



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



In the matter of:

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ISCR Case No. 18-02959

Applicant for Security Clearance

**Appearances**

For Government: Carroll J. Connelley, Esq., Department Counsel

For Applicant: *Pro se*

10/18/2019

**Decision**

HARVEY, Mark, Administrative Judge:

The Internal Revenue Service (IRS) is seeking additional taxes from Applicant for tax years 2009 through 2012, and he has not made any payments for two years. He has two 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 August 11, 2016, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On January 31, 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 18, April 5, and April 7, 2019, Applicant responded to the SOR. (HE 3) Department Counsel requested a hearing. (Transcript (Tr.) 13) On April 24, 2019, Department Counsel was ready to proceed. On May 28, 2019, the case was assigned to me. On July 25, 2019, DOHA issued a notice of hearing, setting the hearing for August 8, 2019, using video teleconference. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of his hearing, provided he would receive 30 days after the hearing to collect and present additional evidence. (Tr. 14-15)

During the hearing, Department Counsel offered five exhibits; Applicant offered three exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 16-19; GE 1-5; Applicant Exhibit (AE) A-AE C) On August 20, 2019, DOHA received a transcript of the hearing. The record was held open until October 9, 2019, to provide Applicant with the opportunity to submit documentation. (Tr. 42, 47; HE 4) Nothing was received from Applicant after his hearing. On October 11, 2019, I emailed Applicant giving him until October 15, 2019, to submit documentation; however, nothing was received. (HE 5)

Some details were excluded to protect Applicant's right to privacy. The tax amounts are rounded to the nearest \$1,000. The cited exhibits and transcript pages have more specific information.

### **Findings of Fact**

In Applicant's SOR responses, he admitted the allegations in SOR ¶¶ 1.a through 1.e. (HE 3) He also provided extenuating and mitigating information. (HE 3) Applicant's SOR responses are admitted into evidence.

Applicant is a 55-year-old senior engineer level one who has worked in a part-time capacity for a defense contractor since 2016. (Tr. 6, 8; GE 1) In 1982, he graduated from high school. (Tr. 7) In 1984, he received an associate's degree in industrial electronics technology. (Tr. 7) He did not serve in the military. (Tr. 7) He has never married, and he does not have any children. (Tr. 7-8) He previously worked for a major aircraft manufacturer for 31 years, retiring in 2015. (Tr. 20)

### **Financial Considerations**

Applicant has a history of financial problems. (Tr. 36-37) He receives \$2,800 in monthly retirement pay from his employment with a major aircraft manufacturer. (Tr. 38) His other income is from his current part-time employment; however, his part-time pay may be as low as \$200 a month. (Tr. 38) His monthly rent is \$1,500. (Tr. 39) His other monthly expenses exceed \$1,000 monthly. (Tr. 40-41)

SOR ¶ 1.a alleges Applicant has a charged-off debt for \$8,504. SOR ¶ 1.b alleges he has a debt placed for collection for \$812. On November 27, 2017, Applicant agreed to pay a debt-resolution company (DRC) \$253 monthly to resolve four debts, including the debt in SOR ¶ 1.a. (AE C) He said the debt alleged in SOR ¶ 1.b is included in the DRC payment plan; however, the names of the creditors listed in the DRC plan do not match the debtor listed in SOR ¶ 1.b. (AE C) Applicant said he made all 18 required payments in accordance with the DRC agreement, and his DRC account is current. (Tr. 33) Applicant planned to increase the amount of his monthly payments. (Tr. 35) Applicant said he would obtain and provide proof of his payments as well as the status of his non-IRS SOR debts. (Tr. 33-35)

SOR ¶¶ 1.c, 1.d, and 1.e allege that: in 2016, two federal tax liens were filed against Applicant for about \$25,000 and about \$5,000; and he failed to pay his federal income taxes as required from 2009 through 2012. Applicant said he timely filed all of his state and federal income tax returns. (Tr. 43) From 2009 through 2012, Applicant withdrew about \$60,000 from his 401(k) account to invest in real estate. (Tr. 23-24) He owed the IRS the following approximate amounts for tax years 2009 through 2012: \$4,000 for 2009; \$8,000 for 2010; \$12,000 for 2011; and \$4,000 for 2012. (Tr. 22-24) A real estate investment entity defrauded Applicant. (Tr. 23; GE 2) Applicant went to the police to file a complaint; however, the police would not investigate the theft of his investment. (Tr. 24-25) He made an offer in compromise with the IRS to pay \$777 monthly; however, at that time he was a full-time employee. (Tr. 25) He was unable to make the \$777 monthly payments after he retired from his full-time position and became a part-time employee. (Tr. 25) Applicant said he made five or six payments under the payment plan, and he intended to provide proof of payments after his hearing. (Tr. 26-27)

Applicant's August 11, 2016 SCA states Applicant has an offer in compromise pending with a tax-resolution company (TRC1). (GE 1)

In 2017, Applicant started working with another tax-resolution company (TRC2) to resolve his IRS debt. (Tr. 30) He most recently communicated with TRC2 in May 2019. (Tr. 31) He does not currently have a payment plan with the IRS. (Tr. 32) I asked Applicant to provide IRS tax transcripts from 2009 to present, and all of his correspondence from or to the IRS concerning settling his tax debts. (Tr. 42-43) None were provided.

### **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 was defrauded and lost his investment. His withdrawal of funds from his 401(k) plan to invest, and the loss of that investment resulted in substantial additional taxes owed to the IRS that he did not or could not pay. This was a circumstance beyond his control that adversely affected his finances. However, he did not prove he acted responsibly under the circumstances, because he did not show he was unable to make more progress paying his delinquent debts. There are not clear indications his financial problems are under control. He did not provide proof that he diligently attempted to establish payment plans to address his taxes and two 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)).

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.” 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).

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.

SOR ¶ 1.a alleges Applicant has a charged-off debt for \$8,504. 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 no 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)).

In sum, Applicant owes about \$26,000 to the IRS for tax years 2009 through 2012. Applicant does not have an established payment plan with the IRS. The SOR also alleges two delinquent non-tax debts. He did not establish with corroborating documentation that he was making payments to DRC to resolve his delinquent non-tax SOR debts. He did not establish he was unable to make greater progress resolving his delinquent SOR debts, including his delinquent taxes. Financial considerations security 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(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 55-year-old senior engineer level one who has worked in a part-time capacity for the current defense contractor since 2016. In 1984, he received an associate's degree in industrial electronics technology. He previously worked for a major aircraft manufacturer for 31 years, retiring in 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 problem here relates to Applicant's handling of his federal income taxes. Applicant knew that he needed to establish a payment plan to address his delinquent taxes, and his federal income tax debt is not in an established payment plan. An established payment plan requires a track record of payments, and he has not made any payments for two years. He had a legal requirement to timely 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 non-tax SOR debts that are past due. He said he is working with DRC to resolve the debts; however, he did not provide corroborating documentation showing his payments. He did not establish he was unable to make greater documented 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 through 1.e:              Against 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.

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Mark Harvey  
Administrative Judge