



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
)  
) ADP Case No. 06-11803  
)  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: D. Michael Lyles, Esq., Department Counsel  
For Applicant: *Pro se*

April 13, 2010  
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**Decision**  
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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s trustworthiness concerns under Guideline G, Alcohol Consumption, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. Applicant’s eligibility for access to sensitive information is denied.

On December 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guidelines G, E, and J. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant’s answered the SOR in writing on December 27, 2009, and elected to have his case decided on the written record. Department Counsel submitted the

Government's File of Relevant Material (FORM) on February 3, 2010. The FORM was mailed to Applicant and was received on February 12, 2010. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided additional information without objection by Department Counsel. The case was assigned to me on March 29, 2010.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted the allegations in ¶¶ 1.a through 1.h, and 2.a through 2.f. He failed to respond to the allegations in SOR ¶¶ 3.a and 3.b. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 54 years old and married. He has worked for a federal contractor since 1990. He has consumed alcohol, at times to excess and to the point of intoxication, from about 1975 to at least 2004. In his answer to the SOR, on December 27, 2009, Applicant stated the following:

I informed the investigator that I had stopped drinking alcohol. This statement was made to intend (sic) that I have stopped drinking alcohol as in hard liquor, i.e. vodka, gin. Not saying these two was the drink of my choice. I also informed the investigator that I was still drinking beer.<sup>1</sup>

Applicant did not provide any information addressing whether he presently abstains from consuming alcohol or if he continues to drink. He did not provide information as to what rehabilitative steps he has taken. In his response to the FORM, he stated that sometime in the 2000 decade he attended a court-ordered "Drug/Alcohol Rehab class."<sup>2</sup>

Applicant admitted his history of alcohol related arrests and convictions beginning in 1988 through 2001. They are as follows:

- 1988-arrested and charged with Speeding and Violation of an Open Container. Ordered to complete 20 hours of community service, fined, license suspended for six months.
- July 1992-arrested and charged with Driving Under the Influence (DUI), Driving Under Suspension (DUS), and Liquor Law Violation. Pleaded guilty and was fined.
- February 1994-arrested and charged with DUS, Open Container, and Defective Tires. Fined \$95.
- June 1994-arrested and charged with DUS. Pleaded guilty. Sentenced to six months in jail, suspended to 90 days house arrest, six months probation, and fined.

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<sup>1</sup> Item 3.

<sup>2</sup> Response to FORM.

- August 1996-arrested and charged with DUS (more than first offense), DUI, and Open Container. Convicted of DUI, other counts dismissed. Forfeited bond of \$152 on DUI.
- April 1998-cited for DUI and DUS. Convicted of both charges and sentenced to one year in jail and a \$2,500 fine, suspended on service of 14 days in jail; \$2,135 fine, and serve three years probation on the DUI offense. Sentenced to six months in jail, suspended on service of 90 days in jail, fined, serve three years probation, and pay restitution in the amount of \$2,000 on the DUS offense.
- December 1998-charged with DUI, DUS, and Open Container. Pleaded guilty to DUI and Open Container. Sentenced to one year in jail, suspended, ordered to serve 10 days in jail and three years probation. DUS dismissed.
- October 2001-involved in alcohol-related accident. Charged with DUI and fined about \$700 (no information if convicted of DUI).
- November 1999-arrested and charged with Failure to Yield and DUS. Fined \$174 for Failure to Yield. Found guilty of DUS, and sentenced to 45 days in jail or \$350 fine.

Applicant completed a Public Trust Position Questionnaire (SF 85P) on October 30, 2002. In response to question 20, which asked if he had been arrested for, charged with, or convicted of any offenses in the last 7 years (leaving out traffic fines less than \$150) he listed a DUI and DUS offense in October 2001. He deliberately failed to disclose the following offenses: the August 1996 DUI, DUS and Open Container charges; the April 1998 DUI and DUS charges; the December 1998 DUI, DUS and Open Container charges, and the November 1999 DUS and Failure to Yield charges.

Applicant completed an SF 85P on August 17, 2004. In response to question 20 which asked Applicant if he had been arrested for, charged with, or convicted of any offenses in the last 7 years (leaving out traffic fines less than \$150) he listed a DUI in October 2001 and a DUS in December 2000. He deliberately failed to disclose that he had been arrested other times in that time period, to wit: April 1998 for DUI and DUS, December 1998 for DUI, DUS, and Open Container, and November 1999 for DUS and Failure to Yield.<sup>3</sup>

Applicant completed a signed and sworn statement on April 14, 2005, which was presented to an authorized investigator for the Department of Defense. He falsified material facts in that he stated he quit using alcohol in October 2002 and deliberately failed to disclose that he continued to drink alcohol to at least 2004.<sup>4</sup>

In response to interrogatories sent to Applicant by DOHA in November 2006, Applicant falsified material facts in that he stated he had stopped drinking alcohol in

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<sup>3</sup> Item 4.

<sup>4</sup> Item 5.

October 2002, when in fact, he failed to disclose he continued to consume alcohol to at least 2004.<sup>5</sup>

Applicant's falsifications and omissions constitute a violation of Federal law, Title 18 USC, Section 1001, felonies.

### **Policies**

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision."

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<sup>5</sup> Item 8.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline G, Alcohol Consumption**

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

I have considered all of the disqualifying conditions under AG ¶ 22, and especially considered the following:

(a) alcohol-related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant drank alcohol to excess and to the point of intoxication from 1975 to at least 2004. He has had four DUI convictions and five other arrests, some were for alcohol-related offenses. I find the above disqualifying condition applies.

I have considered all of the mitigating conditions under AG ¶ 23 including the following:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and

has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with a treatment recommendation, such as participation in meeting of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical profession or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Appellant had numerous alcohol-related incidents in his past from 1988 to 2001. The most recent one reported was in 2001. Applicant's answer to the SOR acknowledges he does not drink hard liquor, but continues to consume beer. Although a significant period of time has passed since his last criminal alcohol-related incident, without additional independent evidence as to his present consumption, I cannot find that his alcohol use will not be a recurring problem or not have a detrimental effect on his reliability, trustworthiness, and good judgment. I find AG ¶ 23(a) does not apply. There is no evidence that Applicant acknowledges his issues with alcohol or has taken actions to overcome his problem. No corroborative evidence was provided to convince me that he has abstained from alcohol consumption or established a modified pattern of consumption. Applicant provided information that he attended a court appointed alcohol awareness program some time in the 2000 decade. There is insufficient evidence to determine that Applicant's issues with alcohol are under control. I find none of the above mitigating conditions apply.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them and especially considered the following:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to considerations of: ... (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant was arrested in June 1994, and charged with DUS. He was found guilty and was sentenced. He was arrested again in November 1999, for Failure to Yield and DUS. He was found guilty of both and sentenced. Applicant's conduct rises to the level of establishing questionable judgment and a pattern of rule violations. His conduct creates a vulnerability and potentially could affect his personal, professional or community standing. I find disqualifying conditions AG ¶¶ 16(c) and 16(e) apply.

Applicant deliberately failed to disclose his complete history of arrests, charges, and convictions on his October 30, 2002 and August 17, 2004, SF 85Ps. He also provided false material facts to a Department of Defense investigator in a sworn statement on April 14, 2005, in which he stated he had stopped consuming alcohol in October 2002, when in fact he deliberately failed to disclose that he continued to drink alcohol to at least 2004. He provided another false statement in the interrogatories provided to DOHA, stating the he stopped drinking alcohol in October 2002, when in fact he admitted that he continued to consume alcohol until at least 2004. I find disqualifying conditions AG ¶¶ 16(a) and 16(b) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions and especially considered the following under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

I have considered all of the facts and information provided. There is no evidence that Applicant made a prompt good-faith effort to correct his omissions or falsifications. AG ¶ 17 (a) does not apply. Applicant's failure to disclose his complete criminal record and alcohol-related incidents is not minor, but serious. No evidence was presented to conclude that his omissions, falsifications, and criminal actions occurred under unique circumstances that are unlikely to recur. I find AG ¶ 17(c) does not apply. There is no evidence indicating that Applicant has acknowledged his alcohol-related problems, obtained counseling, or taken positive steps to alleviate the stressors and underlying behaviors related to criminal offenses and abuse of alcohol. Without sufficient independent evidence, I cannot conclude that his behavior is unlikely to recur. I find mitigating conditions AG ¶¶ 17(d) and 17(e) do not apply.

### **Guideline J, Criminal Conduct**

AG ¶ 30 sets out the security concern relating to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered the following:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has four DUI convictions, four DUS convictions, and convictions for many other minor offenses. He was involved in an alcohol-related accident in October 2001, and was charged with DUI. Applicant admitted in his answer to the SOR that he deliberately omitted relevant information pertaining to his police record and alcohol consumption on his SF 85Ps and provided false information to investigators, in violation



of Title 18 U.S. C. 1001, a felony offense. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and especially considered the following:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

A significant period of time has elapsed since Applicant's last alcohol-related criminal behavior in 2001. However, Applicant's omissions and falsifications on his 2002 and 2004 SF 85P and official statements in 2005 and 2006 reflect a pattern of dishonesty in disclosing his past misconduct. Under the circumstances, I find his deliberate falsifications cast doubt on his current reliability, trustworthiness, and good judgment. Therefore, I find mitigating condition AG¶ 32(a) does not apply. Insufficient evidence was presented to conclude there is successful rehabilitation. I find mitigating condition AG ¶ 17(d) does not apply.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for access to sensitive information by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a significant criminal history beginning in 1988 and primarily involving alcohol-related incidents. Although the passage of time without a criminal incident weighs in Applicant's favor, he failed to provide sufficient and independent evidence to document his current alcohol consumption and refute potential alcohol-related concerns. An additional and serious concern is Applicant's deliberate failure to disclose his entire criminal arrest and conviction record on his SF 85Ps, and his dishonest answers during discussions of his past alcohol consumption information. His willingness to omit and falsify information is a serious concern because the Government relies on applicant's to provide honest information about their background. Failure to do so raises concerns that they may not be honest when they have access to sensitive information. Applicant failed to provide sufficient evidence to mitigate the trustworthiness concerns. Overall the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for access to sensitive information. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising under Guideline G, Alcohol Consumption, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a-1.h:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.f:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a-3b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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Carol G. Ricciardello  
Administrative Judge