

DATE: December 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 04-10146

**DECISION OF ADMINISTRATIVE JUDGE**

**MARC E. CURRY**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's failure to file federal or state income tax returns from 1998 to 2004, and her history of delinquent debt, currently in excess of \$1800, generate financial considerations, criminal, and personal conduct security concerns. She has neither filed her delinquent income tax returns nor made any sufficient progress toward satisfying her financial delinquencies. Clearance is denied.

**STATEMENT OF THE CASE**

On May 4, 2006, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating it was unable to find that it was clearly consistent with the national interest to grant or continue a security clearance. [\(U\)](#) The SOR alleged security concerns under Guideline F, financial considerations, Guideline E, personal conduct, and Guideline J, criminal conduct. Applicant answered the SOR on May 31, 2006. She admitted all of the allegations except subparagraphs 1.c., 1.e., and 1.f, and elected to have the case decided on the written record.

Department Counsel mailed the government's file of relevant material (FORM) to Applicant on August 1, 2006. She received it on August 10, 2006. Applicant did not object to any of the FORM submissions. On September 7, 2006, she submitted, via facsimile, three pages of information in response to the FORM. The case was assigned to me on September 18, 2006. At Department Counsel's request, I took administrative notice of the information contained in Items 15 and 16.

**FINDINGS OF FACT**

I have incorporated Applicants admissions into the findings of fact. In addition, I make the following additional findings of fact.

Applicant is a 45-year-old woman with four children. She has been separated from her husband since March 2003. She has two years of college education, and works as a document coordinator. According to her supervisor, she is a

"dedicated and highly valued employee."<sup>(2)</sup>

Applicant failed to file her federal and state income tax returns from tax years 1998 through 2004, and has approximately \$2000 in delinquent debt. Her failure to pay one of her delinquent debts, in the amount of \$427 owed to Account Services,<sup>(3)</sup> resulted in a default judgment entered against her in April 1999.<sup>(4)</sup>

Applicant attributes her financial difficulties to the failure of her husband's business in 2002, her 18-month period of unemployment from January 2002 to June 2003, and her March 2003 marital separation.<sup>(5)</sup> She paid the Account Services debt on July 29, 2005.<sup>(6)</sup> The other debts, however, remain unpaid. Although she asserts that she organized a payment plan to satisfy the credit card debt listed in subparagraph 1.f., she provided no evidence.

Also, Applicant has not yet filed her back income tax returns.<sup>(7)</sup> In response to government interrogatories propounded in August 2005, Applicant stated that she needed to contact the U.S. Internal Revenue Service and the state revenue authority "for transcripts for past information to file past years taxes."<sup>(8)</sup> Nearly one year later, in May 2006, she had not taken this step.<sup>(9)</sup>

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (mitigating conditions).

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process involves an evaluation of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Guideline F - Financial Considerations:** An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

**Guideline E - Personal Conduct:** Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

**Guideline J - Criminal Conduct:** A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to these adjudicative guidelines are set forth and discussed in the conclusions below.

Since the protection of national security is the paramount consideration, the final decision in each case must be reached <sup>(10)</sup>

by applying the standard that the issuance of the clearance is "clearly consistent with the national interest" In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's loyalty is not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

## CONCLUSIONS

### **Financial Considerations**

Applicant's failure to file federal or state income tax returns from 1998 to 2004, and her history of delinquent debt, currently in excess of \$2000, trigger the applicability of Financial Considerations Disqualifying Conditions (FC DC) E2.A6.1.2.1 (*A history of not meeting financial obligations*), and FC DC E2.A6.1.2.3 (*Inability or unwillingness to satisfy debts*). Applicant's failed business, marital separation, and unemployment exacerbated her financial problems. By the time she began experiencing these problems, however, she had already failed to file her income taxes for three consecutive years, and had a judgment entered against her on a delinquent debt. Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.3 (*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)*) applies, but has limited probative value.

Applicant still has not filed any of her back income tax returns. She asserted that she implemented a payment plan to satisfy her most significant debt, owed to Capitol One Bank, but provided no evidence. I have considered the other mitigating conditions and conclude none apply.

### **Personal Conduct**

Applicant's failure to file federal and state income taxes from 1998 to 2004 also triggers the applicability of Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.5 (*A pattern of dishonesty or rule violations including violations of any written or recorded agreement made between the individual and the agency*). She has taken no steps toward filing her tax returns despite promising to do so more than 18 months ago. None of the mitigating conditions apply.

### **Criminal Conduct**

Under 26 U.S.C. § 7203, wilfully failing to file income taxes is a misdemeanor.<sup>(11)</sup> Here, Applicant argues, in effect, that her failure to file federal income taxes from 1998 to 2004 did not constitute a misdemeanor because she always elected to have her taxable income withheld from her pay during this period.<sup>(12)</sup>

Applicant's assertion is misplaced. The willfulness standard under 26 U.S.C. § 7203 applies to willful failure to file returns, not willful evasion of taxes.<sup>(13)</sup> Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations*

or admission of criminal conduct, regardless of whether the person was formally charged), and CC DC E2.A10.1.2.2 (A single serious crime or multiple lesser offenses), apply. I have considered all of the mitigating conditions, and conclude none apply.

### **Whole Person Concept**

Applicant's financial problems were exacerbated by a divorce, a failed business, and a lengthy period of unemployment. Notwithstanding these problems, she had a legal duty to file her income taxes. Moreover, she has been aware that these problems posed a security risk since 2004, yet has neither filed her back tax returns, nor provided any significant evidence that her delinquencies have been paid or are under control. Upon considering the whole person concept factors, particularly, the absence of rehabilitation, <sup>(14)</sup> and the likelihood of continuation, <sup>(15)</sup> I conclude Applicant has not mitigated any of the security concerns. Clearance 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: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Paragraph 2 - Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3 - Guideline J: AGAINST APPLICANT

Subparagraph 3.c: Against Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Marc E. Curry

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended. (Directive).

2. Supervisor's Recommendation Letter, dated September 7, 2006, as included in Applicant's Response to the FORM, dated September 7, 2006.

3. Subparagraph 1.c.
4. Item 4, *Accounts Services v. Applicant*, filed April 13, 1999.
5. Item 8, Signed, Sworn Statement, dated July 21, 2004, at 2.
6. Item 11, Response to Interrogatories, dated August 8, 2005, at 4.
7. Item 3, Answer, dated May 31, 2006, at 4.
8. *See* note 6 at 2.
9. *See* note 7 at 1.
10. *See* Directive, Sec. 2.3, Sec. 2.5.3, Sec. 3.2, and Sec. 4.2.
11. Item 16.
12. Response to FORM, dated September 7, 2006, at 2.
13. *U.S. v. Hairston* 819 F. 2d. 971, 974 (1987).
14. Directive ¶E2.2.1.6.
15. Directive ¶E2.2.1.9.