

DATE: March 21, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

ADP Case No. 06-12108

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Phillip Earl Jones, Esq., Applicant's Counsel

SYNOPSIS

Applicant had nine delinquent debts listed on her Statement of Reasons (SOR) for 2006. Her SOR debts initially became delinquent because of her unemployment. Under the "whole person" concept, financial considerations are mitigated. Her false answer on one question on her 2002 and 2004 Questionnaires for Public Trust Positions (SF 85P) concerning an arrest and conviction was because she believed she was not required to provide this information. However, her false answer on another question concerning debts delinquent over 180 days was deliberate and with intent to deceive. She did not mitigate concerns about personal or criminal conduct. Eligibility for an ADP I, II or III position is denied.

STATEMENT OF THE CASE

On March 11, 2002, and December 22, 2004, Applicant submitted Questionnaires for Public Trust Positions (SF 85P). (1) On June 23, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, (2) 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. (3) The SOR alleges trustworthiness concerns under Guidelines E (Personal Conduct), J (Criminal Conduct), and F (Financial Considerations). 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 her access to sensitive information, and recommended referral to an administrative judge to determine whether a such access should be granted, continued, denied, or revoked.

In an answer, dated August 9, 2006, Applicant responded to the SOR allegations, and elected to have her case decided at a hearing. (4) On December 7, 2006, an Administrative Judge held a brief hearing, and approved a delay requested by Applicant's Counsel (Ex. 9). On December 18, 2006, the case was transferred to me. On January 30, 2007, her hearing was held. I granted Applicant's request for delay to submit documentary evidence (R. 17, 84-86). DOHA received the

hearing record (R.) on February 7, 2007. I received additional documentary evidence from Applicant on March 2, 2007, which I admitted into evidence as Exhibit A.

FINDINGS OF FACT

As to the factual allegations under Guidelines E, J and F, Applicant admitted the facts in the following SOR paragraphs: 1.a(1) (she was arrested and charged with a criminal offense that she did not disclose on her SF 85P); 1.c(1) to 1.c(9) (she had nine delinquent debts listed in a 2002 credit report); 1.d(1) to 1.d(14) (she had fourteen delinquent debts listed in a 2005 credit report); and 3.a to 3.i (she had nine delinquent debts listed in a 2006 credit report). She denied the other SOR allegations without elaboration. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, and upon due consideration of the same, I make the following additional findings of fact.

Applicant is 39 years old (R. 35).⁽⁵⁾ She is a high school graduate, and received a diploma in electronic engineering from a technical school in 1988 (R. 35). She is a single mother with three children (R. 22-23). She has no prior military service. She has been employed by government contractors for 15 years and on her current contract since March 2002 (R. 22). Her current employment involves engineering for computer systems and information technology.

The following table lists the amounts of the SOR debts, when they were charged off and/or placed for collection (as alleged in the SOR) and their current status.

SOR ¶	SOR Amount	Account type, date charged off or placed for collection, and some current status information
1.c(1)	\$1,310	Financial account debt-Dec. 1998
1.c(2)	\$1,075	Paid bank account debt-Feb. 1999
1.c(3) & 1.d(1)	\$433	Credit card account debt-Apr. 1999
1.c(4)	\$505	Financial account debt-Sep. 1999
1.c(5) & 1.d(2)	\$1,468	Financial account debt-Oct. 1999
1.c(6), 1.d(3), & 3.a	\$1,669	Judgment on vacuum cleaner account-Nov. 1999
1.c(7) & 1.d(4)	\$582	Financial account (increased to \$635)-Nov. 2000
1.c(8), 1.d(6), & 3.c	\$119	IC Systems account-Apr. 2001
1.c(9), 1.d(7), & 3.g	\$82	Cable television account, increased to \$207 by May 2006-Aug. 2001
1.d(5), 1.d (10), 3.b, & 3.d	\$214	Utilities services debt ¶ 1.d(10) indicates this debt increased to \$710 -Mar. 2001
1.d(8)	\$598	Collection account-Jan. 2001
1.d(9)	\$269	Collection account-May 2002
1.d(11)	\$59	Professional services account-Oct. 2003
1.d(12), 1.d (13), 3.e, 3.f & 3.i	\$500	Three medical debts totaling together about \$500
1.d(14)	\$311	Credit account-July 2004
3.h	\$658	Disputed account for television services-Sep. 2005

The SOR alleges that Applicant was required to disclose the debts listed above for SOR ¶¶ 1.c(1) to 1.c(9) on her 2002 SF 85P. She was required to disclose the debts listed above for SOR ¶¶ 1.d(1) to 1.d(14) on her 2004 SF 85P. The debts listed above for SOR ¶ 3.a to 3.i were delinquent at the time of her 2006 credit report. The majority of the debts listed in the above table resulted from medical care her children received, which debts were then sold to various collection

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agencies.

Applicant was unemployed from November 1999 to March 2000, and again from March 2001 until January 2002. She worked as a bartender from January 2002 until starting her current employment on March 11, 2002 (Ex. 1 at 3). Her finances were in turmoil because of the unemployment and underemployment (R. 49-50). She was "ditching creditors all that time" (R. 59). She was sending other creditors \$10 or \$20 (R. 61).

For the judgment in SOR ¶ 3.a, Applicant bought a vacuum cleaner for \$1,700 in 1998. She had difficulty making payments because of unemployment. She attempted to return the vacuum cleaner and to settle the debt. She sent a creditor \$400, but after she paid she realized she had no proof of her payment (R. 72). Ultimately, she did not pay because she was unsure about where or who to send the money (R. 72).

Applicant paid the debt in SOR ¶ 1.c(2) for \$1,075 (R. 77), and subsequent credit reports did not list this debt. In 2005, she indicated her payments on her student loans were deferred (Ex. 4 at 3). At the time of her hearing, her student loan and credit cards were paid off (R. 26, 68, 77, 80). She believed the only bill that was unpaid were some medical bills (totaling approximately \$2,000) (R. 27, 66). Her only loan is her car loan (R. 68). Her financial situation is much better now (R. 49). She was not paying the medical bills in SOR ¶¶ 3.e and 3.f (together totaling about \$400) because the debt was being transferred between collectors and she wanted to avoid double payments (R. 62, 79). She also recognized she was behind on her utilities (SOR ¶ 3.b of \$207, and SOR ¶ 3.d of \$710) (R. 79). The SOR debts in ¶¶ 3.b and 3.d are evidently duplications of the same debt. She disputed the television cable bill in SOR ¶ 3.h (\$ 658) because it related to equipment that they failed to pick up (R. 26, 77).

Applicant's take home pay after deductions is \$3,680 per month (R. 64). Her rent was about \$1,000 per month and is now decreased to \$725 per month (R. 64). Her monthly bills are approximately: electricity (\$600), telephone (\$120 to \$300), water (\$75), television (\$120), medical (\$100), car payment (\$620), car insurance (\$230), gasoline (\$400), groceries (\$800), and clothing (\$400) (R. 64-67). She explained that her monthly bills varied considerably from month-to-month, and no average was available. *Id.* She has about \$2,000 in her savings account (R. 69).

At her hearing, Applicant indicated she did not receive any formal financial counseling (R. 68). After her hearing, she provided a certificate explaining she received financial counseling on "February 27, 2006" (Ex. A). I find the actual date of financial counseling was February 27, 2007.

Applicant was not prepared to thoroughly address her financial issues at her hearing (R. 79-82). She conceded the financial facts as stated in the SOR were correct (R. 82). She agreed for every debt, to provide the current status, including when the creditor was contacted and if payments or a payment plan have been made (R. 81-82). Applicant's counsel agreed that a delay until March 1, 2007, would allow sufficient time to provide additional matters concerning payment of debts, and more precise information about her income and debts (R. 84-86, 99, 101-102). After the hearing was over, Applicant provided a list of debts she had paid or settled, including several that were not listed on the SOR, a certificate establishing financial counseling, and a character reference (Ex. A). She was reluctant to make any payments on her delinquent debts now because she may lose her job because of the trustworthiness determination (R. 62).

A character reference who has known Applicant for ten years said she shows a high degree of integrity and responsibility.⁽⁷⁾ She puts the needs and welfare of her children first. She shows diligence and dedication in her support for the Department of Defense. She has good judgment, maturity, and demonstrates a logical approach problem solutions. She is an outstanding asset to her company and the Department of Defense.

Personal and Criminal Conduct

SOR ¶¶ 1.a, 1.b, and 2.a allege Applicant failed to disclose accurate information to Question 16 (of her March 11, 2002 and December 22, 2004 SF 85Ps), which asks, "**YOUR POLICE RECORD** In the last seven years, have you been arrested for, charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150)."⁽⁸⁾ Applicant answered, "Yes," and disclosed that she received fines and probation for driving under the influence (DUI) of alcohol on January 24, 2000 on both SF 85Ps (R. 37; Ex. 1 at 5; Ex. 2 at 6). She did not disclose any other arrests, charges or convictions on her SF 85Ps.

On February 19, 2000, Applicant went to her boyfriend's residence to collect her property because their relationship had ended due to his infidelity.⁽⁹⁾ Her boyfriend assaulted and threatened her. She struck him on the head with a gun case in self-defense. He called the police. She told the police what happened when they arrived at his residence (R. 35-36). Because she showed no signs of injury, and he had a scratch on his head, she was arrested and spent the next two days in jail (R. 36-37). Six months later she pleaded no contest to disorderly conduct (R. 39), and she paid a \$600 fine. She received a deferred adjudication, and thought her record was going to be expunged (R. 30, 41). She could not find the attorney who handled her assault case (R. 32), but he had told her that the assault would be expunged and would not affect her security clearance (R. 42). She put the assault incident behind her, and did not think about it at the time when she filled out her SF 85P (R. 43). The only incident that came to mind when she signed the SF 85Ps was her DUI (R. 52). She checked with the clerk's office and there was no record of her disorderly conduct conviction (R. 48).

SOR ¶¶ 1.c, 1.d, and 2.a allege Applicant failed to disclose accurate information to Question 20 (of her March 11, 2002 and December 22, 2004 SF 85Ps), which asks, "**YOUR FINANCIAL RECORD - 180-Day Delinquencies** 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."

At her hearing Applicant said in 2002 after she learned that she would be receiving employment with the government contractor, she contacted her creditors and set up payment arrangements (R. 55, 57-58). She believed she started contacting her creditors in January 2002 (R. 57). She did not believe she was delinquent because she was working with her creditors to resolve her debts (R. 56, 58). Her statement about contacting her creditors to make payment arrangements is not corroborated by any documentation.

A one-page statement received from Applicant after her hearing (Ex. A), indicates the first five items listed in the table on page 3, *infra*, were "settled," but there is no evidence about when they were settled. I specifically find that the nine debts in SOR ¶¶ 1.c(1) to 1c(9) were not settled and the settlement amounts paid prior to signing her SF 85P on March 11, 2002. Many of the same delinquent debts were reflected on her March 20, 2002, and March 3, 2005, credit bureau reports. Moreover, she admitted in her response to the SOR that the SOR and the two credit bureau reports accurately reflected her debts.

The last sentence of her post-hearing submission provides, "Items C7-9 and D4-13 (Statement of Reasons.) working with Consumer credit counseling services to consolidate accounts to bring current." (Ex. A). I specifically find that the debts in SOR ¶¶ 1.d(4) to 1.d(13) were delinquent prior to her signing her SF 85P on December 22, 2004.

After considering all the record evidence, I find that she was sincere and truthful about her intent, and her answer on Question 16 of her SF 85Ps. Her failure to disclose her 2000 arrest for assault and conviction of disorderly conduct was an honest mistake, rather than a deliberate lie. However, her answer on Question 20 of her SF 85Ps was deliberately false. She knew she had multiple debts delinquent over 180 days, including a judgment, and she failed to disclose those debts.

POLICIES

Applicant is assigned to an ADP I, II or III position. ADP I and II positions are sensitive positions. Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. 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 ADP I, II and III cases.

In an evaluation of an applicant's trustworthiness suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These 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.

Guidelines ¶ 2. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. 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 decision. Guidelines ¶ 2(c).

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guidelines ¶ 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) 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." Guidelines ¶ 2(b); Regulation ¶ C2.1.2. 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."⁽¹⁰⁾ The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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).⁽¹¹⁾

A person who seeks access to classified information 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 access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. 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. Executive Order 10865, § 7.

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 initial failure to pay her debts is of concern, especially in light of her desire to have access to the nation's sensitive information. Under Guideline F, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. 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.

Two Financial Considerations Disqualifying Conditions (FC DC) could raise a concern pertaining to eligibility for an ADP I/II/III position and may be disqualifying in this case. FC DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. FC DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's actions in initially failing to satisfy her outstanding financial obligations give rise to FC DC 1 and 3. In her response to the SOR, she admitted she was responsible for the delinquent debts listed on the SOR. At the hearing, she credibly disputed the debt in SOR ¶ 3.h (\$658). The 4-year Texas statute of limitations (SOL) limits the legal collectibility of all except for five of her other SOR debts: 3.a (\$1,669-judgment not barred by SOL), 3.e (\$230), 3.f (\$266), 3.g (\$207), and 3.i (\$100). I conclude that the record evidence establishes her responsibility for the delinquent debts in SOR ¶¶ 3.a, 3.e, 3.f, 3.g, and 3.i, but not the other delinquent SOR debts.

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. ⁽¹²⁾

A trustworthiness concern based on financial problems can be mitigated by substantial evidence under FC MCs 1 or 2 that "the behavior was not recent" or "it was an isolated incident." Directive ¶¶ E2.A6.1.3.1 and E2.A6.1.3.2. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. Based on the record evidence as a whole, ⁽¹³⁾ I conclude FC MCs 1 and 2 do not apply because Applicant had five delinquent SOR debts at the time of her hearing, and she is not making payments on these five debts.

Applicant disclosed some information to support consideration of FC MC 3, "the 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)." Directive ¶ E2.A6.1.3.3. Her financial problems began when she became unemployed. Although the causes of her financial problems were "largely beyond her control," she has not provided enough information about changes in her financial situation, especially after she became employed by the government contractor, to warrant full application of FC MC 3. ⁽¹⁴⁾

FC MCs 4 and 6 can mitigate a trustworthiness concern arising from financial problems when, "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," or "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Directive ¶¶ E2.A6.1.3.4 and E2.A6.1.3.6. Applicant receives some credit under FC MC 4 because she has received financial or credit counseling, and there is some evidence that her financial problems are being resolved or are under control. FC MC 6 does not apply because she has not provided sufficient evidence about her efforts to pay her delinquent debts after she became employed by the government contractor. ⁽¹⁵⁾

Guideline E (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 [sensitive] information." Directive ¶ E2.A5.1.1.

Two personal conduct disqualifying conditions (PC DC) could potentially raise a trustworthiness 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 trustworthiness 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 incorrect answers to Questions 16 and 20 of her 2002 and 2004 SF 85Ps. The evidence of record establishes deliberate falsification in regard to Question 20, but not to Question 16. ⁽¹⁶⁾ She admitted preparing her SF 85Ps, and answering incorrectly. She believed she was not required to disclose her assault arrest, and

subsequent conviction for disorderly conduct. Her false answers were due to this mistaken belief. She was, however, aware of multiple debts delinquent over 180 days when she signed the two SF 85Ps. Her claim that she believed she did not have to disclose her debts because she intended to pay, negotiate or was in the process of settling them is not credible.

A trustworthiness concern based on Guideline E may be mitigated by substantial evidence of personal conduct mitigating conditions (PC MC). Under PC MC 1, trustworthiness 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 ¶¶ 1.a, 1.b, and 2.a concerning Question 16 are not established by substantial evidence, but the allegations in SOR ¶¶ 1.c, 1.d, and 2.a concerning Question 20 are established. As such, SOR ¶¶ 1.c, 1.d, and 2.a are relevant to making a security determination about her judgment, trustworthiness, and reliability.

PC MC 2 applies when the "falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Directive ¶ E2.A5.1.3.2. PC MC 3 applies when the "individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3. Applicant has not established PC MCs 2 and 3 because two false SF 85Ps were submitted to the government in 2002 and 2004. Moreover, she was not candid at her hearing about knowingly falsifying her answer to Question 20 of her SF 85Ps. [\(17\)](#)

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 an authorized person gave Applicant improper or inadequate advice or suggested that she omit information from her SF 85Ps. Her lawyer is not an authorized person, however, his advice not to disclose information about her arrest for assault and conviction for disorderly conduct on government documents raises a state of mind defense that is broader than PC MC 4. I conclude, with respect to Question 16, she believed in good faith that it was not necessary to disclose this information, and she did not have the intent to deceive the government. However, no one told Applicant that she did not have to disclose delinquent debts on government documents, and PC MC 4 does not apply to Question 20.

Security concerns can be mitigated under PC MC 5 when an applicant "has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. Under PC MC 5, Applicant did not honestly disclose her financial problems, and such conduct does not merit application of PC MC 5.

Guideline J (Criminal Conduct)

Under Guideline J, a history or pattern of criminal activity raises questions regarding an applicant's willingness or ability to protect [sensitive] information and creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

Two criminal conduct disqualifying conditions (CC DC) could raise a security concern in this case. CC DC 1 applies where there are "[a]llegations 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." Directive ¶¶ E2.A10.1.2.1 and E2.A10.1.2.2.

SOR ¶ 2.a alleges that she violated 18 U.S.C. § 1001 by falsifying two answers on her 2002 and 2004 SF 85Ps. As indicated previously, I find that she did not deliberately falsify Question 16, but she did deliberately falsify Question 20 of her 2002 and 2004 SF 85Ps. For a violation of 18 U.S.C. § 1001 to occur, 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 20 of her SF 85Ps, this accurate answer is capable of influencing the government to deny her access to sensitive information, and her omission to her SF 85Ps was material.

Accordingly, CC DC 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). Directive ¶ E2.A10.1.3.1. There are no "bright line" rules for determining when conduct is "recent."⁽¹⁸⁾ 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 last SOR-alleged incident of criminal conduct was her false statement, when she filled out her security clearance application in December 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 January 31, 2007.⁽¹⁹⁾ 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," Directive ¶ E2.A10.1.3.2, under CC MC 3 when an applicant demonstrates he or she "was pressured or coerced into committing the act and those pressures are no longer present in that person's life," Directive ¶ E2.A10.1.3.3, or for CC MC 4, when an applicant "did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur." Directive ¶ E2.A10.1.3.4. CC MCs 2, 3 and 4 do not apply because Applicant committed the 2002 and 2004 falsifications and then was not candid at her 2007 hearing when addressing the falsification. No one caused her or influenced her to commit the criminal conduct, and she voluntarily committed the criminal conduct. She has not shown a sufficient track record of positive or non-criminal conduct.

In regard to CC MCs 5 and 6, security concerns may be mitigated when an applicant was acquitted or "[t]here is clear evidence of successful rehabilitation." Directive ¶¶ E2.A10.1.3.5 and E2.A10.1.3.6. CC MC 5 and 6 do not apply because Applicant was not acquitted of violation of 18 U.S.C. § 1001 and 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 Directive provision E2.2.1. Applicant's actions when she falsified her SF 85Ps were knowledgeable and voluntary. The falsification constitutes serious criminal conduct. She is 39 years old, sufficiently mature to be fully responsible for her conduct. The motivation for the falsification was to conceal her debts from the government. A person who engages in "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 [sensitive] information." The likelihood of recurrence is significant because she was not forthright and candid at her hearing about her knowledge of her delinquent debts before she completed her SF 85Ps.

Applicant has presented substantial extenuating and mitigating evidence in regard to her financial considerations. Some credit in the whole person analysis for the application of the 4-year Texas statute of limitations is warranted.⁽²⁰⁾ *See* Tex. Civ. Prac. & Rem. Code §§ 16.004(c) and 16.051 (statute of limitations for contracts); 16.004(a)(3) (statute of limitations for debts); *Cont'l Cas. Co. v. Dr. Pepper Bottling Co. of Tex.*, 416 F.Supp. 2d 497, 505-507 (W.D. Tex. 2006); *Facility Ins. Corp. v. Employers Ins. of Wausau*, 357 F.3d 508, 513-514 (5th Cir. 2004) (discussing statute of limitations for open or revolving accounts). Creditor collection of the debts in SOR ¶¶ 3.b, 3.c, and 3.d appeared to be legally barred by the Texas statute of limitations. However, if she has made subsequent payments on these three debts, she may have potentially reinstated these debts and ended the statute of limitations' defense to collection. *See Stine v. Stewart*, 80 S.W.3d 586, 591 (Tex. 2002). Statutes of limitations provide distinct societal and judicial values. "[T]hey stimulate activity, punish negligence and promote repose by giving security and stability to human affairs. The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, statutes of limitations provide potential defendants with certainty that after a set period of time, they will not be ha[iled] into court to defend time-barred claims. Moreover, limitations periods discourage plaintiffs from sitting on their rights. Statutes of limitations are, indeed, fundamental to our judicial system."

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (S.C. Ct. App. 2005) (internal quotation marks and citations omitted). The 4-year Texas statute of limitations (SOL) limits the legal collectibility of all except for five of her SOR debts: 3.a (\$1,669-judgment not barred by SOL), 3.e (\$230), 3.f (\$266), 3.g (\$207), and 3.i (\$100). I conclude that the record evidence establishes her current legal responsibility for these five delinquent debts, but not the other delinquent SOR debts. The five delinquent debts total less than \$2,500, which is a small amount in comparison to her income. Additionally, her financial difficulties stem from her unemployment. The degree that she is "financially overextended," was significantly reduced by payment of several other non-SOR debts as well as her student loans. The absence of evidence of any prior violation of her employer's rules or requirements, her receipt of financial counseling, and her evident sincerity about making future financial progress all weigh in her favor. She has provided sufficient evidence of her efforts to establish her financial responsibility and rehabilitation. She is making sufficient progress resolving her debts, and they are not likely to continue to be a serious, ongoing, long-term problem. *See* ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, "some credit" is still available under that same mitigating condition).

In sum, I conclude she has not mitigated the falsification concerning Question 20 of her SF 85Ps. She was not candid at her hearing about knowing about the status of her delinquent debts before signing the 2002 and 2004 SF 85Ps. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude she has mitigated, part, but not all of the trustworthiness concerns pertaining to personal and criminal conduct. She has mitigated trustworthiness concerns about her financial considerations.

The evidence leaves me with questions and doubts as to Applicant's trustworthiness eligibility and suitability. 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"⁽²¹⁾ and supporting evidence, and my interpretation of my responsibilities under Enclosure 2 of the Directive. Applicant has failed to mitigate or overcome the government's case. For the reasons stated, I conclude she is not eligible for access to sensitive information.

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 E: AGAINST APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Subparagraphs 1.c and 1.d: Against Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline F: FOR APPLICANT

Subparagraphs 3.a to 3.i: For 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 eligibility for a public trust position for Applicant. Eligibility for an ADP I, II or III position is denied.

Mark W. Harvey

Administrative Judge

1. Exhibits (Exs.) 1 and 2 (Questionnaires for Public Trust Positions (SF) 85P), dated December 22, 2004, and March 11, 2002, respectively). Applicant's certification signature appears on page 6 of Exs. 1 and 2. There is an allegation of falsification of these SF 85Ps in SOR ¶¶ 1 and 2.
2. Ex. 10 (Statement of Reasons (SOR), dated June 23, 2006). Exhibit 10 is the source for the facts in the remainder of this paragraph.
3. The Government made a motion to delete all references to Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended from the SOR because the Directive controls the disposition of this case. Applicant's counsel did not object, and I granted the motion (R. 11; Ex. 12). *See also* the Policy section of this decision.
4. Ex. 11 (Applicant's response to SOR was dated August 9, 2006, and was received at DOHA on August 11, 2006) is the source for the facts in this paragraph and the next paragraph.
5. Ex. 1, *supra* n. 1, provides Applicant's date of birth, education, marital status, relatives, and military service information at questions 1, 10, 14, 15 and 16, respectively.
6. Ex. 4 (Applicant's statement, dated June 20, 2005, to a Special Investigator of the Office of Personnel Management) at 1-3. Ex. 4 is the source for the facts in this and the next three paragraphs, unless stated otherwise.
7. Ex. A at 4 is the source for the information in this paragraph.
8. 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 specifically asks an applicant to include police or judicial information that is expunged or sealed.
9. Ex. 4, *supra* n.6 at 3-6, is the source for facts in this paragraph unless stated otherwise. At her hearing, she said her statement to the investigator in regard to the assault was correct (R. 85).
10. "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).
11. "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).
12. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).
13. *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.
14. "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)).
15. 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)). *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.).

16. The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(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. [Moreover], 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.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

17. In ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006) the Board stated that an applicant's statements about his or her intent and state of mind when the SF 86 was executed were relevant but not binding information. Moreover, an applicant's statements are considered in light of the record evidence of a whole. *Id.* "The security concerns raised by an applicant's falsification are 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.*

18. *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.).

19. "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)).

20. *See* ISCR 04-07360 at 2 (App. Bd. Sept. 26, 2006) (stating partial credit was available under FCMC 6 for debts being resolved through garnishment).

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