

DATE: September 28, 2006

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In re:

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SSN: -----

Applicant for Trustworthiness Determination

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P Case No. 06-01064

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Sabrina E. Redd, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has abstained from alcohol since March 2004. She mitigated the trustworthiness concerns stemming from her alcohol use, her alcohol-related incidents, and her alcohol-related criminal conduct. Eligibility for a public trust position is granted.

### **STATEMENT OF THE CASE**

On August 18, 2004, Applicant submitted an application for a public trust position. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under the applicable Defense Department regulation and directive. [\(1\)](#) On March 13, 2006, DOHA issued a statement of reasons (SOR) detailing the basis for its action. The SOR--which in essence is the administrative complaint--alleges concerns about Applicant's trustworthiness under Guideline G for alcohol consumption and Guideline J for alcohol-related criminal conduct. Applicant replied to the SOR in writing on March 31, 2006. She elected to have a hearing before an administrative judge. The case was assigned to another administrative judge on May 31, 2006, and it was reassigned to me on July 30, 2006, due to caseload considerations. The next month a notice of hearing was issued scheduling the case for August 24, 2006. Applicant appeared without counsel and the hearing took place as scheduled. I left the record open until September 15, 2006, to allow Applicant to submit any additional documentary evidence, but no such matters were received. DOHA received the transcript (R.) September 11, 2006.

### **FINDINGS OF FACT**

Applicant's response to the SOR is mixed: she denies SOR subparagraphs 1.a and 2.a and provides explanations; and she admits SOR subparagraphs 1.b, 1.c, 1.d, 1.e and provides explanations. Her admissions and explanations are incorporated herein. In addition, I make the following findings of fact.

1. Applicant is a 56-year-old divorced woman. She is employed part-time, working three days per week, as a patient-

care coordinator for a company that provides services to the Defense Department's TRICARE Management Activity. She has worked in this job since July 1997. Her educational background includes a bachelor's degree in psychology. She has been a registered nurse (RN) since 1977, and she holds a current RN license in her state of residence. State licensing authorities have not taken any action against Applicant due to her alcohol use or her alcohol-related incidents (R. 61-63).

2. Applicant has a history of alcohol-related incidents involving the police, and these form the basis for the SOR allegations. The four incidents as alleged in the SOR and her history of alcohol consumption are discussed below.

3. Applicant has drunk alcohol in the past, although she has abstained since March 2004 and there is no evidence of a current alcohol problem. During 1986-1995, she became heavily involved in competitive running where drinking alcohol was frowned upon as counterproductive to the training program. As a result, she drank little during these years. During 1996-1999 she drank no alcohol. During 2000-2004, she describes herself as a social drinker.

4. In June 1985, Applicant was arrested and charged with driving under the influence (DUI). She pleaded no contest to the charge and was found guilty. Her sentence included 50-hours community service, probation for six months, attending driving school and alcohol classes, and fines and court costs of about \$250. In her reply to the SOR, she explained that this DUI came about because, following dinner with her father, she drank too much wine and attempted to drive home.

5. In February 1987, Applicant was arrested and charged with DUI. In her reply to the SOR, she admitted the arrest and charge, but denied drinking alcohol before driving. Instead, she explained that she was driving her car while emotionally upset and preoccupied and thereby operated her car in such a way as to justify a traffic stop. She refused the breath test fearing it could produce an erroneous result. The case went to trial and the court found her not guilty after a bench trial.

6. In February 1996, Applicant was arrested and charged with DUI. She pleaded no contest and was found guilty. Her sentence include probation for one year, attending driving school and alcohol classes, and fines and court costs of about \$730. In her reply to the SOR, she explained that this incident was a serious error in judgment, and the incident prompted her to stop drinking alcohol for about three years.

7. Starting sometime in 2001 and ending sometime in 2005, Applicant lived with a man who had alcohol problems, and the relationship became especially difficult during 2004-2005. The result was that in about September 2005 the man assaulted and injured Applicant. He was prosecuted, convicted, and served six months in jail. Applicant no longer has any contact with this man.

8. In March 2004, during this difficult time, Applicant was arrested and charged with domestic simple battery after an incident with the man. In her reply to the SOR, she explained she was at home when the man assaulted her and she defended herself. She had drunk alcohol before the incident. The man ended up with scratches on his neck from her fingernails. The police, who were called by neighbors, arrived and saw the scratches on the man and decided to arrest Applicant as she had no visible injuries. The charge against Applicant was dropped and she was not prosecuted.

9. Applicant has never been diagnosed as either an alcohol abuser or alcohol dependent (R. 36). Although not required by court order, she attended Alcohol Anonymous (AA) in the past. For example, after the 1985 DUI she attended AA about five times per week for several months (R. 37). Since then, she has attended AA sporadically. She does not consider herself an alcoholic or a person in recovery, but she does believe that alcohol has played a detrimental role in her life and she does not want that to happen again (R. 37). She views her 1996 DUI as a foolish and serious mistake (R. 42). Also, she explained that she decided to abstain from alcohol in March 2004 because she wants to avoid any further alcohol-related incidents and she recognizes that her body does not handle alcohol well (R. 52-53). An abstainer since March 2004, her intent is to maintain her sobriety and not use alcohol (R. 53).

## **POLICIES**

The adjudicative guidelines set out in the Regulation apply to ADP trustworthiness determinations. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable determination may be made. [\(2\)](#) Appendix 8 of the Regulation sets forth personnel security guidelines and

the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline.

Under the Regulation, "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 a security clearance."<sup>(3)</sup> Each eligibility determination must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Regulation. For example, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 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.

### **BURDEN OF PROOF**

The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(4)</sup> An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(5)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable decision.<sup>(6)</sup> These same standards apply to trustworthiness determinations for ADP positions.

### **CONCLUSIONS**

Under Guideline G,<sup>(7)</sup> a history of excessive alcohol consumption raises a concern because of the potential for deliberate or inadvertent mishandling of sensitive information due to intoxication. The concern is that excessive consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure due to carelessness.

Here, based on the record evidence as a whole, the government established its case under Guideline G. The record evidence shows Applicant has a history of excessive alcohol consumption resulting in law-enforcement involvement, as evidenced by her DUI convictions in 1985 and 1996, as well as the domestic incident in 2004 resulting in her arrest. In reaching this conclusion, I did not consider the 1987 DUI arrest and charge based on the acquittal and given the un rebutted evidence that she drank no alcohol before driving. Given these facts and circumstances, DC 1--alcohol-related incidents away from work--applies against Applicant. Her two DUI convictions and the 2004 arrest are classic examples of alcohol-related incidents away from work.

I reviewed the MC under the guideline and conclude the evidence is sufficient to mitigate the concern. Specifically, MC 3--positive changes supportive of sobriety--applies in Applicant's favor for the following reasons. First, her last alcohol-related incident was the March 2004 arrest, which is more than two years ago. Second, she has abstained from alcohol since March 2004 and her intent is to continue to abstain. Third, she no longer lives or associates with the man who contributed to her last alcohol-related incident. And fourth, Applicant has not been diagnosed as either an alcohol abuser or alcohol dependent. Taken together, these circumstances are positive factors in Applicant's life and wholly support her decision to live a life without using alcohol. In other words, it now appears that Applicant's alcohol use and the troubles that went with it are a thing of the past unlikely to recur. Accordingly, Guideline G is decided for Applicant.

Under Guideline J,<sup>(8)</sup> criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling sensitive information.

Here, based on the record evidence as a whole, the government established its case under Guideline J. As discussed above, Applicant has a history of alcohol-related criminal conduct, as evidence by her two DUI convictions and her March 2004 arrest for domestic simple battery. Given these facts and circumstances, both DC 1<sup>(9)</sup> and DC 2<sup>(10)</sup> of Appendix 8 apply against Applicant. Her history of alcohol-related criminal conduct creates doubt about her judgment,

reliability, and trustworthiness.

I reviewed the MC under the guideline and conclude the evidence is sufficient to mitigate the concern. In short, the criminal conduct concern is mitigated for the same reasons the alcohol consumption concern is mitigated, because the two concerns, as alleged here, are plainly interrelated. In particular, MC 5--there is clear evidence of successful rehabilitation--applies in Applicant's favor for the following reasons. First, her last DUI offense was in February 1996, which is more than ten years ago. Second, the March 2004 arrest was situational, as it related to a troubled personal relationship that Applicant severed in 2005. Third, and most important, the factor that contributed to her criminal conduct--her alcohol use--is no longer present in her life because she quit drinking after the March 2004 arrest and she intends to abstain in the future. Taken together, these circumstances show that her irresponsible alcohol use is a thing of the past unlikely to recur, and her alcohol-related criminal conduct has followed suit. Accordingly, Guideline J is decided for Applicant.

To conclude, Applicant has met her ultimate burden of persuasion to obtain a favorable decision. In reaching my decision, I considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines.

### **FORMAL FINDINGS**

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

SOR Paragraph 1-Guideline G: For Applicant

Subparagraphs a-e: For Applicant

SOR Paragraph 2-Guideline J: For Applicant

Subparagraph a: For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant's eligibility for assignment to public trust position. Eligibility is granted.

Michael H. Leonard

Administrative Judge

1. Department of Defense Regulation 5200.2-R, dated January 1, 1987, as amended (Regulation), and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Regulation, Paragraph C8.2.1.
3. Regulation, Appendix 8 at 132.
4. Directive, Enclosure 3, Item E3.1.14.
5. Directive, Enclosure 3, Item E3.1.15.
6. Directive, Enclosure 3, Item E3.1.15.
7. Regulation, Appendix 8 at 145.
8. Regulation, Appendix 8 at 150.
9. Any conduct, regardless of whether the person was formally charged.

10. A single serious crime or multiple lesser offenses.