

DATE: September 19, 2006

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 05-00199

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 27 years old and works for a company that administers government health benefits. She has a criminal history that includes disorderly conduct charges from her youth. She mitigated the trustworthiness concerns raised by her criminal conduct. Her eligibility for assignment to a sensitive position is granted.

STATEMENT OF THE CASE

On June 13, 2002, 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 (Regulation), and Department of Defense Directive 5220.6, *Defense Industrial Security Personnel Review Program* (Jan. 2, 1992), as amended (Directive). On May 12, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guideline J (Criminal Conduct) of the Directive.

In a sworn statement, dated June 6, 2006, Applicant responded to the SOR allegations and requested a hearing. On June 20, 2006, the case was assigned to another administrative judge and reassigned to me on August 3, 2006. A Notice of Hearing was issued that day, setting the case for hearing on August 22, 2006. At the hearing the Government introduced exhibits (GX) 1-5 into evidence without objections. Applicant testified in her case-in-chief and introduced exhibit AX A into evidence without an objection. The record was left open until September 8, 2006, to give Applicant an opportunity to submit additional evidence in mitigation of the allegations. Applicant submitted additional documents to Department Counsel on August 30, 2006, that I marked AX B-L and admitted into evidence without objections. DOHA received the hearing transcript (Tr.) on September 1, 2006.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in her answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 27 years old and the sole support for her two small children. For the past five years she has worked in customer services for a company that processes government health benefits. (Tr. 14)

She graduated high school in 1997 and enrolled in an eight-month job corps training program in 1998. (Tr. 36)

In April 1996, Applicant was cited for disorderly conduct after she engaged in a physical fight with another woman. She was fined \$140, which remains unpaid. ⁽¹⁾ Her driver's license was suspended for a period of time. (Tr. 16-17) She was 16 years old.

In November 1998, Applicant was arrested and charged with Damage to Property and Disorderly Conduct, both misdemeanors, after engaging in a physical fight with some women and later damaging someone's car. In February 2000, she pleaded No Contest, was found guilty and fined \$662. She paid the fine in July 2000 after a warrant was issued for her arrest.

In November 2000, she was arrested and charged with Disorderly Conduct and Use of Dangerous Weapon after she had a heated altercation with her former boyfriend and threatened him with a knife. She pleaded guilty in January 2003, was sentenced to 12 months probation and ordered to pay court costs of \$125. She was referred to the Certified Abuser Treatment Program, which she attended twice a week from January 2003 through March 2003. She completed probation on January 2, 2004. (Tr. 22)

During the three-month program, she worked on anger management issues, parenting skills and women related issues. She believes the course changed the quality of life for her and her children. As a consequence of participating in the course, she eventually left her boyfriend, who had physically abused her. (Tr. 30, 38, and 42)

According to her current supervisor, Applicant "has been known to go above and beyond the expectations when trying to assist her customers. She is a very good employee." (AX A) Her former manager for three years states Applicant is a hard worker and has good relationships with her co-workers and other supervisors. (AX C) Her Performance Evaluations for the past five years consistently note that she achieves expectations in most categories. (AX E-L) Over the course of her employment, she has been working with sensitive information. (Tr. 48) She appreciates her job and the stability it provides to her life. (Tr. 47)

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 guideline at issue in this case is the following:

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

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 sensitive 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 sensitive information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise sensitive information. Any doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting sensitive information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual access to sensitive information 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 or sensitive 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 facts in evidence, the appropriate legal standards, including the "whole person" concept, and Applicant's credibility. The Government established a potential case for disqualification under Guideline J.

Based on the evidence, two disqualifying conditions (DC) apply: DC 1: *Any conduct, regardless of whether the person was formally charged*, and DC 2: *A single serious crime or multiple lesser offenses*. Applicant admitted she was convicted of three crimes, which involved disorderly conduct and aggressive behavior.

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. The last incident of criminal conduct occurred in November 2000, almost six years ago, and there is no indication of a recent problem. Thus, MC 1: *The behavior was not recent* applies. Subsequently, Applicant completed a behavioral management program in March 2003 that significantly impacted and improved her and her children's life. She has new tools for managing personal issues, as indicated by the absence of additional misconduct and the presence of positive employment evaluations for the last five years. Based on those facts, MC 5: *There is clear evidence of successful rehabilitation*, is applicable.

In addition to the enumerated disqualifying and mitigating conditions, I considered Applicant's young age at the time of the criminal conduct, her present maturity and concern for her children. I also took into account her recognition of her previous misconduct, the lack of evidence that she has mishandled sensitive material, as well as the likelihood that she will monitor her behavior in the future due to a desire to maintain her employment.

After weighing the disqualifying and mitigating factors and evaluating the evidence in the context of the whole person, I

conclude Applicant mitigated the security concerns raised by her prior criminal conduct. Accordingly, all allegations contained in the SOR under Guideline J are decided for her.

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 J (Criminal Conduct) FOR APPLICANT

Subparagraphs 1.a through 1.c: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Her application for eligibility is granted.

Shari Dam

Administrative Judge

1. There is no evidence that any legal action has been initiated to collect the unpaid fine.