



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



In the matter of:)
)
) ISCR Case No. 21-01518
)
Applicant for Security Clearance)

Appearances

For Government: Jeffrey T. Kent, Esq., Department Counsel
For Applicant: *Pro se*
09/16/2022

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s handling of his federal income tax debt for tax year (TY) 2016 and student loan debt resulted in unmitigated Guideline F (financial considerations) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 8, 2019, Applicant completed and signed a Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On September 21, 2021, the Defense Counterintelligence and Security Agency (DCSA) 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 DCSA 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 November 19, 2021, Applicant provided a response to the SOR. (HE 3) On February 24, 2022, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic. On March 18, 2022, the case was assigned to me. On April 19, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 30, 2022. (HE 1) His hearing was held as scheduled using the DOD Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered eight exhibits, and Applicant did not offer any exhibits because his computer crashed. (Transcript (Tr.) 11) All exhibits were admitted without objection, except GE 7, a 2007 appellate court decision which related to a dispute Applicant had with his employer about his termination from employment in 2003. (Tr. 17-20; GE 1-8) Applicant objected to GE 7 because it was prejudicial and not relevant. (Tr. 18) I concluded Applicant's complaints about his employer and his counsel went to the weight and not the admissibility of GE 7. (Tr. 20) GE 7 is given very little weight because it is not recent, and his employer's complaints about Applicant were not litigated in detail at his security clearance hearing. On July 12, 2022, DOHA received a transcript of his security clearance hearing. Applicant provided eight exhibits after the hearing, which were admitted without objection. (Applicant Exhibit (AE) 1-AE 8) Applicant provided a summary of a phone call with the student loan creditor and discussion of ISCR cases (AE A); a transcript of a conversation with the IRS (AE B); and a closing argument (AE C). These three exhibits are admitted. (AE A-AE C) Department Counsel's response is also admitted as well as the email post-trial discussions with the parties. (AE C) The record closed on September 14, 2022. (Tr. 86; HE 4)

Legal Issue

Department Counsel moved to amend the SOR to add an allegation that Applicant failed to timely file some of his federal income tax returns; Applicant objected due to lack of notice; and I denied the motion because Applicant did not have at least 15 days to prepare to address the additional allegations. (Tr. 46; HE 4)

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 the SOR allegations in ¶¶ 1.a and 1.f. (HE 3) He denied that he owed the debts in SOR ¶¶ 1.b, 1.c, 1.d, 1.e, and 1.g. He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 52-year-old software developer, and he has worked for his current employer since 2016. (Tr. 6, 8) In 1988, he graduated from high school. (Tr. 7) In 1992, he received a bachelor's degree, and in 2005, he received a master's degree in computer science. (Tr. 7) He completed three semesters of law school. (Tr. 64) He has never served in the military. (Tr. 7) He has never married, and he does not have any children. (Tr. 7)

Financial Considerations

From 2014 to August 2016, Applicant worked for a mortgage company. (Tr. 27) He was fired from the mortgage company; however, he was not told why he was fired. (Tr. 28-29) He was unemployed for about two months. (Tr. 29) He had to pay about \$1,500 for rent in one state, and he paid about \$3,000 monthly for hotels in another state where he obtained new employment. (Tr. 30-31) He was receiving \$75 an hour at his new employment. (Tr. 31) He withdrew about \$58,000 from his 401(k) account in 2016. (Tr. 31; GE 2 at 12) He believed his employer failed to honor a promise to pay him per diem while he was maintaining two residences in 2016. (Tr. 22; HE 3 at 2; AE 8) He also had a 25 percent reduction in income. (HE 3 at 2) He paid for storage of about \$400 monthly. (Tr. 35)

SOR ¶ 1.a alleges Applicant owes the federal government for delinquent taxes in the amount of \$18,224 for tax year (TY) 2016.

