

DATE: March 26, 2007

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In re:

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SSN: -----

Applicant for ADP I/II/III Position

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ADP Case No. 06-16726

**CISION OF ADMINISTRATIVE JUDGE**

**NOREEN A. LYNCH**

**APPEARANCES**

**FOR GOVERNMENT**

Nicole Noel, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 31-year-old employee of a defense contractor who has a history of arrests for driving under the influence of alcohol. His last DUI was in 2002. He attended alcohol classes and some court ordered counseling. He has mitigated the security concern under Guideline G for alcohol. He has failed to mitigate the trustworthiness concerns under criminal conduct, and personal conduct because he deliberately falsified his 2005 public trust application in violation of federal law. Applicant's eligibility for an assignment to a sensitive position is denied.

**STATEMENT OF THE CASE**

On October 17, 2005, Applicant submitted an application for a position of public trust, an ADP I/II/III position. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Jan. 2, 1992), as amended ( the "Directive").

(1) On August 31, 2006, DOHA issued Applicant a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline G, Alcohol Involvement, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct.

In a sworn statement dated October 18, 2006, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on January 3, 2007. A notice of hearing was issued on January 11, 2007, scheduling the hearing for February 1, 2007. The hearing was conducted on that date. The government submitted Government Exhibits (GE) 1-2 which were admitted into the record without objection. Applicant testified on his own behalf, and submitted seven exhibits AE A-G which were admitted into the record. The record was held open until February 22, 2007, to allow Applicant to submit further documents. Applicant timely submitted six additional documents marked as AE H-M which were admitted without objection. DOHA received the hearing transcript (Tr.) on February 9, 2007.

**FINDINGS OF FACT**

Applicant admitted SOR allegations 1.b, 1.c, and 1.e under Guideline G; and allegations 2.a and 2.b under Guideline J, but he denied the general pattern of criminal activity.<sup>(2)</sup> He admitted allegation 3.a under Guideline E. Those admissions are incorporated as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is an unmarried 31-year-old employee of a defense contractor, serving as a team leader. He graduated from high school in 1994, and received an Associate of Arts (AA) degree in 2002. He is currently attending college classes and wishes to pursue an advanced degree. He submitted an application for a position of trust in connection with his employment on October 17, 2005.<sup>(3)</sup>

Applicant started drinking alcohol at an early age. His mother worked at night, and he and his brother would occasionally go to friends' houses and drink. He continued drinking through high school, and acknowledged that he had a problem with drinking. Upon turning 21, Applicant frequented bars with his friends every weekend. He admits drinking to the point of intoxication or beyond at times. He still consumes alcohol but not as much. His girlfriend does not approve of drinking. He does not drink around her or her child. His intention is to have a designated driver if he is drinking socially away from home.<sup>(4)</sup>

Applicant's use of alcohol led to several arrests. On July 8, 1995, when he was 20 years old, Applicant was stopped for underage drinking. The DUI charge was ultimately dismissed.<sup>(5)</sup> In 1999, a close friend of his died while drinking and driving. Applicant states this made an impression on him.

When he was working for the Department of Corrections, he was arrested for an Aggravated DUI on December 15, 2000. He was at a birthday party and admitted he drank too much and should not have been driving. The charge was amended to a DUI. The aggravated DUI was dismissed. But he served ten days in the county jail, attended a victim impact panel and alcohol treatment classes. He violated his probation and was arrested six months later. The probation was one and one-half years.<sup>(6)</sup>

In 2001, Applicant was returning from a graduation party and was stopped for speeding. He was arrested. He admitted drinking two drinks and a shot. He took a Breathalyzer test and was over the legal limit.<sup>(7)</sup> He spent 30 days in the county jail, did community service and attended alcohol treatment courses for six months. He completed this probation successfully in 2002.<sup>(8)</sup>

On April 27, 2002, Applicant was arrested and charged with (1) Driving under the influence - Liquor/Drugs/Vapors/Combo and (2) Driving under the Influence with Breath Alcohol Content (BAC) of point .10 or more. The court dismissed charge two, but found Applicant guilty of charge one. Applicant's sentence was a guilty fine, and jail 90-days. There are no other details on this charge.<sup>(9)</sup>

As noted above, he continues to drink socially (perhaps three beers). He drinks at parties, special events and weddings. His last drink was approximately seven months ago, according to his testimony at the hearing.<sup>(10)</sup> Since preparing his signed statement, he has decided that he will not drink and drive. The record contains no evidence reflecting a diagnosis of alcohol abuse or alcohol dependence. In recent years, he has reevaluated his friendships and the direction of his life. His work is more important to him, and he has changed the friends with whom he associated or the activities he participated in with his old friends.<sup>(11)</sup>

Applicant attended a job fair in October 2005. He completed an application on line and was hired by his current employer. After he was hired, he completed his public trust application on October 17, 2005. Applicant answered "no" to question 16- Your Police Record (In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? Leave out traffic fines of less than \$150.<sup>(12)</sup>

Applicant has several explanations for not listing any DUI incidents on the public trust form. He remembered the lawyer who represented him several years ago (2001) telling him that DUIs were misdemeanors and that misdemeanors did not need to be listed on an application form for employment.<sup>(13)</sup> He then explained that he was rushed when he completed

the public trust form and did not ask the security officer any questions, but probably misunderstood the question. He was adamant that he believed the question referred only to a criminal offense and the DUI was a driving offense. He also mentioned that when he asked his supervisor for a letter of recommendation, he told her about the DUI's and she said they were misdemeanors and did not need to be listed.<sup>(14)</sup> When he met with the OPM investigator, he provided information concerning the DUI's when confronted with the information. He admitted to the falsification of material facts on the public trust form in his SOR answer, but at the hearing he stated at one point it was not intentional, or alternatively, it was based on legal advice. However, upon cross examination, Applicant admitted that his answer "no" to question 16 was a false statement.<sup>(15)</sup>

Applicant received several promotions with his current employment. He loves his work, and has achieved stellar commendations. His supervisor recommends him highly.<sup>(16)</sup> He is described as knowledgeable, motivated and dedicated. He is a tremendous leader to the team and consistently goes above and beyond the call of duty.<sup>(17)</sup> His supervisor highly recommends him and states that he displays his loyalty by providing superior internal and external customer service to clients. He has been awarded five Shining Star Awards which demonstrate his excellent teamwork skills.<sup>(18)</sup>

Applicant's post hearing submission FBI document is identical with GE 1. The December 15, 2000 aggravated DUI was amended to DUI - Liquor/Drugs/Vapor. The court dismissed the Aggravated DUI, as Applicant explained. The letter from his attorney confirms that the 2000 Agg DUI was originally submitted to the city, dismissed, and then submitted to the county. However, the April 27, 2002 DUI still appears on the record.

## 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."<sup>(19)</sup> In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and

procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive 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:

**Alcohol Consumption - Guideline G: 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.**

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

**Personal Conduct - Guideline E: 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.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

"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."<sup>(20)</sup> An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.<sup>(21)</sup> 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. <sup>(22)</sup>

Initially, the Government 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. <sup>(23)</sup> Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. <sup>(24)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." <sup>(25)</sup> Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. <sup>(26)</sup> The same rules apply to trustworthiness determinations for access to sensitive positions.

## CONCLUSIONS

Upon consideration of all facts in evidence, and after application of the appropriate adjudicative factors, I concluded the following with respect to the allegations set forth in the SOR:

### **Alcohol Consumption**

The government has established its case under Guideline G, based on Applicant's admissions and all the evidence, including the 2002 conviction for DUI. Thus, Alcohol Consumption Disqualifying Condition (AC DC) E2.A7.1.2.1 (*alcohol related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*) applies.

Applicant denied consuming alcohol, at times to the point of excess and to the point of intoxication, to at least February 2006, in his answer to the SOR. However, his admission at the hearing of drinking to intoxication or beyond until 2002 raises AC DC E2.A7.1.2.5 (*habitual or binge consumption of alcohol to the point of impaired judgment*) applies.

Applicant's record lists alcohol related incidents in 1995, 2000, 2001 and 2002. Thus Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.1 (*the alcohol related incidents do not indicate a pattern*) does not apply.

Applicant has not had any DUI's or alcohol related incidents since 2002. He has modified his drinking. AC MC E2.A7.1.3.2. (*the problem occurred a number of years ago and there is no indication of a recent problem*) applies.

Applicant is surrounded by his girl friend and family who do not approve of drinking. He does not drink and drive, but continues to drink in moderation. He is attending classes so that he can earn an advanced degree. He enjoys his work and has proven himself an asset there. There is some evidence in the record to support behavior change or the elimination of high risk behavior. AC MC E2.A7.1.3.3 (*positive changes in behavior supportive of sobriety*) applies.

I find that Applicant has mitigated the alcohol consumption concern. I find in favor of Applicant under Guideline G.

### **Criminal Conduct**

The government has established its case under Guideline J. Based on Applicant's admissions, and several documented arrests and convictions for DUI. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) applies.

With the government's case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Applicant's most recent offense was in 2002. Therefore, Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*the criminal behavior was not recent*) applies. However, CC MC E2.A10.1.3.2 (*the crime was an isolated incident*) does not apply.

Applicant completed alcohol treatment on two separate occasions. He recently stopped drinking. However, more importantly, he deliberately falsified his answer to question 16 on his public trust application in October 2005. Thus, CC MC E2.A.10.1.3.6 (*there is clear evidence of successful rehabilitation*) does not apply.

I find against Applicant under Guideline J Criminal Conduct. His October 2005 failure to truthfully answer question 16 is in violation of federal law, Title 18, United State Code, Section 1001.

### **Personal Conduct**

Personal conduct under Guideline E is always a trustworthiness concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified and/or sensitive information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a trustworthiness concern. If it is deliberate, it is done knowingly and willingly.

In this case, Applicant apologized that the information on his DUI's was not placed on his background application. He asked that this not be held against him. In his answer to the SOR, he admitted allegation 3.a as to falsifying material facts in his response to question 16 on his public trust application. At the hearing, he explained that his lawyer who represented him in 2001 told him DUI's were misdemeanors and did not need to be listed on applications. He then stated that he misunderstood the question. He explained that he did not intend to fool anyone, but argued in mitigation that the falsification was an isolated event. His inconsistent statements, after he admitted to the falsification on his answer to the SOR and during cross-examination at the hearing raise doubt as to his personal conduct. I do not find him credible concerning the omission on his public trust application in October 2005.

Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*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*) applies. Although Applicant gave explanations for answering "no" to question 16 on his public trust application, he was required to provide a truthful answer to question 16. When he signed the application, he certified that his answers were "true, complete, and correct to the best of his knowledge and belief and are made in good faith." However, he admits that answering "no" was a falsification. I do not find his various explanations credible. I find his actions were deliberate.

I have considered the mitigation conditions and find that none apply in this case. Applicant has failed to mitigate the personal conduct concern. Guideline E is decided against Applicant.

### **Whole Person**

In all adjudications, the protection of national security is the paramount concern. The objective of the trustworthiness determination process is the fair-minded, commonsense assessment of a person's life to make an affirmative decision that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of his acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Finally, I considered the whole person concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I balanced the factual circumstances and applied them to the adjudicative criteria established in the Regulation in light of the whole person concept. Applicant mitigated the alcohol consumption concern, but failed to mitigate the criminal conduct and personal conduct concern. An applicant with a good or even exemplary work history may engage in conduct that has negative trustworthiness implications. I have considered the recommendations from his employer. It is premature to grant Applicant a trustworthiness position based on his deliberate failure to disclose his DUIs on his application form. Based on the evidence in the record, it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

### **FORMAL FINDINGS**

Formal findings for or against Applicant on the allegations set forth in the SOR are:

Paragraph 1. Guideline G: For APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2. Guideline J: Against Applicant

Subparagraph 2 a. Against Applicant

Subparagraph 2.b. Against Applicant

Paragraph 3. Guideline E: Against Applicant

Subparagraph 3.a. Against Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant's request for a determination of trustworthiness and eligibility for assignment to sensitive duties. Eligibility is denied.

Noreen A. Lynch

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended; and Memorandum for the Deputy Under Secretary of Defense Counterintelligence and Security, titled "Adjudication of Trustworthiness Cases," dated November 19, 2004.
2. (Applicant's Answer to SOR, dated October 18, 2006) at 1-3.
3. GE 1 (Application for Public Trust Position, dated October 17, 2006) at 1-9; Tr. 23, 24.
4. Tr. 43-44; 60, 62.
5. GE 2 ( FBI Criminal Justice Information Services Record for Applicant) at 1-3; Tr. 32.
6. Tr. 28, 30, 36.
7. .Tr. 34, 35, 36.
8. *Id.*
9. Applicant admitted to this charge in his answer and during testimony at the hearing. He then maintained that there was an error on the FBI record. According to Applicant, the 2000 and 2001 were the same charge because he stated the charge was sent from the city to the county. His post hearing submission shows an amended charge with a different date for 2000. Despite this, Applicant's letter from his attorney explains a violation for a license suspension and not the fact

that he did not have the 2000, 2001 and 2002 alcohol incidents.

10. Tr. 46

11. Tr. 47.

12. Tr. 49.

13. Tr. 50

14. Tr. 55.

15. Tr. 77.

16. AE A and B (Letters of recommendation, dated 2007).

17. AE M ( Letter from supervisor, dated January 20, 2007) at 1.

18. AE C (Scorecard for Team leader); AE D (Shining Star Awards); AE E (Certificate of Recognition); AE F (Certificate of Accomplishment).

19. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

20. Directive, ¶ E2.2.1.

21. *Id.*

22. *Id.*

23. Directive, ¶ E3.1.14.

24. Directive, ¶ E3.1.15.

25. ISCR Case No. 01-20700 at 3 (App. Bd. December 19, 2002).

26. Directive, ¶ E2.2.2.