

DATE: January 26, 2007

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In re:

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SSN: -----

Applicant for Trustworthiness Determination

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ADP Case No. 06-16782

## **DECISION OF ADMINISTRATIVE JUDGE**

**MARK W. HARVEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Fifty-three-year-old Applicant had 22 delinquent debts listed in her statement of reasons (SOR), which totaled \$12,191. One debt was disputed, and another debt was not established. Eleven debts were paid. The nine remaining delinquent debts totaled \$10,861. Her financial situation was aggravated by her payments to her children who were attending college. She is making slow but continuous progress in the payment of her remaining debts. Moreover, all of her unpaid debts except for three (totaling \$1,122) are beyond the 3-year South Carolina statute of limitations. She falsely answered one question on her Questionnaire for Public Trust Positions. Security concerns pertaining to financial considerations, personal conduct and criminal conduct are mitigated under the "whole person" concept. 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. The Regulation, paragraph C8.2.1 provides that the procedural rules of the Directive apply for contractor personnel.

### **STATEMENT OF THE CASE**

On August 17, 2004, Applicant applied for a public trust position and submitted a Questionnaire for Public Trust Positions, Standard Form (SF) 85P. <sup>(1)</sup> On August 31, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a SOR to her, pursuant to the Directive. <sup>(2)</sup> The SOR alleges security concerns under Guidelines F (Financial

Considerations), E (Personal Conduct) and J (Criminal Conduct) and details reasons why DOHA recommends that Applicant's case be submitted to an administrative judge for a determination that she is not eligible for occupying an ADP I/II/III position. Disqualifying and Mitigating Conditions for Guidelines E, F and J are in the Regulation at pages 142-144 and 150.

In a notarized answer, received at DOHA on September 18, 2006, Applicant responded to the SOR allegations, and elected to have her case decided at a hearing.<sup>(3)</sup> On October 31, 2006, the case was assigned to me. The hearing was held on November 29, 2006. DOHA received the transcript of the hearing on December 14, 2006, and I received it on December 15, 2006. I held the record open (R. 51, 53), to permit Applicant to submit additional matters, and on January 3, 2007, she provided additional documentation concerning her financial matters.<sup>(4)</sup>

### FINDINGS OF FACT

As to the factual allegations under Guideline F, Applicant admitted that she was responsible for twenty of the twenty-two debts alleged in the SOR, and under Guideline E, she admitted the the falsification allegation without elaboration.<sup>(5)</sup> She did not respond to the Guideline J allegation. 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 53 years old (R. 6).<sup>(6)</sup> Since June 1997, she has been employed by a United States government contractor and is involved with processing sensitive medical records (R. 8, 49).<sup>(7)</sup> She has no prior military service.<sup>(8)</sup> She attended a technical college from 1972 to 1975 and received an Associates degree in business (R. 6).<sup>(9)</sup> She was never married.<sup>(10)</sup> She has three children (R. 25), and over the years received some financial support, but did not receive court ordered child support (R. 32). Her youngest child is now 23, and none of her children are not part of her household (R. 31).<sup>(11)</sup> She provided financial support for her 30 year old daughter from 1998 to 2002 and to another child while they were attending college and unemployed (R. 27, 31).

In November and December 2006, Applicant paid or resolved twelve debts in SOR ¶¶ 1.b, 1.c, 1.e, 1.j - 1.l, 1.n, 1.q, 1.r, and 1.t - 1.v, which totaled \$1,025.

The nine SOR debts that are scheduled for resolution through a payment plan are in ¶¶ 1.a, 1.f - 1.i, 1.m, 1.o, 1.p, and 1.s. The debts included in her payment plan total \$10,861. The debt in SOR ¶ 1.d of \$305 is disputed because she believed she had paid the creditor (R. 33-34).

Applicant currently has two part time jobs to provide additional income (R. 25). One job pays \$220 and the other pays \$110 per month (R. 28). She had difficulty managing a checking account (R. 26). She closed her checking account two years ago because she wrote at least two bad checks that bounced, and she could not maintain an accurate record of her balance (R. 27, 29). Sometimes she forgot about writing checks, or thought they had cleared her account already (R. 28). In the past she attempted to pay her creditors. However, her vehicles that she used for transportation to work would break down, her children would need something, or some other problem would occur, and she was prevented her from paying her debts (R. 30, 35-36). She inherited the home where she lives and has no rent or mortgage payments (R. 30; Ex. C at 2).

The following table lists the amount of each debt and its current status.

SOR ¶	Amount of debt in \$	Status of debt
1.a	6,634 <sup>(12)</sup>	Payment Plan and statute of limitations (Ex. C at 1)
1.b	35	Paid on November 30, 2006 (Ex. E at 10-11)
1.c	60	Paid on November 30, 2006 (Ex. E at 8-9)
1.d	305	Disputed debt (R. 33; Ex. E at 12-15)
1.e	69	Paid on November 30, 2006 (Ex. E at 7)

1.f	1,282	Payment Plan and statute of limitations (Ex. C at 1)
1.g	112	Payment Plan and statute of limitations (Ex. C at 1)
1.h	191	Payment Plan and statute of limitations (Ex. C at 1)
1.i	821	Payment Plan and statute of limitations (Ex. C at 1)
1.j	93	Paid on November 30, 2006 (Ex. E at 5-6)
1.k	57	Paid on November 30, 2006 (Ex. E at 5-6)
1.l	53	Paid on November 30, 2006 (Ex. E at 5-6)
1.m	689	Payment Plan and statute of limitations (Ex. C at 1)
1.n	47	Paid on November 30, 2006 (Ex. E at 4)
1.o	596	Payment Plan (Ex. C at 1)
1.p	187	Payment Plan (Ex. C at 1)
1.q	14	Paid on December 1, 2006 (Ex. C at 1)
1.r/	107	Paid on December 27, 2006 (Ex. E at 20)
1.s	349	Payment Plan (Ex. C at 1)
1.t	340	Resolved-not her debts on November 9, 2006 (R. 34;Ex. A)
1.u	74	Paid on December 27, 2006 (Ex. E at 18)
1.v	76	Paid on December 27, 2006 (Ex. E at 19)

A witness with excellent financial and business credentials (W) made a statement on Applicant's behalf (R. 38-48). W assisted Applicant as a volunteer without receiving remuneration for her services. W met with Applicant every two weeks for two months and provided financial counseling, which included budgeting, eliminating unnecessary expenses (such as cable television), debt tracking, saving, maintaining contact with creditors, meeting goals and obligations, and assembling an emergency fund (R. 40-41, 46-48). W arranged for a charitable organization to loan Applicant several hundred dollars so that she could pay her smaller debts to help establish her trustworthiness, and maintain her employment (R. 41, 44). Applicant's debt to the charitable organization will be paid out of her next tax refund (R. 42). Applicant only has one credit card and is supposed to pay her debts using money orders (R. 44). W maintains contact with her clients to ensure they stay on their budget and pay their debts according to their payment plans (R. 42). According to Applicant's payment plan, her debts will be paid in 26 months (R. 43; Ex. C-D). W promised to continue to work with Applicant and expressed confidence that Applicant understood her financial responsibilities and would comply with her budget and payment program (R. 48; Ex. C-D).

In 2006, Applicant provided a personal financial statement (PFS) to W. [\(13\)](#) Her net salary, including both of her part time jobs was \$1,270 per month. She budgeted as follows: debt reduction (\$410), allowance (\$52), savings (\$25), rent (\$0), groceries (\$75), utilities (power, sewer, water and telephone) (\$150), insurance (payroll deduction), vehicle expenses (\$548) and recreation (\$10). The 2006 PFS meets the goal of her debt reduction plan by providing \$410 per month. The PSF did not list any assets.

### Personal and Criminal Conduct

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

The following colloquy provides Applicant's rationale for failing to answer, "Yes," in response to Question 22b:

Administrative Judge (AJ): Why didn't you put the debts on the form?

A. Sir, I didn't - well, my understanding - I really didn't thought (sic) that it was (sic) necessary (sic) had to be done.

AJ. Why?

A. I didn't know that my job would have any effect to (sic) my credit.

AJ. You mean, you understood the question?

A. Yes, sir.

AJ. That they were asking for your debts, and you just put, "No"?

A. Because I didn't know that - really, I didn't thought (sic) it was any meaningful (sic) for them knowing it.

AJ. Were you embarrassed about it, or - I mean, why not just put it - put the information down, or at least say - write, yes, I have lots of debts, you know, if you didn't want to, you know, track it down and get the specifics and all that?

A. Probably - I think - I was embarrassed.

( R. 50-51).

Applicant further explained, "I didn't know that my job might depend on the information that - that you asked (sic) on the (sic) - what we had to - clearance came (sic), the people came there. I didn't know it was important. They didn't express (sic) to us like that. They just said this - well, I guess I shouldn't say it but I will say this - [s]he said just fill out - just fill it out, she said. Just put something on there. That was told (sic) to me." ( R. 54). Applicant agreed with Department Counsel that her motivation was to avoid embarrassment (R. 55). She commented that she did not realize that she had so many delinquent debts until she saw her credit report (R. 55). She said she learned from her mistakes (R. 60), and she promised in the future to ensure she provided completely accurate information on trustworthiness forms, even if she had to provide embarrassing information (R. 54).

I carefully observed Applicant's demeanor as she addressed the falsification of her SF 85P. I am convinced she answered, "No" because she did not believe it was important to the government to have information about her delinquent debts, and to avoid embarrassment. At her hearing she responded in a forthright, candid manner to the best of her ability. Her intention was not to deceive the government into erroneously making a positive trustworthiness determination. Moreover, her lack of understanding of the importance of accuracy affected her answers. She lacks sophistication about financial matters, as shown by her inability to balance her check book. She was very careless in the preparation of her SF 85P, as demonstrated by her failure to list her children on her SF 85P. After considering all the record evidence, I find that she was truthful at her hearing about her rationale for answering, "No" to Question 22b.

### **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 trustworthiness concern and may be disqualifying, as well as those which could mitigate trustworthiness 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>(14)</sup> The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition. 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 or her security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. These same burdens of proof apply to trustworthiness determinations for ADP positions.

A person who seeks eligibility for a public trust position enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants eligibility for a public trust position. Decisions include, by necessity, consideration of the possible risk an Applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

### **Financial Considerations**

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

Applicant's 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." FC DCs 1 and 3 apply to her failures to meet her financial obligations, and her admission that she was unable or unwilling to pay her debts. Her SOR debts remained delinquent for several years. Nine SOR debts are being resolved through a payment plan. 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>(15)</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." Based on my evaluation of the record evidence as a whole, <sup>(16)</sup> I conclude FC MCs 1 and 2 do not apply because Applicant had multiple (nine) delinquent SOR debts that were not paid, settled or sufficiently resolved at the time the record was closed.

FC MC 3 does not apply and FC MC 4 partially applies to her SOR debts. Although her debts became delinquent several years ago and were the result of payments to assist her children and to make repairs to vehicles needed to transport her to her employment, these changes in circumstances are not the types of unforeseen problems that trigger application of FC MC 3. These situations are not "largely beyond the person's control" because a prudent persons plans for their children to attend college and sets aside funds to maintain their vehicles. There is a paucity of evidence showing how she endeavored to pay or resolve her delinquent SOR debts over the last three or four years. In regard to FC MC 4, there is sufficient evidence that she received and is applying her financial counseling. She is making progress to resolve her delinquent SOR debts. Based on the sincerity of her testimony, and the other record indicia of improved financial self-discipline, I have some confidence that she is on the right track now towards correction of her financial problems. I will apply some credit for FC MC 4 under the whole person analysis, *infra*.

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>(17)</sup> She does, however, receive some credit in the whole person analysis, *infra*, for the application of the 3-year South Carolina statute of limitations, which applies to all except three of her unpaid SOR debts. *See* S.C. Code. Ann. § 15-3-530. <sup>(18)</sup> The South Carolina Court of Appeals succinctly explained the societal and judicial 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. 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[le]d 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).

Elimination of all of her delinquent debt load (except for three debts totaling \$1,122) through the statute of limitations and her utilization of W's debt payment plan have ended her potential vulnerability to improper financial inducements because she is no longer "financially overextended." However, it does not negate her past conduct, which caused and then failed to resolve her financial jeopardy. Aside from her conscientious work on her financial problem the last two months, she has not provided sufficient information about how she attempted to resolve or repay SOR debts.

### **Personal Conduct**

Under Guideline E, "conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that a person may not properly safeguard classified information."

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 . . . used to . . . determine security clearance eligibility or trustworthiness . . ." A security concern may result under PC DC 3 when an applicant deliberately provides "false or misleading information concerning relevant and material matters to a . . . security official . . . or other official representative in connection with a personnel security or trustworthiness determination."

For PC DCs 2 and 3, Applicant admitted that she gave a deliberately<sup>(19)</sup> false or incorrect answer to Question 22b of her 2004 SF 85P. Although she did not fully understand the implications of Question 22b, she did understand the question itself.<sup>(20)</sup>

Her confusion and carelessness are extenuating, because they show less of an intent to deliberately deceive. Nevertheless, they do not excuse or mitigate her conduct.

A security concern based on Guideline E may be mitigated by 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." The allegation in SOR ¶ 2.a are established by substantial evidence, and constitute deliberate falsifications.

PC MC 2 applies when the "falsification was an isolated<sup>(21)</sup> incident, was not recent,<sup>(22)</sup> and the individual has subsequently provided correct information voluntarily."<sup>(23)</sup> PC MC 3 applies when the "individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." PC MC 2 does not apply, but she receives some credit under the "whole person" analysis because only one false SF 85P was submitted to the government on August 17, 2004, approximately 30 months ago.<sup>(24)</sup> Additionally, she made a belated, good-faith effort to correct the record when she admitted her SF 85P contained incorrect information in her response to the SOR on September 18, 2006 (albeit after being confronted by the facts), and at her hearing.<sup>(25)</sup> Although her eventual admission that the clearance entry was false was not "prompt," she deserves some credit under the "whole person" concept for providing accurate information in 2006.

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." There is no evidence that anyone gave Applicant improper or inadequate advice or suggested that she omit information from her SF 85P. 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." *Id.* Under PC MC 5, Applicant receives some credit for eventually disclosing her financial problems. Any steps made toward rehabilitation are insufficient in magnitude and too recent to support full application of PC MC 5.

### **Criminal Conduct**

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

Two criminal conduct disqualifying conditions (CC DC) could raise a security concern in this case. CC DC 1 applies where there are "any conduct, regardless of whether the person was formally charged" and CC DC 2 applies in situations where an applicant has committed "a single serious crime or multiple lesser offenses."

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

serious<sup>(26)</sup> to jeopardize her security clearance application.<sup>(27)</sup> As such, her omissions to her SF 85P were material. Accordingly, CC DCs 1 and 2 apply because Applicant committed a single serious offense, a violation of 18 U.S.C. § 1001, which is a felony.

Security concerns based on criminal conduct can be mitigated by showing that it was not recent (CC MC 1). There are no "bright line" rules for determining when conduct is "recent."<sup>(28)</sup> 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 SF 85P in 2004. However, the SOR allegation of criminal conduct must be considered along with all the other evidence when applying this mitigating condition. She was forthright and candid when addressing her culpability at her hearing on November 29, 2006. However, viewing her conduct as a whole, CC MC 1 does not apply.

Criminal conduct security concerns may be mitigated under CC MC 2 when the "crime was an isolated incident," or under CC MC 3 when an applicant demonstrates she "was pressured or coerced into committing the act and those pressures are no longer present in that person's life." CC MCs 2 applies because Applicant committed a single falsification of her SF 85P. Moreover, she was subsequently honest about her false statement at her 2006 hearing. Still, CC MC 3 does not apply because no one caused her or influenced her to commit the criminal conduct.

Security concerns pertaining to criminal conduct may be mitigated under CCMC 4 when an applicant "did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur," and under CC MC 5 when "[t]here is clear evidence of successful rehabilitation." Applicant voluntarily committed the criminal conduct and CC MC 4 does not apply. The cause of the falsification, an attempt to avoid embarrassment, will not recur because she fully disclosed her financial information. CC MC 5 applies because she is successfully rehabilitated. She understands the importance of being completely honest, and will provide embarrassing, private information in the future.

#### "Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under the Regulation, Appendix 8, at 132. As noted above, Applicant's lengthy history of failing to meet her financial obligations, her inability or unwillingness to satisfy her debts, and her false statement on her 2004 SF 85P raise serious trustworthiness concerns. She is currently 53 years old, and sufficiently mature to be fully responsible for her conduct. Her actions in generating or failing to resolve her debts in a timely fashion and her falsification were knowledgeable and resulted from voluntary choices to purchase items, to obtain services and to not disclose derogatory financial information. However, her inability to repay her debts resulted from funds she provided her children and vehicle problems. Since October 2006, she paid eleven debts, disputed two others, and placed the remainder of her delinquent debts into an debt repayment plan. There is substantial evidence of financial rehabilitation, positive behavior changes, receipt of financial counseling in 2006, reduction of overall debt and improved circumstances as indicated by self-discipline and good budget counseling. Her falsification occurred approximately 30 months ago and her subsequent statement admitted her omission was deliberate. The motivation for the falsification was to conceal information about her financial problems to avoid embarrassment, it was not designed to deceive or trick the government or her employer into continuing her employment. The potential for pressure, coercion, exploitation, or duress is low. Applicant is current on her debt repayment plan, and her positive employment history since 1997 supports a determination of trustworthiness. She is aware that the government and her employer have the derogatory financial information. The likelihood of recurrence is low. Changes resulting from counseling and greater awareness of financial responsibilities as well as W's assistance will result in a trend of improved financial circumstances. I am confident that she realizes the importance of being accurate and truthful, especially when involved with trustworthiness matters.

In sum, Applicant's financial case shows her willingness to apply self-discipline and her debt management plan to resolve her delinquent debts, even to pay some debts she is not legally required to pay because of the South Carolina 3-year statute of limitations. She has a debt payment plan, and W will maintain contact with her and assist with establishing and reinforcing positive financial practices. 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, personal conduct and criminal conduct.

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>(29)</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 1.v: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 2.a: For Applicant

Paragraph 3, Guideline J: FOR APPLICANT

Subparagraphs 3.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. Ex. 1, Questionnaire for Public Trust Positions, Standard Form (SF) 85P, is dated August 17, 2004, on the last page. There is a falsification allegation regarding Question 22b of the SF 85P.
2. Ex. 5 (Statement of Reasons (SOR), dated August 31, 2006) is the source for all the factual assertions in the remainder of this paragraph.
3. Ex. 6 (Applicant's response to SOR is date stamped as received at DOHA on September 21, 2006).
4. Ex. E (Documentation from Applicant supplementing record with cover letter from Department Counsel).
5. The source for all factual assertions in this paragraph is Ex. 6, *supra* n. 3.
6. Ex. 1, *supra* n. 1, at 1 (date of birth)
7. *Id.*, at 3 (stating she has been employed with the same government contractor since 2002).
8. Ex. 1, *supra* n. 1, question 16, at 6 (military service).
9. *Id.*, question 10, at 2 (where you went to school).
10. *Id.*, question 14, at 5 (marriage).
11. She did not list any children in her SF 85P. *See* Ex. 1, *supra* n. 1, question 15, at 5 (your relatives).

12. The SOR ¶ 1.a amount is \$5,852. Applicant provided a letter from this creditor indicating the amount of this debt had increased to \$6,634 (Ex. B).
13. Ex. C, Personal Financial Statement (PFS), at 2. The remainder of this paragraph is derived from Applicant's PSF.
14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).
15. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).
16. *See* ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for FC MC 1, all debts are considered as a whole.
17. The Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

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

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)). In ISCR Case No. 99-9020 at 6 (App. Bd. Dec. 1, 1999), the Appeal Board specifically addressed application of the statute of limitations, stating a "person who decides not to honor his or her debts may be able to avoid paying those debts until they are legally uncollectible because the statute of limitations has run. Reliance on the running of a statute of limitations would be a legally permissible course of action. However, it would not demonstrate a good-faith effort to resolve one's debts that would fall under the meaning of Financial Considerations Mitigating Condition 6." *See* ISCR Case No. 03-10880 (App. Bd. June 24, 2005); ISCR Case No. 01-09691 (App. Bd. Mar. 27, 2003) (stating an applicant must do more than merely cite the statute of limitations to obtain the full benefit of FC MC 6). *See also* ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003) ("[E]ven if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner."); ISCR Case No. 98-0349 at 2-3 (App. Bd. Feb. 3, 1999) (even though an applicant's delinquent debts were not legally collectible because of the statute of limitations, that fact did not preclude the Administrative Judge from considering the applicant's failure to resolve the delinquent debts before the statute of limitations ran). *Cf.* ISCR Case No. 01-04425 at 3-4 (App. Bd. May 17, 2002) (adverse Guideline F conclusions possible where applicant chose not to pay her delinquent debts, waited until her creditors ceased trying to collect those delinquent debts, and they were eventually dropped from her credit report.).

18. *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).
19. Her statements about her intentions and state of mind are considered in light of the record evidence of a whole. ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006). "The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the government. *Id.* (citing ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004)).
20. 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)).

21. *See* ISCR Case No. 02-12329 at 5 (App. Bd. Dec. 18, 2003) (indicating that inconsistent statements are considered when determining whether a falsification is "isolated").

22. *See* ISCR Case No. 03-16819 at 5 (App. Bd. Oct. 12, 2006) (holding falsification over four years before hearing could be considered "recent").

23. For cases involving an applicant's disclosure to correct an earlier falsification PC MC 3, rather than PC MC 2 is the proper guideline. *See* ISCR Case No. 02-15003 at 3 (App. Bd. Mar. 17, 2005) (citing ISCR Case No. 01-06166 (App. Bd. Oct. 25, 2001)), *see also* ISCR Case No. 97-0289 at 2 (App. Bd. Jan. 22, 1998).

24. *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).

25. 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 as a whole. *Id.* "The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the government." *Id.* (citing ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004)).

26. In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

27. The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. 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)).

28. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (Judge did not err by concluding drug use not recent with passage of slightly less than two and a half years between last use and hearing) (citing ISCR Case No. 02-10454 at 4 (App. Bd. Nov. 23, 2004)). *See* ISCR Case No. 98-0611 at 2 (App. Bd. Nov. 1, 1999) (not error for Judge to find that last marijuana use nine months before close of record was not recent). *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.).

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