The following table reflects Applicant's federal income tax information. (AE 1) For TYs 2014, 2015, 2016, 2017, 2019, and 2020 he provided IRS tax transcripts, and for TY 2018 he provided a tax return. (AE 1; AE 2; AE 5) He filed his TY 2017 federal income tax return about one year late because he was unable to file electronically or online, and he needed to file a paper copy of his tax return. (Tr. 40) He knew he would not owe taxes for TY 2017, and he did not believe it was important to timely file his TY 2017 federal income tax return. (Tr. 40) Some of his other tax returns were filed late because he was unable to file electronically. (Tr. 70) At some point, the IRS advised him that there is no penalty for filing a tax return late if no tax is due. (Tr. 80) He did not provide any evidence that the IRS authorized him or taxpayers in general to file tax returns after their due dates if they believed no taxes were due.

Amounts in the following table are rounded to the nearest thousand. The source for the TY 2018 row is Applicant's tax return. (AE 2) The sources for the other rows are his IRS tax transcripts. (AE 1; AE 2) He requested an extension for filing his TY 2021 federal income tax return. (Tr. 43)

Tax Years	Date Return Filed	Adjusted Gross Income	Taxes Owed or Refunded	Exhibit
2014	Oct. 15, 2015	\$28,000	Refund: \$1,000	GE 3
2015	Sept. 8, 2016	\$75,000	Refund: \$1,000	GE 3
2016	Apr. 15, 2017	\$114,000	Owed: \$18,000	AE 5
2017	Aug. 27, 2019	\$98,000	Refund: \$2,000	AE 1
2018	Oct. 15, 2019	\$112,000	Refund: \$2,000	AE 2
2019	Aug. 12, 2021	\$118,000	Refund: \$1,000	AE 1
2020	Nov. 15, 2021	\$131,000	Refund: \$1,000	AE 1
2021	Aug. 31, 2022			AE 3

Applicant said he filed his TY 2018 tax return in October 2019. (AE 2) He provided an October 15, 2019, Turbo Tax email, which notified him that the IRS rejected his TY 2018 federal income tax return because of an improper PIN code. (AE 4) He mailed in a

paper copy of his tax return to the IRS in response to the October 15, 2019 Turbo Tax email. (AE C) The DOHA interrogatories and at his hearing, he was advised his TY 2018 tax transcript showed no return was filed. (Tr. 41; GE 3 at 23; GE 9) When Applicant contacted the IRS on August 31, 2022, the IRS advised him he should refile his TY 2018 federal income tax return. (HE 3) He plans to refile his TY 2018 tax return early in September 2022. (*Id.*) I have credited Applicant with showing good faith in his efforts to timely file his TY 2018 federal income tax return. No adverse inference is drawn from the filing of this federal income tax return for TY 2018.

Applicant's TY 2016 IRS tax transcript shows he owed \$22,338 on August 30, 2021, and he owed \$18,801 as of September 2022. (GE 3; AE 5) His tax refunds for TYs 2017, 2019, and 2020 were transferred to address his TY 2016 federal income tax debt. His TY 2016 IRS tax transcript shows the following payments in 2021 and 2022: \$352 (Nov. 8, 2021); \$352 (January 5, 2022); \$352 (February 14, 2022); \$270 (April 15, 2022); \$107 (April 15, 2022); \$373 (May 20, 2022); \$373 (June 21, 2022); and \$373 (July 20, 2022). (Tr. 33-34; AE 5) The August 22, 2022 payment of \$373 was dishonored and the IRS imposed a \$25 penalty. (AE 5)

An IRS summary shows Applicant made the following payments to the IRS.

