



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-20964
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

August 4, 2008

Decision on Remand

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns regarding his financial considerations and personal conduct. Clearance is denied.

Statement of the Case

On January 14, 2004, Applicant submitted a Security Clearance Application (SF 86).¹ On May 2, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2,

¹Government Exhibit (GE) 1 (Security Clearance Application, Electronic Personnel Security Questionnaire or “EPSQ”, dated January 14, 2004). For convenience, the security clearance application in this decision will be called an SF 86. Applicant stated he is “currently arranging installment payment of taxes” in response to Question 43. There is no allegation of falsification of the 2004 SF 86.

²GE 4 (Statement of Reasons (SOR), dated May 2, 2007). GE 4 is the source for the facts in the remainder of this paragraph unless stated otherwise.

1992, as amended, modified and revised.³ The SOR alleges security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer dated June 30, 2007, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing.⁴ The case was assigned to Judge Graham on August 16, 2007. Judge Graham held a hearing on September 13, 2007. At the hearing, the Government did not present any witnesses. Applicant was the sole witness on his own behalf. The Government offered three exhibits (GE 1-3; R. 9), and Applicant offered 18 exhibits (AE A-R). Judge Graham admitted all proffered exhibits. Judge Graham granted Applicant's clearance on October 31, 2007. Citations to the transcript in the first hearing are "Tr1."

The Appeal Board remanded Applicant's case on April 10, 2008, and it was assigned to me on April 22, 2008. On May 21, 2008, Applicant's hearing was held, and on June 2, 2008, I received the hearing transcript from the remand proceeding (Tr2.). There was no objection to my consideration of the transcript of the hearing from September 13, 2007 or the exhibits from that hearing (Tr2. 11). I admitted the transcript and exhibits from the first hearing (Tr2. 11-12). Applicant was the only witness at the rehearing. I numbered the documents received before or after the remand hearing from page (pg.) 1-301, and placed them into a separate orange file. As indicated, there was already an AE D from the first hearing. The documents received from Applicant on May 21, 2008, were marked AE D1, and the prior AE D was changed to AE D2. See discussion of exhibits at Tr2. 13-16. Documents received from Applicant on June 9 and 28, 2008, are numbered pg. 1-141 and 142-204. Documents received on August 1, 2008, are numbered pg. 289-300. Department Counsel did not object to my consideration of those documents and they are admitted. Emails between the parties are at pg. 205-258, 263-266, 281-284, and 301. I received Department Counsel's closing argument on July 10, 2008 (pg. 251, 259-262), and Applicant's closing argument the next day (pg. 255-256; 267-268). I closed the record on July 11, 2008 (pg. 257).

On July 16, 2008, I sent an email to the parties providing four documents to them (pg. 269-285). I provided a draft of the factual findings and offered them an opportunity to submit comments concerning those facts (pg. 273-282). I also proposed to amend the SOR to provide additional notice to Applicant (pg. 269). I also asked him

³On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the Statement of Reasons (SOR) was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case because the SOR is dated after Sep. 1, 2006.

⁴GE 4 (Applicant's response to SOR, dated June 30, 2007).

to provide additional information (pg. 269). There was no objection, and I approved the SOR amendment on August 2, 2008. Applicant also provided the information I requested (pg. 289-300). I closed the record on August 2, 2008 (pg. 301).

Appellate Litigation

The Government appealed Judge Graham's decision.⁵ On April 10, 2008, the Appeal Board remanded the Applicant's case for a new decision "with instructions to assign a Judge to issue a new decision after correcting the errors identified in this Decision, consistent with the Judge's obligations under Directive, Additional Procedural Guidance, ¶¶ E3.1.35 and E3.1.25."⁶ ISCR Case No. 06-20964 (App. Bd. Apr. 10, 2008) at 7.

The Appeal Board discussed two errors in Judge Graham's decision:

However, as argued additionally by Department Counsel on appeal, the Judge has significantly undercut the validity of his analysis of matters in mitigation in this case **by focusing only on the current status of the debt owed the IRS and by not considering Applicant's overall debt picture**. While it is true that the outstanding debt to the IRS has been substantially reduced through refund intercepts and payments made by Applicant and his wife, Applicant and his wife have made most of this progress by incurring new debt in the form of a \$30,000 loan and \$6,200 worth of credit card charges. The record evidence clearly indicates that Applicant has, in effect, done little more than transfer a large part of his outstanding IRS debt to new, apparently current, debts with private

⁵The briefs filed by the parties were not part of the file provided to me. I recommend in future cases that briefs of the parties filed with the Appeal Board be routinely provided to the judge who conducted the hearing (who so request) and added to the file, as is the practice at other U.S. civil and military courts.

⁶ Directive ¶ E3.1.25. provides:

The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The applicant and Department Counsel shall each be provided a copy of the clearance decision. In cases in which evidence is received under items E3.1.21. and E3.1.22., above, the Administrative Judge's written clearance decision may require deletions in the interest of national security.

Directive ¶ E3.1.35. states:

Upon remand, the case file shall be assigned to an Administrative Judge for correction of error(s) in accordance with the Appeal Board's clearance decision. The assigned Administrative Judge shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board. The Administrative Judge's clearance decision after remand shall be provided to the parties. The clearance decision after remand may be appealed pursuant to items E3.1.28. to E3.1.35., above.

lenders. Any comprehensive evaluation of Applicant's current financial status (which includes a determination of just how mitigating Applicant's partial satisfaction of his IRS debt is in the context of the totality of the record evidence) must contain an acknowledgment of this fact along with some analysis of how it affects Applicant's security worthiness. Yet the "Conclusions" section of the Judge's decision contains no such analysis, and the Judge instead restricts his comments solely to the reduction of the IRS debt and the plan to retire the debt in the future. **By failing to discuss the significance of the debts incurred to reduce the IRS debt**, including some evaluation of Applicant's future ability to repay the private debts in addition to the remaining IRS debt, the Judge ignored an important aspect of the case. This was error.

Id. at 4 (emphasis added to show errors and corrective actions required).

Additionally, Department Counsel asserts that the Judge's conclusion that the government failed to establish a case under Guideline E is error. Department Counsel's contention is persuasive The SOR allegation brought under Guideline F is not based on Applicant's failure to file income tax returns, as the Judge's analysis under Guideline E suggests. Rather, the SOR allegation under Guideline F is based explicitly on the debt owed the IRS and says nothing about Applicant's failure to file returns. Indeed, the Judge concluded that the government had established its case under Guideline F by referencing three disqualifying conditions, only one of which was disqualifying condition ¶ 19(g). The other two disqualifying conditions were based upon what is the gravamen of the government's concerns in a Guideline F case—failure to live within ones means and failure to satisfy debts and financial obligations. Given the explicit language of the SOR allegation in this case, and given the basic nature of the government's concerns under Guideline F, the Judge had no rational basis to conclude that no separate security concerns were raised by Applicant's failure to file income tax returns as required by law. Obviously, the failure to file tax returns in an of itself, apart from any considerations of financial indebtedness, is a matter that is appropriately addressed under Guideline E, which by its own terms deals with conduct involving questionable judgment, lack of candor, dishonesty⁷ or unwillingness to comply with rules and regulations.

* * *

While the Judge's comments [in his analysis under Guideline F] could be construed as the product of an analysis of Applicant's judgment akin to

⁷The SOR did not allege that Applicant falsified any documentation or that his failure to file his tax returns constituted a lack of candor or dishonesty, so the Appeal Board's commentary about "lack of candor" and "dishonesty" is not directed towards this particular case.

the type of analysis that would have taken place under Guideline E, it is not clear from the Judge's decision that he took into consideration the full range of factors described under Guideline E⁸ and that he engaged in such analysis independent of the financial considerations analysis in the case. For these reasons, an analysis under Guideline E of Applicant's failure to file his income tax returns is needed.

Id. at 5-6 (internal footnotes omitted, additional footnotes added).

The Appeal Board did not address Judge Graham's Whole Person analysis, which described Applicant's failure to file his tax returns as irresponsible, and as demonstrating lapses in judgment.⁹ The Appeal Board did not compare "The Concern" under Guideline E with "The Concern" under Guideline F. Instead the Appeal Board focused exclusively on the Concern under Guideline E, reading it "in isolation." ISCR Case No. 06-20964 at 5-6 (App. Bd. Apr. 10, 2008). The Appeal Board accurately notes that Guideline E emphasizes "concepts of questionable judgment and irresponsibility." *Id.* at 6. The Concern, under Guideline F states, "Failure or inability 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 information" (emphasis added). These are the same characteristics or factors that the Appeal Board wanted addressed under Guideline E. The Appeal Board did not explain why the changes to Guideline E (which were evidently designed¹⁰ to eliminate adverse, duplicative findings under Guideline E,

⁸ It would have been helpful if the Appeal Board had specifically indicated what "factor(s)" was missing from Judge Graham's analysis.

⁹ The Appeal Board stated, "the Judge had no rational basis to conclude that no separate security concerns were raised by Applicant's failure to file income tax returns as required by law." ISCR Case No. 06-20964 at 5 (App. Bd. Apr. 10, 2008). Judge Graham mentioned the potential applicability of AG ¶ 16(g) and stated, "Applicant has a history of not meeting debts *by failing to file and pay taxes owed in excess of withheld taxes in 2000 through 2003*, as set forth in the SOR and government exhibits." (Emphasis added). ISCR Case No. 06-20964 at 5 (A.J. Oct. 31, 2008).

¹⁰ As Judge Graham correctly stated:

Under Guideline ¶ 16(c) a disqualifying condition may arise where there is "credible adverse information in several adjudicative issue areas *that is not sufficient for an adverse determination under any other single guideline . . .*" Also, paragraph 16(d) applies where there is "credible adverse information that is *not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination. . .*" (Emphasis added by Judge Graham).

The Appeal Board's decision does not explain why the prohibitions under AG ¶¶ 16(c) and 16(d) do not preclude making a prejudicial determination against Applicant for his the failure to comply with federal tax provisions under both Guidelines E and F. Nor does it articulate a rationale for why addressing lack of judgment, reliability, trustworthiness and failure to abide by rules could not be sufficiently addressed in the whole person analysis. AG ¶¶ 16(c) and 16(d) seem to prohibit alleging the Guideline F conduct under the general catchall provisions of Guideline E. As the Supreme Court has stated, "As always, where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 442

when that same conduct would be more appropriately alleged under the specific pertinent guideline) should not be applied in cases like Applicant's.

The Government very appropriately notified Applicant that his failure to file his tax returns had important and potentially adverse security implications and advised him with SOR ¶ 2.a that failure to file his income taxes had security implications. There is nothing wrong with parallel notifications under both Guidelines E and F, recognizing that almost any conduct-related disqualification under any Guideline will raise issues of lack of judgment and irresponsibility.

I concluded it was appropriate to amend the SOR and add the following subparagraphs:

1.b Applicant failed to file federal tax returns for tax years 2000 through 2003 until approximately April 2004, and

1.c From about March 17, 2007, until about June 2008, Mr. Moore and his spouse have consistently spent beyond their means as shown by excessive indebtedness, significant negative cash flow, and/or high debt to income ratio.

I will not restate or rely on Judge Graham's findings or conclusions in the Findings of Fact, Analysis or the Formal Findings sections of this decision, and will issue an opinion *de novo*.¹¹

U.S. 437, 445 (1987) (internal citations and quotation marks omitted). Guideline F specifically addresses Applicant's conduct with respect to his taxes. Whereas Guideline E does not even mention failure to pay taxes or failing to file a timely tax return. Furthermore, the similarity between the mitigating conditions under both Guidelines strongly militates against requiring redundant analysis. It would have been better to have placed SOR ¶ 2.a under SOR ¶ 1.a, and numbered it SOR ¶ 1.b because Financial Considerations Guideline AG ¶ 16(g) provides, "(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Guideline E is designed to capture that conduct not otherwise addressed under other guidelines, or to add an element of unreliability or untrustworthiness not apparent in another guideline. I respectfully request that the Appeal Board reconsider their recent interpretations that separate adverse findings under Guideline E are required whenever poor judgment, irresponsibility or rule violations are a security concern without regard to whether that same conduct is addressed with specificity in other guidelines. Ending the practice of duplicative, generalized allegations under Guideline E, which are more appropriately addressed under the specific guidelines that address the conduct at issue, was a significant improvement of the New Guidelines. This improvement provides clearer, more specific notice to Applicants and improves due process because both aggravating and mitigating conditions are specifically tailored to address the situations of particular Applicants.

