



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-03956

**Appearances**

For Government: Stephanie C. Hess, Esquire, Department Counsel

For Applicant: *Pro se*

06/12/2015

**Decision**

DAM, Shari, Administrative Judge:

Applicant was convicted of underage drinking in 1996 and 1997. He was convicted of driving while intoxicated in 2007 and 2013. He remains on criminal probation until 2017. He failed to rebut or mitigate the trustworthiness concerns raised under Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct. His eligibility for a public trust position is denied.

On June 6, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On December 2, 2014, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct. 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); DoD 5200.2-R, *Personnel Security Program*, dated January 1987, as

amended (Regulation); and the adjudicative guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

On January 5, 2015, Applicant answered the SOR (Answer) in writing, and elected to have his case decided on the written record in lieu of a hearing. On February 9, 2015, Department Counsel prepared a File of Relevant Material (FORM), containing three Items. She mailed Applicant a complete copy of the FORM on February 23, 2015. Applicant received the FORM on March 20, 2015, and had 30 days from its receipt to file objections and submit additional information. Applicant did not submit any other information. On May 22, 2015, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all allegations contained in the SOR. His admissions are incorporated into the following findings.

Applicant is 38 years old and unmarried. He earned a bachelor's degree in 2000. In January 2009 he began his current position with a healthcare company. Before being hired by his employer, he worked as a consultant. (Item 2.)

Applicant has a history of alcohol abuse. He admitted that in May 1996 and August 1997, he was charged and found guilty of underage drinking. In September 2007 he was charged with driving while intoxicated (DWI) 3<sup>rd</sup> degree. He plead guilty to DWI 4<sup>th</sup> degree, was fined, and placed on probation for two years. In June 2012 he was charged with another DWI. In February 2013 he was convicted of the charge, fined, and placed on probation until March 2017. He did not present evidence that he has participated in a substance abuse evaluation or treatment program.

### **Policies**

Positions designated as ADP I, II, and III 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 the DoD and 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

Adjudicative Guidelines (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 AG ¶ 2(a), describing 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 the applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who applies for access to sensitive information seeks to enter 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 10865 provides that "Any determination under this order adverse to an applicant shall be a determination 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 trustworthiness 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.

AG ¶ 22 describes a condition that could raise a trustworthiness concern and may be disqualifying in this case:

- (a) alcohol-related incidents away from work, such as driving while 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; and
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

On four occasions Applicant consumed alcohol to the point of committing criminal violations, the two most recent of which involved impaired judgment while driving. The evidence raises the above trustworthiness concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

AG ¶ 23 provides conditions that could mitigate trustworthiness concerns raised under this guideline:

- (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);
- (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; 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 treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

None of the mitigating conditions apply. Applicant has a history of abusing alcohol, beginning in 1996 and continuing into 2012. He has been convicted of driving while intoxicated twice. Given the fact that his misconduct occurred on more than one occasion, AG ¶ 23(a) does not apply. There is no evidence that Applicant admits that he has an alcohol problem or has taken steps to address it. AG ¶ 23(b) does not apply. He did not submit evidence that he is participating in an employee assistance program for treatment of his problems. AG ¶ 23(c) does not apply. He did not provide documentation that he successfully completed treatment for alcohol related issues, and has received a favorable prognosis from a duly qualified health care provider. AG ¶ 23(d) does not apply.

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

AG ¶ 30 expresses the trustworthiness concerns pertaining 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.

AG ¶ 31 describes two conditions that could raise a trustworthiness concern and may be disqualifying in this case:

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

(d) individual is currently on parole or probation.

Applicant has been convicted four times for criminal conduct related to alcohol abuse. The last conviction was in February 2013, at which time he was placed on probation until March 2017. There is no evidence that his probation has been terminated early. The evidence raises both disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate trustworthiness concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; 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.

None of the mitigating conditions apply. AG ¶ 32(a) does not apply for the reasons articulated concerning AG ¶ 23(a) above. There is no evidence that Applicant was pressured into consuming alcohol to the point of impairment or that he did not commit the charges for which he was found guilty. AG ¶ 32(b) and AG ¶ 32(c) do not apply. Applicant did not present evidence of participation in substance abuse rehabilitation, remorse, good employment record, or any of the other factors listed in AG ¶ 32(d). It does not apply.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination 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 the facts and circumstances surrounding this case. Applicant is a 38-year-old man, who began working for a defense contractor in 2009. He has a history of alcohol abuse, which began while he was underage. Based on the evidence in the case file, in particular the fact that Applicant was placed on four years of probation in 2013, it appears that Applicant has a serious alcohol problem which he has not addressed. Overall, the record evidence leaves me with substantial questions as to Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude

Applicant did not meet his burden to mitigate the trustworthiness concerns arising from his alcohol consumption and 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 through 1.d:              Against Applicant

Paragraph 2, Guideline J:                      AGAINST APPLICANT

Subparagraphs 2.a and 2.b:                      Against Applicant

### **Conclusion**

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 eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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SHARI DAM  
Administrative Judge