DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 18-01102
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

10/03/2019

_____

Decision

_____

HARVEY, Mark, Administrative Judge:

Applicant has known that the Internal Revenue Service (IRS) sought additional taxes from him for tax years 2009 and 2010 since 2013, and his tax debt remains unresolved. He did not timely file his federal income tax return for tax year 2015. He has three other unresolved delinquent debts. He did not establish that he was unable to make greater progress resolving his delinquent debts. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 31, 2015, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On June 21, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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 interests of national security to grant or continue a security

clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations). (Transcript (Tr.) 27-28; Hearing Exhibit (HE) 4) On November 1, 2018 and June 25, 2019, the Defense Office of Hearings and Appeals issued amended SORs alleging additional allegations under Guideline F. (HE 5, 6)

On July 26, 2018, May 15, 2019, and June 25, 2019, Applicant responded to the SOR and amended SORs. (Tr. 28; HE 5, 6) On July 16, 2018, he requested a hearing. (HE 5) On November 8, 2018, Department Counsel was ready to proceed. On January 3, 2019, the case was assigned to an administrative judge. On May 13, 2019, the case was transferred to me for administrative reasons. On June 10, 2019, DOHA issued a notice of hearing, setting the hearing for June 27, 2019, using video teleconference. (HE 3)

During the hearing, Department Counsel offered six exhibits; Applicant offered three exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 19; GE 1-6; Applicant Exhibit (AE) A-AE C) On July 11, 2019, DOHA received a transcript of the hearing. On August 16, 2019, Applicant submitted three exhibits, an email and two .pdf documents, which were admitted without objection. (AE D-AE F) On August 19, 2019, Applicant submitted an email. (AE G) The record was scheduled to close on August 28, 2019. (Tr. 63-64, 74-75) On August 19, 2019, I granted Applicant a final extension until September 30, 2019. (AE G) On September 30, 2019, Applicant provided: an email; an Installment Agreement Request, IRS Form 9465; and a letter from his accountant. (AE H-AE J)

Some details were excluded to protect Applicant's right to privacy. The tax amounts are rounded to the nearest $1,000. Specific information is available in the cited exhibits.

Findings of Fact

In Applicant's SOR responses, he admitted the allegations in SOR ¶¶ 1.a, and 1.e through 1.i. (HE 6) He denied the other SOR allegations except he was unsure about SOR ¶ 1.j. (HE 6) He also provided extenuating and mitigating information. (HE 6) Applicant's SOR responses and attached documentation are admitted into evidence. (Tr. 16)

Applicant is a 46-year-old database administrator for a defense contractor. (Tr. 8; GE 1) In 1991, he graduated from high school. (Tr. 8) He has 93 college credits, and he has substantial vocational training. (Tr. 9) From 1995 to 2001, he served in the Army. (Tr. 10) When he left active duty, he was a sergeant (E-5). (Tr. 10) He worked for several government contractors from 2001 to the present. (Tr. 22-24) He was married from 1995 to 2018, and in June 2019, he married. (Tr. 11) His children are ages 8, 15, 22, and 23. (Tr. 11) His spouse from his recent marriage is an artist, and she is currently unable to contribute to the family income. (Tr. 57)

Financial Considerations

SOR ¶ 1.a alleges that a federal tax lien was filed against Applicant in April 2016 for $49,000. SOR ¶¶ 1.b, 1.c, and 1.d allege Applicant failed to timely file his federal income tax returns for tax years 2014, 2015, and 2017. Applicant used accountants to help him file his income tax returns for at least the previous 10 years. (Tr. 35-36) Applicant said the IRS initially audited tax years 2008, 2009, and 2010, and he was first notified that additional taxes were due in 2013 or 2014. (Tr. 31)

On November 8, 2012, the IRS wrote Applicant and explained that the IRS reclassified Applicant and some other workers from "independent contractors" or 1099 filers to "employees" who receive W-2s from their employer. (Tr. 31; AE C at 31) The IRS denied Schedule C expense deductions; however, Applicant was credited with the employer paying the employer's share of Social Security taxes. (AE C at 31) For tax year 2009, Applicant owed an additional $17,000 and for tax year 2010, Applicant owed an additional $6,000. The IRS advised Applicant that he could appeal the IRS examination. (Tr. 31-32; AE C at 29) On October 16, 2013, the IRS wrote Applicant about his tax debt for tax years 2009 and 2010 and indicated he owed a total of about $40,000 for those two years. (GE 6) The IRS provided a detailed list of the charges and changes for those tax years. (GE 6)

