



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



In the matter of:)
)
 REDACTED) ISCR Case No. 20-01018
)
 Applicant for Security Clearance)

Appearances

For Government: Rhett E. Petcher, Esq., Department Counsel
For Applicant: Patricia M. Ballard, Esq. and Peter H. Noone, Esq.

09/16/2022

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is part-owner of a company that contracts with the Department of Defense (DOD). He has a history of significant tax underpayments, both federal and state, which resulted in tax liens totaling more than \$1.5 million. He has resolved the tax liens, but persuasive evidence of reform is lacking, despite a repayment plan with the Internal Revenue Service (IRS) to resolve over \$1 million more in unpaid tax liabilities for recent tax years (TY). Clearance eligibility is denied.

Statement of the Case

On April 30, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F, financial considerations. The SOR explained why the DCSA CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DCSA CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive

5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

Applicant received the SOR on May 8, 2020. He submitted an undated response to the SOR allegations in which he stated that he did not need a security clearance for his duties and that his security officer was submitting the paperwork required to cancel the request for him to acquire clearance eligibility. On January 7, 2021, the DCSA CAF informed him that his response was incomplete because he failed to either admit or deny some of the allegations. On June 7, 2021, Applicant submitted a *pro se* response to the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On November 10, 2021, the Government indicated it was ready to proceed to a hearing. On November 29, 2021, the case was assigned to me to determine whether it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. I received the case assignment and file on December 2, 2021.

On March 4, 2022, after confirming that Applicant was still being sponsored for a security clearance, I advised him that I was scheduling hearings via Microsoft Teams. On April 4, 2022, I informed Applicant that I planned to schedule an online hearing in his case May 10, 2022. Applicant confirmed receipt of the email and indicated that he had legal representation. On April 6, 2022, counsel for Applicant entered an appearance. On April 8, 2022, I scheduled a video teleconference hearing for May 10, 2022. On April 11, 2022, Applicant's attorneys requested a continuance to obtain relevant documentation, which I granted without any objections from the Government. After some coordination with the parties, on July 11, 2022, I scheduled an in-person hearing for August 15, 2022.

At the hearing, convened as scheduled, five Government exhibits (GE 1-5) and 14 Applicant exhibits (AEs A-B and D-O) were admitted in evidence without any objections. Applicant testified, as reflected in a hearing transcript (Tr.) received by DOHA on August 25, 2022. Counsel for Applicant was granted three weeks after the hearing to submit a tax transcript to be marked and considered as AE C.

On August 29, 2022, counsel for Applicant requested an extension of the deadline for post-hearing submissions. I extended the deadline to September 20, 2022, without any objections from the Government. On August 31, 2022, AE C was submitted and accepted into the record without objection.

Summary of Pleadings

The SOR alleges under Guideline F that, as of April 30, 2020, Applicant owed \$1,285,782 on a federal tax lien entered in January 2020 for TYs 2017 and 2018 (SOR ¶ 1.a); \$133,636 on a federal tax lien entered in March 2018 for TY 2015 (SOR ¶ 1.b); and \$57,152 on a federal tax lien entered in July 2007 for TY 2005 (SOR ¶ 1.c). Additionally, Applicant is historically alleged to have failed to pay his federal and state taxes within the

times required by law, as evidenced by federal tax liens entered in October 2016 (released in 2019) for \$82,398 for TYs 2011, 2012, and 2014 (SOR ¶ 1.d.i); in July 2010 (released in 2018) for \$40,743 for TY 2007 (SOR ¶ 1.d.iii); in December 2009 (released in 2018) for \$17,450 for TYs 2006 and 2008 (SOR ¶ 1.d.iv); and state tax liens entered in September 2011 (released in 2013) for \$15,776 for TYs 2006 through 2009 (SOR ¶ 1.d.ii); and in February 2008 (released in 2013) for \$8,718 for TY 2002 (SOR ¶ 1.d.v).

Under Guideline E, Applicant is alleged to have falsified his November 18, 2016 Electronic Questionnaires for Investigations Processing (hereafter SF 86) by responding negatively to inquiries concerning whether he had failed to pay any federal, state, or other taxes when required by law or ordinance in the last seven years, and whether he had a lien placed against his property for failing to pay taxes in the last seven years (SOR ¶ 2.a).

When Applicant responded to the SOR, he denied the allegations in the SOR. He stated that he has paid his tax debts for the tax years alleged and that the liens in SOR ¶ 1.d should have been released as he paid his taxes for those tax years in a timely manner. He denied any falsification of his SF 86 as there was no lien against him as of his personal subject interview (PSI). He added that any audit, adjustment, or revision by tax authorities results in a tax lien, no matter the fault or adjustment reason. He asserted that his tax situations get resolved by him either receiving credit or him paying additional taxes. (Answer.)

Findings of Fact

In setting forth my findings, some details, including specific amounts of income and tax liabilities, were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript. After considering the pleadings, exhibits, and transcript, I make the following findings of fact:

Applicant is 61 years old. He has his bachelor's degree with a concentration in finance and his master's degree in business administration. The degrees were earned in May 1984 and May 2003, respectively. In October 2013, he began consulting for a company that has DOD contracts. At the time, the company had a sole owner who was seeking to retire. Applicant became a full-time employee of the company in February 2014, earning \$220,000 a year. (Tr. 76-77.) In late November 2015, with a \$21 million line of credit, he became a one-fifth owner of the company, which is structured as an S corporation for tax purposes. (Tr. 77.) He was the company's chief financial officer before 2021 when he became its vice chairman and chief strategic officer. (GE 1; Tr. 26-31.) He is required to obtain a security clearance because of his position as a senior management official. (Tr. 30.) Pending a final adjudication of Applicant's security clearance eligibility, the company's board of directors has temporarily excluded him from access to classified information. (AEs H-I.)

Applicant and his spouse have been married since September 1992. They have a 25-year-old son and a 27-year-old daughter who live independently. Applicant and his spouse have owned their current residence since January 1996. (GE 1; Tr. 23-24.) In May

2007, they refinanced the primary mortgage on their home for a loan of \$810,000. (GEs 4-5.)

Applicant worked in the banking industry after college. He was laid off in 2000 from his employment as chief operating officer for a bank. He lost his base salary of \$140,000. (Tr. 80.) He was given severance, but not enough to cover his annual expenses, so he worked for another bank, earning \$160,000 per year, until he was laid off in 2005, as the industry underwent some consolidation and contraction. He then worked for an investment company at \$150,000 per year (Tr. 80), knowing that his position was going to be eliminated within two years, so in June 2006, he started his own consulting business. (GE 1; Tr. 28-33.) Applicant did not have sufficient funds withheld or set aside for his taxes when he was self-employed as future work was not guaranteed. (Tr. 81-84.)

Through September 2013, Applicant was self-employed as a consultant performing operational and financial reviews and evaluating marketing programs and profitability for his clients, which included a shipbuilding company; a toy train manufacturer; a software sales developer; a hardware company; and a sail maker. (GE 1; Tr. 29.) Applicant was, and continues to be, the sole income earner in his household. (Tr. 34.) He had a sizeable mortgage on his home as well as car loans, and found it challenging to “maintain a cost of living that was acceptable.” (Tr. 33-34.) His income fluctuated considerably over the years (Tr. 79) and was as low as \$40,000 annually at one point. Applicant reduced expenses by eating at home rather than at restaurants and taking vacations close to home. He worked with his creditors to address his debts. Some debts were paid late. He regained financial stability about the time that he started his present employment. (Tr. 33-36.)

Applicant and his spouse filed their joint income tax returns on time, but sometimes they filed amended returns. He testified that it became difficult at times to estimate his tax liability. (Tr. 38.) There were times when he was self-employed when he sent in a payment with their tax return but it was less than what he owed. (Tr. 44, 85.) He admits that he “should have been following [his] ups and downs in income.” (Tr. 51.) However, for some tax years, he was billed late for taxes owed for a prior TY. (Tr. 86.) Tax underpayments by them or tax adjustments by the Internal Revenue Service (IRS) and/or their state’s Department of Revenue led to tax liens being placed against their property for unpaid taxes for some tax years. (GE 3; Tr. 44.) Available tax records reflect the following, rounded down to the nearest hundred, with respect to their federal and state tax liabilities and repayment status:

