

DATE: November 17, 2006

In re:

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SSN: -----

Applicant for ADP I/II/III Position

P Case No. 06-00266

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is married, and works as a customer service representative for a Government medical insurance program for military members and their families. Applicant did not list her 2002 arrest for disorderly conduct on her 2003 and 2004 Questionnaires for Public Trust Positions because she knew her co-workers would discuss such information about her as they did about other co-workers. Applicant wanted to protect her privacy and does not engage in such conduct as do her co-workers. Applicant mitigated the criminal conduct and personal conduct trustworthiness concerns. 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 an application for a position of trust for Applicant<sup>(1)</sup>. On February 8, 2006, DOHA issued a Statement of Reasons<sup>(2)</sup> (SOR) detailing the basis for its decision-trustworthiness concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on April 11, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on May 11, 2006. On June 20, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a trustworthiness determination for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on July 5, 2006.

**FINDINGS OF FACT**

Applicant's admissions to 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 60 years old, married, and works for a defense contractor in the health care sector as a customer service representative. She works with military members, dependents, and retirees helping them obtain their medical benefits

and payment for them under government programs. She has worked there for 10 years. She currently earns \$26,000 annually. (Tr. 14, 15, 26)

Applicant was arrested on January 18, 1995, for battery and disorderly conduct. She and her husband were drinking alcohol. They were driving somewhere in their hometown. She scratched his ear from the back seat, and he hit her, breaking her nose and blackening both her eyes. The police arrested her because her husband persuasively accused her of the battery and disorderly conduct. She was knocked unconscious by him, and awoke in the police detoxification facility. The charges were dismissed in court because of her injuries. (Tr. 7, 8, 15-17; Exhibit 5)

Applicant was arrested again on May 4, 2002, in her residence and charged with two counts of disorderly conduct. She and her husband were at home drinking. After falling asleep, Applicant awakened to find police handcuffing her. Her husband later told her she walked out of the bedroom and told him she wished he were dead. He took her statement as a threat and called the police. Applicant's husband told her later he accused her in retribution for an earlier incident that resulted in him spending four months in jail. Applicant does sleepwalking after drinking alcohol. However, without the advice of an attorney, she pled guilty to disorderly conduct, and was put on probation for 18 months. She was also ordered to attend alcohol education and Alcoholics Anonymous (AA). She complied with that order, and still attends AA. She has not had a drink of alcohol in four years. She has had no further criminal arrests since 2002 due in large part to her cessation of drinking. Applicant has a family history of alcoholism, and had her first drink at age 3. (Tr. 17-22; Exhibits 3, 4)

Applicant completed the Questionnaires for Public Trust Positions, the SF-85P (85P), on December 5, 2003, and October 21, 2004. On both forms she did not list her arrests in the previous seven years. The only relevant arrest was the May 4, 2002, arrest for disorderly conduct. Applicant deliberately did not list the 2002 arrest because she did not want people at work to know of her alcohol and marital problems. Over the years she worked there, she heard co-workers talk about other employee's personal problems, and did not want them talking about her. (Tr. 22-25; Exhibits 1-3)

### 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

**Guideline J:** The Disqualifying Guidelines (DC) applicable are 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). Applicant's two arrests for battery and disorderly conduct place her within these DCs.

The Mitigating Conditions (MC) applicable are: MC 1 (The criminal behavior is not recent (E2.A10.1.3.1); 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); MC 4 (The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur. E2.A10.1.3.4); and, C 6 (There is clear evidence of successful rehabilitation. E2.A10.1.3.6). These offenses occurred eleven and four years ago, and hence, they are not recent. They are unlikely to occur because Applicant stopped drinking in 2002 and attends AA. While the alcohol played a role in these incidents, there is some question, based on the facts, as to whether she is culpable for either act. In both incidents her husband made the accusations. There was no evidence to support the first charge in 1995, and it was dismissed. In the 2002 incident, Applicant was asleep when she made an alleged threat, and the accusation was made in retribution by her husband for another incident involving him. The alcohol reduced the voluntariness of the acts because of her lack of control, and sleep walking in the second incident. Applicant's sobriety for four years shows successful rehabilitation. The first two allegations under this guideline are concluded for Applicant.

The allegation in subparagraph 1.c. is that Applicant knowingly and willfully withheld information from the Government, making that action a violation of 18 U.S.C. § 1001. Applicant admitted she deliberately did not disclose her 2002 arrest to protect her privacy from her gossipy co-workers. DC 1 and DC 2 apply. Under these facts, no MC apply. The falsification is recent, and the only pressure was that perceived in Applicant's mind about what her co-workers might say about her history. This part of the SOR is concluded against Applicant.

**Guideline E:** Regarding the failure to disclose her 2002 arrest on the 85P, DC 1 (Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. E2.A5.1.2.1), DC 2 (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 E2.A5.1.2.2), and DC 4 (Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4), apply. Applicant's falsification is based on reliable documentary information received from her employer. She admitted she did not list her 2002 arrest, and explained the reason for that deliberate omission. Keeping such information about her personal history from the Government when it was requested on the 85P potentially increases Applicant's vulnerability to coercion, blackmail, or duress.

There are no pertinent MC that can be applied to this deliberate and wilful falsification by Applicant. Therefore, under these guidelines I conclude the trustworthiness concern against Applicant.

### **Whole Person Analysis**

"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" assignment to sensitive positions, including trustworthiness decisions. (E2.2.1). Each trustworthiness decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy. Directive ¶ 6.3. "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." (E2.2.1). In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive.

Based on her experience in her workplace, Applicant did not disclose her 2002 arrest because she was trying to protect her privacy from co-workers, not hide it from the Government. Her job as a customer service representative in the medical insurance business involves protecting the privacy of all individuals, and she has done it successfully for 10 years. She realizes now she made a mistake which will not recur. It was only one arrest, not a pattern of arrests or criminal conduct. Furthermore, there is a valid question as to whether she actually committed any crime in 2002, and if she had the advice of an attorney those charges might also have been dismissed. At the time of her arrest in 2002, Applicant was 56 years old, and had a history of alcoholism. However, her alcoholism has been remediated over four years, she is more mature at 60 without the alcohol. Applicant is leading a sober lifestyle. There is no likelihood that the disorderly conduct or falsifications will recur because Applicant now understands her problems and the disclosure requirements of the 85P. Finally, I find Applicant to be credible and persuasive in her explanation of the reasons underlying these two incidents, and failure to disclose them on the 85P. Therefore, after weighing Applicant's reasons for failing to disclose the incidents along with other factors under the "whole person concept" of the Directive, I conclude this trustworthiness determination 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: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: 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 DoD Directive 5220.6 (Directive), pursuant to the memorandum 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.