



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



In the matter of:

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also known as -----

Applicant for Security Clearance

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ISCR Case No. 17-02392

**Appearances**

For Government: Adrienne Driskill, Esq., Department Counsel

For Applicant: *Pro se*

10/25/2018

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke her eligibility for access to classified information. Her tax problems were due to the circumstances largely beyond her control; namely, her husband's negligence coupled with his deceit to her over many years. These circumstances also resulted in the dissolution of their longtime marriage. Since discovering the full extent of the tax problems, she took action to remedy the situation and has filed returns and paid the amounts owed to both the IRS and the state tax authority. She is now in compliance with both the IRS and the state tax authority. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations,

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<sup>1</sup> Applicant resumed using her former name per a June 2017 divorce decree.

on November 9, 2015.<sup>2</sup> This document is commonly known as a security clearance application. Thereafter, on July 15, 2017, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant her eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline F for financial considerations.

Applicant answered the SOR on August 18, 2017. She admitted the allegations in the SOR; she provided a one-page memorandum in explanation; and she requested a hearing before an administrative judge.

The case was assigned to me on October 5, 2017. The hearing took place as scheduled on April 11, 2018. Applicant appeared without counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1, 3, 4, 5, and 6. A ruling on Exhibit 2 was held in abeyance pending Applicant's post-hearing response. Applicant's documentary exhibits were admitted as Exhibits A-H. No witnesses were called other than Applicant.

The record was kept open to allow Applicant to submit additional matters. She made a timely submission on June 4, 2018, as follows: (1) Exhibit I, cover letter in explanation; (2) Exhibit J, certificate of compliance and letter of good standing from the state tax authority, dated May 24, 2018; and (3) Exhibit K, IRS account transcript for tax year 2015, dated May 30, 2018. Those matters are admitted without objections. In addition, Applicant indicated in Exhibit I that she did in fact object to Government Exhibit 2, an unauthenticated report of investigation prepared during the course of her 2016 background investigation. Accordingly, her objection is sustained, Exhibit 2 is not admitted, and I have not considered it.

### **Findings of Fact**

Applicant is a 53-year-old employee who is seeking to retain a security clearance that she has held for many years. She is employed as a senior configuration analyst for a large company in the defense industry. She has worked for the same company (or its predecessor in interest) since 1990. She has a good employment record, to include working in classified settings.<sup>3</sup> Her formal education includes a high school diploma and some college. She married in 1985, when she was 20 years old. She now has three adult children, ages 33, 30, and 19, all of whom have served in the U.S. armed forces, and her youngest child is currently serving on active duty with the U.S. Marine Corps.<sup>4</sup> She met her now former husband when she was 15 years old, she described both their

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<sup>2</sup> Exhibit 1.

<sup>3</sup> Exhibits E and G.

<sup>4</sup> Tr. 43.

families as very traditional, and she ran their marital home accordingly. In addition to a full-time job, she managed the children and the household. He was responsible for their financial matters, and she had no reason not to trust him to do so. As noted above, Applicant and her husband divorced in June 2017 after more than three decades of marriage.

Applicant does not dispute the tax problems, although having financial problems or difficulties was not a common occurrence over the years. A credit report obtained during her 2005 background investigation shows no indications of financial distress or irresponsibility.<sup>5</sup> The credit report includes 29 accounts, all of which are listed as “pays as agreed,” 17 accounts have a balance of \$0, and a single account was previously 30 days past due on two occasions.

In her November 2015 security clearance application, Applicant disclosed that she and her then husband failed to file federal and state income tax returns for tax years 2010, 2011, 2012, 2013, and 2014, and she estimated owing \$5,000 for each of those years.<sup>6</sup> She also indicated that they were working with a tax accountant to remedy the situation. Accordingly, the SOR relied on those disclosures to allege (1) a failure to timely pay income tax and to timely file federal and state returns for tax years 2010-2014, and (2) that she was indebted to the IRS “and/or” the state tax authority in the amount of about \$25,000 for tax years 2010-2014, which remained unpaid.<sup>7</sup>

At hearing, Applicant explained that she initially learned about the tax problems in November 2015, when she asked her then husband questions about their financial record in order to complete the security clearance application.<sup>8</sup> His response to her was “don’t worry, I’m taking care of it. That was his response. Don’t worry, I’m taking care of it. That was always his response to me. And like I said, I had no reason to doubt him.”<sup>9</sup>

Learning the full extent of the tax problems was a slow and difficult process for Applicant, because her husband was slow to provide relevant information, and she did not even know the name of their accountant. Her learning curve was also complicated by the fact that their family finances were handled by accounting at her husband’s business. She learned more details during her 2016 background investigation,

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<sup>5</sup> Exhibit 3.

<sup>6</sup> Exhibit 1.

<sup>7</sup> According to *A Dictionary of Modern American Usage* 40 (Bryan A. Garner, Oxford University Press, 1998), the term *and/or* is both outdated and ambiguous. A “legal and business expression dating from the mid-19<sup>th</sup> century, *and/or* has been vilified for most of its life—and rightly so. To avoid ambiguity, don’t use it. Many writers—especially lawyers—would be surprised at how easy and workable this solution is. *Or* alone usually suffices.” The slash is problematic in legal writing because it is inherently ambiguous; its function may be conjunctive or disjunctive, the reader is left to figure it out. Use of the slash (for example, *and/or* and *he/she*) in a formal document such as an SOR is highly discouraged.

<sup>8</sup> Tr. 55-57.

<sup>9</sup> Tr. 56.

describing herself as “shocked.”<sup>10</sup> It was in approximately mid-2016 or early 2017 when she had a good understanding of the situation and starting taking action to resolve the tax problems.<sup>11</sup>

As Applicant learned more and realized the level of her husband’s deceit, the marriage deteriorated. While working on addressing the tax problems, she was also in the process of divorcing her husband, which resulted in selling the marital home they had owned since 2003. In addition, Applicant became seriously ill, on the verge of renal failure, and her employer required her to go on disability for about four and a half months in 2017.<sup>12</sup> To date, Applicant does not fully understand why her former husband neglected their tax obligations, although she thinks it was probably due to a combination of business problems and his irresponsibility and inattention to the paperwork aspect of running his business.<sup>13</sup>

Applicant has filed returns and paid the amounts owed to both the IRS and the state tax authority for tax years 2010-2014.<sup>14</sup> To start, she presented a May 2018 certificate of compliance showing she is in good standing with her state tax authority, which means she has filed all returns and paid all taxes due.<sup>15</sup> She was able to pay the back taxes by using the proceeds of the sale of the marital home, which was a condition or term of the divorce decree.<sup>16</sup> In particular, the marital home was sold for about \$285,000 in April 2017. Applicant and her husband entered into a holdback agreement wherein the sum of about \$85,000 was held by a title company and then disbursed for payment of back taxes pursuant to the divorce decree. Payments of \$4,644, \$3,582, \$9,848, and \$14,517 were made to the IRS for tax years 2011, 2012, 2013, and 2014, respectively, in mid-May 2017, which was before the SOR was issued.<sup>17</sup> And payments of \$1,331, \$3,249, \$2,310, \$5,421, \$6,355, and \$32,312 were made to the IRS for tax years 2008, 2011, 2012, 2013, 2014, and 2015, respectively, in early September 2017, which was shortly after the SOR was issued. Altogether, the payments total about \$83,569.

Concerning the filing of returns, IRS account transcripts establish the filing of all required returns for tax years 2008 through 2016, and the balance due for those tax

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<sup>10</sup> Tr. 57-58.

<sup>11</sup> Tr. 64-65.

<sup>12</sup> Exhibit D; Tr. 80-81.

<sup>13</sup> Tr. 75-78.

<sup>14</sup> Exhibits F, H, I, J, and K.

<sup>15</sup> Exhibit J.

<sup>16</sup> Exhibits A, B, and C.

<sup>17</sup> Exhibit F at 2-3.

years is \$0.<sup>18</sup> The relevant details on filing are as follows: (1) for tax year 2008, a substitute tax return was prepared by the IRS in May 2010; (2) for 2009, a return was filed in late July 2017; (3) for 2010, a substitute tax return was prepared by the IRS in February 2013; (4) for 2011, a return was filed in late July 2017; (5) for 2012, a return was filed in late July 2017; (6) for 2013, a return was filed in late July 2017; (7) for 2014, a return was filed in early July 2017; (8) for 2015, a return was filed in early October 2017; and (9) for 2016, a return was filed in early October 2017. At the hearing in April 2018, Applicant was in the process of working with her accountant to finalize filing returns and pay taxes due for tax year 2017, and she intended to meet the filing deadline later that month.<sup>19</sup> Applicant is no longer intertwined with former husband's business. She will file separate or individual 2017 state and federal income tax returns based on income received by her, and her former husband is obliged to do the same per the divorce decree.<sup>20</sup>

### Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.<sup>21</sup>

It is well-established law that no one has a right to a security clearance.<sup>22</sup> As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>23</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. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>24</sup> The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>25</sup>

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<sup>18</sup> Exhibits F and K.

<sup>19</sup> Tr. 71-74.

<sup>20</sup> Exhibit C at 3.

<sup>21</sup> The 2017 AG are available at <http://ogc.osd.mil/doha>.

<sup>22</sup> *Department of the 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) (no right to a security clearance).

<sup>23</sup> 484 U.S. at 531.

<sup>24</sup> 484 U.S. at 531.

<sup>25</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>26</sup> An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>27</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>28</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>29</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>30</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>31</sup>

## **Discussion**

Under Guideline F for financial considerations, the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is:

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 or sensitive information. . .<sup>32</sup>

The concern is broader than the possibility that a person might knowingly compromise classified or sensitive information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified or sensitive information.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions as most pertinent:

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

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<sup>26</sup> Directive, ¶ 3.2.

<sup>27</sup> Directive, ¶ 3.2.

<sup>28</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>29</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>30</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>31</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>32</sup> AG ¶ 18.

AG ¶ 19(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;

AG ¶ 20(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; 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.

The evidence supports a conclusion that Applicant has a history of tax problems that is sufficient to raise a security concern under Guideline F. The two disqualifying conditions noted above apply to this case. In reaching this conclusion, I considered that the failure to file tax returns or pay tax when due (or both) bears close examination and is a matter of serious concern to the federal government.<sup>33</sup> The nexus or security significance between an applicant's tax problems and their eligibility for access to classified information was explained by the Appeal Board as follows:

Security requirements include consideration of a person's judgment, reliability, and a sense of [their] legal obligations. 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.<sup>34</sup>

In other words, failure to timely file income tax returns or pay tax when due is serious business, and it is viewed with enhanced scrutiny.

Concerning mitigating conditions, Applicant receives credit under AG ¶ 20(b) because the tax problems were caused by her husband's negligence and his deceit in concealing their tax problems from her over many years. Plainly, this is a circumstance largely beyond her control. And I am persuaded that she acted like a reasonable person who was confronting a difficult situation, which was not limited to financial matters. Learning about the full extent of the tax problems and then taking action to address the situation coincided with the dissolution of a long-time marriage, the sale of the marital home owned since 2003, and a serious illness, which resulted in her being placed into a disability status at work for four and a half months in 2017. Taking these circumstances

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<sup>33</sup> The General Accountability Office (GAO) expressed serious concern over the relationship between tax delinquents and clearance holders in its July 28, 2014 report, *Security Clearances: Tax Debts Owed by DOD Employees and Contractors*, <http://www.gao.gov/assets/670/665052.pdf>.

<sup>34</sup> ISCR Case No. 14-00221 (App. Bd. Jun. 29, 2016) at 4 (citations omitted).

together, Applicant has done a remarkable job in resolving very difficult tax problems, which were not of her own making.

AG ¶ 20(g) is also applicable in Applicant's favor. She presented reliable documentation showing that the past-due returns were filed, the back taxes were paid, and that she is now in compliance with the IRS and the state tax authority. I note that in applying this mitigating condition, the length of noncompliance as well as the timing and length of compliance are questions of fact to consider and weigh. The length of noncompliance here is long, but its significance is lessened because Applicant was unaware of the tax problems until late 2015, and she did not fully understand the extent of the tax problems until about mid-2016 at the earliest. Concerning compliance, as noted above, Applicant acted responsibly under the circumstances and was working on the tax problems well before the SOR was issued in July 2017. By then, she had already sold the marital home in April 2017, made multiple payments to the IRS in May 2017, and divorced her husband in June 2017. The federal returns were filed shortly thereafter in July and October 2017 many months before the hearing in this case. Given these circumstances, the timing and length of compliance do not undermine her case in mitigation.

In addition to the formal mitigating circumstances, I have considered the totality of the evidence, to include the fact that Applicant has successfully worked in the defense industry since 1990, about 28 years, and had a security clearance for decades. I considered that the tax problems, which were caused by her former husband's negligence and deceit, were situational in nature and occurred over the course of an otherwise successful career. I also considered that recurrence of similar financial problems is unlikely because she is no longer intertwined with her former husband's business, and their marriage ended in June 2017. Having considered all these matters, I am wholly satisfied that Applicant is an acceptable security risk within the meaning of our adjudicative process.<sup>35</sup>

Following *Egan* and the clearly consistent standard, I have no doubts or concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. I conclude that she has met her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

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<sup>35</sup> AG ¶ 2(a).



### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	For Applicant
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Subparagraphs 1.a and 1.b:	For Applicant
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### **Conclusion**

It is clearly consistent with the national interest to grant Applicant access to classified information. Eligibility granted.

Michael H. Leonard  
Administrative Judge