



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



In the matter of:

)
)
)
)
)

ISCR Case No. 12-10335

Applicant for Security Clearance

Appearances

For Government: Pamela C. Benson, Esq., Department Counsel

For Applicant: Adam Webber, Esq.

09/07/2017

**Decision
on Remand**

HARVEY, Mark, Administrative Judge:

The Appeal Board remanded this case for a new decision. See ISCR Case No. 12-10335 (App. Bd. July 21, 2017). Foreign influence and outside influence security concerns are mitigated for the reasons stated in ISCR Case No. 12-10335 (A.J. Apr. 21, 2017).

Applicant failed to timely file several federal and state tax returns, and after filing them in October 2016, he learned he owed substantial tax debt. He made some payments to address his tax debt; however, he continues to owe about \$30,000 in tax debt. He also owes one large non-tax debt, which is not resolved. He did not establish his financial responsibility. Financial considerations security concerns are not mitigated. Access to classified information is denied.

Statement of the Case

On February 28, 2012, Applicant completed and signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On April 26, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines*

for Determining Eligibility for Access to Classified Information, effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the foreign influence, outside activities, and financial considerations guidelines.

On May 22, 2015, Applicant responded to the SOR and requested a hearing before an administrative judge. (HE 3) On March 8, 2016, Department Counsel amended the SOR, adding paragraph 3.g. (HE 4) On March 27, 2016, Applicant responded to the SOR. On April 19, 2016, Department Counsel was ready to proceed. On May 2, 2016, the case was assigned to another administrative judge, and on July 21, 2016, the case was reassigned to the administrative judge who held the hearing. On August 31, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for September 15, 2016. (HE 1) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered 7 exhibits; Applicant offered 14 exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 17-20; GE 1-7; Applicant Exhibits (AE) A-N) On September 27, 2017, DOHA received a copy of the hearing transcript. Applicant provided two post-hearing exhibits (AE O; AE P); Department Counsel objected to one exhibit, which was not admitted (AE P). On April 21, 2017, the administrative judge issued his decision and concluded the foreign influence and outside activities security concerns were mitigated; however, financial considerations security concerns were not mitigated.

On July 21, 2017, the DOHA Appeal Board concluded that the administrative judge erred when he declined to admit and consider the statement of Applicant's accountant. (AE P) See ISCR Case No. 12-10335 at 2 (App. Bd. July 21, 2017). The Appeal Board remanded the case, and it was assigned to me because the original administrative judge retired from federal service. The Appeal Board instructed me to "inquire of the parties whether a new hearing is required or whether the Judge can rely on the transcript of the hearing contained in the case file. In light of this holding, the other issues that Applicant has raised are not ripe for consideration." *Id.* at 3.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for

all covered individuals” on or after June 8, 2017. Accordingly, I have evaluated Applicant’s security clearance eligibility under the new AGs.¹

On July 31, 2017, Applicant’s case was assigned to me, and on August 3, 2017, the parties advised me that they did not request a new hearing. (HE 5) I approved Applicant’s Counsel’s request to supplement the record and set a suspense of October 5, 2017. (HE 6) On August 28, 2017, Applicant provided four exhibits, which were admitted without objection. (AE O-AE R) On August 29, 2017, I provided a copy of the new AGs to Applicant’s counsel and requested that he provide copies of the IRS Form 1040s and Schedule As for the tax returns filed in 2016 and 2017 as well as proof of any payments made to the IRS. I set a new suspense of September 28, 2017. (HE 7)

On September 4, 2017, Applicant’s Counsel provided seven exhibits; there were no objections; and the proffered exhibits were admitted. (HE 8-HE 9; AE S-AE Y) On September 5, 2017, Department Counsel provided her argument against mitigating financial considerations security concerns. (HE 10) On September 5, 2017, Applicant’s Counsel advised me that no additional exhibits would be submitted, and the record closed that same day. (HE 11)

The Appeal Board did not indicate the Government had filed a cross appeal of the administrative judge’s decision for Applicant under the foreign influence and outside influence guidelines. Applicant’s Counsel indicated the foreign influence and outside influence issues were outside the scope of the remand. (HE 4) Department Counsel did not object, and foreign influence and outside influence issues will not be discussed in this decision.

Findings of Fact²

In Applicant’s SOR response, he admitted the SOR allegation in ¶ 3.a, and he denied the allegations in ¶¶ 3.b through 3.g. He also provided extenuating and mitigating information. Applicant’s admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 62 years old, and he has been employed as a senior acquisition manager from 2010 to present. (Tr. 62; GE 1) He served in the Air Force on active duty from 1973 to 1995, and he was honorably retired from the Air Force. (Tr. 64, 67; GE 1) In 1999, he received a bachelor’s degree. (GE 1) His specialties were electrical engineering and logistics. (Tr. 63) He was employed as the chief executive officer and primary manager from 2002 to present of company (M). (GE 1) Applicant married his third wife in 2003 or 2004. (Tr. 179-180; GE 7) His children and stepchild were born in 1980, 1981, 1995, and 1999. (Tr. 179-180; GE 7) He has held a security clearance from 1973 to

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

² Some details were excluded to protect Applicant’s right to privacy. Specific information is available in the cited exhibits.

present. (Tr. 65) There is no evidence of security violations, arrests, illegal drug possession or use, or alcohol-related incidents. (Tr. 66; GE 1)

Financial Considerations

Applicant cited eight circumstances that adversely affected his finances: (1) he lacked financial expertise in running M, a complex technological company; (2) he provided financial support to his parents and his spouse's parents; (3) the death of his son in 2011; (4) he suffered from the adverse effects of stress, including a heart attack; (5) litigation over his son's estate; (6) a groundless lawsuit against his company alleging fraud; (7) an employee and accountant defrauded M; and (8) he made modifications to his residence to enable his disabled relatives to live with him. (Tr. 29-30, 97-109; 142-143)

M was Applicant's primary employment from 2002 to 2010. (Tr. 70-72) He was also employed as a consultant from 2002 to 2006. (Tr. 135) M purchased a license from a lab to use their technology for \$60,000 to \$70,000 annually. (Tr. 76, 130) M sought investors for the licensed technology. (Tr. 77) M unsuccessfully attempted to market the technology to the DOD and to a foreign country. (Tr. 78-103) M received some funding from the Air Force and from a university starting in 2006. (Tr. 131-133) M stopped functioning in 2007, and everything was put into boxes, and placed in storage. (Tr. 169) By 2010, M and Applicant were deeply in debt; he said from 2010 to 2015 he paid off more than \$450,000 in debt; and his debt total is now about \$30,000. (Tr. 103, 126-127; SOR response) For several years, Applicant was M's only employee. (Tr. 148) He was unsure about how much money M received and how much money M spent. (Tr. 152) One of his partners brought an accountant into M. (Tr. 91) M's accountant was responsible for preparing M's business tax returns and Applicant's personal tax returns, and the accountant generated necessary tax documentation. (Tr. 91, 141) M's accountant was fired in September 2007. (Tr. 92, 141)

After M's accountant left, Applicant focused on marketing the business and learning about what happened to the business's income. (Tr. 92) He considered suing the partner that took company funds; however, he decided not to pursue expensive litigation. (Tr. 93-94) M had considerable debt, and Applicant took out credit cards and a second mortgage on his residence to support M. (Tr. 94) A board member of M accused Applicant of falsifying documents, and he filed a lawsuit against Applicant and M. (Tr. 95) The lawsuit hurt M's ability to market technology. (Tr. 95) Applicant and M prevailed in the lawsuit because the board member had unclean hands, and the lawsuit was dismissed in 2011. (Tr. 95, 156-159) The foreclosure of his mortgage was resolved in court. (Tr. 96) He received some funds from his parents, and from his spouse, who is an attorney. (Tr. 171, 182) Applicant hopes to resurrect M at some future date. (Tr. 169)

Applicant's SOR alleges six delinquent debts and failure to timely file some of his state and federal tax returns. The status of the SOR allegations is as follows:

SOR ¶ 3.a alleges Applicant failed to timely file his federal and state tax returns for tax years 2008 through 2011. (HE 2) In 2009 or 2010, Applicant hired a certified public accountant (CPA) to assist with his taxes. (Tr. 103) His son's death devastated him, and

he was consumed by stress and problems. (Tr. 142) He had boxes of financial materials, and he was overwhelmed and unable to file M's business tax returns. (Tr. 108) In Applicant's February 28, 2012 SCA, he disclosed he had not filed his federal and state income tax returns for tax years 2008 through 2011, and he said, "Business did not receive any funding since 2007. The company taxes and my taxes records are being worked by a local accountant to bring business and my personal taxes up to date." (Tr. 142-143; GE 1) Applicant gave his CPA information about his bills; however, he did not give her information showing his business income. (Tr. 144) The IRS provided a wage and accountant report to show Applicant's income since 2007. (Tr. 103) On August 24, 2017, Applicant's CPA provided an affidavit in which she stated she "oversaw the preparation and filing" of Applicant's federal, state and local tax returns for 2007-2015. (AE O) Applicant's federal, state, and local tax returns were timely filed for 2016. (AE O) Applicant said he is current on all of his tax filings; he received refunds for 2015 and 2016, which were applied to his federal income tax debt; he believes his taxes are all paid; he may owe some additional taxes; and he has contacted the IRS and asked for confirmation that his federal taxes are paid. (AE R at 3)

Applicant provided his federal income tax returns for tax years 2007 through 2016. (AE D; AE E, AE U-AE X) His tax return information is depicted in the following table.

Tax Year	Date on Return	Adjusted Gross Income	Tax Due (-) or Refund
2007	October 6, 2016	\$137,766	\$4,107
2008	October 6, 2016	-\$11,036	\$1,811
2009	October 5, 2016	-\$51,385	\$587
2010	October 5, 2016	-\$72,309	\$30
2011	October 6, 2016	\$19,960	-\$7,866
2012	October 6, 2016	\$79,545	-\$18,197
2013	October 6, 2016	\$51,635	-\$7,937
2014	October 6, 2016	\$66,322	-\$14,810
2015	October 6, 2016	\$5,409	\$7,130
2016	June 28, 2017	\$22,373	\$27,718

For several tax years, Applicant was able to reduce his federal tax debt because of losses from his business as indicated on his IRS Form 1040 and Schedule C. For tax year 2016, he filed jointly with his spouse, and their income on their W-2s was \$142,635. (AE X) Their loss on Schedule C, line 31, in relation to his business was \$127,380. (AE X) He was able to use his business to shelter all of his W-2 income and some of his spouse's W-2 income. (AE X) Their business loss was primarily due to R & D losses from 2007 to 2016. (AE X) His Schedule C, Part V, shows "one tenth of R&D incurred" for each of those nine years as follows: 2007 (\$13,360); 2008 (\$13,666); 2009 (\$17,529); 2010 (\$12,374); 2011 (\$14,491); 2012 (\$11,847); 2013 (\$9,767); 2014 (\$9,953); 2015 (\$13,312); 2016 (\$11,081) for a total R&D expense for tax purposes of \$127,380. (AE X) He and his spouse received a \$5,246 state tax refund for tax year 2016. (AE X)

On October 31, 2016, the IRS wrote Applicant and advised him that his \$7,130 overpayment for tax year 2015 was applied to address his tax debt for tax year 2013, and a debt of \$4,043 remained. (AE T) Applicant's checking account statement shows he paid the IRS \$4,043 in December 2016, and his tax debt for tax year 2013 is resolved. (AE T)

On August 14, 2017, the IRS wrote Applicant and advised him that his overpayment for tax year 2016 (\$27,718) was applied to tax years 2014 (\$21,477) and 2011 (\$6,240) leaving a balance owed of \$7,161. (AE Y) On August 15, 2017, Applicant paid the IRS \$7,305 and resolved his federal income tax debt for tax year 2011. (AE X) It appears that Applicant has resolved all of his delinquent federal taxes except for tax year 2012.

Applicant's CPA's August 24, 2017 affidavit states Applicant "owed \$37,551 in taxes for federal, state, and local taxes for 2007-2015." (AE Q) His CPA may not have credited him with paying \$7,305 on August 15, 2017. For purposes of this decision, I conclude he owes federal, state, and local taxes of about \$30,000.³

SOR ¶ 3.b alleges a bank debt that is 180 days or more past due for \$2,986 with a balance of \$23,352. Applicant's March 7, 2012 credit report shows the last act on this credit card account was in December 2007. (GE 3) Applicant had a bank account with the creditor; however, he did not have a credit card, and he did not understand the basis for the delinquent account. (GE 7) Applicant said this debt was a debt from M, and the debt has cleared or been paid. (Tr. 110; SOR response) On September 26, 2016, Applicant wrote the creditor asking for information about this debt; however, the creditor did not reply to his request for information. (AE J; AE R at 3) He wrote the credit reporting companies to dispute this debt, and it was removed from his credit reports. (AE R at 3)

SOR ¶ 3.c alleges a debt placed for collection for \$1,918. Applicant's October 29, 2014 credit report shows the account was opened in November 2013. (GE 4) Applicant denied that he was responsible for this debt because he did not recognize the name of the collection agent. (Tr. 112; SOR response) On September 26, 2016, Applicant wrote the creditor asking for information about this debt, and the creditor did not reply to his request for information. (AE K; AE R at 4) He wrote the credit reporting companies to dispute this debt, and it was removed from his credit reports. (AE R at 4)

SOR ¶ 3.d alleges that in 2012, a federal income tax lien was filed against Applicant for \$5,541. (HE 2; GE 4; GE 5) Applicant said this lien was paid from his paycheck the month the lien was filed. (Tr. 112-118, 153; SOR response) His September 17, 2016 credit report shows this lien; however, it is not shown on his August 8, 2017 credit report. (AE O) In April 2011, the lien was assessed for \$4,324 for tax year 2007,

³ Applicant's August 24, 2017 statement indicates, "Since my first hearing in this matter, I have paid the IRS all that I am aware I owe toward my outstanding tax liability. At present it is possible that I owe additional sums. . . . The IRS has informed me that they have received my payments but are still processing my returns and calculating whether I owe anything more." (AE R at 3) Applicant's CPA's August 24, 2017 statement is an enclosure to Applicant's statement. In response to these two statements, I asked Applicant to provide documentation showing his payments to the IRS in 2016 and 2017. (HE 7) After receipt of my request, Applicant provided AE S-AE Y.

and \$1,217 for tax year 2008. (Tr. 114-115; AE L) In April 2013, the lien was removed. (Tr. 115-117; AE D)

SOR ¶ 3.e alleges an account placed for collection for \$666. Applicant's March 7, 2012 credit report shows the last act on this telecommunications account was in December 2007. (GE 3) Applicant had an account with the creditor, and he believed the account was in good standing. (GE 7) Applicant stated the account was his son's account. (SOR response) He also said he did not understand the origin of this debt. (Tr. 118-119, 185) The creditor never sent him a letter asking for payment. (Tr. 119)

SOR ¶ 3.f alleges a water softening account placed for collection for \$323. (Tr. 171-173; HE 2) Applicant's March 7, 2012 credit report shows the last act on this account was in September 2010. (GE 3) Applicant said the creditor wrote him and acknowledged the delinquent account entry on his credit report was an error. (Tr. 119-120; SOR response) He wrote the credit reporting companies or creditor seeking information about this debt, and it was removed from his credit reports. (AE N; AE R at 4)

SOR ¶ 3.g alleges a delinquent account for \$11,024 placed for collection in 2015. Applicant's January 12, 2016 credit report indicates the date of first delinquency was in October 2013. (GE 5) Applicant said his lawyer who represented M in a lawsuit billed M for more than he agreed to pay. He said M had an agreement to pay a flat fee of \$4,000 or \$5,000 on the debt, and he paid the agreed upon amount. (Tr. 121, 186; AE R at 5) He had a contract with the lawyer pertaining to the representation; however, he said it was in a box, and he had not located it. (Tr. 121-124, 186) Department Counsel asked for a copy of the contract; however, it was not provided. (Tr. 186-190) Applicant said he was not personally liable for this debt because it is M's debt. (Tr. 120; SOR response; AE R at 5) M was the defendant in the lawsuit, and Applicant was not listed as a defendant in the lawsuit. (Tr. 123-124; AE H) He wrote the creditor and the three major credit reporting companies to dispute this debt, and it has been removed from two out of three of the major credit reports. (Tr. 122; AE R at 5) The creditor insists he owes the debt. (Tr. 122) The delinquent debt is shown on his credit report with a notation that he disputed the information, and he has not satisfied the debt. (AE O at 19) He has written the state attorney general to complain about the business debt being retained on his credit report. (AE R at 5) The creditor has not sued to collect the debt. (Tr. 190)

Applicant's January 12, 2016 credit report only shows two negative financial entries, and they are the debts in SOR ¶¶ 3.d and 3.g. (GE 5) The only negative entry on his August 8, 2017 credit report is the debt in SOR ¶ 3.g. (AE O at 19)

Applicant has excellent credit scores. In his February 28, 2012 SCA, Applicant disclosed the following financial information: he settled two lawsuits in 2008; a bank obtained a judgment against him in 2008 for \$12,000; a lawsuit relating to a foreclosure filed by a bank in 2009 was settled; and a lawsuit filed in 2011 by a bank was settled. (Tr. 124-126; GE 1) Applicant's current annual salary is \$116,000. (Tr. 155) He purchased his present home in 1996, and he successfully paid his first mortgage, and his second mortgage is paid down to \$31,000. (Tr. 89, 182; SOR response)

Character Evidence

One friend and an investor of \$25,000 in M has known Applicant for 29 years. (Tr. 20, 33) He invested \$25,000 in M in 2006, and the \$25,000 was lost. (Tr. 38) He described Applicant as knowledgeable, multi-talented, reliable, trustworthy, too trusting of others, conscientious about security and compliance with rules, and honest. (Tr. 20-40) There was internal strife in M and some employees attempted to steal technology and “subvert” Applicant’s work. (Tr. 25) Someone and his accountant stole about \$500,000 in 2007 from M. (Tr. 33-34, 126, 183) Applicant told him the reason he had problems with his taxes related to an accountant he fired who failed to take care of his taxes. (Tr. 25-26) The accountant was fired in 2007. (Tr. 35)

Applicant’s coworker is an Air Force civilian employee, who has worked closely with Applicant since August 2015. (Tr. 42-47, 53) He did not know about M. (Tr. 54, 60) Applicant is the Air Force’s point of contact with his employer. (Tr. 49) Applicant is honest, reliable, an excellent representative of his company, and helpful. (Tr. 50-51)

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.

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or

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

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

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

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive

presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes four disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the ability to do so;" "(c) a history of not meeting financial obligations;" and "(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

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

(internal citation omitted). The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

Six financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(a) the behavior happened so long ago,⁴ was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;⁵

⁴ A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. February 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sep. 13, 2016)).

⁵ The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

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

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

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

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions fully apply to all SOR allegations. Applicant is credited with mitigating SOR ¶¶ 3.b through 3.f. Applicant cited eight circumstances that adversely affected his finances: (1) he lacked financial expertise in running M, a complex technological company; (2) he provided financial support to his parents and his spouse's parents; (3) the death of his son in 2011; (4) he suffered from the adverse effects of stress, including a heart attack; (5) litigation over his son's estate; (6) a groundless lawsuit against his company alleging fraud; (7) an employee and accountant defrauded M; and (8) he made modifications to his residence to enable his disabled relatives to live with him. Some of these circumstances were completely beyond his control, such as the death of his son and resulting estate litigation and the disability of his parents and parents-in-law and some circumstances were largely within his control, such as the measures he

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)).

took to address his own lack of financial expertise. He did not act responsibly under the circumstances with respect to his taxes and the debt in SOR ¶ 3.g.

Applicant relies upon the absence of delinquent debts from his current credit report to mitigate security concerns. “[T]hat some debts have dropped off his credit report is not meaningful evidence of debt resolution.” ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer.⁶ Debts may be dropped from a credit report upon dispute when creditors believe the debt is not going to be paid usually because it is collection-barred by the statute of limitations, a creditor fails to timely respond to a credit reporting company’s request for information, or when the debt has been charged off. Applicant indicated he disputed certain debts, and they were subsequently not listed on multiple credit reports. Their absence and Applicant’s stated reasons for the disputes are sufficient to credit him with mitigating the debts in SOR ¶¶ 3.b through 3.f.

Applicant is not credited with mitigating the debt in SOR ¶ 3.g for \$11,024. He has the burden of mitigating this debt. He did not provide a copy of the contract with his law firm or a copy of correspondence he wrote to the creditor in SOR ¶ 3.g contesting his responsibility for this debt. The delinquent debt is substantial, and it remains on his current credit report.

Applicant’s failed to timely file his federal and state tax returns for eight tax years: 2007 to 2014. He filed those tax returns in October 2016. He provided federal income tax returns for tax years 2007 through 2012.⁷ He did not owe federal taxes for tax years 2007 through 2010; he owed federal taxes of \$16,063 for tax years 2011 and 2013; and the IRS will likely add penalties and interest to the federal tax debt total. The amount of taxes

⁶Title 15 U.S.C. § 1681c. See Federal Trade Commission website, Summary of Fair Credit Reporting Act Updates at Section 605, <https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf>.