¹¹ The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase "de novo determination":

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define "*de novo* proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence." And, in *United States v. First City National Bank*, 386 U.S. 361, 368 [(1967)], this Court

Findings of Fact

As to the SOR's factual allegations, Applicant admitted the SOR allegations in his response to the SOR and at his hearing. His response to the SOR also provided mitigating information concerning the SOR allegations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 52 years old (Tr2. 5).¹² He graduated from high school in 1974, has attended community college from 1998 to 2004, and completed about one year towards his associates degree in computer science (Tr1. 17; Tr2. 5). He has been the security officer for a federal contractor since September 2001. He married his high school sweetheart in October 1976, and his spouse is now 49 years old (Tr2. 6). His children were born in 1974 and 1979 (Tr2. 7). He served on active duty in the Army from 1976 to 1996, retiring in the grade of Staff Sergeant (E-6) (Tr2. 6). He was an administrative specialist when on active duty (Tr2. 6). He has never been fired from employment, has no adverse police record, has not used illegal drugs in the last seven years, and has no adverse alcohol-related incidents. He has held a security clearance since 1976 (Tr. 17-19), and has held a Top Secret clearance since 2001 (Tr2. 7). In the last seven years he has not had any: bankruptcies, tax liens, repossessions, wage garnishments, unpaid judgments, or civil court actions. Other than his delinquent federal taxes, he has not been over 180 days delinquent on any debts for the last seven years, and was not currently delinquent over 90 days on any debts.

The Army characterized Applicant's active duty service as Honorable (DD Form 214, AE E). He served in combat zones in Somalia and Kuwait (Tr1. 19). He received the following awards and commendations during his Army service: two awards of the Meritorious Service Medal, the Joint Service Commendation Medal, five awards of the Army Commendation Medal, two awards of the Army Achievement Medal, two awards of the Joint Meritorious Unit Award, six awards of the Army Good Conduct Medal, the National Defense Service Medal, the Armed Forces Expeditionary Medal, the Southwest Asia Service Medal, the NCO Professional Development Ribbon, the Army Service Ribbon, four awards of the Overseas Service Ribbon, the United Nations Medal, and the Kuwait Liberation Medal (DD Form 214, AE E).

Financial Considerations and Personal Conduct

Applicant failed to file a federal income tax return for tax years 2000, 2001, 2002, and 2003 when required. The IRS sent Applicant notices indicating he failed to file his returns, and included calculations about how much he owed (Tr1. 37). He

observed that "review *de novo*" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.

(internal footnotes omitted).

¹² The source for the information in this paragraph is Applicant's 2004 security clearance application, unless stated otherwise (GE 1), and sometimes in addition to the cited reference.

purchased a home in August 2001 to increase his interest deductions (Tr1. 39). He filed his tax returns for 2000-2003 after April 2004 (pg. 289). He believed he was not permitted to file a return or an extension unless he included the funds owed (Tr2. 24). He did not have the funds, but believed when he did have the funds he could file and simply pay the penalties and fines (Tr2. 24). When Applicant filed his federal tax returns, he owed the Internal Revenue Service (IRS) about \$65,000 (Tr1. 21-23). On September 13, 2005, he paid the IRS \$7,858 (AE H; Tr1. 41-43; Tr2. 28, 31). On October 11, 2005, he paid the IRS \$869 (AE H). He now understands that he should file his tax returns even if he does not have the funds to pay his taxes when filing (Tr1. 21-22).

In January 2007, Applicant made a compromise offer to resolve his IRS debt (GE 2). The offer proposes to resolve Applicant's taxes owed for 1999, 2000, 2001, 2002 and 2003, by paying the IRS a total of \$68,000, of which \$48,000 was to be paid within 90 days, and \$550 monthly thereafter for 36 months (GE 2). The IRS was interested in cash proffered with the agreement, and subsequently Applicant submitted several other compromises (GE 5). They finally agreed to pay \$36,000 as an initial payment (Tr1. 25). His wife borrowed and paid the IRS \$30,000 on January 9, 2007. (AE. B, H). They also paid the IRS \$2,322 on March 12, 2007, from a tax refund, and \$6,200 on June 19 and 20, 2007, which was charged to their credit cards (Tr1. 41-43; AE C).

As of September 17, 2007, Applicant and his spouse owed the IRS \$34,529 (tax: \$12,394; penalty: \$7,528 and interest: \$14,608) (AE G). Under their payment plan, they promised to pay the IRS \$550 monthly. Applicant said he planned for their tax debt to be paid in two to three years (Tr2. 43).¹³ In April 2008, the IRS applied their 2007 tax refund of \$2,159 to further reduce their federal tax debt (pg. 9). By June 9, 2008, Applicant had paid the IRS debt for tax year 2002, and only owed \$811 for tax year 2003 (pg. 2, 3, 7-11). However, he still owed \$21,272 for tax year 2001 and \$7,836 for tax year 2000. *Id.* He was supposed to start paying at \$550 per month, and then increase his payments to \$1,000 per month (Tr1. 24). His payment plan with the IRS is current (Tr2. 26). His total federal tax debt is \$29,107. *Id.* On August 1, 2009, his federal tax debt was down to \$26,984 (pg. 290).

Applicant and his spouse received three percent pay raises in 2005, and 2006. With these three percent pay raises their gross pay would be approximately \$127,000 in 2005 and \$131,000 in 2006 (Tr1. 46). His 2007 Personnel Financial Statement showed gross annual family income at about \$135,000 (GE 4). Applicant and his spouse purchased a home in 2001 and believed their federal tax bill would be substantially lower because of interest deductions (Tr1. 22). Applicant did not file his tax returns because he failed to withhold sufficient funds on a monthly basis, and did not retain the funds necessary to pay his taxes by April 15th following the end of tax years 2000 to 2003 (Tr1. 37). Applicant did not request any extensions from the IRS (Tr1. 30). Although he had not received financial counseling by the time of his first

¹³ Payment of \$550 per month, results in an annual payment of \$6,600. Not including interest which continues to accrue until the taxes are paid, at \$550 per month, approximately five more years will elapse before the tax debt is paid.

hearing (Tr1. 50), he subsequently did receive financial counseling and received advice to reduce his debts (pg. 268). Applicant's wife is seeking new employment, and Applicant is seeking a part time job to increase his income (pg. 268). Applicant's wife also intends to borrow from her 401K to eliminate one high-interest debt (pg. 268). The three tables that follow provide more specific information about Applicant's IRS payments and income tax returns.

