



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



In the matter of:)
)
) ISCR Case No. 21-01221
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esquire, Department Counsel
For Applicant: Patrick K. Korody, Esquire

03/27/2023

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance is denied.

Statement of the Case

On June 22, 2018, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On January 14, 2020, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued him a set of interrogatories requesting federal tax account transcripts for certain years as well as tax account transcripts for four different states. On an unspecified date, he responded to those interrogatories and submitted a substantial number of documents that came within the request. On August 13, 2021, the DCSA CAF issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline F (financial considerations) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an undated statement, Applicant responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on December 29, 2021. Because of health concerns associated with the COVID-19 pandemic and pandemic protocols, the case was not assigned to me until August 17, 2022. A Notice of Microsoft Teams Video Teleconference Hearing was issued on November 4, 2022. I convened the hearing as scheduled on November 9, 2022.

During the hearing, Government exhibits (GE) 1 through GE 13 and Applicant exhibits (AE) A through AE L were admitted into evidence without objection. Applicant and three witnesses testified. The transcript (Tr.) was received on November 22, 2022. I kept the record open to enable Applicant to supplement it with documentation that was identified during the hearing. He took advantage of that opportunity and timely submitted additional documents that were marked and admitted as AE M through AE Q without objection. The record closed on November 29, 2022.

Findings of Fact

In his Answer to the SOR, Applicant admitted nearly all the factual allegations pertaining to financial considerations. (SOR ¶¶ 1.a. through 1.h.). His admissions are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Background

Applicant is a 64-year-old employee of a defense contractor. He has been serving as a senior geospatial subject matter expert with his current employer since about October 2017. He was a self-employed consultant from January 2016 until October 2017, and from December 2001 until December 2015, he was the president and chief executive officer of his own company, a Chapter S Corporation. He was previously a program manager with another federal contractor from December 1997 until December 2001. A 1978 high school graduate, he earned approximately 165 hours towards a college degree, but he has not earned that degree. He enlisted in the U.S. Army in August 1978, and served on active duty until January 1990, when he was honorably discharged as a staff sergeant (E-6). (AE M) He has been granted a variety of security clearances (secret, top secret, and sensitive compartmented information (SCI) since about 1978. (GE 1 at 41-44) He was married in 1986 and divorced in 1996. He remarried in 1996 and divorced in 2011. He has four children, born in 1986, 1996, 1998, and 2001.

Military Awards and Decorations

During his military service Applicant received the following awards and decorations: the Army Service Ribbon, the Overseas Service Ribbon (2 awards), the Army Good Conduct Medal (3 awards), the Army Commendation Medal (3 awards), the NCO Professional Development Ribbon (2 awards), the Army Achievement Medal (2 awards), and the Expert Badge (M-16 Rifle).

Financial Considerations

General source information pertaining to the financial accounts discussed below can be found in the following exhibits: GE 1 (SF 86, dated June 22, 2018); GE 2 (Incident Report, dated January 20, 2021); GE 3 (LexisNexis Judgment and Lien Filings, dated June 25, 2021); GE 6 (Enhanced Subject Interview, dated October 23, 2018); GE & (Income Tax Documents Submitted by Applicant, various dates); and GE 8 (Equifax Credit Report, dated June 29, 2021).

In his June 2018 SF 86, Applicant reported that because of issues related to a divorce, he had failed to either file and/or pay federal or state income taxes for the tax years 2015 and 2016. He claimed that prior to June 2018 he referred those issues to a nationally known income tax preparation company to review, and he intended to file the returns by the end of July 2018. (GE 1 at 44-46) However, during an interview with an investigator with the U.S. Office of Personnel Management (OPM) on October 23, 2018, it was revealed that one particular state had indicated that he owed \$158,000 in income taxes for 2015 alone, and that he had not filed his individual state income tax returns for the tax years 2010, 2011, and 2012. Applicant disputed those allegations, claiming that he had filed those returns. The state also told him that he had to file income tax returns for the tax years 2015, 2016, and 2017. (GE 6 at 4-5) He acknowledged that the IRS had conducted audits in 2009-2010, and finalized the audits in 2012. In fact, because Applicant owed unpaid income taxes to the Internal Revenue Service (IRS) and/or the state, at least two federal tax liens and one state tax lien were filed against him. As of the date the SOR was issued in August 2021, he was indebted to the federal government for delinquent taxes for multiple years. As for the federal or state income tax returns that had not been timely filed, all those unfiled income tax returns had been filed in early 2019. (Tr. at 76)

