



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



In the matter of:)
)
) ADP Case No. 14-02472
)
Applicant for a Public Trust Position)

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: Applicant’s Spouse, Personal Representative¹

04/30/2015

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny her eligibility to occupy a public trust position in the defense industry. Applicant failed to mitigate the security concerns raised by the \$69,000 in delinquent federal tax debt alleged in the Statement of Reasons (SOR). Accordingly, her request for access to sensitive information is denied.

Statement of the Case

On August 26, 2014, the Department of Defense (DOD) issued an SOR detailing trustworthiness concerns under the financial considerations guideline.² DOD adjudicators were unable to find that it is clearly consistent with the national security to grant or continue Applicant’s access to sensitive information and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant’s eligibility to occupy a public trust position.

¹ Applicant’s Spouse, who is an attorney, elected to appear as a personal representative, not legal counsel in this matter. Department Counsel did not object to him doing so.

² This case is adjudicated under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). The *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG)*, effective within the Defense Department on September 1, 2006, apply to this case. The AG replace the guidelines in Enclosure 2 to the Directive.

Applicant timely answered the SOR and requested a hearing.³ At the hearing, convened on February 10, 2015, I admitted Government's Exhibits (GE) 1 through 5, and Applicant's Exhibits (AE) A through C, without objection. After the hearing, Applicant submitted AE D through G, which were also admitted without objection.⁴ I received the transcript (Tr.) on February 19, 2015.

Findings of Fact

Applicant, 46, began working for a federal contractor in February 2012. Applicant's employer promoted her in 2013 into a position that requires Applicant to obtain eligibility to occupy a position of public trust. On her March 2013 security clearance application, Applicant disclosed derogatory financial information related to outstanding federal income taxes for the 2007 tax year and a 2012 home foreclosure. The ensuing background investigation also revealed that Applicant filed for Chapter 7 bankruptcy protection in 2005 and that the IRS filed tax liens against Applicant and her husband for the 2009, 2012, and 2013 tax years.⁵

The state of Applicant's household finances is influenced by the ebb and flow of her husband's law practice. In 2005, Applicant was a full-time student and her husband's practice was not generating enough income to support their family of five. As a result, they fell behind on their mortgage and filed for bankruptcy protection to save their home from foreclosure.⁶ After winning a large settlement, Applicant's husband returned the mortgage to good standing and paid other past-due bills. The bankruptcy was dismissed. The couple was financially stable until 2007.⁷

At hearing, Applicant's husband testified that they manage their household finances together. Although Applicant's husband maintains his business finances separately, they jointly file their federal income tax return. In 2007, Applicant's husband began having difficulty making his quarterly tax payments and eventually stopped making them altogether. Toward the end of 2007, Applicant's husband won a large settlement. He used the money to pay bills, but he did not pay his federal income taxes. As a result, the IRS filed a tax lien against the couple for \$39,000. Applicant and her husband repeated this cycle in the years that followed. As Applicant's husband received cash settlements, they did not pay federal income taxes on the money received. Instead, they would use the money to pay down past-due tax liabilities from prior years and to pay other delinquent financial obligations. As a result, they accumulated tax debt, which resulted in the IRS filing tax liens against the Applicant and her husband for the

³ The Government's discovery letter, dated November 28, 2014, is appended to the record as Hearing Exhibit (HE) I.

⁴ The e-mails regarding the admissibility of the Applicant's Exhibits are included in the record as HE II.

⁵ Tr. 15-17; GE 1-5.

⁶ SOR ¶ 1.a.

⁷ Tr. 18-20; GE 5.

2009 (\$51,000), 2012 (\$14,000), and 2013 (\$4,000) tax years.⁸ The couple claims to have participated in a payment plan between 2008 and 2014, however, they did not provide any records to corroborate this statement.⁹

In 2008, Applicant's husband's practice experienced a good year. Flush with cash, the couple took advantage of the depressed housing market and purchased a new home for \$340,000. However, the decrease in home values in their state prevented the sale of their old home. They rented the property for almost four years and stopped paying the mortgage toward the end of 2012. They were able to negotiate a short sale of the property to prevent its foreclosure. However, an IRS lien on the property prevented its sale. The mortgage company foreclosed on the property in 2013.¹⁰ The IRS captured \$10,000 of the proceeds from the foreclosure sale and applied it to the couple's outstanding federal tax balance.¹¹

At hearing, neither Applicant nor her husband could provide concrete details about their finances. Applicant earns just over \$71,000 annually. Her husband earns at least \$27,600, which is guaranteed from a municipal contract. However, neither could answer questions about their total household income for 2014. Although they do not have a written budget, Applicant's husband testified that they are able to pay their recurring bills. Applicant's husband did admit that he is two months, \$700, behind on the rent for his office space. Regarding their taxes, Applicant's husband testified that although they filed their annual federal tax returns, they did so after requesting filing extensions because they often had difficulty compiling the financial information their accountant needed to complete the returns. Applicant and her husband agree that his failure to pay taxes on his income is the cause of their tax problems. Applicant testified that she has federal income tax deducted from her pay, claiming 11 tax withholding allowances. Applicant claims that she came up with the number of withholding allowances using the appropriate IRS form.¹² Although she believes her federal tax obligation is satisfied through her payroll deductions, she does not know for sure if this is the case.¹³

Applicant understands that as the number of withholding allowances increases, the amount of federal income tax withheld from her pay decreases. Applicant also admitted that even though she and her husband have their federal tax returns prepared by tax professional, they have never sought advice about her withholding allowances or considered decreasing her withholding allowances. Currently, Applicant's husband is in the process of negotiating a new payment plan with the IRS. He also expects that any

⁸ SOR ¶¶ 1.b-1.d.

⁹ Tr. 21-22,31, 40-44, 55; GE 1-4.

¹⁰ SOR ¶ 1.e.

¹¹ Tr. 22-25, 45-49; AE B.

¹² (Tr. 54, 62); See IRS Instruction for FORM 8379 (2012).

¹³ Tr. 25, 32, 34, 56, 62.

cash settlements he wins during the year will be used to reduce their outstanding tax debt.¹⁴

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.”¹⁵ “The standard that must be met for . . . assignment to sensitive duties, is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.”¹⁶ Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.¹⁷ An administrative judge’s objective is a fair, impartial, and commonsense decision that embraces all available, reliable information about the person, past and present, favorable and unfavorable.

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

A person who seeks access to a public trust position enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

Unresolved delinquent debt is a serious trustworthiness concern because failure to “satisfy debts [or] 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 sensitive

¹⁴ Tr. 27, 57-61.

¹⁵ DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation) ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

¹⁶ Regulation ¶ C6.1.1.1.

¹⁷ See Regulation ¶ C8.2.1.

information.”¹⁸ Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information.

The record establishes that Applicant has a history of financial problems, dating back to at least 2005. Since then, she and her husband have demonstrated a history of not paying their financial obligations, in particular their federal income taxes.¹⁹ They have also demonstrated an inability and unwillingness to satisfy their outstanding tax debts.²⁰ Applicant and her husband's ongoing inability to pay their taxes also indicates that they are living beyond their means.²¹

Applicant argues that the events causing her financial problems were caused by events beyond her control, namely her husband's failure to pay taxes on the income he earns from his law practice. While Applicant's husband's failure to properly pay income taxes is responsible for the majority of the couple's tax debt, the fault does not fall on him alone. Applicant's assertion that with 11 withholding allowances that the deductions from her pay is sufficient to cover her federal tax liability is unsubstantiated. Given their minimum combined income of \$99,000, her assertion is unlikely to be correct. Applicant and her husband made a joint decision to mismanage their federal income tax obligations. They are not employing lawful tax avoidance measures, but are knowingly and willingly engaging in practices designed to evade and manipulate their federal tax obligations. He does not pay income taxes on his income as it is earned and Applicant likely claims more withholding allowances than she is entitled to receive. Applicant is not an injured²² or innocent spouse.²³ Applicant and her husband made financial decisions intentionally prioritizing their self-interests over their obligations to the government.

Applicant did not present any evidence to mitigate the financial considerations concerns. Given the tax strategy Applicant and her husband have pursued, their tax debt was not created by events beyond their control. Furthermore, there is nothing in the record to show that she and her husband have made a good-faith effort to resolve their federal tax liabilities. Nor does the couple plan to deviate from their current tax strategy. Applicant's financial problems are ongoing and cannot be considered under

¹⁸ AG ¶ 18.

¹⁹ AG ¶ 19(c).

²⁰AG ¶ 19(a).

²¹ AG ¶ 19 (e).

²² An injured spouse allocation is available to a married tax payer who files a joint return with their spouse, but believes all or a part of the injured spouses tax overpayment (income tax refund) is captured by the IRS and is applied to a past-due obligation of the spouse. See IRS Instruction for FORM 8379.

²³ An innocent spouse is an individual who filed a joint tax return with their spouse and believes that only the other spouse should be held liable for a particular tax liability. Typically, this designation requires some act of bad faith by the other spouse, such as the other spouse omitting income, claiming false deductions or credits, and that the innocent spouse did not have reason to know of the bad acts. See IRS Instruction for FORMs 8857 and 8379.

control. Applicant's ongoing inability to meet her most basic obligation to the government casts doubts on her suitability to enter into a fiduciary relationship with the government.

Whole Person Concept

Based on the record, I have doubts about Applicant's eligibility to occupy a public trust position. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). Applicant is actively engaged in financial practices that ensure that she will continue to incur debt that she cannot pay. Currently, her unpaid tax debt is almost as much as her annual salary. As a result, their finances are and will remain an area of potential vulnerability that is unacceptable for an individual occupying a position of trust.

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

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant access to sensitive information. Her eligibility to occupy a position of public trust is denied.

Nichole L. Noel
Administrative Judge