



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



In the matter of:

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ISCR Case No. 16-00173

Applicant for Security Clearance

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

10/23/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant has an unpaid judgment against him for \$29,637. He failed to timely file his federal income tax returns for tax years 2010, 2012, and 2013. He did not timely file his state tax return for tax year 2010. He has substantial unpaid federal income taxes from tax years 2006 and 2010. 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 May 10, 2015, Applicant completed and signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). Government Exhibit (GE) 1. On February 17, 2017, 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). Hearing Exhibit (HE) 2. The SOR set forth security concerns arising under the financial considerations guideline.

On March 23, 2017, Applicant provided a response to the SOR, and he requested a hearing. HE 3. On April 25, 2017, Department Counsel was ready to proceed. On May

2, 2017, the case was assigned to me. On May 9, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for June 14, 2017. HE 1. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered seven exhibits; Applicant offered five exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Transcript (Tr.) 19-24; GE 1-7; Applicant Exhibits (AE) A-E. On June 27, 2017, DOHA received a copy of the hearing transcript. On July 11, 2017, Applicant provided six documents, which were admitted without objection. AE F-AE K. The record closed on July 13, 2017. Tr. 102.

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 on or after June 8, 2017. The new AGs supersede the previous AGs. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Findings of Fact²

In Applicant's SOR response, he admitted SOR ¶¶ 1.c, 1.d, 1.i, and 1.n, and he denied the other 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 40 years old, and DOD contractors have employed him as a maintenance technician for two years. Tr. 7, 10. He has attended college; however, he has not received a degree. Tr. 7. He was married from 1994 to 2000 and from 2005 to 2010. Tr. 7-8. He married his current spouse in 2015. Tr. 8. He has one son, who is serving in the U.S. Navy, and a three-year-old son with his current spouse. Tr. 8. He served in the Air Force from 1994 to 2000, and he was a senior airman (E-4) when he received an honorable discharge. Tr. 9, 25-26. Applicant's spouse does not work outside their home. Tr. 76.

Financial Considerations

Applicant and his father went into the restaurant/bar business together, and they owned two restaurants until the restaurants failed around 2014. Tr. 78-81, 88-90. Applicant worked at their restaurants from about 2003 to 2011. Tr. 27, 31-33. He worked at another business from 2010 to 2012. Tr. 33. From 2012 to 2014, he worked for a friend's business for limited income. Tr. 35. He was unemployed from October 2014 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/SEAD4_20170608.pdf.

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

February 2015, and from March to May 2016. Tr. 11-12, 36-37; GE 1. He started with his current employer in May 2016, and he has part-time employment that he started in August 2016. Tr. 37. His monthly gross income is \$8,000. Tr. 37-38.

Applicant owed federal income taxes of \$30,319 for tax year 2006. Tr. 49; SOR ¶ 1.c; GE 2; AE E at 5. He said a secretary of his employer's construction business made a mistake resulting in the tax debt. Tr. 49. His December 20, 2016 IRS tax transcript for tax year 2006 shows: tax return filed November 5, 2007; adjusted gross income of \$76,377; tax per return of \$24,984; tax paid with return of \$1,000; and account balance of \$30,319. GE 2. Apparently, no federal taxes were withheld from Applicant's paycheck, and no quarterly tax payments were made in 2006. Applicant's father was not involved in a business with Applicant in 2006. Tr. 92. In 2008, the federal government filed a tax lien against Applicant for \$24,355. SOR ¶ 1.e. Applicant believes the 2008 tax lien was for taxes owed for tax year 2006. Tr. 50-51. SOR ¶¶ 1.c and 1.e are duplications of each other, and SOR ¶ 1.c is found for Applicant. Tr. 52. Applicant had a refund of \$3,438 for tax year 2015, and the IRS credited the refund towards his tax debt for tax year 2006. Tr. 50; GE 2.

Applicant provided seven federal tax transcripts, which indicate as follows:

Tax Year	Date Filed	AGI	Tax Owed	Tax Refund & Tax Year Applied	Exhibit
2010	Jan. 9, 2017	\$72,347	\$20,112		AE F
2011		0	0		AE G
2012	Jan. 9, 2017	\$15,784		\$433 (2013)	AE H
2013	Jan. 9, 2017	\$36,000	\$6,691		AE I
2014		0	0		AE J
2015	May 9, 2016	\$60,061 ³		\$3,438 (2006)	GE 2
2016	June 5, 2017	\$69,137	\$956		AE K

Applicant said he did not have any income for tax years 2011 and 2014, and he did not file tax returns for those years. Tr. 39-40, 40, 42, 48. The income threshold for filing a federal tax return in 2012 for a single person under age 65 was \$9,750.⁴ He said his employer paid his expenses in 2014, and he did not count those payments as income. Tr. 40. He did not indicate the amount of his expenses.

Applicant failed to timely file his federal tax returns for tax years 2010, 2012, and 2013. Tr. 40. He did not timely file his tax return for tax year 2010 because he knew he "owed a lot of money." Tr. 41. He was also having problems with his spouse. Tr. 41. He did not timely file his tax returns for tax years 2012 and 2013 because he knew he owed

³ Applicant could not explain why his adjusted gross income for tax year 2015 was \$65,000, and his taxable income was only \$35,000. Tr. 101. He said maybe it is a clerical error. Tr. 102.

⁴ See IRS Publication 501, *Exemptions, Standard Deduction, and Filing Information For use in preparing 2012 Returns*, at 2, <https://www.irs.gov/pub/irs-prior/p501--2012.pdf>.

the Internal Revenue Service (IRS) for tax year 2010, and he knew he would not receive a refund. Tr. 44. He “honestly just blew it off.” Tr. 44.

Applicant contacted the IRS twice. Tr. 44-45; SOR response. The first time the IRS advised him that he owed more than \$30,000 for tax year 2010, and he was unable to afford payments. Tr. 45. The second time the IRS advised him he needed to file the tax returns that were overdue before a payment plan could be established. Tr. 45. He was also unable to file because his former spouse took Applicant’s documentation from his storage unit. Tr. 45. When he tried to contact her about his documentation, she would not communicate with him. Tr. 46. He told the IRS about lacking documentation to file his tax return, and the IRS advised him he still needed to file his tax returns. Tr. 47. The IRS was not seeking to levy his bank account or pay, and so he “blew if off again.” Tr. 47.

Applicant said he failed to timely file his state tax return for tax year 2010; however, he timely filed his state tax returns for the other years. Tr. 53; SOR ¶ 1.b; GE 3. Applicant’s SOR alleges a delinquent state tax debt of \$4,283 (SOR ¶ 1.d), two state tax liens filed against him in 2010 for \$16,742 (SOR ¶ 1.f) and \$16,755 (SOR ¶ 1.g), and one state tax lien filed against him in 2014 for \$5,734 (SOR ¶ 1.h). Applicant believed his partner in the construction business paid the state tax liens, and they were released. Tr. 63; GE 2, 3. December 14, 2016 correspondence from the state tax authority indicates in 2015, Applicant made seven payments to address his state tax debt for 2006 and one payment to address his state tax debt for 2010. GE 2. In 2016, Applicant made five payments to address his state tax debt for 2006 and two payments to address his state tax debt for 2010. GE 2. On December 14, 2016, the state tax authority advised him that he had paid \$1,904 to address his delinquent state tax debt from tax year 2010. GE 2. The balance owed on his state tax debt for 2011 is \$4,284. Tr. 52-56, 70; GE 2. He did not make any payments from April 2016 to December 2016 because he was unemployed, and he resumed making \$120 monthly payments towards his state tax debt in January 2017. Tr. 68, 70-71. He owes \$160 to the state tax authority for the 2016 tax year. AE E at 1.

A business that Applicant and his father co-owned closed down, and the landlord obtained a judgment against Applicant and his father for \$29,637. Tr. 58-59; SOR ¶ 1.i. The trustee for Applicant’s Chapter 13 bankruptcy will pay his tax debts. Tr. 63. Applicant’s payment to the bankruptcy trustee will be \$1,700 monthly. Tr. 65, 73. His first payment is scheduled for July 2017. Tr. 73. His bankruptcy is scheduled for a five-year payment plan. Tr. 93, 97. He will pay about \$100,000 into the plan as it is currently configured, and his priority and secured debts will be paid, if he completes the payment plan. Tr. 94. After the current plan is completed, his unsecured nonpriority debts will be discharged.

SOR ¶¶ 1.j and 1.k allege an apartment complex placed two debts for collection for \$2,011 and \$1,885. Actually, Applicant owed only one debt to the apartment complex. Applicant settled the debt for \$1,042, and he provided a letter from the creditor indicating the debt was resolved. Tr. 60; SOR response. SOR ¶ 1.l alleges a county placed a debt for collection for \$1,111, and Applicant did not recognize the debt. Tr. 60-61. SOR ¶ 1.m alleges a debt placed for collection for \$813, and Applicant did not recognize the debt. Tr.

60-61. SOR ¶ 1.n alleges a debt owed to a municipal court placed for collection for \$710, and Applicant said he made some payments. Tr. 61.

Applicant has owed a child-support arrearage of about \$12,000 from sporadically missing payments from 2008 to 2012 for his son who is now 21.⁵ Tr. 64-65; GE 7. He placed his child-support arrearage on his Chapter 13 bankruptcy, and the trustee will pay this priority debt. Tr. 64.

Applicant's bankruptcy indicates he has a non-SOR collection debt for \$4,560. Tr. 74. Applicant's child support was delinquent, and his driver's license was suspended. Tr. 74. He was cited for driving on a suspended license, driving an unregistered vehicle, and driving without insurance. Tr. 74. He made some payments over the years. Tr. 75. He gave priority to paying his state tax debt and child support over paying for his ticket. Tr. 75. He received a letter from child-support division, and his driver's license was reinstated. Tr. 76.

Applicant's bankruptcy attorney told him about six months ago to stop paying his debts, and he followed that advice. Tr. 59, 66, 73. He used his salary to pay \$3,500 for repairs on his vehicle. Tr. 66. He pays \$370 monthly for child support. Tr. 68. Applicant received credit counseling in June 2017 as part of the bankruptcy process. Tr. 47; GE 7. On June 1, 2017, he filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code, and on June 13, 2017, he filed an amended bankruptcy petition. AE A; GE 7. On his bankruptcy Form 106, he listed: secured claims of \$51,146; priority unsecured claims of \$33,439; nonpriority unsecured claims of \$75,149; and total claims of \$159,149. AE A; GE 7.

Applicant's amended bankruptcy filing indicates he has 12 debts as follows: (1) \$4,500 state tax lien for 2010 tax year with an unsecured portion of \$4,500; (2) \$20,113 federal tax lien for tax year 2010 with an unsecured portion of \$5,113; (3) \$1,000 federal tax debt for tax year 2016; (4) child-support debt of \$12,166, as a priority unsecured debt; (5) non-SOR credit card debt for \$2,641; (6) the judgment previously discussed for \$29,637; (7) non-SOR credit card debt for \$809; (8) non-SOR medical debt for \$4,000; (9) non-SOR credit card debt for \$2,585; (10) non-SOR debt for ticket for \$4,560; (11)

⁵ Applicant's SOR does not include information about his delinquent child-support debt and several debts in his bankruptcy filing. 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)). The allegations of non-SOR delinquent taxes will not be considered except for the five purposes listed above.

medical debt for \$238; and (12) federal tax debt for tax year 2006 for \$33,000. AE A; GE 7 (GE 7 is the complete Schedule E/F).

Applicant's father's savings and 401(k) were exhausted in his attempt to support his and Applicant's restaurant businesses. Tr. 79-80. He has been in a Chapter 13 bankruptcy payment plan for three years, and he has two years to go. Tr. 79-80. He provided financial support to Applicant and his family when Applicant was unemployed, including allowing Applicant and his family to live with him. Tr. 81. Applicant's father believes Applicant's financial problems are due to his failed marriage and businesses, and Applicant is financially responsible. Tr. 83-86. Applicant's family has a strong military tradition with Applicant's great grandfather serving in World War I, his grandfather serving in World War II, and his father serving in the Air Force for 24 years to retirement. Tr. 86-87.

Applicant loves his work for DOD, and he loves the United States. Tr. 99. He promised to protect national security and to pay his creditors. Tr. 99-100. He wants to continue to contribute to DOD. Tr. 99.

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." The record establishes AG ¶¶ 19(a), 19(b), 19(c), and 19(f).

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

(a) the behavior happened so long ago,⁶ 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;⁷

⁶ 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)).

⁷ 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].

(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;

(f) the affluence resulted from a legal source of income; 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).

Applicant's periods of unemployment and underemployment and his divorce were outside his control and adversely affected his finances. He is credited with mitigating the following SOR allegations: ¶ 1.d because he has a history of making payments to address his state tax debt; ¶ 1.c because it is a duplication of SOR ¶ 1.e; ¶¶ 1.f, 1.g, and 1.h because the state tax liens were paid; SOR ¶¶ 1.j and 1.k are duplications of the same debt, and Applicant settled the debt for \$1,042; ¶¶ 1.l and 1.m because Applicant did not recognize the debts; and ¶ 1.n because he said he made some payments. SOR ¶ 1.i is a judgment for \$29,637, and Applicant is not credited with mitigating this debt because he did not show any progress resolving this debt.

Applicant's action to resolve his debts utilizing Chapter 13 of the Bankruptcy Code is a positive financial development. The website for U.S. Courts explains the basics for a chapter 13 bankruptcy:

A chapter 13 bankruptcy is also called a wage earner's plan. It enables individuals with regular income to develop a plan to repay all or part of their debts. Under this chapter, debtors propose a repayment plan to make

(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)).

installments to creditors over three to five years. If the debtor's current monthly income is less than the applicable state median, the plan will be for three years unless the court approves a longer period "for cause." (1) If the debtor's current monthly income is greater than the applicable state median, the plan generally must be for five years. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. § 1322(d). During this time the law forbids creditors from starting or continuing collection efforts.

* * *

The provisions of a confirmed plan bind the debtor and each creditor. 11 U.S.C. § 1327. Once the court confirms the plan, the debtor must make the plan succeed. The debtor must make regular payments to the trustee either directly or through payroll deduction, which will require adjustment to living on a fixed budget for a prolonged period. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur new debt without consulting the trustee, because additional debt may compromise the debtor's ability to complete the plan. 11 U.S.C. §§ 1305(c), 1322(a)(1), 1327.

A debtor may make plan payments through payroll deductions. This practice increases the likelihood that payments will be made on time and that the debtor will complete the plan. In any event, if the debtor fails to make the payments due under the confirmed plan, the court may dismiss the case or convert it to a liquidation case under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1307(c). The court may also dismiss or convert the debtor's case if the debtor fails to pay any post-filing domestic support obligations (i.e., child support, alimony), or fails to make required tax filings during the case. 11 U.S.C. §§ 1307(c) and (e), 1308, 521.⁸

Applicant has taken an important step towards showing his financial responsibility. His bankruptcy repayment plan was developed under the supervision of the bankruptcy court after assessing his income, ability to pay, and debts.

Applicant failed to timely file his federal income tax return for tax years 2010, 2012, and 2013. He filed those tax returns on January 9, 2017. He did not timely file his state tax return for tax year 2010. He has substantial unpaid federal income taxes from tax years 2006 and 2010. 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.⁹ For

⁸ See U.S. Courts Website, Chapter 13 Bankruptcy Basics, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics>.

⁹ 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

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. 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 [his or her] 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 [his or her] 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 employing 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

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).

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, 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 was scheduled to begin making payments to the bankruptcy trustee in July 2017, one month after his hearing. In turn, the bankruptcy trustee will make payments to the IRS, state tax authority, and other priority creditors, including to address his child-support arrearage. AG ¶ 20(g) does not fully apply because it is too soon to know whether Applicant will make the necessary payments to the bankruptcy trustee.

There is insufficient evidence about why Applicant was unable to make greater progress sooner resolving his tax issues and insufficient assurance his financial problems are resolved, 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 40 years old, and DOD contractors have employed him as a maintenance technician for two years. He attended college; however, he has not received a degree. He was married from 2005 to 2010. He married his current spouse in 2015. He has one son, who is serving in the U.S. Navy, and a three-year-old son with his current spouse. He served in the Air Force from 1994 to 2000, and he was a senior airman when he received an honorable discharge. Applicant's spouse does not work outside their home. Underemployment, unemployment, and divorce were circumstances beyond Applicant's control that harmed his finances. He received financial counseling, and in June 2017, he filed for protection under Chapter 13 of the Bankruptcy Code. The bankruptcy court scheduled his first payment of \$1,700 for July 2017, the month after his hearing.

Applicant's family has a strong military tradition with Applicant's great grandfather serving in World War I, his grandfather serving in World War II, and his father serving in the Air Force for 24 years to retirement. Applicant loves his work for DOD, and he loves the United States. He promised to protect national security and to pay his creditors. He wants to continue to contribute to DOD.

The evidence against grant of his security clearance is more substantial. Applicant has an unpaid judgment for \$29,637. He failed to timely file his federal income tax returns for tax years 2010, 2012, and 2013. He filed those tax returns on January 9, 2017. He did not timely file his state tax return for tax year 2010. He has substantial unpaid federal income taxes for tax years 2006 and 2010. 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.¹⁰ The primary problem here is that

¹⁰ 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, expenditures for his children's college tuition and expenses, 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.

Applicant has known that he needed to file federal income tax returns for several years, and he waited until January 9, 2017 to file his tax returns. His filing of all unfiled tax returns on January 9, 2017, and his filing of Chapter 13 bankruptcy in June 2017 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 granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations security 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. 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 and 1.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraphs 1.f through 1.h:	For Applicant
Subparagraphs 1.i:	Against Applicant
Subparagraphs 1.j through 1.n:	For 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

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.").