



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



In the matter of:

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ISCR Case No. 17-00247

Applicant for Security Clearance

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel  
For Applicant: Hideaki Sano, Esq.

05/22/2018

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant mitigated the security concerns under Guideline J (criminal conduct); however, security concerns under Guidelines F (financial considerations) and E (personal conduct) are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On March 24, 2014, and May 5, 2015, Applicant completed Questionnaires for National Security Positions (SF 86) or security clearance applications (SCA). (Government Exhibit (GE) 1, 7) On May 9, 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).

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 Guidelines J, F, and E.

On May 22, 2017, Applicant responded to the SOR and requested a hearing. HE 3. On July 6, 2017, Department Counsel was ready to proceed. On October 5, 2017, the case was assigned to another administrative judge. On December 18, 2017, the case was transferred to me. On January 4, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 17, 2018. HE 1. Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. Tr. 15-16. Applicant's hearing was held as scheduled using video teleconference. The video failed after 110 minutes of the hearing had elapsed. Tr. 6, 97. For the last 52 minutes of the hearing, the hearing continued without video. Tr. 97, 133. Applicant and Department Counsel concurred that it was appropriate to complete the hearing without video. Tr. 115. Since the Directive authorizes an Applicant to present their case without a hearing through the submission of documents, I approved the presentation of part of Applicant's case utilizing an audio medium without video.

During the hearing, Department Counsel offered 8 exhibits; Applicant offered 24 exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Tr. 11-12; 20-23; GE 1-8; Applicant Exhibits (AE) 1-24. On January 24, 2018, DOHA received a copy of the hearing transcript.

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A new adjudicative guidelines (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.<sup>1</sup>

### **Findings of Fact<sup>2</sup>**

In Applicant's SOR response, he admitted the SOR allegation in ¶ 2.c, and he denied the other SOR allegations. HE 2. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 41-year-old information technology expert. Tr. 42, 98. He has supported the DOD sporadically from 2001 until around 2015 because he has had occasional employment in the non-federal sector. Tr. 42. He provided his resume. Tr. 42; AE 12. In 1994, he graduated from high school, and he attended college for about seven months. Tr. 43; GE 1. In February 2015, he lost his employment with a DOD contractor because of his arrest for presenting a fraudulent insurance document to the state to obtain tags for his vehicle. Tr. 99. He is currently employed providing information technology services to private financial institutions. Tr. 55. A DOD contractor has offered to reemploy

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<sup>1</sup> 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](http://ogc.osd.mil/doha/5220-6_R20170608.pdf).

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

Applicant if his security clearance is reinstated. Tr. 73-74; AE 19. In 2011, Applicant married, and he has a six-year-old son. Tr. 99. He has not served in the military. Tr. 99; GE 1.

### **Personal Conduct and Criminal Conduct**

In December 2014, Applicant was arrested and charged with felony Forgery and Counterfeiting. In February 2015, he pleaded guilty to the misdemeanor charge of Insurance-Producing False Evidence of Insurance. AE 2. The court ordered him to pay a \$500 fine, a \$75 victim fee, and \$375 in court costs. Tr. 51; AE 2; SOR ¶ 1.a.

In December 2014, Applicant was arrested and charged with two counts: (1) felony Forgery and Counterfeiting; and (2) felony Insurance Certificates-Possession/Sale of Stolen/Counterfeit MCL. He pleaded guilty to the reduced misdemeanor charge of No Proof of Vehicle Insurance. SOR ¶ 1.b. In June 2015, the court put Applicant on probation for six months for No Proof of Vehicle Insurance, and then when he successfully completed his probation, the charge was dismissed. Tr. 52-55; AE 1; AE 3.

Applicant explained that in October 2014, he obtained a vehicle insurance document from a friend that he has known since high school in return for repairing the friend's computer. Tr. 90-91. The document had Applicant's vehicle identification number (VIN) and false insurance company information. Tr. 91. Applicant provided the false document at the vehicle registration location, and obtained tags for his vehicle. Tr. 92. The state sent him a letter indicating the insurance document was fraudulent, and he was directed to present valid documentation. Tr. 47, 93; AE 4. He did not immediately obtain and present valid insurance documentation because he could not afford vehicle insurance. Tr. 93. He said he was on his way to get some "real no-fault" insurance, when the police arrested him in December 2014. Tr. 47, 93. He had not purchased valid vehicle insurance at the time the police arrested him. Tr. 94. Applicant admitted to the police officer that the document he gave the police officer was false. AE 4. He said he gave the false documentation to the police officer because he "panicked." AE 2 at 8. The offenses in SOR ¶¶ 1.a and 1.b were for the same conduct and were alleged in the SOR to have occurred in the same month. Tr. 50. Applicant currently has vehicle insurance. Tr. 54; AE 22.

### **Personal Conduct**

SOR ¶ 3.a alleges Applicant did not disclose on his March 24, 2014 SCA that he failed to file some of his federal and state income tax returns in the previous seven years. He said he was rushed when he completed his SCA. Tr. 68; GE 7. He read the question about taxes, and he understood the question. Tr. 98. He did not answer the tax question correctly because he was focused on completion of the employment section. Tr. 98. He denied that he intended to deceive the Government about his tax situation. Tr. 69, 71.

On May 5, 2014, an Office of Personnel Management (OPM) investigator interviewed Applicant. GE 8. Applicant confirmed to the OPM investigator that all the negative financial answers on his March 24, 2014 SCA were accurate, and he said his

current financial situation is good. GE 8. There is no information in his OPM personal subject interview (PSI) about his federal and state tax debts and his failure to file several federal and state tax returns. GE 8.

When Applicant completed his May 5, 2015 SCA, he disclosed his arrest for fraudulent conduct and his tax situation. Tr. 70; GE 1. He said he filed his tax returns for tax years 2011 through 2014, and he owed about \$35,000. GE 1.

## Financial Considerations

Applicant's underemployment for several years adversely affected his finances. His only unemployment in the previous five years was in February and March 2015. Tr. 100. His current net monthly income is about \$5,200. Tr. 64, 84; AE 18. He is current on his medical insurance and vehicle insurance. Tr. 65; AE 21. He has not had formal financial counseling. Tr. 100. He has an accountant assisting him with his taxes. Tr. 105. His only financial problem is with his federal and state income taxes. Tr. 100-101. An IRS-generated budget shows a monthly remainder of \$2,168. AE 9. The IRS uses reasonable numbers for various categories of expenses, and the IRS did not explain how gross income was determined.

Applicant indicated in response to DOHA interrogatories the following information:

Tax Year	Month Federal and State Tax Returns Filed	Federal Income Taxes Owed	State Income Taxes Owed	Exhibit
2004	April 2005	\$1,633		GE 2 at 25
2007	April 2008	\$922		GE 2 at 28
2008	April 2009	\$1,907		GE 2 at 30
2009	May 2010	\$2,893		GE 2 at 32; AE 5
2010	November 2011	\$15,067	\$1,198	GE 2 at 2-3, 34
2011	March 2015	\$0	\$0	GE 2 at 2-3, 36; AE 5
2012	March 2015	\$6,540	\$691	GE 2 at 2-3, 37
2013	March 2015	\$7,556	\$687	GE 2 at 2-3, 39 <sup>3</sup>
2014	May 2015	\$8,385	\$122	GE 2 at 2-3, 41 <sup>4</sup>
2015	April 2016	\$3,812		GE 2 at 43
2016	April 2017	\$3,039	\$0	AE 5

SOR ¶ 2.a alleges that a tax lien was entered against Applicant in November 2015 for \$4,929. Applicant said the lien was based on the state taxes he owed, and he is making payments to the state. SOR response. SOR ¶ 2.d alleges Applicant owes federal income taxes totaling about \$48,830 for tax years 2004, 2007 to 2010, and 2012 to 2014.

<sup>3</sup> His tax transcript shows the tax per return was \$4,785, and the W-2 withholding was \$23. GE 2 at 39. See also IRS Form W-2. AE 5. His state income tax withheld was \$1,236. AE 5.

<sup>4</sup> His tax transcript shows the tax per return was \$6,875, and the W-2 withholding was \$601. Tr. 87; GE 2 at 41.

SOR ¶¶ 2.b and 2.c allege Applicant failed to timely file his federal and state tax returns for tax years 2010 through 2014, and his state tax return for tax year 2015.

Applicant is credited with timely filing his 2010 federal income tax return; however, he did not timely pay his federal income taxes for tax year 2010 because he did not have the funds to pay his taxes. Tr. 56-57. He received a \$23,000 settlement from his employer in 2010, and he said he did not have the funds to pay his taxes. Tr. 78. For tax years 2011, 2012, 2013, and 2014, his exemptions were too high, and he did not withhold sufficient funds from his salary to pay his taxes. Tr. 56. He said he did not really understand how taking too many exemptions could cause a tax problem. Tr. 103-104. He did not timely file his federal and state tax returns for tax years 2011, 2012, and 2013. Tr. 78-79. In 2015, he hired a tax professional, and all of his past-due tax returns were filed in 2015. Tr. 57-60, 79-80.

On February 16, 2016, the IRS rejected Applicant's July 2, 2015 offer of \$22,200 for delinquent taxes for tax years 2004, 2007 to 2010, and 2012 to 2014. GE 2 at 24. The February 16, 2016 IRS letter did not include a copy of the supporting documentation, and it appears the correct offer-in-compromise amount was \$9,832. SOR response; AE 9; GE 2 at 24. Applicant made two offers in compromise to the IRS. Tr. 60; AE 9-AE 11. On May 21, 2017, the IRS indicated his total liability was \$53,252, and the IRS rejected the first offer in compromise for \$9,832. Tr. 80; AE 9. Applicant objected to the IRS determination that his monthly gross income was \$7,887 (before tax deductions) because his monthly income after taxes is only \$5,192 a month. AE 10. His second offer in compromise is pending an IRS decision. Tr. 82; AE 9. If the second offer in compromise is not accepted, Applicant plans to allow the IRS to draw \$610 monthly from his checking account for 72 months, and he believes the IRS will accept this offer. Tr. 61, 81.

From 2015 through 2016, Applicant paid a total of \$1,932 to the IRS, and the IRS applied those payments to his federal tax debt for tax year 2007. GE 2 at 27. According to a January 8, 2018 IRS tax transcript, in 2017, he made the following payments to the IRS: February \$100; April \$200; May \$596; June \$410; July \$410; and September \$410. AE 6. He said he was making \$410 monthly payments to the IRS; however, he said the IRS told him to stop making payments until there is an agreement. Tr. 82. His bank account is currently on an IRS "code." Tr. 63. From 2015 to present, Applicant has paid the IRS about \$4,000. Tr. 61; GE 2 at 26; AE 6. His underpayment of federal income taxes on his tax returns for tax years 2015 and 2016 is \$6,800. See Table, *supra*. He is confident that he will be able to make the \$610 monthly payments to the IRS. Tr. 66.

At one point Applicant owed \$3,386 to the state for delinquent state taxes. Tr. 62; GE 2 at 49. In February 2017, he owed the state \$2,908 for income taxes. GE 2 at 75. Now he owes \$819 to the state for income taxes. Tr. 62; AE 8; AE 9. He makes monthly payments to the state of \$165. GE 2 at 45-48, 52; AE 24. His payment plan with the state is current. GE 2 at 53; AE 24.

Applicant has \$44 in his bank account. Tr. 88. He does not put much money in his bank account because he likes to keep his money "close . . . for now" at home. Tr. 89. It has nothing to do with hiding money from the IRS. Tr. 89.

## Character Evidence

Two logistics management specialists, who have worked with Applicant for four-to-six years, describe him as follows: he is highly proficient in information technology; his ethics are beyond reproach; and he is trustworthy. Tr. 24-41. They believed he learned from his mistakes and deserved another chance. Their statements support approval of his security clearance. He received a raise in 2013, and good performance reviews from his employer. Tr. 72; AE 13; AE 14. He earned several information technology certifications, which are necessary for his DOD employment. Tr. 43-46; AE 16; GE 2 at 67-73; AE 6; AE 16; AE 17. Applicant acknowledged that he had made mistakes, and he promised to make better choices in the future. Tr. 107.

## 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 the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

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

- (a) the behavior happened so long ago,<sup>5</sup> 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;<sup>6</sup>
- (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

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<sup>5</sup> 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)).

<sup>6</sup> The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

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).

Applicant's underemployment for several years adversely affected his finances. This circumstance was largely beyond his control. Applicant has taken important steps towards establishing his financial responsibility. In 2015, he filed all of his federal and state income tax returns. He made some payments to address his state and federal income tax debts.

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.<sup>7</sup> 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. The failure to timely file federal and state income tax returns has security implications because:

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<sup>7</sup> 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 tax 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).

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 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 federal income 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). In this instance, AG ¶ 20(g) partially applies because Applicant has filed all required tax returns and paid some of his delinquent taxes; however, the timing of the filings of his tax returns is an important criteria of the analysis. In ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) the Appeal Board reversed the grant of a security clearance, discussed how AG ¶ 20(g) applied, and noted:

The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, Applicant's filing of his Federal income tax returns for 2009-2014 after submitting his SCA, undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit.

In this case, Applicant filed his overdue tax returns in 2015 after completing his 2014 SCA and his 2014 OPM PSI; however, it was before he submitted his 2015 SCA and the follow-up interview. He did not provide a good reason for his decisions not to file his federal and state tax returns on time or at least much sooner. He continues to owe a substantial federal income tax debt, and that debt is not being addressed through an agreement that is satisfactory to the IRS. Applicant is credited with mitigating SOR ¶¶ 2.a and 2.e because he is making payments to address his state income tax debt under an established payment plan, and he has substantially reduced the magnitude of this debt. After considering all the facts and circumstances, I conclude Applicant failed to establish mitigation of financial considerations security concerns.

## **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 describes two conditions that could raise a security concern and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(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 October 2014, Applicant presented a false insurance document and obtained tags for his vehicle. In December 2014, he presented a false insurance document to a police officer. He admitted this criminal conduct. The record establishes AG ¶¶ 31(a) and 31(b).

AG ¶ 32 lists conditions that could mitigate security concerns:

(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(a) and 32(d) are established. Applicant committed two criminal offenses, and he received one misdemeanor-level conviction. He completed probation for the second offense, and the second charge was dismissed. He has a good employment record. The offenses have not recurred. He has vehicle insurance. He has learned from his mistakes, and it is unlikely additional criminal conduct will occur. Criminal conduct security concerns are mitigated.

## **Personal Conduct**

AG ¶ 15 articulates the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility[.]

AG ¶ 16 lists conditions that could raise a security concern and may be disqualifying in this case including:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;<sup>8</sup> and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant falsified his March 24, 2014 SCA. He did not disclose on his March 24, 2014 SCA that in the previous seven years he failed to file his federal and state income tax returns for tax years 2011 and 2012 as required by law. He said he was rushed when he completed his SCA. He read the question about filing his tax returns, and he understood the question. He knew at the time he completed his March 24, 2014 SCA that he had not filed his tax returns for tax years 2011 and 2012. His criminal conduct is cross-alleged under Guideline E. The record establishes the disqualifying conditions in AG ¶¶ 16(a) and 16(e) requiring additional inquiry about the possible applicability of mitigating conditions.

Six personal conduct mitigating conditions under AG ¶ 17 are potentially applicable in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

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<sup>8</sup> The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

SOR ¶ 3.b cross-alleges the same conduct alleged under Guideline J. SOR ¶ 3.b is mitigated for the same reasons that the Guideline J conduct is mitigated.

None of the mitigating conditions apply to the allegation that Applicant falsified his March 24, 2014 SCA when he falsely claimed he filed his tax returns as required by law. He had an opportunity to disclose his problems with his taxes during his May 5, 2014, follow-up OPM interview, and he did not do so.<sup>9</sup> His falsification was intentional, is serious, and is not mitigated. He receives some credit for disclosing his arrest for submission of false insurance documents in 2014 and for discussing his tax problem on his May 5, 2015 SCA. His disclosures on his May 5, 2015 SCA are not sufficient to mitigate personal conduct security concerns.

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<sup>9</sup> Applicant's SOR does not allege that he lied to the OPM investigator about his taxes during his May 5, 2014 interview. 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)). There is no evidence that the OPM investigator asked Applicant directly about his federal and state taxes. The allegation that he lied to the OPM investigator will not be considered. His failure to volunteer the information about his taxes during his interview will be considered for the five purposes in (a) through (e) above. Any non-SOR allegations discussed in the statement of facts are not considered for disqualification purposes.

## 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 E, 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 a 41-year-old information technology expert. In 1994, he graduated from high school, and he attended college for about seven months. Two logistics management specialists describe him as highly proficient, ethical, and trustworthy. Their statements support approval of his security clearance. He received a raise in 2013, and good performance reviews from his employer. He earned several information technology certifications. Applicant acknowledged that he had made mistakes, and he promised to make better choices in the future.

The evidence against mitigation of security concerns is more substantial. Applicant did not timely file his state and federal income tax returns for tax years 2011, 2012, and 2013. He owes a substantial federal income tax debt, and he does not have an established payment plan to resolve this debt. He did not disclose his failure to file his federal and state tax returns for tax years 2011, and 2012 on his March 24, 2014 SCA. He read the question and understood it. His false statement on his March 24, 2014 SCA about his tax returns was deliberate, improper, and made with intent to deceive. AG ¶ 15 indicates, "Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes." Applicant's falsifications raise serious security concerns. The protection of national security relies on applicants to self-report conduct that jeopardizes security, even when that disclosure might damage the applicant's career. Applicant cannot be trusted to disclose potentially derogatory information related to security issues. He did not establish his reliability, trustworthiness, and ability to protect classified information.

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. Applicant

mitigated the security concerns under Guideline J (criminal conduct); however, security concerns under Guidelines F (financial considerations) and E (personal conduct) 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 J:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b through 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark Harvey  
Administrative Judge