Applicant explained that because he frequently traveled, his wife handled the family finances. (Tr. at 57) He also contended that his partner Mr. P was responsible for the business operations of their Chapter S Corporation – an organization that had approximately 65 employees at one point, but by 2014 had dropped down to 4 employees – and Applicant and his first wife were partners as well. (Tr. at 69-71) He used professional tax preparers for both the corporate and individual income taxes. In January 2015, when the IRS started investigating the company, according to Applicant, Mr. P destroyed all the corporate records. (Tr. at 96) As a result, Applicant was unable to submit any of the S Corporation income tax documents for my review. (Tr. at 112) Although Applicant tried working with the IRS, his request for a payment plan was rejected. It also refused any person-to-person discussions. Mr. P was also a target of the IRS. Applicant's

wife sought innocent spouse status. Applicant initially said that he was in a dark place at the time and attributed at least some of the problems to his divorce and his need to pay child support and alimony. (Tr. at 75) He subsequently acknowledged that the divorce really did not have anything to do with his failure to file his income tax returns or his failure to pay his taxes. (Tr. at 111)

Applicant claimed to have made some payments to both the IRS and one particular state, and intends to pay what he owes regardless of how long it takes. (Tr. at 103-104) Although he and his attorneys made numerous efforts to deal with several IRS representatives, the COVID-19 pandemic health protocols and reduced workforce limited his access and purportedly restricted his rights under the Taxpayers Bill of Rights. He made several attempts to lower garnishment amounts because the amounts being taken from him was creating severe financial hardships and he did not have enough funds to maintain his basic living standards. (AE N)

The SOR alleged ten different financial issues associated with his failure to either timely file federal or state income tax returns or pay income taxes over a multi-year period, as well as that federal or state tax liens had been filed, as follows:

SOR ¶ 1.a. refers to a federal tax lien entered against Applicant in multiple states in January 2021 in the approximate amount of \$884,063. (GE 3) The amount covers unpaid tax for the tax years 2009 through 2013 as well as statutory additions. (GE 2 Notice of Levy on Wages, Salary, and Other Income (Form 668-W), dated February 3, 2021); GE 5) Applicant claimed that the business was audited for 2009 and 2010 taxes, and it was completed in 2013, when the company was assessed \$884,063. Of that amount, he claimed that 51 percent (\$450,872.13) should be his responsibility with the remaining 49 percent the responsibility of his business partner. Of Applicant's 51 percent, he felt that one-half of that amount (\$225,436.07) should be his ex-wife's responsibility. He initially contended that he paid more than \$70,000 of the money owed, and has the assistance of attorneys to represent him with the IRS. (Answer to SOR at 1) He is in the process of resolving the lien.

SOR ¶ 1.b. refers to the 2009 federal income tax that is alleged as being delinquent in the amount of \$314,318. Applicant applied for and received an automatic extension of time to file his Individual Income Tax Return (Form 1040) and it was extended until October 15, 2010. Calculations by his tax preparer were not completed until November 3, 2010, and it estimated an adjusted gross income of -\$167,976 and that he was owed a refund of \$93,919. (GE 7 at 24, 29-31) The delinquent tax liability is also included in the Form 668-W referred to, and alleged in, SOR ¶ 1.a. During the period November 29, 2021, through September 28, 2022, he made 17 monthly \$2,775 payments to the IRS, totaling \$47,175, supported by verifying documentation. (AE H) He is in the process of resolving the debt.

SOR ¶ 1.c. refers to the 2010 federal income tax that is alleged as being delinquent in the amount of \$525,157. It is unclear if Applicant applied for an automatic extension of time to file his Form 1040, but it appears that he did so because the copy is dated by the tax preparer on October 15, 2011. (GE 7 at 151) Nevertheless, calculations by his tax

preparer estimated an adjusted gross income of \$314,015 and that he owed an additional \$25,885 in income tax. (GE 7 at 85, 151) The delinquent tax liability is also included in the Form 668-W referred to, and alleged in, SOR ¶ 1.a. During the period February 10, 2021, through October 12, 2021, he made 19 monthly (between \$380.11 and \$5,104.44) payments to the IRS, totaling \$82,072.32, supported by verifying documentation. (AE H) He is in the process of resolving the debt.

SOR ¶ 1.d. refers to the 2011 federal income tax that is alleged as being delinquent in the amount of \$23,673. It is unclear if Applicant applied for an automatic extension of time to file his Form 1040, but it appears that he did not do so for there is a note on the Form 1040 stating that "late filing penalty not Incl." (GE 7 at 213) Calculations by his tax preparer estimated an adjusted gross income of \$371,717 and that he owed an additional \$40,636 in income tax. (GE 7 at 212-213) The delinquent tax liability is also included in the Form 668-W referred to, and alleged in, SOR ¶ 1.a. He is in the process of resolving the debt.

SOR ¶ 1.e. refers to the 2012 federal income tax that is alleged as being delinquent in the amount of \$18,598. It is unclear if Applicant applied for an automatic extension of time to file his Form 1040, but it appears that he did not do so for there is a note on the Form 1040 stating that "late filing penalty not Incl." (GE 7 at 305) Calculations by his tax preparer estimated an adjusted gross income of \$516,578 and that he owed an additional \$80,079 in income tax. (GE 7 at 304-305) The delinquent tax liability is also included in the Form 668-W referred to, and alleged in, SOR ¶ 1.a. He is in the process of resolving the debt.

SOR ¶ 1.f. refers to the 2013 federal income tax that is alleged as being delinquent in the amount of \$2,315. It is unclear if Applicant applied for an automatic extension of time to file his Form 1040, but it appears that he did not do so for there is a note on the Form 1040 stating that "late filing penalty not Incl." (GE 7 at 305) Calculations by his tax preparer estimated an adjusted gross income of \$516,578 and that he owed an additional \$80,079 in income tax. (GE 7 at 304-305) The delinquent tax liability is also included in the Form 668-W referred to, and alleged in, SOR ¶ 1.a. He is in the process of resolving the debt.

SOR ¶ 1.g. refers to a state tax lien in the approximate amount of \$147,353 that was entered against Applicant in June 2018, that remained unpaid until about November 2019. (GE 3 at 2-3) Applicant claimed that the business was audited for 2009 and 2010 taxes, and it was completed in 2013, when the company was assessed \$884,063. Of that amount, he claimed that 51 percent (\$147,353) should be his responsibility with the remaining 49 percent the responsibility of his business partner. Of Applicant's 51 percent, he felt that one-half of that amount (\$37,575.02) should be his ex-wife's responsibility, but when he explained the issue to the state, he was told to pay the entire amount and sue her for the remainder. He contends that he paid the entire \$147,353.51. (Answer to SOR at 1) The lien was released on November 19, 2019 – nearly two years before the SOR was issued. The debt has been resolved.

SOR ¶ 1.h. refers to a federal tax lien in the approximate amount of \$5,309 that was entered against Applicant in January 2007. Applicant claimed that he was deployed in Afghanistan in October 2008 when his individual income tax return was submitted to the IRS by his tax preparer, and the necessary taxes were paid. During the spring of 2019, he received a notice of the lien, and he immediately paid the delinquent taxes. (Answer to SOR at 1) While he has not submitted any documentation verifying the payment of the lien, since he has been paying the taxes for 2009 and 2010. Those taxes have almost certainly been paid because the IRS takes the older taxes first. The lien has been resolved.

