DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-01704
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: *Pro se*

09/15/2023

_____

Decision

_____

HARVEY, Mark, Administrative Judge:

Guideline F (financial considerations) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On November 22, 2019, Applicant completed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On October 19, 2021, the Defense Counterintelligence and Security Agency (DCSA) 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 did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline F. (HE 2) On

October 28, 2021, Applicant provided a response to the SOR, and he requested a hearing. (HE 3)

On September 9, 2022, Department Counsel was ready to proceed. On April 12, 2023, the case was assigned to me. On April 24, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting the hearing for July 6, 2023. (HE 1) The hearing was held as scheduled using the Microsoft Teams video teleconference system. (*Id*.)

During the hearing, Department Counsel offered four exhibits into evidence, and Applicant did not offer any documents into evidence. (Tr. 12, 16-18; GE 1-GE 4) All proffered exhibits were admitted into evidence without objection. (Tr. 17; GE 1-GE 4) I have taken administrative notice of information that is widely known about federally funded student loans from the Department of Education (DoED) and White House websites. (HE 5-HE 10; see ISCR Case No. 22-01667 at 2 (App. Bd. May 16, 2023). On July 17, 2023, DOHA received a copy of the transcript. Applicant did not provide any post-hearing exhibits. The record closed on August 10, 2023. (Tr. 58, 62, 61-62)

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

Findings of Fact

In Applicant's SOR response, he admitted all SOR allegations. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 53-year-old nuclear engineer who has worked for his current employer since 1999. (Tr. 6, 10; GE 1 at 11) In 1988, he graduated from high school (Tr. 7) In 2000, he was awarded a bachelor's degree in engineering technology, and in 2013, he received a master's degree in divinity. (Tr. 7)

Applicant served in the Navy from 1988 to 1994, and his specialty was nuclear electrician's mate. (Tr. 9) He received an honorable discharge from the Navy as a petty officer second class (E-5). (Tr. 9) In 1993, he married, and his two children are ages 16 and 19. (Tr. 8)

Financial Considerations

Applicant said his annual pay is about $56,000. (Tr. 48) Since the start of the COVID 19 pandemic, his salary has increased $25,000. (Tr. 49) His spouse's annual salary is about $60,000. (Tr. 49) He has about $200,000 in his 401k retirement account. (Tr. 54) He recently borrowed $50,000 from his 401k account to finance his daughter's education. (Tr. 55) He attributed his financial problems to "lack of financial discipline"; however, he has learned from his mistakes, and he believes that he is now more financially responsible. (Tr. 58) The SOR alleges the following financial concerns:

SOR ¶¶ 1.a and 1.b allege Applicant failed to file as required federal and state income tax returns for tax years (TY) 2015, 2016, 2017, and 2018. He stopped filing his tax returns in 2016 because he expected to receive a refund and did not believe it was a "big issue." (Tr. 21-22) He said he may have timely filed a tax return for TY 2017, and he acknowledged that he failed to timely file tax returns for TYs 2015, 2016, 2018, and 2019. (Tr. 23)

In Applicant's November 22, 2019 SCA, he disclosed that he filed his federal income tax returns for TYs 2015, 2016, 2017, and 2018 in October 2019 (GE 1 at 30-31) For TY 2015, he made a partial payment of $300 to address his federal income tax debt; for TY 2016, he owed $1,375; for TY 2017, he owed $2,700; and for TY 2018, $65,000 (estimated). (*Id*.)

In Applicant's March17, 2020 Office of Personnel Management (OPM) personal subject interview, he explained the $65,000 listed in his SCA that he said he owed for TY 2018 was an error, and the correct amount was $4,000. (GE 2 at 4) He said he filed his tax returns for TYs 2015, 2016, 2017, and 2018 by 2020. (*Id*.) He had not filed his state income tax returns for TYs 2015, 2016, 2017, and 2018; however, he planned to file those state income tax returns when he files his TY 2019 federal income tax return. (*Id*.) He owed the IRS a total of $6,600, and he has a payment plan with the IRS. (*Id*.)

In Applicant's September 2, 2020 response to DOHA interrogatories, Applicant said he filed his federal income tax returns on the following dates: TY 2015 (January 24, 2020); TY 2016 (October 20, 2019); TY 2017 (no date); and TY 2018 (October 21, 2019). (GE 2 at 8) He owed the IRS $6,173. (*Id*.) His state income tax returns were filed on August 31, 2020, and he does not owe any state income taxes. (GE 2 at 10) His August 13, 2020 IRS tax transcript for TY 2015 indicates no tax return was filed, and the IRS sent a notice to Applicant on November 11, 2019. (*Id*. at 11) He subsequently provided documentation from the IRS which indicated his tax debt for TY 2015; however, it did not show when he filed his TY 2015 tax return.

Applicant and his spouse's August 13, 2020 IRS tax transcripts for TYs 2016, 2017, and 2018 show the following information (amounts rounded to nearest $1,000) (AE B at 12-16):

Tax Year	Date Filed	Adjusted Gross Income	Account Balance
2016	Dec. 30, 2019	$135,000	$1,000
2017	Oct. 28, 2019	$145,000	$4,000
2018	Oct. 21, 2019	$146,000	$1,000

Applicant said he was not cheating the government, and at most he was cheating himself out of potential refunds. (Tr. 22) When he was completing a student-loan application for his eldest child, he was supposed to provide tax information to the Department of Education, and this requirement triggered a desire to get his tax returns filed. (Tr. 22) All federal and state tax returns are filed. (Tr. 23-24, 44-45) He owed delinquent taxes for the last four years, and his current total, which includes a tax debt for 2020, is about $5,000. (Tr. 22, 24-25, 27) He has a $100 monthly payment plan with the

Internal Revenue Service (IRS), and his payments are current. (Tr. 24-25; GE 2 at 20-21) He does not owe the state for income taxes. (Tr. 24) Applicant filed his tax returns for TY 2022 in July 2023. (Tr. 28) He owed several thousand dollars for TY 2022, and he paid the IRS when he filed his TY 2022 tax return. (Tr. 28-29)

SOR ¶ 1.c alleges Applicant has a charged-off debt for $18,287. He borrowed the funds to replace the roof or siding on his residence 10 years ago. (Tr. 31, 35) He believed payments of about $200 monthly were being made directly from his or his spouse's bank accounts for "well beyond seven years." (Tr. 31, 33, 35-36) He believed the loan was paid. (Tr. 836) His spouse contacted the creditor, and the creditor wanted a single payment of 75 percent of the balance or to make monthly payments and pay the full balance. (Tr. 32-33) He said the current balance is about $12,000 or $13,000. (Tr. 34) His September 2, 2022 credit report shows the balance is $13,787. (Tr. 45; GE 3 at 6) He is credited with mitigating this debt because he reduced the balance by almost $5,000.

SOR ¶¶ 1.d through 1.j allege Applicant has seven Department of Education (DoED) debts placed for collection totaling $72,996 for $16,768, $15,472, $14,524, $8,516, $7,990, $7,963, and $1,763. About $16,000 of his student-loan debt resulted from his undergraduate education, and the remainder of the debt was from Applicant's master's degree program, and the loans were borrowed from around 2009 to 2012. (Tr. 37, 46) He stopped making payments in 2014 because the creditor's proposed payment plan of about $740 monthly was unaffordable. (Tr. 37, 41, 47) In 2016 or 2017, Applicant was working with the creditor to arrange a payment plan based on his income. (Tr. 40) Under the proposed payment plan, the monthly payment was unaffordable. (Tr. 40-41) There was a four-year gap from 2014 to 2018 in which he did not make any payments. (Tr. 48) In late 2018 or early 2019, DoED garnished $940 monthly from Applicant's pay. (Tr. 38-39; GE 1; GE 2) He investigated a post-COVID 19 rehabilitation plan. (Tr. 38, 42) He is waiting for the documentation from the government to start a rehabilitation plan. (Tr. 38, 41) He has set aside $4,500 for the student-loan payment plan. (Tr. 38, 43)

On March 13, 2020, as a result of the COVID-19 pandemic, the President placed federal student loans in deferment, and the interest rate was zero during the deferment term. *See* DoEd website, "COVID-19 Loan Payment Pause and 0% Interest," available at https://studentaid.gov/announcements-events/covid-19/payment-pause-zero-interest#in-school-zero-interest. (HE 5) In 2022, the President approved one-time debt relief on DoEd loans of $10,000. *See* DoEd website, "One-time Federal Student Loan Debt Relief," available at https://studentaid.gov/manage-loans/forgiveness-cancellation/debt-relief-info. (HE 6)The federal courts issued a stay on this $10,000 debt relief. The President repeatedly extended the deferment.

The federal government's Income-Based Repayment (IBR) is a program that caps a creditor's monthly student-loan payment based on income, and then forgives whatever is still owed after 20 or 25 years. The monthly payments are revised on an annual basis under the category of Revised Pay As You Earn (REPAYE). Under the REPAYE and IBR plans, borrowers provide information about their income, and the student-loan creditor determines the amount they can pay under a formula provided by the DoEd. For married borrowers, the income and student-loan debt of both spouses is considered together to

determine the monthly payment (with limited exceptions). The Federal Student Aid website, "Do you have questions about the different types of income-driven repayment plans?," webpage, available at https://studentaid.gov/manage-loans/repayment/plans/income-driven/questions, states as follows:

> • For the IBR Plan, your monthly payment amount is 10 percent of your discretionary income if you're a new borrower on or after July 1, 2014. If you're not a new borrower, your monthly payment amount under the IBR Plan is 15 percent of your discretionary income.
>
> Example
> • You are single and your family size is one. You live in one of the 48 contiguous states or the District of Columbia. Your AGI is $40,000.
> • You have $45,000 in eligible federal student loan debt.
> • 150 percent of the 2022 HHS Poverty Guideline amount for a family of one in the 48 contiguous states and the District of Columbia is $20,385. The difference between your AGI and 150 percent of the Poverty Guideline amount is $19,615. This is your discretionary income.
> • If you're repaying under the REPAYE Plan, the PAYE Plan, or (if you're a new borrower) the IBR Plan, the calculation works like this: 10 percent of your discretionary income is $1,961.50. Dividing this amount by 12 results in a monthly payment of $163.45.
> • If you are repaying under the IBR Plan and you're not a new borrower, the calculation works like this: 15 percent of your discretionary income is $2,942.25, and dividing this amount by 12 results in a monthly payment of $245.19. (HE 7)

On August 24, 2022, the White House announced a new plan to assist student-loan borrowers:

> Make the student-loan system more manageable for current and future borrowers by:
>
> Cutting monthly payments in half for undergraduate loans. The Department of Education is proposing a new income-driven repayment plan that protects more low-income borrowers from making any payments and caps monthly payments for undergraduate loans at 5% of a borrower's discretionary income—half of the rate that borrowers must pay now under most existing plans. This means that the average annual student-loan payment will be lowered by more than $1,000 for both current and future borrowers.

See "FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most," https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/. (HE 8)

On June 30, 2023, in *Biden v. Nebraska*, 22-506, the Supreme Court struck down the President's loan forgiveness plan. However, the DoEd announced the federal government is working on new plans to assist borrowers in resolving their student-loan debts.

The Public Service Loan Forgiveness (PSLF) program allows forgiveness of a federal student loan after 10 years of income-based payments; however, a debtor must have applied for the program before October 31, 2022. *See* The White House website, https://www.whitehouse.gov/publicserviceloanforgiveness/. (HE 9) The DoED is accepting new applications for the PSLF. *See* DoED website, https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service. (HE 10)

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."

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

> It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying conditions is contained in the mitigation section, *infra*.

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

> (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
>
> (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
>
> (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;
>
> (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

Applicant provided some important mitigating information. He has made progress addressing his debts. He has an established payment plan with the IRS, and he plans to obtain a payment plan from DoED for his student loans as soon as the deferment ends. He set aside $4,500 to help with his student loans once the payments resume. He is making payments on the loan in SOR ¶ 1.c. He and his spouse had an AGI of about $140,000 annually in 2018, and his pay has been increasing. He and his spouse are able to address their debts and establish their financial responsibility.

Applicant's student loans were being paid through garnishment from about 2018 until the federal deferment in 2020. Payment of a debt "though garnishment rather than a voluntary effort diminishes its mitigating force." *Compare* ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) *with* ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns). *See also* ISCR Case No. 09-05700 at 4 (App. Bd. Feb. 24, 2011) (garnished payments towards delinquent tax debts is not mitigating information in light of other factors); ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) (remanding the case to the administrative judge and stating when addressing an Internal Revenue Service garnishment, "On its face, satisfaction of a debt through the involuntary establishment of a creditor's garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor."). I have credited Applicant with mitigation of the debt in SOR ¶ 1.c and his student-loan debts in SOR ¶¶ 1.d through 1.j; however, Applicant loses some mitigating credit because he did not clearly establish that he voluntarily repaid these debts.

Applicant failed to timely file his federal income tax returns for TYs 2015 through 2018. 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 his federal income tax returns for TYs 2015 through 2018, the DOHA Appeal Board has commented:

> Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. *See, e.g.*, ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at* evaluating an applicant's judgment and reliability. *Id*. A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), ***aff'd***, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). *See* ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted); ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [his or her] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [his or her] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. *See* ISCR Case No. 15-01031 at 3 & n.3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an applicant's course of conduct and employing an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

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

In ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) the Appeal Board reversed the grant of a security clearance, discussed how AG ¶ 20(g) applied, and noted:

> The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, applicant's filing of his Federal income tax returns for 2009-2014 after submitting his SCA, undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit.

In this instance, Applicant filed his overdue federal income tax returns within six weeks of completion of his SCA, but before he received the SOR. He established a payment plan in 2019 to address the federal tax debt, and his failure to timely pay his federal tax debt is mitigated. He filed his overdue state income tax returns in 2020. However, the Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [his or her] federal [or state] tax problem, and the fact that [a]pplicant 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 pay federal income taxes when due. *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).

Under all the circumstances, Applicant's failures to timely file his federal and state income tax returns for TYs 2015 through 2018 are not mitigated at this time.

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 common-sense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 53-year-old nuclear engineer who has worked for his current employer since 1999. In 2000, he was awarded a bachelor's degree in engineering technology, and in 2013, he received a master's degree in divinity. He served in the Navy from 1988 to 1994, and his specialty was nuclear electrician's mate. He received an honorable discharge from the Navy as a petty officer second class.

Applicant provided important financial considerations mitigating information. He admitted that he made financial errors; he intends to learn from those mistakes; and he promised not to repeat them. He has been making progress on his finances. He has provided contributions to his employer and the national defense.

The evidence against grant of a security clearance is detailed in the financial considerations section, *supra*, and this evidence is more substantial at this time than the evidence of mitigation. Applicant did not establish that he was unable to timely file his federal and state income tax returns for TYs 2015 through 2018. His failure to take timely, prudent, responsible, good-faith actions from 2016 to 2019 (when those tax returns were due) to get his tax returns timely filed raise unmitigated questions about his reliability, trustworthiness, and ability to protect classified information. *See* AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. "[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)).

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards establishment of a track record of timely filing his tax returns, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate financial considerations security concerns.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraphs 1.c through 1.j:	For Applicant

Conclusion

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

_____
Mark Harvey
Administrative Judge