



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



In the matter of:

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ISCR Case No. 15-02917

Applicant for Security Clearance

Appearances

For Government: Benjamin Dorsey, Esq., Department Counsel
For Applicant: Matthew E. Hughes, Esq.

04/04/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to timely file several federal and state tax returns, and after filing them, he learned he owes substantial state and federal tax debts. He also owes several large non-tax debts which are not in payment plans or otherwise resolved. He did not establish his financial responsibility. Financial considerations security concerns are not mitigated. Access to classified information is denied.

History of the Case

On May 28, 2014, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On December 16, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant pursuant to 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* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2)

Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On March 2, 2016, Applicant responded to the SOR and requested a hearing. On May 25, 2016, Department Counsel indicated he was ready to proceed. On August 15, 2016, the case was assigned to me. On December 2, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 26, 2017. (HE 1) The hearing was held as scheduled.

Department Counsel offered 4 exhibits; Applicant offered 17 exhibits; and all proffered exhibits were admitted without objection. (transcript (Tr.) 13-22; GE 1-4; Applicant Exhibits (AE) A-Q) On February 3, 2017, DOHA received the transcript of the hearing. On March 30, 2017, I received two additional exhibits from Applicant which were admitted without objection. (AE R, AE S)

Findings of Fact¹

In Applicant's SOR response, he admitted the allegations in SOR ¶¶ 1.a through 1.d and 1.j through 1.n. He denied the remaining SOR allegations. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 48-year-old senior information technology and automation expert, and he has worked for a government contractor supporting a non-DOD government agency since 2002. (Tr. 24-27, 61, 64) He has held a security clearance since 2002. (Tr. 24-26, 62) There is no evidence of security violations. In 1991, he received a bachelor's degree. (Tr. 25, 61) He did not serve in the U.S. Armed Forces. (GE 1)

Applicant's father was a government attorney, and his mother worked outside her home after he was 12 years old. (Tr. 24) In 1995, Applicant married, and he has six children ages 10, 12, 12, 16, 19, and 22. (Tr. 27-28; GE 1; AE N, AE O, AE P; AE Q)

Financial Considerations

Applicant described several issues that caused his financial problems. His spouse has a disease affecting her eyes. (Tr. 31) His spouse also spent excessively. (Tr. 32) His daughter received treatment several times for kidney stones. (Tr. 32) In 2004, he purchased a home for \$900,000, and he was surprised by maintenance problems and the magnitude of his real estate tax increases, which went from \$7,000 to almost \$11,000 in 2008 as the value of his home increased to \$1.3 million. (Tr. 33-37, 89) In 2006, his basement was flooded. (Tr. 36) It cost about \$35,000 to correct the problems from the flooding. (Tr. 34) He replaced carpeting, appliances, and made other repairs. (Tr. 91) In 2007 and 2008, there was stress in his home because there were "three children in diapers." (Tr. 39) Around 2009, the real estate market declined decreasing the fair market

¹ Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. Some amounts are rounded up or down.

value of their home. His spouse had difficulties because of post-partum depression and the stress of home schooling their other children. (Tr. 39) For a time Applicant worked two jobs to increase income. The stresses from home and work distracted him from taking care of his taxes.

When Applicant purchased his residence, he financed \$750,000, which included first and second mortgages. (Tr. 90) In 2007, Applicant refinanced his home. (Tr. 35) When he refinanced, he received about \$300,000 in cash. (Tr. 90) Currently Applicant's first mortgage is an interest only debt for \$1,000,000, and it is one-month in arrears. (Tr. 57, 68) With penalties and interest, the arrearage could be about \$12,000. (Tr. 92; GE 4) He did not agree with his credit report statement that his mortgage was \$12,000 delinquent. (Tr. 92; GE 4) He also has a second mortgage of \$140,000. (Tr. 57; AE R) The current fair market value of his home is less than the amount of the two mortgages. (Tr. 58) He is seeking a loan modification. (Tr. 69) In April 2017, his first mortgage payment is scheduled to increase to \$7,500 monthly. (Tr. 86) His increased mortgage payment may help him negotiate a lower payment with the IRS on his tax debt. (Tr. 87)

The SOR alleges Applicant has the following financial issues:

SOR ¶ 1.a alleges Applicant failed to file federal tax returns for tax years 2010 and 2011. For two years, Applicant was employed doing two jobs, and he discovered he had not withheld sufficient money to pay his federal income taxes when due. (Tr. 29-31) On January 17, 2017, he signed his federal income tax returns for tax years 2010 and 2011. (AE B; AE C) He said he filed his 2010 and 2011 tax returns with the Internal Revenue Service (IRS). (Tr. 33) For tax year 2010, his tax return reflects the following information: adjusted gross income (AGI) of \$223,300; taxable income of \$113,800; interest deduction of \$59,500; tax of \$23,500; federal income tax withheld of \$6,500; and amount owed to the IRS of \$14,100. (AE B) For tax year 2011, his tax return reflects the following information: AGI of \$262,500; taxable income of \$155,800; interest deduction of \$55,700; tax of \$31,700; federal income tax withheld of \$7,700; and amount owed to the IRS of \$20,800. (AE B) In January 2017, Applicant made a written offer to pay the IRS about \$200 monthly. (Tr. 71) In January 2017, Applicant filed his federal tax returns for 2014 and 2015 tax years. (Tr. 78) He owes about \$20,000 each for tax years 2014 and 2015. (Tr. 78) He estimated his total federal tax debt to be about \$120,000. (Tr. 79) On March 5, 2017, Applicant made an offer to settle his federal income tax debt by paying \$373 monthly for 24 months for a total of \$8,960. (AE R)²

² Applicant's SOR does not include four financial allegations: (1) he did not timely file his 2014 and 2015 state and federal income tax returns; (2) he owes about \$120,000 to the IRS for federal income taxes; (3) he owes about \$46,000 to his state tax authority for state income taxes; and (4) his mortgage is delinquent. 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.

SOR ¶ 1.b alleges Applicant failed to file state tax returns for tax years 2008 through 2011. After he filed his federal tax returns, the state calculated his tax bill and contacted Applicant. (Tr. 38) The state contacted him possibly in 2013 about taxes owed for 2008 and 2009. (Tr. 64) Applicant did not dispute the amounts the state determined that he owed. (Tr. 38, 64-65) On January 24, 2017, for tax year 2008 he owed the state \$6,830, and on January 24, 2017, he paid the state \$500. (AE F) He has a payment plan for his state taxes for the 2008 tax year. (Tr. 70, 92) On January 24, 2017, for tax year 2009 he owed the state \$1,010, and in 2015, he paid the state about \$1,200. (AE G) On January 24, 2017, Applicant signed his 2010 state tax return, and he owed \$2,600. (AE D) On January 25, 2017, he signed his 2011 state tax return, and he owed \$3,600. (AE E) For tax year 2012, Applicant owes the state \$5,700; and for tax year 2013, he owes the state \$11,500. (AE H) In total, for tax years 2008, 2009, 2010, 2012, and 2013, he owes the state about \$29,000. (AE H) In January 2017, Applicant filed his state tax returns for 2014 and 2015 tax years. (Tr. 78) He owes about \$7,000 each for tax years 2014 and 2015. (Tr. 78-79) In total, for tax years 2008 through 2015, he owes about \$46,000 in state income taxes.

SOR ¶ 1.c alleges Applicant has a charged-off debt owed to a credit union of unspecified amount. Applicant believed this debt related to his 2007 second mortgage which Applicant failed to pay and was charged off in 2015. (Tr. 39-41) He estimated the amount of the mortgage was about \$95,000. (Tr. 40-41, 68) He used the second mortgage to consolidate his debts, to pay-off his credit cards, and to pay two vehicle debts. (Tr. 41-42) He has not made any payments in the previous two or three years. (Tr. 68) He planned to either resume payments or to sell his house and pay the debt upon the sale. (Tr. 68) He currently owes about \$140,000 on this account. (AE R; AE S)

SOR ¶ 1.d alleges Applicant has a charged-off bank debt for \$39,800. In 2007, he borrowed about \$40,000 on an unsecured signature loan to make repairs on his home, to pay his taxes, and to consolidate his debts. (Tr. 42-43) He does not have a payment plan or agreement with the creditor, and he has not contacted the creditor for several years. (Tr. 69-70) He plans to make a payment arrangement with the creditor. (Tr. 70)

SOR ¶¶ 1.e and 1.f allege Applicant has charged-off bank debts owed to the same bank for \$25,700 and \$24,700. Around 2008 and 2009, Applicant borrowed funds from a bank to consolidate debts, pay property taxes, and pay-off credit cards. (Tr. 43-44) In 2016, the bank discharged \$25,700 resolving the debt in SOR ¶ 1.e as indicated in an IRS Form 1099C, and this debt is mitigated. (AE A) Applicant said he has been making payments for 18 months of about \$150 monthly to address the debt in SOR ¶ 1.f, and the balance is now about \$21,000. (Tr. 44-45, 72-73) He did not provide documentation showing any payments to address the debt in SOR ¶ 1.f, and he is not credited with mitigating the debt in SOR ¶ 1.f.

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)). Consideration of these four allegations will not be considered except for the five purposes listed above.

SOR ¶ 1.g alleges Applicant has a charged-off bank debt for \$5,700. In 2006, Applicant obtained a credit card from the bank. (Tr. 45-46) For a time in 2013, he made \$150 monthly payments, and then when he changed jobs, he stopped making payments. (Tr. 74) He said he paid the debt in 2015. (Tr. 46, 73) Applicant's January 23, 2017 credit report shows this debt as paid with a zero balance. (GE 4) He is credited with mitigating this debt.

SOR ¶ 1.h alleges Applicant has a store debt placed for collection for \$4,500. Applicant had a store credit card since 1997, and the debt became delinquent. (Tr. 46) He did not believe he was responsible for the debt because it was his spouse's account. (Tr. 75; GE 4) The debt is shown as past due in the amount of \$3,800 with the most recent payment in 2014, and the charge-off amount of \$4,900, (AE 4)

SOR ¶ 1.i alleges Applicant has debt placed for collection for \$2,027. Applicant researched the debt and learned it was either paid or "aged out." (Tr. 47, 75-76, 83-84) The debt appears on his January 23, 2017 credit report. (GE 4)

SOR ¶¶ 1.j, 1.k, and 1.m allege Applicant has three delinquent medical debts for \$50, \$40, and \$50. Applicant was unsure about these debts because the family had a large number of medical bills over the years. (Tr. 47-49, 76) Except for a few brief lapses, he had health insurance. (Tr. 63) He did not pay these debts because he was looking for an overall solution such as bankruptcy to resolve his debts. (Tr. 77)

SOR ¶ 1.l alleges Applicant has a charged-off store debt for \$5,894. Applicant said he is making payments on this account. (Tr. 48-49) Later, he said he was unsure whether he had a payment arrangement on this account. (Tr. 77)

SOR ¶ 1.n alleges Applicant has a debt placed for collection for \$55. Applicant said this debt may have resulted from a parking ticket that he or his spouse received. (Tr. 50, 76) He did not pay this debt because he was looking for an overall solution such as bankruptcy to resolve his debts. (Tr. 77)

Applicant's income is now lower than in 2009; however, he receives medical benefits for his family. (Tr. 54-55, 67) He told the IRS in his offer to settle his tax debt that he was paying \$1,200 monthly for medical insurance. (AE R) His current monthly pay is \$21,000. (Tr. 80) In 2015, he purchased a new minivan. (Tr. 66) He uses a budget, and he uses about \$1,000 monthly to pay his debts. (Tr. 67) His budget is set forth in his offers to the IRS and state tax authorities to settle his tax debts. (AE R; AE S) He plans to pay his taxes. (Tr. 67-68) In 2009, and when he responded to the SOR, he was considering filing for bankruptcy. (Tr. 92-93; SOR response) He decided not to file for bankruptcy. (Tr. 93)

Character Evidence

Applicant received excellent performance evaluations from his employer. (AE I; AE J) He received positive recognition for his performance, including in an e-mail and two certificates of appreciation. (AE K; AE L; AE M)

Policies

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

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing 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 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it

is clearly consistent with the national interest to grant or continue his or her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern 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.

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 provides two disqualifying conditions that 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 credit reports, SOR response, and hearing record. The record establishes 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,³ 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;⁴ 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.

³ 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)).

⁴ 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)).

The 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).⁵

No mitigating conditions fully apply; however, Applicant presented some important positive financial information. Applicant described several issues that were partially or wholly beyond his control that caused financial problems: his spouse has a disease affecting her eyes; his spouse spent excessively; his daughter received treatment several times for kidney stones; in 2004, he purchased a home for \$900,000, and he was surprised by maintenance problems and the magnitude of his real estate tax increases; in 2006, his basement flooded; in 2007 and 2008, there was stress in his home because there were "three children in diapers;" the real estate market decline decreasing the fair market value of their home; and his spouse suffered from post-partum depression and the stress of home schooling their other children. Applicant is credited with mitigating the following debts: ¶ 1.e (resolved with an IRS Form 1099C); 1.g (paid); and 1.j, 1.k, 1.m, and 1.n (the debts are \$55 and less and are de minimis under the facts of this case).

Applicant contended that the debt in SOR ¶ 1.i was aged off of his credit report meant that it was mitigated. This is incorrect under the Appeal Board's jurisprudence.⁶ Applicant did not provide proof the SOR ¶ 1.i debt was paid or otherwise resolved.

The negative financial considerations concerns are more substantial than the mitigating information. Applicant did not establish that he showed good judgment when he was so heavily leveraged in the real estate market. He did not detail his efforts to reduce expenses and live within his income. After he learned of his tax debts, he made no payments or minimal payments to the address those tax debts, even though he had

⁵ ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

⁶ The Appeal Board noted in ISCR Case No. 15-02957 at 3 (App. Bd. Feb. 17, 2017):

There is more than one plausible explanation for the absence of debts from a credit report, such as the removal of debts due to the passage of time, and the absence of unsatisfied debts from an applicant's credit report does not extenuate or mitigate an overall history of financial difficulties or constitute evidence of financial reform or rehabilitation. See, e.g., ISCR Case No. 01-04425 at 3-4 (App. Bd. May 17, 2002) and ISCR Case No. 03-05197 at 3 (App. Bd. Oct. 14, 2004).

the financial resources to establish payment plans. He failed to timely file his state and federal tax returns for several years.

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.⁷ 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 2, *supra*. He did not receive notice of a Guideline J or E security concern in the SOR.

The record establishes that Applicant failed to timely file several 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 ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no

⁷ 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).

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 when the tax returns were filed 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, “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 did not provide documentation relating to the debts in SOR ¶¶ 1.c, 1.d, 1.f, 1.h, 1.i, and 1.l: (1) proof of payments, such as checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the creditors; (2) correspondence to or from the creditors to establish maintenance of contact;⁸ (3) credible debt disputes sent to creditors indicating he did not believe he was responsible for the debts and why he held such a belief; (4) more evidence of attempts to negotiate payment plans, such as settlement offers or agreements to show that he was attempting to resolve these debts; or (5) other evidence of progress or resolution. Applicant failed to establish mitigation under AG ¶ 20(e) because he did not provide documented proof to substantiate the existence, basis, or the result of any debt disputes. Debt disputes should be sent to creditors and credit reporting companies, and responses received should be offered into evidence.

Applicant’s taxes and several large debts are unresolved. Applicant’s explanations are insufficient to mitigate financial considerations security concerns.

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

⁸ “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.

conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. 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.

Applicant is a 48-year-old senior information technology and automation expert, and he has worked for a government agency and held a security clearance since 2002. There is no evidence of security violations. In 1991, he received a bachelor's degree. Applicant is married, and he has six children. He received excellent performance evaluations from his employer, and positive recognition for his performance.

Several circumstances partially or wholly beyond Applicant's control adversely affected his finances. His home is heavily leveraged with loans totaling \$1,140,000. The magnitude of his borrowing was risky, and it raised judgment concerns. When his house increased in value, he borrowed more money and spent the funds. He repeatedly failed to withhold sufficient funds from his salary to pay his federal and state income taxes when due. His financial behavior raises an inference he was living beyond his means.

The record established that Applicant failed to timely file his federal and state tax returns for several years. He has substantial unresolved state and federal income tax debts. 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 or state 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

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

he owed substantial state and federal tax debts for several years and his federal and state tax debts have increased even after the SOR was issued. His filing of all unfiled tax returns shortly before his hearing is too little too late to mitigate security concerns.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations security concerns are not mitigated.

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 through 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h through 1.i:	Against Applicant
Subparagraphs 1.j and 1.k:	For Applicant
Subparagraph 1.l:	Against Applicant
Subparagraphs 1.m and 1.n:	For Applicant

(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.").

Conclusion

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

MARK HARVEY
Administrative Judge