

DATE: June 30, 2006

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 04-10249

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmonds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 40 years old and works as a program analyst for a federal contractor. He has a history of alcohol abuse and alcohol related criminal charges that extend from 1985 to 1999. In the summer of 1999, he participated in a four-month alcohol rehabilitation program; however, in the fall of 1999, he was involved in a car accident after he consumed alcohol. He stated he continued to consume alcohol until 2004. He did not present any credible evidence of alcohol rehabilitation or treatment documenting sobriety, sufficient to mitigate the trustworthiness concerns raised by alcohol abuse and criminal conduct. He did mitigate those concerns raised by his personal conduct. His eligibility for assignment to a sensitive position is denied.

STATEMENT OF THE CASE

On June 7, 2003, Applicant submitted a public trust position application (SF-85P). 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 Security Personnel Review Program* (Jan. 2, 1992), as amended and modified, (the"Directive"). On January 19, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guideline G (alcohol consumption), Guideline J (criminal conduct), and Guideline E (personal conduct) of the Directive.

In a sworn statement, dated February 11, 2006, Applicant responded to the SOR allegations and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the government's file of relevant material (FORM), containing nine Items, on March 23, 2006. The FORM was mailed to Applicant on March 24, 2006, and received on April 3, 2006. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. On June 5, 2006, Applicant submitted additional information to which Department Counsel did not object. Those materials are marked as Item 10. This case was assigned to me on June 14, 2006.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR, I make the following additional findings of fact:

Applicant is 40 years old. From 1983 to 1987, he was on active duty in the armed services. During that time he held a top-secret clearance. After leaving the service, he held various jobs with private industry. Since June 2003, he has worked as a program analyst for a federal contractor, and has recently been promoted. He is married and has two children.

Applicant admitted that from approximately 1985 until May 2004, he consumed alcohol, at times to the point of intoxication, the last time being in November 1999. Over the course of those years he was charged with public intoxication, and transported by the police to an alcohol facility at least seven times: March 1985, June 1989, July 1990, December 1990, July 1991, April 1993, and November 1993. On each occasion he was held overnight to "sleep off the alcohol." (GX 6 at 1)

During that same period, Applicant was arrested three times for drunk driving. In June 1994, he was charged with (Count 1) Driving Under the Influence, and (Count 2) Possession of a Controlled Substance (marijuana). He pleaded Nolo Contendere to Count 1, was sentenced to 24 hours in jail, and fined \$182.00. He pleaded guilty to Count 2, and was placed on probation.

In August 1996, Applicant was arrested, and charged with (Count 1) Driving Under the Influence, (Count 2) Driving with Revoked License, (Count 3) Improper Registration, and (Count 4) No Insurance. He pleaded Nolo Contendere to Count 1, and was sentenced to 24 hours in jail and assessed costs of \$207. He was found guilty of Count 2, fined \$187, and sentenced to six months in Jail. Counts three and four were dismissed.

In July 1998, Applicant was arrested and charged with (Count 1) Driving While Intoxicated -Third Offense, and (Count 2) Driving While License Revoked. He pleaded guilty to Count 1, and was sentenced to not less than one year and no more than three years in prison. He also pleaded guilty to Count 2, and was sentenced to six months in jail, which sentence was to run consecutively with the prison sentence imposed for Count 1. He was also fined \$100, and served the jail sentence through home detention for 25 months beginning in May 1999. His driver's license was suspended for life in August 1998; however, he will be able to re-apply for it in August 2008. (Item 3 at 5)

In April 1999, Applicant was arrested and charged with (Count 1) Driving Under the Influence -Third Offense, Felony, and (Count 2) Driving While License Revoked for Driving Under the Influence. He had a breath alcohol level of .20%. The case was dismissed after he entered a plea in May 1999 for the July 1998 case.

From April 1999 to July 1999, Applicant was an outpatient at an alcohol treatment facility and diagnosed as alcohol dependent. Subsequent to receiving treatment, Applicant was involved in a serious car accident in November 1999, after consuming alcohol. The police found several open containers of alcohol in his wrecked car after the accident. He admitted that he drove a vehicle and consumed alcohol in violation of his court sentence, but claimed he had permission to leave his house to go to work. (Item 10 at 3)

In January 2001, Applicant was charged with Destruction of Property after an incident with his neighbor. That case was dismissed.

In his February 2006 Answer, Applicant stated "I have not consumed alcohol since my diagnosis of Diabetes in August 2004." (Item 3 at 6) However, he did not submit any evidence documenting his sobriety, or participation in any form of alcohol treatment since his treatment in the summer of 1999 or following the November 1999 incident. In fact, he confirmed that the 1999 treatment was the last program he attended in his Answer to the SOR. He stated "I have successfully completed an outpatient alcohol rehabilitation program at [a local facility] as you have documented." (Item 4 at 6)

When Applicant completed his SF-85F in June 2003, he certified that his answers were true, complete and correct to the best of his knowledge. In response to Question 20. Your Police Record (*In the last 7 years, have you been arrested for,*

charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150.00), he answered "Yes," and listed the 1998 DUI, but did not list the August 1996, April 1999 or January 2001 cases. He explained that he did not list the 1996 DUI because he thought it occurred outside of the seven-year period, but later acknowledged that he should have listed it, as it fell within the requested time frame by two months. He did not disclose the other two cases because they were dismissed and he did not think about them. These are plausible explanations, given the fact that he disclosed his 1998 DUI.

According to the applicable public intoxication law, the police are authorized to arrest any individual without a warrant, who appears to be intoxicated or incapacitated while in a public place. They are then permitted to transport the person to a medical facility or their own residence. Charges brought under this statute are generally considered to be misdemeanors. (Items 8 and 9) In Applicant's February 2006 Answer and his June 2006 supplemental response, he denied the allegations alleged in SOR ¶¶ 1.b through 1.i on the basis that he was not "arrested," despite admitting in a previous written statement that he was charged with public intoxication in all of those instances, and taken to a medical facility. (Item 6) Clearly, Applicant was arrested for (and subsequently charged with) public intoxication under the state law.

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) (Aug. 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 guideline 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:

Guideline G - Alcohol Consumption: A trustworthiness concern arises when excessive alcohol consumption leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information.

Guideline J - Criminal Conduct: A trustworthiness concern may exist when a pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Guideline E - Personal Conduct: A trustworthiness concern may arise when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person 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 requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

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 for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability. ISCR Case No. 95-0611 at 3 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *See* 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." *Id.*

CONCLUSIONS

I considered all of the facts in evidence and the application of the appropriate legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the SOR:

Guideline G: Alcohol Consumption

The Government established a potential case for disqualification under this guideline. Four of the disqualifying conditions apply: (1) Alcohol Consumption Disqualifying Condition ("AC DC") 1 (*Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*). From 1985 to 2004, Applicant was arrested, and charged with conduct related to alcohol consumption on eleven separate occasions. (2) AC DC 3 (*Diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence*). Applicant admitted that in 1999 he was diagnosed as alcohol dependent. (3) AC DC 4 (*Habitual or binge consumption of alcohol to the point of impaired judgment*). Applicant admitted that he has a 19-year history of habitually consuming alcohol to the point of intoxication and impairment over the course of that history. (4) AC DC 5 (*Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program*). Applicant consumed alcohol to the point of intoxication within months of being diagnosed as alcohol dependent and after completing a four-month rehabilitation program. He subsequently continued to drink to some degree for the several years.

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all four of the Alcohol Consumption Mitigating Conditions (AC MC), I concluded that none applies. (1) Applicant has a history of alcohol problems spanning 19 years and demonstrating a pattern of abuse, such that AC MC 1 (*The alcohol-related incidents do not indicate a pattern*) does not apply. (2) Based on his admission that he continued to consume alcohol up to August 2004, AC MC 2 (*The problem occurred a number of years ago and there is no indication of a recent problem*) is not applicable. (3) Applicant stated that he stopped drinking in August 2004, but did not provide any evidence to substantiate his sobriety. His lone assurances that he no longer consumes alcohol, and the absence of any criminal conduct since 1999, are insufficient evidence to support a finding of behavioral change required under AC MC 3 (*Positive changes in behavior supportive of sobriety*). (4) AC MC 4 (*Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a*

similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program) is not applicable. He did not provide any credible evidence that would support the application of this condition. Accordingly, Applicant failed to mitigate the security concerns raised by his alcohol consumption, and all allegations contained in the SOR under Guideline G, except ¶ 1.c for which no evidence was presented, are decided against him.

Guideline J: Criminal Conduct

Based on the evidence, the Government established a potential case for disqualification under Guideline J, specifically, Criminal Conduct Disqualifying Condition (CC DC) 1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), and CC DC 2 (*A single serious crime or multiple lesser offenses*). Applicant admitted the multiple allegations of criminal conduct noted in the SOR, which consisted of lesser offenses.

I reviewed all of the mitigating conditions under this guideline, in particular, two of them, and concluded neither of them applies. (1) As there are eleven incidents of criminal conduct, CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), is not applicable. (2) Applicant did not submit any substantive evidence of rehabilitation for his alcohol problems or in corroboration of his February and June 2006 statements that he no longer consumes alcohol; thus, CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), cannot apply. Although the last criminal incident occurred in 1999, and provided some mitigation under Criminal Conduct Mitigating Condition (CC MC) 1 (*The criminal behavior was not recent*), it is inadequate to mitigate his 19-year history of alcohol problems, and specifically, his continued consumption of alcohol after completing a rehabilitation program. Accordingly, Applicant failed to mitigate the security concerns raised by his criminal conduct, and the allegations under Guideline J are decided against him, with the exception of ¶ 2.a that was a criminal charge subsequently dismissed, and ¶ 2.c that relates to the allegations under Guideline E, which are found in his favor.

Guideline E: Personal Conduct

The Government alleged that Applicant falsified his SF-85P by failing to disclose three incidents of criminal conduct, which constituted a disqualification under Personal Conduct Disqualifying Condition (PC DC) 2 (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). Applicant denied those allegations.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant's explanation that he failed to disclose three criminal incidents because he miscalculated the date of one conviction, and did not think of the two other charges that were dismissed, is plausible, and sufficient to mitigate the Government's allegations. Hence, the allegations contained in SOR ¶ 2.c and ¶ 3.a are concluded in his favor. Accordingly, Guideline E is decided for him.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

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 as follows:

Paragraph1: Guideline G (Alcohol Consumption) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Subparagraph 1.n: Against Applicant

Subparagraph 1.o: Against Applicant

Subparagraph 1.p: Against Applicant

Paragraph 2: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Paragraph 3: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraph 3.a: For 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. His application for eligibility is denied.

Shari Dam

Administrative Judge