

DATE: March 28, 2005

In re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 03-24546

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 31-year-old employee of a defense contractor. She has a history of criminal conduct. She had five incidents resulting in arrests and convictions for a variety of offenses, including assault, driving under the influence of alcohol, possessing marijuana, driving with a suspended license, and providing false information to a police officer. Applicant falsely concealed the records of her convictions within the preceding seven years when she applied for a position of public trust. Applicant completed rehabilitation programs, changed her lifestyle, and refrained from unlawful activity for many years, mitigating the security concerns arising from her criminal history. However, Applicant has failed to mitigate the security concerns arising from her false statement on her application. Applicant's eligibility for assignment to a sensitive position is denied.

STATEMENT OF THE CASE

On March 12, 2003, Applicant submitted an application for a position of public trust. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987), as amended and modified (the "Regulation"), and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On June 22, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the guidelines for Criminal Conduct and Personal Conduct in the Regulation. Although the SOR is styled as an ISCR case concerning an application for a security clearance, the case involves an application for a position of public trust.

Applicant answered the SOR in writing on July 17, 2004. She elected to have a hearing before an administrative judge.

The case was assigned to me on October 14, 2004. With the concurrence of the parties, I conducted the hearing on November 19, 2004. The government introduced five exhibits. Applicant presented five exhibits and testified on her own behalf. At Applicant's request, I left the record open so that she could submit an additional character statement, which was received and admitted on November 23, 2004. DOHA received the transcript (Tr.) on December 7, 2004.

FINDINGS OF FACT

Applicant denied the allegations in ¶ 2.a of the SOR, admitted the remaining factual allegations, and noted mitigating circumstances. Applicant's Answer to SOR, dated June 25, 2004, at 1. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

In December 1994, when she was 20 years old, Applicant and her boyfriend went to a party and got into a confrontation with other guests, resulting in a scuffle. Ex. 2 at 2. The next day, Applicant sought out some of those involved in the affray and challenged them to fight. *Id.* Applicant exchanged blows with one of the individuals. *Id.* The police cited Applicant with challenging another to fight in a public place, assault by means or force likely to inflict grievous bodily harm, and battery. Ex. 3 at 2. In February 1995, Applicant was convicted of assault and sentenced to ten days of community service. Ex. 2 at 3. Authorities dropped the charge of assault by means or force likely to produce grievous bodily harm. Tr. at 22.

In about February 1995, Applicant used a false identification card to get into a bar and consumed about eight beers in three hours. Ex. 2 at 5-6. She began driving her sister's truck home, but was pulled over by the police and cited with driving under the influence of alcohol and providing false identification to a police officer. *Id.* at 6; Ex. 3 at 2. In about April 1995, Applicant pled guilty and was fined \$2,500.00, was ordered to perform 15 days of community service, had her driving privileges suspended for one year, and was required to complete the first offender's program. Ex. 2 at 6-7.

In about March 1996, Applicant went to a wedding reception and consumed about eight drinks. Ex. 2 at 7. Her date began driving them home in her truck, but pulled over to be sick. *Id.* After waiting for several hours, Applicant attempted to drive home, but was stopped by the police for a burnt-out tail light. *Id.* The patrolman arrested Applicant for driving under the influence of alcohol. *Id.*; Ex. 5. In August 1996, Applicant pled guilty to driving under the influence of alcohol. Ex. 2 at 8. The court sentenced her to: a \$2,900.00 fine; 30 days community service; a \$250.00 assessment for police services; completion of an 18-month multiple-offender's program; home confinement for 30 days; and indefinite suspension of her driver's license. Ex. 2 at 8. She was also required to have a interlock (alcohol-sensing) device installed in her vehicle for one year at her expense. *Id.* Applicant subsequently completed the court-ordered requirements. *Id.* at 8-9.

In May 1996, while the drunk-driving charge was pending, Applicant was working the late shift at a restaurant. Ex. 2 at 3. After work, she and a friend parked her truck behind a shopping center to talk and drink beer. *Id.* A police officer investigated, examined the vehicle, and found a pipe used to smoke marijuana by the passenger seat. *Id.* Applicant asserts the drugs and paraphernalia belonged to her friend, but she pled guilty to illegal drug possession and was sentenced to one year probation and a \$100.00 fine. *Id.* at 4.

Thereafter, Applicant had a traffic offense, resulting in the suspension of her license. Ex. 2 at 4. She attempted to arrange rides to work and to care for her son, but was not always able to do so. In June 1999, Applicant was driving to work and was stopped by the police for speeding. Ex. 2 at 4. She lied and told the officer she had forgotten her license. *Id.* She also gave the officer a false name (her sister's name) fearing he would discover her license was suspended. *Id.* A subsequent investigation revealed Applicant had lied about her name. She was cited for driving with a suspended license, providing false information to a police officer, speeding, and failing to provide evidence of insurance. *Id.* at 5. In August 1999, Applicant pled guilty to the charges and was sentenced to ten days in custodial community service, three year's probation, and a \$500.00 fine. *Id.*

Applicant attended a local college beginning in 1999 and received an associate's degree in May 2001. Ex. 1 at 2. She is presently a full-time student at a local university pursuing a bachelor's degree. Tr. at 23. She was named to the college's Honor Roll for her scholastic achievement. Ex. A. Applicant is 31 years old. Ex. 1 at 1. She is the sole provider for her 6-year-old son. *Id.* at 4.

In about March 2003, Applicant began working for a defense contractor as a data analyst. Tr. at 24. Applicant's managers and supervisors praise her skill, initiative, and dependability. Ex. C; Ex. D.

On March 12, 2003, she completed an SF 85P, Public Trust Position Application. Ex. 1 at 1. Question 16 of the application inquired whether she had been arrested for, charged with, or convicted of any offenses within the last seven years. Applicant answered, "yes" but listed only a traffic offense in October 2000.

At the hearing, Applicant indicated that she did not intend to mislead the government by her response to question 16 on the application. She indicated that, at the time she completed the application, she did not remember the date of the June 1999 incident. Tr. at 20. She stated that by answering "yes" to the question, she was admitting to having a police record and she thought that she would have the opportunity to explain it all to an investigator. *Id.* She indicated that she did not report the incidents in 1995 and 1996 because she thought they occurred more than seven years before date of the application.

Applicant acknowledged having some difficulties in the past, but asserted that she has completely changed her lifestyle. Tr. at 19, 21-22. She attributes this change to her acceptance of the responsibilities associated with her pregnancy, the need to care for her young son, her completion of the 18-month alcohol awareness program, her completion of the one-year interlock program, her enrollment and success in college, and not associating with former friends. Tr. at 19-23.

POLICIES

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). In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (August 4, 1995), the President provided that eligibility for access to classified information shall be granted only to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information."

To be eligible for assignment to sensitive duties, an applicant must meet the security guidelines contained in DoD 5200.2-R. "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." DoD 5200.2-R, ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Criminal Conduct - A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness.

Personal Conduct - Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"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 security clearance." DoD 5200.2-R, Appendix 8. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (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 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. *Id.*

DoD contractor personnel are afforded the right to the procedures contained in DoD Directive 5220.6 before any final unfavorable access determination may be made. DoD 5200.2-R, ¶ C8.2.1. Initially, the Government must present

evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Criminal Conduct

According to the Criminal Conduct guideline in Appendix 8 of the Regulation, a "history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." The Regulation sets out several potentially disqualifying conditions related to criminal conduct.

Disqualifying condition (DC) 1 under the Regulation arises where there is evidence of "any [criminal] conduct, regardless of whether the person was criminally charged." Similarly, DC 2 may apply where there is "a single serious crime or multiple lesser offenses." Applicant admits, and the government's evidence shows, that she committed offenses in December 1994, March 1996, May 1996, July 1996, and July 1999. Considering the nature of the offenses and the punishment imposed, I find the substantial evidence demonstrates criminal conduct, specifically multiple lesser offenses. I conclude DC 1 and DC 2 apply.

Under the Regulation, certain conditions may mitigate security concerns arising from a history or pattern of criminal conduct. Mitigating condition (MC) 1 arises where "the behavior is not recent." Most of Applicant's offenses and convictions occurred in 1995 and 1996, almost ten years ago. Her most recent offense happened in about July 1999, over five years ago. Under the circumstances I conclude MC 1 applies.

Under MC 2 of the Regulation, it may be mitigating where "the crime was an isolated event." Applicant had several offenses and convictions related to substance abuse, therefore I find they were not isolated events. Similarly, Applicant's record includes several traffic offenses and false statements to official inquiries. I conclude this potentially mitigating condition does not apply.

Mitigating condition 4 applies where "the factors leading to the violation are not likely to recur." Similarly, MC 5 must be considered where "there is clear evidence of successful rehabilitation." Applicant committed several offenses involving abuse of alcohol or drugs. Thereafter, she successfully completed an 18-month alcohol awareness program, and went one year with an interlock device on her automobile. She has also changed her lifestyle. She is the sole provider for her young son, she is enrolled in college and is a superb student, and she is working for a defense contractor in a position of some responsibility. I find MC 4 and MC 5 apply in this case.

I considered the all the facts and circumstances in light of the "whole person" concept. Applicant knowingly and voluntarily committed numerous substance-abuse offenses within a short time. At first, she seemed undeterred by the courts' corrective measures. At the same time, the offenses occurred when Applicant was young and less mature than today. No doubt, her former associates contributed to her criminal involvement. Since then she has completed rehabilitation programs and made significant changes in her lifestyle, greatly reducing the likelihood of continuation or recurrence. Balancing all the information, I conclude Applicant has mitigated the security concerns arising from her history or pattern of criminal conduct.

Personal Conduct

Under the Regulation, personal conduct demonstrating "questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations" may indicate that an individual may not properly safeguard classified information. The Regulation lists several potentially disqualifying conditions relating to personal conduct.

Disqualifying condition 2 provides that it is potentially disqualifying where there is substantial evidence of "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, or award fiduciary responsibilities." Applicant completed an SF 85P, Public Trust Position Application, on March 12, 2003. Ex. 1 at 1. The form is used to gather information to determine whether an applicant is qualified to hold a position of trust, similar to a security clearance. Question 16 inquired whether Applicant had been "arrested for, charged with, or convicted of any offenses" within the preceding seven years. Applicant did not report four offenses resulting in her arrest and conviction within the seven-year period. Although Applicant asserts her omission was unintentional, I do not find her contentions persuasive. Where an individual has a substantial history of criminal arrests and convictions, a formal inquiry about those incidents would make a reasonable person pay significant attention. Thus, Applicant's explanation that she forgot the dates, or did not realize her arrests and convictions fell within the seven-year period, is not plausible. Moreover, she had a more recent arrest and conviction stemming from the July 1999 incident; even if she could not recall the exact date, she would have known it was within the last seven years. I find Applicant deliberately omitted and concealed the information relating to her criminal history and that the information was relevant and material. I conclude this potentially disqualifying condition applies.

The Regulation provides that security concerns raised by personal conduct may be mitigated under certain circumstances. Mitigating condition 1 arises when "the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." I considered carefully the information which formed the basis for the disqualifying conditions, above, and find that it was substantiated and pertinent to a determination of Applicant's judgment and reliability. Therefore MC 1 does not apply.

Mitigating condition 2 applies where "the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Applicant's false statement on her application for a position of trust was not an isolated incident. She had previously provided false information to a police officer regarding her identity when stopped for a traffic offense. I conclude this potentially mitigating condition does not apply.

Under MC 3 of the Regulation, it may be mitigating where "the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." When interviewed by the security investigator, Applicant was forthcoming about her offenses and convictions. However, Applicant has not shown that she came forward with this information before being confronted with the facts. I conclude MC 3 does not apply. Nonetheless, Applicant's later forthrightness about her background is one of the facts and circumstances to be weighed in this case.

I considered carefully the other potentially mitigating conditions. I find none of them apply in this case.

I considered all the available evidence in light of the "whole person" concept discussed above. At the time Applicant completed the application, she was 28 years old—a mature and responsible adult who could appreciate the significance of making a false statement on an official application. Indeed, Applicant had already experienced the adverse results of having made a false statement to a police officer in 1999. She no doubt appreciated the potentially negative consequences of revealing her history of convictions. As a single parent solely responsible for supporting her young son while trying to work and complete a college degree, Applicant faces many pressures. Unfortunately, when faced with the possible adverse consequences of revealing negative information, she has not always made good choices. Although Applicant has made significant behavioral changes with regard to substance abuse, her more-recent pattern of false official statements makes me hesitate to find that it is clearly consistent with the national security for Applicant to occupy a sensitive position. I conclude Applicant has not mitigated the security concerns arising from her personal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Criminal Conduct: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Paragraph 2, Personal Conduct: AGAINST APPLICANT

Subparagraph 2.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 interests of national security to grant Applicant's eligibility for assignment to sensitive duties. Eligibility is denied.

Michael J. Breslin

Administrative Judge