

DATE: January 16, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 06-07543

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant engaged in underage drinking and committed minor criminal offenses. She is now 21, has not been in trouble for more than two years, and has mitigated alcohol consumption, personal conduct, and criminal conduct security concerns. Eligibility is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue an ADP I/II/III position for Applicant. As required by Department of Defense Regulation 5200.2-R (Jan. 1987), as amended (Regulation), and Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended (Directive), DOHA issued a Statement of Reasons (SOR) on 16 May 2006 detailing the basis for its decision--concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Regulation. Applicant answered the SOR in writing on 24 May 2006 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 16 November 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 1 December 2006 and responded in a writing postmarked 5 December 2006. The case was assigned to me on 27 December 2006.

In the FORM, Department Counsel moved to amend the SOR to delete the following wording: "paragraph 3-614, Department of Defense Regulation 5200.2-R and." Citing a memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, dated 19 November 2004, Department Counsel claims the Regulation "does not apply to trustworthiness cases for which adjudication and due process are provided by the Defense Office of Hearings and Appeals." FORM at 3. As Applicant did not object, the motion is granted, but only to the deletion of the following wording: "paragraph 3-614,".

FINDINGS OF FACT

Applicant is 21 years old. She processes military medical health benefit claims for a defense contractor. She has worked there two years. She is a single mother of a daughter.

When she was 16 years old, Applicant began consuming alcohol on weekends at parties--usually four to five beers over a two to three hour period. She stopped consuming alcohol the following year after she was injured playing basketball. After she graduated from high school, Applicant resumed consuming alcohol, but at an increased rate--she consumed four to five beers four to five times a week. Since she has matured, she no longer buys alcohol.

While she was incapacitated by her injury, Applicant's brother and friends talked her into smoking marijuana. She "started smoking 1-2 hits on a pipe or joint in a party type setting." Item 5 at 5. She stopped smoking after about six months.

In November 2002, when she was 17 years old, Applicant was cited for having open intoxicants in a motor vehicle. She was fined \$225. Applicant was not drinking on that occasion. She was driving home friends who were drinking.

In May 2004, Applicant went to a party and became upset because of the presence of her ex-boyfriend. Applicant had been drinking and left the party. One of Applicant's friends called police because he thought she might harm herself. The police found Applicant in her car, parked in front of a restaurant. Police searched her vehicle and found a pipe under the dashboard on the passenger's side of the vehicle. They also gave her a breathalyzer. The results were .06 %. They arrested her for possession of drug paraphernalia, underage drinking, and violation of the Absolute Sobriety Law. She pled no contest to the alcohol-related offenses and the judge said he would dismiss them if she attended an alcohol program. The drug paraphernalia charge was dismissed. Applicant attended the alcohol program, went back to the court, and showed the clerk proof of her completion of the course. But because she was worried about missing work, she did not stay for the hearing. In her absence, she was convicted of the alcohol-related charges and paid the resulting small fine.

Later in May 2004, Applicant was at another party and consumed 12 beers. She loaned her car to other people at the party. Police contacted Applicant and questioned her about someone from her car throwing beer out the window of the car. Applicant denied that she had been in the car when it happened, but ended up paying a \$136 fine for disorderly conduct so she would not have to go to court--by this time, she had moved back to her hometown.

On 30 August 2004, Applicant completed a Questionnaire for Public Trust Positions (QPTP) by certifying that the statements therein were true, complete, and correct to the best of her knowledge and belief. She also acknowledged that a knowing and willful false statement could be punished by a fine and/or imprisonment. Question 20 asked if, in the previous seven years, she had been arrested. Applicant answered that she had and listed four offenses occurring on three separate occasions. She listed two offenses for May 2004--underage drinking and disorderly conduct--and the fact that she paid fines for each of those offenses. She did not state that, during the May 2004 underage drinking incident, she was also arrested for possession of drug paraphernalia.

POLICIES

An individual may not be assigned to perform sensitive duties unless a competent security authority determines it is clearly consistent with the interests of national security to do so. Regulation ¶ C2.1.2. Positions designated as ADP I or ADP II are classified as sensitive positions. *Id.* ¶ AP10.2.1. ADP III positions are nonsensitive positions. *Id.* AP10.2.3.1. By memorandum dated 19 November 2004, the Deputy Under Secretary of Defense for Counterintelligence and Security directed DOHA to resolve all cases submitted for trustworthiness determinations, including cases of persons applying for ADP III positions, under the Directive. Thus, even though ADP III positions are nonsensitive, they are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and ADP II cases.

"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." *Id.* ¶ C6.1.1.1. Appendix 8 of the Regulations sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. *Id.* ¶ C8.2.1.

CONCLUSIONS

Guideline G--Alcohol Consumption

In the SOR, DOHA alleged Applicant consumed alcohol to the point of intoxication from 2002-2004 (¶ 1.a); was arrested and charged with open intoxicants in a motor vehicle and fined \$225 (¶ 1.b); and was arrested in May 2004 for underage drinking, violation of absolute sobriety law, and possession of drug paraphernalia (¶ 1.c). In her Answer, Applicant admitted the facts contained in the allegations, with explanation.

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, app. 8, at 145. Applicant admits that she drank to the point of intoxication on occasion while she was underage and this resulted in at least one of the offenses of which she was charged and convicted. It is potentially disqualifying for an applicant to be involved in alcohol-related incidents away from work. DC 1. The evidence also raised the issue of habitual or binge consumption of alcohol. Applicant consumed four to five beers four to five days a week, and on at least one occasion, she consumed 12 beers on one evening in May 2004. DC 2.

An applicant may mitigate alcohol consumption security concerns by establishing that the alcohol incidents do not indicate a pattern (MC 1); the problem occurred a number of years ago and there is no indication of a recent problem (MC 2); she has made positive changes supportive of sobriety (MC 3); or that following a diagnosis of alcohol dependence, the applicant successfully completed a rehabilitation and aftercare requirements, has abstained from alcohol for a period of at least 12 months, and has received a favorable prognosis (MC 4). Applicant established that she had made positive changes in her life supportive of sobriety. She is now an adult with a child. She attended an alcohol awareness course and realizes the problems alcohol can cause and the affects it could have on her ability to maintain her employment. In addition, although she permitted persons to ride in her vehicle while drinking, the offense does not relate to her personal consumption of alcohol. Applicant established MC 3.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant deliberately falsified her answer to question 20 on her QPTP by failing to list all of the offenses for which she was charged after her 16 May 2004 arrest. SOR ¶ 2.a. In her Answer, Applicant admitted she had been arrested on that date but denied deliberately falsifying her answer to question 20.

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Regulation, app. 8, at 142. The deliberate falsification or omission of relevant and material facts from any SCA is a security concern and may be disqualifying. DC 2. Information is material if it would affect a final agency decision or would impede a thorough and complete investigation of an applicant's background. *See* ISCR Case No. 01-06870, 2002 DOHA LEXIS 469 at **13-14 (App. Bd. Sep. 13, 2002). An applicant's criminal history is a matter that could affect a final agency decision on whether to grant the applicant a clearance and her failure to disclose it would impede a thorough investigation of the applicant's background.

After carefully considering all the evidence, I am convinced Applicant did not deliberately falsify her QPTP. She listed all the offenses of which she was convicted and was forthcoming in her statement to the security investigator. She knew the drug paraphernalia offense was dismissed and did not realize she needed to report it. If she had wanted to hide the offense, she would not have reported the other offenses of which she was charged on the same occasion.

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant engaged in criminal conduct by violating 18 U.S.C. § 1001 by deliberately falsifying her answer to question 20 on her QPTP (¶ 3.a); was cited and charged with disorderly conduct in May 2004 (¶ 3.b); and was arrested and charged with having open intoxicants in a motor vehicle in November 2002 and was arrested for underage drinking, violation of the absolute sobriety law, and possession drug paraphernalia (¶ 3.c). In her Answer, Applicant admitted all the allegations, with explanation for ¶ 3.c.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Information is material if it would affect a final agency decision or would impede a thorough and complete investigation of an applicant's background. *See ISCR Case No. 01-06870*, 2002 DOHA LEXIS 469 at **13-14 (App. Bd. Sep. 13, 2002). An applicant's failure to fully advise investigators of an arrest for possession of drug paraphernalia would impede a thorough security investigation and affect a final agency decision. A violation of 18 U.S.C. § 1001 is a serious offense-it carries a maximum sentence that includes confinement for up to five years.

As noted in the discussion of Guideline E, I concluded Applicant did not deliberately falsify her QPTP. Although Applicant admitted violating 18 U.S.C. 1001 in her Answer, it appears from her denial and more complete Answer and FORM response to the allegation in ¶ 2.a, that the admission was made in error or confusion. I conclude she misunderstood the question.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Regulation, app.8, at 150. It is potentially disqualifying to engage in criminal conduct (DC 1), especially a single serious crime or multiple lesser offenses (DC 2).

It is possibly mitigating if an applicant can establish that the criminal behavior was not recent (MC 1); the crime was an isolated incident (MC 2); the applicant was pressured or coerced into committing the act and those pressures are no longer present in his life (MC 3); the applicant did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur (MC 4); the applicant was acquitted (MC 5); or there is clear evidence of successful rehabilitation (MC 6).

As I concluded Applicant did not deliberately falsify her QPTP, we are left with relatively minor criminal offenses to consider. It has been more than two years since her last offense and Applicant seems to have matured with the birth of her child. Considering the relatively minor nature of the offenses, Applicant established that the offenses were not recent and that there is clear evidence of successful rehabilitation.

The Whole Person

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Regulation, app. 8, at 132. It involves "the careful weighing of a number of variables known as the "whole person concept." *Id.* An administrative judge should consider the following factors: (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.*

Applicant engaged in underage drinking. She was convicted of committing several minor offenses related to the consumption of alcohol and she was arrested for possession of drug paraphernalia. Applicant did not try to hide these offenses. She freely admitted them on her QPTP. The only allegation she did not report was her arrest for drug paraphernalia, which occurred on the same date as the underage drinking and was dismissed.

Applicant is only 21 years old. The last offense occurred more than two years ago. None of the offenses which I found she committed are serious offenses. Applicant has matured since her underage drinking. She is now a mother who understands her responsibilities to her child, to her employer, and to the persons whose medical records she has access. There is no potential for pressure, coercion, exploitation, or duress, and there is little likelihood of continuation or recurrence. After carefully weighing all the evidence, I conclude Applicant mitigated all of the security concerns raised.

FORMAL FINDINGS

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

Paragraph 1. Guideline G: 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

Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: For Applicant

Subparagraph 3.c: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant or continue Applicant in an ADP I/II/III position. Eligibility is granted.

James A. Young

Administrative Judge