

DATE: December 3, 2007

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In re: )  
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 ----- ) ADP Case No. 07-00428  
 SSN: ----- )  
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 Applicant for ADP I/II/III Position )  
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**DECISION OF ADMINISTRATIVE JUDGE  
MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**  
Jeff Nagel, Esq., Department Counsel

**FOR APPLICANT**  
*Pro Se*

**SYNOPSIS**

Applicant's alcohol abuse has resulted in four alcohol-related incidents, the last occurring in 2005. While Applicant continues to consume alcohol, she no longer consumes alcohol to excess, nor does she drive after consuming any alcohol. While Applicant furnished incomplete information to the Government, it was not a wilful misrepresentation, but rather based on a misunderstanding. Mitigation has been shown. A determination of trustworthiness and access to personal sensitive information is granted.

**STATEMENT OF THE CASE**

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the

Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I) entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Information Systems Positions as defined in DoD Regulation 5200.2R, Personnel Security Program (Regulation), dated January of 1987.

On July 11, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which 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 a determination of trustworthiness, suitability, and eligibility for the Applicant to hold a sensitive Systems Position (ADP-I/II/III).

Applicant filed a notarized response, dated August 17, 2007, to the allegations set forth in the SOR (RSOR), and requested a hearing before a DOHA Administrative Judge. On October 9, 2007, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice, dated October 24, 2007, a hearing was held in Sacramento, California, on November 14, 2007.

At the hearing, Department Counsel offered three documentary exhibits (Government's Exhibits 1-3) and no witnesses were called. Applicant also offered three documentary exhibit (Applicant's Exhibits A-C) and offered her own testimony. The transcript (Tr) was received on November 28, 2007.

### **FINDINGS OF FACT**

In the SOR, the Government alleges concern under Adjudicative Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline G (Alcohol Consumption) of the Directive. The SOR contains six allegations, 1. a. through 1. f., under Guideline J, one allegation, 2. a., under Guideline E, and one allegation, 3. a., under Guideline G. In her RSOR, Applicant admitted SOR allegations 1. a. through 1. e., and she denied 2. a., and 3. a. She failed to respond to 1. f. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 27 years old. She is unmarried, and she has no children. Applicant is a customer Service Representative for a defense contractor who seeks an ADP-I/II/III position on behalf of the Applicant.

#### **Paragraph 1 (Guideline J - Criminal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for access to personal sensitive information because she has engaged in criminal acts.

1.a. Applicant was cited on January 12, 1997, and charged with Drunk in Public. She was placed into a Diversion Program for this offense

1.b. Applicant was cited on March 17, 2001, and charged with (1) Possession of a False Identification, and (2) Open Container/Drunk in Public. She plead Nolle Contendere to Count 2 and was fined \$210. Count 1 was dismissed. At the time of this incident Applicant was 20 years old, not of legal drinking age, but she used her sister's identification to purchase alcohol. She testified that this was the only time she used her sister's identification for this purpose.

1.c. Applicant was cited on January 2, 2002, and charged with (1) Open Container, and (2) Drunk in Public. She was fined \$75.

1.d. Applicant was cited on July 7, 2003, and charged with No Proof of Insurance. She was fined \$331, but \$130 of this fine was suspended after she provided proof of insurance.

Applicant testified that she was involved in an automobile accident, with an automobile that she had recently purchased. Unfortunately, on the day of this incident she drove the vehicle without insurance, and she testified that this was the first day that she had driven the vehicle. She had been planning to purchase insurance two days after the incident, when she received her paycheck.

1.e. Applicant was arrested on June 27, 2005, and charged with Disorderly Conduct/Public Intoxication. She plead Guilty, and she was fined \$350, and placed on one year probation.

Applicant testified that this incident occurred when Applicant and some of her co-workers went to a bar after work. She stated that she remembered having three mixed drinks and two beers. After that she has no recollection of the event. Applicant testified that she was informed that a police officer found her crying on a street corner. The informal probation, upon which she was placed, concluded without further incident.

1.f. The Government alleges that Applicant's conduct, which is alleged in paragraph 2., and which is discussed below, constitutes a violation of Federal Law, Title 18, United States Code, Section 1001, which is a felony. As discussed below, I find her conduct inadvertent due to a misunderstanding, rather than wilful, so it does not constitute a violation of Title 18, United States Code, Section 1001.

## **Paragraph 2 (Guideline E - Personal Conduct)**

2.a. The Government alleges in this paragraph that Applicant is ineligible for access to personal sensitive information because when she completed a signed, sworn Public Trust Position Application (PTPA) on June 20, 2006, (Exhibit 1), she furnished untruthful information to the Government.

Question #16 asks, "In the last 7 years, have you been arrested for, charged with or convicted of any offense(s)?" Applicant answered "Yes" and she listed her December 4, 2005, arrest for Public Intoxication, as cited in allegation 1.e., above. The Government alleges that Applicant should have listed the incidents that have been cited and discussed, above, as allegations 1.b., 1.c., and 1.d.

Applicant responded to interrogatories (Exhibit 2) and testified credibly that she believed the

question only concerned arrests for misdemeanors and felonies, and since the four incidents listed as 1.b., 1.c., and 1.d. only involved citations not arrests, she believed that she answered the question correctly by not including them. Applicant did include the most recent and most serious offense, the 2005 Disorderly Conduct/Public Intoxication arrest, which is by far the most damaging incident with the legal authorities, and also which is consistent with her explanation that she believed only arrests were to be included. Had she wanted to mislead the Government to improve her record, that Disorderly Conduct/Public Intoxication would have been the one to omit from her application. Therefore, I am persuaded that her incorrect response to this question was as a result of a misunderstanding, not an attempt to mislead the Government.

### **Paragraph 3 (Guideline G - Alcohol Consumption).**

3.a. The Government alleges in this paragraph that Applicant is ineligible for access to personal sensitive information because she abuses alcohol to excess.

Applicant's conduct which has been alleged in the SOR as 1.a., 1.b., 1.c., and 1.e., respectively, is included in this paragraph under alcohol consumption.

Applicant testified that at one point in her life she was consuming alcohol to the point of intoxication on four or more days out of every seven days week. She explained the primary reason for her consuming such an excessive amount of alcohol was to help her cope with her boyfriend, who frequently beat her.

Applicant is no longer in a relationship, nor does she have any contact, with her previous boyfriend of five years. She stopped using alcohol completely for a period of five months, and she estimated that she now consumes alcohol one time a month, usually in her home and with her friends or roommates. Generally she consumes no more than four beers, although she has had six or seven beers on occasion. She testified that she never drives a vehicle after she consumes alcohol, even one beer.

### **Mitigation**

Applicant introduced two character letters, one from her direct supervisor, the second from her landlord (Exhibit A). Her supervisor described Applicant in glowing terms as a model employee, who is hard working, conscientious, and trustworthy. Her landlord spoke about Applicant as respectful and very pleasant to be around.

Applicant also submitted her current job performance evaluation (Exhibit B). While it described Applicant as a new employee, it did identify her as someone who is eagerly striving to learn all aspects of her job.

Finally, Applicant submitted a "Certificate of Excellence" (Exhibit C) that she received in October 2007, from her employer for being a "Top Producer."

## **POLICIES**

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate concerns. Furthermore, as set forth in the Directive, each decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.”

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence that is speculative or conjectural in nature.

The Government must make out a case under Guidelines J, E, and G, which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and her suitability for a sensitive Systems Position, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a sensitive Systems Position.

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to Guidelines J, E, and G:

### **(Guideline J -Criminal Conduct)**

The Government has established by substantial evidence that Applicant engaged in criminal conduct, as she was cited or arrested for four alcohol related criminal offenses.

In reviewing the Disqualifying Conditions (DC) under Guideline J, DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. Under Mitigation conditions (MC), I find that MC 32. (d) applies to this Applicant, as there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, and sincere remorse. Applicant's alcohol consumption which was clearly the cause of these criminal acts is now under control and unlikely to lead her to criminal conduct in the future. Applicant has mitigated this allegation. Guideline J is found for Applicant.

#### **(Guideline E -Personal Conduct)**

With respect to Guideline E, the evidence establishes that Applicant provided incorrect material information to the Government in response to one question on the PTPA that she executed on June 20, 2006. Applicant had received four citations and they should have been identified on the PTPA. As discussed above, I find that Applicant's explanation that she did not believe citations were to be included in her response to be credible and reasonable, and Applicant did not intend to mislead the Government.

In reviewing the DCs under Guideline E, I conclude that no DC applies against Applicant. I therefore, resolve Guideline E for Applicant.

#### **(Guideline G -Alcohol Consumption)**

As discussed above, Applicant's alcohol consumption resulted in her being cited or arrested for four alcohol related criminal offenses when she was consuming a tremendously excessive amount of alcohol. As to the amount of alcohol she now consumes, as discussed above, Applicant continues to consume alcohol, but she consumes it far less frequently and in smaller amounts than previously.

The Government established, by substantial evidence, that Applicant was involved in alcohol-related incidents away from work, which is DC 22. (a), and DC (c ) that she engaged in habitual or binge consumption of alcohol to the point of impaired judgment. Applicant continues to consume alcohol on a regular basis, but she has greatly reduced that consumption to once a month.

I find that MC 23. (a) applies as so much time as passed, and the behavior happened under unusual circumstances because of the abuse of her former boyfriend, that it is unlikely to recur and does not cast doubt on the individual's current reliability and trustworthiness. Guideline G is found for Applicant.

On balance, it is concluded that the Applicant has overcome the Government's information opposing her request to hold a sensitive Systems Position . Accordingly, the evidence supports a finding for Applicant as to the allegations expressed in Paragraphs 1, 2, and 3 of the Government's SOR.

### **FORMAL FINDINGS**

**Paragraph 1. Guideline J: FOR APPLICANT**

Subparagraph 1.a.: For Applicant  
Subparagraph 1.b.: For Applicant  
Subparagraph 1.c.: For Applicant  
Subparagraph 1.d.: For Applicant  
Subparagraph 1.e.: For Applicant  
Subparagraph 1.f.: For Applicant

**Paragraph 2. Guideline E: FOR APPLICANT**

Subparagraph 2.a.: For Applicant

**Paragraph 3. Guideline G: FOR APPLICANT**

Subparagraph 3.a.: For Applicant

**DECISION**

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interest to make or continue a determination of trustworthiness, suitability and eligibility for the Applicant to hold a sensitive Systems Position (ADP-I/II/III).

Martin H. Mogul  
Administrative Judge