⁷ Applicant’s SOR does not include three financial allegations: (1) the lawsuits listed in his SCA; (2) failure to timely file tax returns for tax years 2012 through 2014; and (3) taxes owed for tax years 2012 through 2014. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). These three allegations will not be considered except for the five purposes listed above.

owed for tax years 2014 through 2016, is unclear. Applicant's CPA said he "owed \$37,551 in taxes for federal, state, and local taxes for 2007-2015." It is unknown how much Applicant paid to address his tax debt from the date his CPA filed his tax returns to present.

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.⁸ For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as a federal crime. See note 7, *supra*.

In regard to the failure to timely file federal and state income tax returns, the DOHA Appeal Board has commented:

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

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [the applicant's] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [applicant's] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See

⁸ Title 26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931).

ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

In ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance:

Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. . . . By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.

ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted). Applicant provided proof that he “made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements,” and AG ¶ 20(g) applies. However, because of Applicant’s lengthy history of noncompliance with requirements to timely file tax returns, the mitigation in AG ¶ 20(g) is insufficient to alleviate financial considerations security concerns. ISCR Case No. 16-00396 at 3 (App. Bd. Aug. 15, 2017) states:

It is well established, however, that a security clearance adjudication does not turn simply on a finding that one or more of the mitigating conditions apply to the particular facts of a case. Rather, an adjudication requires the exercise of sound discretion in light of the record evidence as a whole. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance determination. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or vice versa.

There is insufficient evidence about why Applicant was unable to make greater progress sooner in the filing of his tax returns, in the payment of his tax debts, and in the resolution of the debt in SOR ¶ 3.g. There is insufficient assurance that his financial problems are being resolved, are under control, and will not recur in the future. Under all

the circumstances, he failed to establish that financial considerations security concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 62 years old, and he has been employed as a senior acquisition manager from 2010 to present. He served in the Air Force on active duty from 1973 to 1995, and he was honorably retired from the Air Force. In 1999, he received a bachelor's degree, and his specialties were electrical engineering and logistics. He was employed as the chief executive officer and primary manager from 2002 to present of company (M). Applicant married his third wife in 2003 or 2004. His children and stepchild were born in 1980, 1981, 1995, and 1999. He has held a security clearance from 1973 to present. There is no evidence of security violations, arrests, illegal drug possession or use, or alcohol-related incidents.

The general sense of Applicant's two character witnesses is that Applicant is knowledgeable, helpful, multi-talented, reliable, trustworthy, too trusting of others, conscientious about security and compliance with rules, honest, and an excellent representative of his company.

Applicant made excellent progress resolving his delinquent debts and getting his tax returns filed in 2016. He paid most of his federal income taxes. He has excellent credit scores. Eight circumstances partially or fully beyond his control adversely effected his finances. He is credited with mitigating the debts in SOR ¶¶ 3.b through 3.f.

The evidence against reinstatement of his security clearance is more substantial. Applicant did not make enough progress resolving the debt in SOR ¶ 3.g. He filed his

federal and state tax returns for tax years 2007 to 2014 in October 2016. Although he paid most of his federal income taxes, he continues to owe about \$30,000 in taxes. When a tax issue is involved, an administrative judge is required to consider how long an applicant waits to file his or her tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments.⁹ The primary problem here is that Applicant has known that he needed to file state and federal tax debts for several years and he waited until October 2016 to file his tax returns. He promised to file his tax returns in his February 28, 2012 SCA. His filing of all unfiled tax returns shortly after his hearing is too little too late to mitigate security concerns.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Foreign influence and outside influence security concerns are mitigated for the reasons stated in ISCR Case No. 12-10335 (A.J. Apr. 21, 2017). Financial considerations security concerns are not mitigated.

⁹ The recent emphasis of the Appeal Board on security concerns arising from tax cases is instructive. See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, “His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation’s secrets.”); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant’s control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant’s wages, and emphasizing the applicant’s failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant’s efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant’s failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse’s medical problems. The Appeal Board emphasized “the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information.” *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted). See *also* ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating “A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant’s reliability, trustworthiness, and ability to protect classified information.”).

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 B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline L:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraphs 3.b through 3.f:	For Applicant
Subparagraph 3.g:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge