

DATE: January 31, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

ADP Case No. 06-13590

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

SYNOPSIS

Thirty-four-year-old Applicant had six alleged debts listed in the statement of reasons (SOR). Her largest SOR debt was settled and paid, and two other SOR debts were paid in full. Two SOR debts were duplications, and she is making payments on her remaining SOR debt of approximately \$2,000. She currently has no legally enforceable, delinquent debts. Her debt problems resulted from separation from her husband, and assistance she provided to her parents, who were ill. For the last four years she has shown her financial responsibility by not generating any new delinquent debt. She has mitigated security concerns about financial considerations. Eligibility for an ADP I/II/III position is granted.

PROCEDURAL RULING

The Statement of Reasons (SOR), does not cite or refer to Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, but it does cite 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. In this case, the pertinent disqualifying and mitigating conditions in the Regulation and the Directive are the same. 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 22, 2004, Applicant applied for a public trust position and submitted a Questionnaire for Public Trust Positions (Standard Form (SF) 85P).⁽¹⁾ On August 29, 2006, DOHA issued a SOR to her, pursuant to the Directive.⁽²⁾ The SOR alleges security concerns under Guideline F (Financial Considerations). 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 October 19, 2006, Applicant responded to the SOR allegations, and 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 December 1, 2006. At the hearing I approved Applicant's request that I hold the record open so she could submit additional documentary evidence (R. 36). DOHA received the transcript of the hearing (R.) on December 18, 2006. Department Counsel had no objection to my consideration of the evidence Applicant provided, and I admitted her additional evidence (Ex. Q) on January 11, 2007.

FINDINGS OF FACT

As to the factual allegations under Guideline F, Applicant admitted that she was responsible for the six debts listed on the SOR, but also indicated she was refinancing her home so that she could pay her creditors.⁽⁴⁾ 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 34 years old.⁽⁵⁾ Since April 2001, she has been employed by a United States government contractor, and she is involved with processing sensitive medical records.⁽⁶⁾ She has no prior military service.⁽⁷⁾ She has a high school diploma.⁽⁸⁾ She attended a university from 1991 to 1993, and business college from 1995 to 1998. *Id.* Applicant was married on December 4, 1993, and has one son (born in 1998).⁽⁹⁾

In 2000, Applicant's parents were sick, and not living together, and she had to take care of them (R. 21, 23). Helping her parents resolve their issues caused her to fall behind in her payments (R. 21, 23, 28). Her father died in March 2005, and her mother died in July 2005 (Ex. L at 3). She was separated from her husband twice, for 9-12 months each time (R. 30). The separations had a negative effect on her financial situation (R. 30). In July 2004, they returned to living together in the same household, and have remained together thereafter (R. 31). She and her husband each have a credit card, and both intend to pay off their credit card balances (R. 31).

She has owned her own home for 30 months (R. 20). On November 9, 2006, she refinanced her home and received \$9,000 in cash (R. 20). Her monthly mortgage payments increased from \$400 to \$871 per month (R. 28). Her new mortgage balance is \$77,200 (R. 29).

Applicant's personal financial statement (PFS) prepared in 2005⁽¹⁰⁾ indicated her net monthly income was \$1,150; and her husband's net monthly income was \$1,800 per month. Their total net household income is \$2,950 per month. She listed monthly household expenses as follows: mortgage (\$400), groceries (\$500), household debts (\$493), clothing (\$0), utilities (\$0), car expenses (\$0), and insurance (\$0), and miscellaneous (\$400). She did not list any specific debt payments or other liabilities.

A letter from a financial training school, dated January 9, 2007 indicates Applicant has begun a 6-week course of financial counseling (Ex. Q at 4). The following table provides the amount of each debt as listed in the SOR and the debt's current status:

SOR ¶	Amount in \$	Status
1.a	1,294	Duplication of debt in SOR ¶ 1.f ⁽¹¹⁾
1.b	5,305	Settled and paid on January 2, 2007 ⁽¹²⁾
1.c	105	Paid on November 28, 2006 ⁽¹³⁾
1.d	92	Paid on November 28, 2006 ⁽¹⁴⁾
1.e	1,891	Duplication of debt in SOR ¶ 1.f ⁽¹⁵⁾
1.f	2,027	Making monthly payments of \$50 ⁽¹⁶⁾

Four persons provided character reference statements (Ex. A-D). They have known and worked with Applicant for

many years. She is generous, loyal, morally upstanding, hard-working, diligent, conscientious, committed to excellence, trustworthy, and dedicated to her company. They emphasize her strong integrity, and assert she will go the extra mile to protect the privacy of her clients. Her performance appraisal, dated January, 6, 2006, is a good overall rating. However, it indicates she needs improvement in the area of dependability involving matters such as unscheduled absences, and it comments about her utilization of excessive unscheduled leave (Ex. Q at 7-10).

