

DATE: February 15, 2008

In re:)	
)	
)	
-----)	ADP Case No. 06-25543
SSN: -----)	
)	
Applicant for Public Trust Position)	

**REMAND DECISION OF ADMINISTRATIVE JUDGE
ARTHUR E. MARSHALL, JR.**

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel
John Bayard Glendon, Esq., Department Counsel

FOR APPLICANT

Pro se

STATEMENT OF THE CASE

On August 13, 2007, I was assigned the above-captioned case. A decision finding against Applicant based on both financial considerations and personal conduct was issued on August 29, 2007. Applicant appealed the adverse decision to the Defense Office of Hearings and Appeals (DOHA). The Appeal Board subsequently issued its decision on December 27, 2007.

In its decision, the Appeal Board stated it found the record unclear as to what efforts were made by Department Counsel or the undersigned to ascertain what happened to a

certain Internal Revenue Service (IRS) letter referenced by Applicant in her July 24, 2007, response to the File of Relevant Materials (FORM).¹ Department Counsel had noted that the letter was not included with Applicant's materials when the case file was being prepared for assignment to a DOHA Administrative Judge.² The Appeal Board remanded the matter to me, broadly stating "the Administrative Judge is permitted to reopen the record as appropriate, to resolve any outstanding issues."

Upon receipt of the remand, I reviewed the record in this case and my earlier decision. On January 10, 2008, I issued an order directing Department Counsel to fully investigate the issue as to what happened or may have happened to the IRS letter at issue, and to report to me any information or deductions.³ On January 17, 2008, Department Counsel submitted his response to the January 10, 2008, order.⁴ After reviewing the general procedures used in the preparation of FORMs, responses to those FORMs, and the processes leading to the forwarding of completed case files for assignment to a DOHA Administrative Judge, as well as the statements of the Legal Assistant who prepared this specific case file, Department Counsel again noted that the referenced IRS letter was neither attached to Applicant's materials nor included in the case files. He also echoed my assessment that there was no sign of a staple, paper clip, or other attempt to append any documents to Applicant's response to the FORM.

Based on the above investigation and assessment, Department Counsel stated that he believed there were only two explanations for the missing IRS letter: First, as suggested by the Appeal Board, that the IRS Letter was separated from Applicant's July 24, 2007, response to the FORM after its arrival at DOHA. Second, that the Applicant mistakenly omitted the IRS letter from the package she sent to DOHA.

With regard to the first explanation, Department Counsel noted his assessment that this explanation is highly unlikely given the Legal Assistant's reputation for highly efficient and methodical work. Further, he noted that it is most likely the Legal Assistant hand delivered her July 31, 2007, memorandum directly to him and that she sits 15 feet from his office. Department Counsel surmised that "it is highly unlikely that she mistakenly separated the IRS letter from Applicant's response and then lost it, while at the same time

¹ In her response to the FORM, Applicant wrote "I have proof for SOR #1a. Here is a copy of the letter I received stating that my IRS account is paid in full and there is nothing else owing." SOR #1a states: "You are indebted to the Internal Revenue Service in the approximate amount of \$7,121.00 on a federal tax lien entered in about March 2004. As of February 9, 2007, this debt has not yet been paid." Department Counsel handwrote on the bottom of the Legal Assistant's July 31, 2007, memorandum: "I do not see any new documents accompanying Ms. Alexander's letter of 7/24/07." In my initial decision, I noted both Department Counsel's comment and my assessment that the referenced letter was neither attached to the response nor contained elsewhere in the official file.

² In its assessment of the matter, the Appal Board notes that, in her appeal brief, Applicant again referenced enclosure of an IRS letter, as well as a letter from an unemployment agency. It concluded, however, that only two pages from a state employment and training agency were attached to her materials.

³ See Order of January 10, 2008.

