



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-16551  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Stephanie C. Hess, Esquire, Department Counsel  
For Applicant: *Pro Se* and with a Personal Representative<sup>1</sup>

September 5, 2008

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke her eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>2</sup> the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on April 23, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline F for financial considerations based on unpaid federal and state tax liens, Guideline J for criminal conduct based on failure to file federal income tax returns, and Guideline E for personal conduct based on falsification of a security-clearance application. For the reasons discussed below, this case is decided against Applicant.

<sup>1</sup> Applicant’s spouse, as discussed herein, served as her personal representative and testified as a witness.

<sup>2</sup> Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.<sup>3</sup> The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's response to the SOR was received by DOHA on June 2, 2008, and she requested a hearing. The case was assigned to me on July 21, 2008. The hearing took place as scheduled on August 14, 2008. The transcript (Tr.) was received on August 25, 2008.

The record was left open until August 28, 2008, to allow Applicant an opportunity to submit documentary information related to the IRS and federal income tax practice and procedure. Applicant made a timely submission, and those matters were forwarded by department counsel who raised no objections. Collectively, the post-hearing matters are admitted as Exhibit E.

### **Findings of Fact**

Applicant denied all the SOR allegations. Based on the record evidence as a whole, the following facts are established by substantial evidence.<sup>4</sup>

Applicant is a 62-year-old truck driver. She and her spouse operate a trucking company, and they each hold a commercial driver's license. They operate as independent contractors for a transit company that contracts with the federal government. She is seeking an industrial security clearance for the first time.

Applicant has a history of financial problems that are related to state and federal income taxes as follows:

- She is indebted to the IRS for approximately \$7,013 for tax year 2001 (Exhibits 4, 8, and D). The IRS filed on a federal tax lien against Applicant for that amount in April 2006.
- She is indebted to a state tax authority for approximately \$4,636 (Exhibits 5, 7, and 8). The state filed three liens against Applicant for different amounts in 2003 and 2004.

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<sup>3</sup> See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

<sup>4</sup> Exhibits 2 and 6 were not admitted into evidence; therefore, those documents were not considered in making findings of fact or for any other aspect of the case.

Beginning in about tax year 2002, Applicant, along with her spouse, stopped filing federal income tax returns. She did so because she was persuaded or convinced by her spouse that no law requires a person to file income tax returns and no law requires a person to pay income taxes. As a result, neither she nor her spouse has filed federal income tax returns since tax year 2002. Applicant's spouse reached these conclusions after studying materials produced by Irwin Schiff,<sup>5</sup> including his book *The Federal Mafia*<sup>6</sup> (Tr. 71).

Applicant and her spouse say they have submitted various material to the IRS, but they have yet to receive a response other than an acknowledgment (Exhibit A). One of the items they submitted to the IRS is a multiple-page document styled "Affidavit of Revocation and Rescission" (Exhibit C). The affidavit contains 25 paragraphs, but in essence they claim that the federal government (Congress and the IRS) committed constructive fraud by misleading and deceiving them and the general public into believing that they were required to file income tax returns and pay income taxes; as a result, they revoked, rescinded, and cancelled all tax documents signed and/or submitted by them; and they declared that they are not and never were taxpayers and are not subject to the federal income tax laws.

Applicant has not paid, settled, or resolved the tax liens alleged in the SOR (Tr. 58). Based on the affidavit submitted to the IRS, Applicant has no intention of filing a federal income tax return and she has no intention of paying federal income taxes (Tr. 62–63). And based on income Applicant reported in a personal financial statement, it appears Applicant and her spouse have sufficient income (\$6,000 monthly) to establish a tax liability and an obligation to file a return (Exhibit 3).

Applicant completed a security-clearance application in June 2005 (Exhibit 1). In doing so, she was required to answer several questions about her financial record. Question 27c inquired about tax liens, and Applicant answered "no," thereby indicating that she had not had a tax lien placed against her for failing to pay taxes or other debts in the last seven years. She did not disclose the three state tax liens filed in 2003 and 2004 because she was unaware of those liens when she completed the application (Tr. 59). She first became aware of the state tax liens during the background investigation (Tr. 65–66).

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<sup>5</sup> Schiff has been described as "a well-known recidivist tax protestor." *United States v. Schiff*, 510 F.3d 1114, 1116 (9<sup>th</sup> Cir. 2007). Schiff was convicted of conspiracy to defraud the government and multiple tax-related offenses, and the Ninth Circuit recently affirmed his convictions and his resulting 151-month sentence. *Id.* at 1117, footnote 2.

<sup>6</sup> In 2004, the Ninth Circuit upheld a preliminary injunction on the sale of a book by Schiff, *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes*, finding it constituted fraudulent commercial speech. *United States v. Schiff*, 379 F.3d 621, 630 (9<sup>th</sup> Cir. 2004).

## Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.<sup>7</sup> As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>8</sup> A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>9</sup> An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.<sup>10</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>11</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>12</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>13</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>14</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>15</sup> The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>16</sup>

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions

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<sup>7</sup> *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

<sup>8</sup> *Egan*, 484 U.S. at 531.

<sup>9</sup> Directive, ¶ 3.2.

<sup>10</sup> Directive, ¶ 3.2.

<sup>11</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>12</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>13</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>14</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>15</sup> *Egan*, 484 U.S. at 531.

<sup>16</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

(DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>17</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

### **Analysis**

Under Guideline F for financial considerations,<sup>18</sup> a security concern typically exists due to significant unpaid debts. "Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information."<sup>19</sup> Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

The record evidence supports a conclusion that Applicant has a history of unresolved financial problems. Both the IRS and a state tax authority have filed tax liens against Applicant for a total of more than \$11,000, and she has no current plan to address these debts. These circumstances raise a security concern because they indicate unwillingness to satisfy debts<sup>20</sup> and a history of not meeting financial obligations<sup>21</sup> within the meaning of Guideline F. In addition, the failure to file federal income tax returns raises a security concern as well.<sup>22</sup> The record evidence is more than sufficient to establish these three disqualifying conditions.

The guideline also provides that certain conditions may mitigate security concerns:

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<sup>17</sup> Executive Order 10865, § 7.

<sup>18</sup> Revised Guidelines at 13–14 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>19</sup> Revised Guidelines at 13.

<sup>20</sup> DC 1 is "inability or unwillingness to satisfy debts."

<sup>21</sup> DC 3 is "a history of not meeting financial obligations."

<sup>22</sup> DC 7 is "failure to file annual federal, state, or local income tax returns as required or the fraudulent filing of the same."

MC 1—the behavior happened so long ago, 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;

MC 2—the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

MC 3—the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

MC 4—the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

MC 5—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;

MC 6—the affluence resulted from a legal source of income.

All of the mitigating conditions have been considered and none apply in Applicant's favor. In contrary, her indebtedness was due to circumstances within her control and resulted from her criminal conduct, which is discussed below. Applicant does not have a reasonable basis to dispute the debts, and she has not made a good-faith effort to resolve the indebtedness. Accordingly, Guideline F is decided against Applicant.

Under Guideline J for criminal conduct,<sup>23</sup> the concern is that "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."<sup>24</sup>

The record evidence supports a conclusion that Applicant has engaged in a pattern of criminal conduct by her deliberate and willful failure to file federal income tax returns since tax year 2002. These circumstances raise a security concern under DC 1<sup>25</sup>

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<sup>23</sup> Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>24</sup> Revised Guidelines at 21.

<sup>25</sup> DC 1 is "a single serious crime or multiple lesser offenses."

and DC 3<sup>26</sup> because her conduct falls within 26 U.S.C. § 7203, which makes the willful failure to file a federal income tax return a misdemeanor offense.<sup>27</sup> Although she has not been charged in federal court, Applicant's multiple violations of her obligation to file a federal income tax return cast significant doubt on her fitness for a security clearance.

Applicant, along with her spouse, assert that no law requires her to file a federal income tax return and that no law requires her to pay federal income taxes. The DOHA Appeal Board has made it clear, however, that a security clearance case is not an appropriate forum for contesting the legality of federal income tax laws:

If Applicant wishes to challenge the constitutionality and legality of federal tax laws (and IRS regulations and practices), then he must seek redress elsewhere. Under the Directive, DOHA Administrative Judges and the Board are authorized to adjudicate industrial security clearance cases, not the constitutionality and legality of federal tax laws and IRS regulations and practices. In recognition of the limits of the jurisdiction of DOHA Administrative Judges and this Board under the Directive, the rulings of federal courts on the legality and constitutionality of the federal tax laws and IRS practices and procedures must be accepted and applied in DOHA proceedings.<sup>28</sup>

I am aware of no decision from a federal court that supports Applicant's position that she is not required to file a federal income tax return and that she is not required to pay federal income taxes. Applicant's Exhibit B, which purports to be a copy of several pages of transcript from a federal court case, does not constitute binding legal precedent and I have given it no weight. Likewise, none of Applicant's other documentary exhibits support her position. Accordingly, the record evidence is sufficient to show that Applicant's failure to file federal income tax returns since tax year 2002 was in violation of 26 U.S.C. § 7203.

The guideline also contains several conditions that could mitigate security concerns, but none apply in Applicant's favor. Her conduct, and that of her spouse, suggests tax evasion. Her criminal conduct was recent and not isolated. Although she was persuaded or convinced to follow her spouse on this journey, there is no evidence showing she was pressured or coerced into doing so. Further, her criminal conduct is

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<sup>26</sup> DC 3 is the "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

<sup>27</sup> Without objections, administrative or official notice was taken of 26 U.S.C. § 7203 as set forth in Appellate Exhibit I (Tr. 34–37). Section 7203 is a penalty provision that does not establish a duty to file federal income tax returns or to pay federal income taxes.

<sup>28</sup> ISCR Case No. 94-1153 (App. Bd. Mar. 26, 1997) (also, the Board notes and summarizes numerous federal court decisions that have rejected challenges to the federal tax laws and IRS regulations and practices). Likewise, see ISCR Case 98-0810 (App. Bd. Jun. 8, 2000) (the Board notes and summarizes numerous federal court decisions that have rejected challenges to the federal tax laws and IRS regulations and practices).

ongoing and likely to continue. These circumstances militate against a successful case in reform and rehabilitation. Overall, Applicant's conduct—as well as the dubious and specious legal arguments in her defense—demonstrates poor judgment. Also, it shows Applicant lacks the trustworthiness and reliability required of those entrusted with the privilege of a security clearance. Accordingly, Guideline J is decided against Applicant.

Personal conduct under Guideline E<sup>29</sup> includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.<sup>30</sup>

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The issue here is the truthfulness of Applicant's answer to Questions 27c of her June 2005 security-clearance application, as she did not report the three state tax liens called for by the question. She denies that her answer was intentionally false and contends she was unaware of the liens when she completed the application. Having had the opportunity to listen to her testimony and observe her demeanor, her explanation is accepted as credible. The evidence is not sufficient to show that she made a deliberately false statement when she answered Question 27c. On this basis, Guideline E is decided for Applicant.<sup>31</sup>

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns raised under Guidelines F and J. Applicant did not meet her ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

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<sup>29</sup> Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>30</sup> Revised Guidelines at 10.

<sup>31</sup> The government did not produce evidence that Applicant completed a security-clearance application in March 2006. On this basis, the falsification allegation in SOR ¶ 3.b is decided for Applicant. Likewise, the allegation in SOR ¶ 3.c is adequately covered in SOR ¶ 2.a. On this basis, the allegation in SOR ¶ 3.c is decided for Applicant.



## 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–1.e:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	For Applicant
Subparagraphs 3.a–3.c:	For Applicant

## Conclusion

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

Michael H. Leonard  
Administrative Judge