



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of)
)
) ADP Case No. 11-04656
)
Applicant for Public Trust Position)

Appearances

For Government: Paul Delaney, Esquire, Department Counsel
For Applicant: *Pro se*

February 13, 2012

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings and exhibits, Applicant has not mitigated the concerns raised under the guidelines for alcohol consumption and financial considerations. Eligibility to occupy a position of public trust is denied.

Statement of the Case

Applicant submitted a Questionnaire for Public Trust Positions (Standard Form 85-P), signed on June 6, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

On August 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) alleging trustworthiness concerns focused on Guideline G (Alcohol Consumption) and Guideline F (Financial Considerations) of the Adjudicative Guidelines (AG).² In an undated Answer to the SOR, Applicant requested a decision without a hearing.

In the Answer to the SOR, Applicant admitted all the allegations under Guideline G, and all but one of the allegations under Guideline F. (Item 4) On November 3, 2011, Department Counsel submitted a file of relevant materials (FORM)³ in support of the Government's preliminary decision to deny Applicant's request. The FORM included 14 supporting documents (Items 1-14). Applicant received the FORM on November 15, 2011. He was given 30 days from the date he received the FORM to file a response. Applicant timely submitted 14 supporting documents (Applicant Exhibits (AE) A through N). The case was assigned to me on February 7, 2011, for an administrative decision based on the written record.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the evidence, I make the following additional findings of fact.

Applicant, 42 years old, was engaged as of March 2011. He has a two-year-old daughter from that relationship. He also has a teenage daughter from a previous relationship. He pays child support of \$300 per month. Applicant was employed as a die-cutter from 2003 to 2008, when he was laid off. He earned a licensed nursing certificate in May 2009. He has been employed since December 2009 as a records review specialist. (Items 5, 6; AE B, N)

Guideline G, Alcohol Consumption

Applicant started drinking alcohol in 1984, when he was about 14. He drank a few times per year from 14 to 19 years of age. In college, he drank about six beers or mixed drinks, three times per week. Since college, he drinks about six alcoholic beverages from one to three times per week. It takes about ten beers for him to become intoxicated. (Item 6)

At his security interview in January 2011, Applicant admitted that drinking alcohol causes him to make bad decisions. It also contributed to his financial problems because he had to pay court fines for alcohol-related arrests, he missed work when he was

¹ Adjudication of this case is controlled by the Adjudicative Guidelines (AG), which were implemented by the Department of Defense on September 1, 2006. The AG supersede the guidelines listed in Enclosure 2 to the Directive.

³ See Directive, Enclosure 3, Section E3.1.7. The FORM included 14 documents (Items 1 - 14) proffered in support of the Government's case.

“hung over,” and having a police record limits his job opportunities. As of January 2011, Applicant had not drunk to intoxication since his 2009 arrest for operating while under the influence of alcohol (OWI). As of early 2011, he was drinking about three or four beers at a sitting, once or twice per week; he did not drink spirits; and he usually drank at home. He intended to continue drinking alcohol, avoid driving after drinking, and avoid drinking to intoxication. (Item 6)

Between 2003 and 2009, Applicant had a series of alcohol-related incidents and offenses. (Item 4) In January 2003, he was hired as a die-cutter. For the next several months, he called in sick about once every two weeks. He informed his supervisor that the absences were related to his alcohol consumption. In August 2003, he was terminated because of his excessive absences. He asked his supervisor if he could be re-hired if he sought alcohol treatment. He was informed he would be re-evaluated at that time. (Items 4, 5, 6)

In August 2003, Applicant was evaluated by a medical doctor. He stated he had a history of binge drinking, and was seeking help. He told the doctor he was on “a leave of absence” from work pending alcohol counseling. The doctor performed an evaluation, which he described as “a brief physical for chemical dependence.” The doctor’s report does not clearly state that he diagnosed Applicant with chemical dependence. Instead, the doctor listed his impression as “History of some binge drinking which he is currently seeking help and will be seen in chemical dependence.” (Items 4, 6, 9)

From August to September 2003, Applicant attended an outpatient alcohol counseling program. He successfully completed the program. He also attended one or two Alcoholics Anonymous (AA) meetings per week. After completing the treatment, Applicant met with his first- and second-line supervisors. He provided evidence that he completed treatment, and was re-hired. He did not disclose his termination on his security clearance application. (Items 4, 6)

About two years later, in August 2005, Applicant and a friend went to several bars, where Applicant drank about ten beers. When driving home, he was stopped by police. His blood alcohol content (BAC) registered at 0.15. He was arrested, charged with Operating a Motor Vehicle while Intoxicated (OWI), and held in jail overnight. He pled guilty at the subsequent court appearance. He lost his driver’s license for six months, was fined \$800, and was required to complete an alcohol assessment. (Items 4, 5, 6)

In October 2009, Applicant was celebrating his birthday with his fiancée and consumed ten mixed rum drinks. He was stopped by police while driving home. His breath test registered 0.22 BAC. Applicant was arrested for OWI and spent the night in jail. In March 2010, he pled guilty. He was sentenced to two days in jail, fined \$1,000, required to complete an alcohol assessment, his driver’s license was revoked for one year, and he was required to spend 13 days on electronic home monitoring. He was subject to random breath tests and urinalyses from April to July 2010. He was also

placed on unsupervised probation pending completion of all the conditions of the sentence. (Item 6; AE B)

In March 2011, as required by his OWI sentence, Applicant was assessed by a licensed clinical social worker. Applicant denied that alcohol is a problem in his personal relationships. He reported using alcohol once or twice per week. He admitted that he was ticketed for driving after his license was revoked. The counselor determined that Applicant's previous assessment of "Irresponsible Use of Alcohol—Borderline" remained accurate. He recommended that Applicant attend the Multiple Offender Program. Applicant attended the program on August 20, 2011. (AE B, C, D)

Applicant remained sober during the 2003 alcohol counseling program and for about one to two months after. He was sober again from October 2009 to July 2010. He stated in his 2011 security interview that he has never been diagnosed as an alcohol abuser or alcohol-dependent. He stated he will always be tempted by alcohol, but that it no longer affects his life negatively. (Items 4, 6, 9)

Guideline F, Financial Considerations

During his security interview in January 2011, Applicant stated that his debts stem from his unemployment from November 2008 to December 2009, and because his job opportunities are negatively affected by his police record. While unemployed, he received unemployment compensation. He also noted that he is able to meet his current expenses but, because he lives paycheck to paycheck, he cannot pay his old debts. At the time of the interview, he planned to pay off his delinquencies by obtaining a second job, living within his means, and setting up a budget. At the time, Applicant's net monthly income was \$1,900, or approximately \$22,800 per year. His monthly expenses, including child support of \$300, totaled \$1,750. His monthly net remainder was \$150. Since his security interview, Applicant has obtained a second job working part-time as a home-care licensed practical nurse, and has worked part-time for more than one year. His part-time job pay statement, dated December 2011, shows this job brought in approximately \$25,000 net pay for the year. His annual net pay from the two jobs is approximately \$47,800. (Item 6; AE M)

Applicant's 13 delinquent SOR debts total \$29,800. The debts appear in three credit reports dated June and December 2010, and May 2011. In his June 2011 interrogatory response, he said he made a \$6 payment on one \$241 debt to the creditor at allegation 1.h; and that his pay was being garnished to resolve a state tax debt (allegation 1.b). In regard to the remaining debts, he said he intended to "consolidate debt or file bankruptcy." However, he did not provide documentation supporting these intentions. (Items 4, 7, 11, 12, 13)

Applicant's student loans total \$18,697. He provided documents showing he has applied to have his student loans rehabilitated. It requires nine timely monthly payments of \$190, starting on January 15, 2012. This date occurred after Applicant submitted his FORM response, so there is no evidence of payment. He also submitted documents

relating to his auto loan, which was \$710 past due in June 2011 (allegation 1.m). He recently set up a payment plan, and payments have been automatically deducted from his account since December 2011. (Items 7, 11-13; AE E, G, H)