⁴ See Department Counsel's Response to Decision of Administrative Judge, dated January 17, 2008.

she managed to copy properly the other documents Applicant sent with her response . . . and to file the original in the Orange File and the copies in the Purple File.” He also noted, as previously mentioned, the lack of evidence of any staples or paper clips having been used to attach any documents to the response.⁵ In conclusion, in light of the procedures used and the available facts, Department Counsel suggested that the second explanation was the correct one.

Department Counsel also forwarded a copy of a May 7, 2007, IRS document he obtained from Applicant during his investigation.⁶ That IRS notice is the letter Applicant meant to include in her response to the FORM. It reflects that an IRS action had recouped \$2,920.97 from Applicant’s tax refund amount of \$3,428.00 for tax year ending 2006 in order to satisfy taxes owed from tax year ending December 31, 2001. As a result of that action, the notice indicated Applicant had a zero balance owed for the tax period ending December 31, 2001. Upon review of Department Counsel’s investigation and the proffered IRS document, I issued an order on January 24, 2008, directing Department Counsel to forward my January 24, 2008, order and permit Applicant to respond or comment on these matters within seven calendar days. On January 29, 2008, he forwarded my order to Applicant and suggested she clarify her suggestion that the IRS’ application of \$2,920.97 in May 2007 satisfied the entire \$7,121 tax lien noted in the SOR at 1.a.

In Applicant’s February 5, 2008, response to my January 24, 2008 order and Department Counsel’s suggestion for further clarification, she stated that the original lien amount of \$7,121.00 was incorrect. She stated it had been reduced over time by installment payments. Through this method, Applicant had made monthly payments to reduce her balances owed and tax refunds owed were applied to her tax lien obligation balance. .

To support her statement, Applicant offered illustrative evidence showing that, as of July 11, 2005, her total beginning tax liability for December 31, 1995, through December 31, 2002, was approximately \$7,385.93. Her proffer further showed that during that period, she submitted \$1,725.60 in payments toward her total obligation. Her ending balance on July 11, 2005, was \$4,976.60 for those tax years, of which; \$3,874.08 was shown owed for tax period ending December 31, 2001 and the balance owed for tax years 1995 and 2002. The May 2007 IRS recoupment satisfied the amount owed for 2001 and intervening payments after July 11, 2005, apparently satisfied the minor sums owed for 1995 and 2002. Consequently, Applicant showed that her tax liability, as cited in SOR 1.a, was satisfied.

⁵ Department Counsel further states: “It also appears that Applicant’s Appeal brief/letter, dated September 26, 2007, also purports to enclose a copy of the same IRS letter for the Appeal Board’s consideration. The copy of this brief/letter provided by the [Appeal Board Chairman] to Chief Department Counsel, dated September 27, 2007, does not include a copy of this IRS Letter as an attachment to Applicant’s brief/letter. The Board’s decision in this case . . . similarly reflects that Applicant’s brief/letter did not include a copy of the IRS Letter, as indicated by Applicant in her brief/letter. . . . It seems that Applicant made the same mistake on two occasions.”

⁶ Notice No. CP49, “Overpaid Tax Applied to Other Taxes You Owe”.

DECISION

After confirming that the thorough procedures cited by Department Counsel accurately portrayed those procedures used in the preparation of FORM cases in which an applicant declines the opportunity for a hearing on the record, I thoroughly considered both Department Counsel's report and the extraneous facts regarding what happened to the referenced IRS letter. Next, I again searched the record for any indication that the IRS statement was ever in the case file and again noted the lack of evidence that any documents to the Applicant's response to the FORM had been physically appended. Department Counsel's exact language regarding the absence of any attachments in his comments to the Legal Assistant on her memorandum, dated July 31, 2007, was then reexamined. Based on the above, I concur with Department Counsel's assessment and conclude that, as a result of simple error, the IRS letter did not originally accompany Applicant's response to the FORM.

Because this omission of the May 2007 IRS letter was the result of unintentional error, and given the Appeal Board's invitation to reopen the record to resolve any outstanding issues, I now include within the record both Department Counsel's and Applicant's narratives and the documents received in response to my orders of January 10, 2008, and January 4, 2008.⁷ The record is now closed.

