

DATE: September 29, 2006

In Re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 06-04776

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has been charged on three occasions with misconduct involving underage consumption of alcohol. She admits she continues to drink even though she is underage. She applied for a position of trust two days after being charged with underage drinking, but she did not disclose that charge on her application. Trustworthiness concerns based on alcohol consumption and personal conduct are not mitigated. Eligibility for assignment to sensitive positions is denied.

STATEMENT OF THE CASE

On March 22, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to not grant a security clearance to Applicant. This action was taken under Executive Order 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). The SOR alleges security concerns under Guidelines G (Alcohol Consumption) and E (Personal Conduct). Under Guideline G, it alleges consumption of alcohol, "at times to excess and to the point of intoxication," from approximately 2000 to at least February 2005 (SOR ¶ 1.a); an alcohol-related credit card offense (¶ 1.b); underage alcohol consumption in March 2004 and December 2004 (¶¶ 1.c, 1.d); and continued underage drinking as of February 2005 (¶ 1.e). Under Guideline E, it alleges Applicant falsified her Standard Form 85P (SF 85P) by failing to disclose being charged with underage drinking in March 2004 (SOR ¶¶ 2.a, 2.b), failed to notify her probation counselor of her citation for underage drinking in December 2004 (SOR ¶ 2.c), and continued underage drinking up to at least February 2005 (SOR ¶ 2.d). She answered the SOR in writing on May 23, 2006, admitted all the allegations except falsifying her SF 85P, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on June 22, 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, and she was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on July 3, 2006, but she did not submit any additional evidence. The case was assigned to me on August 29, 2006.

FINDINGS OF FACT

Based on the entire record, I make the following findings of fact:

Applicant is a 20-year-old claims processor for a defense contractor. She has worked for her current employer since March 2004. She has never received a security clearance or trustworthiness determination.

On August 10, 2003, after consuming several beers at her home, she joined some friends who had broken into several cars and stolen purses, audio equipment, and some credit cards. She knowingly used one of the stolen credit cards to make two purchases. She was arrested and placed in a pretrial diversion program, conditioned on attending a four-hour class, performing 75 hours of community service, paying \$270 in restitution, refraining from further misconduct, and reporting to a diversion program counselor once a month (FORM Item 7).

On March 27, 2004, Applicant was charged with underage drinking. On this occasion, her boy friend threw a brick through her car window and fired a pistol shot into her car. Her mother summoned the police, who questioned Applicant about the incident and then smelled alcohol on her breath. She paid a fine of about \$164.

On March 29, 2004, two days after being charged with underage drinking, Applicant submitted her SF 85P. In response to question 20, asking if she had been arrested for, charged with, or convicted of any offenses in the last seven years, she disclosed her arrest for fraudulent use of a credit card, but she did not disclose that she was charged with underage drinking on March 27, 2004, two days earlier. She updated her SF 85P on October 26, 2004, but again did not disclose the underage drinking offense (FORM Item 6 at)7.

In November 2004, she consumed several beers at a friend's house and then fell asleep in her car. She was discovered by the police and charged with underage drinking. In December 2004, she paid a \$164 fine for this incident (FORM Item 7 at 3).

Applicant did not report the November 2004 incident to her pretrial diversion counselor. In her response to the SOR, she admitted that she continues to consume alcohol even though she is still underage (FORM Item 5).

POLICIES

The adjudicative guidelines set out in Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended and modified (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. Regulation ¶ C8.2.1.

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. "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." Regulation ¶ 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 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." Regulation Appendix 8 at 132. 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. 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. *Id.*

In security clearance cases, the Government must initially present evidence to establish controverted facts in the SOR

that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. 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." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 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. These same burdens of proof apply to trustworthiness determinations for ADP positions.

CONCLUSIONS

Guideline G (Alcohol Consumption)

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. Regulation, Appendix 8 at 145. A disqualifying condition (DC 1) may arise from alcohol-related incidents away from work, such as driving under the influence. *Id.* Applicant's alcohol-related credit card offense and her two instances of being charged with underage drinking establish DC 1.

"[H]abitual or binge consumption to the point of impaired judgment" is also a disqualifying condition (DC 5). *Id.* "Binge drinking" is "the consumption of five or more drinks in a row on at least one occasion." U.S. Dept. of Health & Human Services, Substance Abuse and Mental Health Services Administration, *The National Household Survey on Drug Abuse: Binge Drinking Among Underage Persons*, Apr. 11, 2002. There is no evidence of binge drinking in the FORM. However, Applicant's admitted credit card fraud after consuming alcohol establishes drinking to the point of bad judgment. Accordingly, I conclude DC 5 is established.

Since the government produced substantial evidence to establish DC 1 and DC 5, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on alcohol consumption can be mitigated (MC 1) by showing that "[t]he alcohol-related incidents do not indicate a pattern." Regulation, Appendix 8 at 145. The evidence establishes three alcohol-related incidents between August 2003 and November 2004, and Applicant admits she continues to consume alcohol even though she is still underage. I conclude MC 1 is not established.

Security concerns under this guideline also can be mitigated (MC 2) by showing "[t]he problem occurred a number of years ago and there is no indication of a recent problem." *Id.* There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the record. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* Applicant was still involved in underage drinking as recently as February 2005. Her misconduct is recent, making MC 2 inapplicable.

"Positive changes in behavior supportive of sobriety" also are a mitigating condition (MC 3). Regulation, Appendix 8 at 145. Applicant has presented no evidence of changed behavior since her last incident of underage drinking. Thus, MC 3 is not applicable.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information. Regulation, Appendix 8 at 142. A disqualifying condition (DC 2) under this guideline may be established by "the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary

responsibilities." *Id.* When, as in this case, a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant admits she failed to disclose being charged with underage drinking on March 27, 2004, but claims she forgot about the incident. I find her explanation implausible and not believable. Her assertion that she forgot about this incident within two days is disingenuous at best.

Applicant had an opportunity to correct her SF 85P when she updated it on October 26, 2004. By this time she had paid a fine for her underage drinking, but she again failed to disclose it. I conclude these two incidents of deliberate omission of relevant and material information establish DC 2.

Finally, a disqualifying condition (DC 5) may be established by a "pattern of dishonesty or rule violations." Regulation, Appendix 8 at 142. I am not satisfied there is a pattern of dishonesty established, because Applicant's second incident of nondisclosure on her SF 85P was merely a continuation of the first. However, her repeated incidents of underage drinking establish a pattern of rule violations. Thus, I conclude DC 5 is established.

Since the government produced substantial evidence to establish DC 1 and DC 5, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Two mitigating conditions (MC) are relevant to Applicant's falsification of her SF 85P. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Regulation, Appendix 8 at 143. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. *Id.* Neither condition is established, because her falsifications were recent and she did not disclose her misconduct until confronted with the evidence by a security investigator.

Whole Person Evaluation

In addition to the disqualifying and mitigating conditions under each guideline, I have also considered all the evidence in the context of the whole person as required by the Regulation. I have considered, the nature, extent, and seriousness of Applicant's alcohol-related offenses. Each offense was minor, but they show a pattern of repeated alcohol-related misconduct. I have considered her young age and lack of maturity. I have considered her failure to fully comply with the terms of her probation by failing to disclose further misconduct to her diversion counselor. She has shown no remorse and no change of attitude or behavior. She has attempted to justify her falsification of her SF 85P with an incredible and implausible explanation. After considering the disqualifying and mitigating conditions under each guideline and evaluating all the evidence in the context of the whole person, I conclude Applicant has not carried her burden of showing that it is clearly consistent with the national interest to grant her a favorable trustworthiness determination.

FORMAL FINDINGS

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

Paragraph 1. Guideline G (Alcohol Consumption): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2. Guideline C (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for assignment to sensitive duties. Eligibility is denied.

LeRoy F. Foreman

Administrative Judge