

DATE: September 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

P Case No. 06-09437

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 23-year-old health insurance claims processor who has worked for the same defense contractor since 2004. While a teenager, he was dared into stealing beer from a store. The police escorted him home and he was fined \$100. He failed to include this incident on a 2004 questionnaire because he was not formally arrested and he did not consider the incident to be a charge or conviction. In early 2005, he pled guilty to the charge of Operating a Motor Vehicle While Intoxicated. After a night in jail, he was "scared straight" and is committed to never drinking and driving or being in such a position again. Applicant has shown that his conduct does not pose an unacceptable risk. Eligibility for an ADP I/II/III position is granted.

STATEMENT OF THE CASE

On June 7, 2006, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary determination that Applicant was not eligible for assignment to information systems positions designated ADP I/II/III. (1) The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). It alleges that Applicant was arrested, charged, and sentenced for two criminal infractions, and he purposefully falsified material facts on a Questionnaire For Public Trust Positions (SF-85P) to conceal one of those incidents.

In his undated answer, notarized on June 22, 2006, Applicant admitted, with explanations, the two criminal incidents. He also admitted that he did not include one of the incidents on his SF-85P, and provided an explanation as to why. Applicant waived his right to a hearing in favor of a determination based on the record. On July 17, 2006, the government submitted its File of Relevant Material (FORM), containing its argument and five supporting items. Additionally, the government moved to amend the SOR by replacing the number "22 " with "20 " in subparagraph 2.a of the SOR. Applicant did not object to this motion and otherwise declined to respond to the government's argument and supporting items within the 30-day period provided. The case was assigned to me on September 12, 2006. As a preliminary matter, I grant the government's motion to amend the SOR.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 23-year-old health insurance claims processor who has worked for the same insurer since September 2004. He received his high school diploma in May 2002, and then entered the work force full-time. He was married on July 17, 2004, shortly before starting his current employment. On November 17, 2004, he completed a SF-85P questionnaire.

At some time during the summer of 2001, the same summer he turned 18 years old, ⁽²⁾ Applicant accepted a dare from a peer to steal beer from a local merchant. The police were called, and they drove him directly home without formally booking him. He subsequently appeared in court and paid a fine of approximately \$100. No other punishment was ordered.

The government bases the allegations arising from this incident on an affidavit documenting a March 29, 2005, interview between Applicant and a special investigator for the Office of Personnel anagement, Investigations Service. During that interview, Applicant described the incident in layman's terms. In his response to the SOR, he qualified his admission to the incident, as it was paraphrased in the SOR, in an attempt to clarify what had happened:

"I regrettably admit to the charge of shoplifting. I was a senior in high school and I stole two cases of beer from a local grocery store and was caught by a store employee. I wasn't arrested[.] I was escorted home by the police and I had to go to the courthouse and pay a fine of about \$100. Since then I have matured a great deal and I would never steal again and I think it is a horrible thing to do and I am embarrassed that I did it."
⁽³⁾

When completing his SF-85P in November 2004, Applicant did not mention the beer theft incident and answered "no" to Question 20⁽⁴⁾ on the questionnaire. He did not list it because he was never arrested and never taken into custody:

"I admit to forgetting to put my shoplifting charge on the questionnaire. For that instance I was not arrest[ed] and was just escorted home by the police so I think that when I read the question I just forgot to include that since I was never put into custody. I am very sorry for the mistake and I can assure you it was not intentional."⁽⁵⁾

On or about March 3, 2005, Applicant, now 21-years old, went to a bar with a friend of a friend in a town he did not know. Over the ensuing hour to 90 minutes, he consumed one whiskey and cola and three beers. Planning to go to his companion's home about a block away, he was pulled over by the police after he went down the block the wrong way. A Breathalyzer was administered, indicating a blood alcohol level of .18. He spent the night in jail and was released the next morning:

As a result I felt like a horrible person sitting in the jail cell and it made me realize I never want to be in trouble with the law ever again. Since my arrest I never go out to bars, I also do not get drunk at all. If I drink, it is only socially and occasionally. I can give my word I will never put myself in that situation again."⁽⁶⁾

Ultimately, he pled guilty to the charge of Operating a Motor Vehicle While Intoxicated (OWI), and was fined \$736.

It is Applicant's intent to never again drink and drive.⁽⁷⁾ Aside from this incident, his use of alcohol has not impacted his life, marriage, or work. Prior to this incident, he would get intoxicated about once a month, typically after fishing or bowling with his father-in-law.⁽⁸⁾ Otherwise, he would enjoy an occasional drink on a social basis with other adults. Since the incident, Applicant has refrained from alcohol. It is his immediate and future intent to continue with this abstinence. Realistically, however, the now-23-year-old notes that he does not know how long he will continue with complete abstinence from alcohol.⁽⁹⁾ He does, however, emphasize that he will never again drink and operate a motor

vehicle, in recognition of the potential harm it could pose and in light of his eye-opening experience in prison.

POLICIES

To be eligible for assignment to sensitive duties, an applicant must meet the security guidelines contained in the Regulation. "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."⁽¹⁰⁾ Appendix 8 of the Regulation sets forth the 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."⁽¹¹⁾ Each eligibility determination must be a fair, impartial, and commonplace decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Regulation.⁽¹²⁾ 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 the 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.⁽¹³⁾

DoD contractor personnel are afforded the right to the procedures contained in DoD Directive 5220.6 before any final unfavorable access determination may be made.⁽¹⁴⁾ In security clearance cases, the Government initially must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.⁽¹⁵⁾ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.⁽¹⁶⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁷⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽¹⁸⁾

The same rules apply to trustworthiness determinations for access to sensitive positions.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has presented a case for disqualification under both Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). For clarity, I will discuss each separately.

Criminal Conduct

DOHA determined that Applicant was not eligible for assignment to information systems positions designated ADP I/II/III based on his two instances of criminal conduct. Criminal conduct raises a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Here, Applicant admits that he pled guilty to the charge of Operating a Motor Vehicle While Intoxicated (OWI) and that he was charged and fined for shoplifting. Consequently, both Criminal Conduct Disqualifying Condition (CC DC) 1 (*any conduct, regardless of whether the person was formally charged*) and CC DC 2 (*a single serious crime or multiple lesser offenses*) apply.

The OWI occurred in March 2005, so that event is clearly recent. In contrast, however, the retail theft incident, which was the result of a teenage dare, is not recent. Moreover, this event occurred either when Applicant was still a minor, or immediately after his turning 18 years of age, prior to his high school graduation, his marriage, and his entry into the work force. Because of the circumstances surrounding this teenage incident, and due to the passage of over five years since it occurred, Criminal Conduct Mitigating Condition (CC MC) 1 (*the behavior was not recent*) applies to the 2001 retail theft incident.

Although two crimes are cited, obviating application of CC MC 2 (*the crime was an isolated incident*), the circumstances surrounding the retail theft incident are noteworthy. It occurred when Applicant was still a teenager and in his senior year of high school. He was dared into stealing beer from a retail store by a fellow teen. The power and influence of high school peer pressure is not something that can be easily dismissed; it is a real and strong influence on all but the strongest willed and most mature juveniles, minors, and teens. Since that time, however, Applicant has considerably and demonstrably matured: he has graduated from high school and earned his diploma, married, and taken on full-time employment to support his family. Much of his socialization now appears to be more on an adult level, such as his fishing and bowling with his father-in-law; he no longer is a teenager undertaking dares and not taking responsibility for his actions. Today, he recognizes that theft is a "horrible thing," and he is duly embarrassed that he once undertook a juvenile dare and stole beer.⁽¹⁹⁾ Therefore, to a limited extent, CC MC 3 (*the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) applies to the retail theft incident. For similar reasons, I find that CC MC 4 (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*)⁽²⁰⁾(emphasis added) clearly applies.

Finally, with regard to the retail theft incident, Applicant seems genuinely contrite. He recognizes that what he did was wrong, and that it was a "horrible thing." He is now embarrassed that he performed such a dare and committed such a theft as a teen. Moreover, he clearly expressed the intent to never commit such an act again. Indeed, this one incident is the only occurrence of its kind in Applicant's record. Similarly, his contrition regarding the motor vehicle infraction is equally apparent, and his ameliorative response to that incident demonstrates a maturity beyond his years. Given these facts, CC MC 5 (*there is clear evidence of successful rehabilitation*) applies in both matters.

Applicant clearly demonstrated recent criminal conduct when he received his OWI in 2005. He has, however, presented strong facts mitigating the five-year-old, juvenile dare that resulted in a citation for retail theft and a negligible fine. Consequently, the OWI stands alone as the sole incident of criminal conduct performed by the Applicant creating doubt about his judgment, reliability, and trustworthiness. Standing alone, the OWI does not represent a true history or pattern of criminal conduct.⁽²¹⁾ Regardless, given his contrition and ameliorative reaction to the OWI to make sure he never again finds himself on the wrong side of the law and in jail, Applicant also has mitigated security concerns arising from the OWI. Consequently, he has mitigated concerns arising from his past criminal conduct.

Personal Conduct

Under the applicable Regulation, personal conduct is a major concern because it asks whether a person's past conduct justifies confidence that the person can be trusted to properly safeguard classified information. Personal conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The Regulation sets out certain conditions relating to personal conduct that could raise security concerns.

Here, the amended SOR states that Applicant deliberately falsified material facts on his SF-85P by failing to list his "arrest" for retail theft. Applicant's admission to this allegation, however, is qualified. He states that he did not cite to that incident on his SF-85P because he did not consider the incident to be an "arrest," *per se*, since he was not actually arrested, but only driven home by the police and subsequently fined; nor did he apparently consider it to be a charged offense or a conviction.

In constructing its SOR, the government apparently relied exclusively on Applicant's March 2005 affidavit.⁽²²⁾ In that affidavit, Applicant loosely used the term "arrest" to describe what happened to him after he stole the beer and the police arrived at the scene. The government then chose to rely on the legal phrasing of a 22-year-old with a high school diploma in his use of that term during an Office of Personnel Management investigation, without seeking corroborative evidence from a police or court document. Therefore, when the allegations were set forth in the SOR, Applicant sought to clarify the language adopted by the government with what actually happened: he was driven home and later paid a fine. There is no evidence that he was ever technically arrested or formally charged.⁽²³⁾ Based on his explanation, and in the absence of contrary evidence, his clarification makes sense and is highly credible. Therefore, despite his admission to not including the incident on the SF-85P, and in the absence of any evidence that he intended to falsify, omit, or conceal information, no Personal Conduct Disqualifying Condition applies.

I have considered Applicant under the "whole person" concept based on the evidence in the record before me. He is a maturing young man with a basic high school education endeavoring to pursue a career as an insurance claims processor. Now in his early 20s, Applicant is married and , enjoys a regular home life. He is embarrassed about his high school dare and resolved not to fall prey to such antics again; a resolve easily reenforced by maturity. Although he received an OWI a little over a year and a half ago, the experience of being forced to spend the night in jail apparently impressed him sufficiently to never want to find himself in that demeaning position again. A social drinker before, he is now abstaining until such time he feels he might return to responsibly having drinks on social occasions. He remains firm, however, in his resolve to never mix drinking and driving again. The incidents at issue are two in number, and they took place over the past five years, a period representing a little over a quarter of the Applicant's life. He is a maturing young man who demonstrates a ready ability to learn from his mistakes and who understands the possible repercussions of any further misconduct.

As for whether he falsified his SF-85P, the facts clearly indicate that Applicant does not necessarily understand the nuance of certain legal terms that also have a more generic usage. His explanation as to what happened after the police arrived following his theft of beer, however, is highly credible, and there is no indication that he actively sought to mislead or conceal information on his questionnaire. Given all these facts, explanations, and considerations, Applicant does not pose an unacceptable security risk. Consequently, I conclude that Applicant is entitled to a favorable eligibility determination.

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:

Paragraph 1. Guideline J (Criminal Conduct) FOR APPLICANT

Subparagraph 1.a For Applicant

Subparagraph 1.b For Applicant

Paragraph 2. Guideline E (Personal Conduct) FOR APPLICANT

Subparagraph 2.a For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant Applicant's eligibility for assignment to sensitive duties. Eligibility for positions designated ADP I/II/III is granted.

Arthur E. Marshall, Jr.

Administrative Judge

1. 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 procedural rules set out in the Directive for security clearance cases are applied to ADP trustworthiness determinations. The adjudicative guidelines set out in Department of Defense Regulation 5200-2R, *Personnel Security Program* (Jan. 1987), as amended and modified (Regulation), are used to make ADP trustworthiness determinations.

2. Applicant's date of birth is given as July 6, 1983. Therefore, he started that summer as a juvenile, and reached his majority mid-summer of that year.

3. Applicant's Answer to the SOR, notarized June 22, 2006.

4. **"20. Your Police Record** In the last 7 years, have you been arrested for, charged with, convicted of any offense(s)?"
5. Applicant's Answer to the SOR, *supra*, note 3.
6. *Id.*
7. Applicant's Affidavit, dated March 29, 2005, at 3.
8. *Id.*
9. *Id.*, at 4.
10. Regulation ¶ C6.1.1.1.
11. Regulation Appendix 8.
12. *Id.*
13. *Id.*
14. Regulation ¶ C8.2.1.
15. Directive, ¶ E3.1.14.
16. Directive ¶ E3.1.15.
17. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
18. Directive ¶ E2.2.2.
19. Applicant's Answer to the SOR, *supra*, note 3.
20. Given his age and maturity, it seems highly unlikely that Applicant will again be subjected to a juvenile's dare and feel socially pressured to undertake one.
21. Regarding the OWI, Applicant has expressed a true commitment never to again mix drinking with driving, and shown that he was truly "scared straight" after spending a degrading night in jail.
22. In its FORM, all references to this incident are footnoted with reference to either Applicant's March 2005 Affidavit or his Answer to the SOR.
23. As opposed, for example, to being cited in a juvenile context.