

KEYWORD: Alcohol; Financial; Personal Conduct; Criminal Conduct

DIGEST: Applicant failed to mitigate security concerns about her use of alcohol, two alcohol-related arrests, her financial problems, and her deliberate falsification of her Application for a Position of Trust (SF 85P). Eligibility for an ADP I/II/III position is denied.

CASENO: 06-08068.h1

DATE: 04/30/2007

DATE: April 30, 2007

In re:)	
)	
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SSN: -----)	ADP Case No. 06-08068
)	
Applicant for ADP I/II/III Position)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
MATTHEW E. MALONE**

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant failed to mitigate security concerns about her use of alcohol, two alcohol-related arrests, her financial problems, and her deliberate falsification of her Application for a Position of Trust (SF 85P). Eligibility for an ADP I/II/III position is denied.

STATEMENT OF THE CASE

On September 17, 2004, Applicant submitted a Public Trust Position Application (SF 85P). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant a position of trust. On May 2, 2006, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline G (alcohol), Guideline E (personal conduct), Guideline F (financial considerations), and Guideline J (criminal conduct).

Applicant timely responded to the SOR, and requested a hearing. The case was assigned to a DOHA administrative judge on October 13, 2006. A hearing scheduled for November 21, 2006, was cancelled because Applicant took a leave of absence from her employment. The case was transferred to me on November 17, 2006, due to caseload considerations, and I rescheduled the hearing for January 8, 2007, at which the parties appeared as scheduled. The government submitted ten exhibits (Gx. 1- 10) that were admitted into evidence without objection. Applicant testified and introduced three exhibits (Ax. A - C), which were admitted without objection. I left the record open after the hearing to allow Applicant time to submit additional relevant information. Her 13-page post-hearing submission was timely received and admitted without objection as Ax. D. DOHA received the transcript (Tr.) on January 16, 2007.

FINDINGS OF FACT

The government alleged in SOR 1 that Applicant drank alcohol at times to excess between June 2003 and September 2004 (SOR ¶ 1.a); that in June 2003 she was charged with and convicted of DUI (SOR ¶ 1.b); that in March 2004 she was again charged with and convicted of DUI (SOR ¶ 1.c); and that in September 2004 she was charged with and convicted of DUI, and that the charge was still pending trial as of the SOR issuance (SOR ¶ 1.d). In response, Applicant admitted the allegations in SOR 1.a, 1.b, and 1.d. She denied being arrested in March 2004, and claimed she was arrested for an unsubstantiated violation of the terms of her sentence from her June 2003 conviction.

Under SOR 2, the government alleged Applicant deliberately falsified her response to question 16 of her SF 85P (arrests, charges, and/or convictions for any offense in the past seven years) by omitting the two arrests alleged in SOR ¶¶ 1.c and 1.d (SOR ¶ 2.a); and that she deliberately falsified her answer to question 22 (debts currently more than 180 days past) by omitting from her answer several delinquent debts listed in SOR 3. (SOR ¶ 2.b). Applicant denied intentionally falsifying her answers to the SF 85P.

Under SOR 3, the government alleged Applicant owed approximately \$19,900 for 16 unpaid debts that have either been charged off as business losses or referred for collection (SOR ¶¶ 3.a - 3.p). Applicant admitted the allegations in SOR ¶¶ 3.b, 3.f, 3.g, 3.j, 3.l, 3.m, and 3.o.

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

Under SOR 4, the government alleged as criminal conduct, Applicant's falsifications listed in SOR ¶¶ 2.a and 2.b, insofar as her answers may violate 18 U.S.C. 1001 (SOR ¶ 4.a); and Applicant's three DUI arrests and convictions listed in SOR ¶¶ 1.a - 1.c (SOR ¶ 4.b).

Her admissions are incorporated herein as facts. After a thorough review of the transcript and exhibits, I make the following additional findings of relevant fact:

Applicant is 25 years old and has worked since January 2001 for a health care and medical insurance company contracted to manage medical insurance claims and information for TriCare, the Department of Defense (DoD) medical insurance system for military personnel and their families. She is also a single mother of a four-year-old child.

Applicant attended college for one year in 1999. While in school, she received several unsolicited credit cards, which she used to supplement funding her parents gave her occasionally. She soon became overextended in her use of personal credit and was unable to repay those accounts (SOR ¶¶ 3.a, 3.e, 3.g, 3.m, and 3.o) because she could only afford rent, groceries, and other necessities. After she left school and was supporting herself, she continued to accumulate unpaid debt through other sources, such as retail stores (SOR ¶¶ 3.b and 3.f), and through unpaid cable television, internet service, residential telephone and cell phone accounts (SOR ¶¶ 3.d, 3.h,² 3.i, 3.k, and 3.p).³ Of these, Applicant claimed she paid the delinquent phone bill listed in SOR ¶ 3.d,⁴ and that the phone bill listed in SOR 3.i was resolved when the phone company kept her deposit after she moved.⁵ Applicant also failed to repay a cash advance company in 2003 (SOR ¶ 3.l), and became delinquent on her car insurance payments (SOR ¶ 3.m).⁶

The aforementioned debts total approximately \$10,000. The largest accounts past due are for credit cards in the amounts of \$1,738 (SOR ¶ 3.a), \$1,222 (SOR ¶ 3.g), and \$2,685 (SOR ¶ 3.m). Applicant has not paid or taken any verifiable actions to resolve any of her delinquent accounts. In a written statement given to a government investigator in April 2005, Applicant represented she had plans to pay her debts off through a credit counseling service, but she failed to follow through on her plans.⁷

Sometime in 2000, Applicant was involved in a serious car accident. Her insurance company determined her car to be a total loss. However, by the time a determination of liabilities was

² This account is the same as that listed in ¶ 3.j. Accordingly, I find for the Applicant as to SOR ¶ 3.j.

³ Tr., 46;

⁴ Tr., 79.

⁵ Tr., 81 - 82.

⁶ Gx. 2 - 4; Gx. 7; Gx. 8.

⁷ Gx. 7.

completed,⁸ the garage where her car was taken after the accident had obtained a mechanic's lien against the title to the car. The insurance company has relied on the presence of the mechanic's lien as justification for not paying on Applicant's claim. The result has been that the credit union that financed the car loan has, since 2001, been looking to Applicant for the \$9,712 due on the loan (SOR ¶ 3.c). Applicant has disputed this debt, but does not have the resources to resolve it.⁹

On February 2, 2005, Applicant submitted a personal financial statement (PFS) that showed a positive net cash flow each month of about \$1,879; however, at hearing she claimed she does not have much money left over each month, and does not know why. She has a negative balance in her checking account and nothing in her savings account.¹⁰

On June 27, 2003, Applicant was arrested and charged with driving under the influence (DUI) of alcohol (SOR ¶ 1.b). She and some friends had been at a club in another city and Applicant had several mixed drinks. This was not the first time Applicant had driven after drinking alcohol. She recalls her blood alcohol content (BAC) was between .12% and .14% when she was arrested. The legal limit in her state at the time was .08%. She was found guilty, sentenced to four days in jail, fined nearly \$1,500, and her driver's license was restricted. She was also ordered to attend a driver alcohol safety class and undergo 90 days of alcohol counseling.

In March 2004, Applicant was arrested for failing to attend her driver safety class; however, this was quickly resolved because the paperwork that transferred supervision of her sentence from the jurisdiction where she was arrested to where she lived and would attend the class was a day late. This charge is erroneously reflected in Gx. 9 as another DUI charge.¹¹

On September 4, 2004, Applicant was again arrested and charged with DUI. The charge was pending as of the end of her background investigation. At hearing, Applicant testified she was convicted of this DUI and received a sentence similar to that from her earlier conviction. She also testified she is still on probation from the second conviction, that her license was suspended, and she was ordered to abstain from alcohol. She admitted she still drank despite the court order, and that she was last intoxicated on Christmas Eve 2006. Applicant admitted that she drank with friends as often as every weekend, frequently to the point of intoxication, and she disclosed that she has driven at times since her most recent conviction, despite having a suspended driver's license.¹²

On September 17, 2004, Applicant submitted her SF-85P. In response to question 16 (arrests, charges, and/or convictions in the last seven years), she disclosed her June 2003 DUI arrest and conviction, but did not disclose her DUI arrest from the week before she completed the questionnaire. In response to the SOR ¶ 2.a, she denied intentionally falsifying her answer to this question. At hearing she testified that she knew the charge was pending, but thought she only had

⁸ Applicant testified she was held partially responsible for the accident.

⁹ Tr., 37 - 39, 77. Ax. D.

¹⁰ Gx. 5; Tr., 84 - 86.

¹¹ Gx. 9; Answer to SOR.

¹² Tr., 62 - 66, 89 - 90.

to disclose convictions.¹³ In response to question 20 (debts currently more than 180 days delinquent),¹⁴ she disclosed only her \$9,000 debt to the credit union stemming from her car accident in 2000, discussed above. She did not disclose any of her other credit card or other personal debts, discussed above, which she knew to be more than 180 days past due. In response to SOR ¶ 2.b, Applicant denied intentionally falsifying her answer to this question, and at hearing testified that she knew by listing the largest of her debts the government would find out about the others.¹⁵

Applicant's friends and co-workers speak highly of her willingness to work hard and help others. She has volunteered for projects to help the homeless and has been active in community efforts to stop violence in her hometown. Applicant enjoys a good reputation at work as an affable and professional worker who is good at her job.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines¹⁶ to be considered in evaluating an applicant's suitability for access to sensitive information.¹⁷ Each trustworthiness determination must reflect consideration of both disqualifying conditions (DC) and mitigating conditions (MC) under each adjudicative issue applicable to the facts and circumstances of each case.¹⁸ Each determination must also reflect a fair and impartial common sense consideration of all available relevant and material information,¹⁹ and it must reflect the adjudication process outlined in the Directive at

¹³ Answer to SOR; Gx. 1; Tr., 49 - 51.

¹⁴ SOR 2.b alleged she deliberately falsified question "22. Your Financial Record." In the SF 85P submitted as Gx. 1 in support of this allegation, this question is number 20. Neither party has addressed this discrepancy, and I conclude from all of the available information about this allegation that the reference in SOR 2.b is a typographical error.

¹⁵ Answer to SOR; Gx. 1; Tr., 51.

¹⁶ Directive, Enclosure 2.

¹⁷ Department Counsel moved to amend the SOR to show that a memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004), directed that adjudication of trustworthiness cases for ADP I, II, and III positions be resolved using the provisions of the Directive rather than, as originally drafted, DoD Regulation 5200.2-R, *DoD Personnel Security Program*, as amended (Regulation). Applicant did not object and I granted the motion. (Tr., 11) Positions designated as ADP I or ADP II are classified as sensitive positions in section AP10.2.1 of the Regulation. ADP III positions are nonsensitive positions. (Regulation, AP10.2.3.1) By virtue of the aforementioned memorandum, however, even though they are nonsensitive positions, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases.

¹⁸ Also, Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions and mitigating conditions associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation, C8.2.1)

¹⁹ Directive, 6.3.

Section E2.2.1.²⁰ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to sensitive information.

_____ Trustworthiness determinations are intended solely to resolve whether it is clearly consistent with the national interest²¹ for an applicant to receive or continue to have access to sensitive information. The government bears the initial burden of producing admissible information on which it based the preliminary decision against the applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, the burden then shifts to the applicant to refute, extenuate or mitigate the government's case. As with security clearances, no one has a "right" to such access.²² Thus, an applicant bears a heavy burden of persuasion. Access to sensitive information is a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect sensitive information pertaining to the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.²³

CONCLUSIONS

Financial Considerations. Under Guideline F, an applicant who is financially overextended through delinquent debt and poor personal financial management may be at risk of engaging in

²⁰ "The adjudicative 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 the relevance of an individual's conduct, the adjudicator should consider the following factors:

- E2.2.1.1. The nature, extent, and seriousness of the conduct;
- E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;
- E2.2.1.3. The frequency and recency of the conduct;
- E2.2.1.4. The individual's age and maturity at the time of the conduct;
- E2.2.1.5. The voluntariness of participation;
- E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes;
- E2.2.1.7. The motivation for the conduct;
- E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and
- E2.2.1.9. The likelihood of continuation or recurrence;"

²¹ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988). See also, Regulation, C6.1.1.1 ("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.")

²² See *Egan*, 484 U.S. at 528, 531.

²³ See *Egan*; Directive, E2.2.2.

illegal acts to generate funds to resolve their fiscal difficulties.²⁴ Applicant incurred several debts while she was in school and for several years after through her careless use of credit cards. After leaving school in 2000, she continued to accrue delinquent debts through her credit cards and through non-payment of accounts at stores and for various utilities. Ironically, her largest debt – \$9,712 to the company that financed the car she totaled in an accident (SOR ¶ 3.c) – did not arise through her own mismanagement. However, her overall financial problems have kept her from being able to pay or otherwise resolve that debt. Further, although she has had a good job for the past six years, she cannot explain why she has no money left over each month. Aside from the debt listed at SOR ¶ 3.j, the government has presented sufficient information to support the allegations under this guideline. These facts warrant consideration of Guideline F disqualifying condition (DC) 1²⁵ and DC 3.²⁶

By contrast, Applicant has failed to show that her financial problems are either not recent or that they constitute an isolated circumstance in her background. Nor has she demonstrated that the factors leading to her indebtedness are not likely to recur or that she has sought help through credit counseling. Indeed, as noted above, she still has trouble managing her money and she lacks the resources to repay or meaningfully address her delinquencies. Aside from the debt stemming from the car accident, none of her debts resulted from factors beyond her control, and she has not made any good-faith effort to repay these debts. Accordingly, none of the Guideline F mitigating conditions apply to these facts. On balance, I conclude Guideline F against the Applicant.

Alcohol Consumption. The security concern about alcohol consumption, as expressed through Guideline G, is that excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.²⁷ Such consumption may be presented as alcohol-related incidents such as fighting, domestic violence, arrests for alcohol-related crimes, and clinical diagnoses of alcoholism or alcohol dependence. Here, available information shows Applicant twice was convicted of DUI, that between June 2003 and September 2004, she drank every weekend with friends, often to the point of intoxication, that she continued to consume alcohol in violation of her probation requirement that she abstain, and that she was intoxicated as recently as December 2006. On these facts, Guideline G DC 1²⁸ and DC 5²⁹ must be considered.

There is not sufficient information in this record to warrant consideration of any of the listed mitigating conditions under Guideline G. Applicant's last documented alcohol-related incident occurred in 2004. Thus, were it not for Applicant's recent intoxication in violation of a court order,

²⁴ Directive, E2.A6.1.1.

²⁵ Directive, E2.A6.1.2.1. A history of not meeting financial obligations;

²⁶ Directive, E2.A6.1.2.3. Inability or unwillingness to satisfy debts;

²⁷ Directive, E2.A7.1.1.

²⁸ Directive, E2.A7.1.2.1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;

²⁹ E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment;

MC 2³⁰ might apply. In short, Applicant failed to produce any information that would indicate her alcohol use has or is likely to change. Therefore, it is also likely she will be involved in alcohol-related adverse conduct in the future, thus perpetuating the government's doubts about her judgment and reliability. Accordingly, I conclude Guideline G against the Applicant.

Personal Conduct. Under Guideline E, a security concern may arise if it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.³¹ Here, the government questioned Applicant's trustworthiness by alleging she deliberately falsified material facts on her SF 85P by listing only one of her arrests in response to question 16 and only one of her debts in response to question 20.³² Available information is sufficient to support these allegations. Applicant's explanation of her response to question 20 – that she intended to disclose her debts to the government by listing her largest debt – might seem plausible were that the only such omission. However, taken together with the fact her response to question 16 omitted an arrest that had occurred only a week earlier, the most reasonable conclusion to be drawn from all of the information bearing on this issue is that Applicant intended, through her answers to these questions, to mislead the government by minimizing the scope of her financial problems and her arrest record.

Accordingly, Guideline E DC 2³³ must be considered. Additionally, in light of Applicant's continued drinking in violation of the terms of her probation, and her decision to drive despite the fact her driver's license has been revoked as part of her most recent DUI conviction, I have also considered Guideline DC 5.³⁴ By contrast, Applicant failed to submit sufficient information in response to the government's case that would support any of the Guideline E mitigating conditions. I conclude Guideline E against the Applicant.

Criminal Conduct. The facts raised as security concerns about Applicant's drinking and her deliberate false statements to the government also raise security concerns addressed in the Directive under Guideline J. Specifically, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.³⁵ A person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information. The criminal activity at issue may consist of a single serious crime or multiple lesser offenses. Here, available information shows that Applicant has been twice convicted of DUI, and that she continues to break the law by violating her probation and driving without a

³⁰ E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem;

³¹ Directive, E2.A5.1.1.

³² See note 14, supra.

³³ Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

³⁴ E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

³⁵ Directive, E2.A10.1.1.

license. Available information also shows she deliberately made false statements to the government through her responses in her SF 85P. It is against federal criminal law and punishable by fines and/or imprisonment to knowingly and wilfully make a false statement or representation to any agency of the U.S. government concerning a matter within its jurisdiction.³⁶ Applicant signed her SF 85P directly below an advisement to that effect, thereby demonstrating she was aware of the consequences of her false statements. All of the foregoing requires consideration of Guideline J DC 1 and DC 2.³⁷ By contrast, there is no information available that would support consideration of any of the Guideline J mitigating conditions. Her criminal conduct is recent, it is not isolated, and, in view of the fact Applicant's conduct includes knowing violation of the terms of her probation, she cannot claim she is rehabilitated. I conclude Guideline J against the Applicant.

Whole Person. In evaluating Applicant's case, I have also considered the adjudicative process factors collectively referred to as the "whole person" concept.³⁸ As discussed above, Applicant has not demonstrated her criminal conduct, her drinking, and her financial problems will not recur. The overriding security concern here is the lack of information showing rehabilitation or changed circumstances that would resolve the government's concerns based on these facts. Applicant is a smart, hard-working person, and her friends and associates speak highly of her. However, their recommendations carry diminished weight in that none of their remarks demonstrated any firsthand knowledge of the adverse information in Applicant's background.

A fair and commonsense assessment³⁹ of the entire record before me shows the government properly expressed reasonable doubts about Applicant's suitability to hold a sensitive position. The SOR was based on sufficient, reliable information about Applicant's excessive alcohol use, her alcohol-related criminal conduct, her deliberate false statements to the government, and her financial problems. Such issues bear directly on an applicant's ability and willingness to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its sensitive information.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline G (Alcohol):	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Subparagraph 1.c:	Against the Applicant
Subparagraph 1.d:	Against the Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST THE APPLICANT

³⁶ Title 18 U.S.C. § 1001.

³⁷ Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged; and E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

³⁸ See note 20, supra.

³⁹ Directive, E2.2.3.

Subparagraph 2.a:	Against the Applicant
Subparagraph 2.b:	Against the Applicant
Paragraph 1, Guideline F (Financial):	AGAINST THE APPLICANT
Subparagraph 3.a:	Against the Applicant
Subparagraph 3.b:	Against the Applicant
Subparagraph 3.c:	Against the Applicant
Subparagraph 3.d:	Against the Applicant
Subparagraph 3.e:	Against the Applicant
Subparagraph 3.f:	Against the Applicant
Subparagraph 3.g:	Against the Applicant
Subparagraph 3.h:	Against the Applicant
Subparagraph 3.i:	Against the Applicant
Subparagraph 3.j:	For the Applicant
Subparagraph 3.k:	Against the Applicant
Subparagraph 3.l:	Against the Applicant
Subparagraph 3.m:	Against the Applicant
Subparagraph 3.n:	Against the Applicant
Subparagraph 3.o:	Against the Applicant
Subparagraph 3.p:	Against the Applicant
Paragraph 4, Guideline J (Criminal Conduct):	AGAINST THE APPLICANT
Subparagraph 4.a:	Against the Applicant
Subparagraph 4.b:	Against the 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’s request for eligibility for assignment to a sensitive position. Eligibility is denied.

Matthew E. Malone
Administrative Judge