



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



In the matter of:

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ISCR Case No. 18-02854

Applicant for Security Clearance

**Appearances**

For Government: Moira Modzelewski, Esq., Department Counsel

For Applicant: Charles McCullough III, Esq.

09/24/2019

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant has known that the Internal Revenue Service (IRS) sought additional taxes from him for several years. In 2011, a tax lien was filed against his residence. Applicant knew that he needed to file his federal and state income tax returns for tax years 2009 through 2016, and he did not file them until October 2018 to August 2019. He currently owes about \$71,000 to the IRS (not including interest and penalties), and this debt is not in an established payment plan. He did not prove that he was unable to make greater progress resolving his delinquent tax debt. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On April 13, 2017, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On February 15, 2019, 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). (HE 2) On March 22, 2019, Applicant responded to the SOR and requested a hearing. (HE 3) On April 18, 2019, Department Counsel amended the SOR, and on May 31, 2019, Applicant responded to the amended SOR. (HE 4, 5) In the amended SOR, SOR ¶ 1.f was withdrawn, and SOR ¶¶ 1.b, 1.d, 1.e, and 1.g were replaced. (HE 4)

On June 3, 2019, Department Counsel was ready to proceed. On June 27, 2019, the case was assigned to an administrative judge. On July 8, 2019, the case was transferred to me for administrative reasons. On June 10, 2019, DOHA issued a notice of hearing, setting the hearing for September 5, 2019. (HE 1)

During the hearing, Department Counsel offered six exhibits; Applicant offered nine exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 14-17; GE 1-6; Applicant Exhibit (AE) A-AE I) On September 13, 2019, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits. All tax-related amounts are rounded to the nearest thousand if over \$1,000.

### **Findings of Fact**

In Applicant's SOR responses, he partially admitted and partially denied the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 1.e, 1.g, 1.h, and 1.i. (HE 5) He also provided extenuating and mitigating information. (HE 6) His admissions are accepted as findings of fact. Applicant's SOR responses and attached documentation are admitted into evidence. (Tr. 16)

Applicant is a 61-year-old senior account executive for a defense contractor. (GE 1; SOR response) His resumé provides a detailed description of his professional accomplishments over from 1987 to present. (Tr. 18-20; SOR response, Tab C) He has never served in the military. (GE 1) His daughter suffered from a long-term medical condition which required multiple expensive hospitalizations. (Tr. 21-22; SOR response) In 1984, he married. (GE 1) In 2013, he separated from his spouse, and in 2016, he was divorced. (Tr. 22-23, 58, 112; SOR response) Applicant accepted responsibility for all of the debts from their marriage including his mortgage. (Tr. 40; SOR response) His children were born in 1987 and 1992. (Tr. 21; GE 1) He has held a security clearance for many years. There is no evidence of a security violation.

## Financial Considerations

When Applicant completed his April 13, 2017 SCA, he disclosed that he failed to timely file his federal income tax returns for tax years 2009, 2011, 2012, 2013, 2014, and 2015. (GE 1) He said he timely filed his 2017 and 2018 tax returns. (Tr. 23, 94) By the time his hearing was held, all required tax returns were filed. (Tr. 24, 35) He promised to timely file his future tax returns. (Tr. 37)

Applicant attributed his failure to timely file his federal income tax returns to unemployment, medical expenses, separation from his spouse, excess family spending, and divorce. (Tr. 97; GE 1) His spouse spent money frivolously, and this character flaw contributed to their marital problems. (Tr. 97-98) He was unemployed from May to October 2009, and from March to June 2013. (Tr. 44, 56, 59) In 2009, he was paid for three months of the unemployment period, and he received a severance check for about \$60,000. (Tr. 44-45)

