

KEYWORD: Alcohol; Personal Conduct; Criminal Conduct

DIGEST: Applicant failed to mitigate security concerns about her use of alcohol, her arrest record, and her deliberate falsification of her Applications for a Position of Trust (SF 85P). Eligibility for an ADP I/II/III position is denied.

CASENO: 06-09228.h1

DATE: 05/29/2007

DATE: May 29, 2007

In re:	)	
	)	
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SSN: -----	)	ADP Case No. 06-09228
	)	
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, her arrest record, and her deliberate falsification of her Applications for a Position of Trust (SF 85P). Eligibility for an ADP I/II/III position is denied.

## STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the interests of national security to grant her a position of trust. On August 7, 2006, DOHA issued a Statement of Reasons (SOR) alleging facts in Applicant's background that raise trustworthiness concerns addressed in the Directive under Guideline E (personal conduct), Guideline J (criminal conduct), and Guideline G (alcohol).

Applicant timely responded to the SOR, and requested a hearing. The case was assigned to me on November 16, 2006, and I convened a hearing on January 10, 2007. The government submitted four exhibits (Gx. 1 - 4) that were admitted into evidence without objection. Applicant testified, produced two witnesses, and introduced three exhibits (Ax. A - C), which were admitted without objection. DOHA received the transcript (Tr.) on January 18, 2007.

## FINDINGS OF FACT

The government alleged in SOR ¶ 1 that Applicant deliberately falsified her answer to question 16 (arrests, charges, and/or convictions for any offense in the past seven years) of an SF 85P she submitted in April 2003 by listing two arrests in 2001, but omitting a November 1998 arrest for being under the influence of a controlled substance (SOR ¶ 1.a); and that she deliberately falsified her answer to question 16 (arrests, charges, and/or convictions for any offense in the past seven years) of an October 2004 SF 85P by answering "no," thereby omitting the same November 1998 arrest (SOR ¶ 1.b). She admitted she did not list the arrests, but denied the gravamen of the allegations; that is, doing so with intent to mislead.

Under SOR ¶ 2, the government alleged Applicant was arrested in November 1998, and charged with being under the influence of a controlled substance, which was later dismissed (SOR ¶ 2.a); that she was arrested in May 2001, was charged with and pleaded no contest to drunk driving, and with hit and run with property damage, was fined, placed on probation until December 2002, and ordered to attend an alcohol awareness and safety class (SOR ¶ 2.b); that she was arrested in July 2001, charged with and pleaded no contest to driving on a suspended license, was fined and given a 10-day jail sentence (SOR ¶ 2.c); and that he violated 18 U.S.C. § 1001 by deliberately falsifying her SF 85Ps as alleged in SOR ¶ 1 (SOR ¶ 2.d). In response, Applicant admitted with explanation the allegations in SOR ¶¶ 2.a, 2.b, and 2.c, but denied intentionally falsifying her SF 85P responses as alleged in SOR ¶ 2.d.

Under SOR ¶ 3, the government alleged Applicant consumed alcohol between 2001 and 2004, at times to excess and to intoxication (SOR ¶ 3.a); that her arrest listed in ¶ 2.b is also an alcohol-related security concern (SOR ¶ 3.b); and that, in February 2004, she felt her alcohol use was a problem and that she was considering treatment or counseling (SOR ¶ 3.c). Applicant admitted all three allegations.

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

Applicant's 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 27 years old and has worked since January 2003 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. Her work record has been very good. Her evaluations and feedback from her supervisor, who testified at the hearing, show she has been very reliable and has had no problems on the job. Her supervisor also noted Applicant has shown more maturity and personal growth at work in the last year.<sup>2</sup> Applicant has been married since June 2003, and they have one child, who was born in March 2005.

From about 1996 until 2000, Applicant used methamphetamine ("meth"), an illegal substance. She used primarily because her boyfriend used meth and other drugs on a regular basis. On November 22, 1998, Applicant went to her boyfriend's apartment because he was mentally unstable from excessive drug use that day. She had been using meth either earlier in the day or the night before. Her boyfriend was paranoid and thought he would be attacked, so he called the police. They arrested him and Applicant after both tested positive for drugs in their systems. As part of a plea deal by her boyfriend, Applicant pleaded guilty to being under the influence of illegal drugs, but was released without jail time, fines, or other penalties. Applicant was under the impression the charges had been expunged or that her record in this matter was sealed.<sup>3</sup>

Applicant has consumed alcohol, often to the point of intoxication, since she was 16 years old.<sup>4</sup> On May 12, 2001, she drove some friends to a public park to go drinking. They were threatened by some teenagers nearby, so Applicant tried to drive away, but struck a car on the way out of the park. After leaving the park, she and her friends called the police to report the incident and the fact they had hit a car. When they met with police, Applicant was given a breathalyser test that showed her blood alcohol content to be greater than the .08% state limit. She was arrested and charged with drunk driving, hit & run, and alcohol related over .08%. She pleaded no contest to a reduced charge of wet reckless driving (a driving offense involving alcohol, but less than the legal limit). Her driver's license was suspended, and she was placed on probation for 18 months.<sup>5</sup>

On July 18, 2001, Applicant was pulled over for having her high beams on. She was charged with driving on a suspended license, and she pleaded no contest. Her probation was extended to three years and she served ten days in jail on weekends.

Applicant submitted an SF 85P in April 2003. In response to question 16 ("Your Police Record. In the last seven years, have you been arrested for, charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150)."), Applicant answered "yes" and listed her two arrests in 2001, but not her arrest in 1998. She has explained that she thought she did not have to list

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<sup>2</sup> Tr., 67 - 73.

<sup>3</sup> Gx. 4; Tr., 28.

<sup>4</sup> Tr., 43.

<sup>5</sup> Gx. 1; Gx. 3; Gx. 4; Tr., 41 - 42.

the 1998 arrest because the charge was dismissed or the record of it had been sealed.<sup>6</sup> However, when she was interviewed by a government investigator in February 2004, she stated that she had pleaded guilty.<sup>7</sup> When interviewed again in May 2005, she stated she thought she did not have to list the arrest because she thought it was outside the seven-year time requirement.<sup>8</sup>

When her company's contract requirements changed, she was asked to fill out another SF 85P in October 2004. In response to the same question, she answered "no," thereby omitting all three of her arrests.<sup>9</sup> She could not explain why the arrests were not included in the second questionnaire.

Applicant told investigators in February 2004 that she felt she had a problem with alcohol. She has experienced several bouts of binge drinking and stated that it takes about a fifth of liquor for her to feel intoxicated. Applicant knows she has developed a high tolerance for alcohol, and has tried to limit her consumption to wine with dinner only. She has attended Alcoholics Anonymous (AA) meetings on her own about ten times. Most recently, she attended three meetings in the two months before her hearing. She is not working the 12 steps, and she does not yet have a sponsor. Applicant regards herself as an alcoholic, and admits she has trouble abstaining from alcohol. Her difficulty in this regard is due, in part, to the fact her husband drinks, and sometimes he "can't stand that [Applicant] is not going to drink with him."<sup>10</sup>

Applicant testified she last consumed alcohol about two months before the hearing.<sup>11</sup> Her husband subsequently testified they had drunk champagne together either previous week or ten days earlier on New Years Eve.<sup>12</sup> On cross-examination, Applicant stated she was last intoxicated prior to June 2004, when she became pregnant with her child.<sup>13</sup> In response to questions from the bench, she acknowledged she had gotten drunk at a party in the spring of 2005, after her child was born.<sup>14</sup> Applicant's mother and sister have expressed to her their concern about her drinking. Applicant knows she has to stop drinking and wants to quit so she and her husband can have another child.<sup>15</sup>

## POLICIES AND BURDEN OF PROOF

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<sup>6</sup> Answer to SOR; Ax. C; Tr., 38 - 40.

<sup>7</sup> Gx. 3.

<sup>8</sup> Gx. 4.

<sup>9</sup> Gx. 2.

<sup>10</sup> Tr., 56.

<sup>11</sup> Tr., 43.

<sup>12</sup> Tr., 78.

<sup>13</sup> Tr., 44.

<sup>14</sup> Tr., 58.

<sup>15</sup> Tr., 47 - 48.

The Directive sets forth adjudicative guidelines<sup>16</sup> to be considered in evaluating an applicant's suitability for access to sensitive information.<sup>17</sup> 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.<sup>18</sup> Each determination must also reflect a fair and impartial common sense consideration of all available relevant and material information,<sup>19</sup> and it must reflect the adjudication process outlined in the Directive at Section E2.2.1.<sup>20</sup> 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. Having reviewed the information presented by the parties, I conclude Guideline E (personal conduct), Guideline G (alcohol), and Guideline J (criminal conduct) must be considered in this case.

Under the Regulation, trustworthiness determinations are intended solely to resolve whether it is clearly consistent with the interests of national security for an applicant to receive or continue

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<sup>16</sup> Directive, Enclosure 2.

<sup>17</sup> 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. The adjudicative guidelines in the Directive cases are virtually identical to those in the Regulation.

<sup>18</sup> 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)

<sup>19</sup> Directive, 6.3.

<sup>20</sup> "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;"

to have access to sensitive information.<sup>21</sup> 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.<sup>22</sup> 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 interests of national security" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>23</sup>

## CONCLUSIONS

**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.<sup>24</sup> The government questioned Applicant's trustworthiness by alleging she deliberately falsified material facts on her SF 85P in April 2003 by omitting her 1998 arrest from her response to question 16 of her 2003 SF 85P (SOR ¶ 1.a), and by omitting all her arrests from her response to the same question on her 2004 SF 85P (SOR 1.b).<sup>25</sup> Applicant responded to SOR ¶ 1.a, by stating she thought her 1998 arrest did not have to be disclosed because the charge had been dismissed. However, in two statements to government investigators, she provided two other explanations. She disclosed both her 2001 arrests in her April 2003 SF 85P. As to SOR ¶ 1.b, Applicant had no explanation why none of her arrests were listed on her October 2004 SF 85P, which was submitted pursuant to a change in her company's contract with the government.

I conclude Applicant intended to falsify her answers in both questionnaires. Each of her three explanations, standing alone, might be plausible reasons why she did not list her 1998 arrest on either form. As to the second SF 85P, omitting all her arrests after declaring the two most recent arrests on the first SF 85P seemingly would not make sense. However, combined with her conflicting testimony at hearing, her disparate explanations of her answers to question 16 tend to support the

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<sup>21</sup> 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.")

<sup>22</sup> *Department of the Navy v. Egan*, 484 U.S. 518, at 528, 531.

<sup>23</sup> See *Egan*; Directive, E2.2.2.

<sup>24</sup> Directive, E2.A5.1.1.

<sup>25</sup> SOR ¶ 1.b alleges Applicant answered "no" to question 16, but goes on to allege she deliberately omitted only her 1998 arrest. Gx. 2 plainly shows she did not list as required any of her arrests in the last seven years. However, the government did not explain why SOR ¶ 1.b does not allege omission of the 2001 arrests.

government's allegations. Additionally, I am concerned about her lack of candor in testimony about her drinking, discussed under Guideline G, below. In short, available information requires application of Guideline E DC 2 and DC 5.<sup>26</sup> By contrast, there is insufficient information in this record to warrant application of any of the listed mitigating conditions. Based on all available information probative of this issue, I conclude Guideline E 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.<sup>27</sup> This issue 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 began abusing alcohol in high school until at least early 2005, when she is last known to have been intoxicated (SOR ¶ 3.a). It was not unusual for Applicant to consume as much as 1/4 a bottle of vodka in a single sitting, and, from about 1996 until 2000, she would abuse alcohol while also using methamphetamine with her boyfriend. Her drinking has resulted in at least one arrest (SOR ¶ 3.b), and has caused her mother and sister to voice their concerns about how much she drinks. Alcohol has been enough of a problem for Applicant that she believes she is an alcoholic, and that she should seek counseling and/or treatment for her use of alcohol (SOR ¶ 3.c). These facts require consideration of Guideline G DC 1 and DC 5.<sup>28</sup>

Applicant responded to the government's information by asserting she is working to overcome her problems with alcohol by attending AA meetings and working to abstain from alcohol altogether. On the latter point, she has had mixed results. She acknowledges having a glass or two of wine periodically, but her claims are suspect due to her inconsistent testimony about when she last consumed alcohol and when she was last intoxicated. As to her participation at AA, while laudable and to be encouraged, this is too recent and infrequent to be a reliable indicator of sobriety. Applicant has no sponsor and is not yet working on a structured approach such as the 12-step program advocated by AA. Despite her apparent acknowledgment of her problems with alcohol, Applicant has failed to show the actions she is taking will be effective or that they will continue; nor has she established a sufficient period of sobriety on which the government may rely in determining that her use of alcohol will no longer cast doubt on her trustworthiness. The information Applicant submitted is insufficient to overcome the government's reasonable doubts about her trustworthiness raised by her use of alcohol. In light of all the available information probative of this issue, I conclude Guideline G against the Applicant.

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<sup>26</sup> 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; and 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.

<sup>27</sup> Directive, E2.A7.1.1.

<sup>28</sup> 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; and E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment.

**Criminal Conduct.** Applicant's arrests and false statements to the government raise trustworthiness 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.<sup>29</sup> 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 sensitive information. The criminal activity at issue may consist of a single serious crime or multiple lesser offenses.

Here, the government has reasonable doubts about Applicant's suitability for access to sensitive information because available information shows she was arrested three times between 1998 and 2001. As to her first arrest in 1998 (SOR ¶ 2.a), although the charge was dismissed as part of her boyfriend's plea bargain, available information is sufficient to show, as alleged in the SOR, Applicant violated state laws against illegal drug use. The record further supports the allegations that Applicant was convicted in May 2001 for DUI (SOR ¶ 2.b), and in July 2001 for driving on a suspended license (SOR ¶ 2.c). Applicant also engaged in criminal conduct by intentionally falsifying her two SF 85P questionnaires (SOR ¶ 2.d), as discussed under Guideline E, above. It is against federal criminal law to knowingly and wilfully make a false statement or representation to any agency of the U.S. government concerning a matter within its jurisdiction.<sup>30</sup> The facts established through SOR ¶ 2 require consideration of Guideline J DC 1 and DC 2.<sup>31</sup>

None of the Guideline J mitigating conditions apply here. But for Applicant's deliberate falsification of her 2003 and 2004 SF 85Ps, the record would support consideration of Guideline J MC 1<sup>32</sup> as her other criminal conduct occurred nearly six years ago. Further, given that at least one of Applicant's arrests was alcohol-related, were it not for on going concerns about Applicant's use of alcohol, discussed under Guideline G, above, the record would also support consideration of Guideline J MC 6.<sup>33</sup> Since her last arrest, she has made several recent positive changes in her lifestyle. However, her unreliable statements about her last alcohol use, and her recent falsification of her questionnaires undermine any claim of rehabilitation. As long as she drinks, she will be at risk of future criminal conduct. Because there is insufficient information available to overcome the government's concerns about her criminal conduct, 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.<sup>34</sup> Applicant's record at work is very good, and she has the support of management based on her performance over the past few years. She is a mature adult who is trying to rectify several past problems in her life, most notably her alcohol use and the legal and personal problems it has caused. She and her husband have started a family and are endeavoring to become financially sound. Yet the disqualifying information about

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<sup>29</sup> Directive, E2.A10.1.1.

<sup>30</sup> Title 18 U.S.C. § 1001.

<sup>31</sup> 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.

<sup>32</sup> Directive, E2.A10.1.3.1. The criminal behavior was not recent.

<sup>33</sup> Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

<sup>34</sup> See note 20, supra.



Applicant's alcohol use and criminal conduct is exacerbated by failure to be completely candid at hearing. This conclusively undermines her claims of rehabilitation. A fair and commonsense assessment<sup>35</sup> 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 criminal conduct and alcohol consumption. 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. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I cannot conclude she has mitigated the security concerns expressed in the SOR.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant
Subparagraph 2.b:	Against the Applicant
Subparagraph 2.c:	Against the Applicant
Subparagraph 2.d:	Against the Applicant
Paragraph 3, Guideline G (Alcohol):	AGAINST THE APPLICANT
Subparagraph 3.a:	Against the Applicant
Subparagraph 3.b:	Against the Applicant
Subparagraph 3.c:	Against the Applicant

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<sup>35</sup> Directive, E2.2.3.

## **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant's request for eligibility for assignment to a sensitive position. Eligibility is denied.

Matthew E. Malone  
Administrative Judge