



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



In the matter of:

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Applicant for Public Trust Position

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ADP Case No. 11-13402

**Appearances**

For Government: Jeff A. Nagel, Department Counsel  
For Applicant: Alan E. Spears, Attorney At Law

November 9, 2012

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I) entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Information Systems Positions as defined in DoD Regulation 5200.2-R, Personnel Security Program (Regulation), dated January of 1987.

The Applicant submitted his Electronic Questionnaire for Investigations Processing (SF 86), on June 28, 2011. (Government Exhibit 1.) On April 4, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines J and G regarding the Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

The Applicant answered the SOR in writing through counsel on May 17, 2012, and requested a hearing before an Administrative Judge. DOHA received the request on August 3, 2012, and the case was assigned to the undersigned Administrative Judge that same day. DOHA issued a notice of hearing on August 10, 2012, scheduling the hearing for September 17, 2012. At the hearing the Government presented five exhibits, referred to as Government Exhibits 1 through 5, which were admitted without objection. The Applicant called on witness and presented four exhibits, referred to as Applicant's exhibits A through D, which were admitted without objection. He also testified on his own behalf. DOHA received the transcript of the hearing (TR) on September 20, 2012. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

### **FINDINGS OF FACT**

The Applicant is 43 years old and unmarried. He has a high school diploma and military training. He has one son who he financially supports. He is employed by a defense contractor as a Help Desk Technician, and is applying for a determination of trustworthiness in connection with his employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for a determination of trustworthiness because he has engaged in criminal activity that calls into question his ability or willingness to comply with laws, rules and regulations.

Paragraph 2 (Guideline G - Alcohol Consumption). The Government alleges that the Applicant is ineligible for a determination of trustworthiness because he abuses intoxicants.

The Applicant admits in their entirety each of the allegations set forth under these guidelines, except allegation 1(a) that he admits in part. Both guidelines alleged in the SOR will be discussed together. The Applicant has abused alcohol, at times to excess, and to the point of intoxication, from approximately 2001 until at least 2009. His history of alcohol abuse includes three arrests for Driving under the Influence of Alcohol, all of which occurred within a nine year time period. He was arrested in April 2001, November 2005, and March 2009. The Applicant admits that on each occasion his blood alcohol level was well over the legal limit. (Tr. p. 48.) The Applicant also admitted that there were others times he was intoxicated and got behind the wheel of a vehicle to drive but was not arrested. (Tr. p. 54.) The Applicant admits that he is an alcoholic. (Tr. p. 40.)

The Applicant joined the United States Navy in 1987 and served honorably for twenty years until he retired as an E-6 in 2007. During his military career, he received a number of awards and medals that included two Navy Unit Commendation Medals, three Navy Achievement medals, six Good Conduct medals, two National Defense medals, among others. He was deployed seven times and held a top secret security clearance without incident. (Government Exhibit 3.)

The Applicant began drinking alcohol at the young age of thirteen. At that time he would drink one to two times per month at social events, and then go for months without drinking. At the age of nineteen, he began consuming alcohol on a regular basis, mainly on the weekends, and would drink to the point of intoxication about twice a month. By the age of twenty-one, when he joined the Navy, his consumption of alcohol had significantly increased. He drank every weekend, got intoxicated, and consumed four to five drinks each time. He continued this pattern of drinking until he was arrested in April 2001. (Government Exhibit 4.)

In April 2001, while on active duty in the military, the Applicant was arrested for (1) Driving Under the Influence, and (2) Driving with a BAC of over .08%, a misdemeanor. (Government Exhibit 2.) He explained that he was coming from a party and was speeding off the freeway when he hit a traffic light pole. He states that he pulled inside the trolley station which was next to the light pole to inspect the damage. He noticed that the pole had moved slightly. His car was still driveable, so he continued home. The police arrived at his house and he was arrested. (Tr. p.35.) The Applicant pled guilty to DUI, and was sentenced to a fine of \$1,500, 3 days jail time, a suspended license for one year, 100 hours of community service and assignment to a three month first offenders education program. The Applicant states that he completed all terms of his sentence. The Applicant testified that he received only a warning for this misconduct from his military unit Executive Officer. Following this arrest, the Applicant was able to maintain complete sobriety for one year before he returned to drinking alcohol. (Tr. p. 54.)

In November 2005, while on active duty in the military, the Applicant was arrested a second time for (1) Driving Under the Influence, and (2) Driving with a BAC of over 08%. (Government Exhibit 2.) The Applicant stated that he had been drinking for four or five hours with coworkers at a bar when on the way home he was pulled over by police for swerving. He was subsequently arrested (Tr. p. 36.) He pled guilty. In June 2005, he was sentenced to a fine of about \$2,000, 100 hours of community service, a drivers license suspension for one year, and three years of unsupervised probation. He was also ordered to participate in a DUI education program. The Applicant completed the DUI education program but did not successfully complete the probationary period before he was arrested again. The Applicant received only a warning for this misconduct from his military unit Executive Officer. After this arrest, the Applicant quit drinking and was completely sober for two years before he returned to consuming alcohol. (Tr. p. 55.)

In March 2009, before he completed his probationary period, the Applicant was arrested a third time and charged with (1) Driving Under the Influence, and (2) Driving with a BAC of over .8%. (Government Exhibit 2.) The Applicant testified that he was living with his girlfriend at the time, when friends came over to play cards while consuming alcohol for a three hour period. The friends left, and the Applicant learned that his girlfriend had been seeing another man. An argument developed, and to avoid further confrontation, the Applicant asked her to leave. She refused, so he decided to go stay at a friend's house. Alone in the car and driving to his friend's house, the Applicant got into a single car accident. He was speeding and hit a retaining wall on a

freeway entrance ramp. The Applicant was given a field sobriety test which he failed. He was given a breathalyzer test with the results of about .20% BAC. He was arrested and held overnight in jail, before being released on his own recognizance. In July 2009, the DUI charge was dismissed, and the Applicant pled guilty to Driving While Having A Measurable Blood Alcohol Level of .08% or greater. The Applicant was sentenced 240 days of confinement, but was permitted to participate in a work furlough program with a reporting date of July 28, 2009. He was also sentenced to a fine of \$2,674, and suspended a \$100 probation revocation restitution fine. He was placed on five years of unsupervised probation, and ordered to participate in a DUI education program. (Applicant's Exhibit A.) He states that he attended AA meetings twice a week and completed an 18 month alcohol program. (Tr. p. 36.) He claims that he has completed all terms of his sentence except the probationary period. He is currently on probation and will remain on probation until July 2014. (Tr. p. 59.) Following this arrest, the Applicant was able to maintain complete sobriety for two years before he started drinking again. (Tr. p. 55.)

On May 16, 2012, the Applicant filed a Motion For Early Termination Of Probation. The motion was denied by the court because the Applicant was unable to produce records of AA meetings. (Applicant's Exhibits C and D and Tr. p. 43.)

Although he continues to consume alcohol, the Applicant claims that he no longer drinks like he used to. He states that he probably has one or two drinks and he does not drive. He believes that his problem was with the driving. Now when he drinks he stays at home. (Tr. p. 51.) The Applicant does not attend AA meetings regularly, last attended one about two months before the hearing, and has only attended three times in the past year. He last consumed alcohol just three weeks before the hearing.

Applicant's close friend, who served in the Navy and Coast Guard for eleven years; considers the Applicant like a son; who was instrumental in helping him get the job; testified that the Applicant is very dependable and trustworthy both on and off the job. He states that the Applicant is heavily relied upon by others at work and respected by all. When the Applicant lost his drivers license following his arrest in 2009, his friend car pooled with him to work to make sure he got there. At times they stop after work for a beer. (Tr. pp. 16-27.)

Two letters of recommendation were submitted on behalf of the Applicant. One from his Program Manager, and the other from the Supervisor of Security. They believe that the Applicant is an outstanding employee who exceeds performance standards for his position. He is said to be a self-starter who is punctual and can handle pressures well. He is reliable, trustworthy, and an integral asset to the team. (Applicant's Exhibit B.)

## POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

### Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

#### Conditions that could raise a security concern:

31.(a) a single serious crime or multiple lesser offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

#### Conditions that could mitigate security concerns:

None.

### Guideline G (Alcohol Consumption)

21. *The Concern.* 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.

#### Conditions that could raise a security concern:

22.(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;

22.(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;

#### Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to sensitive information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for a position of trust is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.

## **CONCLUSIONS**

In the defense industry, civilian workers must be counted upon to safeguard sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for a determination of trustworthiness may be involved in criminal conduct, and alcohol abuse that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued access to sensitive information. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him access to sensitive information.

In this case the Government has met its initial burden of proving that the Applicant has engaged in Criminal Conduct (Guideline J), and excessive Alcohol Consumption (Guideline G.) The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his eligibility to access sensitive information. Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

Very troubling in this case is the Applicant's recent pattern and history of alcohol abuse and related criminal conduct. The Applicant is an alcoholic who has been arrested on at least three occasions over the past 9 years, each time for Driving Under the Influence (DUI). Following each arrest he abstained from the use of alcohol for one to two years and then returned to drinking alcohol again. His most recent arrest for DUI occurred in 2009, and he was able to maintain complete sobriety for two years, until he started drinking again in 2011. He is currently still consuming alcohol. With no crystal ball, but just his past record, if he continues to drink, he will soon be arrested again. He does not attend AA meetings or any other support group to assist in maintaining sobriety. In fact, at this point in his life, the Applicant does not seem to realize the seriousness of his disease and has not made a commitment to sobriety. He believes that his problem is driving while under the influence of alcohol, not the alcohol use itself. At this time, given his past extensive history of alcohol abuse, and his continued drinking, there is no guarantee that he will not return to his old ways.

In regard to his criminal conduct, under Guideline J, Disqualifying Conditions 31.(a) *a single serious crime or multiple lesser offenses*, and 31.(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. None of the mitigating conditions are applicable.

Regarding Applicant's alcohol abuse, under Guideline G, Disqualifying Conditions 22.(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*, and 22.(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*, apply. There is no evidence in the record that any of the mitigating conditions apply. Accordingly, I find against the Applicant under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption).

I have also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to sensitive information. The Applicant is a 43 year old admitted alcoholic with an extensive history of alcohol abuse who continues to consume alcohol. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of poor judgment, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard sensitive information.

The Applicant has not demonstrated that he is sufficiently trustworthy, and at this time, he does not meet the eligibility requirements for a position of trust. Accordingly, I find against the Applicant under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for access to sensitive information. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

- Paragraph 1: Against the Applicant.
  - Subpara. 1.a.: Against the Applicant.
  - Subpara. 1.b.: Against the Applicant.
  - Subpara. 1.c.: Against the Applicant.

- Paragraph 2: Against the Applicant.
  - Subpara. 2.a.: Against the Applicant.

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant’s access to sensitive information.

Darlene Lokey Anderson  
Administrative Judge