The IRS represented that Applicant owed the following federal income tax debts:

Tax Year	Adjusted Gross Income	IRS Claim at Bankruptcy Proceeding	IRS Claim of Interest and Penalties to Petition Date of Aug. 11, 2018	Exhibit
2008	$140,000	n/a	n/a	GE 3 at 3
2009	$135,000	$17,000	$8,000	AE A at 3; AE C at 5; GE 3 at 5
2010	$135,000	$14,000	$4,000	AE A at 3; AE C at 5; GE 3 at 9
2011	$108,000	n/a	n/a	AE A at 3; AE C at 5; GE 3 at 13
2012	$109,000	n/a	n/a	GE 3 at 15
2013	$106,000	n/a	n/a	GE 3 at 17
2014	Unknown	$10,000	$1,000	AE A at 3; AE C at 5
2015	Unknown	$10,000	$1,000	AE A at 3; AE C at 5
2016	$108,000	n/a	n/a	GE 3 at 23
2017	Unknown	$11,000	$0	AE A at 3; AE C at 5; GE 3 at 25
Total		$62,000	$15,000+$9,000= $24,000	AE C at 5

Applicant did not disclose any delinquent debts and that he failed to timely file or fully pay his federal income taxes when due on his May 31, 2015 security clearance

application (SCA). (GE 1) In Applicant's February 20, 2018 Office of Personnel Management (OPM) personal subject interview (PSI), he discussed the IRS tax lien, said he disputed his tax debt, and claimed he timely filed all tax returns. (GE 2 at 7-8) In the OPM PSI, Applicant said he had a plan to resolve his delinquent debts, and he intended to execute that plan. (GE 2 at 10) He blamed his delinquent debts on his former spouse's gambling and excessive spending. (GE 2 at 10-11)

The IRS indicated as of August 11, 2018, Applicant's federal income tax debt totaled $85,000. (AE C at 5) The IRS summary included information about taxes, interest, and penalties. (AE C at 5) The IRS letter also notes that the IRS had not received a tax return for tax years 2014, 2015, and 2017, and Applicant owed delinquent taxes and/or interest and penalties for tax years 2009, 2010, 2014, 2015, and 2017. (AE C at 1, 5; GE 3 at 19, 21; GE 3 at 25) Applicant's accountant also said he owed delinquent taxes for tax year 2011 ($206). (AE C at 1, 5)

On December 18, 2018, the U.S. Attorney filed a response in Applicant's bankruptcy indicating: (1) Applicant did not appeal the audits for tax years 2009 and 2010, and the audit's determination of his tax debt constitute his tax liability; and (2) Applicant never filed a tax return for tax year 2014. (GE 6 at 65)

Applicant said he timely filed the tax returns, and he had copies of them. (Tr. 36-37) I asked Applicant to provide copies of the tax returns for tax years 2014, 2015, and 2015. (Tr. 65) He said he was going to ask his accountant when she submitted those tax returns. (Tr. 65) He sent a registered mail receipt showing something was submitted to the IRS on April 15, 2015, and he said this was his 2014 federal income tax return. (Tr. 66, 73; AE A at 2) I have credited Applicant with timely filing his federal income tax return for tax year 2014. He said he was unaware that the IRS had not received his tax returns until 2018 when he received the IRS information at his bankruptcy. (Tr. 37) He said he "reproduced" the tax returns and received the refunds. (Tr. 37)

Applicant's May 22, 2018 IRS tax transcript for tax year 2016 indicates a $4,000 refund was transferred to address his debt for tax year 2009 on April 15, 2017. (GE 3 at 24)

On May 20, 2019, the IRS notified Applicant that he was credited with a $4,000 refund for tax year 2015, and this refund was applied to his tax debt for tax year 2009. (AE C at 9) He was also credited with a $3,000 refund for tax year 2017, and this refund was applied to his tax debt for tax year 2009. (AE C at 11)

Applicant said he was unwilling to settle with the IRS because the IRS kept changing the amounts owed. (Tr. 53, 60) He said the IRS did not act in good faith. (Tr. 54) He believed everyone who worked for his employer was targeted by the IRS. (Tr. 54-55) Applicant believed he was making constructive progress resolving his federal income tax debt because he recently asked the IRS for an advocate to be appointed. (Tr. 34) He wanted the tax advocate to obtain a settlement amount from the IRS, and then negotiate an offer in compromise and payment plan. (Tr. 60)

Applicant's May 10, 2019 IRS tax transcript for tax year 2009 shows a zero balance owed. (AE C at 17-22) On October 8, 2018, the IRS wrote off the balance due of $30,000. (AE C at 22) It is unclear why the IRS applied the refunds of $4,000 and $3,000 for tax years 2015 and 2017 to tax year 2009 because they were applied in 2019 after the IRS wrote off the balance owed for 2009.

Applicant's May 22, 2018 IRS tax transcript for tax year 2009 shows $30,000 owed. (GE 3 at 5) The most recent payment that was not a refund from another tax year was $150 paid on February 27, 2017. (GE 3 at 8)

On June 25, 2019, Applicant's accountant wrote that Applicant owed an unspecified amount to the IRS for tax year 2009, and citing a May 19, 2019, IRS tax transcript, the accountant said Applicant owed $24,000 to the IRS for tax year 2010. (Tr. 57; AE C at 1-2, 24-28) The most recent payment toward his tax debt for tax year 2010, according to the May 19, 2019 IRS tax transcript, was $150 on February 10, 2014. (AE C at 27; GE 3 at 11) The IRS added $11,000 to the debt for tax year 2010 on February 10, 2014 "by examination." (AE C at 2, 27; GE 3 at 11) The accountant was unsure about the basis of examination's result. (AE C at 2) Applicant's accountant believes the tax debt for tax year 2010 is unsettled and might be substantially less. (Tr. 58; AE C at 2)

Applicant believed the IRS miscalculated his taxes, and he was actually taxed as both an employee and an independent contractor. (Tr. 32) Applicant believed the lien was filed against his residence; he was able to refinance his mortgage; and he believed the lien was lifted. (Tr. 33) Applicant said that his accountant determined he might be due a refund. (Tr. 32)

On September 30, 2019, Applicant sent an email and provided an Installment Agreement Request, IRS Form 9465 indicating he offered to settle a $48,000 IRS debt by making $884 monthly payments for 72 months. (AE G; AE I) Applicant's signature is dated September 27, 2019. (AE I) Payments under the installment agreement start on November 25, 2019. (AE I)

Applicant continues to contest the amount of the tax debt, and his accountant plans to meet with a taxpayer advocate. (AE I; AE J) Applicant's accountant promised to work with the taxpayer advocate to resolve Applicant's tax issues. (AE J)

SOR ¶ 1.e alleges Applicant filed for bankruptcy under Chapter 13 of the Bankruptcy Code in August 2018, and it was dismissed on April 25, 2019. Applicant said the IRS was not cooperating with him, and he filed for Chapter 13 bankruptcy protection. (Tr. 38) His attorney advised him that the bankruptcy was a good idea, and he went along with this advice. (Tr. 60) The bankruptcy required monthly payments that Applicant believed he could not afford; the IRS "changed the deal"; and he elected not to continue the bankruptcy. (Tr. 39-41) He received a $19,000 refund from the bankruptcy court. (Tr. 51) He said he was retaining the $19,000 for the present. (Tr. 51) He has about $35,000 in his 401(k) account, and he is holding those funds in reserve too. (Tr. 51-53)

SOR ¶¶ 1.f and 1.g allege that two charged-off debts were owed to the same bank for $9,286 and $10,590. Applicant said his former spouse handled the family finances during their marriage, and she mismanaged these two credit cards. (Tr. 41-43) Applicant assumed responsibility for the debts in his divorce, and the creditor charged off the debts. (Tr. 42) He accepted responsibility for the debts, and he said it was very difficult to settle them. (Tr. 42) In a letter dated August 2, 2019, the creditor for the $9,286 debt agreed to settle the debt for $5,575 with the first installment payment of $3,645 due by August 1, 2019. (AE E) It is unclear why the letter is dated after the first payment is due. (AE E) He did not present any evidence of payments actually made to address these two delinquent bank debts.

SOR ¶ 1.h alleges Appellant's has a $208,760 mortgage debt that is $15,601 past due. Applicant said the account became past due during the Chapter 13 mortgage process. (Tr. 43) On July 12, 2019, Applicant accepted a new payment arrangement with the mortgage lender, and on July 18, 2019, the mortgage lender signed the agreement. (Tr. 44; AE B; AE F) At the time of his hearing, he expected to make his first mortgage payment under the new agreement on August 1, 2019; however, according to his mortgage agreement, his first payment is due on September 1, 2019. (Tr. 45; AE F)

SOR ¶ 1.i alleges Appellant has a $2,103 credit-card debt that is $258 past due. Applicant said he erroneously indicated in response to a DOHA interrogatory that he was responsible for the debt. (Tr. 46) He subsequently determined that he was an authorized user on this credit-card account, and he was not responsible for this debt. (Tr. 45-47)

SOR ¶ 1.j alleges Appellant has a $1,061 bank debt that is $293 past due. Applicant was responsible for this debt in the divorce decree. (Tr. 47) Applicant said he was unaware of this account, and it did not appear in his credit report. (Tr. 47) He accepted responsibility for this debt in his SOR response.