Date	Amount	Tax Year
Nov. 22, 2017	\$50	2016
Jan. 22, 2019	\$50	2016
June 3, 2019	\$100	2016
July 12, 2019	\$150	2016
July 30, 2019	\$150	2016
Sept. 30, 2019	\$225	2019
Nov. 8, 2021	\$352	2016
Jan. 5, 2022	\$352	2016
Feb. 14, 2022	\$352	2016
Apr. 15, 2022	\$270	2016
Apr. 15, 2022	\$107	2022
May 20, 2022	\$373	2016
June 21, 2022	\$373	2016
July 20, 2022	\$373	2016

In Applicant's August 13, 2021 response to DOHA interrogatories, he provided an unsigned installment agreement request in which he offered to pay \$500 monthly to the IRS to address his federal income tax debt for TY 2016. (GE 3) According to the IRS tax transcript for TY 2016, on September 23, 2019, an installment agreement was established with the IRS. (AE 5) On September 30, 2019, he paid \$175, and on September 30, 2019, he paid \$225. (*Id.*) On May 2, 2021, the IRS removed him from the installment agreement. (*Id.*) On November 2, 2021, a new installment agreement was established. (*Id.*)

On November 7, 2021, Applicant paid \$352, even though he did not expect the IRS to finalize his payment agreement of \$352 monthly for 72 months until December

2021. (HE 3 at 12) On August 22, 2022, he paid \$373, and on September 6, 2022, he paid \$373. (AE 5) According to the IRS payment activity document, these last two payments were being processed. (*Id.*) He conceded he failed to comply with a previous agreement with the IRS because he believed the monthly payment was too high. (*Id.*) He explained the IRS wanted him to make monthly payments of at least \$400, and he wanted a lower monthly payment. (Tr. 34) Resolution of Applicant's tax issues was also delayed due to understaffing at the IRS and the pandemic. (Tr. 42, 44-45)

SOR ¶ 1.b alleges an account placed for collection for \$713. This debt resulted from a dispute Applicant had with his landlord. (Tr. 48-51) Applicant delayed paying for this debt because he disputed his responsibility for it. (HE 3 at 4-5) On November 5, 2021, Applicant paid the creditor \$590, and the creditor indicated the balance owed is \$0. (*Id.* at 15) This debt is resolved. (Tr. 48, 52-53)

SOR ¶ 1.c alleges a medical account placed for collection for \$673. This was an ambulance bill from several years ago. (Tr. 55-56) Applicant informed the creditor that the debt was supposed to be paid by his insurance; the creditor agreed; and the debt was removed from his credit report. (HE 3 at 5; AE 6)

SOR ¶ 1.d alleges a medical account placed for collection for \$144. (GE 3 at 17) On November 8, 2021, Applicant paid the creditor \$215. (HE 3 at 17) This debt is resolved. (Tr. 57)

SOR ¶ 1.e alleges an account placed for collection for \$484. Applicant said he settled this debt on November 24, 2021. (HE 3 at 7) This debt is resolved. (Tr. 58-60)

SOR ¶ 1.f alleges a delinquent student-loan account for about \$80,000. In August 2003, Applicant was fired his job, and his student loans became delinquent. (Tr. 21, 63-66; HE 3 at 8) He said he made some payments before his student loans became delinquent. (Tr. 63-64) He did not provide documentary corroboration that he made these payments. He returned to college and received a master's degree in 2005. (*Id.*) He was underemployed for 10 years. He said he tried "on multiple times, to reform that loan and to set up some kind of payment arrangement with my services. I was rebuffed doing that." (Tr. 21, 69) He said he attempted to rehabilitate the loan; however, the creditor wanted an initial payment of \$20,000. (*Id.*) He did not provide any documentation showing the creditor wanted an initial payment of \$20,000 before he could begin repaying his student loan. The creditor threatened to garnish Applicant's wages, and then elected not to do so. (Tr. 68) Applicant believed his income was too low to warrant garnishment. (Tr. 69)

On November 19, 2019, Applicant said his student-loan account was recently transferred to the Department of Education (DoEd), and he intends to use the nine-month loan rehabilitation program to bring his loan out of default status. (HE 3 at 8) At his hearing, he estimated his student loan debt might be \$90,000. (Tr. 62) He said some of his debt or late charges might be waived if he completed a reform period. (Tr. 62) In June 2022, he submitted documentation such as a budget, pay records, and bills, to apply for a "Fresh Start" payment plan that would enable rehabilitation of his student loans. (Tr. 71-

