



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



In the matter of: )  
)  
) ISCR Case No. 20-03625  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Jeffrey T. Kent, Esq., Department Counsel  
For Applicant: *Pro se*

07/01/2022

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant failed to establish that he was unable to make greater progress sooner filing his federal and state income tax returns for tax years (TY) 2016 and 2018 and to pay his federal income tax debt for TY 2018. He failed to mitigate Guideline F (financial considerations) security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On May 28, 2019, Applicant completed a Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On March 23, 2021, 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. (HE 2) On

April 13, 2021, Applicant provided his response to the SOR, and he requested a hearing. (HE 3)

On June 9, 2021, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic. On January 21, 2022, the case was assigned to me. On March 11, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a Notice setting the hearing for April 7, 2022. (*Id.*) His hearing was held as scheduled in the vicinity of Arlington, Virginia using the DOD Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered six exhibits; Applicant offered the documents previously submitted in his response to the SOR; and all proffered exhibits were admitted into evidence without objection. (Tr. 11-14, 19-23; GE 1-GE 6) On April 15, 2022, DOHA received a copy of the transcript. Applicant provided three post-hearing exhibits, which were admitted without objection. (Tr. 48; Applicant Exhibit (AE) F-AE I) The record closed on May 27, 2022. (Tr. 48, 54)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, he admitted all of the SOR allegations. (HE 3) He also provided mitigating information. (*Id.*) His admissions are accepted as findings of fact.

Applicant is a 57-year-old engineering technician II who has worked for a defense contractor for three years. (Tr. 7, 9; GE 1) In 1984, he graduated from high school. (Tr. 7) He has never served in the military. (Tr. 7) He was married in 1987 and divorced in 1991. (GE 1 at 22) His two children were born in 1987 and 2004. (*Id.* at 25)

### **Financial Considerations**

For several years, Applicant was paid cash for labor work without the information being shared with the Internal Revenue Service (IRS). (Tr. 44-46) He has a history of not filing tax returns because his refunds were going toward a child support debt, and he did not believe this was fair because he was not permitted to see his daughter. (Tr. 31; GE 4 at 9) His child support debt for his oldest child was paid in 2016. (GE 2 at 14) He acknowledge that his handling of his taxes was not "the right thing to do." (Tr. 31) Later, after his child support was paid, he failed to file some tax returns because he was distracted by other events and issues in his life, including the illness and death of his father. (Tr. 32-33, 47-48)

SOR ¶ 1.a alleges Applicant failed to file his federal income tax returns for TYs 2016 and 2018. Applicant said he was unable to find W-2s or other documents showing his income for TY 2016. (SOR response, Ex. A) For TY 2016, he provided an IRS account transcript showing no tax return was found. (SOR response, Ex. A) He subsequently filed his tax return for TY 2016 on August 13, 2021. (AE I at 11)

Applicant's April 20, 2022 TY 2018 IRS tax transcript indicates his TY 2018 federal income tax return was filed on May 4, 2020; however, his IRS processing date was May 3, 2021. (AE H at 1) On April 24, 2021, a duplicate return was filed. (*Id.*) When he filed his TY 2018 federal tax return, he owed the IRS \$739; however, he did not pay the IRS \$739 when he filed his TY 2018 tax return. (Tr. 25-30) His tax debt for TY 2018 was paid with his federal income tax refunds for TYs 2020 and 2021, with the final payment being made in April 2022. (*Id.* at 2; AE H at 1; AE G)

SOR ¶ 1.b alleges Applicant failed to file as required his federal income tax return for TY 2017. An IRS tax transcript shows his TY 2017 tax return was filed in April 2019. (GE 3 at 13) He was due a \$470 refund, and it was transferred to address a non-IRS debt. (*Id.*)

SOR ¶ 1.c alleges Applicant failed to file as required his state income tax returns for TYs 2016, 2017, and 2018. For TY 2016, he said "nothing found, nothing to report." (SOR response, Ex. C at 1) For TYs 2017 and 2018, he provided copies of his state income tax returns; however, they were not signed or dated. (*Id.*) His tax return preparer dated his TY 2018 state tax return April 24, 2021, and he owed \$325. (*Id.* at 7-8) He said he filed his TY 2017 and 2018 state tax returns around April 2021. (Tr. 35)

SOR ¶ 1.d alleges Applicant owes past-due state income taxes of \$5,900 for TYs 1991, 1992, 2008, 2009, 2013, and 2014. His July 14, 2020 state tax account summary indicates he owes a total of \$5,901 for the following six TYs: 1991 (\$168); 1992 (\$1,650); 2008 (\$3,630); 2009 (\$2,772); 2013 (\$590); and 2014 (\$557). (GE 2 at 11) His May 17, 2021 state tax account summary indicates he owes a total \$5,702 for the following six TYs: 1992 (\$1,371); 2008 (\$322); 2009 (\$2,640); 2013 (\$324); 2014 (\$574); and 2018 (\$471). (AE H at 10) On March 23, 2021, the SOR was issued, and from April 20, 2021, to July 23, 2021, he made eight payments of \$50 to \$55, and one \$200 payment. (SOR response, Ex. D at 2-3; AE H at 13) He made several \$55 payments in 2022. (Tr. 36-38)

SOR ¶ 1.e alleges Applicant owes a delinquent medical debt for \$201. On April 21, 2021, he paid the creditor \$304, and the debt in SOR ¶ 1.e is resolved. (SOR response, Ex. E at 2) He also paid a non-SOR medical debt for \$115. (Tr. 39-40; *Id.*)

The IRS received Applicant's federal income tax return for TY 2019 on May 18, 2020, and for TY 2020 on May 10, 2021. (AE H at 5, 6) His TY 2020 federal income tax return indicates he had itemized deductions of \$12,400 and his TY 2021 federal income tax return indicates he had itemized deductions of \$12,550; however, he did not provide a copy of his Schedule As for those two TYs. (AE I at 1, 5) He self-prepared his federal income tax returns for TYs 2020 and 2021. (AE I at 2, 6) He is credited with timely filing his state and federal income tax returns for TYs 2020 and TY 2021. (Tr. 41-42; AE H at 3, 8; AE I at 1-9) He received a \$42 refund in May 2022 for TY 2021 and the remainder of his refund was used to pay his tax debt for TY 2018. The \$42 refund is an indication all of his federal income taxes are current. (AE H at 3, 9)

On April 25, 2022, Applicant's program manager lauded his diligence, responsibility, and potential for future contributions to his employer. (AE F) He was

promoted to engineering technician II, and he is likely to be promoted to positions of greater responsibility in the future. (*Id.*)

## 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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 Director of National Intelligence 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

AG ¶ 19 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts”; “(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 the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying conditions is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 are as follows:

(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 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 provided some important mitigating information. He was distracted by the illness and death of his father and other situations in his life. These circumstances were beyond his control, and they adversely affected his finances. However, “[e]ven if applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the judge could still consider whether applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999)).

Another component under AG ¶ 20(a) is whether Applicant maintained contact with creditors and attempted to negotiate partial payments to keep debts current. He did not prove that he maintained contact with the IRS over the years or that he worked diligently to timely file his tax returns and timely pay his federal income taxes. He did not act responsibly with respect to his federal income tax debt for TY 2018 because he waited until April 2022 to pay it using tax refunds.

SOR ¶ 1.b is mitigated because an IRS tax transcript shows Applicant’s TY 2017 federal and state income tax returns were filed in April 2019. His failure to timely file his TY 2017 federal and state tax returns is not recent and is mitigated. SOR ¶ 1.d is mitigated because he has an established payment plan designed to resolve his state income tax debt, and he made multiple payments in 2021 and 2022. See AG ¶ 20(g). SOR ¶ 1.e is mitigated because the debt is paid.

Applicant failed to timely file his federal income tax returns for TYs 2016 and 2018 and to timely pay any taxes due. 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 or supply information, 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 crime. In regard to the failure to timely file federal income tax returns when due, 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 & n.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).

Applying the Appeal Board’s jurisprudence, SOR ¶¶ 1.a and 1.c are not mitigated. Although Applicant filed his TY 2016 and 2018 federal and state income tax returns, he did not file them timely. He did not prove that he was unable to make greater progress sooner filing these two tax returns. He failed to timely pay his federal income tax debt for TY 2018. Under all the circumstances, he 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 57-year-old engineering technician II who has worked for a defense contractor for three years. In 1984, he graduated from high school. Applicant’s program manager lauded his diligence, responsibility, and potential for future contributions to his employer. He was promoted to engineering technician II, and he is likely to be promoted to positions of greater responsibility in the future.

Applicant provided important financial considerations mitigating information. His failures to timely file tax returns were affected by several circumstances beyond his control. He mitigated the financial issues alleged in SOR ¶¶ 1.b, 1.d, and 1.e. From 2020 to present, he made some progress paying his state tax debts, and his federal income taxes are current.

The evidence against grant of a security clearance is more substantial at this time. Applicant did not provide establish that he was unable to make greater progress sooner filing his federal and state income tax returns for TYs 2016 and 2018 and to pay his federal income tax debt for TY 2018. His failure to take prudent responsible actions raise unmitigated questions about his reliability, trustworthiness, and ability to protect classified information. See AG ¶¶ 15 and 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. “[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant’s eligibility for access to classified information.” ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)).

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. Applicant failed to mitigate financial considerations security concerns.

## 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 and 1.e:	For Applicant

## Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's national security eligibility for access to classified information. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge