



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



In the matter of:)
)
) ISCR Case No. 19-01855
)
Applicant for Security Clearance)

Appearances

For Government: Gatha L. Manns, Esq., Department Counsel
For Applicant: *Pro se*
11/10/2022

Decision

HARVEY, Mark, Administrative Judge:

Guidelines F (financial considerations), D (sexual behavior), E (personal conduct), and M (use of information technology) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On September 17, 2019, Applicant completed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On November 30, 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); Department of Defense (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 Guidelines F, D, E, and

M. (HE 2) On February 25, 2022, Applicant responded to the SOR, and he requested a hearing. (HE 3)

On May 15, 2022, Department Counsel was ready to proceed. On June 8, 2022, the case was assigned to me. On June 17, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a Notice setting the hearing for August 24, 2022. (*Id.*) Applicant's hearing was held as scheduled in the vicinity of Arlington, Virginia using the Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered 12 exhibits, and all proffered exhibits were admitted into evidence without objection. (Tr. 21-23; GE 1-GE 12) Applicant did not offer any documents at his hearing. He provided five exhibits after the hearing, which were admitted without objection. (Applicant Exhibit (AE) A-AE E) On September 1, 2022, DOHA received a copy of the transcript. On September 26, 2022, the record closed. (Tr. 26-27, 120, 126)

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, 1.e to 1.k, and 3.a. (HE 3) He did not admit or deny some SOR allegations, and he denied some allegations. His admissions are accepted as findings of fact.

Applicant is a 50-year-old operations manager who has worked for the same DOD contractor since 2013. (Tr. 6, 37-38) In 1990, he graduated from high school. (Tr. 7, 28) In about 2002, he earned an associate's degree in aviation maintenance technology, and in 2003, he was awarded a bachelor's degree in aviation aerospace management. (Tr. 7, 29) He has an airframe and power plant license for aviation. (Tr. 31) He was on active duty from November 2019 to June 2022, and in June 2022, he resumed working for his current employer. (Tr. 39-41) He had a reduction in annual pay from about \$98,000 to about \$70,000 while he was on active duty. (Tr. 60-62)

Applicant was married the first time from 1992 to 1997, and the second time from 2003 to 2012. (Tr. 8) His stepson is 22, and his son is 18. (Tr. 8-9, 32-33) He served on active duty in the Navy from 1992 to 1997, and in the Navy Reserve from 2014 to present. (Tr. 9) He is a petty officer second class (E-5). (Tr. 9) His current Navy specialty is Yeoman. (Tr. 9) He has 13 years of Navy service. (Tr. 110)

Financial Considerations

SOR ¶ 1.a alleges Applicant filed for discharge of liabilities totaling \$149,105 in January 2014 under Chapter 7 of the Bankruptcy Code, and the bankruptcy judge discharged his nonpriority unsecured debts in April 2015. (GE 1 at 35; GE 2 at 9; GE 6 at 1) The secured claims totaled \$110,935; the priority claims were \$850; and the unsecured nonpriority claims were \$37,320. (GE 2 at 9) Around 2012, Applicant and his second wife

separated, and he was unable to pay the bills without her income. (Tr. 44) In 2013, his starting pay was about \$24 an hour. (Tr. 42) When he filed for bankruptcy, Applicant was \$24,000 behind on his \$107,604 mortgage, and the fair market value of the property was substantially below the amount of the mortgage. (Tr. 112; GE 2 at 16) The bankruptcy documentation indicates Applicant's monthly income over the previous six months averaged \$5,647, and his IRS tax transcript showed his income for Tax Year (TY) 2014 was about \$109,000. (Tr. 113) Applicant suggested that perhaps the extra funds on his TY 2014 tax return came from his military duties, overtime with his contractor employer, or a cash payout from a previous employer. (*Compare* Tr. 116 with GE 2 at 49-51) He understood that his income could not exceed the threshold in the bankruptcy statute, or he would not qualify for a Chapter 7 bankruptcy discharge of his debts. (Tr. 114-115) He said he would provide documentation after his hearing to show his income statement on his bankruptcy was correct. (Tr. 117, 121) He did not provide the evidence showing the income on his bankruptcy submission was accurate. His bankruptcy documentation included a \$2,576 state tax lien. (Tr. 48)

SOR ¶ 1.b alleges Applicant owes delinquent federal taxes totaling \$6,112 for TY 2014. (GE 3 at 2, 9) His September 24, 2020 IRS tax transcript for TY 2014 shows an account balance of \$9,177 owed to the IRS, and it shows IRS tax transfers to address his TY 2014 tax debt from TY 2017 of \$1,143, from TY 2018 of \$1,037, and from TY 2019 of \$647. (GE 4 at 9-10) He also made a \$143 payment on March 10, 2020. (*Id.*) On February 14, 2020, Applicant told an Office of Personnel Management (OPM) investigator that he "arranged a payment plan with the IRS, and made on-time payments until [he] defaulted." (GE 10 at 2) He did not resume payments. (*Id.*) He told the OPM investigator that he intended to borrow funds from his 401k account to pay his delinquent tax debt. (GE 10 at 4) His tax transcripts for TY 2014 did not show a repayment plan with the IRS. (GE 4 at 10; AE B) His October 1, 2021 IRS tax transcript for TY 2014 shows an account balance of \$6,112. (AE B) Applicant's October 1, 2021 IRS tax transcript for TY 2020 shows on April 15, 2021, he had a \$1,332 credit transferred to address his TY 2014 tax debt, and he received a \$360 refund. (GE 3 at 18) The \$360 refund shows all of his federal income taxes are paid through TY 2020.

SOR ¶¶ 1.c and 1.d allege Applicant failed to timely file his federal and state income tax returns for TYs 2010, 2012, 2013, 2015, 2016, 2017, and 2018. (GE 3)

On September 30, 2021, in response to DOHA interrogatories, Applicant did not fill in the rows in the tables showing his federal and state tax returns were filed for TYs 2010, 2012, and 2013. (GE 3 at 2, 4) His September 24, 2020 TY 2015 IRS tax transcript indicates in 2018 the IRS assessed an additional tax of \$1,900; he had a \$274 penalty for filing his tax return late; and no payments were shown to address his tax debt. (GE 4 at 5-6) His account balance owed on September 24, 2020, was \$5,593. (GE 4 at 5) He said he paid this tax debt. (GE 3 at 2) The IRS \$360 refund of his TY 2020 taxes shows the IRS concluded all of his previous federal income taxes were paid. (GE 3 at 18)

The information in the following table is based on Applicant's September 24, 2020 and October 1, 2021 IRS tax transcripts. (GE 4; AE A-AE D) Adjusted gross income is

rounded to the nearest thousand dollars. He did not provide tax transcripts for TYs 2010, 2012, and 2013.

Tax Year	Date Tax Return Filed	Adjusted Gross Income	Taxes Currently Owed	Exhibit
2010				
2011	Mar. 12, 2012	\$65,000	\$0	GE 3 at 7; AE A
2012			\$0	
2013			\$0	
2014	Apr. 15, 2015	\$109,000	\$0	GE 4 at 9-10; AE B
2015	Aug. 12, 2016	\$83,000	\$0	GE 4 at 5; AE C
2016	Jan. 17, 2018	\$93,000	\$0	GE 4 at 16; AE D
2017	Aug. 28, 2018	\$101,000	\$0	GE 4 at 15
2018	Feb. 24, 2020	\$102,000	\$0	GE 4 at 1-4
2019	Apr. 15, 2020	\$109,000	\$0	GE 4 at 11
2020	May 19, 2021	\$92,000	\$0	GE 3 at 18

Applicant's October 1, 2021 TY 2011 IRS tax transcript shows he had an IRS tax payment agreement from November 2016 to February 2018. (GE 3 at 8) He made nine payments from \$80 to \$155. (*Id.*) In October 2018, his debt to the IRS for TY 2011 was paid. (*Id.*)

Applicant's September 25, 2020 TY 2016 IRS tax transcript indicates the IRS assessed an additional penalty of \$125 for filing his tax return late; and his September 24, 2020 IRS tax transcript for TY 2016 shows an account balance owed of \$327. (GE 4 at 7-8) He said he paid this tax debt. (GE 3 at 2)

On February 14, 2020, Applicant told an OPM investigator that he timely filed his 2015 and 2016 state tax returns. (GE 10 at 2) He said he would provide information about when he filed some of his tax returns after his hearing. (Tr. 52) At the time of his hearing, he had not filed his federal and state tax returns for TY 2021; he had not requested an extension; and he said he needs additional documentation to get his tax return filed. (Tr. 53-55) On September 17, 2022, Applicant paid a bill of \$275 for preparation of one or more tax returns. (AE E) This is apparently a receipt for preparation of his TY 2021 federal and state income tax returns. Applicant said all of his tax debts were paid. (Tr. 50)

In sum, Applicant failed to timely file his federal and state income tax returns for TYs 2015, 2016, 2017, and 2018. There was no evidence presented that he requested any filing extensions. Applicant said he failed to timely file several tax returns because of "neglect" and a lack of a "sense of urgency." (Tr. 51) He suspected that he owed the IRS, and he delayed filing his tax returns. (Tr. 51) His federal income taxes for TY 2011 were not paid until 2018, and his federal income taxes for TY 2014 were not paid until April 15, 2021, when part of his refund for TY 2020 was transferred to address his TY 2014 tax debt.

SOR ¶¶ 1.e through 1.j allege Applicant has six U.S. Department of Education (D. ED.) student loan debts totaling \$35,398 in collections for \$9,282, \$5,052, \$10,163, \$1,418, \$2,501, and \$6,982. (Tr. 25; GE 5 at 2; GE 6 at 2-3; GE 7 at 4-5; GE 7 at 5; GE 11 at 2; GE 12)

Applicant said he attempted to get his student loans forgiven; however, he learned he was not eligible to have his student loans forgiven. (Tr. 58) He intends to pursue a master's degree. (Tr. 58) Once he starts his master's program, he will be able to obtain a forbearance on his student loans. (Tr. 100) He intends to pay his student loans. (Tr. 58) He has not made any payments to address his student loans since about 2017. (Tr. 62-63) He did not present documentary evidence to show his most recent payments.

In March 2020, as a result of the COVID-19 pandemic, the President directed the Department of Education (D.ED.) to place federal student loans in forbearance. The federal government 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 or \$20,000 of student loan debt; however, this program is currently on hold due to litigation in the 8th Circuit Court of Appeals. See Desiree Montilla, "Experts weigh in on temporary hold placed on student loan forgiveness plan," (Oct. 24, 2022), <https://www.nbc12.com/2022/10/24/experts-weigh-temporary-stay-placed-student-loan-forgiveness-plan/>.

SOR ¶ 1.k alleges a charged-off debt for \$22,619. (GE 5 at 2; GE 6 at 4; GE 7 at 6; GE 11 at 2; GE 12) Applicant was in an accident, and his car was damaged to the extent that it was not economically repairable. (Tr. 63 106) He was injured in the accident; however, he did not indicate that he lost income due to the accident. (Tr. 106) His car insurance had lapsed, and he acknowledged his responsibility for the debt. (Tr. 64) He said he made two payments on his loan to purchase the vehicle, and then the creditor advised him the debt was charged off. (Tr. 64-65) He said the creditor stopped accepting payments. (Tr. 67) He intends to pay this debt. (Tr. 65) He said he would try to get some documentation about the debt after the hearing; however, he did not provide anything about this debt after the hearing. (Tr. 68)

Applicant received financial counseling as part of the bankruptcy process. (GE 2 at 61) He maintains a budget. (Tr. 99) He has about \$40,000 in his 401k retirement account. (Tr. 102) He has about \$1,500 monthly remaining after paying his expenses. (Tr. 99) He intends to use the \$1,500 monthly discretionary income or remainder to assist his son with his college expenses, to travel to his son's sports events, and to pay for his son's car. (Tr. 100-101)

Sexual Behavior, Personal Conduct, and Information Technology

SOR ¶ 2.a alleges under the sexual behavior guideline that Applicant videotaped women's buttocks and genital areas without their knowledge or consent prior to October 2017 for sexual gratification. (GE 8)

SOR ¶ 3.a alleges under the personal conduct guideline that Applicant received a corrective action memo (CAM) in about December 2017, from his employer for: allowing his employer-issued phone (EIP) to be accessed by a non-employee; failing to take steps to secure his password; and recording videos of sexually explicit material on his EIP. (Tr. 87; GE 8; GE 9 at 6)

SOR ¶ 3.b alleges under the personal conduct guideline that Applicant failed to report to his facility security officer (FSO) that his former girlfriend stole his EIP until she attempted to extort him for rent.

SOR ¶ 3.c alleges under the personal conduct guideline that Applicant used his EIP to view pornography from about January 2017 to about November 2017.

SOR ¶ 3.d cross alleges under the personal conduct guideline the allegation in SOR ¶ 2.a.

SOR ¶ 4.a cross alleges under the information technology guideline the allegations in SOR ¶¶ 3.a to 3.d.

Applicant videotaped women's buttocks and genital areas prior to October 2017. (Tr. 77, 91) According to the employer's report, "The women pictured were fully clothed" in the 25 videos found on Applicant's EIP. (GE 9 at 6) About half of the videos were taken of several women at stores and at a children's school. (GE 9 at 19) At his hearing, Applicant claimed the videos were of only three women: his girlfriend, his fiancée, and a woman in a store. (Tr. 78, 119) The 25 videos of women showed them wearing various articles of clothing and of the crotch of one of the women while she was sitting facing him. (Tr. 118) At his hearing, he said he used his personal cellphone and not his EIP to take the pictures or videos of the women's buttocks and genitals. (Tr. 92) However, his employer's report stated Applicant "admitted taking the videos using his [EIP] within the last few months leading up to the investigation when his personal cell phone was broken." (GE 9 at 6)

Applicant claimed all of the videos were with the consent of the women except when he videotaped one woman walking in a store without her consent. (Tr. 117-118) Applicant said at his hearing that the woman he videotaped in the store was wearing slacks. (Tr. 118) His girlfriend said the video of her was taken without her consent, and she said multiple women were videotaped in stores. (GE 9 at 6) He denied that the pictures he took were pornographic. (Tr. 80) He said "Everybody was fully clothed." (Tr. 80) He said he would provide a statement after his hearing from his fiancée indicating the videos of her body were made with her consent; however, he did not provide a statement from her or an explanation for why he failed to provide it. (Tr. 122) The pictures or videos were not part of the security file provided to me. The employer report indicated no nude photographs were found on his EIP.

Applicant said he was trading his personal cell phone in for a replacement, and he downloaded his pictures alleged in SOR ¶ 2.a onto his EIP. (Tr. 75, 84) He also had pornography on his personal cell phone that he transferred to his EIP; however, his

employer's report did not describe any pornography found on his EIP. (Tr. 83-84) The employer report described the pictures and videos as "inappropriate" rather than as pornographic. He said he wanted to preserve the pornography on his EIP so that he could transfer it back to his new privately-owned phone. (Tr. 83, 92) He used the pornography to enable him to get sexually aroused. (Tr. 83) At his hearing, he said he was unsure whether he used his EIP to view the pornography that he transferred from his personal phone. (Tr. 84-85) He did not define the term "pornography."

As to how his girlfriend obtained possession of his EIP, Applicant's girlfriend was visiting him. (Tr. 72-73) He knew her cell phone was broken, and she needed a cell phone. (Tr. 72-73) He went to check on his son, and he left his girlfriend in the kitchen where his EIP was located. (Tr. 73) When Applicant returned to the kitchen, his girlfriend was gone. (Tr. 73) Later in the evening, his girlfriend called him, and Applicant realized she was using his EIP. (Tr. 74) He left his password behind the foam padding of the container holding his EIP. (Tr. 74-75) She said she was going to use his EIP to conduct some of her own business. (Tr. 74) She did not have access to classified information on the EIP. (Tr. 75) Applicant's girlfriend returned the EIP the day after she took it. (Tr. 79, 94) Applicant did not report her accessing his EIP because he did not believe she could access classified information on his EIP. (Tr. 94) His former girlfriend attempted to extort rent of about \$1,100 from him in return for her silence about the sexual videos on his EIP. (Tr. 88; GE 10 at 2) Applicant refused to pay her to keep her from reporting the videos on his EIP. (*Id.*)

Applicant learned that his employer knew about the incident involving his EIP when his manager told him that a woman made allegations against him, and they wanted to check his EIP. (Tr. 86) When he received the CAM, a manager told him that he made the right decision when he chose not to give in to the woman's extortion, and management still considered him to be a trustworthy employee. (Tr. 88) In addition to the CAM, Applicant received about seven days of suspension from work without pay. (Tr. 87-88) Applicant knew it was wrong to use his EIP to make and store videos of women's buttocks. (GE 9 at 8) Applicant told his employer that he did not want his fellow employees to know about his videotaping of women's buttocks.

Applicant's former girlfriend also informed his Navy Reserve unit about the videos on his EIP, and according to Applicant, his Navy Reserve unit said, "what you do is your business, they said, but it wasn't our phone. It wasn't any of our equipment. They said they don't condone that type of behavior, but that was basically it. The Navy was like, hey, you know, this is not use. This is basically [your employer]." (Tr. 96) There is no evidence of any adverse action from the Navy for the incident involving misuse of his EIP.

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. His family's income was significantly reduced when he was divorced. He served on active duty in the Navy from November 2019 to June 2022, and his Navy pay was less than the pay from the DOD contractor. 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)). Applicant is credited with mitigating the allegations in SOR ¶¶ 1.a and 1.b. The loss of his spouse's income when they were divorced, and his resulting delinquent mortgage were good reasons for filing for bankruptcy, and he is credited with paying his delinquent tax debt for TY 2014 on April 15, 2021, before the SOR was issued.

Applicant failed to prove that he timely filed his federal and state income tax returns for TYs 2015, 2016, 2017, and 2018. He said he failed to timely file several tax returns because of "neglect" and a lack of a "sense of urgency." (Tr. 51) He suspected that he owed the IRS, and he delayed filing his tax returns.

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense. Title 26 U.S.C. § 7203, willful failure to file return 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 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.c and 1.d are not mitigated because he did not timely file his TYs 2015, 2016, 2017, and 2018 federal and state income tax returns. As of the date of his hearing on August 24, 2022, he had not filed his federal and state tax returns for TY 2021; he had not requested an extension; and he said he needed additional documentation to get his tax return filed. On September 17, 2022, Applicant paid a bill of \$275 for preparation of one or more tax returns. His delinquent federal income taxes for TY 2011 were not paid until 2018. His delinquent federal income taxes for TY 2014 were not paid until April 15, 2021. I am not considering his failure to timely file his FY 2020 federal and state income tax returns, and his failure to timely pay his FY 2011 federal income taxes for disqualification purposes. See Discussion of limits on consideration of non-SOR allegations in the sexual behavior section.

Applicant has six D. ED. student loan debts totaling \$35,398 in collections, and he has not made any payments since about 2017. 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 March 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 (App. Bd. 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)).

