



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



In the matter of:

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ISCR Case No. 19-01441

Applicant for Security Clearance

**Appearances**

For Government: Andre M. Gregorian, Esq., Department Counsel

For Applicant: *Pro se*

10/23/2019

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant failed to timely file his federal and state tax return for tax year 2015. He has not made enough payments under his payment plan to mitigate his federal income tax debt. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On April 12, 2016, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On June 21, 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 July 24, 2019, Applicant responded to the SOR and requested a hearing. (HE 3)

On August 8, 2019, Department Counsel was ready to proceed. On August 15, 2019, the case was assigned to me. On September 11, 2019, DOHA issued a notice of hearing, setting the hearing for September 26, 2019. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel offered seven exhibits; Applicant offered nine exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 18-21; GE 1-7; Applicant Exhibit (AE) A-AE I) On October 11, 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 equal to or over \$1,000, and to nearest \$100 if below \$1,000.

### **Procedural Issue**

Department Counsel moved to withdraw SOR ¶ 1.g. (Tr. 13) Applicant did not object, and I granted Department Counsel's motion. (Tr. 14)

### **Findings of Fact**

In Applicant's SOR responses, he admitted the SOR allegations in ¶¶ 1.a through 1.d, and he denied SOR ¶¶ 1.e through 1.g. (HE 3) He also provided extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 40-year-old information security consultant who has worked for his current defense-contractor employer for four years. (Tr. 7-8, 22) In 1998, he graduated from high school, and he attended college; however, he did not receive a degree. (Tr. 7, 22) He has no military service. (Tr. 7, 23) He was married from 2002 to 2008, and he married again in 2016. (Tr. 8, 30; GE 1) He has two children ages 2 and 14 and three step children ages 15, 19, and 21. (Tr. 9, 30-31) He has not had any unemployment in the previous five years. (Tr. 8) He is not required to pay any child support. (Tr. 9)

### **Financial Considerations**

SOR ¶¶ 1.a and 1.b allege Applicant failed to timely file his federal income tax return for tax year 2015 and his state tax return for tax year 2015. Applicant prepared his 2015 federal income tax return; however, he did not mail it to the IRS. (Tr. 33-34) He lost track of his 2015 federal income tax return on his cluttered desk. (Tr. 33) His work schedule was demanding and hectic, and he did not give a high-enough priority to getting his 2015 tax returns filed. (Tr. 33-34) He mostly attributed the failure to file his 2015 federal income tax return to an oversight. (Tr. 38) According to his 2015 federal income tax return, he owes the IRS \$14,000. (Tr. 35-36; AE B) He plans to file the 2015 federal income tax return soon. (Tr. 39) He did not timely file his federal income tax returns for tax years 2011

through 2018, although several of those years could have been filed within the extension periods. (Tr. 44) His state tax returns for those same years were not timely filed. (Tr. 44-45)

SOR ¶ 1.c alleges Applicant owes federal income taxes of about \$6,000 for tax year 2016. He acknowledged that he owed the tax debt for tax year 2016. (Tr. 33, 36) He did not resolve his federal tax debt for five reasons: (1) procrastination; (2) busy with heavy demands from work; (3) family issues; (4) use of funds for travel; and (5) payments of 25 percent of his income to address his state income tax debt. (Tr. 37-39) The family issues involved custody of his daughter and taking his children to sporting events. (Tr. 38) In September 2019, he completed an online payment agreement with the IRS relating to his 2011 to 2016 federal income taxes. (Tr. 40-41; AE D) He estimated his federal tax debt to be about \$35,000 including tax year 2015. (Tr. 41-42) His first payment of \$521 was made to the IRS in September 2019 under his payment plan. (Tr. 36, 42-43)

SOR ¶ 1.d alleges Applicant owes state taxes of about \$9,000. From 2012 to 2018, the state tax authority filed six tax liens against Applicant. (Tr. 49) Applicant had a wage garnishment to collect a \$47,000 state tax debt. (Tr. 46) All of Applicant's state income taxes are now paid. (Tr. 45, 48-51; AE E) He believed he filed his state income tax return for tax year 2015. (Tr. 45-46; AE C)

SOR ¶ 1.e alleges Applicant has a past-due vehicle financing debt for \$1,255. One of Applicant's payments was returned for insufficient funds, and the creditor reported the debt as past due. (Tr. 58) The debt is now current. (Tr. 58-59; AE G)

SOR ¶ 1.f alleges Applicant has a charged-off account for \$1,285. Applicant rented furniture in 2010, and the most recent payment was in 2011. (Tr. 59-60) Applicant contacted the creditor, and the creditor was unable to locate the debt. (Tr. 59-60) The account is closed. (Tr. 59-60)

Applicant's current annual base salary is about \$200,000 with a potential \$30,000 bonus. (Tr. 26-27) Applicant is current on his student loan payments. (Tr. 23) He has not had any financial counseling. (Tr. 61) Now that the state-wage garnishment is complete, he has the available funds to maintain currency on his debt and to establish and complete an IRS payment plan. (Tr. 65) He has been entrusted with sensitive information during his career, and he has conscientiously protected the information. (Tr. 64-65)

Two coworkers who have known Applicant for five to seven years positively described Applicant work performance and character. (AE I) He is an honest, diligent, professional who makes significant contributions to his employers. (AE I)

## **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).

The SOR alleges and the record establishes that Applicant failed to timely file when due his state and federal income tax returns for tax year 2015. He has a federal income tax debt of about \$35,000. His reasons for not timely filing his 2015 federal and state income tax returns are not sufficient to excuse his failure to timely file these documents.

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.

Applicant's SOR does not allege he failed to timely file when due his federal and state income tax returns for tax years 2011, 2012, 2013, 2014, 2016, 2017, and 2018. His SOR does not allege that he owed delinquent federal income taxes for several of those years, and his federal tax debt now totals about \$35,000. 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 non-SOR allegations will not be considered except for the five purposes listed above.

Applicant has taken an important step towards showing his financial responsibility. Applicant filed all required tax returns, except for his 2015 federal income tax return; his state tax debt is paid; and his federal income tax debt is in a payment plan. He assured he will timely file all future tax returns and pay his federal income tax debt.

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 2011 through 2018. He has not made enough payments under his federal income tax payment plan to mitigate his federal income tax debt of about \$35,000. Applicant failed to establish mitigation of financial considerations security concerns.

### **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 40-year-old information security consultant who has worked for his current defense-contractor employer for four years. In 1998, he graduated from high school, and he attended college; however, he did not receive a degree. He has not had any unemployment in the previous five years. Two coworkers described Applicant as an honest, diligent, and professional employee who makes significant contributions to his employers.

Applicant failed to timely file his federal and state tax returns for tax years 2011 through 2018. He has not made enough payments under his federal payment plan to mitigate his federal income tax debt. He has had delinquent federal or state income taxes for several years. In 2019, he paid his state tax debt, and he is currently making payments to address his federal income tax debt.

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 *a/so* 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 timely file his federal and state income tax returns. He had a legal requirement to timely file his tax returns and pay his 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, and 1.c:	Against Applicant
Subparagraphs 1.d, 1.e, and 1.f:	For Applicant
Subparagraph 1.g:	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