Applicant also submitted documents regarding six garnishments that were being deducted from his pay in 2011. In his FORM response, he states, "My payroll check is currently being garnished for a medical bill. In the past year, I have paid of (*sic*) two medical bills and a tax levy thru (*sic*) my checks being garnished." (AE A) He is being garnished for the following debts:

- An unpaid judgment for a medical debt of \$14,565. It is unclear if this is the same medical debt as the one alleged at allegation 1.a for \$12,105. (AE I)
- A medical debt in the amount of \$518. Applicant added a hand-written note that it is "Paid." It is unclear if this debt is listed in the SOR, which contains five delinquent medical accounts, but none with a similar balance. (AE I)
- A lien by a state unemployment insurance agency to recover an \$880 overpayment of unemployment compensation (allegation 1.b). Applicant added a hand-written note that it is "Paid." (AE K)
- A garnishment, identified as "Child" in his pay statement, which amounted to \$3,395 as of November 2011. Applicant notes it relates to expenses for his two-year-old daughter's birth. His part-time wages are also garnished for this debt. It is unclear whether this garnishment relates to medical debts in the SOR of \$12,105 and \$6,294 (allegations 1.a and 1.c) (AE L, M)
- Two additional garnishments, identified as "Writ," totaled more than \$800 as of November 2011. One of the garnishments, for \$349, is paid. (AE L)
- A dental service garnishment for a debt totaling \$349. Applicant added a hand-written note that it is "Paid." (AE J)

In his response to the FORM, Applicant submitted an email dated December 12, 2011, that appears to be from a financial counseling firm. It indicates Applicant spoke with a representative, who provided general advice on how to begin resolving his debts. Applicant did not provide further explanation of his relationship with this company, or evidence showing he retained it or has set up payment plans. (AE A, F)

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under-Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge must apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty

of the applicant concerned.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the following security concern about alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

I have considered the disqualifying conditions under Guideline G, AG ¶ 22, especially the following:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program; and

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program.

Applicant began drinking alcohol at 14, and has consumed alcohol to the point of intoxication on numerous occasions since that time. He was terminated from his employment in 2003 because of excessive absences, which he admits were due to being “hung over.” He admits he engaged in binge drinking, and that he does not make sound decisions when drinking. He drove after becoming intoxicated and subsequently

was arrested and convicted of OWI in 2005 and 2009. His BAC of 0.15 in 2003 and 0.22 in 2009 were both high. He participated in a one-month outpatient alcohol treatment program following the first arrest. These facts support application of AG ¶¶ 22 (a), (b), and (c). The doctor's evaluation in 2003 refers to chemical dependence, but the ambiguous statements in the evaluation do not clearly show that this doctor himself found Applicant to be alcohol dependent. I cannot determine who used the "chemical dependence" description that appears in Applicant's medical file. The record shows a 2010 diagnosis by an LCSW, but it is an assessment of "Irresponsible Use of Alcohol—Borderline" and not dependence or abuse. AG ¶¶ 22 (d), (e), and (f) do not apply.

AG ¶ 23 provides the following relevant factors that can mitigate security concerns:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser); and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant's alcohol-related behavior was frequent: he consumed several alcoholic beverages one to three times per week for many years. He drank alcohol, not under unusual circumstances, but in common situations such at bars, with friends, and at home with his fiancée. At times, Applicant became intoxicated, and he sometimes drove while intoxicated, which demonstrated extremely poor judgment. On two of those instances, he was arrested. His one-year driver's license revocation ended in 2011, which is recent. His conduct and convictions raise questions as to his judgment and reliability. AG ¶ 23(a) does not apply.

Applicant recognizes and admits the problems that alcohol has caused in his life. However, he continues to drink three or four beers at a sitting, once or twice per week. This mitigating condition concerns rehabilitation, and I find that Applicant is not rehabilitated, because he continues to engage in conduct that led to poor decisions and alcohol-related arrests in the past. AG ¶ 23(b) does not apply.

