



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



In the matter of: )  
)  
) ISCR Case No. 19-01643  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David Hayes, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

12/10/2020

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant failed to timely file her federal and state income tax returns for tax years 2011, 2013, and 2015. She is making payments under an Internal Revenue Service (IRS) installment plan to address her federal income tax debt, and she plans to start an installment plan to resolve her state income tax debt soon. She has made progress getting her financial house in order; however, she did not prove she was unable to timely file her federal and state tax returns. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On August 30, 2017, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On October 4, 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; as amended, 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) Applicant provided an undated response to the SOR and requested a hearing. (HE 3)

On September 1, 2020, Department Counsel was ready to proceed. On September 18, 2020, the case was assigned to me. On October 23, 2020, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 30, 2020. (HE 1) The hearing was held as scheduled. Applicant waived her right to 15 days' notice of the date, time, and location of the hearing. (Transcript (Tr.) 10)

During the hearing, Department Counsel offered five exhibits; Applicant offered 37 exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 16-17; GE 1-5; Applicant Exhibits (AE) A-AE KK) Applicant provided seven additional documents after her hearing, which were admitted into evidence without objection. (AE LL-AE RR) The record closed on November 13, 2020. (Tr. 15, 89) On November 19, 2020, 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 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, she admitted the allegations in ¶¶ 1.a, 1.b, 1.c, 1.e, 1.f, 1.g, 1.h, 1.j, and 1.k, and she denied the allegations in SOR ¶¶ 1.d, 1.i, 1.l, and 1.m. For some of her debts, she admitted in part and denied in part the allegations. For example, she admitted that she had the account, but said the debt was under a current payment plan. She also provided extenuating and mitigating information. Her admissions are accepted as findings of fact.

Applicant is a 50-year-old systems engineer. (Tr. 19; GE 1) Her current annual income from her systems engineer employment is \$119,000. (Tr. 36; AE QQ) She has worked as a systems engineer since 2014. (AE N) She also has part-time employment working in a drug store as a cashier, where her annual income is about \$5,000. (Tr. 19, 36) She has held a security clearance since 1998. (Tr. 22) In 1997, she received an associate's degree in emergency medical services. (GE 1; AE O) In 2001, she received a bachelor's degree. (GE 1; AE O; AE V; AE BB at 5) In 2012, she received a master's degree in technology management and homeland security. (Tr. 26-27; GE 1; AE O; AE V; AE BB at 5)

Applicant has been married four times: from 1989 to 1990; from 1990 to 1995; from 1995 to 2001; and from 2001 to present. (Tr. 37-49; GE 1) Her children are ages 14, 18, 22, and 26. (Tr. 20; GE 1) Three of Applicant's children continue to live with her, and two

of them have had mental health issues. (Tr. 20) Applicant served on active duty in the Army for four years and for 12 years in the Army Reserve. (Tr. 20-21) She left the Army as a staff sergeant, and she received an honorable discharge. (Tr. 21; AE U) Her Army specialty was medical laboratory specialist. (Tr. 21)

Applicant was deployed to Iraq from March to July or August 2003. (Tr. 22, 74; AE LL, at ¶ 1) She was exposed to hostile fire and danger in Iraq. (Tr. 42) Her deployment to Iraq was difficult for her husband and children. (AE Y) She returned early from Iraq because her husband attempted suicide and was hospitalized or partially hospitalized from July to November 2003. (Tr. 22, 42-43; AE LL at ¶¶ 2-5) He was making \$90,000 annually before he became unemployed because of his hospitalization. (Tr. 23) He was unemployed or underemployed from 2003 to August 2006. (Tr. 23-24, 40; AE LL at ¶¶ 5-9) In 2004, the mortgage company foreclosed on her home as a result of the reduction in family income from her husband's unemployment. (Tr. 23-24, 40; AE BB at 2)

Applicant's son was hospitalized for substantial periods of time from September 2009 to October 2011 because of a mental health condition and related behavioral issues. (Tr. 24, 45; AE LL at ¶¶ 10-14; AE OO) TRICARE paid the medical expenses, and she paid \$2,500 monthly for his educational expenses. (Tr. 24, 45; AE BB at 2) In 2011, her son moved to a group home, and in 2015, he moved to foster care. She had to pay the state for the foster and residential care. (AE LL at ¶¶ 17, 25, 26-27; SOR response) Her son was periodically moved to other care facilities, and in July 2018, he moved into the family home. (AE LL at ¶¶ 33, 37) In August 2019, her son had knee surgery and was unable to work. (AE LL at ¶ 44)

From 2010 to 2016, Applicant was separated from her spouse because he wanted to live away from Applicant and their children. (Tr. 25; AE LL at ¶ 16) Her husband did not provide child or spousal support. (Tr. 25; AE MM) Her husband was periodically unemployed, or underemployed. (AE LL at ¶¶ 2, 9, 29, 30, 31, 41, 42, 43; AE MM)

In 2014, Applicant became unemployed for two months because her employer lost a government contract, and then when she was again employed, she received a substantial reduction in her pay. (Tr. 25, 46; AE BB at 2) She took funds out of her retirement plan to pay for her son's care and education. (Tr. 26; SOR response) She had some tenants in her home, and they failed to pay the rent. (Tr. 47; AE BB at 3) Her home went into foreclosure around 2016. (Tr. 47-48; GE 2; AE BB at 3)

In 2016, Applicant's husband began living with Applicant again. (AE BB at 3) In 2017, Applicant allowed another family in desperate financial straits to move in with her, her husband, and children because she did not want them to live in a car. (AE BB at 4) Applicant did not indicate how long the family lived in her residence.

Applicant's husband currently lives with Applicant in the same household. (Tr. 36) He is a calibration engineer. (Tr. 36) His annual salary is \$67,000; however, he does not provide significant financial support for his family. (Tr. 36-37; AE QQ) He pays for car insurance, the cable bill, and some household maintenance expenses. (Tr. 69; AE QQ)

After Applicant's mother's husband died, she moved in with Applicant, and she pays the home heating oil bill out of her Social Security. (Tr. 50, 69; AE QQ)

### Financial Considerations

Applicant provided a detailed listing of her bills on her SCA. (Tr. 72; GE 1) Applicant had a myriad of unexpected financial and family problems: (1) her son and daughter were hospitalized several times for depression, anxiety, and other mental health issues; (2) her son was unable to work because he injured his knee; (3) her husband had mental-health problems that required inpatient and outpatient treatments and affected his ability and willingness to support his family; and (4) Applicant had disruptions in her income from changes in employment and her tenant's failures to pay rent. (Tr. 67; AE BB) Her finances have some positive aspects. She has been continuously employed for the last three years, and her oldest son has left home, is married, and is financially independent. (AE BB at 2-4)

The SOR alleges 10 delinquent debts totaling \$45,803 and failure to file or timely file tax returns as follows:

SOR ¶ 1.a alleges that Applicant failed to timely file her federal income tax returns for tax years 2011 through 2017. SOR ¶ 1.b alleges that she owes federal income taxes totaling \$31,234 for tax years 2011 and 2015.

SOR ¶¶ 1.c and 1.d allege Applicant failed to timely file her state income tax returns for tax years 2011 through 2017.

Applicant filed as head of household for tax years 2011, 2012, 2013, 2014, and 2015, and she filed as married filing joint return for tax years 2016, 2017, and 2018. (AE A; AE B) The amount owed as of July 2019 is based on IRS account transcripts for tax years 2014, 2016, 2017, and 2018. (AE A) Tax returns for tax years 2011, 2013, and 2015 were provided; however, tax transcripts for those years were not provided. (AE B) The following table shows the date Applicant's federal income tax return was filed, her adjusted gross income, rounded to the nearest thousand, and tax owed (-) or surplus (+) rounded to nearest hundred.

Tax Year	Tax Return Filed	Adjusted Gross Income	Tax Owed	Amount Owed as of July 2019	Exhibit
2011	June 27, 2019	\$260,000	-\$14,400		AE B
2012	June 19, 2013	\$102,000	+\$3,700	\$0	GE 2
2013	June 27, 2019	\$104,000	+\$4,200	\$0	AE B
2014	Apr. 15, 2015	\$175,000	-\$6,100	\$0	AE A
2015	June 27, 2019	\$123,000	-\$2,500		AE B
2016	Apr. 15, 2017	\$90,000	+\$4,600	\$0	AE A
2017	Apr. 15, 2018	\$107,000	+\$4,600	\$0	AE A
2018	Mar. 11, 2019	\$123,000	+5,800	\$0	AE A

For tax year 2011, Applicant withdrew \$159,900 from her pension plan. (AE B, IRS Form 1040, line 16a) For tax year 2015, Applicant withdrew \$42,100 from her pension plan. (AE B, IRS Form 1040, line 15b) When Applicant took one of the withdrawals from her retirement account, she thought she might be able to take a medical deduction for her son's mental health expenses; however, later she found out it did not qualify because it was an education expense. (Tr. 53) These two withdrawals from her pension plan caused most of her federal income tax debt.

In 2011, Applicant learned there was an issue with her state income taxes because a state tax authority filed a lien against her pay for \$12,600. (Office of Personnel Management (OPM) personal subject interview (PSI) at 7). She blamed the failure to file her tax returns on her husband, and said it was due to his mental health issues. (*Id.*) The lien started in April 2012, and it was resolved in 2017. (*Id.*)

On August 30, 2017, Applicant completed her SCA, and she stated:

[The IRS] provided me with what years I need to file and the information on my income for those years as well as where to find the forms and instructions. Once I have filled out the forms as married filing single, I will schedule another assistance appointment where I can turn them in and then set up a payment plan for any amounts that are owed that day. The [IRS] assistance office also provided information on [the] State office of taxation in order to ensure I am able to file my state income taxes for those years as well. I will be following up with the [state tax returns] once I have completed each federal form. (emphasis added, GE 1 at 45)

Applicant did not specify in more detail the information she received from the IRS about her income and withholdings for tax years 2011, 2013, and 2015.

On September 20, 2017, Applicant responded to questions from an OPM investigator substantially as follows:

Subject provided her husband the documents needed to fill out the taxes for [tax years 2011, 2013, and 2015] but he failed to do so due to his depression. ... Subject started filling out the paperwork needed to file and will set up a payment plan after she finishes the paperwork. Subject is prioritizing her taxes to the front of the list of things to pay and is willing and capable of paying this debt. Subject had no further details.

For unfiled or unpaid state income taxes, in her response to DOHA interrogatories Applicant indicated in a table that the state owed Applicant a refund for tax year 2011 and provided a refund. (GE 2) For her state tax returns for 2013 and 2015, she wrote that she was in the process of filing those tax returns. (OPM interview at 6) The OPM interviews are summaries and are not verbatim. Applicant made the handwritten notes on the margins on some pages such as "paid in full" by some debts which she intended to be "corrections." (GE 2)

On July 17, 2019, Applicant agreed to an IRS installment payment plan, in which she agreed to make \$453 monthly payments to address her \$31,500 federal income tax debt for tax years 2011 and 2015. (AE C) On July 25, 2019, Applicant responded to DOHA interrogatories. (GE 2) On September 22, 2019, she paid the IRS \$450, and on October 22, 2019, she paid the IRS \$500. (AE D) Both payments went to address her tax debt for tax year 2011. (*Id.*) On November 21, 2019, she arranged to have an automatic direct withdrawal from her bank account paid to the IRS. (AE E; AE Z)

On November 25, 2019, the IRS reduced her refund for tax year 2013 to \$3,800. (AE F) She was unable to receive the federal income tax refund for tax year 2013 because her tax return was filed more than three years late. (Tr. 58)

Since September 2019, Applicant has made all payments under her IRS payment plan, and along with her refunds, she has reduced her federal income tax debt to about \$14,000. (Tr. 28)

Applicant timely filed her state income tax return for tax year 2017. (AE G) In October 2020, Applicant filed her state income tax returns for tax years 2013 and 2015. (Tr. 31, 59; AE DD) She owes the state tax authority \$500 for tax year 2013, and \$2,000 for tax year 2015, and she is waiting for the state to contact her about a payment plan. (Tr. 60; AE DD)

Applicant said that she did not know her federal income tax returns were not filed because her husband had filed them in the previous years. (Tr. 53-56) He used TurboTax, which is a computer and Internet-based system that does not require a taxpayer's signature to file tax returns. (Tr. 73-74) She said she discovered her tax returns were not filed when a state tax entity contacted her about her tax return for tax year 2011, and she suggested this discovery occurred in 2016 or 2017 possibly in July or August 2017. (Tr. 54-56, 74) She did not explain why she believed from 2012 to 2016 or 2017 that her husband, who was suffering from mental health issues and who failed to file a state tax return around 2012 or had filed an incorrect state tax return, could be entrusted with filing her tax returns.

After Applicant received the letter from the state tax entity about not filing a state tax return, she went to an IRS office in August 2017, and asked which federal tax returns were not filed. (Tr. 54-55; GE 1) The IRS informed her that her federal income tax returns for tax years 2011, 2013, and 2015 were not filed. (Tr. 56)

Applicant said she spent the next two years gathering information to file her tax returns for tax years 2011, 2013, and 2015. (Tr. 57) She said, "the federal transfers given to me at the IRS office [did] not include the state numbers. And [she] had to track down [her] W-2 forms for 2015. The company had been sold. And due to COVID they couldn't [give her] the tax, the W-2 form until recently." (Tr. 59) When she delivered the tax returns to the IRS, the IRS stamped them indicating the IRS received them. (AE B)

The lack of W-2s does not excuse a failure to timely file a tax return. When a taxpayer lacks documentation, such as a W-2, the correct approach is to contact the IRS

seeking help to obtain a W-2, and in any event, a tax return should be timely filed with an estimate of income and taxes withheld. See IRS website, Form W-2 Missing? IRS Can Help, available at <https://www.irs.gov/newsroom/form-w-2-missing-irs-can-help>.

In sum, Applicant timely filed her federal income tax returns for tax years 2014, 2016, 2017, and 2018. (Tr. 50; AE A; AE B) She filed federal income her tax returns late for tax years 2011, 2013, and 2015. She paid her federal income tax debt down from \$31,000 to about \$14,000 through monthly tax payments in accordance with her IRS settlement agreement and through IRS transfers of refunds for tax years 2016, 2017, and 2018. (Tr. 57-58) In October 2020, she filed her state income tax returns for tax years 2013 and 2015, and she owes the state about \$2,500.

SOR ¶ 1.e alleges Applicant has a past-due debt for \$1,646, and the total debt is \$7,742. She made consistent payments for several years; however, a credit card was compromised, and this caused a break in payments for several months. (Tr. 62) On October 19, 2019, the creditor indicated the amount of her debt was \$7,281, and the next \$155 payment was due on November 15, 2019. (AE H) She made five \$155 monthly payments from June to October 2019. (AE H) From October 2019 to October 2020, she made eleven \$155 payments. (Tr. 31, 62; AE EE; AE FF) The creditor indicated her account is “currently on-time.” (AE I)

SOR ¶ 1.f alleges a medical account placed for collection for \$1,556. In October 2020, Applicant made her first payment on her \$35 monthly payment plan. (Tr. 31, 62; AE GG)

SOR ¶ 1.g alleges a charged-off account for \$792. In November 2020, Applicant established a \$25 monthly payment plan for this account, and she made the first payment. (Tr. 32-33, 62; AE J; AE HH)

SOR ¶¶ 1.h and 1.i allege accounts placed for collection for \$449 and \$386 owed to the same creditor. Applicant mistakenly thought these debts were paid. (Tr. 64) Once she realized they were delinquent, she paid them in full in 2019. (Tr. 33, 64-65; AE L; AE JJ)

SOR ¶ 1.j alleges a charged-off department store account for \$303. Applicant attempted to pay the debt; however, the creditor would not accept payment because it was beyond the statute of limitations. (Tr. 33-34, 65)

SOR ¶ 1.k alleges an insurance account placed for collection for \$300. On an unspecified date, Applicant established a \$50 monthly payment plan with the creditor. (Tr. 34, 65; AE II)

SOR ¶ 1.l alleges a medical account placed for collection for \$2,482. Applicant has a payment plan with the creditor, and she made the first two payments. (Tr. 34-35, 66)

SOR ¶ 1.m alleges a utility account placed for collection for \$559. Applicant has a payment plan with the creditor, and she made the first payment. (Tr. 35; AE JJ)

Applicant received financial counseling, and she provided a budget. (Tr. 71; AE AA; AE QQ) Her annual gross salary is \$119,000, and she receives an additional \$5,000 annually from her part-time employment. (AE QQ) Her monthly net remainder is \$468. (*Id.*) Applicant does not use credit cards. (Tr. 68) She is unsure of the status of some of her family's recent medical bills. (Tr. 68)

### **Character Evidence**

Coworkers, supervisors, and friends described Applicant in positive terms. (AE Q; AE R; AE CC) The general sense of their statements is that she is intelligent, innovative, professional, detail oriented, helpful, honest, reliable, conscientious, and trustworthy. (AE Q; AE R; AE CC) She has an exceptionally strong reputation as a diligent and dedicated employee. (AE Q; AE R; AE CC) Her positive work attributes contributed to the success of the enterprises where she is employed. (AE Q; AE R; AE CC) There is no evidence of security violations or criminal conduct.

In 2009, Applicant received a Society of Logistics Award and a certificate of appreciation from the Department of Labor for her contributions to a data collection program. (AE O; AE S) Her performance review for 2019 showed good to excellent evaluations. (AE P) She received additional awards for her contributions to her employer, the Boy Scouts, and the Army. (AE S) In 2019, she received an \$800 performance award and a 1.8 percent pay increase. (AE S) She contributed to her community as a paramedic from 1995 to 2001, to the fire department, Boy Scouts, Girl Scouts, Junior Miss, a recreation center, her church, and various volunteer and youth activities. (AE BB at 4-5)

### **Request for Evidence**

At the conclusion of the hearing, I asked Applicant to provide additional documentation:

And ma'am if you can find those letters where you were first notified, I need to make a timeline in this case of when you discovered the tax returns were not filed. And then what you did about those tax returns. Because the filing of the tax returns is the key determinant in this case, because of the Appeal Board's jurisprudence. So, I have to look very carefully at whether you acted responsibly in connection with filing those tax returns. . . . [I have to determine] were you responsible when you filed those tax returns, after you discovered they were not filed? So, I have to nail that down. (Tr. 87-88)

Applicant did not provide the letter or letters of notification she received about her not filing tax returns. She did not provide the IRS tax transcripts for tax years 2011, 2013, and 2015, which may have contained information about the IRS attempts to notify her about the missing tax returns. She provided a statement from her husband; however, he did not admit that he was responsible for filing Applicant's tax returns or that he misled her about filing tax returns. (AE MM) She did not ask for additional time to seek additional documentation.



## 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 [or her] 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.

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)).

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's son and daughter were hospitalized several times for depression, anxiety, and/or other mental health issues. More recently, her son was unable to work because he injured his knee. Her husband had mental-health problems over the last ten years, which required inpatient and outpatient treatments and affected his ability and willingness to support his family. Applicant had disruptions in her income from changes in her employment and her tenant's failures to pay rent. She is a generous person who volunteered to help others including allowing another family facing financial hardship to move in with her family. She allowed her mother to move in with her after her mother's husband died. These medical problems and spousal issues are circumstances beyond her control that adversely affected her finances.

Applicant has taken important steps towards establishing her financial responsibility. She filed all required tax returns and made substantial progress addressing her debts. The SOR alleges 10 delinquent debts totaling \$45,803. She paid the debts in SOR ¶¶ 1.h and 1.i. The creditor in SOR ¶ 1.j waived collection of her debt because of the statute of limitations. She has an established payment plan for the debt in SOR ¶ 1.e. She reduced her federal tax debt from \$31,324 to about \$14,000. She has started payment plans on the other SOR debts. Her unpaid state tax debt of \$2,500 is relatively modest. She received financial counseling, and has a budget that she follows. She has sufficient financial resources to establish and maintain her financial responsibility. These circumstances establish mitigation under AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(g) for all of her debts, including her tax debts. These five mitigating conditions do not mitigate security concerns caused by her failure to timely file her federal and state income tax returns.

The critical financial considerations issue is Applicant's failure to timely file her state and federal income tax returns. 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). Failure to file a state tax return may also be a crime under state law. For purposes of this decision, I am not weighing Applicant's failure to timely file her federal and state income tax returns against her as crimes. 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).

In ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board explained that in some situations, even if no taxes are owed when tax returns are not timely filed, grant of access to classified information must nevertheless be denied. In ISCR Case No. 15-1031 (App. Bd. June 15, 2016) the applicant filed his 2011 federal income tax return in December 2013, his 2012 federal tax return in September 2014, and his 2013 federal tax return in October 2015. He received federal tax refunds of at least \$1,000 for each year. Nevertheless, the Appeal Board reversed the Administrative Judge’s decision to grant access to classified information.

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 this case, Applicant provided evidence of mitigation under AG ¶¶ 20(c) and 20(g) because she received financial counseling, generated a budget, filed her tax returns, established payment plans with the IRS, and plans a payment plan with the state tax authority. Her history of compliance with her IRS payment plan shows she some reform going forward. However, there is insufficient evidence showing Applicant's multiple failures to timely file her tax returns were prudent good-faith decisions. She did not establish she was unable to make greater progress sooner filing her federal income tax returns for tax years 2011, 2013, and 2015, and her state income tax returns for tax years 2013 and 2015. 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 50-year-old systems engineer. Her current annual income from her systems engineer employment is \$119,000. She has worked as a systems engineer since 2014. She also has part-time employment working in a drug store as a cashier, where her annual income is about \$5,000. She has held a security clearance since 1998. In 1997, she earned an associate's degree in emergency medical services. In 2001, she received a bachelor's degree. In 2012, she received a master's degree in technology management and homeland security. Applicant's coworkers, supervisors, and friends lauded Applicant's performance and trustworthiness. The general sense of their statements is that she is intelligent, innovative, professional, detail oriented, helpful, honest, reliable, conscientious, and trustworthy. She has an exceptionally strong reputation as a diligent

and dedicated employee. She received awards for her work performance. She contributed to the success of the enterprises where she is employed. Applicant's support to her family, employer, friends, and community are positive attributes that warrant considerable mitigating weight.

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 suggests 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 her tax returns and made substantial progress paying her debts. Her remaining tax debt is relatively low in comparison to her income. However, the primary problem here relates to the timing of Applicant's filing of her federal and state income tax returns. She 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 her in 2017, she said she was going to collect the documentation and file her tax returns. She did not file her federal income tax returns for 2011, 2013, and 2015 until June 27, 2019, after she completed her SCA and had her OPM interview. She did not file her state tax returns for 2013 and 2015 until October 2020. She did not establish she was unable to make greater progress sooner in the resolution of her tax issues. Her 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 timely file her tax returns "may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about [her] 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraphs 1.d through 1.m:	For 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