



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



In the matter of:

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ISCR Case No. 19-01649

Applicant for Security Clearance

**Appearances**

For Government: Andrea Corrales, Esq., Department Counsel

For Applicant: Alan V. Edmunds, Esq.

10/07/2020

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**Decision**

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HARVEY, Mark, Administrative Judge:

Applicant failed to timely file his federal and state income tax returns for tax years 2010, and 2013 through 2018. He is making payments under Internal Revenue Service (IRS) and state installment plans to address his tax debts. He has made progress getting his financial house in order; however, he did not prove he was unable to timely file his tax returns and to make greater documented progress sooner resolving his state and federal income tax debts. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 5, 2015, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On November 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 December 26, 2019, Applicant responded to the SOR and requested a hearing. (HE 3)

On February 5, 2020, Department Counsel was ready to proceed. On February 19, 2020, the case was assigned to me. On March 4, 2020, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 17, 2020. (HE 1A) The hearing was cancelled due to the coronavirus. On June 20, 2020, I coordinated with Applicant's Counsel to set a hearing date. On July 17, 2020, DOHA issued a hearing notice setting Applicant's hearing for July 30, 2020. (HE 1B) The hearing was held as scheduled. Applicant waived his right to 15 days' notice of the date, time, and location of the hearing. (Transcript (Tr.) 6)

During the hearing, Department Counsel offered three exhibits; Applicant offered eight exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 11-13; GE 1-3; Applicant Exhibits (AE) A-AE M) On August 12, 2020, DOHA received a transcript of the hearing. The record initially was scheduled to close on August 17, 2020, and an extension was granted until September 18, 2020. (Tr. 63, 68; HE 4) Applicant provided nine additional documents and a supplemental closing argument, which were admitted without objection. (AE N-AE W) On September 18, 2020, the record closed. (Tr. 68; HE 4)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript. ISCR and ADP decisions and the Directive are available at <https://ogc.osd.mil/doha/isp.html>.

### **Findings of Fact**

In Applicant's SOR response, he admitted and denied with clarification the allegations in SOR ¶ 1.a.; he admitted with clarification the allegations in SOR ¶¶ 1.b, 1.c, 1.f, 1.g, and 1.h; and he admitted in part and denied in part the allegations in SOR ¶¶ 1.d, and 1.e. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 42-year-old senior cloud engineer. (Tr. 14-15, 17; AE G; GE 1) He has 20 years of experience as an information technology specialist. (AE G) He attended college for several years; however, he did not receive a degree. (GE 1; AE G) He received numerous information technology certifications. (AE G) He has never served in the U.S. military. (GE 1) He was married from 2002 to 2016, and he has two children who are ages 15 and 23. (Tr. 14; GE 1; AE F)

## Financial Considerations

The SOR contains the following financial allegations:

SOR ¶¶ 1.a through 1.g, allege that Applicant failed to timely file his federal income tax returns for tax years 2010, and 2013 through 2018. They allege he has delinquent federal income taxes as follows: 2010 (\$5,830); 2013 (\$5,278); 2014 (\$15,701); and 2017 (\$6,451). SOR ¶ 1.h alleges that Applicant failed to timely file his state income tax returns for tax years 2010 through 2018, and he owes the state \$18,361 for delinquent state taxes.

Before his marital difficulties, Applicant timely filed his tax returns. (Tr. 16, 62; SOR response at 3) He said his spouse left him in 2010, and he was required to pay \$1,900 monthly for child support during the divorce proceedings. (Tr. 16; SOR response at 3) He was also required to pay the mortgage on the family residence. (*Id.*) When his divorce was finalized, his monthly child support was set at \$2,139, and he was required to pay his children's medical expenses and some other expenses. (AE E) He unsuccessfully attempted to obtain a reduction in his child support payment from the court. (SOR response at 3) Beginning in May 2016, he had \$2,674 automatically garnished from his paycheck for child support, which included payment for an arrearage. (Tr. 20; SOR response at 3; AE F) He had to pay attorney fees for his divorce. (Tr. 45)