On his April 13, 2017 SCA, Applicant estimated that he owed \$25,000 for tax year 2009, \$25,000 for tax year 2011, and \$0 for the other tax years. (GE 1) He also disclosed that his \$475,000 mortgage was delinquent, and he was attempting to resolve the debt with a short sale. (GE 1) He was working with an attorney and intended to file his tax returns. (GE 1) He expected that the short sale would change the amount of taxes due. (GE 1) He disclosed that he had significant tax problems and a large delinquent mortgage debt. (Tr. 60; GE 1) He carelessly failed to disclose that he had not filed his 2010 federal tax return, the magnitude of his federal tax debt, his 2011 federal tax lien, and his failure to file state tax returns for tax years 2009 to 2015. (Tr. 60) Nevertheless, his disclosures were sufficient to place security officials on notice of financial considerations security concerns, and I do not conclude that he intended to deceive security officials of the scope or magnitude of his financial problems. (Tr. 62-63)

Applicant's budget indicates he has a gross monthly salary of \$14,129. (Tr. 81, 111; GE 2 at 31) He owns stocks and bonds valued at \$125,000. (GE 2 at 31) He had a monthly remainder of \$1,683 available to address his tax debt. (GE 2 at 31) He worked with attorneys and an accountant on his tax issues. (Tr. 98-99)

SOR ¶ 1.a alleges Applicant failed to timely file his federal income tax returns for tax years 2009 through 2013 as required. SOR ¶ 1.b, as amended, alleges Applicant failed to timely file his federal income tax returns for tax years 2014, 2015, and 2016 as required. Applicant's March 2018 Office of Personnel Management personal subject interview (OPM PSI) indicates Applicant did not file or pay his federal income taxes from 2009 to present. (GE 2 at 44) He said the reason for not filing the tax returns was marital stress and unemployment. (GE 2 at 44) The dates of his federal income tax filings are depicted in the tables below. He acknowledged that the IRS may dispute some of the tax returns he filed, and he may have to refile some tax returns. (Tr. 80)

SOR ¶ 1.c alleges the IRS filed a federal tax lien against Applicant in February 2011 for \$106,000. According to LexisNexis, the federal tax lien for \$106,000 was filed in February 2011 in a county court. (GE 4) The LexisNexis document does not show the tax

years that were the basis of the lien. (GE 4) The lien is also indicated on his 2017 credit report. (GE 5 at 2-3) Applicant said he may not have learned about the lien in 2011 because he was not opening the letters he received from the IRS because his entire financial life was a “disaster” at that time. (Tr. 89) Applicant’s March 2018 OPM PSI indicates the source of the \$106,000 tax lien may be unpaid taxes for tax years 2006 and 2007. (Tr. 46-48, 52-53; GE 2 at 48) He was unable to locate documents showing he filed his 2006 and 2007 tax returns. (Tr. 31-32, 49-51) He was unsure about the tax years represented in the 2011 tax lien. (Tr. 100) In August 2019, the IRS issued a Certificate of Discharge of Property from Federal Tax Lien. (AE I) The IRS discharge states:

The United States’ interest in the above described property under the referenced lien is now valueless. Therefore, under Section 6325(b)(2)(B) of the Internal Revenue Code, the Internal Revenue Service discharges the above described property from the lien. However, the lien remains in effect for all other property, or rights to property, to which the lien is attached.

(AE I) On April 25, 2019, an IRS representative wrote Applicant and advised him that he would issue the Certificate of Discharge once it was established that Applicant had been divested of all rights in the property. (SOR response) Applicant said his accountant told him that the lien was discharged because the IRS was pleased about Applicant’s progress resolving his tax issues. (Tr. 32-33) Applicant made a \$30,000 payment to the IRS in October 2017. (Tr. 53, 64)

The IRS generally has 10 years to collect a debt. After that time has passed, the IRS can no longer legally enforce collection of the debt. The 10-year period is measured from the date that the tax was assessed, not when it was originally due. The 10-year clock does not start running until the tax return is filed. If the IRS files a tax return then the statute of limitations began running whenever that assessment was processed by the IRS. Before the statute of limitations is applied, tolling must also be assessed. Applicant has not established that the statute of limitations applies to the \$106,000 tax debt, which is the source of the 2011 tax lien. The lien on Applicant’s residence is resolved otherwise he would not have been able to transfer it back to the mortgage holder. See SOR ¶ 1.j, *infra*. However, based on the IRS’ statement on the lien certificate itself, Applicant has not proven that the underlying tax debt is resolved. (Tr. 72-73, 100, 107-111)

SOR ¶ 1.d, as amended, alleges Applicant is indebted to the federal government for \$40,000 for tax year 2015. The IRS assessed a \$40,000 debt when the IRS generated a substitute tax return. When Applicant filed his federal income tax return for tax year 2015, he paid the tax of less than \$500. The IRS lost his tax return but cashed the check he sent in with his tax return. (Tr. 104) He refiled his tax return for tax year 2015. (Tr. 104) SOR ¶ 1.d is mitigated. SOR ¶ 1.e, as amended, alleges Applicant is indebted to the federal government for \$47,000 for tax year 2016. When Applicant filed his federal income tax return for tax year 2016, he concluded he owed \$32,000 for that tax year. SOR ¶ 1.e is not resolved.

The IRS represented in March 25, 2019 tax transcripts that Applicant owed the following federal income tax debts based on the IRS' generation of a substitute tax return:

Tax Year	Date of Tax Return (month & year)	Adjusted Gross Income (to nearest \$1,000)	IRS Claim of Taxes Owed (to nearest \$1,000)	Exhibit
2010	Sept. 2012	\$259,000	\$28,000	GE 3 at 1
2011	Oct. 2013	\$454,000	\$60,000	GE 3 at 2
2012	Nov. 2014	\$222,000	\$13,000	GE 3 at 3
2013	Sept. 2017	\$247,000	\$43,000	GE 3 at 4
2014	Sept. 2017	\$0	\$0	GE 3 at 5
2015	Aug. 2017	\$189,000	\$37,000	GE 3 at 6
2016	Dec. 2018	\$365,000	\$45,000	GE 3 at 7
2017	Oct. 2018 (filed by Applicant)	\$364,000	\$0	GE 3 at 8
Total			\$226,000	

SOR ¶ 1.g, as amended, alleges Applicant failed to timely file his state B income tax returns for tax years 2009 through 2013 as required. He admitted he did not timely file tax returns for those five years. (Tr. 80) The dates Applicant filed his state B income tax returns are depicted on the following table. The dates on his tax returns were the dates he signed and mailed them to tax authorities. (Tr. 78; AE H, AE I) Applicant provided the following information about his tax returns at his hearing:

Tax Year	Date of Tax Return (month & year)	Adjusted Gross Income (to nearest \$1,000)	Claim of Taxes Owed (to nearest \$1,000)	Exhibit
2009	Fed.-Aug. 2019	\$369,000	\$25,000 Due	AE B
	State-Aug. 2019	" "	\$4,000 Due-paid Aug. 2019	AE A
2010	Fed.-July 2019	\$259,000	\$1,000 Refund	AE D
	State-July 2019	" "	\$1,000 Refund	AE C
2011	Fed.-Mar. 2019	\$442,000	\$9,000 Due	SOR response, Tabs H, I
	State-May 2019	" "	\$1,000 Refund	" "
2012	Fed.-Mar. 2019	\$222,000	\$4,000 Refund	" "
	State-May 2019	" "	\$1,000 Refund	" "
2013	Fed.-Mar. 2019	\$247,000	\$5,000 Due	" "
	State-May 2019	" "	\$3,000 Due	" "
2014	Fed.-Dec. 2018	\$187,000	\$1,000 Refund	" "
	State-Dec. 2018	" "	\$1,000 Refund	" "
2015	Fed.-Dec. 2018	\$141,000	\$0	" "
	State-Dec 2018	" "	\$2,000 Refund	" "
2016	Fed.-Oct. 2018	\$365,000	\$32,000 Due	" "
	State-Oct. 2018	" "	\$0	" "
2017	Fed.-Oct. 2018	\$364,000	\$0	" "

SOR ¶ 1.h alleges Applicant failed to timely file his state M income tax returns for tax years 2014, 2015, 2016, and 2017 as required. Applicant lived in state M, and he did not file state M tax returns because he honestly believed he was a resident of state B. (Tr. 78-79) His driver's license was in state B, and he voted in state B. The home that was pending foreclosure as alleged in SOR ¶ 1.j was in state B. In October 2018, Applicant filed a state M income tax return for tax year 2017. (SOR response, Tab K) He said he timely filed his 2017 and 2018 tax returns. (Tr. 23)

SOR ¶ 1.i alleges Applicant owes state income taxes to state M for \$2,000 for tax year 2016. On December 4, 2018, Applicant paid the state tax debt, and it is resolved. (SOR response, Tab J)

SOR ¶ 1.j alleges Applicant has a mortgage account past due in the amount of \$107,000 with a total loan balance of \$474,000. In 2013, Applicant and his spouse separated. (Tr. 55) Applicant and his spouse were unemployed. (Tr. 28) In 2005, Applicant purchased a residence for \$635,000. (Tr. 81) His primary mortgage was for \$500,000, and his secondary mortgage was for \$125,000. (Tr. 82) In May 2013, Applicant moved out of his residence, and in December 2013, Applicant stopped paying his mortgage. (Tr. 56-57, 112) His spouse was unemployed outside her home. (Tr. 112) He paid spousal support of about \$5,000 monthly, and he expected her to pay the mortgage out of her \$5,000 monthly payment. (Tr. 112-113) In early 2015, she moved out, and the residence was unoccupied for the next four years. (Tr. 113) Applicant attempted to obtain a short sale; however, he was unsuccessful either because the mortgage company was unwilling to accept the resolution or the IRS was unwilling to release the lien without payment, or both. (Tr. 114-118) Applicant also attempted to renegotiate the mortgage payment through a mortgage modification. (Tr. 28-29) Applicant sued the mortgage company alleging the mortgage company violated the Fair Credit Reporting Act when the mortgage company reported the foreclosure to credit reporting companies. (Tr. 29, 113-114) The mortgage company paid the real estate taxes on the property from December 2013 to July 2019. (Tr. 115) In July 2019, the mortgage account holder agreed to accept a deed in lieu of foreclosure. (Tr. 29, 85; AE E; AE F) The mortgage holder paid \$5,000 towards Applicant's attorney fees in settlement of the dispute. (Tr. 29; AE G) In July 2019, the mortgage debt was resolved. (Tr. 29-30, 106)

In sum, Applicant filed and paid all of his state income taxes. (Tr. 105-106) He estimates his federal tax debt is \$71,000 after filing his tax returns, not including penalties and interest. (Tr. 24-26, 76, 91-92) Applicant believes the IRS will waive the penalties. (Tr. 91) He was unable to afford the payment plan the IRS suggested because they assumed he owed \$200,000 or \$300,000, as indicated on the table on page 5, and the IRS wanted an initial payment of \$100,000. (Tr. 104-105) Based on his accountant's recommendation, he decided to wait for the IRS to assess his new tax debt after he filed his tax returns. (Tr. 105) Applicant assured that he intends to pay a substantial amount to address his federal tax debt after the IRS confirms the amount of his tax debt. (Tr. 27, 101) After making the substantial initial payment to the IRS, he intends to make \$1,000 monthly payments until his federal income tax debt is paid. (Tr. 27) He hopes to have an established payment plan with the IRS by the end of 2019. (Tr. 34-35)

## Character Evidence

Applicant described himself as an honest person who was accepted responsibility for his financial issues. (Tr. 119) He promised to be financially responsible in the future. (Tr. 119-120) He emphasized his history of support to the Department of Defense and his conscientious compliance with security requirements.

A close friend of 10 years described Applicant as reliable, conscientious, and trustworthy. (SOR response, Tab D) A former coworker and friend of 15 years lauded Applicant's integrity, professionalism, and trustworthiness. (SOR response, Tab D) Applicant's 2019 performance review detailed his contributions to his employer and outstanding performance. (SOR response, Tab E)

## 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: “(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(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’s daughter had medical problems requiring multiple hospitalizations. Applicant was unemployed for several months in 2009 and 2013. 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 advice from accountants and attorneys, and he generated a budget. He made financial progress paying several debts, resolving his mortgage debt, and filing all required tax returns. However, in light of his long history of not timely filing his tax returns and his current delinquent tax debts, there are not clear indications his financial problems are under control.

Applicant is credited with mitigating SOR ¶¶ 1.d (paid taxes for tax year 2015), 1.h (honestly believed he did not need to file tax returns in state M), 1.i (paid tax debt for state M for tax year 2017), and 1.j (resolved mortgage debt).

The evidence against mitigating Applicant’s failure to timely file his federal and state tax returns and pay his federal income tax debt is more persuasive. He did not establish that he was unable to better address his delinquent taxes. He did not provide proof that he diligently attempted to establish payment plans to address his federal income tax that he learned were delinquent several years ago. He did not establish a track record of payment of his delinquent federal income taxes.

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 timely file his federal and state tax returns for tax years 2006 and 2007. The record is not clear about when or if those tax returns were filed. I did not consider the failure to timely file his 2006 and 2007 federal and state tax returns for any purpose.

Applicant has taken an important step towards showing his financial responsibility. From October 2018 to August 2019, he filed his federal and state income tax returns for tax years 2009 through 2016; however, his filings of those tax returns were not timely.

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 (9<sup>th</sup> Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7<sup>th</sup> Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7<sup>th</sup> 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.

In sum, Applicant failed to timely file his federal and state tax returns for tax years 2009 to 2016. He estimated he owed the IRS \$71,000 not including penalties and interest. He believes all of his tax returns are filed, and his state income taxes are paid. There is insufficient evidence about why Applicant was unable to timely file his tax returns for tax years 2009 to 2016. He did not establish he was unable to make greater progress resolving his delinquent tax debts. Applicant failed to establish mitigation of financial considerations security concerns for the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 1.e, and 1.g.

## 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 61-year-old senior account executive for a defense contractor. In 2013, he separated from his spouse, and in 2016, he was divorced, ending a 29-year marriage. Applicant accepted responsibility for all of the debts from their marriage including his mortgage.

A close friend of 10 years and a former coworker and friend of 15 years described Applicant as reliable, conscientious, professional, honest, and trustworthy. His 2019 performance review detailed his outstanding performance. He held a security clearance for many years. There are no allegations of security violations.

Applicant owes about \$71,000 to the IRS for tax years 2009 (\$25,000), 2011 (\$9,000), 2013 (\$5,000), and 2016 (\$32,000), excluding penalties and interest. Applicant assured that he intends to pay a substantial amount to address his federal tax debt after the IRS confirms the amount of his tax debt. After making the substantial payment, he intends to make \$1,000 monthly payments until his federal income tax debt is paid. Applicant does not have an *established* payment plan agreeable to the IRS to address his federal income tax debt. He filed his federal and state income tax returns for tax years 2009 to 2016 from October 2018 to August 2019.

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 problem here relates to Applicant's handling of his federal and state income taxes. Applicant knew that he needed to file his federal income tax returns for tax years 2009 through 2016, and he did not file them until October 2018 to August 2019. Applicant assured that he intends to pay a substantial amount to address his federal tax debt after the IRS confirms the amount of his tax debt. He evidently has the financial resources available now to make a substantial down payment on his tax debt without waiting to negotiate a settlement with the IRS. He promised to timely file his tax returns in the future. However, he owes a federal income tax debt that is not in an established payment plan. 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. He did not establish he was unable to make greater progress resolving his delinquent taxes. His actions under the Appeal Board jurisprudence are too little, too late to fully mitigate security concerns. 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.b, 1.c, 1.e, and 1.g:	Against Applicant
Subparagraphs 1.d, 1.h, 1.i, and 1.j:	For Applicant
Subparagraph 1.f:	Withdrawn

### **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.

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Mark Harvey  
Administrative Judge