SOR ¶ 1.i. refers to the 2016 federal income tax return that Applicant failed to file as required. Applicant denied the allegation, claiming that copies of his Form 1040 were sent by him and his attorneys to multiple offices within the IRS. (Answer to SOR at 1) However, the Form 1040 that he submitted during the hearing reflects that it was not signed by him and his tax preparer until February 22, 2019 – well after even the date permitted by the IRS as an extended filing date. (AE D; AE F)

SOR ¶ 1.j. refers to the state income tax returns for at least the tax years 2015, 2016, and 2017, that Applicant failed to file as required. Applicant denied the allegation, claiming that his income tax returns and tax payments were sent by him to the state. (Answer to SOR at 1) However, the correspondence that he submitted during the hearing reflects that his state income tax returns for 2015 and 2016 were not signed by him and his tax preparer until February 22, 2019 – well after even the date permitted by the state as an extended filing date. (AE E) The 2017 state income tax return was not signed by him and his tax preparer until February 28, 2019 – well after even the date permitted by the state as an extended filing date. (AE G)

As of November 9, 2022, according to a Personal Financial Statement, Applicant reported a monthly net income was \$6,980; monthly expenses of \$1,435; and debt payments, including IRS payments, totaling \$5,272, leaving a remainder of about \$273 available for saving or spending. (AE C) He owns a 23 foot twin hull motor boat in storage that is worth less than what he owes on it (GE 10; Tr. at 62); as well as operating vehicles or parts of vehicles: a Ford Mustang Convertible; a Ford F350 truck; a Porsche Sedan; a Honda Convertible (GE 9); two residences in one state (GE 11; GE 12; Tr. at 59-60); a residence in Canada (GE 13); and 50 percent of a hunting cabin in another state (Tr. at 58-59). His June 2021 credit report reflects no overdue accounts. (GE 8)

Character References

Mr. Z is currently the senior director of digital and IRS solutions for the company that has a business unit for which Applicant works. He has known Applicant for over 12 years in different capacities: as a customer, worker, and friend. Applicant is considered a well-respected subject matter expert in the field, and he has an excellent reputation across the entire organization. He is a go-to expert on all things geospatial. There has been no reason to ever question his integrity or reliability. (Tr. at 26-34)

Mr. R spent nearly 27 years in the U.S. Army, at one point serving under then-Colonel Colin Powell. After he retired, he was eventually hired by Mr. P of Applicant's company. He was the sixth new employee. He worked for the company from 2002 until mid-2008, serving commands that were about to deploy overseas. Because of a shortage of civil servants, his contractor position was converted to a civil service position. While working for Applicant's company, he was deployed to Afghanistan for several months and then to Kuwait. He worked closely with Applicant who was a member of the crisis support response team. He described Applicant as a straight arrow whose word was his bond, and the one to whom everyone directed their questions. There have never been any questions regarding his integrity, trustworthiness, or loyalty. (Tr. at 35-43)

Mr. M retired as a chief warrant officer in the U.S. Army after 23 years of service. He was referred to Applicant's company by his friend Mr. R. He joined Applicant's organization in 2002 and remained there until about 2008-09. He was employee number seven. Most of the new employees were retired Army warrant officers who were embedded with the warfighter during their deployments and their tours in Afghanistan and Iraq to provide geospatial intelligence from the national level to the warfighters. Applicant was not only the president of the company, but he was also an actual operator on the front line. Mr. P ran the business side of the company and Applicant was the operations man – the go-to-guy in the field. Applicant was always very open, receptive, and knowledgeable. He is reliable, loyal, and has first rate integrity. Mr. M also converted to a civil service position. (Tr. at 45-52)

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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 and modified.)

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)) “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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.” (*Egan*, 484 U.S. at 531)

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 I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

Applicant failed to timely file his federal income tax return for the tax year 2016, and his state income tax returns for the tax years 2015, 2016, and 2017. In addition, because he failed to pay his federal and state income taxes for a multi-year period, federal and state tax liens were entered against him. The federal tax lien was in the approximate amount of \$884,063, and the state tax lien was in the approximate amount of \$147,353. The IRS levy resulted in substantial amounts of money being taken from his salary, but there is still a large unpaid balance remaining. The state lien was released in November 2019 when Applicant paid it off. On February 22, 2019 – well before the SOR was issued – Applicant's tax preparer completed that 2016 federal income tax return and submitted it to the IRS. Applicant's explanation regarding the late filing of the income tax return is not a legal justification for inaction. Likewise, while the state income tax returns for the tax years 2015, 2016, and 2017 were finally filed on February 28, 2019 – also well before the SOR was issued – they were still not timely filed.

