



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



In the matter of:)
)
) ADP Case No. 14-00373
)
Applicant for Public Trust Position)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

09/29/2014

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a public trust position. Because Applicant does not have a history of alcohol-related issues or misconduct, his February 2012 driving under the influence (DUI) of alcohol arrest and subsequent conviction is mitigated as an isolated event that does not reflect negatively on his current ability to handle or safeguard sensitive information. Applicant's eligibility to occupy a public trust position is granted.

Statement of the Case

On February 25, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under the alcohol consumption guideline. DOHA recommended the case be submitted to an administrative judge to determine whether or not Applicant is eligible to occupy a public trust position.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on August 4, 2014. At the hearing convened on August 18, 2012, I admitted Government's Exhibits (GE) 1 through 3 and Applicant's Exhibits (AE) A and

B, without objection. After the hearing, I received AE C through F without objection.¹ I received the transcript (Tr.) on August 26, 2014.

Procedural Issues

Case Classification

The SOR was erroneously issued as an industrial security clearance review (ISCR) case. Based on the belief of the parties, the hearing in the matter was also conducted as an ISCR hearing. However, this case should have been issued and adjudicated as a public trust position.² As such the facts of this case are adjudicated under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). The *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG)*, effective within the Defense Department on September 1, 2006, apply to this case.

Waiver of Notice Requirement

Applicant received less than 15 days written notice of the time and place of the hearing as required under Directive ¶ E.3.1.8. Applicant waived the notice requirement, electing to proceed with the hearing as scheduled.³

Findings of Fact

Applicant, 50, has worked as an information technology professional for a federal contractor since 2004. Although he does not have access to sensitive or personally identifiable information in the course of his duties, he does manage the storage of those electronic records. Applicant is a highly regarded employee, whose performance exceeds expectations. This is Applicant's first application for a public trust position.⁴

Applicant completed his security clearance application in May 2013, disclosing a May 2012 DUI conviction. On an evening in February 2012, Applicant decided to attend a friend's birthday party where he consumed alcohol. After the party, he had drinks at a bar with another friend. Over the course of the evening, Applicant had two to three drinks. When Applicant left the bar, he did not feel impaired. Approximately two miles from his home, a police officer pulled Applicant over for speeding and swerving. Applicant admits he may have swerved his vehicle when he looked over at his ringing phone to see if the call was from his wife, who was out of town. Applicant admitted to the officer that he had been drinking. Applicant passed the field sobriety tests, but his blood alcohol content measured .10%. Applicant pleaded guilty to DUI and was

¹ Hearing Exhibit (HE) I.

² HE II.

³ Tr. 7.

⁴ Tr. 37-38; GE 1, AE A,C,F.

sentenced to 3 years unsupervised probation, which expires in December 2015. He was also ordered to complete a first offender's program, attend alcohol education classes, and to pay a \$2,400 fine. Applicant has complied with requirements of his sentence, completing his court-ordered classes. He has a \$300 balance on his fine.⁵

The court did not impose any alcohol-consumption restrictions in Applicant's DUI sentence. Applicant is a social drinker. He consumes alcohol on average once per month and on special occasions. He rarely consumes more than two to three alcohol beverages in a sitting. He does not have a history of alcohol abuse or dependence.⁶

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions."⁷ "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 interests."⁸ 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.⁹ An administrative judge's objective is a fair, impartial, and commonsense decision that embraces all available, reliable information about the person, past and present, favorable and unfavorable.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to a public trust position 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

⁵ Tr. 18-21, 25-34; GE 1-3, AE D,E.

⁶ Tr. 19, 24; GE 2.

⁷ DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation) ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁸ Regulation ¶ C6.1.1.1.

⁹ See Regulation ¶ C8.2.1.

Analysis

Excessive alcohol consumption is a security concern because it “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.”¹⁰ In February 2012, Applicant was arrested for and subsequently pleaded guilty to driving under the influence of alcohol.¹¹ Although it is an instance of poor judgment, it is mitigated as an isolated event that is unlikely to recur and that does not reflect negatively on his current eligibility to occupy a public trust position.¹² The incident is not indicative of ongoing alcohol issues. Applicant does not have a history of alcohol abuse or dependence. Nor does the incident reveal any concerns about Applicant’s honesty or trustworthiness. Applicant properly disclosed his DUI conviction on his security clearance application and discussed the incident candidly throughout the adjudication process. He has accepted responsibility for his actions and expresses remorse for his conduct. Although he remains on unsupervised probation until December 2015, this is not an indication that he cannot be trusted with sensitive information. On the contrary, Applicant’s compliance and completion of the terms of his sentence is indicative of his ability to follow rules and regulations.

Whole-Person Concept

I have no reservations about Applicant’s current reliability, trustworthiness, and ability to protect sensitive information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2. The purpose of a public trust eligibility determination is not to punish or sanction a person for their past actions. Rather the purpose is to make “an examination of a sufficient period of a person’s life to make an affirmative determination that the personal is an acceptable security risk.”¹³ Applicant made a mistake that demonstrates a lapse in judgment, but he does not have a history of misconduct of any kind that indicates he is unable to occupy a public trust position.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

¹⁰ AG ¶ 21.

¹¹ See AG 22(a).

¹² See AG 23(a).

¹³ AG ¶ 2(a).

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to assign Applicant to sensitive duties. Eligibility for a public trust position is granted.

Nichole L. Noel
Administrative Judge