



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



In the matter of: )  
 )  
----- ) ISCR Case No. 11-03183  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Paul M. Delaney, Esq., Department Counsel  
For Applicant: *Pro se*

06/27/2012

**Decision**

Harvey, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges four delinquent debts, totaling \$181,675. He mitigated two debts. On June 19, 2012, the IRS determined that the taxes and civil penalties owed for 2007, 2009, and 2010 are \$155,874. He has not made the first payment under his installment agreement with the IRS. Financial considerations are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On October 18, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF-86) (GE 1). On November 17, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines F (financial considerations) and E (personal conduct). (Hearing Exhibit (HE) 3) The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to

continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked. (HE 3)

On January 11, 2012, Applicant responded to the SOR and requested a hearing. (HE 4) On February 17, 2012, Department Counsel was ready to proceed on Applicant's case. On February 23, 2012, DOHA assigned Applicant's case to me. On March 1, 2012, DOHA issued a hearing notice, setting the hearing for March 28, 2012. (HE 2) The hearing notice had the wrong location for the hearing. On March 15, 2012, DOHA issued an amended notice of hearing. (HE 1) Applicant's hearing was held on March 28, 2012. Applicant waived his right to 15 days of notice of the time and place of his hearing. (Tr. 15-16) At the hearing, Department Counsel offered 9 exhibits, and Applicant offered 18 exhibits. (Tr. 37, 39-50; GE 1-9; AE A-R) There were no objections, and I admitted GE 1-9 and AE A-R. (Tr. 37, 42-50) On April 6, 2012, I received the transcript of the hearing. I asked Applicant to provide his tax returns for 2005 to 2010, and amended tax returns if those tax returns were incorrect. (Tr. 144-147) I asked for proof of his mortgage payments. (Tr. 147) I held the record open until June 15, 2012, to permit Applicant to provide additional documentation. (Tr. 146, 157-159) On June 15 and 19, 2012, Applicant provided additional evidence. (AE S, T) Department Counsel did not object and AE S and T were admitted into evidence.

### **Findings of Fact<sup>1</sup>**

In his Answer to the SOR, Applicant admitted responsibility for the debts in SOR ¶¶ 1.a to 1.c and 1.f. (HE 4) He partially admitted responsibility for the debt in SOR ¶ 1.d. (HE 4) He also provided explanations for the SOR allegations. (HE 4) His admissions are accepted as findings of fact.

Department Counsel withdrew the allegations in SOR ¶¶ 1.e and 2.a. (Tr. 16-17) The allegation in SOR ¶ 2.a was the only allegation under Guideline E.

Applicant is a 51-year-old defense-readiness specialist, lessons-learned specialist, and systems analyst for a Defense contractor. (Tr. 5) He has worked for the same employer with some periods of unemployment since 2004. (Tr. 5; SOR response at 4; GE 1) He graduated from high school in 1979 and entered Air Force basic training in July 1979. (Tr. 6; SOR response at 3) He earned two associate's degrees, one in communications and one in instructor technology. (Tr. 6) He was married from 1982 to 1989, and he and his spouse had two children. (SOR response at 3) In 1996, he married and was divorced eight months later. (SOR response at 4) In 2000, he married his spouse. (SOR response at 4) His spouse has three children from a prior marriage. (SOR response at 4) He has a total of five children; however, only one 17-year-old child is still living with Applicant and his spouse. (Tr. 61)

---

<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant's Air Force specialty was information technology. (Tr. 7) Applicant honorably retired from the Air Force in 1999 as a master sergeant (E-7). (Tr. 6-7; SOR response at 4) He has held a security clearance for 32 years, including a Top Secret clearance with access to Sensitive Compartmented Information (SCI). (Tr. 8, 149) His security clearance application does not list any reportable incidents involving illegal drugs, alcohol, the police, or courts. There is no evidence that he abuses alcohol or uses illegal drugs.

## **Financial Considerations**

Applicant disclosed his delinquent debts in his October 18, 2010 SF-86. (GE 1) The SOR and his credit reports state his nonpriority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code in April 2010, and they list four delinquent debts, totaling \$181,675 as follows: 1.a is for a tax lien filed by the Internal Revenue Service (IRS) for \$125,089; 1.b is a tax lien filed by the IRS for \$21,295; 1.c is a state tax lien of \$20,541; and 1.d is a mortgage debt of \$152,571 past due in the amount of \$14,750. (HE 3)

In 2006, Applicant's spouse discovered that a three-story building was available that could be upgraded to enable it to be used for a large 24-hour daycare center. (Tr. 54; SOR response at 4-5) They purchased the building for \$188,000. (Tr. 70) His spouse generated a detailed business plan, obtained construction estimates, and borrowed \$250,000 as a first lien from a bank.<sup>2</sup> The first lien holder provided \$100,000 to purchase the building and \$150,000 for construction, and the building owners took back an \$80,000 second lien, which was secured by two of Applicant's rental properties. (Tr. 54-55; SOR response at 5; GE 2 at 12-1 to 12-3; GE 2 at 13-1 to 13-14; AE O)<sup>3</sup> Applicant's spouse planned to upgrade the building in three phases (one phase for each floor). (SOR response at 5; AE J-L, architect's drawings of building) Applicant and his spouse did not anticipate the requirement for a sprinkler system throughout the building. (SOR response at 5)

When they were nearly done with the first phase of construction, local inspectors working for a state agency advised Applicant and his spouse that they needed to complete phase two before the building could be opened for daycare clients because the children should not be subjected to the noise of an ongoing major construction project. (SOR response at 5) There were 100 children on the daycare center's waiting list.<sup>4</sup> (SOR response at 5) Local officials working for a state agency prohibited Applicant

---

<sup>2</sup>Applicant said the first loan was for \$236,000 rather than \$100,000. (Tr. 55) Later, he said the first loan was for \$258,000 and the second loan was for \$236,000. (Tr. 64) Still later, the first loan was \$236,000, and the loan for the second phase of construction was for \$258,000. (Tr. 68) For purposes of this decision the precise amount of the two loans is irrelevant. (Tr. 68)

<sup>3</sup>Applicant said the building owner financed a \$100,000 loan for Applicant and his spouse, and the other \$88,000 used to purchase the building was financed by their bank. (Tr. 70; GE 6, Schedule D)

<sup>4</sup>Applicant said he and his spouse had over 120 kids on a waiting list before the daycare center was opened. (Tr. 56, 65) Later, they had 145 kids and the largest daycare center in their area. (Tr. 57)

and his spouse from requiring deposits from clientele on their waiting list. (SOR response at 6)<sup>5</sup> Applicant and his spouse borrowed an additional \$300,000 from their bank to complete phase two of the construction project.<sup>6</sup> (SOR response at 6) They owed their bank \$400,000 and their monthly payment was \$4,500. (SOR response at 6) State officials determined that they had insufficient playground space, and they purchased a nearby property for \$30,000. (SOR response at 6) Eventually the debt owed to the bank reached \$518,000. (Tr. 42-43; AE I) In sum, construction costs greatly exceeded earlier estimates when the business was planned. (Tr. 46; AE M, N)

A critical planned source of income for the daycare center was the state child care subsidy payments for low income parents. (SOR response at 6-7) In November 2006, the daycare center opened with 17 children. (SOR response at 6) Applicant and his spouse received a \$30,000 bridge loan from their bank to help with expenses until the state began making the subsidy payments in January 2007. (Tr. 103) Applicant admitted purchasing milk and food for the children from the commissary on base to save money.<sup>7</sup> (SOR response at 6) For example, on one occasion he purchased 30 gallons of milk at the commissary for the daycare center. (Tr. 58)

Applicant's daughters and spouse ran the daycare business. (SOR response at 7) Applicant primarily provided assistance in the areas of maintenance and repairs. (Tr. 58; SOR response at 7)

In June 2007, the state subsidy checks were delayed, and the daycare business lacked sufficient funds to fully pay employees. (SOR response at 7) By September 2007, 85% of children were receiving daycare services supported by the state subsidy. (SOR response at 7) The state subsidy checks were substantially less than expected. (SOR response at 7) Applicant's spouse told Applicant that the payroll taxes "were being taken care of, and not to worry about it." (SOR response at 7) She may have said in May 2007 that "some payroll taxes were being paid, but not all." (Tr. 59) In October 2007, he found out for sure that the payroll taxes were not being paid. (Tr. 59; AE P) The monthly payroll was \$24,000 to \$28,000, and they said they could not afford to pay their taxes. (Tr. 60)

In January 2008, Applicant's spouse received notice that their building's former owner was in the process of filing to foreclose on their lien. (SOR response at 7-8) In

---

<sup>5</sup>Later Applicant and his spouse learned that the local officials working for a state agency erroneously required the second phase to be completed and improperly prohibited collection of deposits from clients. (Tr. 55; SOR response at 7)

<sup>6</sup>Applicant said the second bank loan was for \$258,000 was merged into the first loan, and the new monthly payment was \$5,000 per month for a \$518,000 mortgage. (Tr. 55, 69) See n. 2, *supra*. He also had an \$88,000 mortgage with the bank, which was initially used to purchase the building. (Tr. 71-72; GE 6, Schedule D) In total, there were three mortgages totaling about \$620,000 on the daycare center. (Tr. 72-74) They had a dispute with a contractor about construction costs on their daycare center, and the contractor placed a \$93,000 mechanics lien on their daycare center. (Tr. 74-75, 103)

<sup>7</sup>Abuse of the commissary system by purchasing items for a privately owned business is not used against Applicant in any way in this decision.

May 2008, Applicant and his spouse filed for reorganization of their business under Chapter 11 of the Bankruptcy Code. (SOR response at 8) They reduced their payroll and made some payments to their creditors. (SOR response at 8) In about May 2008, Applicant learned that his spouse had not paid payroll taxes for their employees. (SOR response at 8) He informed the IRS and state authorities; however, they were unable to arrange payments because of the Chapter 11 Bankruptcy plan. (SOR response at 8) The creditors holding unsecured nonpriority claims under Applicant's Schedule F filing totaled \$148,848. (GE 6)

Applicant borrowed money from his brother, friends, and his father to fund the daycare center. (Tr. 58) He denied that he received significant income from the daycare business, stating:

I can honestly say that I have in fact not seen any direct compensation from this business other than [his spouse] periodically receiving a salary. I can honestly state that my wife and I have lost approximately \$320,000 in personal assets including 2 rental properties,<sup>8</sup> and \$40,000 directly invested as a result of the failure of this business. The [state] failed us. (SOR response at 8)

In October 2009, Applicant and his spouse closed their business. (Tr. 62; SOR response at 8) That same month, Applicant and his spouse converted the Chapter 11 to a Chapter 7 bankruptcy. (Tr. 62; SOR response at 8) At that time they had 105 children enrolled and 96% were supposed to be receiving state subsidies. (SOR response at 8) The state arrearage in subsidy payments was about \$160,000, which has never been paid. (Tr. 105; SOR response at 9) His unsecured non-priority debts were discharged in April 2010. (SOR response at 9)

Applicant had \$102,000 in his employee stock option plan (ESOP). It was a protected asset, and the bankruptcy court did not require him to use it to pay creditors. (Tr. 96) In 2009, he took \$102,000 from his ESOP and used \$30,000 to put a roof on his daycare center. (Tr. 93-94, 111) He gave the remainder of the funds to his daughter to establish her daycare center. (Tr. 93-94)<sup>9</sup> He chose to have \$59,000 in family debts discharged as follows: \$3,500 owed to his father; \$20,566 owed to his son-in-law; \$15,000 owed to his sister-in-law; \$7,500 owed to his brother; \$5,500 owed to his father-in-law; \$7,000 owed to his stepdaughter's mother-in-law. (Tr. 94-95) He said he planned to use some of the profits from his daughter's business to repay the family debts. (Tr. 95) He is making payments to his father out of his retirement pay. (Tr. 98) His spouse said her father was repaid, and the debt to Applicant's son-in-law was reduced to \$10,000. (Tr. 106) There are some additional taxes due on the withdrawal

---

<sup>8</sup>Applicant did not have a deficiency from the two foreclosed properties because of his Chapter 7 bankruptcy discharge. (Tr. 92) He also turned in two vehicles during the bankruptcy process. (Tr. 92)

<sup>9</sup>Applicant's daughter-in-law estimated that the funds Applicant provided were substantially less than \$70,000, and there is no written contract requiring repayment of whatever funds Applicant provided to her. (Tr. 135-137) A manager at his daughter's daycare center stole \$12,000 in 2010, and she is being prosecuted. (Tr. 99, 137)

from the ESOP. (Tr. 111) He has land in another state valued at about \$10,000 and \$4,000 in a 401(k) account. (Tr. 97)

For tax year 2007, Applicant owed \$16,712. (Tr. 76; GE 5 at 5-31) For tax year 2009, he owed \$5,011. (Tr. 78) He incurred the ten tax penalties for failing to withhold sufficient tax payments for the quarters from September 30, 2006 (\$2,250) to December 31, 2009 (\$2,643), ranging in amounts from \$1,500 to \$20,000. (Tr. 78; GE 2) Applicant and his spouse initially hired an enrolled agent to help them contest their tax debt. (Tr. 81-82) On April 12, 2010, Applicant completed financial counseling as part of his bankruptcy. (GE 2 at 9-1) After his bankruptcy discharged his debts, he made a tentative plan to pay the IRS \$500 per month for the first year. (Tr. 83-84; SOR response at 9) On December 22, 2010, the IRS filed a federal tax lien for \$125,089. (SOR ¶¶ 1.a; SOR response) On July 15, 2011, the IRS filed a federal tax lien for \$21,291. (SOR ¶¶ 1.b; SOR response) He planned to make the first payment on February 28, 2012; however, the state levied or garnished \$533 a month from his pay, and he decided not to pay the IRS. (Tr. 84-85, 102) An IRS agent was going to recalculate the monthly payment, taking into consideration the state garnishment of his pay. (Tr. 85, 102) After the first year, the IRS would reassess their ability to pay. (SOR response at 9)

The debt in SOR ¶ 1.c for \$20,541 is for a state tax debt. On July 20, 2011, the state filed a tax lien for \$20,541. (GE 5) It is being addressed through a \$533 monthly garnishment of Applicant's pay. (Tr. 84-85)

The debt in SOR ¶ 1.d is for a mortgage debt of \$152,571, which was indicated as being past due in the amount of \$14,750. In January 2010, Applicant reaffirmed his mortgage debt as part of his Chapter 7 bankruptcy. (SOR response at 10) Applicant was unemployed from March 2010 until August 2010. (SOR response at 10; GE 2 at 48) In March 2010, he received \$1,640 in unemployment compensation. (SOR response at 15) Applicant was underemployed from August to October 2010. (SOR response at 10) In October 2010, they resumed making their mortgage payments. (Tr. 119) Applicant said they were about three months behind on their mortgage. (SOR response at 10) Applicant's house payment is \$1,475. (SOR response at 10; GE 2 at 6-39) Of the SOR reported arrearage of \$14,750, \$5,903 is for overdue mortgage payments, and \$8,846 is due for fees and penalties. (SOR response at 10) Applicant said he made some double payments and was attempting to catch up on the mortgage. (SOR response at 10) His home is valued at \$160,000. (SOR response at 10) On April 20, 2011, Applicant paid the creditor \$738. (AE T at 18) On May 31, 2011, Applicant paid the creditor \$2,214. (AE T at 17) On June 17, 2011, January 13, 2012 and on January 27, 2012, he made payments to the creditor of \$740. (AE T at 9, 10, 16) On July 1, 2011; August 1, 2011; August 31, 2011; October 5, 2011; October 13, 2011; October 31, 2011; November 30, 2011; and January 31, 2012, he made payments of \$1,476 to the creditor. (GE 2 at 6-39; AE T at 11, 12, 13, 14, 15)

Applicant's spouse said they are amending their tax returns from 2006 to 2010 because the daycare was not making any money. (Tr. 107, 110, 116) She said their taxes were a "mess." (Tr. 116) She told Applicant in October 2007 that the daycare

center was not paying their payroll taxes. (Tr. 108) She said they failed to pay their payroll taxes for two months in 2006 and all of 2007. (Tr. 108) She deducted payroll taxes from employee salaries and diverted the money to other uses. (Tr. 109) She thought they owed \$88,000 for payroll taxes and the remainder were for personal taxes. (Tr. 108)

The following table depicts information from Applicant and his spouse's federal income tax transcripts.

<b>Tax Year</b>	<b>Year Filed</b>	<b>Adjusted Gross Income</b>	<b>Amount Owed</b>	<b>Citation</b>
2005	Apr. 10, 2006	\$84,270	\$4,800	GE 2 at 5-27
2006	Unknown	\$98,843	\$10,873	Tr. 111-112; AE T at 6
2007	Feb. 28, 2011	\$173,532 <sup>10</sup>	(\$10,873)	Tr. 111-112, 114; GE 2 at 5-31; AE T at 19-26
2008	Feb. 28, 2011	\$74,080	\$10,985 <sup>11</sup>	Tr. 111-112; GE 2 at 5-6, 5-7; AE T at 27-32
2009	Feb. 28, 2011	\$151,784 <sup>12</sup>	(\$3,686)	Tr. 111-112; GE 2 at 5-33; AE T at 33-38
2010	Dec. 6, 2011	\$181,755	(\$14,420)	Tr. 111-112 AE T at 6, 39-44

In 2007, Applicant and his spouse reported a capital gain of \$38,881 and no gain or loss for the daycare center. (AE T at 6) The rationale for the \$38,881 capital gain is not apparent. In 2008, Applicant and his spouse did not show any capital gain, and they reported a loss on their daycare business of \$63,593. (AE T at 6) In 2009, Applicant and his spouse did not show any capital gain, and they reported a loss on their daycare business of \$15,231. (AE T at 6)

---

<sup>10</sup>Applicant said his gross income in 2007 was about \$40,000. (Tr. 115) Later he said his gross income was about \$105,000. (Tr. 142-144) On June 15, 2012, he said that his 2007 tax return had some "discrepancies," and his accountant has requested additional tax transcripts. (AE T at 3) His accountant indicated "[i]n 2007 their tax return shows a capital gain for the corporation but no other income/loss. At this time we need copies of the corporate return and K-1s to verify or correct the amounts on this return." (AE T at 5)

<sup>11</sup>In 2008, Applicant withheld \$15,584, and his taxes were \$4,600. (GE 2 at 5-6) The IRS applied \$10,984 to Applicant's federal tax debts. (GE 2 at 5-6, 5-7) On June 15, 2012, he said that his amended 2008 tax return had some "discrepancies," and his accountant has requested additional tax transcripts. (AE T at 3) His accountant stated that the 2008 return seemed pretty accurate. (AE T at 5) Applicant received the advantage of a "very substantial business loss shown on the sub-S corporation K-1s." (AE T at 5)

<sup>12</sup>Applicant's spouse said her income from the daycare center was \$15,000 to \$17,000. (Tr. 116) Applicant said they were always in the red on the daycare center. (Tr. 120) Applicant's bookkeeper said they were always in the red and never made any money on the daycare center because the state failed to make the promised subsidy payments. (Tr. 123-126) She was not involved in generating tax returns or paying taxes. (Tr. 123-126) Applicant's daughter-in-law was not involved in paying the taxes for the daycare center. (Tr. 130)

Applicant's spouse said a tax service (MF) prepared her 2007 and 2008 tax returns, and she signed her 2008 tax return in 2009. (Tr. 113) A March 11, 2010 tax service memorandum indicates the tax service was supposed to file Applicant's tax returns for 2007 to 2009. (Tr. 112) Applicant's spouse said the tax service was actually supposed to file the returns for tax years 2008 and 2009. (Tr. 113) She said the tax service paperwork said their tax return was filed for 2008; however, it was actually not filed. (Tr. 113-114)

In February 2009, Applicant applied to the IRS to be designated an "innocent spouse" because he was not very involved in the financial aspects of the daycare center. (Tr. 141; AE P) He was the vice president and treasurer of the company. (Tr. 141; AE P) He signed some checks and numerous legal documents, such as mortgages. (Tr. 141) The IRS denied his request for innocent spouse designation. (Tr. 141-142) He told the IRS that in June 2007 he learned the company was not paying their payroll taxes. (AE P)

On June 19, 2012, the IRS determined that the taxes for 2007, 2009, and 2010, as well as the civil penalties for September 30, 2006 to December 31, 2009 are \$155,874. (AE S at 3-4) The IRS accepted Applicant's installment agreement where he agreed to pay \$620 per month beginning on July 28, 2012, until the debt is paid in full. (AE S at 3) The IRS "will continue to charge penalties and interest" until the full debt is paid. (AE S at 3)

Applicant provided a personal financial statement, which indicated the following monthly totals: gross pay (including retirement) is about \$8,400; net pay is about \$6,500; and net available to address his SOR debts is about \$1,800. (Tr. 86-88; GE 3-1) After deducting the monthly \$533 garnishment from the state, he will have a remainder of about \$1,300. (Tr. 88-89)

## **Character Evidence**

On August 29, 2011, Applicant noticed sensitive documents on a cargo platform outside a Government building where he worked. (SOR response at 12, 16) He collected the documents and turned them in to security. (SOR response at 12, 16) He subsequently learned that some of the documents contained classified information. (SOR response at 12) Applicant cited this instance as an example of his good judgment and initiative to protect classified information. (SOR response at 12-13)

A retired U.S. Marine Corps chief warrant officer and colonel described Applicant as ethical, courageous, courteous, respectful, conscientious, and responsible. (GE 2 at 14-1, 14-2) Applicant is an asset to any organization. (GE 2 at 14-1, 14-2) The retired colonel was Applicant's direct supervisor for 11 months, and he stated, "I had absolute confidence that any tasking I passed to him would be executed with the utmost rigor, detail, and sensitivity." (GE 2 at 14-2)

Applicant's family members described him as honest, diligent, and responsible. He contributed a substantial amount of work to help the daycare center succeed. From



2007 to 2009, Applicant's employee performance evaluations described his performance as exceptional in all areas. (GE 2 at 15-2 to 15-14)

A Government employee, who retired after 26 years of military service as a lieutenant colonel and has known Applicant since 2002, encouraged his company to hire Applicant in June 2011 for his current position and for a previously-held position with his company. (Tr. 21, 23, 33, 35) He described Applicant as diligent, trustworthy, responsible, and conscientious with good judgment. (Tr. 19-20, 34) As a lessons-learned specialist, Applicant performs valuable work for his company. (Tr. 22, 24) Applicant told him that he was making full restitution for his taxes. (Tr. 25) Applicant was able to perform with exceptional attention to detail and diligence in the performance of his work. (Tr. 31-33) He recommended reinstatement of Applicant's security clearance. (Tr. 34)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about applicant's allegiance, loyalty, or patriotism.

It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline F (financial considerations).

### **Financial Considerations**

AG ¶ 18 articulates the security concern relating to financial problems:

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 overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations

under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his SF-86, credit reports, his SOR response, and his statement at his hearing.

Applicant's debts became delinquent in 2008 and 2009. His SOR alleges four delinquent debts, totaling \$181,675. On December 22, 2010, the IRS filed a federal tax lien for \$125,089. On July 15, 2011, the IRS filed a federal tax lien for \$21,291. On July 20, 2011, the state filed a tax lien for \$20,541. It is being addressed through a \$533 garnishment of Applicant's pay. In April 2010, Applicant's unsecured nonpriority debts were discharged under Chapter 7 of the Bankruptcy Code. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 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; 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.

None of the mitigating conditions fully apply to all of Applicant's SOR debts. The debts in SOR ¶¶ 1.d and 1.f are mitigated under AG ¶¶ 20(b) and 20(d). Applicant's efforts to establish a successful daycare business were reasonable and responsible. Nevertheless, the family daycare business failed due to the unexpected failure of the state to pay for daycare expenses as well as unexpected construction requirements. He received financial counseling as part of the bankruptcy process. He generated a budget or personal financial statement. He understands how to establish his financial

responsibility and eliminate delinquent debt. He acted responsibly when his debts became overwhelming by having his debts discharged under Chapter 7 of the Bankruptcy Code in April 2010.<sup>13</sup> He maintained contact with his creditors,<sup>14</sup> and he attempted to establish payment plans. He hired attorneys and accountants, and he made multiple settlement offers. I am also crediting him with mitigating his state tax debt of \$20,541 because it is being addressed through a \$533 garnishment of Applicant's pay.<sup>15</sup> Applicant has shown reasonable diligence in bringing his mortgage to current status. Applicant was unemployed from March 2010 until August 2010 and underemployed from August to October 2010. Unemployment, underemployment, and failure of the family daycare business were circumstances largely beyond Applicant's control.

Applicant's federal tax debts cannot be mitigated because he acted irresponsibly. He knew about the tax underpayments in 2007 or 2008, and will not begin making payments until July 2012. In 2009 and 2010, he failed to withhold sufficient funds from his salary, and in 2008, his business quarterly tax payments were insufficient. He failed to file his federal tax returns on time. In 2009, he and his spouse had an adjusted gross income (AGI) of \$151,784, and in 2010, they had an AGI of \$181,755. On December 22, 2010, the IRS filed a federal tax lien for \$125,089. On July 15, 2011, the IRS filed a federal tax lien for \$21,291. On June 19, 2012, the IRS determined that the taxes owed for 2007, 2009, and 2010, as well as the civil penalties for September 30, 2006 to December 31, 2009 are \$155,874. The IRS accepted Applicant's installment agreement where he agreed to pay \$620 per month beginning on July 28, 2012 until the debt is

---

<sup>13</sup>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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) 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)).

<sup>14</sup>"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.

<sup>15</sup>See ISCR Case No. 08-06059 at 6 (App. Bd. Sept. 21, 2009) (indicating involuntary payment of debts through garnishment is not necessarily mitigating).

paid in full. The IRS “will continue to charge penalties and interest” until the full debt is paid.

He did not establish “there are clear indications that the problem is being resolved or is under control.” He did not prove that he acted responsibly under the circumstances. His irresponsible failure to file his tax returns in a timely manner and to ensure that sufficient funds were withheld from his monthly paychecks and from the daycare business on a quarterly basis caused most of his delinquent federal tax debt. Once he learned of the tax problems, he failed to take reasonable action in a timely fashion to resolve his federal tax debt.

AG ¶ 20(e) is not fully applicable. Although he is having an accountant review his 2007 and 2008 tax returns, there is no convincing assurance that this review will result in a substantial reduction in his tax debt.

Applicant has not provided enough evidence to establish that his delinquent debt is unlikely to recur. His track record of financial responsibility shows insufficient effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations concerns. It is likely that financial problems will continue for several years.

### **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.

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. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Although the rationale for reinstating Applicant’s clearance is insufficient to support a security clearance at this time, there are several factors tending to support approval of his access to classified information. Applicant is a 51-year-old defense-readiness specialist, lessons-learned specialist, and systems analyst for a Defense

contractor. He has worked for the same employer with some periods of unemployment since 2004. He earned an associate's degree in communications and an associate's degree in instructor technology. He is married, and has two children from a prior marriage and three stepchildren. He honorably retired from the Air Force in 1999 as a master sergeant (E-7). He has held a security clearance for 32 years, including a Top Secret clearance with SCI access. His file did not disclose any reportable incidents involving illegal drugs, alcohol, the police, or courts.

Applicant's financial woes were caused by the failure of his family daycare business, unemployment, and underemployment. The failure of the daycare business was caused by reliance on the state's promises to pay for daycare, unanticipated construction costs, and not due to mismanagement. He and his spouse's bankruptcy in 2010 was an appropriate response to resolve their nonpriority unsecured debts. Applicant had financial counseling, and he is sufficiently mature to understand and comply with his security responsibilities. Several character witnesses lauded Applicant's character and work performance, as ethical, courageous, courteous, respectful, conscientious, and responsible. He is an asset to his company and his family. He deserves substantial credit for volunteering to support the U.S. Government as an employee of a defense contractor and during his years of active duty Air Force service. There is every indication that he is loyal to the United States and his employer. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial. He is an intelligent person, and he has the ability to pay his taxes in a timely manner. His filing of his federal tax returns and handling of his federal tax debts were irresponsible. For several years, he failed to withhold sufficient funds from his salary, and he failed to ensure that the family business quarterly tax payments were made. He failed to file his federal tax returns on time. In 2009, he and his spouse had an AGI of \$151,784, and in 2010, they had an AGI of \$181,755. In 2009, he took \$102,000 from his ESOP, and he gave \$30,000 to about \$70,000 to his daughter to establish her daycare center. They had the means to start paying their delinquent federal income tax debt sooner. On December 22, 2010, the IRS filed a federal tax lien for \$125,089. On July 15, 2011, the IRS filed a federal tax lien for \$21,291. On June 19, 2012, the IRS determined that the taxes owed for 2007, 2009, and 2010, as well as the civil penalties are \$155,874. He has not made the first payment under his installment agreement with the IRS. It will be many years before his federal tax debt will be repaid. There are not "clear indications that the problem is being resolved or is under control." He did not prove that he acted responsibly with respect to his federal taxes under the circumstances. Financial considerations security concerns are not fully mitigated at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not fully mitigated, and eligibility for access to classified information is denied.

## Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant
Subparagraph 1.e:	For Applicant (Withdrawn)
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT (Withdrawn)
Subparagraphs 2.a:	For Applicant (Withdrawn)

## Conclusion

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

---

MARK HARVEY  
Administrative Judge