



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



In the matter of:)	
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-----, -----)	ADP Case No. 08-03849
SSN: -----)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Laura F. Gabel, Personal Representative

May 26, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant failed to pay state and Federal income taxes during many of the ten years since her Chapter 7 bankruptcy discharge. She married a Russian immigrant she barely knew in order to help him obtain legal residency, but has had no contact with him for more than a year. She mitigated foreign influence concerns, but not financial considerations. Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Applicant submitted her Public Trust Position Application (SF 85P), on July 18, 2007. On November 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines F and B. The action was taken under Executive Order 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the revised adjudicative guidelines (AG) promulgated by the President

on December 29, 2005, and effective within the Department of Defense (DoD) for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on December 1, 2008. She answered the SOR in writing on December 3, 2008, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 30, 2009, and DOHA assigned the case to me on that date.

DOHA issued a notice of hearing on February 17, 2009, and I convened the hearing as scheduled on March 10, 2009. Department Counsel offered Government Exhibits (GE) 1 through 8, which were admitted without objection. Applicant testified on her own behalf, and offered Applicant's Exhibits (AE) A through E, which were also admitted without objection. I granted Applicant's request to leave the record open until March 24, 2009, to permit submission of additional evidence. This evidence was forwarded by a letter dated March 20, 2009, that Department Counsel received and forwarded, without objection, on April 9, 2009. The evidence was marked AE F, and admitted. DOHA received the transcript of the hearing (Tr.) on March 19, 2009.

Findings of Fact

Applicant is a 69-year-old employee of a federal contractor, where she has worked for almost two years as a customer service representative. In her answer, she admitted to all of the allegations in the SOR, with some explanations. Those admissions and explanations are incorporated in the following findings.

Applicant was married to an Army warrant officer for more than 24 years. They divorced in 1990 or 1991. She has five children, the youngest two of whom were about ages 17 and 14 at that time and lived with her. The then-17-year-old daughter has continued to live with Applicant ever since, and has two children of her own. This daughter performs daycare in their home, but does not otherwise provide income to support their household. (GE 1 at 5-6; Tr. at 56-57, 60-61, 96-97.) In November 1998, Applicant could not afford to pay her debts and filed a petition for Chapter 7 bankruptcy. This case resulted in discharge of her dischargeable debts in February 1999. (GE 2 at 3; Tr. at 62, 65.)

The state in which she formerly resided, until 2000, filed tax liens against Applicant for \$738 in August 2000, for \$1,370 in September 2003, and for \$2,425 in October 2003. (GE 2 at 3-4.) In September 2007, Applicant told an investigator from the Office of Personnel Management (OPM) that she did not have money withheld to pay her state income taxes because she did not think she made enough money to owe any. She did, however, show him a letter confirming that she had satisfied the \$2,425 lien that related to tax year 1999, and advised that she was paying her remaining state tax debts at the rate of \$100 per month. (GE 4 at 9.) She has continued those payments to date, and her remaining state tax arrearage was \$850.55 as of February 18, 2009. She intends to keep paying under this arrangement, which will conclude later this year at the current rate. (AE E; Tr. at 45, 47-52.)

The Federal government filed a tax lien against Applicant in the amount of \$17,771 in September 2004. (GE 2 at 3; GE 6.) This lien related to unpaid taxes for years 1999, 2000, and 2001. (AE D.) Applicant provided a copy of her agreement with the IRS for installment payments of \$602 per month to resolve her delinquent tax debt. The agreement was negotiated in November 2008, and she began making payments in January 2009. These documents reflect that her total delinquent Federal tax debt is \$38,955, and includes arrearages from tax years 2002, 2003, 2004, and 2007, in addition to the three earlier years covered by the 2004 lien. It will take more than five years to repay this debt if she makes all the payments as agreed. (AE C; AE D; AE F at 5; Tr. at 52-55, 67-68.)

Applicant told the OPM investigator in September 2007 that she thought the \$17,771 Federal tax lien resulted from her not withholding income taxes during the years 2000 through part of 2004 because she thought she was exempt from taxes because she did not make enough money. She said she had an offer in compromise prepared and intended to file it with the IRS when her finances were sufficiently in order to make the payment schedule. In her August 2008 response to DOHA interrogatories, she said that the company that had prepared her offer in compromise was out of business, and her accountant was preparing another one that she would file within the next two weeks. (GE 4 at 9, 12.)

During the hearing, Applicant explained that she adjusted her withholding for her former state and Federal income taxes to zero because she needed the extra money to meet living expenses. From 1999 to 2004 she did not file Federal returns, so she did not calculate what she would have owed. She started filing tax returns again in 2005, but did not explain why she owed delinquent taxes for 2007. She did submit a copy of the July 2008 bill from her accountant for preparing her 2007 Federal tax return, however, and testified that she did file a return for that year. (GE 4 at 14; Tr. at 56-58, 66-70, 88-90, 98.)

Applicant married a Russian immigrant who she met at her church in April 2007 after a brief courtship. He needed to marry an American in order to obtain a green card and keep his job. Although they could barely communicate due to his poor English skills, he was very nice to her and she married him because she "thought this would be good." He worked in a city about 20 miles from where she lives, and stayed there with friends during the week after their marriage. He would stay at her house on weekends at first. She sponsored his application for a green card, and he was able to keep his job. After about a year of this, she asked him to contribute toward meeting household expenses and he refused. In April 2008, Applicant decided she had "had enough" and told him to move out. She has not spoken to him since then. She intends to divorce him someday, if and when she can afford the legal costs of doing so. She speaks no Russian, has never met or spoken to any of his children who live in Germany and Russia, and has no ongoing family relationship with him except being legally married. I took administrative notice of the facts concerning Russia set forth in HE II, as requested by Department Counsel and without objection by Applicant. (Tr. at 30-35, 58-59, 70-75, 82-88, 99-102.)

Applicant provided a letter and testimony from her eldest daughter, and a letter from that daughter's husband, describing her loving and caring nature, honesty, dependability and trustworthiness. She is hardworking and always looking for ways she can help others even to her own detriment. I evaluated Applicant's testimony to be credible, although her memory for details was poor at times. Her present income is sufficient to meet her regular living expenses and comply with her tax repayment agreements, although with some difficulty. A recent Personal Financial Statement reflects a monthly surplus of \$736. (AE A; AE B; AE F at 3-4, 6-7; Tr. at 96-111.)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." 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.

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 as to obtaining a favorable trustworthiness decision.

A person who applies for access to sensitive information seeks to enter 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 protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to financial considerations:

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 information. An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying. Department Counsel argued persuasively that the evidence raised two of these potentially disqualifying conditions: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” He cited her tax debts covering almost ten years of delinquent taxes and substantial remaining amount due. (Tr. at 113.) There was neither any allegation nor proof of compulsive, addictive, or problem gambling. Nor was there any evidence of drug abuse or alcoholism. However, there is substantial and undisputed evidence of many years of income tax evasion. Accordingly, this evidence establishes the additional disqualifying condition: “(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.”

AG ¶ 20 provides conditions that could mitigate security concerns arising from a history of unpaid debt. Since Applicant did not dispute the legitimacy of any SOR-listed debt, the four potentially pertinent conditions are:

(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;

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's delinquent taxes arose over the past ten years and she still owes more than \$39,000 despite recent repayment efforts. At least eight different tax years were involved, including as recently as 2007. These debts were the result of her deliberate choice to stop regular withholding so she could increase her available income to spend on other things. These actions by Applicant preclude any mitigation under AG ¶ 20(a), since her deliberate choice to evade her state and Federal income tax obligations continues to reflect adversely on her judgment and trustworthiness.

Applicant had her former debts discharged in bankruptcy in 1999, many years after her divorce and when her youngest child was 22 years old. By definition, the debts arose during periods when she was employed, since they involve income taxes that should have been withheld from her wages. She did not act responsibly since she deliberately chose not to pay these taxes. She accordingly established no mitigation under AG ¶ 20(b). She offered no evidence of financial counseling. She has entered repayment programs for her delinquent taxes, but only began repaying her Federal taxes a few months ago, and after receipt of the SOR, despite having told the OPM investigator she would do so months earlier. This conduct has begun to establish mitigation under AG ¶¶ 20(c) and (d), but has not continued for a sufficient period to indicate clearly that the problem is being resolved or to show a good-faith change in her demonstrated disregard for her legal obligations toward the Government. Her lengthy period of failure to pay her taxes showed the lack of judgment and unwillingness to abide by rules and regulations at the heart of this guideline's security concerns.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. The two conditions potentially raised by Applicant's marriage to a Russian citizen are:

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Applicant married a man she barely knew primarily in order to help him become a resident alien who could legally continue to work in the U.S. She continued a relationship with him on weekends for about a year, after which she broke off all connections to him. She inquired into divorce, but found it would cost more than she could afford so she has not yet pursued it. Her marriage is sufficient to raise prima facie security concerns under these two disqualifying conditions, however.

AG ¶ 8 provides conditions that could mitigate security concerns. Those applicable to Applicant's brief marital relationship include:

- (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

During the period from April 2007 to April 2008, when Applicant and her husband had some semblance of a family relationship, none of these conditions applied. However, since then she has had no contact with him whatsoever, and has no intention of pursuing any future relationship. She has never had any communication with any of his children, and has no other contact with any Russians. Although Russia is among the most active foreign nations targeting intelligence collection efforts against the U.S., there is nothing about her brief relationship with this Russian immigrant that would presently heighten the risk of her being targeted or exploited. She has no present loyalty or obligation toward him or any foreign entity. Accordingly, foreign influence security concerns are mitigated.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's conduct of concern involves her delinquent taxes dating back at least ten years, after a bankruptcy court had discharged her debts and given her a fresh start to establish financial responsibility. Her tax debt exceeds \$39,000 and will not be resolved for at least five years under a

plan she entered too recently to have yet established a pattern of compliance. She deliberately chose not to pay taxes in order to have more funds available to spend on other things she wanted to buy for herself and others. Her entry into the Federal repayment agreement covering the vast bulk of this debt was apparently motivated by her receipt of the SOR, rather than by any good-faith determination to fulfill her legal obligations to the Government. She is not subject to coercion or exploitation through her marriage relationship to a Russian, but remains subject to pressure and duress due to her difficult financial position and the need to support her adult daughter and two grandchildren. In the face of such pressures, she chose to violate her obligations to state and Federal governments over a ten-year period, and a three-month period during which she repaid less than 5% of the resulting debt is insufficient to show that recurrence is unlikely.

On balance, Applicant presented insufficient evidence to fully mitigate reliability and trustworthiness concerns arising from her failure to pay her taxes over the past ten years. Overall, the record evidence leaves substantial doubts as to Applicant's present eligibility and suitability for a public trust position. For all these reasons, Applicant has not mitigated the security concerns arising from her financial considerations.

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:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to ADP I/II/III sensitive information is denied.

DAVID M. WHITE
Administrative Judge