Account Type	Date	Amount Paid	Citation	
IRS Payments	Sep. 13, 2005	\$7,858	AE H	
	Oct. 11, 2005	\$869	AE H	
	May 25, 2006	\$1,365	AE H	
Source-signature loan	Jan. 9, 2007	\$30,000	AE H; Tr2. 32-34	
	Mar. 12, 2007	\$2,322	AE D1 at 1; H	
Source-credit card	Jun. 19, 2007	\$2,000	AE D1 at 1; H; Tr2. 34-36	
Source-credit card	Jun. 20, 2007	\$4,200	AE D1 at 2; H; Tr2. 34-35	
	Aug. 16, 2007	\$445	AE D1 at 1	
	Aug. 16, 2007	\$105	AE D1 at 2; H	
	Sep. 21, 2007	\$550	AE D1 at 1	
	Oct. 21, 2007	\$550	AE D1 at 1	
	Nov. 26, 2007	\$550	AE D1 at 1	
	Dec. 27, 2007	\$550	AE D1 at 1	
	Jan. 30, 2008	\$550	AE D1 at 1	
	Mar. 5, 2008	\$550	AE D1 at 1	
	Mar. 27, 2008	\$550	AE D1 at 1	
	Apr. 27, 2008	\$550	AE D1 at 1	
	Apr. 21, 2008	\$2,159	AE D1 at 3	
		Total	\$55,723	

2001 Return Information	Applicant	Spouse	Total	Citation
Adjusted Gross Income	\$61,750	\$35,532	\$97,282	AE M
Taxable Income	\$50,979	\$28,119	\$79,098	AE M
Total Tax	\$11,413	\$4,909	\$15,716	AE M
Total Payments	\$5,612	\$89	\$5,701	AE M
Balance Due	\$5,801	\$4,820	\$10,015	AE M

Year of Tax Return	Adjusted Gross Income	Taxable Income	Total Tax	Total Tax Paid	Tax Refund or (Due)	Citations
2002	\$105,816	\$66,595	\$15,716	\$5,701	(\$10,015)	AE N & M
2003	\$119,019	\$78,129	\$13,151	\$8,077	(\$5,182)	AE O
2004	\$123,017	\$83,254	\$14,294	\$9,082	(\$5,332)	AE P
2005	\$126,473	\$71,345	\$11,161	\$14,703	\$3,542	pg. 295-6
2006	\$139,992	\$72,110	\$11,146	\$16,639	\$5,493	pg. 297-8
2007	\$140,342	\$84,324	\$13,929	\$15,739	\$2,159	pg. 299-300

The following tables summarize information on Applicant's various accounts.

Account Type	Date	Balance	Paid	Status
Credit Union G1	May 2008	\$4,854	\$150	Current (pg. 16; AE D1 at 11, 150)
	Apr. 2008	\$4,950	\$150	Current (pg. 17)
	Mar. 2008	\$4,909	\$150	Current (pg. 19)
	Feb. 2008	\$4,820	\$160	Current (pg. 21)
	Jan. 2008	\$4,919	\$240	Current (pg. 23)
	Dec. 2007	\$5,083	\$150	Less than Min \$236 Pmt (pg. 25)
	Nov. 2007	\$4,821	\$135	Less than Min \$145 Pmt (pg. 27)
	Oct. 2007	\$4,488	\$150	Current (pg. 29)
	Sep. 2007	\$4,024	\$118	Less than Min \$121 Pmt (pg. 31)
	Aug. 2007	\$3,929	\$160	Current (pg. 33)
	Jul. 2007	\$4,039	\$227	Current (pg. 35)
	Jun. 2007	\$4,213	\$200	Current (pg. 37)

Account Type	Date	Balance	Paid	Status
Credit Card M	Jun 2008	\$7,247	\$200	Current (pg. 39)
	May 2008	\$7,320	\$200	Current (pg. 40; AE)
	Apr. 2008	\$7,341	\$420	Current (pg. 41)
	Mar. 2008	\$7,334	\$0	Past Due \$208 (pg. 42)
	Feb. 2008	\$7,169	\$210	Current (pg. 43)
	Jan. 2008	\$7,031	\$600	Current (pg. 44)
	Dec. 2007	\$7,556	\$0	Past Due \$379 (pg. 45)
	Nov. 2007	\$7,283	\$200	Past Due \$170 (pg. 46)
	Oct. 2007	\$7,407	\$0	Past Due \$161 (pg. 47)
	Sep. 2007	\$7,190	\$150	Current (pg. 48)
	Aug. 2007	\$6,224	\$100	Current (pg. 49)
	Jul. 2007	\$6,014	\$200	Current (pg. 50)
	Jun. 2007	\$5,921	\$200	Current (pg. 51)
	May 2007	\$5,913	\$200	Current (pg. 52)

Account Type	Date	Balance	Paid	Status
Credit Union N	May 2008	\$20,777	\$420	Current (pg. 53)
	Apr. 2008	\$20,875	\$390	Current (pg. 54)
	Mar. 2008	\$19,199	\$400	Current (pg. 55)
	Feb. 2008	\$19,015	\$400	Current (pg. 56)
	Jan. 2008	\$19,195	\$350	Current (pg. 57)
	Dec. 2007	\$16,194	\$320	Current (pg. 58)
	Nov. 2007	\$15,733	\$332	Current (pg. 59)
	Oct. 2007	\$15,933	\$325	Current (pg. 60)
	Sep. 2007	\$15,370	\$325	Current (pg. 61)
	Aug. 2007	\$15,092	\$300	Current (pg. 62)
	Jul. 2007	\$14,493	\$300	Current (pg. 63)
	Jun. 2007	\$12,071	\$274	Current (pg. 64)
	May 2007	\$8,507	\$200	Current (pg. 64)

In 2007, Applicant paid \$1,011 in finance charges on his account with Credit Union N (pg. 57).

Account Type	Date	Balance	Paid	Status
Credit Union H	May 2008	\$20,036	\$0	Past Due \$384 (pg. 65)
	Apr. 2008	\$19,223	\$765	Current (pg. 66)
	Mar. 2008	\$19,182	\$0	Past Due \$381 (pg. 67)
	Feb. 2008	\$19,060	\$790	Current (pg. 68)
	Jan. 2008	\$19,633	\$766	Current (pg. 69)
	Dec. 2007	\$19,827	\$340	Current (pg. 70)
	Nov. 2007	\$18,883	\$?	Page Missing
	Oct. 2007	\$18,679	\$390	Current (pg. 71)

Total finance charges billed for his account with Credit Union H in 2007 was \$1,175 (pg. 69).

