

DATE: September 19, 2006

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 06-05595

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 28 years old and works for a company that administers government health benefits. She has a criminal history that includes three alcohol-related incidents, including two charges for underage drinking. When she completed her application for access to sensitive information, she did not disclose the two underage drinking incidents. She mitigated the trustworthiness concerns raised by alcohol consumption and personal conduct. Her eligibility for assignment to a sensitive position is granted.

STATEMENT OF THE CASE

On October 25, 2004, and November 15, 2004, Applicant signed and 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 9, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guidelines G (Alcohol Consumption) and E (Personal Conduct) of the Directive.

In a sworn statement, dated May 25, 2006, Applicant responded to the SOR allegations and requested a hearing. On June 23, 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 24, 2006. At the hearing the Government introduced exhibits (GX) 1-4 into evidence without objections. Applicant testified in her case-in-chief. DOHA received the hearing transcript (Tr.) on September 8, 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 28 years old and divorced. She has two young children who live with her. Since October 2003, she has worked in the benefits and claims department for a company that administers a government health plan and received a promotion. (Tr. 12) Prior to this job she held miscellaneous positions with other employers. Recently, she enrolled in college and will begin taking six credits of credit courses on-line, starting this September. She wants to pursue a degree in behavioral sciences. (Tr. 11-13) Her employer is aware of this proceeding. (Tr. 33)

In November 1998, she was charged with Underage Drinking-Possess-Consume after the police were called to a party she was attending with 30 to 40 people. She was fined \$160. (Tr. 14-18). In January 1999, she was at a friend's house when the police arrived after receiving a complaint about loud music. She was charged with Underage Drinking-Possess (2nd) offense and paid a \$332 fine.

(GX 4) She was 18 or 19 at the time.

In May 2004, Applicant was arrested and charged with Operating While Under Influence (1st) offense. She met a girlfriend at a local bar to celebrate her promotion and had a couple of mixed drinks. She left that bar to meet friends at another bar where she had two beers. Later that night, the police found her in her car parked on the side of the road. She has very little memory of what happened and believes she blacked out. (Tr. 20) She pleaded (or pled?) guilty to the charge and was fined \$700. She was ordered to undergo an alcohol assessment and attend alcohol education classes, which she completed in April 2005. (GX 2 at 3) Her driver's license was revoked for seven months, and returned to her in January 2005. (Tr. 20-23) As part of the education program, she signed a statement vowing not to drink and drive again, with the understanding she would lose her license and go to prison for one year. (Tr. 23) She has not had a drink since this incident, other than a glass of wine with her family at Christmas. (Tr. 28) The assessment found she did not have an alcohol problem.

In a March 2005 statement, she stated, "Prior to this incident, I have never blacked out or passed out or been intoxicated or drugged. Prior to the incident, I would only have a couple of beers twice a month when out with friends. I would not drink to intoxication, but only to socialize." (GX 2 at 3)

She emphasized that her "future intent is to not drink alcohol because this event was very frightening for me." (*Id.* at 4)

When Applicant signed her SF-85P in October and November 2004, she certified that her answers were true, complete and correct to the best of her knowledge. In response to Question 20. Your Police Record *In the last 7 years, have you been arrested for, or charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150.)*, she answered "Yes," and listed the May 2004 conviction. She did not list the 1998 and 1999 charges for underage drinking. When she completed the application at work, she miscalculated the number of years that had passed since the date of the incidents, which was approximately six years and within the seven-year time frame. (Tr. 30) She denied that she intentionally falsified her application. (Tr.32) I find her explanation credible.

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 guidelines at issue in this case are the following:

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.

Guideline E - Personal Conduct: A trustworthiness concern may arise when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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 classified 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 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 and the appropriate legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the SOR:

Guideline G - Alcohol Consumption

The Government's evidence established a potential case for disqualification under this guideline. Two disqualifying conditions (DC) apply: DC 1: *Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*, and DC 2: *A single serious crime or multiple lesser offenses*. Applicant admits she was convicted of underage drinking charges in 1998 and 1999, and

driving while under the influence of alcohol in 2004.

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. The last incident occurred in May 2004, more than two years ago, and there is no indication of a recent problem. The alcohol assessment did not find her to have an alcohol problem. She completed the court ordered alcohol counseling sessions in 2005, and essentially stopped consuming alcohol as of May 2004. She enjoys her job and received one promotion. This month, she began pursuing a college education. Based on these facts, I conclude Mitigating Condition (MC) 2: *The problem occurred a number of years ago and there is no indication of a recent problem*, and MC 3: *Positive changes in behavior supportive of sobriety*, apply. The allegations contained in SOR ¶¶ 1.a through 1.d are decided in her favor.

Guideline E: Personal Conduct

The Government alleged that Applicant falsified her SF-85P by failing to disclose two alcohol-related charges, which constituted a disqualification under Personal Conduct DC 2: *(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)*. Although Applicant admitted she failed to disclose the information, she denied that she intentionally falsified her application.

When a falsification allegation is controverted or denied, 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) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant's explanation that she miscalculated the passage of time from the dates of the two incidents to the date she completed the application by approximately one year is credible, given her disclosure of the 2004 charge and truthful demeanor while testifying. Hence, the allegations contained in SOR ¶ 2.a are concluded in her favor.

In addition to the enumerated disqualifying and mitigating conditions, I considered Applicant's age at the time of the underage charges and criminal conduct, and maturity today. I also took into account her recognition of the effect that conduct has had on her life, as well as the likelihood that she will curtail her future alcohol consumption as a result of the "frightening" experience.

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 alcohol consumption, and personal conduct. Accordingly, all allegations contained in the SOR under Guidelines G, and E 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:

Paragraph 1: Guideline G (Alcohol Consumption) FOR APPLICANT

Subparagraphs 1.a through 1.d: For Applicant

Paragraph 2: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraph 2.a: 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