DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 15-07654
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

08/07/2017

Decision

HARVEY, Mark, Administrative Judge:

There was insufficient evidence of his criminal offenses, and criminal conduct security concerns are mitigated. Applicant did not provide sufficient evidence of resolution of his financial issues, and financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 10, 2015, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On September 6, 2016, 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 financial considerations and criminal conduct guidelines.

On November 7, 2016, Applicant provided a response to the SOR, and Applicant requested a hearing. (Transcript (Tr.) 15-16; HE 3) On February 17, 2017, Department Counsel was ready to proceed. On March 20, 2017, the case was assigned to me. On March 29, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for April 19, 2017. (HE 1) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered 6 exhibits; Applicant offered 10 exhibits; the only objection was to the admissibility of GE 4; and all proffered exhibits were admitted into evidence. (Tr. 18-24; GE 1-6; Applicant Exhibits (AE) A-J) Applicant objected to consideration of his indictment because it was dismissed before trial. (Tr. 20-22; GE 4) The objection was overruled because the disposition of the charges goes to the weight not to the admissibility of the indictment. (Tr. 22) On April 27, 2017, DOHA received a copy of the transcript of the hearing.

While this case was pending a decision, 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]

Findings of Fact[2]

Applicant's SOR response admitted the SOR allegations in ¶¶ 1.a through 1.g, and 2.a. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 50 years old, and he has been employed as a software engineer for a DOD contractor for two years. (Tr. 6, 10; GE 1) In 1985, he graduated from high school. (Tr. 6-7) In 2014, he received a bachelor's of science degree in computer information systems. (Tr. 7) He graduated summa cum laude with a 3.67 grade point average (GPA). (Tr. 57) He served in the Army from 1986 to 1996; his military occupational specialty (MOS) was logistical specialist (92A); he served overseas in South Korea and Hawaii; when he left the Army, he was a specialist (E-4); and he received an honorable discharge.

[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.

(Tr. 7-8; GE 1) In 1986, he married, and in 2005, he divorced. (Tr. 9) His children are ages 23, 26, 29, and 30. (Tr. 9)

In 2009 or 2010, Applicant was injured at his federal employment, and he did not receive any income for about six months. (Tr. 33) From 2011 to 2015, Applicant was unemployed. (Tr. 10) During those years, he attended university. (Tr. 10) He received monthly partial disability from his federal employer of about $2,300 from 2011 to 2015. (Tr. 22) In 2015, his monthly disability was reduced to $568. (Tr. 32)

Financial Considerations[3]

The status of Applicant's 10 SOR allegations is as follows.

¶ 1.a alleges Applicant failed to timely file his federal and state tax returns for tax years 2001, 2003, 2004, 2005, and 2007. In 2007, he filed his federal income tax return for tax year 2001. (Tr. 36) In 2006, he filed his federal income tax return for tax year 2004. In 2007, the Internal Revenue Service (IRS) filed a substitute federal income tax return for tax year 2004. (Tr. 36) In November of 2007, Applicant filed his federal income tax returns for tax years 2005 and 2006. (Tr. 36) In October of 2009, Applicant filed his federal income tax return for 2007. (Tr. 36)

Applicant's attorney is working on filing his state income tax returns for state B for tax years 2001 through 2005. (Tr. 37) He estimated he owed about $10,000 to state B for those tax years. (Tr. 38) He also owes $1,584 to state B for tax year 2006. (Tr. 44; GE 3 at 73-76) He said he does not need to file income tax returns for state B after 2006 because he does not have connections with state B after 2006. (Tr. 44) Applicant's state B income tax return for tax year 2007 was signed in June 2016 and shows $1,506 as the amount of taxes owed. (GE 3 at 77-80) Applicant's partial state B income tax return for tax year 2008 was presented. (GE 3 at 81-84) Applicant's 2009 state B income tax return was signed in June 2016 and shows $1,728 as the amount of taxes owed. (GE 3 at 85-89) Applicant's 2010 state B income tax return was signed in April 2011 and shows $2,089 as the amount of taxes owed. (GE 3 at 64-65; 91-95)

[3] Applicant's SOR does not include allegations that he failed to timely file his state tax returns for state A for tax year 2002 and for tax years 2006 to 2010. Some of his delinquent federal income taxes may not be encompassed in the federal tax liens in SOR ¶¶ 1.c and 1.d. 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 non-SOR allegations will not be considered except for the five purposes listed above.

On February 21, 2017, Applicant filed his state income tax return for state A for tax years 2001 through 2005. (Tr. 28-29; AE E-I) He provided the front page of his state income tax returns. (AE E-I) In June 2016, he filed his state A income tax returns for tax years 2006 through 2010. (GE 3 at 48-63, 66-70) Applicant said he did not need to file income tax returns to state A for tax years 2011 through 2014 because disability benefits are not taxable. (Tr. 46) He said all of his state A and federal income tax returns were filed. (Tr. 36)

¶ 1.b alleges Applicant failed to pay his federal and state income taxes for 2001, 2003, 2006, 2007, and 2008. He said he did not owe state A income taxes for tax years 2001 through 2005. (Tr. 29-30) On April 10, 2017, he paid the state A income tax authority $311, and he said the $311 payment was for tax years 2015 and 2016. (Tr. 30-31, 45; AE J) He said he did not owe any income taxes to state A because he will receive a credit for taxes paid to state B. (Tr. 45) On April 10, 2017, he wrote he paid the IRS $1,929, which he said was for tax year 2016. (Tr. 31-32; AE J)

¶ 1.c alleges Applicant owes a federal tax lien entered in March 2011 for $8,933, and ¶ 1.d alleges Applicant owes a federal tax lien entered in September 2008 for $44,868. Applicant said he was able to settle this debt. (Tr. 43) He did not pay this debt. (Tr. 47, 52)

Applicant had difficulty with his tax returns because his spouse claimed their children as dependents when she filed her tax returns. (Tr. 41) He owed taxes when he went to file his returns, and this situation put him in "a spiral" where he was unable to pay his tax debt. (Tr. 42) After Applicant was injured in 2009 or 2010, his federal tax account went into hardship status, and he did not have to make payments on his federal tax debt. (Tr. 40) According to Applicant's May 18, 2016 IRS tax transcript, Applicant owed the following amounts to the federal government for the listed tax years: $13,216 for 2001; $0 for 2003; $15,957 for 2004; $0 for 2005; $9,721 for 2006; $6,262 for 2007; $6,250 for 2008; and $0 for 2009 through for 2014. (Tr. 38; GE 3 at 4-33) Applicant said the IRS determined he owed $53,000, and the IRS agreed to settle the debt for $6,000. (Tr. 38) Appellant initially said he would send payment in the next 90 days, and then he said the IRS will need 90 days to complete the settlement. (Tr. 38) He said the tax debt was taken off of his credit report. (Tr. 39) Applicant's only complete credit report of record is dated March 26, 2015. (GE 6) A copy of the IRS settlement offer is not part of the file.

¶ 1.e alleges a judgment filed against Applicant in June 2008 for $1,152. Applicant said it was paid; however, he did not provide any documentation showing payment. (Tr. 47)

¶ 1.f alleges a store debt placed for collection for $270. Applicant said it was charged-off and closed without being paid. (Tr. 47-48)

¶ 1.g alleges a mortgage debt that went to foreclosure, and any deficiency balance remains unpaid. Applicant said the foreclosure was in 2012 or 2013, and there was no deficiency balance. (Tr. 48) Applicant's March 26, 2015 credit report indicates the

Department of Veterans Affairs (VA) guaranteed the mortgage.[4] There is no evidence that Applicant owes a deficiency on the loan in SOR ¶ 1.g.

¶ 1.h alleges a debt placed for collection for $1,871. Applicant said the debt was paid; however, he did not have any documentation to show payment. (Tr. 48)

¶¶ 1.i and 1.j allege two medical debts placed for collection for $63 and $35. Applicant said he paid the two debts; however, he did not provide documentation showing payment. (Tr. 50)

On April 10, 2017, Applicant paid a non-SOR medical collection debt for $100. (Tr. 26-27; AE A) On April 7, 2017, Applicant paid a medical debt for $124, and on April 12, 2017, the creditor wrote that a non-SOR account has a zero balance. (Tr. 27-28; AE B) On April 7, 2017, Applicant paid a non-SOR medical debt for $281, and on April 13, 2017, the creditor wrote the account had a zero balance. (Tr. 28; AE C) On April 7, 2017, Applicant paid a non-SOR medical debt for $104, and on April 13, 2017, the creditor wrote the account had a zero balance. (Tr. 28; AE D) He has about $5,500 in his bank account. (Tr. 34) In 2016 or 2017, he withdrew $15,000 from his 401(k) account to pay his federal income tax debt to the federal government. (Tr. 34) He also withdrew $13,000 from his 401(k) account to pay his attorney to help with his criminal charges. (Tr. 35) He has about $2,000 left in his 401(k) account. (Tr. 34) He did not receive credit counseling. (Tr. 33)