The student loan debts in SOR ¶¶ 1.e through 1.j are not mitigated. SOR ¶ 1.k alleges a charged-off debt for \$22,619. He did not provide proof of any payments or attempts to establish a payment plan. SOR ¶ 1.k is not mitigated.

Under all the circumstances, Applicant's delinquent debts are likely to recur, and they cast doubt on his current reliability, trustworthiness, or good judgment. He failed to establish mitigation of financial considerations security concerns.

Sexual Behavior

AG ¶ 12 contains the security concern for sexual behavior:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 includes conditions that could raise a security concern and may be disqualifying:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant videotaped the buttocks areas of several women in stores and at a school without their consent. He made these videos for his personal sexual arousal. Making these nonconsensual videos of women in public places shows lack of judgment and discretion. AG ¶ 13(d) applies. There was no evidence presented that Applicant's conduct was criminal or that he was unable to stop. When his girlfriend threatened to expose his conduct, he refused to pay her rent. AG ¶¶ 13(a), 13(b), and 13(c) do not apply.

AG ¶ 14 lists conditions that could mitigate security concerns:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Applicant claimed at his hearing that all videotapings of women's buttocks and genitals except in a store were consensual. I find that he minimized the number of women subjected to nonconsensual videotapings. Applicant claimed he did not use his EIP to videotape the women; however, he told his employer that he used his EIP to videotape the women because his phone was broken. I find that he lied at his hearing when he denied that he used his EIP to videotape the buttocks of women without their consent. 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. April 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)). I limited my consideration of these issues to the five purposes listed above.

AG ¶ 14(c) provides some mitigation because Applicant refused to allow extortion from his girlfriend to coerce him into paying her rent. His employer and security officials are aware of the sexual behavior. AG ¶ 14(d) does not apply. Applicant's nonconsensual videotaping behavior was generally private and discrete because he did not want the women he was videotaping in stores and at a school to discover what he was doing.

However, Applicant did not meet his burden of proving the videotaping was consensual. Appellant did not establish that the women freely chose to be in his videos.

AG ¶ 14(e) does not apply. He did not receive therapy to address his nonconsensual videotaping of the buttocks of females in stores and a school.

Applicant did not take full responsibility for his conduct, which is often considered the first step on the road to rehabilitation. More time must pass without actions of security concern before reinstatement of his security clearance will be warranted. Guideline D security concerns are not mitigated.

Use of Information Technology

AG ¶ 39 contains the security concern for use of information technology:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

AG ¶ 40 lists conditions that could raise a use of information technology security concern and may be disqualifying including:

- (a) unauthorized entry into any information technology system;
- (b) unauthorized modification, destruction, or manipulation of, or denial of access to, an information technology system or any data in such a system;
- (c) use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system;
- (d) downloading, storing, or transmitting classified, sensitive, proprietary, or other protected information on or to any unauthorized information technology system;
- (e) unauthorized use of any information technology system;
- (f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system when prohibited by rules, procedures, guidelines, or regulations or when otherwise not authorized;

(g) negligence or lax security practices in handling information technology that persists despite counseling by management; and

(h) any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.

Applicant placed videotapes of the buttocks and genital areas of women on his EIP. He used his EIP to make some of these videotapes. AG ¶ 40(e) is established.

AG ¶ 41 lists use of information technology conditions that could mitigate security concerns including:

(a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the misuse was minor and done solely in the interest of organizational efficiency and effectiveness;

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good faith effort to correct the situation and by notification to appropriate personnel; and

(d) the misuse was due to improper or inadequate training or unclear instructions.

None of the mitigating conditions fully apply. Applicant was not truthful at his hearing about his culpability. He falsely said at his hearing he did not use his EIP to make at least some of the nonconsensual videos of women's buttocks. He told his employer that he used the EIP to make some of the videotapes because his cell phone was broken. His false statements at his hearing show a lack of credibility and rehabilitation. Use of information technology security concerns are not mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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. . . .

AG ¶ 16 includes two conditions that could raise a security concern and may be disqualifying include:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant failed to take steps to secure his password for his EIP, and he recorded inappropriate videos of women's buttocks on his EIP. The evidence establishes Applicant's girlfriend took his EIP without his consent. Applicant failed to report to his FSO that his EIP had been taken by his former girlfriend. She attempted to extort him for rent. The first time Applicant's employer learned about the misuse of his EIP was when Applicant's former girlfriend reported him for placing inappropriate videos on his EIP.

SOR ¶ 3.c alleges under the personal conduct guideline that Applicant used his EIP to view pornography from about January 2017 to about November 2017. This allegation is not established. The record does not establish that the videotapes of women's buttocks wearing clothing are pornographic. The employer report does not indicate any images of nude people were found on his EIP.

SOR ¶ 3.d cross alleges under the personal conduct guideline the allegation in SOR ¶ 2.a. SOR ¶ 2.a alleges under the sexual behavior guideline, and the record establishes, that Applicant videotaped women's buttocks without their knowledge or consent prior to October 2017 for his own sexual gratification. SOR ¶ 3.d is established; however, this allegation is a duplication of SOR ¶ 2.a.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant failed to report to security officials the following issues: his own misuse of his EIP to make nonconsensual videotapes of women's buttocks in stores and at a school; his girlfriend's use of his EIP; and her extortion attempt. None of the mitigating conditions fully apply to Applicant's conduct. Personal conduct security concerns are not mitigated.

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 Guidelines F, D, E, and M are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 50-year-old operations manager who has worked for the same defense contractor since 2013. In about 2002, he earned an associate's degree in aviation maintenance technology, and in 2003, he earned a bachelor's degree in aviation aerospace management. He has an airframe and power plant license for aviation. He was on active duty from November 2019 to June 2022, and in June 2022, he resumed working for his current employer. He had a reduction in annual pay from about \$98,000 to about \$70,000 while he was on active duty. He served on active duty in the Navy from 1992 to 1997, and in the Navy Reserve from 2014 to present. He is a petty officer second class. He has 13 years of Navy service.

Applicant provided important financial considerations mitigating information. His delinquent debts were affected by circumstances beyond his control. He was divorced and he lost the financial support he received from his spouse which was necessary to pay his mortgage. His pay was reduced while he was on active duty in the Navy. He filed bankruptcy. In 2015, his nonpriority unsecured debts were discharged.

The evidence against grant of a security clearance is more substantial at this time. Applicant did not establish that he was unable to make greater progress sooner filing his federal and state income tax returns for TYs 2015, 2016, 2017, and 2018. As of the date of his hearing on August 24, 2022, he had not filed his federal and state tax returns for TY 2021. His federal and state tax returns for TY 2021 were prepared in September 2022. His federal income taxes for TY 2011 were not paid until 2018. His delinquent federal income taxes for TY 2014 were not paid until April 15, 2021. He has six D. ED. student loan debts totaling \$35,398 in collections, and he has not made any payments on these six D. ED. loans since about 2017. He has not recently made any payments to address a charged-off debt for \$22,619. His failure to take prudent, responsible actions raise unmitigated questions about his reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

In 2017, Applicant used his EIP to non-consensually videotape the buttocks of women in stores and a school. His girlfriend disclosed the abuse of his EIP to Applicant's employer. He minimized the number of women he videotaped, and he falsely claimed all

except one of the videotapings were consensual. He falsely claimed he did not use his EIP to make any videos. A failure to be forthright and candid about security-relevant conduct at a security clearance hearing shows a lack of rehabilitation.

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, sexual behavior, personal conduct, and use of information technology 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
Subparagraphs 1.a and 1.b:	For Applicant
Subparagraphs 1.c through 1.k:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a and 3.b:	Against Applicant
Subparagraphs 3.c and 3.d:	For Applicant
Paragraph 4, Guideline M:	AGAINST APPLICANT
Subparagraph 4.a:	Against 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.

Mark Harvey
Administrative Judge