72; AE 7; AE 9) He said he was continuing to work on rehabilitating his student loans. (Tr. 24) The Fresh Start program begins in October 2022. (AE 9)

In March 2020, as a result of the COVID-19 pandemic, the DoEd placed federal student loans in forbearance. The DoEd extended the student loan payment pause through December 31, 2022. The pause includes the following relief measures for eligible loans: a suspension of loan payments; a 0% interest rate; and stopped collections on defaulted loans. See Federal Student Aid website, <https://studentaid.gov/announcements-events/covid-19>. The President announced forgiveness of \$10,000 of student loan debt; however, Applicant may be ineligible for the forgiveness because his income exceeds \$125,000. (*Id.*) There are other programs Applicant is researching to resolve his student loan debts. (AE 7; AE 9)

SOR ¶ 1.g alleges an account placed for collection for \$1,263. On November 16, 2021, Applicant paid \$948 and settled this debt. (HE 3 at 9-10, 18) This debt is resolved. (Tr. 60-62)

Applicant has taken actions to reduce his expenses. (Tr. 25) He moved, and his rent and utilities are lower. (Tr. 25, 73-74) He has about \$1,000 monthly available to pay his student loan and tax debt. (Tr. 73) He enrolled in a consumer debt and credit counseling course, and he plans on taking another credit counseling course. (Tr. 27, 77-79) His June 23, 2022 credit report indicates all 15 accounts are in “pays as agreed” status. (GE 8)

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 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: "(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). Further discussion of the disqualifying conditions and the applicability of mitigating 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 an 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 indicated a circumstance beyond his control which adversely affected his finances. He had periods of unemployment and underemployment. He moved to a different state, and he had moving expenses that his employer failed to reimburse. However, "[e]ven if [an applicant's] financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the [administrative judge] could still consider whether [the 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)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current. Applicant did not provide supporting documentary evidence that he maintained contact with his student loan creditor over the last four years. He is credited with maintaining contact with the IRS over the last four years.

Applicant failed to timely file his federal income tax returns for TYs 2017, 2019, and 2020. He filed his federal income tax returns as follows: TY 2017 on August 27, 2019; TY 2019 on August 12, 2021; and TY 2020 on November 15, 2021. He made a good faith attempt to file his TY 2018 tax return on October 15, 2019, and no adverse inference is drawn for the IRS not crediting him with filing his federal income tax return for TY 2018.

The SOR does not allege that Applicant failed to timely file any federal income tax returns. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). The non-SOR allegations will not be considered except for the five purposes listed above.

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 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th 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, 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).

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 may be inappropriate. 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.

Applicant has known about his delinquent tax debt of about \$18,000 for TY 2016 since April 15, 2017. He made some payments over the years and the IRS received his tax refunds for other TYs; however, there were also significant periods with no payments. Applicant filed his overdue federal income tax returns. He established a payment plan with the IRS after he received the SOR. He has not established mitigation of his federal income tax debt for TY 2016 because he was dilatory in his establishment of his payment plan.

The debts in SOR ¶¶ 1.b through 1.e, and 1.g are mitigated. These debts were less than \$1,000 each and he resolved them. Applicant cited three security clearance cases he believed were similar to his case. (AE A at 2) Decisions of administrative judges

in other cases are persuasive but not binding on other administrative judges. In ISCR Case No. 19-01208 (A.J. June 17, 2020), the administrative judge granted that applicant's clearance even though applicant filed tax returns late and defaulted on his student loans. The judge noted: after filing his overdue tax returns he did not owe anything to the IRS; he paid \$6,000 to address his student loan debt in 2018; after August 2018, he made timely payments of \$675 monthly; and one student loan was forgiven. In ISCR Case No. 19-01685 at 9 (A.J. Feb. 10, 2020), the administrative judge denied that applicant's security clearance. In ISCR Case No. 19-02273 at 2 (A.J. May 19, 2020), the administrative judge granted that applicant's security clearance and said applicant "admits that he was behind in repayment of eight separate student loan debts totaling about \$42,019. He is now current with his student loan debts, and repayment is in deferment as Applicant is attending graduate school." The administrative judge did not provide enough history of that applicant's student loan payments to compare it to the Applicant's handling of his student loans in this case. The three cases Applicant provided are factually distinguishable from Applicant's case.

Applicant is not credited with mitigating his student-loan debt in SOR ¶ 1.f. He admitted he did not voluntarily establish a payment plan for his student-loan debt before the COVID-19 pandemic forbearance. The Fresh Start program he plans to utilize is not scheduled to begin until October 2022.

Complete reliance on the COVID-19 pandemic-based student loans deferment to establish mitigation for security clearance purposes is misplaced. Applicant's student loans were delinquent before May 2020. See ISCR Case No. 20-03208 at 2 (App. Bd. July 6, 2021); ISCR Case No. 20-01527 at 2 (App. Bd. June 7, 2021) (noting student loans totaling about \$20,000 that were delinquent before the COVID-19 federal deferment may be the basis for revocation of access to classified information). Applicant did not establish he was unable to establish a payment plan and make some payments for several years before the federal deferment in 2020. See ISCR Case No. 14-03612 at 3 (Aug. 25, 2015) ("Indeed, even if a credit report states that a debt has been paid, that fact alone does not, in and of itself, resolve concerns arising from the dilatory nature of an applicant's response to his debts or other circumstances that detract from an applicant's judgment and reliability. In this case, the Judge commented on the absence of detailed evidence about how Applicant addressed his finances and reasonably had doubts about his clearance eligibility based on that lack of evidence").

Applicant's history of non-payment of his federal student-loan debt has important security implications. See ISCR Case No. 20-01004 at 3 (App. Bd. June 28, 2021) ("Resolution of a delinquent debt does not preclude further inquiry or examination regarding it. Even if an alleged debt has been paid or canceled, a Judge may still consider the circumstances underlying the debt as well as any previous actions or lapses to resolve the debt for what they reveal about the applicant's worthiness for a clearance") (citing ISCR Case No. 15-02957 at 3 (App. Bd. Feb. 17, 2017)). In August 2022, Applicant applied for a student loan payment plan. However, this action after receipt of the SOR does not automatically mitigate security concerns.

[T]he timing of ameliorative action is a factor which should be brought to bear in evaluating an applicant's case for mitigation. An applicant who begins to resolve security concerns only after having been placed on notice that his or her clearance is in jeopardy may lack the judgment and willingness to follow rules and regulations when his or her personal interests are not threatened.

ISCR Case No. 17-04110 at 3 (App. Bd. Sept. 26, 2019) (citing ISCR Case No. 17-01256 at 5 (App. Bd. Aug. 3, 2018)). "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." ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015).

Applicant did not establish that he was unable to make more progress sooner in the resolution of his student-loan debt totaling about \$90,000. He did not show he was unable to establish a payment plan to resolve his TY 2016 tax debt sooner. There is insufficient assurance that his financial problems are being resolved. 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 52-year-old software developer, and he has worked for his current employer since 2016. In 1992, he received a bachelor's degree, and in 2005, he received a master's degree in computer science. He completed three semesters of law school.

Applicant did not provide a good reason for his procrastination in failing to pay or establish payment plans for several years for the debts in SOR ¶¶ 1.a and 1.f. His payment plan established in 2022 to pay his TY 2016 federal income tax debt, and his efforts to establish a payment plan in 2022 for his student loan debt, in light of his financial resources, is too little too late to mitigate security concerns.

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. Applicant's evidence did not overcome the *Dorfmont* presumption.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards establishing a track record of timely paying his taxes and his student loans, and a better record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

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
Subparagraphs 1.b through 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge