

DATE: February 21, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 06-07542

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant had four debts alleged in the statement of reasons (SOR). Her debt problems resulted primarily from two divorces and the failure of her former spouses to provide adequate financial support to her and her two children. She received financial counseling. She paid one debt. Collection of her three remaining delinquent SOR debts is barred by the 3-year South Carolina statute of limitations for such debts. However, in 2004, she deliberately failed to disclose her delinquent debts on her Questionnaire for Public Trust Positions (Standard Form (SF) 85P). She has mitigated concerns about financial considerations, but not her personal conduct or criminal conduct. Eligibility for an ADP I/II/III position is denied.

PROCEDURAL RULING

The Statement of Reasons (SOR) refers to Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. A memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security) to Director, Defense Office of Hearings and Appeals (DOHA), dated November 19, 2004 states DOHA shall utilize provisions of the Directive to resolve contractor cases involving trustworthiness determinations. Department Counsel made a motion to delete all references to the Regulation, and Applicant had no objection to this change to her SOR (R. 11). I granted Department Counsel's motion (R. 11-12), but note that the aggravating and mitigating conditions in the Regulation and the Directive for this case are substantially the same. Moreover, paragraph C8.2.1 of the Regulation provides that the procedural rules of the Directive apply for contractor personnel.

STATEMENT OF THE CASE

On August 16, 2004, Applicant submitted a Questionnaire for Public Trust Positions (Standard Form (SF) 85P).⁽¹⁾ On May 8, 2006, DOHA issued a SOR to her, pursuant to the Directive and Regulation.⁽²⁾ The SOR alleges security

concerns under Guideline F (Financial Considerations), Guideline E (Personal Conditions), and Guideline J (Criminal Conduct). The SOR detailed reasons why DOHA recommends that Applicant's case be submitted to an administrative judge for a determination that Applicant is not eligible for occupying an ADP I/II/III position.

In an answer notarized on June 27, 2006, Applicant responded to the SOR allegations. On August 31, 2006, in a separate letter, she elected to have her case decided at a hearing.⁽³⁾ On October 31, 2006, the case was assigned to me. The hearing was held on November 3, 2006. At the hearing I approved Applicant's request that I hold the record open so she could submit additional documentary evidence (R. 49; Ex. G). DOHA received the transcript of the hearing (R.) on November 28, 2006, and I received it on December 4, 2006. Department Counsel had no objection to my consideration of the evidence Applicant provided, and I admitted her additional evidence (Ex. H) on January 22, 2007.

FINDINGS OF FACT

As to the factual allegations under Guideline F, Applicant admitted that she or her husband were responsible for the four debts listed on the SOR.⁽⁴⁾ She thought a debt consolidation company (DCC) had paid two debts, was unsure of the amount owed on one account, and thought her former husband was supposed to pay one debt. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact.

Applicant is 39 years old (R. 4).⁽⁵⁾ For the last 12 years, she has been employed by a United States government contractor, and she is involved with processing sensitive medical records.⁽⁶⁾ She has access to social security numbers and other private information (R. 6-7). She has no prior military service.⁽⁷⁾ She has a high school diploma (R. 4).⁽⁸⁾

Applicant was married in 1987, and has two children from that marriage (born in 1988 and 1994).⁽⁹⁾ She was divorced between 1993 and 1997 (R. 26). Her first husband often failed to pay his court ordered child support (R. 20-21; Ex C). She married again in 2000, and is now divorced (R. 26). Before she married her second husband, he said he did not have credit and paid cash for everything (R. 29). Later, she received a credit report indicating he had credit problems (R. 29). Her second husband agreed to provide financial support after they were separated (R. 18). However, after six months of separation, he discontinued his financial support to her (R. 18).

