



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 14-05409
)	
Applicant for Position of Trust)	

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns raised by her deliberate attempts to engage in tax fraud. Her request for eligibility to occupy a position of trust is denied.

Statement of the Case

On February 18, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for her job with a defense contractor. After reviewing the results of the ensuing background

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5200.2-R, as amended (Regulation).

investigation, DOD adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.²

On February 6, 2015, DOD issued Applicant a Statement of Reasons (SOR) alleging facts which raise trustworthiness concerns addressed through the adjudicative guidelines (AG)³ for financial considerations (Guideline F) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on July 9, 2015, and I convened a hearing on August 6, 2015. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 5.⁴ Applicant testified and presented Applicant's Exhibits (Ax.) A - C. I left the record open after the hearing to receive additional relevant information. DOHA received the hearing transcript (Tr.) on August 17, 2015. The record closed on August 28, 2015, when I received Applicant's post-hearing submission that is included, without objection, as Ax. C.⁵

Findings of Fact

Under Guideline F, the Government alleged that Applicant failed to timely file her state tax returns, or pay taxes due, for tax years 2005 - 2007 (SOR 1.a); that she owes \$10,816 for a state tax lien filed against her in 2010 (SOR 1.b); that she failed to timely file federal tax returns, or pay taxes due, for tax years 2006 and 2007 (SOR 1.c); and that she owes \$32,716 for a federal tax lien filed against her in 2011 (SOR 1.d). Under Guideline E, the Government cross-alleged as personal conduct Applicant's failure to file and pay taxes alleged in SOR 1.a and 1.c (SOR 2.a).

Applicant admitted with explanation the allegations at SOR 1.b and 1.d. She denied the remaining SOR allegations. In addition to the facts established by Applicant's admissions, and based on all available information, I make the following findings of fact.

Applicant is 52 years old and since June 2008, has been employed in an information technology (IT) position by a defense contractor. Her job requires eligibility for a position of trust because her employer supports management of the health care system used by members of the military, and Applicant must be found suitable to be entrusted with personally identifiable information (PII) associated with the health care system's constituents. Applicant worked in similar jobs outside the defense industry starting around 1997. In August 2007, Applicant was fired from her job of ten years with

² Required by the Regulation, as amended, and by DOD Directive 5220.6, as amended (Directive).

³ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

⁴ Department Counsel also provided a copy of the letter forwarding to Applicant advance copies of Gx. 1 - 5 (Hx. 1) and a list identifying Gx. 1 - 5 (Hx. 2).

⁵ Department Counsel's email forwarding Ax. D and waiving objection thereto is included as Hx. 3.

a nationally-known IT corporation for misusing her corporate credit card. (Gx. 1; Gx. 2; Tr. 47 - 52)

Applicant earned an associates' degree in management information systems in May 1994. She is nearly finished with her studies for a bachelor's degree. Applicant was married from May 1986 until divorcing in September 1988. She has three children, all now adults, whom she raised by herself. (Gx. 1; Gx. 2; Tr. 54 - 55)

Applicant has worked for most of her life, including holding jobs in high school. She makes in excess of \$100,000 annually in her current field. She has always been aware of her federal and state income tax reporting obligations. Other than in the years alleged in the SOR, Applicant reported and paid her taxes as required. Nevertheless, Applicant did not file her federal or state income taxes as alleged in the SOR. She did so because in 2005, her sister told her about a book that purported to establish a legal way to avoid paying income tax.⁶ Although Applicant did not read the book, or only read parts of it, she decided to change her income tax withholding status to "exempt" and she stopped filing her federal and state income tax returns. Applicant testified that she was reinforced in the propriety of her actions by a telephone conversation with someone from the IRS. It appears that conversation occurred as a result of an IRS inquiry about the change in Applicant's tax withholding status, and Applicant insists the IRS representative referred to the need to close "that loophole." Applicant did not present anything to explain or corroborate her claim in that regard. (Gx. 1; Gx. 2; Tr. 37 - 44, 55 - 58, 82 - 89)

In 2008, Applicant became alarmed by the fact that a famous movie star⁷ had been convicted and jailed for failing to timely file his income taxes. In July 2008, Applicant retained the services of a tax debt resolution firm to assist her in preparing her past-due tax returns and establishing repayment plans with both state tax authorities and the IRS. Payments were made on a regular basis from 2008 until sometime in 2010, when Applicant learned that the firm had stopped providing the services for which she had paid. She started working with H&R Block and was able to bring current all of her past-due federal and state tax return filings by June 2010. She also re-established repayment plans for all of her past-due tax obligations. (Gx. 1; Gx. 2; Ax. A; Ax. B; Ax. D; Tr. 28, 45 - 47, 60 - 75)

⁶ The book, "Vultures in Eagle's Clothing: Lawfully Breaking Free from Ignorance Related Slavery," was written in 1997 by Lynne Meredith. In 2002, she and others were arrested and charged with numerous federal crimes relating to income tax fraud, mail fraud, and conspiracy to commit those crimes. In June 2005, she was sentenced to ten years imprisonment in a federal penitentiary. See *United States v. Meredith*, 685 F.3d 814 (9th Cir. 2012) cert. denied, 133 S.Ct. 563 (U.S. 2012).

⁷ Wesley Snipes, renowned for his roles in films such as "U.S. Marshals," "White Men Can't Jump," "Major League," and "Blade," was charged in 2006 with federal tax fraud, and was convicted in 2008 of failing to file his federal income tax returns. Mr. Snipes was sentenced to three years in prison. See *Snipes v. U.S.*, 611 F.3d 855 (11th Cir. 2010), cert. denied, 131 S.Ct. 2962 (U.S. 2011).

Policies

Positions designated as ADP I and II are classified as “sensitive positions.”⁸ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is “clearly consistent with the interests of national security” to do so.⁹ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.¹⁰

Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,¹¹ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors, commonly referred to as the “whole-person” concept, listed in the guidelines at AG ¶ 2(a).¹² The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government’s case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion.

A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant’s suitability for access should be resolved in favor of the Government.

⁸ Regulation, ¶ C3.6.15.

⁹ Regulation, ¶ C6.1.1.1.

¹⁰ Regulation, ¶ C8.2.1.

¹¹ Directive, 6.3.

¹² “(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.”

Analysis

Financial Considerations

Available information is sufficient to support all of the SOR allegations. The facts established raise a trustworthiness concern about Applicant's finances that is addressed at AG ¶ 18, as follows:

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 overextended 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.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); 19(c) (*a history of not meeting financial obligations*); 19(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*); and 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*).

I have also considered the following pertinent AG ¶ 20 mitigating conditions:

(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;

(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.¹³

Applicant's information, particularly her post-hearing submission, shows she has resolved her tax delinquencies and brought her filing status current with both state and federal tax authorities. She is not likely to repeat her conduct in this regard. However, the fact that she would so recklessly decide that she could avoid her tax obligations and

¹³ The mitigating conditions at AG ¶¶ 20(e) and 20(f) are not pertinent to these facts and circumstances.

attempt to defraud the Government for personal gain creates doubt about her judgment and reliability that are not easily resolved. In 2008, Applicant's efforts to resolve her tax delinquencies were motivated by a fear of going to jail, as had a famous movie star. In none of her explanations for her conduct did she express an understanding that she had shirked her income reporting and tax paying obligations as a U.S. citizen. The "good faith" attached to her corrective efforts is attenuated by the fact she was motivated by fear of punishment rather than an acceptance of her responsibilities and a recognition of her errors in judgment.

Based on the foregoing, AG ¶ 20(a) does not apply because the Applicant's conduct was recklessly fraudulent and continues to reflect poorly on her trustworthiness and judgment. AG ¶ 20(c) applies, because the problem – Applicant's unfiled returns and resulting tax debts – are being resolved. AG ¶ 20(d) does not apply because the "good faith" aspect of Applicant's resolution efforts is shallow, at best. On balance, Applicant has not mitigated the trustworthiness concerns about her failure to meet her tax reporting and payment obligations.

Personal Conduct

Available information also established trustworthiness concerns about Applicant's personal conduct. That concern is expressed at AG ¶ 15, as follows:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, Applicant's willingness to engage in tax fraud requires application of the following AG ¶ 16 disqualifying conditions:

b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant provided false information to government representatives when she claimed to be exempt from tax withholding in 2005. She relied on that misrepresentation to avoid reporting her income and paying her taxes. She did so without any good-faith basis for thinking her conduct was legal. By her own account, she did not read the book

her sister told her about, and she did not corroborate her claim that a phone call with the IRS confirmed there was a legal basis for her actions.

By contrast, AG ¶ 17 lists the following conditions that, if established, might mitigate the trustworthiness concerns about Applicant's conduct:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) association with persons involved in criminal activities has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(a) does not apply for the same reasons expressed regarding AG ¶ 20(d), above. Likewise, I have reservations about the applicability of AG ¶ 17(d); Applicant's acknowledgment of her taxpayer responsibilities is elusive and does not inspire confidence that she will continue to meet her obligations in the future. AG ¶ 17(b) does not apply because Applicant did not substantiate her claim that an IRS official conformed that her actions were legitimate. The book to which she was referred, and which she may or may not have read, was written by a person who was convicted of, and imprisoned for, tax fraud. As to AG ¶ 17(c), Applicant's conduct was anything but minor. It was tantamount to an effort to defraud the Government for personal gain. Such conduct goes to the heart of the Government's need to ensure each person in whom it reposes its trust is reliable and has the requisite good judgment. AG ¶¶ 17(e) and 17(f) are not pertinent to these facts and circumstances. On balance, Applicant did not mitigate the trustworthiness concerns about her personal conduct.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines E and F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has resolved her delinquent tax debts and income tax returns. However, this information is not sufficient, in light of the record evidence as a whole, to overcome the doubts raised by her willingness to engage in such conduct in the first place. Because protection of the interests of national security is the principal purpose of these adjudications, any remaining doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is denied.

MATTHEW E. MALONE
Administrative Judge