TY	Tax liabilities and liens	Payments
2002 State (SOR ¶ 1.d.v.)	\$6,100 assessment Mar. 2007; \$2,600 in statutory additions; notice of lien issued; lien filed for \$8,700 Feb. 19, 2008. (GE 3; AE D.)	Paid, lien released Feb. 27, 2013. (GE 3; AE D.; Tr. 49.)
2005 Federal (SOR ¶ 1.c)	\$57,100 assessment May 29, 2006; \$1,800 penalty for	Paid \$8,000 Dec. 1, 2006; \$40,000 Dec. 14, 2007;

	late payment Oct. 2, 2006 (AE C); notice of \$57,100 lien June 19, 2007; lien filed July 2, 2007. (GE 3.)	\$7,300 July 22, 2008; lien released July 22, 2008. (AE C; Tr. 40.)
2006 Federal (SOR ¶ 1.d.iv)	\$10,400 assessment Jan. 2009; debt included in Dec. 4, 2009 notice of \$17,400 lien; lien filed Dec. 14, 2009. (GE 3; AE D.)	Paid, lien released May 30, 2018. (GE 3; AE D.)
2006 State (SOR ¶ 1.d.ii)	\$3,400 assessment Sep. 23, 2010; \$1,700 statutory additions; \$4,900 balance included in \$15,700 lien filed Sep. 19, 2011. (GE 3.)	Paid, lien released Aug. 27, 2013. (GE 3; AE D.)
2007 Federal (SOR ¶ 1.d.iii)	\$40,700 assessment June 14, 2010; notice of \$40,700 lien issued June 29, 2010; lien filed July 6, 2010. (GE 3; AE D.)	Paid, lien released Mar. 7, 2018. (GE 3; AE D; Tr. 46.)
2007 State (SOR ¶ 1.d.ii)	\$11,000 assessment Apr. 15, 2008; statutory additions \$2,800; \$7,700 balance included in \$15,700 lien filed Sep. 19, 2011. (GE 3; AE D.)	Lien released Aug. 27, 2013. (GE 3; AE D.)
2008 Federal (SOR ¶ 1.d.iv)	\$7,000 assessment from June 22, 2009; debt included in \$17,400 lien filed Dec. 14, 2009. (GE 3.)	Paid, lien released May 30, 2018. (GE 3; Tr. 49.)
2008 State (SOR ¶ 1.d.ii)	\$18,600 assessment Apr. 15, 2009; statutory additions \$900; \$3,300 balance included in \$15,700 lien filed Sep. 19, 2011. (GE 3.)	Lien released Aug. 27, 2013. (GE 3; Tr. 46.)
2009 State (SOR ¶ 1.d.ii)	\$7,700 assessment Apr. 15, 2010; \$180 balance included in \$15,700 lien filed Sep. 19, 2011. (GE 3.)	Lien released Aug. 27, 2013; (GE 3; Tr. 46.)
2011 Federal (SOR ¶ 1.d.i)	\$45,100 assessment Oct. 12, 2015; debt included in Oct. 5, 2016 notice of lien for \$82,300; lien filed Oct. 20, 2016. (GE 3; AE D.)	Lien released Feb. 6, 2019. (GE 3; AE D; Tr. 46.)
2012 Federal (SOR ¶ 1.d.i)	\$6,000 assessment Jan. 5, 2015; debt included in Oct. 5, 2016 notice of lien for	Lien released Feb. 6, 2019. (GE 3; AE D; Tr. 46.)

	\$82,300; lien filed Oct. 20, 2016. (GE 3; AE D,)	
2014 Federal (SOR ¶ 1.d.i)	\$31,100 assessment Nov. 23, 2015; debt included in Oct. 5, 2016 notice of lien for \$82,300; lien filed Oct. 20, 2016. (GE 3.)	Lien released Feb. 6, 2019. (GE 3; AE D; Tr. 46.)
2015 Federal (SOR ¶ 1.b)	\$133,600 assessment May 22, 2017; notice of lien Mar. 6, 2018; lien filed Mar. 16, 2018. (GE 3.)	Paid lien released Apr. 8, 2020. (AE B; Tr. 39.)
2016 Federal (not alleged)	\$106,400 tax overpayment based on first filing; \$44,300 refund shown on amended return (AE N); subsequent IRS assessment of taxes owed of almost \$500,000. (Tr. 45, 52.)	On repayment plan with IRS (Tr. 40); balance about \$400,000. (Tr. 52.)
2017 Federal (SOR ¶ 1.a)	\$15,700 assessment Nov. 19, 2018; debt included in Jan. 9, 2020 notice of lien for \$1,285,700; lien filed Jan. 21, 2020. (GE 3.)	Paid, lien released Oct. 6, 2021. (AE A; Tr. 39.)
2018 Federal (SOR ¶ 1.a)	\$1,133,000 assessment Nov. 4, 2019; debt included in Jan. 9, 2020 notice of lien for \$1,285,700; lien filed Jan. 21, 2020. (GE 3.)	Paid, lien released Oct. 6, 2021. (AE A; Tr. 39.)

On November 18, 2016, Applicant completed an SF 86, not having previously held a security clearance. He responded negatively to all of the SF 86's financial record inquiries, including the following:

In the past seven (7) years have you failed to file or pay Federal, state, or other taxes when required by law or ordinance? and

In the past seven (7) years, [have] you had a lien placed against your property for failing to pay taxes or other debts. (Include financial obligations for which you were the sole debtor, as well as those for which you were a cosigner or guarantor). (GE 1.)

On October 4, 2018, Applicant had a personal subject interview (PSI) with an authorized investigator for the Office of Personnel Management (OPM). When asked about the SF 86 query concerning any liens in the last seven years, Applicant stated that he was not certain how to answer the question. He explained that he did not believe he had any liens against him, but he had been on a payment plan to resolve a tax lien issue from 2009.

He explained that he had some financial issues in 2009 when he was self-employed and became delinquent on some \$40,000 in federal income taxes. He stated that his taxes were not fully paid off. When confronted with the record of tax liens that had been filed against him as of his PSI (in February 2008 for \$8,700; in December 2009 for \$17,400; in July 2010 for \$57,100 and \$40,700; in September 2011 for \$15,700; and in October 2016 for \$82,300), Applicant expressed his belief that they all stemmed from the original tax lien in 2009. (GE 2.) When asked on cross-examination why he did not fully disclose his tax problems, he testified, in part:

I explained to [the OPM investigator] I was going through a payment plan with the IRS. She did not ask any details whatsoever. And I said I was on target — and was paying my taxes. . . So it was noticed. (Tr. 96-97.)

Since 2016, most of Applicant’s income has been S corporation distributions that he states have been used to pay his tax liabilities. (AE N; Tr. 66-67, 72-73.) Applicant testified that in 2017 and 2018, he took S corporation distributions at least three times a year, which resulted in a large increase in his federal income tax liability for those TYs. (Tr. 88.) His and his spouse’s federal and state income tax returns for tax years 2016 through 2020 show the following with respect to his income and their joint tax liabilities, rounded down to the nearest hundred:

TY and date of return	Adjusted Gross Income approximated	Taxes withheld from wage income and tax liability reported on tax returns.
2016 Federal return (July 2018)	\$1.4 million	\$20,700 withheld; \$466,400 tax liability.
2017 Federal return (July 2018)	\$711,200	\$29,500 withheld; \$172,300 tax liability.
2017 State return (June 2018)	\$685,800 taxable income	\$9,100 withheld; \$21,012 after tax credits.
2018 Federal return (Sept. 2019)	\$2.6 million	\$24,400 withheld; \$893,300 tax liability.
2018 State return (Sept. 2019)	\$2.6 million	\$9,000 withheld; \$84,300 after tax credits.
2019 Federal return (July 2020)	\$2.025 million	\$55,600 withheld; \$685,000 tax liability.
2019 State return (July 2020.)	\$2.1 million	\$15,600 withheld; \$66,400 after tax credits.
2020 Federal return (May 2021)	\$3.8 million	\$92,701 withheld; \$1.3 million (estimated balance due of \$539,500).
2020 State return (May 2021)	\$3.8 million	\$23,600 withheld; \$108,300 (estimated balance due of \$32,600).

Applicant asserts that he was unaware before his PSI that tax liens had been filed against him. He denies ever receiving any notice of a tax lien having been filed. (Tr. 38-39, 47.) The Government submitted notices of federal and state tax liens for the TYs alleged. Those notices were filed against Applicant and his spouse and properly recorded with the registry of deeds in their county. (GE 3.) No evidence was presented showing that the lien notices were mailed to Applicant. He knew he owed taxes and indicated that to his understanding, the IRS may choose or not to issue a lien for unpaid taxes. (Tr. 47-48.) He asserted in response to the SOR, "It is practice for any tax discrepancy that there be a lien placed no matter if the issue is [the] taxpayer or Department of Revenue." (Answer.)

Regarding adjustments to his federal and state tax liabilities, Applicant asserts that when he was notified of adjustments, he immediately communicated with the tax authorities. He was assigned a representative and entered into payment plans to pay the taxes. (Tr. 38-39, 48, 52.) He admitted that he paid some taxes late. (Tr. 47.) Applicant maintains his own records of tax payments, which indicate that he paid the IRS approximately \$3.4 million between October 18, 2016, and May 13, 2022, in addition to his standard coupon payments based on his tax returns. (Tr. 92.) Applicant's payment records show that, in 2016, he paid the IRS only \$1,000 a week from October 18, 2016, through December 27, 2016, when his income exceeded \$1 million that year. His weekly payment increased over time (to \$1,500 from mid-January 2017 to mid-February 2017; \$1,900 from mid-February 2017 to mid-June 2017; \$2,500 from mid-June 2017 to late December 2017; \$4,000 throughout 2020; \$5,000 from January 2021 to mid-April 2021; and \$10,000 since then). Included in the \$3.4 million were the tax withholdings from his base salary (Tr. 109), which for recent years were as follows: \$35,000 for TY 2017; \$24,300 for TY 2018; \$54,200 for TY 2019; \$67,800 for TY 2020; and \$65,400 for TY 2021 (AE L); and also some quarterly lump-sum payments as large as \$150,000 to \$250,000 as determined by the IRS. (Tr. 110-111.) Assuming he submitted sizeable estimated tax payments, the tax lien for 2017 and 2018 clearly shows that his estimated payments fell considerably short of what he and his spouse owed. Payment records from his bank show that just over \$1.9 million was debited from his bank account between November 20, 2020, and May 6, 2022. (AE K.) Applicant estimated that, as of mid-August 2022, he has paid more than \$3.7 million in taxes, including fees and penalties, with no effort on his part to reduce his tax burden. (Tr. 39.) As to why he did not indicate on his SF 86 that he had failed to pay some taxes on time in the seven years preceding his November 2016 SF 86, Applicant reiterated that he was unaware of the tax liens and that, while he was late in making certain payments to the IRS, he was making payments. (Tr. 68.) He testified that "anything that [he] had to pay that was late [he] never thought of that as being that negative." (Tr. 69.) He subsequently explained,

So I filed my taxes, and I've been paying the taxes. Did I pay it in full? No. I didn't know the answer should have been, no. I didn't know I should have answered, I have filed the taxes on time, but I owe the IRS some extra money. (Tr. 93.)

He testified that he read the SF 86 question about failing to pay any federal, state, or local taxes in the last seven years as "that [he] failed and didn't pay any tax." (Tr. 94-95.)

In 2021, Applicant's company exceeded expectations and earned a profit of approximately \$11 million. Currently, Applicant and his partners each receive a base annual salary of \$460,000. (Tr. 31.) He indicated that he not only has paid off the founder of the company but that he has obtained an additional \$30 million in credit to pay off other partners. (Tr. 69-70.)

Applicant is on a repayment plan with the IRS for TY 2020. (Tr. 40.) He reports that he owed approximately \$500,000 in 2016, which is down to "slightly under" \$400,000, and a little less than \$1.3 million for 2020, which is down to about \$800,000. (Tr. 52, 108.) He makes weekly payments to the IRS (Tr. 52, 108) and controls the payments. In addition, he is required to make quarterly payments of \$250,000. (Tr. 53.)

Applicant's February 2020 credit report showed that, in August 2019, he obtained a \$300,000 loan (balance \$293,454) and a vehicle loan for \$84,185 (balance \$75,898). (GE 5.) He testified that the \$300,000 was a home-equity loan. (Tr. 103.) When asked why he took on such a sizeable automobile loan when he had such a large federal income tax delinquency, he testified that he thought he could afford the payments but turned the vehicle in to the dealer after only three months. The home-equity loan went to college tuition. (Tr. 104-105.)

Applicant provided a current estimate of monthly expenses totaling \$6,294, including \$4,300 for his mortgage, but only \$94 in electricity costs and \$400 for gasoline. (AE O.) He converted his heat system to natural gas, and recently upgraded his air conditioning units. (Tr. 37.) As of February 2020, the balance on their primary mortgage was \$665,972 with scheduled repayment at \$4,028 per month. (GE 5.) As of July 27, 2022, their mortgage balance was \$572,407. (AE E.) He testified that was paying \$5,000 a month on his mortgage as of mid-August 2022. (Tr. 108.) Applicant has about \$380,000 in combined investment and retirement assets. (Tr. 37.)

Applicant has held several voluntary positions in the communities where he has lived over the years, including as a volunteer fireman, the founder of a street hockey league, youth sports coach, treasurer of a local yacht club, and board member of his town's finance committee. (Tr. 24-25.)

Character References

Two long-time friends of Applicant attest to him being hardworking, honest, and reliable. They endorse Applicant for a security clearance as he is willing to follow rules and dedicated to maintaining confidentiality. (AE F.) Neither of the friends commented about Applicant's tax issues, so it is unclear whether they are aware of his substantial tax underpayments that led to the issuance of both federal and state tax liens.

A certified public accountant, who recently retired from being managing director of the firm that provided audit and tax compliance services for Applicant's company, has provided individual tax preparation services for Applicant since 2017. He attests that

Applicant always “processed” his tax returns on time and that he appropriately addressed any adjustments made to his tax returns by the tax authorities. He considers Applicant to be willing and dedicated to maintaining confidentiality and recommends him for clearance eligibility. (AE G.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F: Financial Considerations

The security concerns about financial considerations are articulated in AG ¶ 18:

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.

Applicant has a security significant history of tax underpayments of primarily federal but also state income taxes over the past 20 years. The Government's evidence shows that the IRS filed at least six different tax liens between July 2007 and January 2020 for unpaid tax liabilities totaling in excess of \$1.6 million for TYs 2005 through 2008, 2011 and 2012, and 2014 through 2018. Over \$1.2 million was owed for TYs 2017 and 2018. The state filed tax liens for approximately \$8,700 in February 2008 for TY 2002 and for \$15,700 in September 2011 for TYs 2006 through 2009. The only lien not released as of the April 30, 2020 SOR was the \$1,285,700 federal lien filed in January 2020 for TYs 2017 and 2018. Even so, some of the liens were not resolved promptly. The \$8,700 state tax lien for TY 2002 was resolved five years after the lien was filed. A \$17,400 federal tax lien for TYs 2006 and 2008, filed in December 2009, was not satisfied until May 2018. A \$40,700 federal lien filed in July 2010 for TY 2007 was not resolved until March 2018. Guideline F security concerns are established when an individual does not comply with his or her tax payment obligations. AG ¶ 19(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,” applies.

Applicant has the burdens of production and persuasion in establishing sufficient mitigation to overcome the financial concerns raised by his noncompliance with such an important obligation as paying his income taxes on time. One or more of the following conditions under AG ¶ 20 may apply in whole or in part:

(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; 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.

AG ¶ 20(a) cannot reasonably apply, given Applicant’s persistent underpayment of his federal income taxes by the tax deadlines. There is no evidence of any state tax underpayments since TY 2009. However, he owed the IRS about \$1,285,700 for tax years 2017 and 2018 as of January 2020. He testified that he was assessed almost \$1.3 million in additional federal income tax liabilities for tax years 2016 and 2020 that he is currently repaying under a payment plan. While Applicant attributes the problem to a difficulty in accounting for the taxes owed on S corporation distributions, evidence of reform is lacking with respect to a change in his handling of his tax matters to ensure that he pays most of his taxes due when his future tax returns are filed. The concern in this regard is amplified, given his education in business management and finances.

The inconsistency in Applicant’s income when he was self-employed from June 2006 until January 2014 is a factor to consider in mitigation under AG ¶ 20(b), but it does not apply to his ongoing tax-payment issues since TY 2014. He was paid an annual salary of \$200,000 when he became a full-time employee in January 2014. The evidence shows that he had little more than \$20,700 in federal income taxes withheld from wage earnings of approximately \$233,000 in 2016. Due to significant pass-through income in 2016, his tax liability for 2016, based on his return, was about \$466,400. He had only \$29,500 in federal income taxes withheld on \$193,800 in income in 2017. He had even less, around \$24,400

in federal income taxes withheld from \$195,400 in wage income in 2018. Based on his own calculations, when considering his S corporation income, he had a federal tax liability of approximately \$893,300. Even accounting for estimated tax payments, the discrepancies between what he paid to the IRS and what he owed when his tax returns were filed suggest that he gave priority to maintaining “an acceptable lifestyle” over a good-faith effort to address his tax issues. AG ¶ 20(b) is not satisfied by waiting for IRS assessments of significant tax underpayments.

AG ¶ 20(c) and AG ¶ 20(g) are established in that Applicant has made payments that have fully resolved the tax liabilities alleged in the SOR. Yet, in another aspect, his handling of his tax matters continues to raise concerns as to whether he can be counted on to give priority to paying his taxes over his personal interests. The Appeal Board has reaffirmed that the timing of corrective action is an appropriate factor to consider in applying AG ¶ 20(g). See *e.g.*, ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018) (citing ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018)). It took Applicant almost six years to pay off his \$8,700 state tax debt from 2007 and eight years to satisfy his \$17,400 in federal taxes owed for TYs 2006 and 2008. While lack of income could explain the delay in addressing his state taxes for TY 2002, as those taxes were resolved in February 2013, when he was still self-employed, Applicant has not provided reasonable justification for failing to satisfy his federal tax debt for TYs 2006 and 2008 sooner. The \$17,400 lien for those past-due taxes was not released until May 30, 2018, despite adjusted gross income of some \$1.4 million in TY 2016 and about \$711,000 in TY 2017. His \$40,700 in delinquent federal taxes for TY 2007, assessed in June 2010, was not fully resolved until March 2018, well after he applied for security clearance eligibility.

A federal tax lien is the government’s legal claim against property when an individual does not pay a tax debt. The lien protects the government’s interest in all of an individual’s property, including real estate, personal property, and financial assets. A federal tax lien is issued after the IRS assesses tax liability, sends a Notice and Demand (*i.e.* bill) for payment and the individual neglects or refuses to pay in full the debt in time. See www.irs.gov. Applicant may not have known about the liens, but he received notices from the IRS notifying him of his tax liability and the deadline for payment. The issuance of the tax liens indicates that Applicant did not pay the taxes owed within the time set by the IRS. Late payments triggered by demands for payment do not reflect the good-faith required for mitigation under AG ¶ 20(d). Applicant’s own payment records show that, in 2016, he paid the IRS only \$1,000 a week from October 18, 2016, through December 27, 2016, when his income exceeded \$1 million that year. His weekly payment increased over time (to \$1,500 from mid-January 2017 to mid-February 2017; \$1,900 from mid-February 2017 to mid-June 2017; \$2,500 from mid-June 2017 to late December 2017; \$4,000 throughout 2020; \$5,000 from January 2021 to mid-April 2021; and \$10,000 since then). He had to make additional large lump-sum payments on a quarterly basis in amounts determined by the IRS. In recent years, Applicant was no longer in a situation where he had to make a difficult decision to either pay his taxes when due or provide for his family. The issuance of a tax lien as recently as January 2020 raises doubts that he may not comply with laws, rules, and regulations when his immediate interest is not imperiled. He still owes about \$400,000 in

federal income taxes for TY 2016 and \$800,000 for TY 2020. The financial considerations security concerns are not fully mitigated.

Guideline E: Personal Conduct

The security concerns about personal conduct are set forth in AG ¶ 15, which provides:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The SOR alleges under Guideline E that Applicant deliberately falsified his November 2016 SF 86 by responding negatively to the financial inquiries regarding any tax delinquency in the last seven years and any liens filed against his property in the last seven years for failure to pay taxes or other debts. Specifically, the SOR alleges that Applicant failed to disclose a March 2018 federal tax lien for \$133,600 for taxes owed for TY 2015; a July 2007 federal tax lien for \$57,100 for taxes owed for TY 2005; an October 2016 federal tax lien for \$82,300 for taxes owed for TYs 2011, 2012, and 2014; a September 2011 state tax lien for \$15,700 for taxes owed for TYs 2006 through 2009; a July 2010 federal tax lien for \$40,700 for taxes owed for TY 2007; a December 2009 federal tax lien for \$17,400 for TYs 2006 and 2008; and a February 2008 state tax lien for \$8,700 for TY 2002. Applicant denies any intent to falsify his SF 86, asserting that he was unaware of any liens and that he was making payments toward the taxes owed.

The Appeal Board has repeatedly held that, to establish a falsification, it is not enough merely to demonstrate that an applicant's answers were not true or accurate. To raise security concerns under Guideline E, the responses must be deliberately false. In analyzing an applicant's intent, the administrative judge must consider an applicant's answers in light of the record evidence as a whole. See *e.g.*, ISCR Case No. 14-05005 (App. Bd. Sep. 15, 2017).

Applicant cannot be held to have failed to list the March 2018 federal lien that had not yet been placed as of his November 2016 SF 86 or the February 2008 state lien that was outside the seven-year scope of the SF 86 tax lien inquiry. However, four tax liens, those entered in October 2016, September 2011, July 2010, and December 2009, were within seven years of his SF 86. There is no evidence that Applicant was ever notified of the tax liens.

However, a reasonable inference of deliberate falsification is warranted with respect to his denial of the SF 86 inquiry concerning failure to pay taxes as required within the last seven years. Liens are issued only after a failure to pay the taxes owed within the deadline set forth in a notice of taxes owed and demand for payment. The federal tax liens for TYs

2006, 2007, 2008, 2011, 2012, and 2014 had not been fully resolved as of his SF 86. The \$82,300 in federal income taxes for TYs 2011, 2012, and 2014 was assessed in 2015, and so were well within seven years of his SF 86. Tax liabilities totaling \$58,100 were assessed during the first half of 2009, beyond the seven-year scope of the SF 86 query, but the taxes were not fully satisfied until 2018. It is unclear whether Applicant made any payments on that debt before October 2016. The payment records in evidence date from October 18, 2016, and show only four payments totaling \$4,000 as of his November 18, 2016 SF 86. Applicant's current explanation for responding "No" to whether he had failed to pay taxes within the last seven years is that he read the question as whether he failed to pay **any** taxes. He would have the Government believe that since he made tax payments, albeit sometimes late, he thought the question did not require an affirmative response. His explanation is not plausible in light of his education in finance; his business experience, including as a chief financial officer; his substantial tax delinquencies; and the ongoing nature of the problem. Disqualifying condition AG ¶ 16(a) applies. It provides:

(a) deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

Two of the seven potentially mitigating conditions under AG ¶ 17 could have some applicability in this case. They are:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's lack of full candor when he completed his SF 86 is mitigated somewhat by the passage of time under AG ¶ 17(c). However, the evidence against mitigation is more persuasive at this time. When Applicant was asked about the tax liens during his PSI, he admitted that his tax problems were ongoing and had not yet been paid off, but he also claimed that he was on a payment plan to resolve a tax lien from 2009. The October 2016 tax lien for \$82,398 indicates that he was notified of the tax liabilities for 2011, 2012, and 2014. He was less than fully forthcoming about his tax problems during his PSI, and it is not a credible defense to state that the investigator did not ask for details. Even if he was unaware of the subsequent tax liens, he knew that his tax problems did not end when he was a self-contractor. By claiming that he put the DOD on notice by telling the OPM investigator that he was on a payment plan to resolve issues stemming from a 2009 lien,

he raises substantial doubts as to whether he understands the importance of full and frank disclosure. The personal conduct security concerns are not fully mitigated.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). Those factors are:

(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.

The analyses under Guidelines F and E 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 testified that his tax debts built up over time and that he addressed them when he had the funds. He is no longer the self-employed individual who could not pay his taxes because of insufficient or inconsistent income. While he has paid off more than \$3 million in taxes, he has not shown a significant change from the historically reactive manner in which he addresses his taxes. Notwithstanding the difficulty in estimating his tax liability at times, he has taken S Corporation distributions on a quarterly basis while clearly not paying enough in taxes on that income when he can afford to do so. Even after being placed on notice by the DOD that his manner in handling his taxes is of concern to the DOD, he underpaid his federal income taxes for TY 2020 by almost \$1.3 million, of which \$800,000 is still owed.

The Appeal Board has made clear that voluntary compliance with such rules and systems as those pertaining to paying taxes when required by law and not when or in a manner personally advantageous is essential for protecting classified information. See, e.g., ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016). It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). Based on the evidence of record, it is not clearly consistent with the interests of national security to grant security clearance eligibility for Applicant at this time.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances, 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.

Elizabeth M. Matchinski
Administrative Judge