The next table shows the status on the \$30,000 signature loan used to pay the IRS (Tr2. 32-33).

Account Type	Date	Balance	Paid	Status
Signature Loan Spouse Name Only	May 2008	About \$29,300	\$700	AE D1 at 5 (check)
From Credit Union H	Apr. 2008	About \$29,600	\$700	AE D1 at 6-7 (check)
	Mar 2008	\$29,995	\$700	Current (pg. 72; AE D1 at 8)
	Feb. 2008	\$30,294	\$700	Current (pg. 73; AE D1 at 9)
	Jan. 2008	\$30,471	\$700	Current (pg. 74; AE D1 at 10)
	Dec. 2007	\$30,660	\$700	Current (pg. 75)
	Nov. 2007	\$30,935	\$700	Current (pg. 75)
	Oct. 2007	\$31,191	\$700	Current (pg. 75)
	Sep. 2007	\$31,398	\$700	Current (pg. 76)
	Aug. 2007	\$31,633	\$700	Current (pg. 76)
	Jul. 2007	\$31,803	\$700	Current (pg. 76)
	Jun. 2007	\$32,047	\$700	Current (pg. 77)
	May 2007	\$32,304	\$700	Current (pg. 77)
	Apr. 2007	\$32,478	\$700	Current (pg. 77)

Applicant's spouse paid \$5,360 in interest on this loan in 2007 (pg. 74; AE D1 at 10), and had paid \$1,435 for the first three months of 2008 (AE D1 at 8). The interest rate on this loan is 17.9 percent (Tr2. 33; AE D1 at 10; pg. 72).

Account Type	Date	Balance	Paid	Status
Loan Account 1	May 2008	\$7,967	\$310	Current (pg. 78)
	Apr. 2008	\$8,030	\$306	Current (pg. 79)
	Mar. 2008	\$5,522	\$165	Current (pg. 80)
	Feb. 2008	\$5,580	?	(pg. 80)

Applicant provided an account statement from his corporate card (pg. 82; AE D1 at 14-15). It shows a payment of \$1,020 in May 2008, bringing the account to a zero balance. *Id.*

The table below shows additional information from the same creditor for two personal credit cards.

Account Type	Date	Balance	Paid	Status
Credit Card 1	Jun 2008	\$1,610	\$1,610	Current (pg. 83)
	May 2008	\$1,602	\$840	Current (pg. 84)
	Apr. 2008	\$907	\$650	Current (pg. 85)
	Mar. 2008	\$558	\$1,575	Current (pg. 86)
	Feb. 2008	\$460	\$0	Current (pg. 87)
	Jan. 2008	\$1,392	\$600	Current (pg. 88)
	Dec. 2007	\$361	\$1,262	Current (pg. 89)
	Nov. 2007	\$746	\$0	Current (pg. 90)
	Oct. 2007	\$336	\$0	Current (pg. 91)
	Sep. 2007	\$230	\$67	Current (pg. 92)
	Aug. 2007	\$64	\$1,282	Current (pg. 93)
	Jul. 2007	\$220	\$1,534	Current (pg. 94)
	Jun. 2007	\$1,246	\$400	Current (pg. 95)

Applicant's spouse's credit union account G2 shows a balance owed from April 2007 to March 2008 from about \$4,000 to about \$5,000, and a savings or checking-type account with a balance ranging from about \$100 to about \$5,000 (pg. 96-103). Applicant's credit union account received his pay automatically from Department of Defense Finance, and retained a balance from about \$100 to about \$4,000 (pg. 105-128). Applicant's income is actually greater than indicated on his federal tax returns because his Veterans Administration disability is tax free (pg. 289).

Account Type	Date	Balance	Min Payment	Status
Credit Union G3	May 2008	\$6,327	\$233	Current (pg. 105-106, 147)
	Apr. 2008	\$3,997	\$176	Current (pg. 107-108)
	Mar. 2008	\$3,993	\$176	Current (pg. 109-110)
	Feb. 2008	\$4,115	\$176	Current (pg. 111-112)
	Jan. 2008	\$4,235	\$176	Current (pg. 113-114)
	Dec. 2007	\$4,351	\$176	Current (pg. 115-116)
	Nov. 2007	\$4,466	\$176	Current (pg. 117-118)
	Oct. 2007	\$4,578	\$176	Current (pg. 119-120)
	Sep. 2007	\$4,690	\$176	Current (pg. 121-122)
	Aug. 2007	\$4,799	\$176	Current (pg. 123-124)
	Jul. 2007	\$4,907	\$176	Current (pg. 125-126)
	Jun. 2007	\$5,017	\$176	Current (pg. 128)
	May 2007	0	0	Loan began on June 14, 2007 (pg. 128)

Applicant's June 9, 2008, building store balance owed is \$10,656 (pg. 81; AE D1 at 13). This debt resulted from purchase of an air conditioner (Tr2. 26-27), and appears on his credit reports at pg. 157. The account currently does not require a

minimum payment (pg. 81; AE D1 at 13). He chose the “no interest” plan, which results in an \$802 finance charge. Payments on the new balance of \$11,307 begin in September 2008. The interest rate is 15.4% on this account (AE D1 at 13).

Credit Reports showed ten credit accounts. Applicant provided account statements corroborating nine of the ten accounts. One account for \$17,566 was not substantiated because Applicant did not provide statements on this account. The nine accounts as depicted in the next table totaled about \$108,000 in debt with minimum payments of \$2,311 monthly.

Account Type	Date	Balance	Min Payment	Status
Credit Union G1	Jun 2008	\$4,970	\$150	Current-Pays as Agreed (C-PAA) Last reported delinquent in 2004 (pg. 16, 150, 181, 182)
Credit Union G3	May 2008	\$6,327	\$233	C-PAA (pg. 105-128, 147)
Credit Card 1	Jun 2008	\$1,601	\$0	C-PAA (pg. 83-95, 151, 183)
Credit Card M	Jun 2008	\$7,278	\$208	C-PAA (pg. 39-52, 154)
Revolving Credit/Building Store	Jun 2008	\$10,655	\$0	C-PAA (pg. 81; AE D1 at 13, 157)
Loan Account 1	May 2008	\$7,863	\$230	C-PAA (pg. 78-80, 157)
Revolving (Not Substantiated)	Jun 2008	\$17,566	\$430	C-PAA (pg. 187) No Account Statements
Signature Loan From Credit Union H	May 2008	\$29,447	\$691	C-PAA (pg. 72-77, AE D1 8-10, 189) ¹⁴
Credit Union H	May 2008	\$19,398	\$388	C-PAA (pg. 65-71, 189-190)
Credit Union N	May 2008	\$20,529	\$411	C-PAA (pg. 53-64, 194)
Total		\$108,068	\$2,311	

Mortgage and Home Equity Loans

Applicant has lived in the same residence since August 2001. See GE 1 and correspondence from creditors. Applicant provided records concerning his mortgage (pg. 130-141). In December 2004, Applicant took out a home equity loan, and he repaid the home equity loan of \$49,191 in July 2005 (pg. 164, 174, 187; 202). He refinanced his mortgage account in July 2005, borrowing \$530,565 (pg. 165, 190; 200). He now has an unpaid balance of \$529,738 with a monthly payment of \$4,202

¹⁴ Applicant's spouse opened a credit line with a high limit of \$33,000 in December 2006, and she currently owes \$29,447 on the account (pg. 189).

(pg. 130). His mortgage interest rate is 7.25 percent. Each month his principal is reduced by about \$460 (pg. 130, 132). His mortgage statement for December 1, 2007, showed \$32,313 interest paid for 2007 (pg. 136). He had a mortgage account from 2001 to 2002 in the amount of \$265,000 (pg. 167, 197, 201). Then he had another mortgage account from 2002 to 2004 in the amount of \$268,800 (pg. 173-174). He had another mortgage account from March 2004 to August 2005 for \$333,700 (pg. 169, 198). He made payments on all mortgage accounts as agreed (pg. 163-164, 172-174, 197-198, 201). On July 16, 2008, I sent an email to Applicant asking him to explain what he did with the proceeds from the 2005 mortgage refinancing.

In July 2005, a car loan of \$28,000, borrowed in October 2001 was paid as agreed (pg. 168). Applicant's credit reports show one public record state income tax judgment filed in 1992 for \$575 (pg. 143, 177, 203). The Judgment's Satisfaction was filed on October 15, 1997 (pg. 144).

2007 Personnel Financial Statement¹⁵

On March 17, 2007, Applicant provided his Personnel Financial Statement (PFS). Net monthly income was \$8,144. Monthly expenses totaled \$2,242. He listed seven debts with minimum monthly payments totaling \$5,535. Net remainder was \$367. More specific information on the debts disclosed on his PFC is listed in the following table:

Account Type	Balance (Mar. 2007)	Monthly Payment (Mar. 2007)	Balance (Jun. 2008)	Monthly Payment (Jun. 2008)	Status
Mortgage	\$536,331	\$4,183	\$529,000	\$4,202	Current
Credit Union G1	\$4,741	\$143	\$4,854	\$150	Current
Credit Union H	\$16,100	\$150	\$20,036	\$350	Current
Credit Card M	\$6,164	\$139	\$7,247	\$200	Current
Credit Union N	\$511	\$20	\$20,777	\$400	Current
Signature Loan-H	\$32,802	\$700	\$29,300	\$700	Current
Credit Union G3	\$2,000	\$200	\$6,327	\$230	Current
Credit Union G2			\$4,500	\$300	Current
Loan Account 1			\$7,967	\$310	Current
Back Fed. Taxes			\$29,000	\$550	Current
Non-Mortgage Total	\$62,318	\$1,352	\$130,008	\$3,190	
Total	\$598,649	\$5,535	\$659,008	\$7,392	

On August 1, 2008, Applicant provided an update (ph. 290) showing from the June 2008 totals above, Credit Union G1 was about the same; Credit Union H was down \$700; Credit Card M was up \$100; Credit Union N was down \$400; Signature Loan H was down \$1,100; Credit Union G3 was unchanged; Credit Union G2 was up \$360; and Loan Account 1 was up \$1,400 (pg. 290). His PFS listed savings of \$2,300, stocks

¹⁵ His Personal Financial Statement (PFS) (GE 3) is the source for the facts in this section.

in his spouse's 401K of \$34,861, and real estate valued at \$568,192. It also included personal property (such as jewelry) and two cars. This PFS did not include his monthly tax payment of \$550, nor did it include the increased tax payment to \$1,000 (Tr1. 47-48). Applicant planned to meet the deficit with decreased expenditures (such as less eating outside their home, and lower utilities). *Id.*

In 2007, Applicant received a three percent pay raise increasing his salary for a 40 week from \$6,626 to \$6,825 (AE C). His annual pay in 2007 was \$82,046 (AE D1 at 16). His benefits in 2007 were valued at \$21,778 for total income of \$103,824 (AE D1 at 16).

Applicant's supervisor has known him for six years.¹⁶ She has supervised him for the last two years. He is a crucial employee. He is highly respected by his peers and supervisors. He is trustworthy, honest and loyal to the company and the United States.

In sum, Applicant's overall debt situation is significantly worse now than it was in March 2007 because he owes approximately \$11,000 more to the store because of his air conditioner (Tr2. 46-47), and his other debts have apparently increased by about \$35,000. He is current on all accounts, which means he is paying in accordance with at least the minimum payment requirements of each particular account (Tr2. 47-48). On July 17, 2008, I observed in an email that Applicant's refinanced his residence from \$269,000 in 2004 to \$334,000 and then in July 2005 to \$530,000; however, he did not volunteer what he did with the resulting funds, when he provided additional documentation on August 1, 2008 (pg. 289-300).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to

¹⁶ Applicant's supervisor's letter, dated September 19, 2007 is the source for the facts in this paragraph.

classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”¹⁷ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. 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).¹⁸

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

¹⁷ See Directive ¶ E3.1.14. “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the 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).

¹⁸ “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to financial considerations:

Failure or inability 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 information. An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes four nine conditions that could raise a security concern and may be disqualifying: "(a) inability or unwillingness to satisfy debts; . . . (c) a history of not meeting financial obligations; . . . (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis; . . . and (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant's history of financial and tax-related problems are documented with respect to his failure to file his federal income tax returns on time in 2000, 2001, 2002 and 2003. When he signed his SF 86 on January 14, 2004, he indicated he was "currently arranging installment payment of taxes." In January of 2007, he reached a compromise agreement with the IRS. He agreed to pay the IRS \$30,000 immediately, and then to make payments of \$550 monthly. He admitted that the reason he did not pay his taxes from 2000 to 2003 was due to inability. Since January 2007, he has paid the IRS about \$55,000 and has reduced his tax debt from about \$65,000 to about \$29,000. The government established the disqualifying conditions in AG ¶¶ 19(a), 19(c) and 19(g).

Applicant and his spouse owe a mortgage of approximately \$530,000 and their monthly principle, interest, taxes and insurance are \$4,202. Their loan, credit card, tax and other debts total about \$130,000, and their monthly payments are about \$3,200. Several of their debts have interest rates of over 15 percent. Their adjusted gross income as indicated in their tax returns in 2001 was about \$97,000; in 2002 it was about \$106,000; in 2003 it was about \$119,000; and in 2004 it was about \$123,000. From 2005 to 2007, their income went up about three percent annually, and is now about \$135,000. The PFS Applicant provided in March 2007 showed \$1,650 in monthly, non-mortgage debt payments, and a positive cash flow of \$367. As of June 2008, his monthly non-mortgage debt payments have increased by about \$1,500 resulting in a monthly negative cash flow. His overall non-mortgage debt has increased about \$30,000 in the last 15 months. Debt payments consume approximately half of Applicant's adjusted gross income. Applicant and his wife spend

consistently beyond their means. Their indebtedness is excessive. Their negative cash flow is significant. And their debt-to-income ratio is high. AG ¶ 19(e) applies.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;¹⁹ and

(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.

¹⁹In ISCR Case No. 07-06482 (App. Bd. May 22, 2008) the Appeal Board explained how financial responsibility under Guideline F can be demonstrated:

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." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has ". . . established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his 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. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). 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 conduct does not warrant full application of AG ¶ 20(a) because he did not act more aggressively and responsibly to resolve his delinquent debts. He knew he owed the IRS money, and yet, year after year, from 2000 to 2003 he failed to file a tax return. In January 2004, he said he was working on a compromise agreement with the IRS. Yet it took three more years to actually reach a compromise agreement. From January 2007 to June 2008, he paid the IRS \$55,000 in addition to his taxes for tax years 2006 and 2007, reducing his IRS debt from \$65,000 to about \$29,000. AG ¶¶ 19(a), 19(c) and 19(g) are somewhat mitigated with respect to his tax debt because of his actions for the last 15 months. However, the overall handling of his tax problem continues to "cast doubt on [his] current reliability, trustworthiness, or good judgment." While he belatedly expended sufficient effort to reduce security concerns with respect to the IRS debts, he shifted his debt problem to his spouse when she took out a signature loan for \$30,000 at 17.9 percent, resulting in a monthly payment of \$700 with limited reduction in the principal. This resolution shows questionable judgment.

Applicant did not describe any conditions beyond his control that caused his financial problems.²⁰ AG ¶ 20(b) does not apply.

AG ¶¶ 20(c) and 20(d) do not fully apply. Applicant received financial counseling. However, there are not "clear indications that the problem is being resolved or is under control." There is insufficient information to establish that Applicant applied the knowledge obtained from financial counseling or that he showed good faith²¹ in the resolution of his debts. Although Applicant and his wife are current on all of their accounts, and their creditors are satisfied with their payments, Applicant and his spouse continue to go further into debt. In the last 15 months, their debt load has increased by about \$40,000. Applicant and his spouse refinanced their residence

²⁰"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)).

²¹The 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good faith" mitigating condition].

(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. June 4, 2001)).

in 2004, increasing the mortgage from \$269,000 to \$334,000. Then in December 2004, they borrowed \$49,000 on their residence. In July 2005, they refinanced their residence again and borrowed a total of \$530,000. They have used the equity in their house to live beyond their means. After July 2005, they used credit cards and signature loans to continue to live beyond their means.

AG ¶ 20(e) is not applicable. Applicant has not disputed the SOR debt to the IRS. He agreed he was responsible for the IRS debt listed in SOR ¶ 1.a.

In sum, Applicant did not establish he acted responsibly, prudently and in good faith. He failed to show a “meaningful track record . . . of actual debt reduction through payment of debts.” See n. 20, *supra*. He received financial counseling; however, he failed to arrange payment plans that would result in reduction of the amount of his debts. He lacks sufficient income remaining after making the minimum payments to effectively reduce his overall debts. His conduct with his creditors casts doubt on his current reliability, trustworthiness, and good judgment. He should have been more diligent and made greater efforts to reduce his indebtedness and curtail his spending, especially after receipt of the SOR. At his first hearing he promised to reduce expenses, and use the extra funds to reduce his debts. There are not clear indications his financial problems are being resolved or are under control. He did not establish that he made a good faith effort to reduce the amount of his debts. He did not show sufficient conditions beyond his control to mitigate security concerns. His financial problems are continuing and likely to recur. He has not carried his burden of proving his financial responsibility. Based on my evaluation of the record evidence as a whole, I conclude no mitigating conditions fully apply.

Guideline E (Personal Conduct)

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case:

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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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 person may not properly safeguard protected information;

(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 person may not properly safeguard protected 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 other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

AG ¶¶ 16(a) and 16(b) do not apply because Applicant is not accused of falsifying any information provided to the government in connection with his security clearance, or employment. AG ¶¶ 16(e), 16(f) and 16(g) do not apply because: (1) Applicant did not commit misconduct outside the United States; (2) security officials are aware of his financial and tax problems, and his problems are not so significant as to seriously and adversely affect his reputation or community standing; (3) he did not

violate any commitments to his employer; and (4) he does not associate with persons involved in criminal activity.

The Appeal Board may have determined that AG ¶¶ 16(c) and/or 16(d) applies when an Applicant willfully fails to file their tax return stating:

Obviously, the failure to file tax returns in an of itself, apart from any considerations of financial indebtedness, is a matter that is appropriately addressed under Guideline E, which by its own terms deals with conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules and regulations.²²

However, applying AG ¶ 16(c) to address the security concerns related to his failure to file tax returns appears inconsistent with the limiting language in AG ¶ 16(c), which indicates there must be “credible adverse information in several adjudicative issue areas that is *not sufficient for an adverse determination under any other single guideline*” (emphasis added). AG ¶ 16(d) contains a similar limitation stating, “credible adverse information that *is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination*” (emphasis added). Clearly an unexcused failure to file one’s tax return from 2000 to 2003 specifically implicates Guidelines F and J.²³ Because such conduct is specifically covered under other guidelines and is sufficient to result in an adverse determination, AG ¶¶ 16(c) and 16(d) should not be applied as disqualifying conditions.

Nevertheless, the law requires me to comply with Appeal Board precedent. Failure to file a tax return violates a statute, 26 U.S.C. § 7203, which is a type of rule. See n. 23, *supra*. He failed to file his taxes on multiple occasions, resulting in multiple rule violations. Based on the remand order, I find that AG ¶¶ 16(c) and 16(d)(3) apply

²² I recognize that the Appeal Board was in a quandary because SOR ¶ 2.a was alleged under Guideline E instead of Guideline F. However, instead of distinguishing or limiting the restrictive language in Guideline E, and encouraging duplicative application of adverse findings against Applicants, I respectfully suggest that the Appeal Board could have reminded judges that issues of willful failure to file tax returns raise concerns about questionable judgment, and unwillingness to comply with rules and regulations that must be addressed under the whole person concept. AG ¶ 2(d) provides, “Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.” The Whole Person concept encompasses a review and application of AG ¶ 2(d)’s criteria without resort to AG ¶¶ 16(c) and 16(d).

²³ Guideline J addresses the security implications of criminal conduct. 26 U.S.C. § 7203 provides:

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.

with respect to SOR ¶ 2.a because Applicant willfully failed to file four tax returns and failed to pay his federal income taxes on time.

AG ¶ 17 provides conditions that could mitigate security concerns:

(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 improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. 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 caused 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 activity 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.

None of the mitigating conditions in AG ¶ 17 fully apply. Applicant did not falsify any documentation, nor did he refuse to cooperate with an investigation or inquiry. See AG ¶¶ 17(a) and 17(b). He was vulnerable to exploitation or duress due to his tax and financial problems because he admitted these problems to security personnel. See AG ¶ 17(e). He admitted he did not file his tax returns for 2000, 2001, 2002 and 2003 until 2004 and the information about failing to file his tax returns is substantiated. See AG ¶ 17(f). He did not associate with persons involved in criminal activity. See AG ¶ 17(g).

Mitigating conditions under AG ¶¶ 17(c) and 17(d) partially apply. Applicant acknowledged that he failed to file his 2000, 2001, 2002 and 2003 tax returns until around April 2004. He receives credit for admitting his misconduct. Moreover, the

offenses ended over four years ago, and his misdemeanors are not particularly recent. The commission of the tax offenses occurred under unique conditions that are unlikely to recur. Applicant knows that eventually the IRS will determine the taxes based on employer-filed W2s. The IRS will unilaterally complete the taxpayer's return and pursue additional taxes and penalties. Failure to comply with federal tax requirements results in heavy civil penalties, and there are potential criminal penalties. Clearly federal tax responsibilities have priority over other debts. His statement that he understands that even if he does not have the funds to pay his taxes, he should still file a tax return convinces me that in the future he will file his tax return when required. Knowing the probable consequences of repeating his poor tax decisions, Applicant will timely file accurate tax returns in the future. Underpayment of taxes is unlikely to recur. However, the conduct in SOR ¶ 2.a cannot be considered piecemeal. The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). His misconduct must be considered in connection with his failure to obtain a repayment agreement until January 2007, and the failure to fully pay the IRS. He received financial counseling, and this counseling will help him gain financial stability. After consideration of all the circumstances in this case, there is insufficient mitigation to eliminate security concerns resulting from his personal conduct in SOR ¶ 2.a. The misconduct continues to cast doubt on Applicant's current reliability, trustworthiness, or good judgment.

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(a):

- (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), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Eventually Applicant signed an agreement with the IRS and began to pay his \$65,000 tax debt. He paid about half of his IRS debt using a signature loan that his spouse obtained. His recognition of his misconduct and promise to file and pay his taxes as he is legally required to do weighs in his favor. His misconduct ended in April

2004, and he has not violated the tax law or any other criminal or civil laws since then. He is a law-abiding person as shown by his lack of a criminal record. He does not abuse alcohol or use illegal drugs. He provided evidence of remorse, or regret concerning his misconduct. He was embarrassed by his misconduct, and he recognized the damage his misconduct will cause his reputation. All of his debts are in current status, and he has received financial counseling. He has been married since 1976 to the same spouse. He raised two children into adulthood. His record of good employment weighs in his favor. He served his country on active duty in the Army for 20 years. He earned awards and honors for his military service. His service in a combat zone is especially noteworthy. These factors show some responsibility, rehabilitation, and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. His decisions not to file his tax returns in 2000, 2001, 2002 and 2003 on time were knowledgeable and voluntary. This misconduct was aggravated when he failed to aggressively seek a resolution until January 2007. Because there are multiple violations of the law, his misconduct is not isolated. He was sufficiently mature to be fully responsible for his conduct. Criminal misbehavior is not prudent or responsible. His failure to pay taxes at the same time that he was receiving the benefit of others' taxes through receipt of military retirement pay, VA disability pay, and government contractor pay aggravates his impropriety, and weighs against granting or continuing his security clearance. Applicant and his spouse consistently spend beyond their income, and have excessive indebtedness, significant negative cash flow, and a high debt-to-income ratio. Even after receiving the SOR, and promising at his first hearing to restrain his spending, he has not demonstrated that he has done so. I have persistent and serious doubts about his judgment, reliability, and trustworthiness.

Applicant's poor judgment with respect to his willful failure to file tax returns and his high debt to income ratio raise serious concerns about his willingness to comply with rules and regulations and his future financial stability. His misconduct calls into question his current ability or willingness to comply with laws, rules and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to financial considerations and personal conduct.²⁴

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"²⁵ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

²⁴ Even if I had found "For Applicant" with respect to SOR ¶ 2.a because the conduct could have been alleged more appropriately under Guideline F, or because it duplicates the conduct alleged under SOR ¶ 1.b, I still would have found against Applicant under SOR ¶¶ 1.b and 1.c, as well as under the whole person concept.

²⁵ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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
Subparagraphs 1.b and 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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 or continue eligibility for a security clearance for Applicant. Clearance is denied.

Mark W. Harvey
Administrative Judge