Applicant said he did not have any formal financial counseling; however, he did receive advice and counsel from his accountant. (Tr. 55) His Chapter 13 bankruptcy filing indicates he had credit counseling within 180 days of filing his Chapter 13 bankruptcy in August 2018. (GE 6 at 5 of 54) He uses a monthly budget, and he sets aside about half of his income for debt resolution. (Tr. 55-56)

Character Evidence

A GG-13 has known Applicant for more than 20 years and worked with Applicant for nine years. (AE A at 5) He described Applicant as loyal and trustworthy, and he recommended approval of Applicant's security clearance. (AE A at 5)

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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the 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 in this decision should be construed to suggest that it is based, 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, Secretary of Defense, and DNI 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 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

> 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

> This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; "(b) unwillingness to satisfy debts regardless of the ability to do so"; "(c) a history of not meeting financial obligations"; and "(f) 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." The record establishes AG ¶¶ 19(a), 19(b), 19(c), and 19(f).

AG ¶ 20 lists financial considerations mitigating conditions which may be applicable in this case:

> (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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) 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;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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.

The DOHA 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).

Applicant's spouse was financially irresponsible, and his marriage to her ended in divorce. Applicant believed he was an independent contractor when he filed his tax returns. The IRS subsequently determined he was an employee. This change in status resulted in substantial additional taxes owed to the IRS. These are circumstances beyond his control that adversely affected his finances. However, these circumstances are insufficiently detailed to prove he acted responsibly under the circumstances. He received financial counseling during the Chapter 13 bankruptcy process, and he generated a budget; however, there are not clear indications his financial problems are under control. He did not establish that he was unable to better address his delinquent taxes and other debts. He did not provide proof that he diligently attempted to establish payment plans to address his taxes that he learned were delinquent in 2013 and three other nontax delinquent debts. He did not establish a track record of payment of his delinquent debts.

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. Sept. 13, 2016)).

Applicant's SOR does not allege he did not disclose any delinquent debts and his failure to timely file or fully pay his federal income taxes when due on his May 31, 2015 SCA. 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. Apr. 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)). The allegation that he did not disclose any delinquent debts and his failure to timely file or fully pay his federal income taxes when due on his May 31, 2015 SCA will not be considered except for the five purposes listed above. Inaccurate information in an SCA is particularly important in the assessment of Applicant's credibility and promises to resolve debts.

Applicant has taken an important step towards showing his financial responsibility. In late 2018 or 2019, he filed his federal income tax returns for tax years 2015 and 2017; however, his filing of his tax return for tax year 2015 was not timely. I decline to credit him with timely filing his federal tax return for tax year 2015 without a statement from his accountant or an email showing when his tax return was filed or at least sent to the IRS. On May 20, 2019, the IRS notified Applicant that he was credited with a $4,000 refund for tax year 2015, and this refund was applied to his tax debt for tax year 2009. (AE C at 9) He should have known that his tax return for tax year 2015 was not filed earlier when he did not receive a refund, and instead he received a bill from the IRS, which is an indication the IRS generated a substitute return.

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense. Title 26 U.S.C, § 7203, willful failure to file return, supply information, or pay tax, reads:

> Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . .

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931). For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as a federal crime. In regard to the failure to timely file federal and state income tax returns, 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) (emphasis in original). *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 [his or her] 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 [his or her] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. *See* ISCR Case 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 employing 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 ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

> Applicant filed his 2011 Federal income tax return in December 2013 and received a $2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of $3,664 for 2012 and $1,013 for 2013.

Even if no taxes are owed when tax returns are filed, the Appeal Board provided the following principal rationale for reversing the grant of a security clearance:

> Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, [that applicant] did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted). AG ¶ 20(g) applies in part because he filed his tax returns and paid some of his required taxes; however, the timing of the filing of his tax returns is an important aspect of the analysis. In ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) the Appeal Board reversed the grant of a security clearance, discussed how AG ¶ 20(g) applied, and noted:

> The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, Applicant's filing of his Federal income tax returns for 2009-2014 after submitting his SCA, undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit.

Applicant's SOR indicates two large delinquent debts are in charged-off status on his credit report. A "charged-off debt" is an accounting entry. A creditor considers a debt owed to the creditor to be an asset. When the value of the asset is in doubt, the creditor is required to change the status of the debt to reflect its current status. When the debt appears to be uncollectible, the creditor should change the status for accounting purposes from being an asset to charged off. Notwithstanding the change to charged-off status, a creditor may still sell the debt to a collection agent, and the debtor may still pay or settle the debt. Eventually, the charged-off debts will be dropped from the debtor's credit report. "[T]hat some debts have dropped off his credit report is not meaningful evidence of debt resolution." ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer. Title 15 U.S.C. § 1681c. *See* Federal Trade Commission website, Summary of Fair Credit Reporting Act Updates at Section 605, https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf. Debts may be dropped from a credit report upon dispute when creditors believe the debt is not going to be paid, a creditor fails to timely respond to a credit reporting company's request for information, or when the debt has been charged off. "Mere evidence that debts no longer appear on credit reports is not reason to believe that they are not legitimate or that they have been satisfactorily resolved." ISCR Case No. 16-02941 at 2 (App. Bd. Dec. 29, 2017) (citing ISCR Case No. 14-03747 at 2-3 (App. Bd. Nov. 13, 2015)).

Applicant received a settlement offer on the charged-off debt in SOR ¶ 1.f for $9,286, and he did not establish that he was unable to settle the debt earlier with the termination of his bankruptcy and the return of $19,000 from the bankruptcy court.

In sum, Applicant's accountant said Applicant owed $24,000 to the IRS for tax year 2010. On September 27, 2019, Applicant signed an offer to the IRS to begin payments under the installment agreement on November 25, 2019, to address a $48,000 tax debt. Applicant failed to prove he timely filed his federal income tax return for tax year 2015. There is insufficient evidence about why Applicant was unable to file his federal tax return for tax year 2015 on time. He owes two charged-off debts to the same bank for $9,286 and $10,590, and he owes a $1,061 bank debt that is $293 past due. He has not made any recent payments to address any of these debts. He did not establish he was unable to make greater progress resolving his delinquent SOR debts, including his delinquent taxes. Applicant failed to establish mitigation of financial considerations security concerns for the allegations in SOR ¶¶ 1.a, 1.c, 1.f, 1.g, and 1.j.

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(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 AG ¶ 2(c), "[t]he 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. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 46-year-old database administrator for a defense contractor. He has 93 college credits, and he has substantial vocational training. From 1995 to 2001, he served in the Army. When he left active duty, he was a sergeant. He worked for several government contractors from 2001 to the present. He was married from 1995 to 2018, and in June 2019, he married. His children are ages 8, 15, 22, and 23. A GG-13 has known Applicant for more than 20 years and worked with Applicant for nine years. He described Applicant as loyal and trustworthy, and he recommended approval of Applicant's security clearance.

Applicant owes $24,000 to the IRS for tax year 2010. On September 27, 2019, Applicant signed an offer to the IRS to begin payments under the installment agreement on November 25, 2019, to address a $48,000 tax debt, which includes the tax debt for tax year 2010. Applicant plans to continue to contest the amount of his tax debt. Applicant failed to prove he timely filed his federal income tax return for tax year 2015.

The Appeal Board's emphasis on security concerns arising from tax cases is instructive and binding on administrative judges. *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 his failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before the retired E-9's 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, expenditures for his children's college tuition and expenses, and spouse's serious medical and mental health 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). *See also* 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.").

The primary problems here relate to his handling of his federal income taxes. Applicant knew that he needed to file his federal income tax return for tax year 2015, and he did not file it until late 2018 or 2019. He owes a federal income tax debt that is not in an established payment plan. An established payment plan requires a track record of payments, and the first payment under his plan has not been made. He had a legal requirement to timely file his tax returns and pay his taxes. He may not have fully understood or appreciated the importance of these requirements. He procrastinated. His

actions under the Appeal Board jurisprudence are too little, too late to fully mitigate security concerns.

In addition to Applicant's tax issues, he owes two charged-off debts to the same bank for $9,286 and $10,590, and he owes a $1,061 bank debt that is $293 past due. He has not made any recent payments to address any of these debts. He did not establish he was unable to make greater progress resolving his delinquent SOR debts, including his delinquent taxes. Applicant's failure to "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 [his] reliability, trustworthiness, and ability to protect classified or sensitive information." AG ¶ 16.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. I have carefully applied the law, as set forth in Egan, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time.

Formal Findings

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

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraphs 1.a, 1.c, 1.f, 1.g, and 1.j: Against Applicant
Subparagraphs 1.b, 1.d, 1.e, 1.h, and 1.i: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of 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