

DATE: October 30, 2006

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 05-11195

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 47 years old, unmarried, and is a medical records specialist for a government health care provider. Applicant had several arrests in the 1990s for driving while intoxicated and assaults. She did not disclose these arrests on her trustworthiness applications in 2003 and 2004. Applicant mitigated her criminal conduct and personal conduct trustworthiness concerns. Her eligibility for assignment to sensitive positions is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a Applicant's application for a position of trust⁽¹⁾. On February 6, 2006, DOHA issued a Statement of Reasons⁽²⁾ (SOR) detailing the basis for its decision-trustworthiness concerns raised under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) and of the Directive. Applicant answered the SOR in writing on March 16, 2006. On June 15, 2006, I convened a hearing to consider whether to grant Applicant eligibility for a position of public trust. DOHA received the hearing transcript (Tr.) on June 26, 2006.

FINDINGS OF FACT

Applicant's admissions to all of the SOR allegations are incorporated here 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 47 years old, unmarried with a 21 year old daughter and a two year old grandson who live with her and whom she supports. She persuaded her daughter to get her GED and go to college. She works for a defense contractor as a medical records specialist. She has been employed there for 12 years. Applicant went to school in the 1990s for a medical lab technician and a medical assistant certificate in an effort to turn her life around from the way she had been living. Applicant left her home when she was 13 years old. (Tr. 16, 18, 41, 48)

In 1974 Applicant was arrested for prostitution. She was 16 years old. She was convicted and fined \$30 and court costs. She was arrested again for prostitution in May 1979. That charge was dismissed. (Tr. 17, 18; Exhibit 4)

In 1992, Applicant was arrested in January for driving while intoxicated (DUI) and reckless driving. She pled guilty to the DUI, paid fines and fees totaling \$200, attended an alcohol education program, and the reckless driving charge was dismissed. Then, on March 4th she was arrested for 2nd Degree Assault and non-family strong arm assault, but Applicant does not remember the circumstances of that incident and no disposition is known. Next, on March 31st she was arrested for DUI 2nd offense, reckless driving, and driving while suspended. No disposition of that arrest is known. In December 1992, Applicant was arrested for DUI, driving while suspended, wanton endangerment because her daughter was in the car when arrested, reckless driving, assault 2nd degree on a police officer, resisting arrest, disorderly conduct, and simple assault. Applicant was intoxicated when arrested. After the police stopped her car, she realized she needed to get her seven year old daughter home and thought the police were preventing her from doing so. Her home was nearby where she was stopped. Applicant pushed the policeman out of the way so she could get her daughter home. The police interpreted her actions as resisting arrest, simple assault, and disorderly conduct. Applicant was convicted of some of the charges but cannot recall which charges resulted in conviction. She was fined \$700, had her driver's license suspended, and was ordered to attend alcohol education classes. She completed those classes. (Tr. 19-24; Exhibits 3-8)

In 1996 Applicant was arrested in April for 4th degree assault, which was later dismissed. This incident involved an argument with her boyfriend. On July 14th she was arrested for DUI and reckless driving. No disposition of this arrest is known. On August 18th she was arrested for burglary 2nd degree, forced entry of a residence belonging to her boyfriend, violation of a protective order, and contempt of court. All these charges were dismissed, apparently after it became known her boyfriend invited her to his house even though he had a protective order against her, and then called the police attempting to endanger her job situation. Again, on September 26th, Applicant was invited to her boyfriend's house and was again arrested for burglary 2nd degree and forced entry into a residence. No disposition of that offense is known. On October 10th Applicant was indicted for operating a motor vehicle while impaired 4th offense, and reckless driving. She pled guilty to DUI and was sentenced to three years in jail with two years suspended, five years of supervised probation, \$65 in court costs, and ordered to attend alcohol education for one year. On June 23, 1997, she was placed on home incarceration program for the remainder of her sentence and granted work release. Her employer signed the paperwork for the work release, and she continues to work for that employer. The reckless driving charge was dismissed. (Tr. 28-36; Exhibits 3, 4, 9, 10)

In 1999, Applicant was arrested in July for operating a vehicle under the influence of intoxicants, and driving while suspended. She pled guilty to the intoxicated driving charge, was fined \$293 including fees, and ordered to attend an alcohol education program. The reckless driving charge was dismissed. On August 20th she was arrested for aggravated assault 4th degree spousal (*sic*) abuse when her daughter and niece accused her of hitting her daughter on the head. Her daughter would not attend school, instead going to the niece's house nearby. The daughter and niece later recanted their false accusations, but Applicant still went to an anger management course, after which the charge was dismissed. (Tr. 37-40; Exhibits 3, 10, 11)

In 2000, Applicant was charged with the violation of a local ordinance. Applicant does not remember the facts of this offense or what ordinance was violated. (Tr. 41)

Applicant completed public trust position applications (SF-85P) on August 26, 2003, and August 24, 2004. On both forms she answered Question 20 ("In the last seven years was she arrested for, charged with, or convicted of, and offenses?") with "no," not listing the offenses from September 1996 through 1999. Applicant did not list them because she failed to count backward correctly. She did not keep dates in her mind and thought several offenses were beyond the seven year period, was confused about the dates and the facts of the specific offenses, could not remember the facts and dates of several offenses, and decided in 1999 to change her lifestyle, "block out the bad stuff," and avoid legal troubles. Applicant did not knowingly and willfully fail to disclose her 1996 and 1999 offenses. (Tr. 19, 22, 24, 28, 30, 35, 41, 42, 44, 45, 51; Exhibits 1 and 2; Answer)

Applicant stopped drinking alcohol in 1999. She considered herself an alcohol abuser and she, after her court-ordered

alcohol education programs, decided on her own to quit drinking. She did not crave alcohol and did not get the "shakes." She drank to help her cope with the events of her life, and when she decided to change her life in 1999, she stopped drinking. She also changed her group of friends, including her former boyfriend, and does not go to bars to socialize anymore. (Tr.18, 38, 41, 47)

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 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. I have carefully considered all the facts in evidence and the legal standards.

Certain Disqualifying Conditions (DC) and Mitigating Conditions (MC) under each guideline apply.

Based on all the evidence, the criminal conduct trustworthiness concerns 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 had 14 criminal arrests in 25 years, involving DUI and assaults. She had one ordinance violation in 2000. She engaged in a pattern of unlawful behavior fueled by alcohol and an unfortunate lifestyle starting when she left her family home at 13.

MC 1 (The criminal behavior is not recent E2.A10.1.3.1) and MC 6 (There is clear evidence of successful rehabilitation E2.A10.1.3.6) apply. Applicant's last arrest on a criminal charge was in 1999, seven years ago. That time lapse is not recent. Applicant in 1999 decided she needed to reform her life, and did so successfully. She quit drinking, continued to work regularly, has not been arrested for any other offenses since 1999, and has been a law-abiding citizen. She supports her daughter and grandchild in her home, and encouraged her daughter to obtain her GED and attend college. Applicant successfully rehabilitated herself.

MC 3 (The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life E2.A10.1.3.3) may also apply because the two burglary arrests in 1996 were entrapments by her boyfriend who invited her to his residence and called the police to arrest her when she arrived. Also, the alcohol she drank for years and the company she formerly kept are no longer in her life creating whatever pressures they did. From 1999 onward she has not used alcohol and stopped associating with her former boyfriend. Therefore, I conclude this trustworthiness concern for Applicant.

Regarding the personal conduct concern, I found Applicant to be credible in her explanations that she was confused about the dates, and had tried to improve her life in part by putting the past out of it. She repeatedly testified she was confused about events and dates, could not remember the specific incidents, and confused several incidents between the years that they occurred. She did not deliberately omit, conceal, or falsify any incidents on the SF-85Ps. Considering her demeanor and testimony, and the volume of incidents, I found her credible, and I conclude no DC apply. Therefore, I conclude this concern for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a through 1.p: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: 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.

Philip S. Howe

Administrative Judge

1. Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of Department of Defense Directive 5220.6 (Directive). Memo from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004)
2. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and the Directive.