



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 17-01890
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O'Connell, Department Counsel  
For Applicant: Tokay T. Hackett, Esq.

07/06/2018

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by her tax-related financial issues. Clearance is denied.

**Statement of the Case**

On June 15, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the financial considerations guideline. Applicant answered the SOR and requested a hearing. By agreement of the parties, a hearing was scheduled for March 1, 2018.

The hearing was convened as scheduled. Applicant testified and called several references as witnesses. The offered exhibits were admitted into the administrative record without objection.<sup>1</sup> The transcript of the proceeding was received on March 12, 2018.

**Findings of Fact**

Applicant, 40, is married with three children. She served in the U.S. military from July 1996 to November 1998. She has been with her current employer, a federal contractor, since November 2014. Her security clearance application does not reflect any

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<sup>1</sup> Government Exhibits 1 – 5; Applicant's Exhibits A – Q.

periods of unemployment, except from January to December 2009. Applicant earned an associate's degree in 2011, and is currently pursuing a bachelor's degree. She earns approximately \$120,000 annually at her job.<sup>2</sup>

Applicant did not timely file her federal and state income tax returns for tax years 2004 through 2014. She claims to have been unaware that her former spouse failed to file their tax returns until 2010 or 2011, after they divorced. The IRS filed a \$3,700 tax lien against Applicant in 2012, and a \$51,000 tax lien in 2013. Notwithstanding the proceeding, Applicant went on leisure travel to the Caribbean in 2012 and 2014.<sup>3</sup>

As of September 2014, Applicant owed approximately \$66,000 in federal income taxes for tax years 2004 – 2012. She testified that the current balance is about \$72,000. Applicant entered into installment agreements with the IRS in the past, but failed to comply with the terms of these past agreements. She entered into her current installment agreement with the IRS in July 2017, about a month after the SOR was issued. Applicant testified that she has made the agreed-upon monthly installment payments.<sup>4</sup>

IRS account transcripts for the 2004 – 2015 tax years reflect the following:

<b>Tax Year</b>	<b>Filed?</b>	<b>When Filed?</b>	<b>Balance?</b>	<b>Notes</b>
2004	Yes	April 2007	\$0	Filed and paid after IRS initiated enforcement action. <sup>5</sup>
2005	No	N/A	Unknown	IRS sent inquiry about unfiled tax return in November 2016. <sup>6</sup>
2006 – 2008	Yes	January and February 2013	Over \$30,000	Tax returns filed years after IRS sends notice inquiring about unfiled returns. Installment agreement entered into after IRS initiates collection action. <sup>7</sup>

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<sup>2</sup> Tr. 47-49, 69, 73-76; Exhibit 1; Exhibit A; Exhibit O.

<sup>3</sup> Tr. 50-52, 61-63; Answer; Exhibit 1 at 35-36; Exhibit H at 1; Exhibit I at 44. In 2010, Applicant was advised of the availability of filing for innocent spouse relief. (Exhibit 2 at 49-50.) No evidence was provided that Applicant pursued this potential avenue of relief.

<sup>4</sup> Tr. 52-67; Exhibit 2 at 27-35, 44-48; Exhibit E. Applicant did not provide documentation to corroborate her testimony that she is making the monthly agreed upon payments.

<sup>5</sup> Exhibit 2 at 4-7 (The IRS prepared a substitute tax return in September 2006). In April 2017, the IRS released the 2012 tax lien for tax years 2004 and 2009. (Exhibit 2 at 70; Exhibit C; Exhibit I at 45.)

<sup>6</sup> Exhibit 2 at 8-9. Applicant testified that she has since filed her 2005 federal income tax return, but did not provide documentation to corroborate her testimony. (Tr. 63-64.)

<sup>7</sup> Exhibit 2 at 10-15.

2009	Yes	April 2010	\$0	Filed return a few days late. <sup>8</sup>
2010	Yes	April 2013	\$9,600	Filed return only after IRS sent inquiry. <sup>9</sup>
2011	Yes	March 2013	\$27,000	Filing of tax return and other remedial action taken only after IRS initiated enforcement action. <sup>10</sup>
2012	Yes	June 2013	\$3,900	Filed late. <sup>11</sup>
2013-2014	No	N/A	Unknown	IRS sends letter limiting withholding allowance. <sup>12</sup>
2015	Yes	April 15, 2016	\$0	Only return filed on time. Withheld \$1,755 more in taxes than owed, amount credited to balance. <sup>13</sup>

Applicant testified that she filed all overdue state tax returns and paid her outstanding state tax debt. She provided documentation showing she resolved a 2010 state tax lien, and paid her 2011 and 2012 state taxes in full. She also resolved a charged-off debt referenced in SOR 1.d.<sup>14</sup>

Applicant's performance evaluations are favorable.<sup>15</sup> Her references provided their favorable opinions about her work, reliability, and overall good character.<sup>16</sup>

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<sup>8</sup> Exhibit 2 at 16-17, 49.

<sup>9</sup> Exhibit 2 at 18-19.

<sup>10</sup> Exhibit 2 at 20-21.

<sup>11</sup> Exhibit 2 at 22.

<sup>12</sup> Exhibit 2 at 23-24. Applicant testified that she filed her overdue 2013 and 2014 federal income tax returns (Tr. 65-66), but did not submit documentation to corroborate her testimony. She claims not to owe for either year (Tr. 65), but her current IRS installment agreement (Exhibit E) reflects that she owes for tax year 2014.

<sup>13</sup> Exhibit 2 at 26. Applicant testified that she had filed her 2016 tax return as of the hearing. She did not submit documentation to corroborate her testimony. Tr. 71-72.

<sup>14</sup> Tr. 14, 70; Exhibit D (satisfaction of 2010 state tax lien); Exhibits F, G, N (payment of 2011 and 2012 state income taxes); Exhibits I at 5 and Exhibits K, J and L (resolution of \$1,700 charged-off auto loan debt).

<sup>15</sup> Exhibit Q.

<sup>16</sup> Exhibit B; Tr. 17-46.

## Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

DOHA administrative judges “are creatures of the Directive,”<sup>17</sup> who derive their authority from the Directive. The Directive also sets forth an administrative judge’s responsibilities and obligations, including the requirement that a judge remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.<sup>18</sup>

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<sup>17</sup> ISCR Case No. 17-01213, n. 2 (App. Bd. June 29, 2018).

<sup>18</sup> However, a judge’s mere disbelief of an applicant’s testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on matters not alleged in an SOR, unless an applicant is provided adequate notice an issue raises a security concern. ISCR Case No. 14-

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. ISCR Case No. 11-13626 at 3-4 (App. Bd. Nov. 7, 2013) (“Security clearance adjudications are predictive in nature, and it is foreseeable that persons with prior good records may nevertheless engage in conduct or undergo circumstances that raise doubts about their future judgment or reliability.”)

## **Analysis**

### **Guideline F, Financial Considerations**

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. See AG ¶ 18.

The security concern here is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt cast doubt upon a person's judgment, self-control, and other qualities essential to protecting classified information. See *generally* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

In assessing Applicant's case, I considered the disqualifying and mitigating conditions listed under Guideline F, including:

AG ¶ 19(c): a history of not meeting financial obligations;

AG ¶ 19(e): consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators;

AG ¶ 19(f): failure to file or . . . failure to pay annual Federal, state, or local income tax as required;

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05986 (App. Bd. May 26, 2017). Non-alleged issues can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances;

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

An applicant who fails to timely file or pay his or her taxes, a basic and fundamental financial obligation of all citizens, bears a heavy burden in mitigating the financial considerations security concern.<sup>19</sup> An administrative judge should closely examine the circumstances giving rise to an applicant's tax-related issues and his or her response to it. Furthermore, an applicant's claim of financial reform must be weighed against the lack of judgment and reliability evidenced by the person's failure to timely file their income tax returns or pay their taxes.<sup>20</sup>

Applicant failed to meet her burden of proof and persuasion. She failed to timely file her federal and state tax returns for over a decade. She continued to file her tax returns late and not pay her taxes after her divorce. Although she receives some credit in mitigation for filing her overdue tax returns, resolving the non-tax debt referenced in the SOR, and apparently resolving her state tax debt; such evidence is insufficient to mitigate the serious security concerns raised by her long history of failing to file tax returns and pay her taxes. She took action to remedy her overdue federal tax returns and pay her back taxes only after the IRS took some form of action. Furthermore, she failed to abide by the terms of previous installment agreements; placed her personal leisure travel over her legal obligation to pay her federal taxes; and only entered into her current installment agreement after the SOR was issued. She provided no documentation to corroborate her testimony that she has been making the agreed-upon monthly payments on her current installment agreement and her past-due federal tax debt stands at over \$50,000. AG ¶¶ 19(c), 19(e), and 19(f) apply. None of the mitigating conditions fully apply.<sup>21</sup>

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<sup>19</sup> See *generally* ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues).

<sup>20</sup> ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-00221 (App. Bd. June 29, 2016); ISCR Case No. 15-01031 (App. Bd. June 15, 2016); ISCR Case No. 12-09545 (App. Bd. Dec. 21, 2015).

<sup>21</sup> ISCR Case No. 17-01213 (App. Bd. June 29, 2018) (reversing favorable decision involving an applicant with a history of tax issues because no evidence of true financial reform); ISCR Case No. 16-01211 (App. Bd. May 30, 2018) (reversing favorable decision because applicant started taking action to resolve tax issue only after IRS initiated enforcement action); ISCR Case No. 17-01382 (App. Bd. May 16, 2018) (reversing favorable decision involving applicant who failed to timely file returns for seven years, because circumstances contributing to late filing did not mitigate heightened security concerns and applicant took remedial action only after being placed on notice clearance was in jeopardy).

## **Whole-Person Concept**

In addition to the specific adjudicative guidelines, a judge must also consider the non-exclusive group of factors falling under the whole-person concept.<sup>22</sup> I hereby incorporate my above analysis and highlight some additional whole-person matters.

Applicant self-reported the information about her tax problems on her security clearance application and timely filed her tax returns for the past two years. She served in the military, is a hard worker, and her references vouch for her character. However, this and the other favorable record evidence are insufficient to mitigate the security concerns raised by Applicant's long history of failing to file and pay her taxes. Overall, the record evidence leaves me with doubts about Applicant's eligibility for access to classified information.<sup>23</sup>

## **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 (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant

## **Conclusion**

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge

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<sup>22</sup> See AG ¶ 2. See also SEAD-4, ¶ E.4; Directive, ¶ 6.3.

<sup>23</sup> I also considered the exceptions listed in SEAD 4, Appendix C. However, Applicant did not provide sufficient evidence to warrant application of any of the exceptions in Appendix C.