Criminal Conduct

In April 2015, a grand jury indicted Applicant for theft of government funds, Workers' Compensation fraud, and making a false statement to a government agency. In November 2015, the charges were dismissed without prejudice. Applicant injured his leg while at work when he stepped in a hole. (Tr. 53) He had two surgeries. (Tr. 54) He went on permanent disability. (Tr. 54) He walked to his college classes, and an investigator videotaped him walking. A physician reviewed his medical records and concluded

[4] The VA loan guarantee is as follows: "For loans between $45,000 and $144,000, the minimum guaranty amount is $22,500, with a maximum guaranty, of up to 40 percent of the loan up to $36,000, subject to the amount of entitlement a veteran has available." As to whether the VA loss on a loan must be repaid, the VA explains:

> Must the loan be repaid?
>
> Yes. A VA guaranteed loan is not a gift. It must be repaid, just as you must repay any money you borrow. The VA guaranty, which protects the lender against loss, encourages the lender to make a loan with terms favorable to the veteran. But if you fail to make the payments you agreed to make, you may lose your home through foreclosure, and you and your family would probably lose all the time and money you had invested in it. If the lender does take a loss, VA must pay the guaranty to the lender, and the amount paid by VA must be repaid by you. If your loan closed on or after January 1, 1990, you will owe the Government in the event of a default only if there was fraud, misrepresentation, or bad faith on your part.

Factsheet VAP 26-4 is available on the VA website at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CD4QFjAA&url=http%3A%2F%2Fwww.benefits.va.gov%2Fhomeloans%2Fdocs%2Fvap_26-4_online_version.pdf&ei=g4QbU_zSCaST0QH0mIDwAg&usg=AFQjCNFv0-ay6SGFdfcDFlaE7aENpSq0cA.

Applicant was not so seriously injured as to be incapable of working in employment that required standing for at least six hours a day. (Tr. 53-57) Applicant insisted he was not guilty of the offense. There is no evidence that the federal agency has sought recovery of the disability pay Applicant received.

Character Evidence

Applicant's project manager has known Applicant for 18 months. (Tr. 60) Applicant is diligent, dedicated, honest, trustworthy, loyal, and patriotic. (Tr. 60-62) Applicant's supervisor described him as energetic, diligent, frugal, trustworthy, and conscientious. (Tr. 63-67)

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 . . . 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). Applicant's history of delinquent debt is documented in his 2015 credit report, SOR response, and hearing. The record establishes the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(g) 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,[5] 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;[6]

[5] 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)).

[6] 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-

> (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; however, Applicant is credited with mitigating SOR ¶ 1.g because there is no evidence of a post-foreclosure deficiency, and the VA guaranteed the payment of his mortgage. There is no evidence Applicant engaged in fraud, misrepresentation, or bad faith. *See supra* note 4. He said he paid the debts in ¶¶ 1.i and 1.j, which together total less than $100. He does not need to provide proof that he paid ¶¶ 1.i and 1.j because the amount of the two medical debts is low. In April 2017, he paid four non-SOR medical debts. Over the years, he made some payments on his delinquent federal and state taxes.

Applicant's unemployment, divorce, and disability were beyond his control and adversely affected his finances. He does not receive full mitigation because he mishandled his state and federal income taxes before his disability in 2009 and his divorce in 2005. These circumstances do not excuse a failure to timely file tax returns for multiple tax years.

> 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)).

Applicant failed to timely file his federal and state tax returns for tax years 2001, 2003, 2004, 2005, and 2007. He also failed to timely file his state A tax returns for tax years 2002 and 2006 through 2010. *See supra* note 3. He conceded he owed about $50,000 in delinquent federal taxes and about $10,000 in delinquent state taxes.

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 supra* note 3. 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 harm, no foul" approach to an Applicant's course of conduct and employed an "all's well

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[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).

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 did not provide 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) does not apply.

Applicant relies upon the absence of delinquent debts from his current credit report and/or the charge-off status of the debt in SOR ¶ 1.f to mitigate security concerns. Non-collectability of a charged-off "debt does not preclude consideration of the debt and circumstances surrounding it." ISCR Case No. 15-05049 at 3 (App. Bd. July 12, 2017) (citation omitted). "[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.[8] Debts may be dropped from a credit report upon dispute when creditors believe the debt is not going to be paid or when the debt has been charged off.

[8]Title 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.

There is insufficient evidence about why Applicant was unable to make greater progress resolving his tax issues. There is insufficient assurance that his financial problems are being resolved, are under control, and will not recur in the future. He failed to establish that financial considerations security concerns are mitigated.

Criminal Conduct

AG ¶ 30 describes the security concern about criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

AG ¶ 31 lists one condition that could raise a security concern and may be disqualifying in this case, "(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted." In April 2015, Applicant was indicted by a grand jury for theft of government funds, Workers' Compensation fraud, and making a false statement to a government agency. The indictment indicates the grand jury believed Applicant provided false information about the severity of his injury and his inability to work and thereby obtained Workmans' Compensation benefits.

The evidentiary standard for a grand jury indictment is probable cause to believe the defendant committed the offense. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 423 (1983). Probable cause exists where the facts and circumstances are reasonably trustworthy and "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been . . . committed." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). *See also Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (probable cause does not require a fact to be "more likely true than false"); *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980) ("probable cause" means "the existence of a reasonable ground to believe the accused guilty") (internal quotation marks omitted). "Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision." *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

AG ¶ 32 describes four conditions that could mitigate security concerns including:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
>
> (c) no reliable evidence to support that the individual committed the offense; and

> (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(c) applies. The reliability of a grand jury indictment as proof of crime is limited. The grand jury process does not necessarily include consideration of exculpatory evidence or the accused's statement. Applicant's presentation at his security clearance hearing impeached the reliability of the evidence that he committed the offense. His indictment was dismissed, which is an indication the U.S. Attorney's Office did not believe there was sufficient probable cause to support the indictment. The federal agency that paid the disability to Applicant from 2011 to 2015 has not taken action to collect the disability payments. Applicant had two surgeries to correct his injury, and he insisted that he was honest about his inability to return to his federal employment. Security clearance proceedings employ the "substantial evidence" evidentiary standard, which 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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See* ISCR Case No. 15-05049 at 4 (App. Bd. July 12, 2017) ("A Judge's material findings must be based on substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence.") (citing ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014)). The substantial evidence standard is more rigorous than the probable cause standard. *TVA v. Whitman*, 336 F.3d 1236, 1240 n. 6 (11th Cir. 2003).

After careful assessment of Applicant's case in mitigation, I conclude there is not substantial reliable evidence of record that he committed the felonies listed on his indictment. Criminal conduct 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 Guidelines F and J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is 50 years old, and he has been employed as a software engineer for a DOD contractor for two years. In 2014, he received a bachelor's of science degree in computer information systems. He graduated summa cum laude with a 3.67 GPA. He served in the Army from 1986 to 1996; his MOS was logistical specialist; he served overseas in South Korea and Hawaii; when he left the Army, he was a specialist; and he received an honorable discharge. In 1986, he married, and in 2005, he divorced. His children are ages 23, 26, 29, and 30. His character evidence supports granting his access to classified information. Divorce, disability, and unemployment adversely affected his finances. There is no evidence of security violations.

The financial evidence against granting Applicant's security clearance is more substantial. Applicant failed to timely file his federal and state tax returns for tax years 2001, 2003, 2004, 2005, and 2007. He also failed to timely file his state A tax returns for tax years 2002 and 2006 through 2010. *See supra* note 3. While he made some payments to address his tax debt over the years as shown in his tax transcripts, he conceded he owed about $50,000 in delinquent federal taxes and about $10,000 in delinquent state taxes. He provided insufficient corroborating or substantiating documentary evidence of payments and established payment plans for the SOR debts in ¶¶ 1.b through 1.f and 1.h. He did not provide a detailed plan about how he intended to resolve all of his delinquent SOR debts. His actions show lack of financial responsibility and judgment and raise unmitigated questions about his reliability, trustworthiness, and ability to protect classified information. *See* AG ¶ 18. More documented information about his inability to pay debts, financial history, credible debt disputes, or documented financial progress is necessary 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 more effort towards documented resolution of his past-due debts, and 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. Criminal conduct security concerns are mitigated; however, financial consideration security concerns are not mitigated. It is not clearly consistent with the interests of national security to grant Applicant security clearance eligibility at this time.

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.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraphs 1.i and 1.j:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

_____
Mark Harvey
Administrative Judge