The legal requirement to file a federal income tax return is based upon an individual's gross income and other enumerated conditions. Once it is determined that there is an obligation to so file, the following applies:

Any person required under this title to pay any estimated tax or tax, or 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 pay such estimated tax or tax, 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 and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year."

(26 U.S.C. § 7203, *Willful failure to file return, supply information, or pay tax.*)

AG ¶¶ 19(a), 19(c), and 19(f) have been established, but there is no evidence that Applicant has been unwilling to satisfy his debts regardless of an ability to do so, and AG ¶ 19(b) has not been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties under AG ¶ 20:

(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; 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), 20(b), 20(c), 20(d), 20(e), and 20(g) partially apply. Applicant acknowledged having some financial issues as far back as June 2018 when he submitted his SF 86. However, those financial issues actually arose before 2007 when the first federal tax lien was entered against him. A debt that became delinquent several years ago is still considered recent because “an applicant’s ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions.” ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)). This case involves two separate financial issues: the failure to timely file federal and state income tax returns, and the failure to pay federal and state income taxes.

Applicant attributed his financial issues essentially to a combination of factors. He initially claimed that his business partner Mr. P was responsible, and then referred to being in a dark place because of marital issues that eventually led him to have to pay alimony and child support. Added to the mix was the IRS’s refusal to meet personally with him or his attorneys to discuss the federal tax issues and the COVID-19 protocols that caused months to pass without significant discussions. Even if he did not have sufficient funds to pay his income taxes, he was still required to timely file his income tax returns. Applicant should have been aware that as far back as before 2009, there were income tax issues. He should have been more attentive to those issues at that time. Instead, he simply permitted the process to remain unchanged with Mr. P handling the finances and his tax preparer continuing to file (or not file) various corporate and individual income tax returns without more substantial oversight. Applicant’s failure to more timely address his federal and state income tax issues lead to a conclusion that his delayed voluntary actions or longstanding inaction until 2019 were to some degree irresponsible.

An applicant who begins to resolve his or her financial problems only after being placed on notice that his or her security clearance is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018)). In this instance, Applicant completed his SF 86 in June 2018; underwent his OPM interview in October 2018. Yet, it was not until February 2019 that he filed the delinquent federal and state income tax returns. The SOR was issued on August 13, 2021. Each step of the initial security clearance eligibility review process placed him on notice of the significance of the financial issues confronting him. By failing to rectify the status of his federal and state income tax return filings over such a lengthy multi-year period, Applicant failed to demonstrate the high degree of good judgment and reliability required of those granted access to classified information. While the IRS and the state governments filed tax liens against him, Applicant is credited with the timely payment of taxes to release the state tax lien in November 2019 – also well before the SOR was issued. However, because the federal tax lien was so incredibly high, the IRS levied against his wages and took

significant amounts from him each month. But he still owes a substantial amount of unpaid income taxes.

The DOHA Appeal Board has observed:

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). See 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 applicant has purportedly corrected his or her federal tax problem, and the fact that the applicant is now motivated to prevent such problems in the future, does not preclude careful consideration of an applicant'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 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an Applicant's course of conduct and employed 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).

Clearance decisions are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. They are not a debt-collection procedure. The guidelines do not require an applicant to establish resolution of every debt or issue alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant immediately resolve issues or make payments on all delinquent debts simultaneously, nor is there a requirement that the debts or issues alleged in an SOR be resolved first. Rather, a reasonable plan and concomitant conduct may provide for the payment of such debts, or resolution of such issues, one at a time. Mere promises to pay debts in the future, without further confirmed action, are insufficient. In this instance, there are some promises, along with substantial involuntary payments and some voluntary payments.

Several years ago, well before the SOR was issued, Applicant started the effort to address his financial issues. Unfortunately, due to the COVID-19 pandemic and health protocols, as well as manpower shortages at the IRS, meaningful discussions between Applicant's attorneys, accountants, and the IRS were seemingly impossible. As noticed above, while there were issues involving the individual income tax returns, there were no documents associated with the S Corporation offered into evidence, and it is unclear if the IRS was concerned with those income tax returns or merely with the individual income tax returns. Still, Applicant was able to partially address his financial issues. The Appeal Board has previously commented on such a situation:

Even 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. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation."

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. Jun. 4, 2001)).

There is evidence of financial counseling and a budget. Nevertheless, it remains difficult to determine if Applicant is currently in a better position financially than he had been because of continuing difficulties in making his monthly payments under the federal tax levy. While, in this instance, the IRS did not furnish guidance or afford access to a reasonable degree because of the national health pandemic issues, Applicant's actions, or inaction, for such a long period between 2009 and 2019, under the circumstances cast doubt on his current reliability, trustworthiness, and good judgment. (See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).)

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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); see also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

There is some mitigating evidence under the whole-person concept regarding Applicant's financial considerations. Applicant is a 64-year-old employee of a defense contractor. He has been serving as a senior geospatial subject matter expert with his current employer since about October 2017. He was a self-employed consultant from January 2016 until October 2017, and from December 2001 until December 2015, he was the president and chief executive officer of his own company, a Chapter S Corporation. He was previously a program manager with another federal contractor from December 1997 until December 2001. A 1978 high school graduate, he earned approximately 165 hours towards a college degree, but he has not earned that degree. He enlisted in the U.S. Army in August 1978, and served on active duty until January 1990, when he was honorably discharged as a staff sergeant (E-6). He has been granted a variety of security clearances (secret, top secret, and SCI) since about 1978. He is a well-respected geospatial subject matter expert who has served on the front line with deployed troops. He self-reported income tax problems and made some efforts to resolve them, eventually filing all his delinquent federal and state income tax returns, satisfying a state tax lien, trying to deal with the IRS during the COVID-19 pandemic, and paying substantial sums to the IRS to resolve his federal tax lien. He may have been the victim of inappropriate financial actions by his former business partner.

The disqualifying evidence under the whole-person concept is simply more – not much more – substantial. Applicant failed to timely file his federal income tax return for the tax year 2016, and his state income tax returns for the tax years 2015, 2016, and 2017. In addition, because he failed to pay his federal and state income taxes for a multi-year period, federal and state tax liens were entered against him. The federal tax lien was in the approximate amount of \$884,063, and the state tax lien was in the approximate amount of \$147,353. The IRS levy resulted in substantial amounts of money being taken from his salary, but there is still a large unpaid balance remaining. The state lien was released in November 2019 when Applicant paid it off. On February 22, 2019 – well before

the SOR was issued – Applicant’s tax preparer completed that 2016 federal income tax return and submitted it to the IRS. Applicant’s explanation regarding the late filing of the income tax return is not a legal justification for inaction. Likewise, while the state income tax returns for the tax years 2015, 2016, and 2017 were finally filed on February 28, 2019 – also well before the SOR was issued – they were still not timely filed.

In ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008), the Appeal Board addressed a key element in the whole-person analysis in financial cases stating:

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has “. . . established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan.” The Judge can reasonably consider the entirety of an applicant’s financial situation and his [or her] actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Applicant’s track record of claimed or verifiable efforts to resolve the debts is growing and improving. However, while some of his recent efforts have been reasonable, positive, and encouraging, his failure to timely file his federal and state income tax returns until 2019 – well before the pandemic appeared – was not reasonable. Overall, the evidence leaves me without substantial questions and doubts as to Applicant’s eligibility and suitability for a security clearance. Accordingly, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant

Subparagraph 1.c.:	For Applicant
Subparagraph 1.d.:	For Applicant
Subparagraph 1.e.:	For Applicant
Subparagraph 1.f.:	For Applicant
Subparagraph 1.g.:	For Applicant
Subparagraph 1.h.:	For Applicant
Subparagraph 1.i.:	Against Applicant
Subparagraph 1.j.:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge