

DATE: October 18, 2007

In re:

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SSN: -----

Applicant for a Public Trust Position

ADP Case No. 06-25938

**DECISION OF ADMINISTRATIVE JUDGE  
PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Caroline H. Jeffreys, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 27 years old, unmarried, and works for a defense contractor in the health insurance business as a claims resolution processor. She has two disorderly conduct arrests, and two driving while intoxicated arrests. Applicant did not mitigate the alcohol consumption trustworthiness concern. She did mitigate the personal conduct trustworthiness concern. Eligibility for a public trust position is denied.

## **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a position of trustworthiness for Applicant<sup>1</sup>. On February 28, 2007, DOHA issued a Statement of Reasons<sup>2</sup> (SOR) detailing the basis for its decision—trustworthiness concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines of the Directive issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. Applicant answered the SOR in writing on March 16, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on June 20, 2007. On August 7, 2007, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a trustworthiness determination for Applicant. The Government submitted exhibits that were admitted into evidence. Applicant did not submit any exhibits at the hearing. The record was kept open until August 21, 2007, to allow Applicant to submit exhibits concerning her alcohol evaluation program in 2006, but no additional exhibits were received. DOHA received the hearing transcript (Tr.) on August 20, 2007.

## **FINDINGS OF FACT**

Applicant admitted all the SOR allegations, and they are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 27 years old, unmarried, and works for a defense contractor in the health insurance business. She has worked there for three and a half years as a claims resolution processor. She graduated from high school and attended college for two semesters. (Tr. 26, 28; Exhibit 1)

Applicant was arrested on December 27, 2003, on charges of battery and disorderly conduct. She and another woman were involved in an argument at a local nightclub. Applicant hit the other woman with her hand in the club parking lot. Applicant was drinking alcohol before the incident. Applicant claims she only had two or three beers. She pled “no contest” to the charges, and was fined \$243, and completed a nine-month “Values, Influences, and Peers” program, an Alcohol and Other Drug program over nine weeks, and some follow-up counseling. After completion of these requirements, Applicant resumed drinking “socially,” consuming “a couple of beers here and there.” Applicant claims she was told if she completed these requirements, the arrest would not appear on her record. She did not disclose this arrest on her trustworthiness application of November 3, 2005. (Tr. 22, 29-34, 61, 62; Exhibits 1-3)

Applicant was arrested on October 3, 2004, for operating a motor vehicle while intoxicated and with a prohibited alcohol concentration (PAC). She drove a friend’s car away from the bar at

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<sup>1</sup>Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of DoD Directive 5220.6 (Directive), pursuant to the memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004).

<sup>2</sup>Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and the Directive.

4 p.m. that afternoon. She had been drinking at another bar earlier in the day. She collided with another car in the parking lot of the first bar after she drove back there from the second bar. She claims she was drinking beer and shots, having had only two or three beers. Her blood alcohol content (BAC) was .23%. The legal limit in her state is .08%. She drove the car because she thought she was the soberest person in her group of friends. She pled “no contest” to the driving while intoxicated charge, was fined \$725, ordered to undergo an alcohol assessment and group dynamics classes which she did from November 2004 to August 2005, and her driver’s license was revoked for eight months. Applicant does not remember any diagnosis of an alcohol condition after her assessment. Applicant rode to work with a friend while her license was revoked, and did not drink too often during that time period, she claims. However, she admitted she did drive occasionally. (Tr. 37-43, 57; Exhibits 1-3)

Applicant was arrested on September 5, 2005, for disorderly conduct at a bar. She needed to use the bathroom, but it was occupied, so she urinated in the alley behind the bar. She was fined, but the fine was returned when the charges were dropped because the arresting police officer did not appear in court. Applicant understood that because the charges were dropped this arrest would not be on her record. Consequently, she did not disclose it on her trustworthiness application of November 3, 2005. Applicant claims she only drank one or two beers. (Tr. 24, 43, 44; Exhibits 1-3)

Applicant was arrested on March 3, 2006, for operating a motor vehicle while intoxicated, 2<sup>nd</sup> offense, and PAC. She was arrested less than four miles from the bar she attended. Her BAC was .25%. Again, she pled “no contest.” She was sentenced to eight days in jail, and allowed release during the day to go to work, fined \$1,375, had her driver’s license revoked for 14 months (it remains revoked), and was ordered to take multiple offender classes at a local college. The assessment at the college in June 2006, resulted in a diagnosis of “irresponsible use of alcohol.” (Tr. 45-50, 58; Exhibits 1-3)

Applicant started drinking alcohol in high school at age 17. She characterizes her drinking as “social”, and the maximum she drinks at any one occasion is three beers, according to her recollection, but never considered herself or felt like she was drunk on any occasion. Applicant’s listed weight on her trustworthiness application is 125 pounds. She admitted she drank and drove a few more times than those when she was arrested, and that occasionally she drove to the store and gas station while her driving privileges were revoked. Applicant does not consider herself as having a problem with alcohol. She considers her arrests as bad luck and being at the wrong place at the wrong time. She disputes the December 2003, disorderly conduct incident as reported by the arresting police officer. (Tr. 27-29, 31, 34, 38, 40, 42, 44, 45, 50-52, 63)

Applicant completed her trustworthiness application on November 3, 2005. In answering Question 20 (in the last seven years, have you been arrested for, charged with, or convicted of any offenses?), she stated, “Yes,” listing her October 2004, operating a motor vehicle while intoxicated offense. She did not list her December 2003, and September 2005, disorderly conduct arrests in answer to Question 20. She understood these arrests were not on her record, and therefore, she claims she made a decision not to list them. No one helped her complete the application or told her not to list the arrests. (Tr. 22-24, 53-55; Exhibit 1-3)

## **POLICIES**

As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). By direction of the Under Secretary of Defense for Counterintelligence and Security, adjudications of cases forwarded to DOHA by the Defense Security Service or the Office of Personnel Management (OPM) for a trustworthiness determination shall be conducted under the provisions of the Directive. Eligibility for a position of trust is predicated upon the applicant meeting the guidelines contained in the Directive and a finding it is clearly consistent with the national interest to do so. *See* Directive ¶ 2.3. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his trustworthiness determination.” *See* Directive ¶ E3.1.15

The adjudication process is based on the whole person concept. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required. The decision to deny an individual eligibility to occupy a position of trust is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a such a determination.

In evaluating the trustworthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive, and the revised Guidelines, effective September 1, 2006. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See revised Guidelines ¶2.a., effective September 1, 2006). Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible to occupy a position of trust. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant’s trustworthiness suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has

established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his trustworthiness determination. ISCR Case No. 01-20700 at 3 (App. Bd. 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

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Guideline G: Alcohol Consumption: The Concern:** Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness. ¶21

**Guideline E: Personal Conduct: The Concern:** Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. ¶15

“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 revised Guidelines, effective September 1, 2006, set forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation ¶ C8.2.1)

## **CONCLUSIONS**

**Guideline G:** Applicant has a ten-year history of drinking. She has two disorderly conduct arrests resulting from her drinking. She has two operating a motor vehicle while intoxicated arrests, with the latest arrest occurring in March 2006. She participated in two assessment programs, and was diagnosed in the second program as being an irresponsible user of alcohol. Her two operating arrests were based on property damage, and a BAC of .23% in the first one, and a BAC of .25% in the second one. In neither case did Applicant consider herself drunk. She consistently characterized her drinking as “social” and never more than three beers. Yet, at 125 pounds of weight, to achieve a BAC of .23% and .25% she must have consumed more than she remembers, or is deliberately minimizing her alcohol use and consumption.

The Disqualifying Conditions (DC) that are applicable are ¶22.a (alcohol-related incidents away from work, such as driving while under the influence, fighting, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent), and ¶22.c (habitual consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent). Applicant’s alcohol consumption patterns caused her legal difficulties. Two drunk driving incidents

in two years, plus her admission she drove drunk on other occasions, shows questionable judgment and a continuing failure to control her impulses. Couple these incidents with her continued statements that all she ever drinks is two or three beers socially, demonstrates a lack of recognition of her alcohol problem. I do not find her explanations credible or persuasive.

The Mitigating Conditions (MC) in ¶23 of the revised Guideline G do not apply to the pattern of conduct and habitual use of alcohol demonstrated by Applicant. It is her burden of proof to persuade me the MC should be applied in her favor. She has done nothing to accomplish that goal and meet her burden. She did not submit any alcohol assessment from the two court-ordered programs she attended in 2004 and 2006, nor did she present any current alcohol assessment she might have obtained at her own expense to counter the Government's evidence. She denies she has a problem with alcohol. She had no persuasive evidence to explain how her drinking habits resulted in BAC three times her state's legal limits. Obviously, she was minimizing her consumption and has a more serious problem with alcohol than she realizes.

**Guideline E:** Applicant did not list two disorderly conduct arrests on her trustworthiness application because she thought that the first would not appear on her record after she completed the court-ordered community service and education programs based on what she was told in court, and the second charge was dismissed when the arresting officer did not appear in court and her fine was returned. That is a reasonable understanding by someone inexperienced in the legal system, and who failed to think through fully Question 20 on the application.

The DC which might apply is ¶16.(a) involving deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, or determine trustworthiness. However, I find Applicant's explanation credible as to why she did not list the two arrests. She listed the one driving and alcohol offense because it was on her record. These two offense were comparatively minor, particularly the public urination, in contrast to the driving offenses. Therefore, I do not consider Applicant's failure to disclose them as a deliberate omission designed to mislead the Government. On the basis of that conclusion, this DC does not apply. No MC need be applied if no DC apply.

**Whole Person Analysis:** "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is" eligible for a trustworthiness decision. (Revised Guidelines ¶2.a) "Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." In evaluating Applicant's case, I have considered the adjudicative factors listed in the revised Guidelines, effective September 1, 2006, contained in ¶2.a.

Applicant is a mature person who is responsible for her actions. She engages in a pattern of drinking that in three years resulted in four arrests. Two arrests were serious driving and drinking offenses. Her driving privileges were revoked twice, and currently remain revoked. Her voluntary drinking in bars with friends, the continuous pattern of it over the past four years, her minimizing of its extent and effect on her behavior, coupled with her lack of responsibility for her drunk driving offenses, and her attitude that the incidents were merely "bad luck," all demonstrate a serious lack

of good judgment and responsible behavior. Because Applicant does not consider herself as having an alcohol problem, it is likely the behavior will continue, resulting in more arrests. She has not changed her behavior or developed other interests to replace the need to drink alcohol. Applicant has not comprehended and incorporated the lessons she learned at two assessment programs to change her behavior. Applicant displayed a consistent lack of good judgment in these actions and attitudes. These actions demonstrate Applicant is not reliable and trustworthy.

Accordingly, I conclude the alcohol consumption trustworthiness concern against Applicant. I conclude the personal conduct trustworthiness concern for Applicant. I conclude the “whole person concept” against Applicant on the alcohol issue.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G:                      AGAINST APPLICANT

    Subparagraph 1.a to 1.g.:              Against Applicant

Paragraph 2. Guideline E:                      FOR APPLICANT

    Subparagraph 2.a:                      For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Her application for eligibility for an public trust position is denied.

Philip S. Howe  
Administrative Judge