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."⁽¹⁷⁾ 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. 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 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 debts in SOR ¶¶ 1.a to 1.f became delinquent between 1999 and October 2001. They have been delinquent for at least five years. Applicant established that two SOR debts were paid on November 28, 2006, and the debt in SOR ¶ 1.b was settled and paid on January 2, 2007. Two debts were a duplication of a third debt (SOR debts ¶¶ 1.a, 1.e and 1.f), and they were placed into a payment plan in September 2006.

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 in SOR ¶¶ 1.a to 1.f, 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. ⁽¹⁸⁾

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, ⁽¹⁹⁾ I conclude FC Cs 1 and 2 do not apply because Applicant had multiple delinquent SOR debts. Payment of two SOR debts in November 2006 and one in January 2007, after she received the SOR is simply too recent to merit application of FC MC 1.

FC MC 3 partially applies to all of her SOR debts because the debts became delinquent in 2000 and 2001 and were the result of her periodic leaves from work, as well as her support to her mother and father when they were ill. 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." Applicant, however, does not receive full credit for FC MC 3 because she waited until November 2006 and January 2007, to pay three SOR debts.

She received financial counseling, and receives partial credit under FC MC 4 because there are clear indications (especially since November 2006) that the problem is resolved and under control. In regard to application of the statute of limitations, FC MC 6 does not apply because there is insufficient information to establish that Applicant showed good faith in the resolution of her debts over the last four years.⁽²⁰⁾ 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 debts. *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 for delinquent debts).⁽²¹⁾

"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 34 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 absence from work to care for her mother and father. There is some evidence of rehabilitation, positive behavior changes, and improved circumstances as indicated by self-discipline and the complete absence of new delinquent, unpaid debt over the last four years. The potential for pressure, coercion, exploitation, or duress is low. Applicant is current on her recent debts. She has no delinquent debt. There is some concern about the difficulty she and her husband will have paying their increased mortgage. However, greater awareness of financial responsibilities will result in a continuously improving trend of financial circumstances. Moreover, stability in her employment, increases in her income through annual salary increases, and reduction in her debt load should establish a solid financial foundation for her future. In sum, the likelihood of recurrent debt problems is low.

Her sole unresolved SOR debt is being paid at the rate of \$50 per month under a payment plan, which she ratified even though the debt in SOR ¶ 1.f was uncollectible under the 3-year South Carolina statute of limitations for debts. Her ratification of the debt in SOR ¶ 1.f shows a strong regard for her obligation to repay her creditors.

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 shows more evidence of trustworthiness than in ISCR Case No. 04-07360. Applicant had six SOR debts. Two SOR debts were paid in November 2006, and one was paid in January 2007. Two other debts were duplications, and the remaining SOR debt is being paid using a payment plan. After weighing the disqualifying and mitigating conditions, and all 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"⁽²²⁾ 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 1f: 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. Exhibit (Ex.) 1 (Questionnaire for Public Trust Positions, Standard Form (SF) 85P) is dated August 22, 2004 on the last page.
2. Ex. 6 (Statement of Reasons (SOR), dated August 29, 2006). The SOR is the source for all factual assertions in the remainder of this paragraph.
3. Ex. 7 (Applicant's notarized response to SOR).
4. The source for all factual assertions in this paragraph is Ex. 7, *supra* n. 3.
5. Ex. 1, *supra* n. 1, at 1 (date of birth); R. 6.
6. *Id.*, question 11 at 3 (employment); R. 6.
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. 20.
10. Ex. L at 3 (statement to investigator from the Office of Personnel Management (OPM)). This paragraph is derived from Applicant's PFS.
11. Last activity shown on account was July 2000 (R. 20-21; Ex. 3 at 7; Ex. 4 at 5). Applicant started making payments of \$50 per month in September 2006, and provided receipts for October and November 2006 (R. 21-22; Ex. I and J). The debts in SOR ¶¶ 1.a, 1.e, and 1.f were sold to the same creditor (R. 25-27; Ex. O). She promised to continue making her payments on this account until it was paid in full (Ex. O).
12. This is debt resulted from voluntary repossession of a car in 2000 (R. 22-24). Last activity shown on account is July 2000 (Ex. 3 at 5). The creditor listed in SOR ¶ 1.b sold the debt to another creditor. On January 2, 2007, the debt was \$7,751 (Ex. M). It was settled for \$2,800 and paid on January 2, 2007 (Ex. M).
13. Ex. F (Medical bill receipt for full payment on November 28, 2006; R. 24-25). Last activity on account is shown on October 2001 (Ex. 3 at 11).
14. Ex. E (Cable bill receipt for full payment on November 28, 2006; R. 25-26).
15. This account became delinquent in September 2000 (Ex. 4 at 5; R. 26). *See* n. 11, *supra* for explanation of payment plan.
16. This account was reported delinquent in July 2000 (Ex. 4 at 5). *See* n. 11, *supra* for explanation of payment plan.
17. "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).

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

19. *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.

20. 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.).

21. *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).

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