

DATE: September 19, 2006

In re:

SSN: -----

Applicant for a Security Clearance

P Case No. 06-07842

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 26 years old and works for a company that administers government health benefits. He has a criminal history that includes alcohol-related convictions, including a charge of underage drinking. When he completed his application for access to sensitive information, he did not disclose two criminal charges. He mitigated the trustworthiness concerns raised by alcohol consumption, criminal conduct, and personal conduct. His eligibility for assignment to a sensitive position is granted.

STATEMENT OF THE CASE

On October 21, 2004, Applicant 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 (the "Regulation"), and Department of Defense Directive 5220.6, *Defense Industrial Security Personnel Review Program* (Jan. 2, 1992), as amended (the "Directive"). On May 17, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guidelines G (Alcohol Consumption), J (Criminal Conduct), and E (Personal Conduct) of the Directive.

In a sworn statement, dated May 30, 2006, Applicant responded to the SOR allegations and requested a hearing. On June 28, 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 23, 2006. At the hearing the Government introduced exhibits (GX) 1-3 into evidence without objections. Applicant testified in his case-in-chief and introduced exhibits (AX) A-C into evidence without objections. DOHA received the hearing transcript (Tr.) on September 1, 2006.

PROCEDURAL MATTERS

At the commencement of the hearing, Department Counsel withdrew its Motion to Amend the SOR.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 24 years old and single. For the past 2 ½ years he has worked in customer services for a company that processes government health benefits. Prior to this job he worked for his father's landscaping business and other employers. He attended two years of college and studied business. (Tr. 11-12)

In May 2000, Applicant was arrested and charged with (Count 1) Operating While Intoxicated, and (Count 2) Operating While Intoxicated-BAC. He was found guilty on both counts, fined \$562, and ordered to attend alcohol education classes. His license was suspended for six months. This incident occurred while he was driving home after a Prom party. He was 18 years old. (Tr. 14-15) The following month he was arrested at a party for underage drinking and resisting or obstructing an officer. He was found guilty on both charges and fined \$161. The police officer who arrested him was the same man who arrested him in May. He underwent an alcohol assessment, which determined he was not alcohol dependent. (Tr. 16-18)

In August 2003, while driving home from a bar with his friends, Applicant's car was struck by a motorist who fell asleep at the wheel. When the police arrived at the scene, Applicant and his friends were ordered to take a sobriety test. After doing so, he was arrested and charged with (Count 1) Operating While Intoxicated, 2nd Offense, and (2) Operating with BAC.10 or More, 2nd Offense. He was found guilty on Count 1, fined \$1,186, sentenced to three days in jail and twelve days of home confinement. He was ordered to complete another alcohol assessment and pay restitution. His driver's license was revoked for seven months. Count 2 was dismissed. He completed the assessment and thirteen hours of alcohol counseling. The assessment again concluded he was not alcohol dependent. (Tr. 18-21) That was the last time he drank to excess. (Tr. 13) He was 23 years old at the time.

In June 2004, he was at a local bar with his friends when a fight broke out. After he intervened in an attempt to help a waitress who had been assaulted, a group of men beat him unconscious. He was subsequently charged with disorderly conduct; however, the matter was dismissed after he and the waitress appeared in court. (Tr. 21-22)

When Applicant completed his SF-85P in July 2004, he certified that his answers were true, complete and correct to the best of his 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.)*, he answered "Yes," and listed the May 2000 and August 2003 charges. He did not disclose the June 2000 and June 2004 charges. When he completed the application at work, he forgot about the June 2000 incident, and thought he did not need to disclose the 2004 incident because it was dismissed and expunged from his record. He denied that he intentionally withheld the information. (Tr. 22-24) I find his explanation credible.

Since August 2003, Applicant drinks occasionally and cautiously. (Tr. 25) He recently moved in with his girlfriend. She is a unit coordinator at the company where he works and holds an ADP clearance. They drive to work together. (Tr. 36-37)

According to a work Performance Review for the last six months of 2005, Applicant exceeds expectations in some categories and achieves expectations in others. His immediate supervisors compliment his reliability, trustworthiness and ethics. (AX A-C)

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 J - Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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 he was involved in two minor alcohol-related incidents in 2000, and one in 2003, all of which resulted in criminal convictions.

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. The last incident occurred in August 2003, three years ago, and there is no indication of a recent problem. At the hearing he stated he was never diagnosed as having an alcohol problem after either alcohol assessment. Additionally, he completed the court ordered alcohol counseling sessions in 2003, and now cautiously monitors his alcohol consumption. 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 his favor.

Guideline J: Criminal Conduct

The Government established a potential case for disqualification under DC 1 of this guideline: *Any conduct, regardless of whether the person was formally charged*, and DC 2: *A single serious crime or multiple lesser offenses*. Applicant admitted he was convicted of three minor crimes which involved the consumption of alcohol. ⁽¹⁾

As set forth in Guideline G above, the last incident of criminal conduct occurred in August 2003. Subsequently, Applicant completed two alcohol education courses, and significantly curtailed his drinking since the 2003 charge. In addition, he received a very good evaluation from his employer for the second half of 2005, supporting his assertions of rehabilitation and responsible conduct. Hence, MC 1: *The behavior was not recent*, and MC 5: *There is clear evidence of successful rehabilitation*, apply in this case, and mitigate SOR ¶¶ 2.a and 2.b.

Guideline E: Personal Conduct

The Government alleged that Applicant falsified his SF-85P by failing to disclose two criminal 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 he failed to disclose the information, he denied that he did intentionally.

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 he failed to disclose the June 2000 incident because he forgot about it when he completed the application, and believed the 2004 dismissed charge was expunged, is credible, given his disclosure of the other two charges and truthful demeanor while testifying. Hence, the allegations contained in SOR ¶¶ 3.a are concluded in his favor.

In addition to the enumerated disqualifying and mitigating conditions, I considered Applicant's young age at the time of the criminal conduct, the absence of any transgressions over the last three years, and his employer's satisfaction with his performance. I also took into account his recognition of his previous conduct and present level of maturity, as well as

the likelihood that he will carefully monitor his behavior in the future due to his desire to maintain a good employment record.

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 his alcohol consumption, criminal and personal conduct. Accordingly, all allegations contained in the SOR under Guidelines G, J and E are decided for him.

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 J (Criminal Conduct) FOR APPLICANT

Subparagraphs 2.a and 2b: For Applicant

Paragraph 3: 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. His application for eligibility is granted.

Shari Dam

Administrative Judge

1. The 2004 incident is not included because it was dismissed and not construed to be criminal misconduct.