



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



In the matter of:

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ISCR Case No. 17-01048

Applicant for Security Clearance

Appearances

For Government: Nicholas T. Temple, Esq.

For Applicant: Joshua G. Whitaker, Esq.

08/21/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant used marijuana with varying frequency from 1994 to May 2015. He did not hold a security clearance during his involvement with marijuana. Security concerns under Guidelines H (drug involvement and substance misuse) and E (personal conduct) are mitigated. Applicant did not submit enough documentary corroborating information about his finances to mitigate Guideline F (financial considerations) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 27, 2016, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1). On May 19, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an 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 H, E, and F. Hearing Exhibit (HE) 2.

On July 12, 2017, Applicant provided a response to the SOR. HE 3. On September 11, 2017, Department Counsel was ready to proceed. On February 16, 2018, the case was assigned to me. On March 26, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 3, 2018. (HE 1) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered 9 exhibits; Applicant offered 23 exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Tr. 14-27; GE 1-9; AE A-W. On May 15, 2018, DOHA received a copy of the hearing transcript. The record closed on July 9, 2018. (Tr. 78, 82)

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

Findings of Fact²

Applicant's SOR response admitted in part SOR ¶¶ 1.a through 1.d, 3.d, and 3.e. (HE 3) He also provided mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 44-year-old engineer. (Tr. 28; GE 1) In 1999, he graduated from a top-tier engineering school with a bachelor's degree. (Tr. 28-29; GE 1) He has not served in the military. (GE 1) In 2003, he married, and his children were born in 2005, 2007, and 2010. (GE 1) He has never held a security clearance or a sensitive position such as a police officer. (Tr. 73)

Drug Involvement and Substance Misuse and Personal Conduct

In Applicant's May 27, 2016 SCA, he admitted use of marijuana in college on a weekly basis.³ After college, he used marijuana during parties and vacations. Following his marriage in 2003, he used marijuana about every six months usually on golfing and fishing trips. The police caught Applicant in possession of marijuana in May 2011 and May 2015. He was not convicted of marijuana possession for either offense.

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.

³ The information in this paragraph is from Applicant's May 27, 2016 Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1).

SOR ¶¶ 1.a through 1.d allege under the drug involvement and substance misuse guideline that Applicant possessed and used marijuana and marijuana paraphernalia. In 2003, 2011, and 2015, his marijuana possession resulted in the involvement of the police. SOR ¶ 2 cross alleges the same conduct as in SOR ¶ 1 under the personal conduct guideline. The status of those allegations is as follows:

SOR ¶ 1.a alleges Applicant used marijuana with varying frequency from 1994 to at least May 2015. Applicant admitted that he possessed and used marijuana from 1994 to May 2015.

SOR ¶ 1.b alleges Applicant was charged with possession of marijuana and identity fraud in January 2003. The police stopped Applicant, and Applicant gave the police his brother's identification because he did not have his own identification. (Tr. 30, 64) He admitted that the small amount of marijuana in his vehicle was his marijuana. (Tr. 30, 64)

SOR ¶ 1.c alleges Applicant was charged with marijuana possession and speeding in May 2011. Applicant was in his vehicle with several others. (Tr. 31, 64) The police stopped Applicant for driving 55 miles per hour (MPH) in a 45 MPH zone. (Tr. 31) A police officer smelled marijuana because one of his passengers was smoking marijuana. (Tr. 31) Applicant denied that it was his marijuana. (Tr. 65) Applicant was charged with marijuana possession because it was in his vehicle; however, the charge was dismissed because the marijuana found in his vehicle was not Applicant's marijuana. (Tr. 31)

SOR ¶ 1.d alleges Applicant was arrested and charged with possession of marijuana and marijuana paraphernalia in May 2015. Applicant was on a fishing trip, and the police stopped Applicant because the tags on his vehicle were expired. (Tr. 31-32, 65) Applicant and his associates each had some marijuana on their person. (Tr. 32, 66) The marijuana charge was dismissed after Applicant completed community service.

Applicant said he used marijuana to alleviate stress. (Tr. 32, 66-67; SOR response) He was reluctant to seek medical help for the stress because of his culture. (Tr. 67) He received a prescription for Wellbutrin, and he has a current prescription for Wellbutrin. (Tr. 68) He no longer needs marijuana to help with stress. (Tr. 32) He realizes that marijuana possession and use show poor judgment, and he wants to be a good example to his children. (Tr. 71) He recognized the adverse impact of drug abuse. He also understands that possession of marijuana violates federal law and constitutes criminal conduct. He does not intend to use marijuana in the future. (Tr. 33, 72) He does not associate with users of illegal drugs. (Tr. 69)

Financial Considerations

In 2004, Applicant and a partner purchased a small company with gross annual revenue of about \$750,000. (Tr. 29) In 2009, he bought out his partner. (GE 1) Applicant promised to pay the original owner of the company \$7,000 monthly, and he completed all payments in November 2017. (Tr. 34) Applicant owns the subchapter S corporation now. (Tr. 34, 57) His corporation's annual income is currently about \$70,000,000. (Tr. 29) His corporation performs construction as a general contractor on large projects. (Tr. 35)

Applicant and his spouse both work for his corporation, and his corporation is their only source of income. (Tr. 70)

The SOR in ¶ 3 alleges seven financial issues. The status of each SOR allegation is as follows:

SOR ¶ 3.a alleges an unpaid federal tax lien entered in February 2013, for \$126,000. Applicant said the debt resulted from errors by his accountant or bookkeeper. (SOR response) The lien resulted from tax year 2010. (SOR response, Ex. 4) On November 9, 2016, this tax lien was released. (SOR response, Ex. 4) Applicant said the debt was paid. (SOR response)

SOR ¶ 3.b alleges an unpaid federal tax lien entered in April 2014, for \$31,148. Applicant admitted it was his tax debt. He owed \$7,556 for tax year 2006, and \$23,592 for tax year 2011. From October 2016 to January 2018, he made payments. He completed payment of the tax debt, and on February 1, 2018, this tax lien was released. (Tr. 72; AE B)

Applicant said his tax returns were amended three times. (Tr. 56) His tax transcript for tax year 2011 indicates transfers from tax years 2010 and 2015 in October 2016, February 2017, March 2017, and May 2017. (AE B) He is credited with paying his tax bills for tax years 2010 and 2015 with a surplus.

Tax Year	Date Tax Return Filed	Adjusted Gross Income	Taxable Income	Tax Owed	Tax Withheld	Tax Debt Paid
2011	Jan. 9, 2013	\$229,668	\$190,051	\$27,474	\$8,385	Jan. 2018

SOR ¶ 3.c alleges an unpaid federal tax lien entered in February 2012, for \$77,074.⁴ The lien was for tax years 2008 and 2009. (SOR response, Ex. 5)

Applicant said the tax debts resulted from his business; however, they were filed against Applicant in his personal capacity. (Tr. 53) Applicant's business failed to pay the payroll tax for four or five quarters for employees in a different state from where Applicant lived. (Tr. 54) Applicant blamed the problem on his managers. (Tr. 54) The IRS entered the liens to reinforce his payment plan. (Tr. 54) Applicant focused on the construction management of his corporation, and he said his employees were responsible for ensuring corporate finances were properly handled. (Tr. 55)

SOR ¶ 3.d alleges a corporate judgment against Applicant for \$600,000. A subcontractor sued Applicant initially for \$22 million. (Tr. 38) Eventually the claim was negotiated down to \$600,000. (Tr. 38) The settlement agreement is confidential. (Tr. 58) During his August 25, 2016 Office of Personnel Management personal subject interview (OPM PSI), Applicant said he owed about \$300,000 to the creditor, and he planned to have the debt satisfied by 2018. (GE 2 at 5) At his hearing, he said the current balance

⁴ SOR ¶ 3.c was withdrawn at the request of Department Counsel because the lien was not placed against Applicant. (Tr. 11-12; HE 2)

owed is \$240,000, and Applicant plans to pay this debt in two years. (Tr. 39, 59) He currently pays \$7,166 monthly to the creditor. (Tr. 60) Department Counsel asked for a copy of the agreement and proof of the payments. (Tr. 60)

SOR ¶ 3.e alleges an unpaid judgment entered against Applicant for \$3,100 entered in March 2016. Applicant said the debt was for condominium fees for about 18 months, and in June 2017, the debt was satisfied. (Tr. 60; SOR response, Ex. 6)

SOR ¶ 3.f alleges an unpaid medical judgment entered against Applicant for \$1,066 in August 2014. Applicant said he paid this debt. (Tr. 61) Applicant indicated he believed he could locate a receipt showing payment. (Tr. 62) He did not provide a receipt showing payment.

I requested that Applicant provide tax transcripts for 2008 to present, a current credit report, and information about the status of the debt in SOR ¶ 3.d. (Tr. 75-77) He said he does not owe any state income taxes. (Tr. 76) He did not provide any post-hearing documentation.

Applicant successfully completed several high-visibility government contracts for the DOD and other federal agencies. (Tr. 40-52; AE E-AE W) Applicant paid several large debts over the years.

Policies

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

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation

about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing 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

Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern for drug involvement:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any “controlled substance” as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

AG ¶ 25 lists two conditions that could raise a security concern and may be disqualifying in this case, “(a) any substance misuse (see above definition);” and “(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Applicant possessed and used marijuana⁵ from 1994 to May 2015. AG ¶¶ 25(a) and 25(c) are established.

AG ¶ 26 details conditions that could mitigate security concerns:

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

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

The DOHA Appeal Board in ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), 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

⁵ Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

to classified information will be resolved in favor of the national security.”
Directive, Enclosure 2 ¶ 2(b).

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no “bright line” rules for determining when such conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”⁶

Applicant used marijuana for more than 20 years; however, he stopped using marijuana in May 2015. He made a clear resolution not to use marijuana in the future. He recognized the adverse impact of drug abuse. He also understands that possession of marijuana violates federal law and constitutes criminal conduct. I accept Applicant’s statement that he intends to continue to abstain from illegal drug possession and use as credible. AG ¶ 26(a) applies to his possession and use of illegal drugs.⁷ AG ¶ 26(a) applies.

⁶ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge’s decision to revoke an applicant’s security clearance after considering the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

⁷ In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse. In ISCR Case No. 14-00775 (App. Bd. July 2, 2015), the Appeal Board sustained the revocation of a security clearance for an Applicant, who did not hold a security clearance that used marijuana 20 months before the administrative judge decided the case.

AG ¶¶ 26(b), 26(c), and 26(d) are not fully applicable. AG ¶ 26(b) does not apply because he did not provide “a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.” Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. He did not complete a drug counseling or treatment program. He did receive some counseling in connection with his prescription for Wellbutrin. His need for marijuana is reduced because he has a prescribed drug to control his stress and anxiety.

Applicant has not used marijuana since May 2015; he did not hold a security clearance when he used marijuana; he does not associate with known marijuana users; and he promised not to use marijuana in the future. Drug involvement security concerns are mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

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

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . ; (3) a pattern of . . . rule violations; and

(e) personal 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.

Guidelines F security concerns are independently sufficient without consideration of Guideline H security concerns to deny Applicant's security clearance, and AG ¶ 16(c) does not apply. SOR ¶ 2.a cross-alleges under the personal conduct guideline the same conduct alleged under the drug involvement and substance misuse guideline. All of Applicant's conduct causing a security concern in SOR ¶ 2.a is explicitly covered under Guideline H in SOR ¶¶ 1.a through 1.d. AG ¶ 16(d) does not apply.

Applicant's involvement with marijuana affects his professional and community standing. However, this conduct does not create a vulnerability to exploitation, manipulation, or duress because security officials are aware of it. Applicant freely and frankly revealed his marijuana possession and use on his SCA and discussed it during his OPM PSI. AG ¶ 16(e) is not established. Assuming some residual Guideline E security concerns remain, consideration of mitigating conditions is warranted.

AG ¶ 17 lists two conditions that could mitigate security concerns in this case:

(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; and

(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.

AG ¶¶ 17(c) and 17(d) are established for the reasons stated in the previous drug involvement and substance misuse section. Personal conduct security concerns are mitigated.

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 three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts;" "(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(c), and 19(f) requiring additional inquiry about the possible applicability of mitigating conditions.

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

- (a) the behavior happened so long ago,⁸ 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;

⁸ 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. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

(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.

SOR ¶ 3.a alleges an unpaid federal tax lien entered in February 2013, for \$126,000. The lien resulted from tax year 2010. On February 9, 2016, this tax lien was released. Usually a tax lien is released if the taxpayer has established a payment plan and complied with it for a substantial period of time or paid the tax debt. I have credited Applicant with mitigating this debt because the lien was released before the SOR was issued.

SOR ¶ 3.b alleges an unpaid federal tax lien entered in April 2014, for \$31,148. Applicant admitted it was his tax debt. According to the lien, he owed \$7,556 for tax year 2006, and \$23,592 for tax year 2011. Applicant permitted his taxes to become delinquent in 2006 and 2011, and he did not pay his tax debt until January 2018. From October 2016 to January 2018, he made payments to address this debt. Because of his lengthy course of delinquent taxes and the resolution after receipt of the SOR without an adequate explanation for the delinquency, I conclude he did not establish mitigation of SOR ¶ 3.b.

SOR ¶ 3.d alleges a corporate judgment against Applicant for \$600,000. During his August 25, 2016 OPM PSI, he said he owed about \$300,000 to the creditor, and he planned to have the debt satisfied by 2018. At his hearing, he said the current balance owed is \$240,000, and he plans to pay it off in two years. He said he pays \$7,166 monthly to the creditor. Department Counsel asked for a copy of the settlement agreement and proof of the payments. He did not provide requested documentation. This debt is not mitigated.

Applicant provided proof that the judgment alleged in SOR ¶ 3.e for \$3,100 entered in March 2016 was satisfied in June 2017. This debt is mitigated.

SOR ¶ 3.f alleges an unpaid medical judgment against Applicant for \$1,066. Applicant said he paid this debt; however, he did not provide proof that the judgment was satisfied. This debt is not mitigated.

Applicant did not provide sufficient documentary evidence of resolution of the debts in SOR ¶¶ 3.b, 3.d, and 3.f. There is insufficient evidence explaining the delay in Applicant's resolution of these three SOR debts. Delinquent federal taxes from 2006 to 2018 are particularly problematic. There is insufficient assurance that these three SOR debts are being, will be, or are resolved. Under all the circumstances in the record before me, 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 Guidelines H, E, and F 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 44-year-old engineer. In 1999, he graduated from a top-tier engineering school with a bachelor's degree. In 2004, Applicant and a partner purchased a small company with gross annual revenue of about \$750,000. In 2009, he bought out his partner. His corporation's annual income is currently about \$70,000,000. His corporation performs construction as a general contractor on large projects. He has successfully completed numerous government contracts. He paid several large debts over the years. He ended his marijuana use in May 2015.

The evidence against granting his security clearance is more persuasive. Applicant has had federal income tax problems since 2006. Applicant did not provide requested federal income tax transcripts. In ISCR Case No. 16-02322 (App. Bd. Mar. 14, 2018) the Appeal Board reversed the grant of a security clearance because of concerns about timely filing and payment of income taxes. The Appeal Board noted that the applicant in that case failed to provide a requested IRS income tax transcript, and this failure undermined the conclusion that the applicant met her burden of persuasion relating to payment of taxes. *Id.* at 4 and n. 3. Applicant in this case did not provide corroborating documentation: (1) that his federal taxes are paid; (2) that his payments are current on the \$600,000 judgment; and (3) that the medical judgment for \$1,066 is resolved.

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, and the AGs, to the facts and circumstances in the context of the whole person. Guidelines H and E security concerns are mitigated; however, Guideline F 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 H:	FOR APPLICANT
Subparagraphs 1.a through 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a and 3.e:	For Applicant
Subparagraphs 3.c:	Withdrawn
Subparagraphs 3.b, 3.d, and 3.f:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge