

DATE: November 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

P Case No. 06-11447

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 24 years old and works for a company that administers government health care benefits. From approximately December 2000 until July 2005, he consumed alcohol on numerous occasions to the point of intoxication, resulting in five criminal arrests. When completing his SF-85P application, he failed to disclose some of those charges. He mitigated the trustworthiness concerns raised by his personal conduct, but not those raised by his alcohol consumption or criminal conduct. His eligibility for assignment to a sensitive position is denied.

STATEMENT OF THE CASE

On October 6, 2003, Applicant submitted a public trust position application (SF-85P). He resubmitted it on October 19, 2004, and initialed changes to it on January 18, 2005. 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 June 7, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guideline G (alcohol consumption), Guideline E (personal conduct), and Guideline J (criminal conduct) of the Directive.

In a sworn statement, dated June 28, 2006, Applicant responded to the SOR allegations and waived his right to a hearing. However, on August 23, 2006, he reconsidered his waiver and filed a request for a hearing. On October 12, 2006, this case was assigned to me. A Notice of Hearing was issued that same day, setting the case for hearing on October 24, 2006. At the hearing Department Counsel introduced Government Exhibits (GX) 1 through 5 into evidence without objections. Applicant testified in his case-in-chief and introduced Applicant Exhibits (AX) A through H into evidence without objections. DOHA received the hearing transcript (Tr.) on November 13, 2006.

PROCEDURAL ISSUES

Prior to the commencement of the hearing Department Counsel filed a Motion to Amend the SOR as follows:

1. Strike the introductory paragraph one on page one and replace it with the following:

"A review of your eligibility for occupying Information Systems Position designated ADP I/II/III to support a contract with the Department of Defense (DoD) has been made pursuant to DoD Directive 5220.6, dated January 2, 1992. This office recommends that your case be submitted to an Administrative Judge for a determination that you are not eligible for occupying such a position. This recommendation is based on the following reasons":

2. Strike the final sentence in subparagraph 1.f. and replace it with the following:

You pled no contest to Count (2) resulting in a sentence of 20 days in jail with Huber privileges, a fine of \$938, and revocation of your license for 14 months.

Applicant did not object to the Motion and it was granted.

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. After high school, he completed two years of technical college. Since October 2004, he has worked for a company that administers health insurance benefits for the government. He presently works a computer programmer. (Tr. 21)

In his Answer, Applicant admitted he consumed alcohol at times to the point of intoxication from about December 2000 to July 2005, and was arrested five times on charges related to alcohol consumption, three for underage drinking. In December 2000, he was arrested, charged with Underage Drinking and Possession, found guilty, and fined \$197. He was 18 years old at the time. In ay 2001, he was arrested and charged with Underage Drinking and Possession. He was found guilty and fined \$167. He was 19 years old. In September 2002, he was arrested and charged with Underage Drinking. He pleaded no contest, completed an alcohol assessment, was diagnosed as alcohol abuse, attended classes on substance abuse, and paid a \$225 fine. (Tr. 52) The charges were dismissed in December 2002. He was 20 years old. (GX 2) All of these arrests occurred after police were called to a house party he attended. (Tr. 23-24)

On September 5, 2003, Applicant was arrested and charged with Count (1) Operating While Intoxicated 1st Offense, and Count (2) Operating With PAC .10 or More 1st Offense. In November, he pleaded guilty to Count (1), and was ordered to undergo another alcohol assessment, attend more classes, and pay a \$660 fine. His driver's license was suspended for six months. He was 21 years old and had been drinking at a bar prior to the arrest. (Tr.25, 45; GX 3)

In August 2004, Applicant was arrested and charged with Disorderly Conduct after he and his friends got into trouble. He pleaded no contest and paid a \$243 fine by mail.

On October 30, 2004, Applicant was arrested, and charged with Count (1) Operating While Intoxicated 2nd Offense and Count (2) Operating With PAC .206 or More 2nd Offense. In March 2006, the court dismissed Count (1) and entered a guilty finding on Count (2). He was ordered to undergo an alcohol assessment, sentenced to 14 days jail with Huber privileges, and fined \$938. His driver's license was revoked for 14 months. It was revoked as of the date of this hearing, although it was to be reinstated in a matter of days. (Tr. 49-50) In April 2006, Applicant entered an alcohol outpatient treatment program and attended weekly counseling sessions through July 2006. He was again diagnosed with alcohol abuse. (Tr. 53) According to his substance abuse counselor's letter of June 2006, if he "continues his present level of good engagement in his treatment regimen, including his abstinence, we feel confident he will graduate with a good prognosis." (AX H)

Applicant testified that he did not consume alcohol from October 2004 until July 2006. He stopped drinking after he was arrested in October 2004, and remained sober through the time he completed the alcohol rehabilitation program from April 2006 through July 2006. (Tr. 32, 54, 68) Since leaving treatment, he has consumed alcohol on two occasions,

once in August 2006 and again in September 2006. (Tr. 54, 67-68) He does not participate in any program designed to maintain sobriety because he does not believe it is necessary or recommended by his counselor. (Tr. 33, 63-64) He asserted he is not currently drinking. (Tr. 32)

Applicant began drinking beer in high school at the age of 17. He acknowledges that alcoholism has been an issue for family members, creating problems for them and himself. (Tr. 32, 62, 64, 66)

When Applicant completed his SF-85F in October 2004, and updated it in January 2005, 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 seven years, have you been arrested for, charged with, or convicted on any offenses?*), he answered "Yes." He listed the September 2002 and 2003 charges, an April 2001 traffic offense, and three speeding violations he received between June 1998 and November 1999. He did not disclose the December 2000 and May 2001 underage drinking charges, the August 2004 disorderly conduct charges, or the October 2004 alcohol related charges. He denied intentionally or deliberately falsifying his SF 85P. (Tr. 62)

Applicant did not disclose the underage drinking information because he thought the incidents were more than seven years old and one had been dismissed. When he attempted to retrieve his record from the state's transportation department to check his record, he was told the underage drinking information was confidential. (Tr. 26) The charges did not appear on a printout he later received from the department. (Answer at 4) He did not disclose the August 2004 charge because he paid the fine by mail and had forgotten about it. (Tr. 29) At the time he updated the SF 85P in January 2005, the October 2004 charges were still pending and he did not realize he was required to disclose all arrests, regardless of their status. He misunderstood the question. (*Id.*) Given his accurate disclosure of several matters, including old speeding offenses, I find Applicant's explanation for not disclosing four arrests credible.

Applicant's two managers claim he is a reliable and trustworthy employee. One of them is fully aware of Applicant's alcohol problems and believes he is maturing. (AX B and C) His yearly performance reviews, covering the time period of October 2003 through May 2006, consistently note that he achieves company expectations. (AX E, F and G)

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:

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 an unauthorized disclosure of classified or sensitive 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.

Guideline J - Criminal Conduct: A trustworthiness concern may exist when a pattern of criminal activity creates doubt

about a person's judgment, reliability, and trustworthiness.

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 classified 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 classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance request to an individual 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. *See* 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. *See* 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 of the facts in evidence and the application of 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

Based on Applicant's admissions that he consumed alcohol to the point of intoxication for several years and was arrested and convicted of five charges for incidents related to alcohol consumption, the Government established a potential disqualification under Alcohol Consumption Disqualifying Condition (AC DC) 1 (*Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other incidents related to alcohol use*), and AC DC 4 (*Habitual or binge consumption of alcohol to the point of impaired judgment*).

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all mitigating conditions under the guideline, I conclude none apply. (1) Applicant has a history of alcohol problems spanning four years and demonstrating a pattern of abuse, such that Alcohol Consumption Mitigating Condition (AC MC) 1 (*The alcohol-related incidents do not indicate a pattern*) does not apply. (2) Applicant testified that he did not drink from October 2004 through July 2006, but then drank on two occasions in the two months following his release from treatment and after receiving a diagnosis of alcohol abuse twice. Based on that evidence, AC

MC 2 (*The problem occurred a number of years ago and there is no indication of a recent problem*) is not applicable. (3) Although he has not encountered any criminal problems since October 2004, he does not participate in any program to support sobriety, despite a June 2006 recommendation from his counselor to maintain abstinence, and thus has not provided sufficient independent evidence of behavioral changes, as required under AC MC 3 (*Positive changes in behavior supportive of sobriety*). (4) AC MC 4 (*Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*) is not applicable.

Guideline E: Personal Conduct

The Government alleged that Applicant falsified his SF-85P by failing to disclose four arrests, constituting a potential disqualification under Personal Conduct Disqualifying Condition (PC 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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). Applicant denied those allegations during his testimony.

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 did not disclose four arrests because he thought two of the underage drinking charges were confidential, one having been dismissed. He forgot about the 2004 citation for disorderly conduct and misunderstood Question 20 that required him to disclose his last arrest regardless of its disposition. I found his testimony and explanation on these matters sufficiently credible, given his honest disclosure of other misconduct. Hence, the allegations contained in SOR ¶ 2.a are concluded in his favor. Accordingly, Guideline E is decided for him.

Guideline J: Criminal Conduct

Based on the conclusion that Applicant did not deliberately falsify his SF-85 P, as required under 18 U.S.C. § 1001, the Government did not establish a potential case for disqualification under SOR ¶ 3.a.

However, the Government did raise a potential disqualification under Criminal Conduct Disqualifying Condition (CC DC) 2 (*A single serious crime or multiple lesser offenses*), as to the allegations contained in ¶¶ 3.b and c. Applicant admitted all six arrests and charges set forth in the SOR. After reviewing all mitigating conditions, in particular Criminal Conduct Mitigating Condition (CC C) 5 (*There is clear evidence of successful rehabilitation*), I concluded none apply. Although Applicant is changing his lifestyle, as evidenced by his testimony, work recommendations, and the absence of additional criminal charges, his driver's license was in a revoked status during this proceeding, such that he remains under the criminal court's jurisdiction. Until he provides proof that he has successfully completed all terms of the March 2006 court order and documents a significant period of sobriety, there is insufficient evidence of successful rehabilitation to trigger this condition.

The Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, I considered the totality of the evidence in view of the "whole person" concept, including Applicant's young age now and at the time of his arrests, his candid testimony about his alcohol consumption, and the length of time he has consumed alcohol irresponsibly. I gave great weight to the fact that he was charged with an alcohol offense within days of executing his second SF-85P in October 2004, by which time he should have been aware of the Government's concern about alcohol consumption, having previously disclosed a charge on his initial October 2003 application. I also took into account his current employment history and successful performance. While he presented some evidence of a commitment to a new lifestyle,

I am not convinced that he provided enough evidence to assure the Government that similar conduct will not recur in the future and to warrant access to sensitive information at this time. Applicant mitigated those security concerns raised by his personal conduct but not those related to alcohol or criminal conduct. Accordingly, Guideline E is concluded for him and Guidelines G and J concluded against 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) AGAINST APPLICANT

Subparagraphs 1.a - 1.f: Against Applicant

Paragraph 2: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraph 2.a: For Applicant

Paragraph 3: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraphs 3.a - 3.c: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. His application for eligibility is denied.

Shari Dam

Administrative Judge