

DATE: December 28, 2006

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In re:

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SSN: -----

Applicant for Trustworthiness Determination

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ADP Case No. 06-07550

**DECISION OF ADMINISTRATIVE JUDGE**

**MARK W. HARVEY**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Thirty-eight-year-old Applicant had nine alleged debts listed in the statement of reasons (SOR). One debt was a duplication. She paid four small SOR debts on December 1, 2006. The remaining four debts were past the statute of limitations, and two of the four debts were primarily the responsibility of her husband. She currently has no legally enforceable, delinquent debts. Her mortgage and car payments and other debts have been under control for the last three years. She is going to receive or has been receiving financial counseling. She misunderstood the Questionnaire for Public Trust Positions question concerning delinquent debts. She has mitigated concerns about financial considerations and personal conduct. Eligibility for an ADP I/II/III position is granted.

**PROCEDURAL RULING**

On November 3, 2006, Department Counsel made a motion to amend the Statement of Reasons (SOR), changing the reference from Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended to DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. <sup>(1)</sup> Applicant did not object to the amendment. I granted Department Counsel's motion (Record of Hearing (R.) 14).

Applicant waived the fifteen day notice requirement <sup>(2)</sup> for her hearing (R. 13-14). At her hearing on November 3, 2006, she requested that the record be held open so that she could submit additional documentary evidence. I received additional documents, which I designated, Exhibit N (pages 2-5). Department Counsel had no objection to my consideration of the additional evidence, and I admitted Exhibit N.

**STATEMENT OF THE CASE**

On August 16, 2004, Applicant applied for a public trust position and submitted a Questionnaire for Public Trust Positions (Standard Form (SF) 85P). <sup>(3)</sup> On June 5, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a

SOR to her, pursuant to the Directive and the Regulation.<sup>(4)</sup> The SOR alleges security concerns under Guidelines F (Financial Considerations) and E (Personal 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 a notarized answer, received at DOHA on June 26, 2006, Applicant responded to the SOR allegations, and elected to have her case decided at a hearing.<sup>(5)</sup> On October 13, 2006, the case was assigned to me. The hearing was held on November 3, 2006. DOHA received the transcript of the hearing on November 28, 2006, and I received it on December 4, 2006. I held the record open at Applicant's request, and received additional matters from Applicant on December 8, 2006.

### FINDINGS OF FACT

As to the factual allegations under Guideline F, Applicant admitted that she and/or her husband were responsible for most of the nine debts listed on the SOR.<sup>(6)</sup> 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 38-years-old. For the last ten years, she has been employed by a United States government contractor and is involved with processing sensitive medical records.<sup>(7)</sup> She has no prior military service.<sup>(8)</sup> She has completed two years of college with a 3.59 GPA, and has begun working towards a 4-year degree with an on line university.<sup>(9)</sup> She has applied for student loans to pay for her education.<sup>(10)</sup> She was married on October 13, 1993.<sup>(11)</sup> Her first three children were not fathered by her husband (R. 24). Their father sometimes fails to pay child support (R. 24). She and her husband separated several times, and then the separation became permanent in 2002.<sup>(12)</sup> A family court order restrained her husband from visiting her family because he is a threat to them.<sup>(13)</sup> It also ordered him to pay \$80 per week support, and noted that he had a cocaine problem.<sup>(14)</sup> She is now a single parent with four children.<sup>(15)</sup> Her children were born in 1986, 1987, 1990, and 1992.<sup>(16)</sup> Her husband does not provide financial support (R. 24).

The debts in SOR ¶¶ 1.a (\$6,062) and 1.f (\$4,269) are duplications. The debt in SOR ¶ 1.f is less most likely because it includes a credit for the repossession and sale of Applicant and her husband's car in 1999.<sup>(17)</sup> They purchased the car in 1997, and made payments for two years of \$313 per month. Her husband refused to assist with payments, and she was unable to make the payments by herself. The debt was transferred to the creditor in SOR ¶ 1.f and she made payments of about \$50 to \$100 per month, but in 2000 she stopped making payments because she could not afford them. SOR ¶ 1.f indicates it was placed for collection by a third creditor in February 2002. Applicant accepted responsibility for the debt in SOR ¶ 1.f.

The debt in SOR ¶ 1.b (\$187) resulted from Applicant's purchase of a watch for \$250 in the late 1990s.<sup>(18)</sup> Some payments were made, but then payments were stopped about 1999. Applicant accepted responsibility for the debt in SOR ¶ 1.b.

Regarding the medical debts in SOR ¶¶ 1.c (\$93) and 1.g (\$85),<sup>(19)</sup> both were paid by a money order for \$128 on December 1, 2006.<sup>(20)</sup> The medical debts in SOR ¶¶ 1.d (\$67) and 1.i (\$43) were also paid by a money order for \$160 on December 1, 2006.<sup>(21)</sup> Some part of the delinquency on the medical debts resulted from unanswered question(s) pertaining to cost sharing or co-pays (R. 27-28). She was also unsure about the origin of several of these debts, but paid them anyway (R. 29-31).

For the debt of \$5,904 in SOR ¶ 1.e, her husband purchased a used Ford Taurus in 2000, and she co-signed for the loan.<sup>(22)</sup> Applicant and her husband separated, and her husband kept the car (R. 25). The car had mechanical problems, which the dealership refused to remedy. He did not make the payments, and the car was repossessed in April 2001 (R. 26). The creditor contacted her on one occasion, and she informed the creditor that she was separated from her husband, and she suggested the creditor should contact her husband.

The debt in SOR ¶ 1.h (\$272) was a loan Applicant's husband obtained from his employer, but Applicant co-signed for a line of credit. (23) She thought that when her husband left his job that he had paid off the employer's loan, but later she learned he still owed his employer for this debt. Applicant could not recall anything else about this debt. SOR ¶ 1.h indicates this debt was charged off in arch 2003 as a bad debt.

In her interview of February 15, 2005, Applicant said that she did not intend to pay the joint debts because she believed they were her husband's responsibility, and she did not have the money anyway. (24) She was current on her non-SOR bills.

Applicant provided a personal financial statement (PFS), dated December 17, 2004, to a security investigator. (25) In 2004, her gross salary was \$2,126 per month, her net salary was \$1,562 per month, and her expenses totaled \$1,070 per month. She listed monthly household expenses as follows: lot rent (\$140), groceries (\$200), clothing (\$0), utilities (\$350), car expenses (\$380), and miscellaneous (\$0). She listed the following debts: mortgage of \$30,000 with a monthly payment of \$430; credit card debt of \$2,000 with a monthly payment of \$138; an instant loan of \$600 with a monthly payment of \$81; and a financial services debt of \$10,000 with a monthly payment of \$300. Her total monthly debt payment was \$948. After deducting all expenses she had a negative cash flow of \$456 per month. (26) The PFS lists real estate valued at \$35,000 and a car valued at \$11,000. In an interview on February 15, 2005, and at her hearing, Applicant stated that her monthly expenses fluctuate, and when she needs more money she borrows from her father, her church and a friend. (27) She has received two raises after completing her 2004 PFS, but she did not indicate the size of the raises (R. 33).

Her Pastor provided counseling and worked with her on setting up a budget (R. 35). In November 2006, Applicant joined a company that provides formal credit counseling. (28)

Her mortgage and car payments are current. (29) For example, she borrowed \$15,629 in 2003, and her car payment is \$328 per month. She has paid this debt down to \$3,935. She paid off non-SOR debts for \$926 and \$2,081 in August 2006 using money borrowed from her 401K account. (30) She maintains a budget, and her payments are timely (R. 44-45).

Question 22b of her August 16, 2004, SF 85P asked, "Are you now over 180 days delinquent on any loan or financial obligation? Include loans or obligations funded or guaranteed by the Federal Government. (31) She answered, "No" on Question 22b. In her security interview on December 17, 2004, she said she answered, "No" because she "had no delinquent debts over 180 days that were Federal Guaranteed debts." (32) At her hearing on November 3, 2006, she indicated she misunderstood Question 22b's requirements stating, "Because when I read the question, I did not understand that to mean that any loans or outstanding loans from - on my credit reports. I was just assuming that for loans that I was paying at that time." ( R. 37). She elaborated that she did not think she needed to list past debts in which she was not making any payments (R. 37-38). Department Counsel asked,

"Why didn't you think that [not paying your debts] would be considered delinquency?" She responded:

I really didn't think about that. The only thing that I really questioned - in all honesty, I was not thinking about any past debts. I was just thinking about current, even though I know it says delinquent. But I was not thinking [about] anything that happened in the past or anything that I haven't paid from the past. R. 38.

I carefully observed Applicant's demeanor as she answered the questions about falsification of her SF 85P. Additionally, I have factored into my credibility determination the inconsistency of her explanation in her statement to the investigator, concerning why she answered, "No" to Question 22b. Another important factor is she did not receive any contacts from creditors for a lengthy period of time, (33) and did not intend to pay the SOR creditors. She answered "No" because she thought the government was seeking information about her "current" delinquent debts. She mentally limited the question to those delinquent debts that she intended to pay, and to the debts that were not delinquent. At her hearing she responded in a forthright, candid manner to the best of her ability. She had difficulty understanding financial

matters. She often paused and seemed bewildered at the hearing. For example, Department Counsel was diligently attempting to obtain information about whether Applicant's income was sufficient to meet her current obligations. After several delays and non-responsive answers, Department Counsel asked that the hearing be adjourned temporarily to permit a friend who was sitting at Applicant's table to explain what was needed (R. 33-34). Moreover her employer's earliest performance review notes, "Listen more closely to instructions for a clear understanding of directions and ask questions when unsure of clear direction to avoid repeating errors."<sup>(34)</sup> After considering all the record evidence, I find that she was truthful about her intent, and her answer on Question 22b of her SF 85P was an honest mistake, rather than a deliberate lie.

Her Pastor's son stated he knew her for thirteen years and she is honest and trustworthy (R. 43 and Exhibit L). He would help her financially when able to do so (R. 43). Her Pastor describes her as selfless and trustworthy (Exhibit L). Her employee evaluations reveal a hard-working, reliable, 10-year employee.<sup>(35)</sup> Three friends (two are fellow employees) write that she is hard working, highly moral, honest and trustworthy.<sup>(36)</sup>

## 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."<sup>(37)</sup> 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:

#### **Guideline F (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. Regulation, Appendix 8, 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 actions in failing 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.a and 1.f was a duplication of the same delinquent car loan. The eight debts in SOR ¶¶ 1.b to 1.i were delinquent for a substantial period of time and are discussed briefly below.

FC DCs 1 and 3 apply to her eight failures to meet her financial obligations, and her admission that she was unable to pay her debts, which then became delinquent and remained delinquent for several years. 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. <sup>(38)</sup>

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, <sup>(39)</sup> I conclude FC Cs 1 and 2 do not apply because Applicant had multiple (eight) delinquent SOR debts. Payment of the four small debts so recently, well after she received the SOR, and shortly after her hearing is simply too recent to merit application of FC MC 1.



FC MC 3 partially applies to all eight SOR debts at issue because the debts became delinquent several years ago and were the result of her separation from her husband and his failure to financially support Applicant. Her financial situation was aggravated by the failure of the father of her three children to consistently pay child support. This change in family circumstances is a good example of the unforeseen problems that trigger application of FC MC 3, causing financial problems that may be "largely beyond the person's control." I conclude that Applicant's statement about how her debts became delinquent is credible and sufficient to provide some credit under FC MC 3 in regard to her debts. Applicant, however, does not receive full credit for FC MC 3 because she is still unable to pay all her debts, and waited until after her hearing to pay the four small SOR debts. There is a paucity of evidence showing how she endeavored to pay or resolve her debts over the last several years. However, her recent resolution of four SOR debts, keeping her mortgage and car payments current, and payment of two large non-SOR debts in August 2006 warrants some credit, which will be applied in the whole person analysis, *infra*. Based on the sincerity of her testimony, and the other record indicia of improved financial self-discipline, I am confident that she is on the right track now towards correction of her financial problems.

She receives partial credit under FC MC 4 because there is sufficient evidence that she has will begin or has begun to receive financial counseling, and there are clear indications (since August 2006) that the problem is being resolved or is under control.

FC MC 6 does not apply because there is insufficient information to establish that Applicant showed good faith in the resolution of her debts.<sup>(40)</sup> She has not provided sufficient information about how she attempted to resolve or repay her debts from 1999 until December 1, 2006. She does, however, receive some credit in the whole person analysis, *infra*, for the application of the 3-year South Carolina statute of limitations to her four unpaid SOR debts. S.C. Code. Ann. § 15-3-530 lists the statute of limitations for various debts, including all four of Applicant's unpaid SOR debts.<sup>(41)</sup> In *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (S.C. Ct. App. 2005), the court succinctly explained the societal value of application of the statute of limitations:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. *See Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956); *City of Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004).

Significantly, "statutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims." *In re Elkay Indus., Inc.*, 167 B.R. 404, 408, (D.S.C. 1994). "Moreover, limitations periods discourage plaintiffs from sitting on their rights." *Id.* at 408-09. Statutes of limitations are, indeed, fundamental to our judicial system.

Elimination of her delinquent debt load through the statute of limitations has ended her potential vulnerability to improper financial inducements because she is no longer "financially overextended," but it does not negate her past conduct which failed to resolve the financial jeopardy resulting from the failure of the father of three of her children and her husband to provide financial support.

### **Personal Conduct**

Under Guideline E, "conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that [applicant] may not properly safeguard classified information." Directive ¶ E2.A5.1.1.

Two personal conduct disqualifying conditions (PC DC) could potentially raise a security concern and may be disqualifying in this case. PC DC 2 applies where there has been "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Directive ¶ E2.A5.1.2.2. A security concern may result under PC DC 3 when an applicant deliberately provides "false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in

connection with a personnel security or trustworthiness determination." Directive ¶ E2.A5.1.2.3.

For PC DCs 2 and 3, Applicant gave a false answer to Questions 22b of her 2004 SF 85P.<sup>(42)</sup> The evidence of record, however, does not establish falsification of Question 22b by substantial evidence. Although she admitted preparing her trustworthiness questionnaire, and answering incorrectly, she did not fully understand the question.<sup>(43)</sup>

At the time she completed the SF 85P, she thought that the answer she provided was correct. Her statements show confusion about which debts were supposed to be disclosed.

A security concern based on Guideline E may be mitigated by substantial evidence of personal conduct mitigating conditions (PC MC). Under PC MC 1, security concerns may be mitigated when the derogatory "information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Directive ¶ E2.A5.1.3.1. The allegations in SOR ¶ 2.a are not established by substantial evidence. The erroneous answer was a mistake, and was not made with intent to deceive.

PC MC 4 applies when "[o]mission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided." Directive ¶ E2.A5.1.3.4. There is no evidence that anyone gave Applicant improper or inadequate advice or suggested that she omit information from his SF 85P.

In sum, I am satisfied that Applicant's erroneous answer to Question 22b of her SF 85P was a mistake caused by her misunderstanding of the question. She honestly believed that the correct answer was "No," at the time she provided it.

### **"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, and inability or unwillingness to satisfy her debts raise serious trustworthiness concerns. She is currently 38 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 were knowledgeable and voluntary. Her debt problems resulted from voluntary decisions to purchase items. However, her inability to repay her debts resulted from her separation from her husband and the failure of the father of three of her children to take financial responsibility for their familial obligations. They made decisions not to use their money for Applicant and her family, or for paying the four currently delinquent SOR debts. There is some evidence of rehabilitation, positive behavior changes, and improved circumstances as indicated by self-discipline and the complete absence of new delinquent debt over the last three years. Moreover, increased income because of her educational accomplishments, her receipt of financial counseling, and her payment of six creditors in the last six months all show powerful signs of financial improvement in the future. The potential for pressure, coercion, exploitation, or duress is low. Applicant is current on her recent debts, most importantly, her mortgage and her car loan are current, and have not been significantly delinquent. Changes resulting from counseling and greater awareness of financial responsibilities will result in a continuously improving trend of improved financial circumstances. Moreover, stability in her employment, increases in her income, and reduction in her debt load show improved self-discipline, and greater consciousness of her financial responsibilities. In sum, the likelihood of recurrent debt problems is low.

In ISCR Case No. 04-07360 (App. Bd. Sep. 26, 2006), the Board noted that two SOR debts were paid through judgment and garnishment, one SOR debt was paid through settlement, and one SOR debt was never paid. Indeed, for one SOR debt the applicant did not even contact the creditor about payment. Nevertheless, the applicant showed that he reduced his overall debt by 95% and the Board affirmed the decision to grant that applicant a clearance.

Applicant's financial case is similar to ISCR Case No. 04-07360. She paid four SOR debts. One SOR debt is a duplication. Four unpaid SOR debts remain, and her husband has the primary responsibility to pay the largest debt. Her two most recent unpaid, delinquent debts are the debt charged off in March 2003 (SOR ¶ 1.h), followed by the debt in April 2001 (SOR ¶ 1.e). Her four unpaid SOR debts are all barred by the South Carolina's 3-year statute of limitations. As such, the concern about current financial pressure that may result in illegal activity is significantly lower because as

a matter of law, she no longer has any delinquent debts. 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 the trustworthiness concerns pertaining to financial considerations.

Substantial evidence supports Applicant's trustworthiness eligibility and suitability. I take this position based on the law, my "careful consideration of the whole person factors"<sup>(44)</sup> 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 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 1j: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

### **DECISION**

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 for a public trust position. Eligibility for an ADP I/II/III position is granted.

Mark W. Harvey

Administrative Judge

1. Department Counsel's motion is at R. 14-15. 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. Accordingly, in this decision I will follow the procedural rules of the Directive but apply the adjudicative guidelines in the Regulation.
2. Directive ¶ E3.1.8, provides, "The Applicant shall be notified at least 15 days in advance of the time and place of the hearing."
3. Exhibit 1, Questionnaire for Public Trust Positions, Standard Form (SF) 85P, is dated August 16, 2004 on the last page.
4. Exhibit 8, Statement of Reasons (SOR), dated June 21, 2006. The SOR is the source for all the factual assertions in the remainder of this paragraph.
5. Exhibit 9 (Applicant's response to SOR was notarized, but is not dated. It is date stamped as received at DOHA on June 26, 2006).
6. The source for all factual assertions in this paragraph is Exhibit 9, *supra* note 5.
7. Exhibit 1, *supra* note 3, at 1 (date of birth) and Exhibit 9, *supra* note 5, at 2 (employment).
8. Exhibit 1, *supra* note 3, question 16, at 6.



9. Exhibits J and K; R. 7.
10. Exhibit 1, *supra* note 3, at 4-5.
11. *Id.*, question 14, at 5.
12. Exhibit 9, *supra* note 5, at 2.
13. Exhibit M.
14. *Id.*
15. Exhibit 9, *supra* note 5, at 2.
16. Exhibit 2 (Interview of Applicant by Special Investigator of the Office of Personnel Management, dated December 17, 2004), at 1.
17. *Id.* at 2-3; R. 22-24; 28-29.
18. Exhibit 2, *supra* note 16, at 3.
19. Applicant did not remember the debt in SOR ¶ 1.g (\$85). Exhibit 9, *supra* note 5, at 1. This debt is for a medical account placed for collection in January 2003, according to SOR ¶ 1.g.
20. Exhibit N (documents received on December 8, 2006, from Applicant), at 4.
21. *Id.*
22. Exhibit 2, *supra* note 15, at 1-2 and R. 25-26 are the sources for the facts in this paragraph, unless stated otherwise.
23. Exhibit 2, *supra* note 15, at 3 and R. 30 are the sources for the facts in this paragraph, unless stated otherwise.
24. Exhibit, 2, *supra* note 15, at 4-5 is the source for this paragraph, unless stated otherwise.
25. Exhibit 2 (Form 154, Personal Financial Statement (PFS), dated December 17, 2004), at 7. The remainder of this paragraph is derived from Applicant's PFS.
26. She paid off the credit card debt of \$2000, and the instant loan of \$600 in August 2006, to reduce her monthly debt payments. *See* Exhibits B and C; R. 19, 34-36. Her PFS did not include the child support she occasionally receives.
27. Exhibit 3, (Interview of Applicant by Special Investigator of the Office of Personnel Management, dated February 15, 2005), at 1; R. 32, 37.
28. Exhibit N, documents received on Dec. 8, 2006, at 5.
29. Exhibits I and J.
30. Exhibits B and C; R. 19, 34-36.
31. The Security Clearance Application Standard Form (SF) 86 (September 1995 version) was not used in this case because the issue is Trustworthiness or Public Trust, rather than a security clearance. It is noteworthy that the SF 86 has two Questions concerning debts: Question 38. "**Your Financial Delinquencies - 180 days** In the last 7 years, have you been over 180 days delinquent on any debt(s)?" and Question 39. "**Your Financial Delinquencies - 90 days** Are you currently over 90 days delinquent on any debt(s)?" By asking the question two different ways, and seeking two different types of information, there is less of an opportunity for mistakes. SF 86 Question 39 apparently seeks information that is not included in Question 38. In any event, the use of the 7-year qualifier in Question 38 versus the "current" qualifier in

Question 39 is relevant because Applicant apparently applied a "current" qualifier to her answer to Question 22b.

32. Exhibit 3, *supra* note 27, at 4-5.

33. The medical debt in SOR ¶ 1.i (\$43) was the only debt placed for collection in 2004. She did not remember this debt (Exhibit 9, *supra* note 5, at 1; R. 31). She considered the debt in SOR ¶ 1.h (\$272), which was placed for collection in March 2003 as her husband's debt (R. 30-31). Applicant did not remember the other 2003 debt, which is the debt in SOR ¶ 1.g (\$85). Exhibit 9, *supra* note 5, at 1; R. 29.

34. Exhibit A (Performance Review, dated Jan. 7, 1997) at 4.

35. Exhibit A (nine Performance Reviews) and Exhibit G (10-year letter of appreciation from employer).

36. Exhibits D-F.

37. "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 (4<sup>th</sup> Cir. 1994).

38. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

39. *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.

40. 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.).

41. *See* ISCR Case No. 04-07360 at 2 (App. Bd. Sept. 26, 2006) (stating partial credit was available under FCMC 6 for debts being resolved through garnishment).

42. In ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006) the Board stated that Applicant's statements about his intent and state of mind when he executed his SF 86 were relevant but not binding information. Moreover, his statements are considered in light of the record evidence of a whole. *Id.* "The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004)." *Id.*

43. 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.

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