The following table provides the amount of each SOR debt and the its current status:

SOR Paragraph	SOR Amount	Account Type and Date Charged Off or Placed for Collection
¶ 1.a	\$2,353	Bank card debt-Apr. 2000 (R. 27-30)
¶ 1.b	\$2,034	Credit company debt-Aug. 2000 (R. 27-30)
¶ 1.c	\$28,495	Credit and mortgage company debt (actually \$18,502) -May 2002 (R. 32-33)
¶ 1.d	\$154	Credit bureau debt-Paid (Ex 9 at 1, 4; Ex. G at 5; R. 40-41)

In regard to the debt in SOR ¶ 1.c (\$28,495), Applicant purchased a mobile home in 1998 (R. 32). She fell behind in her payments, and told the creditor to repossess her mobile home (R. 32, 36). The balance owed after the auction of her mobile home was \$18,502 (R. 33).

Applicant's personal financial statement (PFS) prepared on March 14, 2005 indicates her gross pay per month is \$1,957.⁽¹⁰⁾ She also included in income \$655 per month she receives on an irregular basis for child support (R. 39-40). Her monthly net pay after deductions is \$2,030. She listed monthly household expenses of \$2,030 per month as follows: rent (\$620), groceries (\$355), clothing (\$20), utilities (\$250), car expenses (\$450), insurance (\$75), after school care (\$160), and miscellaneous (\$100). She did not list any other debt payments or other liabilities. After deducting all expenses, she had a positive cash flow of 30 cents per month. The car expense of \$450 per month in the PFS includes money for

possible car repairs and her monthly payment to repay her 401(k) account, which she used to finance the purchase of a car (R. 37-38). Her son graduated from high school in June 2006, and just started a new job (R. 38). He lives in her home and should be able to contribute to the household expenses (R. 38).

Applicant said no payments were made on her SOR debts for four years (R. 41), and she was unable to make payments in the near future towards her debts because she expected to receive less child support now that her son had completed high school (R. 39). She intended to resolve her delinquent debts using bankruptcy (R. 41-42). Her agreement with her bankruptcy attorney specifies payment of a basic fee of \$1500 and \$299 court costs, which must be paid before the case is filed in court (Ex. A at 15). Applicant paid her attorney \$800 on November 19, 2006 (Ex. G at 5). A memorandum from her financial counselor documents the financial counseling she received in January 2007 (Ex. H at 2).

Applicant provided three letters of commendation or appreciation from her employer lauding her hard work on behalf of her customers or clients (Ex. B at 2, 4, 5). Nine character witnesses, who have known Applicant for many years described her as trustworthy, precise, straightforward, reliable, helpful, dependable, dedicated, warm, professional, respectful, and friendly. *Id.* They emphasized her strong integrity and honesty (Ex. B at 6-14). She cares deeply about her family and being a good employee. *Id.* Her performance reviews corroborated her character witnesses' descriptions of her hard work, dedication and solid work performance on behalf of the government contractor (Ex. D).

Personal Conduct

Question 22b of her 2004 SF 85P asks, "**YOUR FINANCIAL RECORD** Are you now over 180 days delinquent on any loan or financial obligation? Include loans or obligations funded or guaranteed by the Federal Government." Applicant answered, "No." SOR ¶¶ 2.a and 3.a allege that this answer is false.

Applicant's February 4, 2005, statement to an OPM special investigator stated, "I did not list [delinquent debt] accounts on my [SF 85P] because I did not understand the questions. I only thought the questions concerned filing for bankruptcy?" (Ex. 2 at 2). In her response to the SOR, Applicant said, "I misunderstood the question, or I would have listed everything." (Ex. 9 at 1, 4). She reiterated her answer, "I admit I did not fill out the paperwork correctly now - I misunderstood the question. Otherwise I would have put everything down." (Ex. 9 at 2, 3).

At her hearing, Applicant changed her explanation for failing to disclose her delinquent debts on her 2004 SF 85P, and instead indicated that she believed DCC had paid the debts alleged in SOR ¶¶ 1.a and 1.b. It is necessary, therefore, to discuss her statement at her hearing and her relationship with DCC in detail.

The following colloquy between Department Counsel and Applicant provides her explanation for answering, "No" to Question 22b:

Q. Okay. Let's go to the financial statement, excuse me, the SF 85P. Now, in your Answer you said that you misunderstood the question. What did you misunderstand?

A. Just - on question 22, it says, in the last seven years, have you or your company ever been - you or your company over which you exercise some control, filed for bankruptcy, been declared bankrupt, been subject to a tax lien or have legal judgment rendered against you for a debt. And I read it literally. I did not at that time file bankruptcy. In my mind all I had in my mind was repossession, and it does not discuss repossession here.

Q. What about 22(b)?

A. As far as being - it says are you now over 180 days delinquent on a loan or financial obligation. At this point in time, my thinking was that [the debt consolidation company (DCC)] would end up taking care of my credit, and I wasn't behind on anything. [\(11\)](#)

Q. Okay. When was the last time that you had checked on DCC?

A. Honestly? I haven't - I tried calling, you know, previously, of getting the letter from the Trade Commission. But after

my ex-husband had given me the letter from the Trade Commission saying that they had shut them down, there was no way of contacting them, I thought.

Q. Okay. And when were you aware that they were shut down?

A. I want to say it was in like January of - all right. The letter was in September of 2002 from the Federal Trade Commission. Documentation had to be in by November the 30th - it was January of 2003 before he gave me this letter.

Q. So in 2003 you were aware that there were problems with DCC?

A. Right.

Q. And you filled out your SF 85P in August of 2004, correct?

A. Correct, but at that point in time I still did not know that they had not - I had not had a credit report pulled, [I] did not know that DCC had not [taken] care of what I asked them to take care of.

Q. When you found out that they had been shut down did you do anything to check on the status of your accounts?

A. No. I - the van - I had asked for my van and trailer to be taken from me, and I didn't have any reason to look for - at my credit report because I knew I couldn't - I am living on - if I don't have cash for it, then I don't need it, unless there's an emergency on my vehicle. Then I have to borrow money from my 401(k) or my mother. At the time that this all went on I probably could have gotten a hardship from my 401(k), but I didn't even know that was available.

(R. 34-36). In her closing argument, Applicant stated, "As far as the - the form was concerned, like I stated previously I - I clearly did not interpret the questions on the way that they were, I guess, intended to be done." (R. 49). A detailed review of Applicant's involvement with DCC reveals that she was aware that DCC had not paid the debts alleged in SOR ¶¶ 1.a and 1.b.

Applicant and her second husband decided to use DCC to improve their credit in order to qualify to purchase a house (R. 29). They understood that if they paid DCC \$400 per month for two years all of their debt would be resolved (R. 29). Applicant made payments of \$250 per month to DCC for about eight months, starting in December 2000 (R. 27-28). During this period she separated from her second husband, who had orally agreed to make payments to DCC (R. 27). Her second husband stopped making payments, and Applicant contacted DCC and asked DCC to apply the money in reserve to the accounts in SOR ¶¶ 1.a and 1.b (R. 27, 30). She did not receive any response from DCC (R. 27). Her second husband gave her a letter from the Federal Trade Commission (FTC) stating the DCC was shut down (R. 28, 30). After receiving the FTC letter, she did not hear from her creditors, and she did not contact her creditors, except for a recent letter from a non-SOR creditor (R. 30).

In her response to the SOR, Applicant provided an account statement from DCC, indicating DCC received seven payments of \$250 in the period December 18, 2000 to June 15, 2001. (12) For each payment, DCC charged \$62.50 as a clearance fee. Applicant said she thought she paid DCC more than the account statement indicates (R. 31). However, she did not have any documentation from DCC showing a greater account balance (R. 31). On June 18, 2001, DCC paid a non-SOR creditor \$800, and \$512.50 remained in her account. DCC showed a balance for SOR accounts ¶¶ 1.a (\$635 owed with no settlement amount) and 1.b (\$2,034 owed and an offer to settle dated September 12, 2001 for \$875). A letter from DCC seeking permission to settle and pay the debt in SOR ¶ 1.b was signed by Applicant and dated September 12, 2001 (provides the debt in SOR ¶ 1.b was settled for \$875 and \$12.50 remained in her DCC account after deducting \$875 (Ex. 8 at 8)). A letter from DCC seeking permission to settle and pay a non-SOR debt was signed by Applicant and dated October 8, 2001 (states a non-SOR debt was settled for \$590 and \$297 remained or would remain in her DCC account after deducting \$590 (Ex. 8 at 10-11)).

A letter from Applicant to DCC, dated August 21, 2002, indicates she sent telefaxes and left messages in June and July 2002, asking DCC to provide the status of the settlement on the debt in SOR ¶¶ 1.a, 1.b, and a non-SOR debt (Ex. 8 at 14, 15). An undated subsequent letter from Applicant to DCC, states, "do what you can with [the SOR ¶ 1.a debt], and send me a check for the balance in the trust account." (Ex. 8 at 16). Another letter from Applicant to DCC, in September

2002 indicates she wants proof that the SOR ¶ 1.a debt has been paid, and the balance in the trust account (Ex. 8 at 17).

Applicant's response to the SOR contained a letter from the FTC indicating on August 20, 2002, DCC's assets were frozen, and on September 3, 2002, a receiver took over the distribution of DCC's assets.⁽¹³⁾ The FTC letter notes that the liabilities of DCC greatly exceed its assets, and all customers of DCC should file a claim for any money DCC owes them. The FTC letter states, "You should be aware that FTC's ongoing lawsuit against [DCC] does not affect your creditors' ability, or right, to collect any debt you owe." Applicant provided a letter dated February 21, 2003, from the creditor for the debt in SOR ¶ 1.a offering to settle the debt of \$1,623 for \$860 (Ex. E).

I conclude Applicant knew that DCC had not in fact paid the delinquent debts alleged in SOR ¶¶ 1.a and 1.b, when she signed her 2004 SF 85P. Her statement at her hearing about her rationale for answering, "No" to question 22b at R. 28 and R. 34-36 is not credible.

POLICIES

In the evaluation of an Applicant's security suitability for a public trust position, an administrative judge must consider Appendix 8 of the Regulation, which sets forth brief introductory explanations for each guideline, and the adjudicative guidelines, which are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC).

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision at Appendix 8 of the Regulation. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

To be eligible for a public trust position, an applicant must meet the security guidelines contained in the Regulation. "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." Regulation ¶ C6.1.1.1.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Regulation, Appendix 8. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision. Specifically, an administrative judge should consider the nine adjudicative process factors listed in the Regulation, Appendix 8, at 132: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

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

Since the protection of sensitive information is the paramount consideration, the final decision in each case is arrived at by applying the standard that eligibility for a public trust position is "clearly consistent with the interests 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.

In the decision-making process, facts must be established by "substantial evidence."⁽¹⁴⁾ The government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with Regulation, Appendix 8, that it is not clearly consistent with national security to approve eligibility for a public trust position. Directive ¶ E3.1.14. If the government meets its initial burden, the Applicant then has the burden of persuasion, that is to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case.

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." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. These same burdens of proof apply to trustworthiness determinations for ADP positions.

A person who seeks eligibility for a public trust position 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 eligibility for a public trust position. Decisions include, by necessity, consideration of the possible risk an 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 classified or sensitive information. The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings.

CONCLUSIONS

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 following with respect to the allegations set forth in the SOR:

Financial Considerations

The government has met its initial burden under Guideline F. Applicant's failure to pay her debts is of concern, especially in light of her desire to have access to sensitive government information. Appendix 8 of the Regulation clearly expresses the government's concern regarding financial considerations, stating, "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect sensitive information.

Applicant's failure to satisfy her outstanding financial obligations give rise to Financial Considerations Disqualifying Condition (FC DC) 1, "a history of not meeting financial obligations," and FC DC 3, "inability or unwillingness to satisfy debts." The debt in SOR ¶ 1.d was paid. The debts in SOR ¶¶ 1.a to 1.c became delinquent between 2000 and 2002, and remain unpaid. The amount of debt in SOR ¶ 1.c was actually \$18,502 rather than \$28,495, the amount alleged.

FC DCs 1 and 3 apply to her failure to meet her financial obligations, and her admission that she was unable to pay the debts, which then became delinquent and remained delinquent. The government produced substantial evidence of these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition.

The burden of disproving a mitigating condition never shifts to the government. ⁽¹⁵⁾

I considered Financial Considerations Mitigating Condition (FC MC) 1, "the behavior was not recent;" FC MC 2, "it was an isolated incident;" FC MC 3, "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);" FC MC 4, "the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control;" and FC MC 6, "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

The Regulation does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. Based on my evaluation of the record evidence as a whole, ⁽¹⁶⁾ I conclude FC Cs 1 and 2 do not apply because Applicant had multiple delinquent SOR debts.

FC MC 3 partially applies to all of her SOR debts because the debts became delinquent as the result of her first husband's failure to pay court ordered child support, and the failure of her second husband to fully honor his

commitment to provide financial support. These changes in family circumstances trigger application of FC MC 3, as they caused financial problems that may be "largely beyond the person's control." Applicant, however, does not receive full credit for FC MC 3 because she has made insufficient financial progress by the time the record was closed on January 22, 2007. There is a paucity of evidence showing how she endeavored to pay or resolve her SOR debts over the last four years, especially after her OPM interview on February 4, 2005, made her aware of the security significance of her financial problems.

She received financial counseling, and receives partial credit under FC MC 4 because there are substantial indications that the problem is being resolved and she is gaining control of her financial situation. In regard to application of the 3-year South Carolina statute of limitations, and payment of some funds to her attorney for a possible bankruptcy, FC MC 6 does not apply because there is insufficient information to establish that Applicant showed good faith in the resolution of her debts from 2002 to 2005.⁽¹⁷⁾ Her involvement with DCC did not involve any attempt to resolve her largest debt. Moreover, her total delinquent debts were over \$22,000 and she paid DCC less than \$2,000. After learning that DCC had not paid her debts, she did not undertake any effort to pay the debts in SOR ¶¶ 1.a to 1.c. Her actions in generating and failing to resolve her delinquent debts over the last four years are most relevant to security concerns relating to financial considerations, and weigh against mitigating financial considerations. Financial considerations are also addressed in the "whole person" analysis, *infra*.

Personal Conduct Personal Conduct is always a security concern because it asks whether a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Personal 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.

I considered Personal Conduct Disqualifying Condition (PC DC) 2, "the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire," and PC DC 4, "personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or pressure."

PC DCs 2 and 4 apply because Applicant gave a false answer to Question 22b of her 2004 SF 85P.⁽¹⁸⁾

At her hearing she said she thought that DCC had paid the delinquent debts alleged in SOR ¶¶ 1.a and 1.b. Actually, she was well aware that DCC had not paid these two delinquent debts. She had correspondence from the FTC, and a creditor indicating that DCC was not honoring its obligations to apply her payments to her debts. Moreover, she sent correspondence to DCC that showed she did not believe that DCC had paid the delinquent debts alleged in SOR ¶¶ 1.a and 1.b. I have considered all of the personal conduct mitigating conditions (PC MC), but especially PC MC 1, the derogatory "information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability," PC MC 2, "the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily," and PC C 5, "the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."

Applicant's financial difficulties increased her vulnerability to pressure, and she deliberately failed to disclose her relevant, delinquent debts on her 2004 SF 85P. No mitigating conditions apply. She was not advised by anyone to omit information about her delinquent debts from her 2004 SF 85P. While her subsequent disclosure of her delinquent debts to an OPM investigator is a "positive step to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure," she was not candid at her hearing about why she failed to disclose the delinquent debts alleged in SOR ¶¶ 1.a and 1.b. Her failure to be totally honest in connection with her 2004 SF 85P and at her 2006 hearing strikes at the very core of the trustworthiness determination. Her untruthful response on her 2004 trustworthiness questionnaire is significant, and not mitigated.

Criminal Conduct

Under Guideline J, a history or pattern of criminal activity raises questions regarding an applicant's willingness or ability to protect classified information and creates doubt about a person's judgment, reliability and trustworthiness.

Two criminal conduct disqualifying conditions (CC DC) could raise a security concern in this case. CC DC 1 applies

where there are allegations or admissions of criminal conduct, "regardless of whether the person was formally charged" and CC DC 2 applies in situations where an applicant has committed "a single serious crime or multiple lesser offenses."

SOR ¶ 3.a alleges that she violated 18 U.S.C. § 1001 by falsifying question 22b of her 2004 SF 85P. As indicated previously, I find that she deliberately falsified her 2004 SF 85P. For a violation of 18 U.S.C. § 1001 to occur, however, the falsification must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995) as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." *See also United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). If Applicant had provided an accurate answer to Question 22b of her SF 85P, this accurate answer is capable of influencing the government to deny her security clearance. Her delinquent debts are sufficiently significant to jeopardize her security clearance application, and as such they are material. Accordingly, CC DCs 1 and 2 apply because Applicant committed a single serious offense, a violation of 18 U.S.C. § 1001, which is a felony.

Security concerns based on criminal conduct can be mitigated by showing that it was not recent (CC MC 1). As indicated previously in the discussion of materiality under 18 U.S.C. § 1001, there are no "bright line" rules for determining when conduct is "recent."⁽¹⁹⁾ If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* Applicant's only SOR-alleged incident of criminal conduct was her false statement, when she filled out her SF 85P on August 16, 2004. However, the SOR allegation of criminal conduct must be considered along with all the other evidence when applying this mitigating condition. She was not forthright and candid when addressing her culpability at her hearing on November 3, 2006.⁽²⁰⁾ Viewing her conduct as a whole, CC MC 1 does not apply.

Criminal conduct security concerns may be mitigated under CC MC 2 when the "crime was an isolated incident," or under CC MC 3 when an applicant demonstrates she "was pressured or coerced into committing the act and those pressures are no longer present in that person's life." CC MCs 2 and 3 do not apply because Applicant committed the 2004 falsification and then was not honest at her 2004 hearing when addressing the falsification, and no one caused her or influenced her to commit the criminal conduct.

For CC MC 4, security concerns pertaining to criminal conduct may be mitigated when an applicant "did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur." Applicant voluntarily committed the criminal conduct, and has not shown a sufficient track record of positive or non-criminal conduct. CC MC 4 does not apply.

In regard to CC MC 5, security concerns may be mitigated when "there is clear evidence of successful rehabilitation." CC MC 5 does not apply because there is a dearth of evidence about changes in her life that establish her successful rehabilitation.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under the Regulation, Appendix 8, at 132. As noted above, Applicant's lengthy history of failing to meet her financial obligations, her inability or unwillingness to satisfy her debts, and her false response on her 2004 SF 85P raise serious trustworthiness concerns. She is currently 39 years old. She was sufficiently mature to be fully responsible for her conduct. Her actions in generating or failing to resolve her debts in a timely fashion, and her falsification on her SF 85P were knowledgeable and voluntary. Her debt problems resulted from voluntary decisions to purchase items. However, her inability to repay her debts resulted from the failure of her former husbands to provide sufficient financial support. There is some evidence of rehabilitation, positive behavior changes, and improved circumstances as indicated by self-discipline and the almost complete absence of new delinquent, unpaid debt over the last three years. Moreover, changes in her financial habits resulting from her financial counseling show signs of financial improvement in the future. The potential for pressure, coercion, exploitation, or duress from her financial problems should decrease in the future, providing she applies the financial counseling she is receiving. Moreover, Applicant was able to pay the debt in SOR ¶ 1.d.

The debts in SOR ¶¶ 1.a to 1.c are not collectible because of the 3-year South Carolina statute of limitations. *See* S.C. Code. Ann. § 15-3-530 (listing the statute of limitations for various debts); *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (S.C. Ct. App. 2005) (explaining the societal value of application of the statute of limitations to delinquent debts). Greater awareness of financial responsibilities through financial counseling should result in a trend of improved financial circumstances. There is a sufficient history that she is financially responsible, and able to live within her means. The trustworthiness concerns pertaining to her falsification of her SF 85P remain significant, especially in light of her failure to be completely candid about why she provided a false answer to question 22b. She knew that DCC had not paid the delinquent debts alleged in SOR ¶¶ 1.a and 1.b in 2004 when she signed her SF 85P. Nevertheless, at her 2006 hearing she said in 2004 she believed DCC had paid the delinquent debts alleged in SOR ¶¶ 1.a and 1.b.

After weighing the disqualifying and mitigating conditions, all facts and circumstances, the mitigating and aggravating evidence weighing for and against her, in the context of the whole person, I conclude she has mitigated under the whole person concept the trustworthiness concerns pertaining to financial considerations, but not personal and criminal conduct.

Applicant's trustworthiness eligibility and suitability is not supported by substantial evidence. I take this position based on the law, my "careful consideration of the whole person factors"⁽²¹⁾ and supporting evidence, as well as my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities. For the reasons stated, I conclude Applicant is not eligible for a public trust 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 F: FOR APPLICANT

Subparagraphs 1.a to 1.e: For Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline J: AGAINST APPLICANT

Subparagraph 3.a: 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 Applicant's eligibility for a public trust position. Eligibility for an ADP I/II/III position is denied.

Mark W. Harvey

Administrative Judge

1. Exhibit (Ex.) 1 (SF 85P) is dated August 16, 2004, on the last page.
2. Ex. 8 (Statement of Reasons (SOR), dated May 8, 2006). The SOR is the source for all factual assertions in the remainder of this paragraph.
3. Ex. 9 (Applicant's response to SOR, notarized on June 27, 2006). Her request for a hearing is Ex. 9 at 5.
4. The source for all factual assertions in this paragraph is Ex. 9, *supra* n. 3.

5. Ex. 1, *supra* n. 1, at 1 (date of birth); R. 6.
6. *Id.*, question 11 at 3 (employment).
7. *Id.*, question 16, at 6 (military service).
8. *Id.*, question 10, at 2 (education); R. 6.
9. *Id.*, questions 14 and 15, at 5 (marital status and relatives); R. 22.
10. Ex. 3 (Applicant's Personal Financial Statement (PFS) provided to a special investigator for the Office of Personnel Management, dated March 14, 2005), at 1. This paragraph is derived from Applicant's March 14, 2005 PFS and R. 37-40, unless stated otherwise.
11. Earlier in the hearing Applicant stated, "I had thought everything was taken care of through the debt consolidation" for the debts alleged in SOR ¶¶ 1.a and 1.b (R. 28).
12. Ex. 9 at 6-7 is the source for the facts in this paragraph unless expressly indicated otherwise.
13. Ex. 8 at 12-13 is the source for the facts in this paragraph.
14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).
15. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).
16. *See* ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for FC MC 1, all debts are considered as a whole.
17. The Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)). In ISCR Case No. 99-9020 at 6 (App. Bd. Dec. 1, 1999), the Appeal Board specifically addressed application of the statute of limitations, stating a "person who decides not to honor his or her debts may be able to avoid paying those debts until they are legally uncollectible because the statute of limitations has run. Reliance on the running of a statute of limitations would be a legally permissible course of action. However, it would not demonstrate a good-faith effort to resolve one's debts that would fall under the meaning of Financial Considerations Mitigating Condition 6." *See* ISCR Case No. 03-10880 (App. Bd. June 24, 2005); ISCR Case No. 01-09691 (App. Bd. Mar. 27, 2003) (stating an applicant must do more than merely cite the statute of limitations to obtain the full benefit of FC MC 6). *See also* ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003) ("[E]ven if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner."); ISCR Case No. 98-

0349 at 2-3 (App. Bd. Feb. 3, 1999) (even though an applicant's delinquent debts were not legally collectible because of the statute of limitations, that fact did not preclude the Administrative Judge from considering the applicant's failure to resolve the delinquent debts before the statute of limitations ran). *Cf.* ISCR Case No. 01-04425 at 3-4 (App. Bd. May 17, 2002) (adverse Guideline F conclusions possible where applicant chose not to pay her delinquent debts, waited until her creditors ceased trying to collect those delinquent debts, and they were eventually dropped from her credit report.).

18. In ISCR Case No. 03-10380, 2006 Lexis 37, at *22 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 App. Bd. June 9, 2004), the Board stated:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. In that decision, the Board went on to state that given the record evidence in that case, it was legally permissible for the Judge to conclude Department Counsel had established a *prima facie* case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

19. *See generally, e.g.* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (Although the passage of three years since Applicant's last act of misconduct did not, standing alone, compel the Judge to apply CC MC 1, as a matter of law, the Judge erred by failing to give an explanation why he did not apply that mitigating condition.).

20. "Conduct not alleged in a SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) (citing ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)).

21. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).