Based on the information and exhibits now of record, and in light of both the Appeal Board's broad language in remanding the matter and judicial economy, I have reconsidered the matter. Applicant's satisfaction of the tax lien noted in SOR allegation 1.a is acknowledged as satisfied, Applicant's explanations regarding her negative answers regarding obligations on her SF-85P, and the disqualifying and mitigating conditions applicable to Guidelines F and E are reconsidered below in view of this additional finding.⁸ All other prior findings as to the facts, policies, and discussion contained in my original decision and not conflicting with this new evidence and explanation are affirmed.

Guideline F, Financial Considerations

Failure or an 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.⁹ In this matter, the Government provided substantial evidence that Applicant had 17 unpaid, delinquent debts amounting to about \$13,000 accrued over several years. Therefore, Financial Considerations Disqualifying Condition (FC DC) 1, AG ¶ 19(a), (*inability or unwillingness*

⁷ Neither party expressed objection(s) to the documents submitted.

⁸ It is also noted that Applicant offered no new facts or exhibits indicating she has sought financial counseling or showing her current financial situation.

⁹ The revised Adjudicative Guidelines (AG) ¶ 18.

to satisfy debts) and FC DC 2, ¶ 19(c) (a history of not meeting financial obligations) apply. Given this showing, the burden now shifts to Applicant to present evidence of refutation, extenuation, or mitigation, to overcome the case against her.

The majority of the debts cited in the SOR were referred for collection between late 2000 and 2002. The most recent obligations cited were turned over for collection around November 2006. Taken as a whole, the debts noted in the SOR steadily grew in number with each passing year between November 2000 and November 2006. Some debts were accrued during a period of unemployment; other debts were acquired while employed, but on a salary or budget that did not satisfy all of her obligations. Given the more recent obligations, it cannot be said that Applicant's accrual of debt is a thing of the past or something aberrational in her credit history. Based on the scant facts provided, Financial Considerations Mitigating Condition (FC MC) 1, ¶ AG 20(a), (*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*) does not apply. Moreover, despite two periods of unemployment and jobs yielding salaries which apparently could not cover her expenses, no facts are in the record to show she has sought credit counseling as a method of better handling her obligations and budgeting her future income. Consequently, FC MC 3, AG ¶ 20(c) (*the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control*) does not apply.

Of the approximately \$13,000 at issue, approximately \$2,000 represents medical debt acquired providing essential medical care to address her son's severe asthma during a period when she was unemployed. Financial Considerations Mitigating Condition (FC MC) 2, AG ¶ 20(b), (*the conditions that resulted in the behavior 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*) applies to these specific medical obligations, although it is notable that there is no indication whether Applicant has responsibly addressed these debts since the time they were acquired. Additionally, Applicant has demonstrated that the tax lien cited at SOR 1.a regarding approximately \$7,121 has been repaid through an installment plan and an IRS recoupment, giving rise to FC MC 4, ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). Of the approximately \$13,000 at issue in the SOR, a little over \$9,000 has been mitigated or shown to be repaid, leaving approximately \$4,000 unaddressed.

Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.¹⁰ In her response to the FORM, Applicant admitted the allegations under Guideline E that she denied having a tax lien or delinquent debts (over 180 days) on her SF-85P despite the fact she had a tax

¹⁰ AG ¶ 15.

lien and multiple delinquent obligations.¹¹ As noted in my original decision, Applicant set forth three explanations. First, regarding Guideline E, in general, she wrote: "I did not correctly answer the question. It was not intentionally," then referred to her work record. Second, with regard to the tax lien, she stated: "I am trustworthy. My tax account status was on hold until I was able to make payments again [sic] I was told to do a financial worksheet over the phone and I was over extended. I am filing for my taxes and I should have a small amount that I would owe." Third, regarding her other delinquencies, she only addressed the above-referenced medical obligations. Regarding those debts, she wrote: "It was not intentionally [sic] the old medical bills I had I thought were being paid from Medicaid [sic] I was told they would be back dated from the time I had applied and the other bills[.] I was not able to make payments on my account due to my income situation."

Guideline E is primarily predicated on issues involving deliberate falsity, an element found lacking in the original decision. Personal conduct concerns can also arise, however, from conduct involving questionable judgment and questionable reliability. Applicant admitted she was "on hold" in repaying her tax lien when she completed her SF-85P. Her most recent submissions clearly show that she was otherwise addressing that lien both before and after she completed the SF-85P. Consequently, she knew she had a tax lien and she knew she had a balance owed toward that tax obligation when she completed that questionnaire. She chose, however, not to disclose that fact on the form. Moreover, while she may have been confused as to her liability for certain medical bills, there is no indication that she diligently and properly sought the advice or counsel of a security manager, a supervisor, or a colleague before certifying that her SF-85P answers were true, complete, and correct to the best of her knowledge. Furthermore, she failed to identify or reference the other delinquent accounts at issue on her questionnaire. As a result, known obligations were not included on the SF-85P and investigators were given no notice of their existence. Such a situation both vexes and undermines the investigative process. It also raises serious questions regarding Applicant's judgment and reliability. Based on the few facts presented here, none of the available Personal Conduct Mitigating Conditions apply.

"Whole Person" Analysis

I have considered both the record and Applicant in light of the "whole person" concept. She is a mature woman and mother with a high school diploma and some experience in the insurance industry. She experienced minor financial problems which eventually manifested themselves in the annual accrual of additional debt. Inasmuch as she has satisfied her tax lien, Applicant demonstrated that she repaid over half of the \$13,000 cited in the SOR as raising concerns.¹² She has not, however, shown any

¹¹ In response to questions inquiring whether she had been subject to a tax lien in the preceding seven years [SF-85P Question 22(a)] or was then 180 days or more delinquent on any loan or financial obligations (SF-85P Question 22(b)), Applicant answered "No."

¹² The amount referenced is the sum paid off to satisfy the \$7,121 tax lien cited in the SOR.

progress made toward paying off the remaining balance of her obligations.¹³ Moreover, Applicant has not provided any references as to whether she has received productive financial counseling, whether she is currently free of delinquent debt, or whether her current financial situation mitigates, rebuts, or extenuates the financial considerations concerns set forth in Guideline F. Consequently, financial concerns still remain.

Furthermore, Applicant knew she had a tax lien and delinquent debts when she completed her April 2006 SF-85P form and certified that she had no such liens or debts. Indeed, evidence recently submitted and admitted on remand shows that her efforts toward satisfying her tax lien had been an on-going process. That evidence also shows that she finished her incremental satisfaction of this tax obligation by May 2007. Additionally, although she may have been confused with regard to her son's emergency medical bills, she has provided no reason why she failed to mention her other delinquent debts on the form. To specifically deny liens and obligations under these circumstances not only calls into question one's reliability and trustworthiness, but also raises serious concerns under Guideline E.

An applicant in an ADP determination is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.¹⁴ She "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue" her security clearance.¹⁵ "Any doubt is to be resolved in favor of the national security."¹⁶ Here, distinct doubts remain under two independent guidelines. Applicant has failed to mitigate concerns arising under both Guideline E and Guideline F regarding her eligibility for assignment to sensitive duties. Eligibility for positions designated ADP I/II/III is denied.

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
Paragraph 2. Guideline E (Personal Conduct):	AGAINST APPLICANT

¹³ Although approximately \$2,000 was previously mitigated as unexpected medical necessity, that does not excuse Applicant from her obligation for those debts.

¹⁴ Directive ¶ E3.1.15.

¹⁵ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁶ Directive ¶ E2.2.2.

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility for positions designated ADP I/II/III is denied.

Arthur E. Marshall, Jr.
Administrative Judge