

DATE: September 11, 2006

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In re:

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SSN: -----

Applicant for ADP I/II/III Position

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P Case No. 04-10856

## **DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 23 years old. He works for a defense contractor. He was arrested in November 2002 for possession a controlled substance in his car. Next, he was arrested for driving while intoxicated in November 2003 and pled guilty. His next driving while intoxicated arrest occurred in May 2004. His blood alcohol content in both arrests was .17%. His final arrest was for driving while revoked and without insurance in July 2004. He pled guilty to one offense in each case. He deliberately did not disclose the July 2004 arrest in his September 2004 statement to the Government investigator. He did not mitigate the criminal conduct, the alcohol consumption, personal and trustworthiness concerns. His eligibility for assignment to sensitive positions is denied

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue Applicant's eligibility for assignment to computer-related positions-ADP I/II/III. On April 13, 2006, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of the Directive<sup>(2)</sup>. Applicant answered the SOR in writing on May 6, 2006. Applicant requested his case be decided on the written record in lieu of a hearing.

On June 1, 2006, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not file a response to the FORM. The Department Counsel moved to amend the SOR to correct the SOR by deleting the reference to Guideline J in Paragraph 3, and substituting Guideline E and the paragraph of "concern" language. Applicant was given the opportunity to respond to the written motion. He did not file a response to motion or the FORM. I granted the motion and the SOR is amended. The case was assigned to me on August 1, 2006.

### **FINDINGS OF FACT**

Applicant admitted all the SOR allegations. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 23 years old. He works for a defense contractor. (Item 4)

Applicant was arrested on November 9, 2002, on a traffic violation. A small amount of crystal methamphetamine was found in his automobile. He claims it was not his, but belonged to a person to whom he gave a ride home that night. The police charged him with a felony of 3<sup>rd</sup> degree possession of a controlled substance. This charge was later amended to a felony of 5<sup>th</sup> degree possession of a controlled substance. He pled guilty, was fined \$2,000, payable in \$250 credits for each negative urine sample he submitted for drug testing, given three years probation, and had to attend a 72 hour chemical dependency class in eight hour blocks of time. (Items 3, 5, 6)

Applicant was arrested on November 20, 2003, for driving while intoxicated with a blood alcohol content (BAC) of more than .10%. His BAC was .17%. The police charged him with two 4<sup>th</sup> degree driving while intoxicated charges. He pled guilty to the second one. The first one was dismissed in the plea bargain. He was fined \$400, ordered to serve 30 days in an alcohol treatment facility, his driver's license was revoked, and he was given one year probation. (Items 3, 5, 6)

Applicant was next arrested on May 3, 2004, and charged with 3<sup>rd</sup> degree driving while intoxicated that was later amended to careless driving, and 3<sup>rd</sup> degree driving while intoxicated with a BAC of more than .10% within two hours of driving. His BAC was .1701%. He pled guilty to the first charge, and the second was dismissed in the plea bargain. He received one year of probation and a \$365 fine. (Items 3, 5, 6)

Applicant's next arrest occurred on July 12, 2004, for driving on a revoked license and without insurance. He pled guilty to the driving without insurance charge, and was sentenced to 30 days in jail and a fine of \$500. The driving while revoked charge was dismissed. (Items 3, 5, 6)

Applicant admits he deliberately failed to disclose his July 12, 2004, arrest in the statement he gave to the Government investigator on September 2, 2004. He disclosed only the drug arrest, and the two earlier driving while intoxicated arrests. (Items 3, 5, 6)

### POLICIES

As Commander in Chief, 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). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). By direction of the Under Secretary of Defense for Counterintelligence and Security, adjudications of cases forwarded to DOHA by the Defense Security Service or the Office of Personnel Management (OPM) for a trustworthiness determination shall be conducted under the provisions of the Directive. Eligibility for a position of trust is predicated upon the applicant meeting the guidelines contained in the Directive and a finding it is clearly consistent with the national interest to do so. See Directive ¶ 2.3. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his trustworthiness determination." See Directive ¶ E3.1.15

The adjudication process is based on the whole person concept. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required. The decision to deny an individual eligibility to occupy a position of trust is not necessarily a determination as to the loyalty of the applicant. See Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a such a determination.

In evaluating the trustworthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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 to occupy a position of trust. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his trustworthiness determination. ISCR Case No. 01-20700 at 3 (App. Bd. 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

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.* E2.A10.1.1

Guideline G: Alcohol Consumption: *The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.* E2.A7.1.1

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

## CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant has not submitted any information that mitigates the allegations.

Regarding the criminal conduct concern, Disqualifying Conditions (DC) 1 (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2) apply. Applicant has four arrests in 20 months, one involving possession of a controlled substance, and two involving driving while intoxicated with both BAC at .17%, the legal maximum being .10%. There are no Mitigating Conditions (MC) applicable to these facts. Therefore, I conclude this trustworthiness concern against Applicant.

The alcohol consumption trustworthiness concern is evidenced by Applicant's heavy consumption of alcohol to the level of intoxication with BAC of .17% in two consecutive incidents. DC 1 (Alcohol-related incidents away from work, such as driving while under the influence of alcohol. E2.A7.1.2.1) and DC 5 (Habitual or binge consumption of alcohol to the

point of impaired judgment. E2.A7.1.2.5) apply. There are no MC applicable to these facts. I conclude this trustworthiness concern against Applicant.

Finally, the personal conduct trustworthiness concern has DC 3 (Deliberately providing false or misleading information concerning relevant and material matters to an investigator or other official representative in connection with a personnel security or trustworthiness determination. E2.A5.1.2.3) applicable. Applicant admits he deliberately falsified the information in the statement he gave to the Government investigator during the course of his trustworthiness investigation. There are no MC applicable. I conclude this trustworthiness concern against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.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 national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. Adjudications are required for all persons applying for security clearances or assignment to sensitive duties. DoD 5200.2-R ¶ C2.1.1 (Jan 1987). ADP I positions are a critical-sensitive; ADP II positions are noncritical-sensitive; ADP III positions are nonsensitive. *Id.* at AP 10.2. DoD contractor personnel are authorized the procedural benefits set forth in DoD Directive 5220.6. *Id.* at C8.2.1. The regulation does not require adjudication for nonsensitive positions such as ADP III. DoD Directive 5220.6 ¶ 2.4 states that the Directive "[p]rovides a program that may be extended to other security cases at the direction of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD(C3I))." Nevertheless, the Deputy Undersecretary of Defense for Counterintelligence and Security ordered that ADP III positions would also require adjudication as if they were sensitive positions., Memo from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004). However, it does not appear that decision was ever sent out for comment or

formally published, as required by 5 U.S.C. § 552(a)(1)(D).