

(e) 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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

No mitigating conditions fully apply; however, Applicant presented some mitigating information. He had variations in his income, and periods of unemployment after leaving the Army. These unusual circumstances were beyond Applicant's control and caused or contributed to Applicant's financial problems. In June 2018, he ended the garnishment of

---

<sup>4</sup>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) 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)).

his pay for child support, and in the last three years, he had decreased his child-support debt arrearage by several thousand dollars. He is credited with mitigation of the debts in SOR ¶¶ 3.a through 3.c. Applicant receives significant mitigation under AG ¶ 20(g) because there is no evidence that he owes any federal or state income taxes, and he filed his overdue tax returns for tax years 2013, 2014, 2016, and 2017. His income over the last three years has increased, and his annual income is now around \$104,000.

Applicant failed to timely file his federal and state income tax returns for tax years 2014, 2016, and 2017.<sup>5</sup> The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case

---

<sup>5</sup> Applicant’s SOR does not allege that he did not timely file his federal and state tax returns for tax year 2014. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

*Id.* (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant’s failure to timely file his state and federal tax returns for tax year 2014 will not be considered except for the five purposes listed above.

No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

In conclusion, Applicant receives substantial credit for getting his federal and state tax returns filed in December 2018, and establishing he does not owe any taxes. However, he failed to timely file his tax returns for 2014, 2016, and 2017. Financial considerations concerns are not mitigated.

### **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. I have incorporated my comments under Guidelines D, J, F, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 48 years old, and he has been employed by a defense contractor as a cyber-security specialist and penetration tester for three years. In 2005, he graduated from a university and received a bachelor’s degree. In December 2011, he received a technical information technology certification. He intends to complete another “year or so” of classes so he can receive another bachelor’s degree. In 2007, he received an on-line master’s degree; however, he later discovered the degree program was fraudulent, and his degree was “nullified.” He established a cyber-security business in 2010, and he received several awards.

Letters and emails positively describe Applicant’s work and contributions to his community. He worked numerous hours as a volunteer and often helped others with computer problems. He diligently endeavored to improve his knowledge and credentials.

Applicant served in the Army from August 1988 to August 1991. His Army MOS was encrypted signal interceptor. While he was in the Army, he held a top secret

clearance with access to sensitive compartmented information. He served in Panama during Operation Just Cause.

Applicant's history of failing to timely file his federal and state income tax returns when due raises unresolved financial considerations security concerns.<sup>6</sup> When an issue involving taxes is involved, an administrative judge is required to consider how long an applicant waits to file their tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments.<sup>7</sup> It is a positive development that Applicant filed his federal and state tax returns for tax years 2013, 2014, 2016, and 2017. However, the primary financial considerations problem here is that Applicant did not timely file his federal and state tax returns for tax years 2014, 2016, and 2017 until December 2018.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Guideline D, J, F, and E security concerns are not mitigated.

---

<sup>6</sup> See ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

<sup>7</sup> See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant's failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse's medical problems. The Appeal Board emphasized "the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information." *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted)).



## 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 D: Subparagraphs 1.a through 1.c:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline J: Subparagraphs 2.a through 2.c:	AGAINST APPLICANT Against Applicant
Paragraph 3, Guideline F: Subparagraphs 3.a through 3.c: Subparagraphs 3.d through 3.g:	AGAINST APPLICANT For Applicant Against Applicant
Paragraph 4, Guideline E: Subparagraphs 4.a and 4.b:	AGAINST APPLICANT Against Applicant

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

---

MARK HARVEY  
Administrative Judge