

KEYWORD: Criminal; Alcohol; Personal Conduct

DIGEST: Applicant is 38 years old, divorced, and works as a supervisor of adjustments for a defense contractor engaged in the health care industry. Applicant has four alcohol-related driving arrests and convictions, and two driving while revoked arrests. He was diagnosed as alcohol dependent in full remission, but failed to follow the alcohol assessment's aftercare recommendations. He failed to disclose his 2003 driving arrest on his trustworthiness application. Applicant failed to mitigate the criminal conduct, alcohol consumption, and personal conduct trustworthiness concerns. Eligibility for an ADP I/II/III position is denied.

CASENO: 06-10643.h1

DATE: 06/07/2007

DATE: June 7, 2007

In re:)	
)	
)	
-----)	ADP Case No. 06-10643
SSN: -----)	
)	
Applicant for ADP I/II/III Position)	
)	

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

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 38 years old, divorced, and works as a supervisor of adjustments for a defense contractor engaged in the health care industry. Applicant has four alcohol-related driving arrests and convictions, and two driving while revoked arrests. He was diagnosed as alcohol dependent in full remission, but failed to follow the alcohol assessment's aftercare recommendations. He failed to disclose his 2003 driving arrest on his trustworthiness application. Applicant failed to mitigate the criminal conduct, alcohol consumption, and personal conduct trustworthiness concerns. Eligibility for an ADP I/II/III position is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a position of trust for Applicant¹. On August 18, 2006, DOHA issued a Statement of Reasons² (SOR) detailing the basis for its decision—trustworthiness concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on October 10, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on February 27, 2007. On April 19, 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 and the Applicant submitted exhibits that were admitted into evidence. Applicant submitted exhibits subsequent to the hearing and the Government had no objection to their admission into evidence. DOHA received the hearing transcript (Tr.) on April 27, 2007.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations 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 38 years old, divorced, and has two teenaged children. He and his wife divorced in part due to his alcohol use. He works as a supervisor of adjustments for a defense contractor in the health services business. He started with that company in February 2001. His employee evaluations from May 2004 to May 2006, show he meets or exceeds all expectations set by his supervisors. He owns his own home. (Tr. 24, 25, 28, 56; Exhibits 1, A, B)

Applicant admitted he was arrested for driving a motor vehicle while intoxicated on May 7, 1995. No disposition of that charge is known. Applicant drove while intoxicated on December 11, 1996, and was arrested on that charge. The charge included the allegation that it was his fourth such offense. His blood alcohol content (BAC) was .1% or higher. The state court found him guilty, fined him \$1,610, ordered him to spend six months in jail, and to attend alcohol assessment classes. He spent four or five months in jail pursuant to the court's sentence. His driving privileges were revoked for three years. They have not be reinstated. He currently has an occupational license, allowing him to drive to work, obtained on or after March 2006. (Tr. 27, 29, 30, 53; Exhibit 2; Answer)

Applicant was again arrested on August 12, 1999, and charged with operating a motor vehicle while intoxicated and operating a motor vehicle after suspension or revocation. He was convicted of the intoxicated driving charge, and fined \$,1736, ordered to spend 120 days in jail, had his driving

¹Adjudication 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).

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

privileges revoked for an additional 24 months, and ordered to take a mandatory alcohol assessment. Applicant drove while revoked at times after his arrest and conviction. He also got to work being driven by his wife when they were still married, until about December 2004 when they were divorced. (Tr. 27, 50; Exhibits 2, 3; Answer)

Applicant's next encounter with the law was an arrest on January 25, 2001, while attempting to get a cell phone from his wife with whom he got into an altercation. He scratched her in the process. She called the police. He was charged with disorderly conduct and battery. The charges were later dismissed after he completed the deferred sentencing arrangement. (Exhibits 2, 3; Answer)

The next incident in which Applicant was involved was an arrest on October 5, 2003, when he was arrested for driving while intoxicated, fifth offense. The court found him guilty in March 2005, sentenced him to nine months in jail, ordered to attend an alcohol assessment, suspended his driving privileges for another three years, placed him on five years probation, and fined him \$1,875. Applicant served six months of jail time, reduced by good behavior, on a work release program. (Tr. 21, 22, 26, 30, 34; Exhibits 2; Answer)

Applicant was arrested on March 21, 2005, for driving while revoked. He was found guilty and fined \$583. (Tr. 30, 50; Exhibit 2; Answer)

Applicant claims he has been abstinent from alcohol since October, 2003. Applicant admitted he consumed alcohol to excess and to intoxication from approximately 1995 to at least October 2003. He went to Alcoholics Anonymous (AA) from February 2005 to March 2006. He ceased his participation when he was in jail resulting from his last arrest and conviction for driving while intoxicated. He claims he did not have the desire for alcohol, so the need for AA was not present in his life. He attended the alcohol assessment program required by the court after his March 2005 conviction. The counselor noted Applicant was there because of a sixth operating a vehicle while intoxicated offense. The summary of his treatment, dated October 13, 2005, diagnoses Applicant as having alcohol dependence with physiological dependence in full sustained remission. During his treatment, the counselor found Applicant maintained sobriety and strengthened his recovery program by AA participation and working with an AA sponsor. The counselor noted Applicant was also attending church, attending AA meetings, and working with a recovery sponsor by the end of his treatment. The program discharged him successfully with a good prognosis. The aftercare program recommendation was continued abstention from addictive substance use, *"will continue to attend AA meetings and church and use the support of his sponsor. (Applicant) will follow through with his recovery program and driver's safety plan."* Applicant submitted this exhibit after the hearing, and at the hearing made no mention of church attendance or an AA sponsor. He is not attending AA anymore. The assessment is signed by a certified substance abuse counselor. Applicant obtained his current occupation driving privileges after completing the state-required assessment program. (Tr. 26, 35, 41, 55; Exhibits 2, C; Answer)

Applicant stated on the Government interrogatories he completed on June 15, 2006, that he attended AA *"usually about twice a month. It really helps keep things in perspective."* At the hearing he admitted he ceased AA attendance on or about March 2006, a time before he wrote his answer to the interrogatories. His answers were notarized and he affirmed that they were *"true and correct to the best of my knowledge and belief."* (Tr. 26; Exhibit 2)

Applicant completed his Questionnaire for Public Trust Position (85P) on May 28, 2003. He signed the revised version on February 16, 2005. Question 20 asked whether Applicant had been arrested for, charged with, or convicted of any offenses in the past seven years. Applicant answered “yes” and disclosed his 1996 offense, his 1999 offense and conviction in 2000, and the 2001 battery arrest. In his February 2005 update of his 85P, he did not disclose the October 2003, arrest. Applicant claims the process was quick and his conviction was not finalized at that time, but his 2003 arrest had already occurred. The knowing and wilful making of a false statement to a U.S. Government agency is a violation of 18 U.S.C. § 1001, a felony offense. His answer to the SOR claims he discussed this conviction later with the Government investigator after February 2005, but there is no documentary confirmation of such conversation in the evidence. (Tr. 17-19, 45; Exhibit 2; Answer)

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. 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* Directive, Section E2.2.1. of Enclosure 2). 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 J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.* E2.A10.1.1

Guideline G: Alcohol Consumption: *The Concern: 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.* E2.A7.1.1

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

"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." (Regulation ¶ C6.1.1.1) Appendix 8 of the Regulation sets 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 J: Applicant has four alcohol-related driving offenses listed in the SOR. His court-ordered alcohol assessment notes he has six offenses for driving while intoxicated. He has two driving while revoked offenses listed in the SOR, and admitted to driving while revoked since his 1996 revocation of driving privileges. It was only in the past year he obtained an occupational driving permit. The Disqualifying Conditions (DC) that apply to these facts are DC 1 (allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1) and DC 2 (a single serious crime or multiple lesser offenses. E2.A10.1.2.2). Applicant has a history of driving while intoxicated. He also has a history of driving while his driving privileges are revoked, which ended only when he obtained an occupational license in March 2006. He wilfully and knowingly did not disclose his 2003 arrest on his 85P.

Considering the Mitigating Conditions (MC) under this guideline, I conclude none can be applied reasonably. Applicant engaged in a pattern of law violations that only ended recently. The alcohol-related driving offenses started in 1995 or before, and total six offenses according to the alcohol counselor. Applicant voluntarily committed these offenses, as he did the driving while revoked. There is no evidence of successful rehabilitation of the alcohol problems because he has not complied with the alcohol treatment aftercare recommendations. Again, Applicant does what he wants to do, not what the professionals or the law require him to do to conform his behavior to lawful behavior.

Guideline G: Applicant's alcohol and driving history make DC 1 (alcohol-related incidents away from work, such as driving while under the influence. E2.A7.1.2.1), DC 4 (evaluation of alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. E2.A7.1.2.4), and DC 7 (habitual or binge consumption of alcohol to the point of impaired judgment. E2.A7.1.2.7) applicable. Applicant has six alcohol-related driving offenses on his record, was diagnosed at a court-ordered alcohol assessment program as alcohol dependent, though in full remission if he maintained his support network, and has an eight-year history of habitual alcohol consumption. Alcohol played a substantial part in his divorce.

MC 3 (positive changes in behavior supportive of sobriety. E2.A7.1.3.3) and MC 4 (following diagnosis of alcohol dependence, the individual has successfully completed outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of AA or similar organizations, has abstained from alcohol for a period of at least 12 months, and has received a favorable prognosis from a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. E2.A7.1.3.4) might apply.

However, Applicant did not comply with the aftercare recommendations when he ceased AA participation. He made no mention of an AA sponsor at the hearing, so that relationship could not be explored. He made his own decision not to attend AA after only one year's participation following an eight-year, at least, period of habitual alcohol consumption and multiple alcohol-related driving arrests. His claim of abstinence since October 2003 was not substantiated beyond his self-serving declaration. He did not show any positive changes in behavior supportive of sobriety. He did not show any behavioral changes, except to state alcohol caused him too many problems. In addition, I am dissuaded from applying either of these MC because Applicant misrepresented his AA participation and its duration in his interrogatory in June 2006, as compared to his testimony at the hearing. His interrogatory answer led the Government to believe he continued to participate, yet at

the hearing he stated he stopped AA participation in March 2006. At the hearing, he did not bring or submit the alcohol assessment that is Exhibit C, so cross-examination by the Government of discrepancies and assertions therein could be explored. I have serious doubts and concerns about Applicant's true relationship with alcohol in light of his history. I conclude he has not persuaded me the MC should apply. The burden of proof is on him that any MC should apply.

Guideline E: Applicant deliberately did not disclose on his 85P his 2003 alcohol and driving arrest when he recertified his answers on February 16, 2005. He had been arrested, which action was within the scope of Question 20 on the 85P. Hence, DC 2 (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2) applies. His decision not to disclose was, by his testimony, based on the fact that he had not yet been convicted of the offense. That is not a persuasive explanation to excuse his failure to disclose. He knew he had been arrested, therefore he knew a fact that should have been disclosed.

His testimony at the hearing did not persuade me that any MC should apply, or that he had a reasonable excuse for not disclosing his 2003 arrest. It was certainly within the same genre of other arrests and convictions relating to alcohol that he did disclose.

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. Directive E2.2.1. "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." *Id.* In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1. under the "whole person analysis." His alcohol-related incidents are serious and occurred over an eight-year period. They are frequent and recent. They were voluntary, as was his decision to stop his participation in alcohol rehabilitation and AA. There is no substantive evidence of rehabilitation provided by Applicant, except his own will power not to consume alcohol anymore. He submitted no objective evidence of his abstinence. There is a substantial risk of his behavior recurring unless he establishes the support system recommended in the aftercare portion of his October 2005 assessment.

The Government set forth in the SOR two pages of trustworthiness concerns. Applicant's initial presentation at the hearing was that his job performance for the past six years, his own perception that he did not need AA participation, and his unsubstantiated sobriety should be a basis for granting him a favorable trustworthiness decision. However, the discrepancies between his interrogatory answer on his AA participation and his testimony, and also his aftercare recommendations and what he actually did, plus his entire history of multiple driving arrests and attitude toward driving while revoked, raise substantial doubts as to what Applicant's true relationship toward alcohol is, how trustworthy he really is, and whether he can comply with Government requirements on trustworthiness. Any doubt is to be resolved in favor of the national interest. Applicant failed to sustain his burden of proof that any MC should apply.

I conclude the criminal conduct trustworthiness concern against him. I also conclude the alcohol consumption trustworthiness concern against him. The personal conduct trustworthiness concern is concluded against him. Lastly, the "whole person concept" I conclude against him.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

 Subparagraph 1.a: Against Applicant

 Subparagraph 1.b: Against Applicant

 Subparagraph 1.c: Against Applicant

 Subparagraph 1.d: Against Applicant

 Subparagraph 1.e: Against Applicant

 Subparagraph 1.f: Against Applicant

 Subparagraph 1.g: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

 Subparagraph 2.a: Against Applicant

 Subparagraph 2.b: Against Applicant

 Subparagraph 2.c: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

 Subparagraph 3.a: Against 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 ADP I/II/III position is denied.

Philip S. Howe
Administrative Judge