Some mitigation applies under AG ¶ 23 (d) as Applicant successfully completed one month of court-ordered counseling in an alcohol treatment program in 2003. The record does not indicate if his counselor advised that he abstain from drinking, but he has abstained for periods in 2003 and in 2009-2010. However, since then, he has not modified his drinking, but drinks frequently, consuming several drinks one to three times per week. AG ¶ 23 (d) applies in part, but is insufficient to overcome the disqualifying conditions that apply.

Guideline F, Financial Considerations

AG ¶ 18 expresses the following security concern about financial considerations:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds.

The relevant disqualifying conditions are AG ¶19 (a) (*inability or unwillingness to satisfy debts*) and AG ¶19 (c) (*a history of not meeting financial obligations*). The SOR alleges more than \$29,000 in delinquent debts. They have been accruing for several years, indicating that Applicant has been either unable to unwilling to resolve them. AG ¶¶ 19(a) and (c) apply.

Under AG ¶ 20, the following potentially mitigating factors are relevant:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant was on notice that delinquent debts were a concern when he completed his application more than two years ago. He was reminded that debts were a concern when he met with an investigator in January 2011. Again, when he completed DOHA interrogatories seven months ago, he was reminded that delinquent debts were an issue. However, the majority of the debts in the SOR remain unpaid, with no plan in place to resolve them. With almost \$30,000 in bad debt, his delinquencies are both frequent and recent. His failure to make consistent efforts to resolve them raises questions about his reliability and judgment. AG ¶ 20(a) does not apply.

AG ¶ 20(b) mitigates financial problems that stem from unexpected events beyond an applicant's control. Applicant experienced a year of unemployment from 2008 to 2009, and his current annual income is modest. However, to apply this mitigating condition, an applicant must also show that he acted responsibly under the circumstances. The record contains scant evidence that Applicant worked with creditors over the past two years to pay his debts. He established one payment plan for his automobile loan in December 2011. He contacted a consumer credit agency in December 2011, after receiving the FORM. Other than an initial email, there is no evidence that he retained that firm. AG ¶ 20(b) applies in part.

AG ¶ 20 (c) and (d) involve good-faith efforts to resolve debts. They do not apply because, as discussed, Applicant has made little effort over the past two years to resolve his debts. His auto loan payment and contact with a consumer credit agency both occurred recently, after he received the DOHA FORM. Most of his delinquent debts are being paid, not through his efforts, but through forced garnishment of his wages, which does not constitute a good-faith effort.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a):

- (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 extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the appropriate

guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant has a long history of alcohol consumption. It has caused significant hardship in his life, including a job termination, two criminal offenses of OWI, financial hardship of paying court costs and fines, and the difficulty in obtaining work because of his police record. Despite these effects, he continues to consume alcohol several times per week. Applicant abstained from alcohol at two different time periods in the past, but returned to alcohol use both times. Applicant's decisions to drink and drive posed a danger to himself and others. He admits he will always be tempted by alcohol, and at this point in time, I cannot confidently conclude he will not be involved in alcohol-related incidents in the future.

Applicant started to make some effort to resolve his debts, but only recently, and in response to this adjudication process. Despite having a net monthly remainder of \$150 from his full-time job, and additional funds available from his part-time job, most of his debts are being handled through enforced garnishment of his wages, rather than through his own efforts. His contact with a consumer credit agency is within the past two months, after he received the Government's FORM, and there is no evidence he has retained that company or started a payment plan through it. Applicant has not established a record of meeting his financial obligations.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability to occupy a public trust position. For all these reasons, I conclude Applicant has not mitigated the concerns arising from the cited adjudicative guidelines.

Formal Findings

Formal findings 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:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.f	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a. – 2.m	Against Applicant

Conclusion

In light of the foregoing, it is not clearly consistent with national security to grant Applicant access to sensitive information. Applicant's eligibility to occupy a position of public trust is denied.

RITA C. O'BRIEN
Administrative Judge