In his SOR response, Applicant said due to stress, he "forgot that he had an obligation to file his income taxes." (HE 3 at 3) His former spouse took their children with her when she left, and he was upset. (Tr. 17) Some of the delay in the filing of his tax returns was caused by the necessity to obtain needed documentation that was in storage and on his accountants' or tax preparers' failures to correctly or expeditiously file his tax returns. (Tr. 49, 50-52; AE P) He subsequently filed all necessary tax returns. (SOR response at 3) During his September 13, 2017 Office of Personnel Management (OPM) personal subject interview (PSI), Applicant said he did not timely file his tax returns because he did not want to pay the government. (GE 2 at 14)

Applicant has lived with his parents since 2010 to assist with their medical care and their finances. (SOR response; AE V) In 2010, his mother was diagnosed with breast cancer. (AE V) In 2012, his mother was diagnosed with a gallbladder illness which required surgery, and in 2015, his mother was diagnosed with cardiovascular disease and a blood clot on her lungs. (AE V) In 2018, his mother was diagnosed with chronic gastric inflammation, and she retired from her DOD employment because of her illness. (AE V) In 2015, his father was diagnosed with kidney and prostate cancer, which required surgery in 2016. (AE V) In September 2019, his father was diagnosed with congested heart failure, and is currently under treatment. (AE V) His father is or was an owner-operator truck driver with no medical benefits, and when he took time off to help his spouse during her illness, the family lost income. (SOR response) Applicant assisted with payment of medical bills and cared for his parents. (AE V)

Applicant filed his state income tax returns at about the same time as his federal income tax returns. (Tr. 34, 38, 40, 43, 53, 56-60) He provided the following information regarding the timeliness of filing his federal and state tax returns.

<b>Tax Year</b>	<b>Approximate Filing Date</b>	<b>Adjusted Gross Income</b>	<b>Balance Owed as of Dec. 20, 2019</b>	<b>Exhibit</b>
2010	June 3, 2013	\$97,011	\$4,760	Tr. 18, 34; SOR Response; AE A at 1
2012	Aug. 5, 2013	\$134,585	\$0	AE A at 2
2013	Aug. 10, 2015	\$152,966	\$5,401	AE A at 3
2014	Sept. 27, 2015	\$202,105	\$15,686	Tr. 43; GE 3 at 6; AE A at 4
2015	Nov. 25, 2019	Not Listed	\$0	Tr. 49; SOR Response; GE 2 at 2, 4; AE A at 6; AE T
2016	Nov. 25, 2019	Not Listed	\$0	Tr. 49, 54-55; SOR Response; GE 2 at 2, 4; AE A at 8; AE T
2017	July 30, 2019, or Aug. 1, 2019	\$160,502	\$6,723	Tr. 58-59; AE A at 9; GE 2 at 2, 4
2018	July 30, 2019, or Aug. 1, 2019	\$160,085	\$0	Tr. 58-59; AE A at 10; GE 2 at 2, 4; GE 3 at 11
2019	July 2020	Not Listed	\$0	Tr. 60-61

The following table depicts the payments Applicant has made to address his four federal tax debts.

<b>Tax Year &amp; Payment</b>	<b>Date of Payment</b>	<b>Action</b>	<b>Exhibit</b>
2010-\$2,374	Apr. 15, 2012	Transfer of Tax Refund for Tax Year 2011	AE A at 1
2010-\$304	Apr. 15, 2013	Transfer of Tax Refund for Tax Year 2012	AE A at 1
2010-\$252	July 16, 2015	Payment	AE A at 1; AE J at 3
2014-\$300	Dec. 16, 2015	Payment	AE A at 4; AE J at 3
2010-\$150	May 12, 2016	Payment	AE A at 1; AE J at 3
2013-\$300	July 6, 2016	Payment	AE J at 2
2010-\$300	Aug. 19, 2016	Payment	AE A at 1; AE J at 2
2014-\$250	Oct. 31, 2016	Payment	AE A at 5; AE J at 2
2010-\$250	Dec. 16, 2016	Payment	AE A at 1; AE J at 2
2014-\$300	Jan. 13, 2017	Payment	AE A at 5; AE J at 2
2014-\$300	Apr. 26, 2017	Payment	AE A at 5; AE J at 2
2014-\$300	July 13, 2017	Payment	AE A at 5; AE J at 2
2014-\$300	Aug. 22, 2017	Payment	AE A at 5; AE J at 2

<b>Tax Year &amp; Payment</b>	<b>Date of Payment</b>	<b>Action</b>	<b>Exhibit</b>
2014-\$300	Oct. 17, 2017	Payment	AE A at 5; AE J at 2
2014-\$300	Feb. 6, 2018	Payment	AE A at 5; AE J at 1
2010-\$250	Mar. 5, 2018	Payment	AE A at 1; AE J at 1
2015-\$250	Mar. 5, 2018	Payment	AE A at 7
2014-\$300	May 9, 2018	Payment	AE A at 5; AE J at 1
2014-\$350	Sept. 10, 2018	Payment	AE A at 5; AE J at 1
2010-\$250	Nov. 1, 2018	Payment	AE A at 1; AE J at 1
2010-\$250	Jan. 10, 2019	Payment	AE A at 1; AE J at 1
2010-\$250	Feb. 22, 2019	Payment	AE A at 1; AE J at 1
2010-\$105	Apr. 15, 2019	Transfer of Tax Refund for Tax Year 2018	AE A at 1
2014-\$250	Jan. 6, 2020	Payment	AE J at 1
2020-\$225	Jan. 6, 2020	Payment	AE J at 1
2010-\$475	Feb. 19, 2020	Payment	AE J at 1
2013-\$475	Mar. 18, 2020	Payment	AE J at 4
2010-\$3,944	Apr. 20, 2020	Payment	AE J at 4
2010-\$475	May 18, 2020	Payment	AE J at 4
2010-\$5,050	June 22, 2020	Payment	AE J at 4

During Applicant's OPM PSI on November 1, 2018, Applicant was questioned about his delinquent tax debt and failure to file tax returns for tax years 2015 and 2016. (GE 2 at 18) He said he would file the tax returns "this month." (*Id.*) He filed them on November 25, 2019. (AE T)

From 2010 to present, Applicant's annual income was from \$97,000 to \$200,000. (Tr. 28) He established an IRS installment payment agreement on November 12, 2015. (AE A at 4) On June 12, 2017, the IRS said Applicant was no longer in installment payment agreement status and initiated a levy. (Tr. 44; AE A at 5) In 2018 and 2019, the IRS erroneously credited him with several payments for tax year 2015, and then transferred the payments to tax year 2010. (*Compare* AE A at 1 *with* AE A at 6-7) On June 21, 2018, the IRS wrote Applicant about not filing his tax return for tax year tax 2016. (AE A at 8) On November 15, 2018, the IRS wrote Applicant about not filing his tax return for tax year 2017. (AE A at 9) From June 2017, to 2019, Applicant did not have an IRS-approved payment plan. (Tr. 45)

On August 3, 2019, Applicant responded to DOHA interrogatories. (GE 2) He said he owed \$31,429 in federal income taxes as follows: 2010 (\$5,865); 2013 (\$5,273); 2014 (\$15,686); and 2017 (\$4,605). (GE 2 at 2-3) On November 15, 2019, Applicant established an IRS installment payment plan for tax year 2019. (AE A at 9) From October 2019, to June 2020, he made nine \$250 payments to the IRS. (AE C) His current IRS payment plan is to pay the IRS \$472 monthly. (Tr. 19-20; AE B) On June 22, 2020, he paid the IRS \$5,050, and his federal income tax debt for tax year 2010 was paid. (Tr. 19; AE J at 5, 8) As of the date of his response to the SOR and his hearing, his IRS and state payment plans were current. (Tr. 23; SOR response) He said he would provide copies of

the tax returns filed in August 2019 after his hearing. (Tr. 52) He did not know how much he owed the IRS for tax years 2015 and 2016. (Tr. 57) On August 7, 2020, he paid the IRS \$6,748, and he said it was to address his tax debt for tax year 2018; however, in his response to interrogatories, he said his tax debt for tax year 2018 was zero. (GE 2 at 3; AE S; Exhibit Cover Sheet) His IRS tax transcript for tax year 2018 shows he received a \$105 refund which was transferred to address his tax debt for tax year 2010. (GE 3 at 11) He may have meant that his \$6,748 payment was to address his federal tax debt for tax year 2017.

On April 28, 2014, Applicant paid his state tax debt for tax year 2011. (AE Q at 1) On August 21, 2014, he paid his state tax debt for tax year 2012. (AE Q at 1) From June 2017, to May 2018, he made monthly payments to the state tax authority from \$200 to \$250, and he paid his state tax debt for tax year 2013. (AE Q at 1-2) On May 22, 2018, he owed the state tax authority \$14,582 for tax year 2014. (AE Q at 2)

From May 2018, to July 2019, he made monthly payments to the state tax authority from \$200 to \$250, and he reduced his state tax debt for tax year 2014 to \$13,162. (AE Q at 2-3) He estimated he owed the state tax authority \$1,500 for tax year 2019. (Tr. 60-61) From June 2, 2018, to January 31, 2020, Applicant made 18 payments to the state tax authority totaling \$3,945. (Tr. 21; AE C; AE I) He missed payments in March 2019 and September 2019, and he made two payments in December 2019. (AE C; AE I) The missed payments were due to a miscommunication between Applicant's bank and the state tax authority. (Tr. 46) At the time the SOR was issued, he owed the following amounts to the state tax authority for specific tax years: \$2,042 (2013); \$9,195 (2014); \$2,281 (2017); and \$624 (2018). (Tr. 42-44, 59-60; GE 2 at 4, 28) On December 11, 2019, the state tax authority and Applicant agreed to a \$250 monthly payment plan. (AE U) From January to July 2020, he made seven \$250 monthly payments to the state tax authority. (AE U) At his hearing, he said he was current on his state tax payment plan. (Tr. 24) His balance for tax years 2010 through 2013 was zero. (Tr. 37-39, 43) He did not know how much he owed the state tax authority for tax years 2015 and 2016. (Tr. 57)

In August 2020, he paid the state tax authority \$7,501 for the following tax years: \$3,453 (2015); \$3,230 (2017); and \$818 (2018). (AE R; AE U) As of August 2020, he owed the state tax authority \$11,561. (AE U)

Applicant provided a personal financial statement indicating as follows: his monthly gross salary and other income was \$13,031; his monthly expenses were \$2,510 (includes child support of \$1,975); his monthly debt payment was \$1,622 (includes federal income tax payment of \$475, but did not include payment to the state tax authority); and his monthly remainder was \$2,282. (AE K) He received financial counseling in December 2019. (AE D)

After receipt of the SOR, Applicant received an offer of employment with a starting salary of \$170,000. (AE M) In March 2020, Applicant started receiving an annual salary of \$170,000. (Tr. 17, 25, 30) His monthly remainder probably increased from \$2,282 after he started his new employment in March 2020. (Tr. 31)

In 2016, Applicant went to Cuba for 10 days. (Tr. 33) In 2017, he traveled to Mexico, and in 2017, Applicant and his then girlfriend traveled to Morocco. (Tr. 33; GE 2 at 17) In August 2018, Applicant and a friend traveled to Jamaica and stayed at a resort. (*Id.*) He did not provide the amounts he spent for his overseas trips or the amount of money that he provided to support his parents.

## **Character References**

Four coworkers, supervisors, or managers described Applicant in positive terms. (Tr. 20-21; AE H; AE L) The general sense of their statements is that he is dedicated, detail oriented, talented, dependable, professional, helpful, honest, reliable, conscientious, and trustworthy. (AE H; AE L) His diligence and other positive attributes contributed to the success of the enterprises where he was employed. (AE H; AE L) There is no evidence of security violations.

## **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.

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

Applicant was separated from his spouse in 2010, and divorced in 2016. Applicant also indicated his parents had serious medical problems, and he provided financial and other support to them. He had financial stress from having to pay child support, attorney fees, and other expenses. Divorce and medical problems are circumstances beyond his control that adversely affected his finances.

Applicant has taken important steps towards showing his financial responsibility. He filed all required tax returns and made substantial progress addressing his tax debt. He paid his federal tax debt for tax year 2010. He also had taxes withheld and paid to the IRS from his salary. Notwithstanding his excellent progress in 2020, in 2019, he only made three payments totaling \$605, which were in addition to his federal income tax withholding payments.

From June 2017, to May 2018, he made monthly payments to the state tax authority from \$200 to \$250, and he paid his state tax debt for tax year 2013. On May 22, 2018, he owed the state tax authority \$14,582 for tax year 2014. From May 2018, to July 2019, he made monthly payments to the state tax authority from \$200 to \$250, and he reduced his state tax debt for tax year 2014 to \$13,162. In August 2020, he paid the state tax authority \$7,501 for the following tax years: \$3,453 (tax year 2015); \$3,230 (tax year 2017); and \$818 (tax year 2018). As of August 2020, he owed the state tax authority \$11,561.

Appellant said he forgot about filing his federal and state tax returns due to stress from his relationship with his spouse, difficulty obtaining records, and problems with tax preparers. These excuses are not persuasive because he failed to timely file his tax returns over an extended period of time. From April 15, 2011, to November 25, 2019, he was late filing various tax returns as follows: 2010 (filed June 3, 2013); 2013 (filed August 10, 2015); 2015 and 2016 (filed November 25, 2019); and 2017 and 2018 (filed July 30, 2019).

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 the 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. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted); 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).

Even if no taxes are owed when tax returns are not timely filed, the Appeal Board provided the following principal rationale for reversing the grant of a security clearance. See, e.g., ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016) (noting 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). 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.

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)).

In sum, Applicant provided evidence of mitigation under AG ¶¶ 20(c) and 20(g) because he received financial counseling, generated a budget, filed his tax returns, established payment plans with the IRS and state tax authority, and complied with those payment plans for a sufficient period of time to indicate he currently intends to timely file and pay his taxes. However, there is insufficient evidence showing Applicant's multiple failures to timely file his tax returns were prudent good-faith decisions. He did not establish he was unable to make greater progress sooner resolving his delinquent tax debts. 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 42-year-old senior network and administrative security professional. He has 20 years of experience as an information technology specialist. He attended college for several years, and he received numerous information technology certifications. He was married from 2003 to 2016, and he has two children. Four coworkers, supervisors, or managers lauded Applicant's performance and trustworthiness. The general sense of their statements is that he is dedicated, detail oriented, talented, dependable, professional, helpful, honest, reliable, and conscientious. His diligence and other positive attributes contributed to the success of the enterprises where he was employed. He is an excellent employee who made substantial contributions to his company and the national defense over a lengthy career. There is no evidence of security violations.

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).

In ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired Navy E-9 and cited his failure to timely file state tax returns for tax years 2010 through 2013 and federal tax 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 Appeal Board reversed the favorable decision of the administrative judge in a case where the applicant filed his 2009, 2010, and 2011 tax returns in February 2014 and

his 2012 tax return in August 2015 all before the SOR was issued. ISCR Case No. 15-03481 at 3 (App. Bd. Sept. 27, 2016). The applicant owed less than \$1,800 in federal income taxes for those four tax years at the time of the decision. *Id.* The Appeal Board found the timing of the filing of his tax returns to be important stating:

Applicant did not resolve his tax filing delinquencies until after submission of his security clearance application and after undergoing his background interview. Taking action to resolve the delinquent tax filings well after the initiation of the security clearance process undercuts a determination that those actions constitute a good-faith effort to resolve the delinquencies.

*Id.* at 5.

Applicant filed all of his tax returns and made substantial progress paying his federal and state tax debts. His remaining tax debt is relatively low in comparison to his income. He has substantial child-support responsibilities. However, the primary problem here relates to the timing of Applicant's filing of his federal and state income tax returns. Applicant knew that he needed to timely file his income tax returns. He may not have fully understood or appreciated the importance of this requirement in the context of his eligibility for access to classified information. When the OPM investigator questioned him in 2018, he promised to get his tax returns filed "this month." He did not file the tax returns for tax years 2015 and 2016 until November 25, 2019. (AE T) He did not establish he was unable to make greater progress sooner in the resolution of his tax issues. His actions under the Appeal Board jurisprudence are too little, too late to fully mitigate security concerns. See ISCR Case No. 15-03481 at 5 (App. Bd. Sept. 27, 2016). 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 ¶ 18.

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.h:	Against Applicant

## **Conclusion**

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