



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



In the matter of:)
)
-----) ADP Case No. 06-15001
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: William S. Aramony, Esquire

December 17, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant mitigated trustworthiness concerns regarding Guidelines J (Criminal Conduct) and E (Personal Conduct). Applicant’s court-martial and dismissal from military service were more than 13 years ago. Her subsequent conduct establishes that she is rehabilitated. Applicant’s eligibility to occupy an ADP I/II/III position is granted.

Statement of the Case

On June 22, 2003, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 5). On April 22, 2007, Applicant submitted another SF 86 (GE 5). On July 2, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her (GE 11), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2,

1992, as amended, modified and revised.¹ The SOR alleges trustworthiness concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy an ADP I/II/III position, which permits access to sensitive information, and recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked.

On July 20, 2008, Applicant responded to the SOR allegations and elected to have her case decided by a hearing before an administrative judge (GE 12). On October 16, 2008, the case was assigned to me. On October 20, 2008, notice was issued and on October 27, 2008, amended notice was issued for the hearing, which was held on November 25, 2008. At the hearing, Department Counsel offered eight exhibits (GEs 1-8) (Transcript (Tr.) 25), and Applicant offered 13 exhibits (Tr. 27-29, 107; AE A-M). There were no objections, and I admitted GEs 1-8 (Tr. 26-27), and AEs A-M (Tr. 28-29, 107). Additionally, I admitted the SOR, response to the SOR and two Hearing Notices (GEs 9-12). I received the transcript on December 4, 2008.

Procedural Issues²

The SOR cited facts that would have brought Applicant's case under the prohibitions of the Smith Amendment (10 U.S.C. § 986), because she was convicted and sentenced to punishments including dismissal from the Air Force for offenses under the Uniform Code of Military Justice (UCMJ). However, this section of the United States Code, which applied only to clearances granted by DoD, was repealed on January 28, 2008, when the President signed the National Defense Authorization Act for Fiscal Year 2008 into law. It was replaced by adding Sec. 3002 to 50 U.S.C. § 435b (the Bond Amendment), which applies throughout the Federal Government. Sec. 3002(c) of this new provision continues the requirement for disqualification, absent a meritorious waiver, for persons who were sentenced to and served imprisonment for more than a year. However, this disqualification only applies to prevent clearances that would provide access to special access programs (SAP), Restricted Data (RD), or any other information commonly referred to as "special compartmented information" (SCI).

This statutory modification ends the former Smith Amendment requirement for a meritorious Secretarial waiver to grant or continue a regular, or "collateral," security clearance to a person who has received a dismissal from the Air Force. On June 20, 2008, prior to the issuance of the SOR and the hearing in this case, the Under

¹On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

²Administrative Judge White cogently explained the interplay between the Smith Act, the Bond Amendment and revised Adjudicative Guideline (AG) J in ISCR Case No. 07-11963 (A.J. Aug. 20, 2008). I have borrowed freely and extensively without further citation from his explanation in this section.

Secretary of Defense (Intelligence) issued a memorandum providing interim guidance for implementation of the Bond Amendment. This memorandum set forth guidance for adjudicators to assess the potential application of the Bond Amendment to security clearance determinations and requirements for “Exception” identification of persons subject to its limitations in the Joint Adjudication Management System (JAMS) if a collateral clearance is granted. The granting of access to SAP, RD or SCI to such individuals requires a meritorious waiver under the terms of that memorandum. Such access is not at issue in this case, and accordingly the Bond Amendment was not addressed in either the SOR or at the hearing.

The repeal of the Smith Amendment also nullified the legal authority by which the Under Secretary of Defense for Intelligence modified the revised Adjudicative Guidelines (AG) that were approved by the President on December 29, 2005. When the Under Secretary promulgated the AG for use within DoD, on August 30, 2006, he added provisions reflecting the Smith Amendment. AG H (Drug Involvement), AG I (Psychological Conditions), and AG J (Criminal Conduct) were each modified, but only the latter guideline is involved in this case. It was modified by adding AG ¶¶ 31(f), 32(e), and footnotes 1 and 2. Because the President, in Executive Order 12968, intended to establish “a uniform Federal personnel security program” (Intro.), and required a “common set of adjudicative guidelines for determining eligibility for access to classified information” (Sec. 3.1(f).), the authority for these DoD modifications to the guidelines ended with the repeal of the Smith Amendment. The new statutory requirements are in effect and must be followed pending formal revision of the AG, but only the prohibition against granting clearances to unlawful drug users and addicts under AG H applies to “collateral” security clearances. Accordingly, the Smith Amendment-related provisions added to AG J have been repealed, and do not apply to the remaining proceedings in this case.

Findings of Fact³

Applicant admitted the SOR allegations. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant was born in 1948 in the Philippines (GE 5). She was married in 1984 and divorced in 1986 (GE 5). She married again in 1989 and divorced in 1992 (GE 5). Applicant attended medical school from 1969 to 1972 in the Philippines, graduating magna cum laude (Tr. 63; GE 5; AE A). She completed her residency in New York State (AE A). She received a medical license in three states (Tr. 63). Applicant joined the military as a general surgeon in July 1981 (Tr. 64; GE 5).

³Some details have not been included in order to protect Applicant’s right to privacy. Specific information is available in the cited exhibits.

Criminal Conduct⁴

In June 1995, Applicant was convicted contrary to her pleas by a general court-martial with members of dereliction of duty, signing a false official document and larceny of government funds, in violation of Articles 92, 107, and 121, UCMJ; 10 U.S.C. §§ 892, 907 and 921. She was sentenced to total forfeitures, confinement for six months and dismissal from the Air Force. She was released early from confinement at Fort Leavenworth because of good behavior (Tr. 74).

Prior to her court-martial, Applicant completed 14 years of outstanding service as a board certified surgeon and rose to the rank of Lieutenant Colonel. The day she was scheduled to be promoted to Colonel she learned she would not be promoted because she was under investigation for larceny of housing allowances (Tr. 74). At the time of her offenses and court-martial, she was assigned to an overseas command in the Far East. Applicant's mother died on December 19, 1991, and Applicant was divorced on January 18, 1992 (Tr. 68, 91). She learned her divorce was final in October 1992, and the members modified the findings to reflect when she learned of her change of status (Tr. 69; GE 1 at 442). Her entitlement to receive dependent allowances terminated when she was divorced. She notified the personnel office of her divorce; however, she failed to notify the finance office of her divorce (Tr. 70, 97, 102). Her notification to personnel was apparently not documented in her personnel records at the time she made this disclosure. Applicant continued to receive more allowances than she was entitled to receive.

In December 1993, Applicant signed a document certifying her entitlement to dependent allowances (Tr. 91). She listed her deceased mother as her dependent (Tr. 91). She also listed her deceased mother as a dependent on her 1992 and 1993 income tax returns (Tr. 92). Her tax returns indicate her mother lived with her for 12 months of the 1992 and 1993 tax years (Tr. 93-94). When she was about to change duty stations, a personnel specialist, who was preparing her orders, asked about the status of her husband. At first, she said she was separated from her husband and he need not be listed on her orders. The personnel specialist replied that until there was a divorce, he could be listed on her orders. Applicant then informed the personnel specialist that she was divorced. However she falsely reiterated that her mother was her dependent. After court-martial charges were preferred, Applicant reimbursed the government about \$23,000 for the overpayment of her housing allowance (Tr. 73). She subsequently amended her tax returns to correct the false information submitted in her 1992 and 1993 tax returns (Tr. 115-116).

At Applicant's court-martial she claimed she was unaware that she was receiving the extra pay by virtue of the false dependent information that she provided to finance

⁴ Applicant admitted the appellate court decision, dated November 27, 1996, which affirmed her findings and sentence, accurately described her background, her criminal conduct and the processing of her court-martial conviction and sentence (Tr. 68, 100; GE 3). Unless stated otherwise, this appellate court decision is the source for the information in this section.

(Tr. 95-96). She said she did not remember signing the false certification in December 1993 concerning her mother's continuing status as a dependent (Tr. 98).

Post-trial Actions

After her court-martial, Applicant lost her license to practice medicine (Tr. 72-74). She practiced medicine in the Philippines from 1996 to 2000 (Tr. 75). She provided medical services in a poor village and was usually paid with food such as rice or chickens (Tr. 77-79). She often provided surgery in the Philippines without charging for her services (AE A). In 2000, her debts were discharged using bankruptcy; however, her credit is good now (Tr. 76, 80). Her September 17, 2008, credit report showed four open accounts and no delinquent information (AE H). From 2000 to 2002, she typed some transcripts and babysat children (Tr. 79). In 2002, she began her work for government contractors (Tr. 79). She told Mr. C, her employer, about the court-martial the first day she met him (Tr. 83). Since 2004, Applicant has worked with sensitive patient and provider information (Tr. 84-85). She carefully safeguards the privacy information entrusted to her (Tr. 85-90). Applicant was remorseful about her misconduct (Tr. 76). None of the offenses have recurred (Tr. 90). After her conviction she is extra careful about signing things and avoiding doing anything that might be construed as false (Tr. 100-101).

Recommendations and Achievements

The President and CEO of the government contractor employing Applicant (Mr. C) has known Applicant about six years (Tr. 15). Mr. C retired from the Navy after 24 years service with the rank of Commander (Tr. 16-17). Applicant disclosed her court-martial before she was hired (Tr. 18, 22-23). Applicant began working for the contractor in August 2002 (Tr. 17). In 2003, the contractor initially submitted Applicant's clearance request, and she was awarded an interim ADP clearance (Tr. 17). She currently has access to sensitive information (Tr. 23). Applicant works in the area of medical credentialing and quality assurance (Tr. 20). She works side-by-side with active duty medical personnel (Tr. 20-21). Mr. C described Applicant as a valued employee with excellent to outstanding work performance (Tr. 19-20). Applicant is very trustworthy (Tr. 21).

Colonel (Ret.) (COL) S has known Applicant for 27 years (Tr. 31). COL S and Applicant worked together for two years before Applicant's court-martial, and they stayed in touch over the years thereafter (Tr. 32). When she was on active duty, Applicant distinguished herself for her positive relationships with patients and staff at the hospital (Tr. 33). COL S drove from New Mexico to Arlington, Virginia to speak on Applicant's behalf (Tr. 34). Applicant has demonstrated through hard work and initiative that she has been rehabilitated (Tr. 35-38, 42-43). Applicant is very honest and trustworthy (Tr. 34-35, 37-37).

Commander (Ret.) (CMDR) L served on active duty for 25 years and retired as a Commander in 1998 (Tr. 46). CMDR L was previously a director for the contractor who

hired Applicant (Tr. 46, 50). He came to Applicant's hearing from Colorado (Tr. 45). Applicant was responsible for developing and improving verification and documentation of health care providers' credentials (Tr. 47-48). She worked with the highest levels of the Services' medical departments including their Surgeon Generals (Tr. 56). Applicant did an excellent job and her contributions to the Department of Defense are "tremendous" (Tr. 54, 57). CMDR L would trust Applicant with his life (Tr. 56). Despite her court-martial, CMDR L recommended her for a position with access to sensitive government information and believes she is highly trustworthy (Tr. 51-55, 58-59).

An August 2006 letter of appreciation from a Major General in the Office of the Surgeon General described a critically important topic Applicant presented at a symposium as an outstanding success (AE B). A December 2006 letter of appreciation from a Colonel at the Department of Defense level warmly thanked Applicant and other contractor employees for her guidance, tireless efforts and superb work product (AE C). She received several certificates and a memorandum of appreciation for her work on behalf of the contractor (AE D, E, F). The contractor's 2007 annual evaluation for her performance rated her outstanding in ten categories, exceeds expectations in seven categories and meets expectations in one category (AE G). The contractor's comments on the 2007 annual rating emphasized her strong leadership, solid reliability and outstanding judgment (AE G).

Other character witnesses who have known Applicant for many years and some for decades lauded her contributions to her employer, hard work, diligence, dedication, friendliness, positive attitude, honesty and trustworthiness (AE A, J, K, L). Senior personnel, such as a medical doctor (AE A), a retired Colonel (AE J) and a retired Navy Captain (AE L) provided written character references.

Applicant has contributed her services to charity and family for many years. She has always supported her sister, who is mentally handicapped (Tr. 65). Every two years Applicant tried to return to the Philippines to provide pro bono surgical services at a clinic (Tr. 66). She tutors illiterate people twice a week in the United States (Tr. 67; AE I). She also volunteers in other worthy endeavors such as collecting food for the poor (Tr. 67).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicants eligibility for access to classified or sensitive

information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance or a public trust position is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information and sensitive information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance or public trust determination.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified or sensitive information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance [or access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or

trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant trustworthiness concern is under Guidelines J (Criminal Conduct) and E (Personal Conduct).

Criminal Conduct

AG ¶ 30 expresses the trustworthiness concern pertaining to criminal conduct, “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.”

AG ¶ 31 describes six conditions that could raise a trustworthiness concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

AGs ¶¶ 31(a), 31(b) and 31(c) apply. Applicant was convicted of two felony-level offenses and one misdemeanor at her general court-martial in 1995. Specifically, the court-martial found her guilty of dereliction of duty, signing a false official document and larceny of government funds. She admitted that she committed the three criminal offenses. She was sentenced to total forfeitures, confinement for six months and dismissal from the Air Force.

AG ¶ 32 provides four conditions that could potentially mitigate trustworthiness concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) and 32(d) apply to mitigate the criminal conduct. Applicant's last offense resulting in a conviction occurred prior to her June 1995 court-martial, more than 13 years ago. She served her sentence to confinement and paid full restitution to the government. She frequently volunteers in her community. She worked for three years in the Philippines after her trial providing surgical services to villagers for almost no remuneration, which provided a lengthy period to contemplate her poor judgment and theft of government funds. She has changed her lifestyle and her environment. She is no longer a practicing physician or Air Force officer. Her criminal offenses are unlikely to recur because they had a devastating impact on her lifestyle and medical career. Her demonstrated intent not to commit future crimes is encompassed in these two mitigating conditions. She has demonstrated remorse and been reformed. She has worked with information technology for six years and has a good employment record. There is a strong evidentiary record in this case showing her full rehabilitation for the particular offenses resulting in her charges and convictions. At her hearing she demonstrated her current reliability, trustworthiness, and good judgment through her candor at her hearing about the offenses. She was very remorseful and sincere in her acceptance of responsibility and her declaration of culpability.

Personal Conduct

AG ¶ 15 expresses the trustworthiness concern pertaining to 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. 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.

AG ¶ 16 describes three conditions that could raise a trustworthiness concern and may be disqualifying in this case:

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's conduct is explicitly and most specifically covered under the criminal conduct guideline. Aside from her criminal conduct and behavior directly related to the criminal offenses, there is no other adverse information. Therefore, AG ¶¶ 16(c) and 16(d) do not apply.

However, there is an issue in any personal conduct case when criminal conduct involving false documents and larceny are established. Such conduct shows “questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.” Such misconduct raises questions about Applicant’s “reliability, trustworthiness and ability to protect classified [or sensitive] information.” See AG ¶ 15. Applicant engaged in personal conduct “that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.” Clearly her criminal conduct and dismissal from the Air Force are activities that adversely affect her personal, professional and community standing.

AG ¶ 17 provides seven conditions that could mitigate trustworthiness concerns in this case:

- (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;
- (f) the information was unsubstantiated or from a source of questionable reliability; and
- (g) association with persons involved in criminal activity 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(c), 17(d) and 17(e) apply. Applicant disclosed her court-martial conviction to her employer before she was hired and listed it on her security clearance applications. At her hearing, she fully and frankly described her criminal conduct. She has taken the positive step of disclosure to her employer and security officials, ending any vulnerability to exploitation or duress. The offenses occurred more than 13 years ago, and have not recurred. She was held accountable, paid her restitution and served her confinement. She has served the poor and illiterate in the Philippines and United States. She has performed very well for her employer for six years and has demonstrated her reliability and trustworthiness. For all the reasons indicated in the previous section, and this section, I conclude she has been rehabilitated and untrustworthy, unreliable, or other inappropriate behavior is unlikely to recur;

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance or 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 security clearance or public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

The comments in the Analysis section of this decision are incorporated in the Whole Person Concept. Applicant committed serious offenses in 1992 and 1993. She failed to inform the finance office about her divorce and her mother's death. She falsely certified she had a dependent to the finance section. She received about \$23,000 in housing allowance to which she was not entitled. She falsified her federal tax returns in 1992 and 1993 when she claimed her deceased mother as a dependent and illegally failed to pay some of her income taxes. Applicant's deliberate misconduct is serious and she received a significant punishment. The court-martial sentence included a dismissal, a punishment reserved for situations involving serious misconduct by an officer. She lost her licenses to practice medicine in the United States.

Applicant's mitigating information is more compelling. A court-martial held Applicant accountable for her misconduct in 1995. She paid restitution, served her confinement, amended her tax returns and paid her income taxes. In the 13 years that

followed her court-martial, she has not committed any new offenses. At her hearing, she was candid about her misconduct and very remorseful. She provided full and complete information on her security clearance applications and at her hearing. I do not have any questions or concerns about her current ability or willingness to comply with laws, rules and regulations.

Applicant also receives substantial credit for her strong support from credible witnesses concerning her efforts to reform and rehabilitate herself after 1995. Her work for a defense contractor is excellent to outstanding, and aside from the SOR allegations no other disciplinary or trustworthiness-related problems surfaced. Her record of good employment weighs in her favor. There is very compelling evidence of her responsibility, rehabilitation and mitigation. I am convinced that she is loyal to her family, her company and her country.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude she has mitigated trustworthiness concerns pertaining to criminal conduct and personal conduct. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors” and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government’s case. For the reasons stated, I conclude she is eligible to occupy an ADP I/II/III position.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant’s eligibility to occupy an ADP I/II/III position. Applicant’s eligibility to occupy an ADP I/II/III position is granted.

Mark W. Harvey
Administrative Judge