



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



In the matter of:)
)
 REDACTED) ADP Case No. 15-05527¹
)
 Applicant for Public Trust Position)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

09/08/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate concerns raised by three drunk driving arrests, the last of which occurred over seven years ago. Eligibility for a public trust position is granted.

Statement of the Case

On February 12, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging concerns under the alcohol consumption and personal conduct guidelines. Applicant answered the SOR and requested a hearing.

On May 18, 2017, the hearing was held. Applicant testified at the hearing and the exhibits offered by the parties were admitted into the administrative record without objection.² The transcript (Tr.) was received on May 26, 2017.

¹ The Statement of Reasons was amended at hearing to correctly identify this matter as an ADP case.

² Government Exhibits 1 – 8; Applicant's Exhibits A – C. Prehearing correspondence, the notice of hearing, and case management order are attached to the record as Appellate Exhibits I – III.

Findings of Fact

Applicant, 35, is employed as a federal contractor applying for a position of trust to work on information systems used by the DoD to improve the quality of care for injured service members. He has been arrested three times for driving under the influence (DUI). The last of these arrests occurred over seven years ago and the record does not reflect any other alcohol-related arrests or incidents.

Applicant started consuming alcohol when he entered college. In April 2003, when he was 22 years old and a senior in college, Applicant was arrested for the first time for DUI. He went to a bar to watch his friends perform in a local band. He consumed a relatively large amount of alcohol in a short period of time and then made the poor decision to attempt to drive back to school. He got a flat tire and pulled off onto the side of the road. While he was changing the tire, the police pulled up and arrested him on suspicion of DUI. He pled guilty, but as it was his first offense the court deferred entering a finding of guilt. He was ordered to attend a course on the dangers of drunk driving. The charge was eventually dismissed and expunged by the court.³

Applicant acknowledges that the first DUI arrest had no discernible impact, as he was young and tended to blame bad luck for his poor decision making. In August 2004, a little over a year after the first DUI, Applicant was again arrested and convicted for DUI (second). He was at a bar drinking when another male made an unwanted sexual advance. Applicant left the bar in a somewhat panicked state and got behind the wheel of his car. He lost control of the car and was involved in an accident. He hit a building after losing control of his car, but no one except Applicant was injured. The police determined that his blood alcohol content (BAC) at the time of the accident was approximately .16, or twice the legal limit. He was convicted of DUI on his plea of guilty. The court sentenced Applicant to three months in jail (suspended) and two years of unsupervised probation. He paid all required court costs and fines, and completed all terms of his probation, including the mandatory alcohol counseling course.⁴

After the 2004 DUI, Applicant stopped drinking alcohol for a few years. But then, he started going out with friends and started drinking again. In April 2010, after watching his favorite hockey team get eliminated in what he described as a “shocking playoff loss,” Applicant decided “to go drown [his] sorrows at the local bar.”⁵ He felt “tipsy” after consuming alcohol, but decided to drive home as he was “only a couple of miles from his home.”⁶ He was pulled over by police for speeding, and was arrested for DUI after providing a breath sample that indicated a .15 BAC. He went to court, pled guilty, and was found guilty. Applicant testified about the colloquy that he then had with the judge after the court accepted his guilty plea and its impact on him:

³ Tr. 26-41, 54; Exhibits 1, 2.

⁴ Tr. 41-42; Exhibits 1, 2, 4, 5, 7.

⁵ Tr. 43.

⁶ Exhibit 2 at 2.

I'll never forget the judge saying to me that day, "Mr. [Applicant], have you ever been to jail before?: And I said, "No, sir." And his response was, "Well, you are going there today." And that hit me like a ton of bricks. And that was one statement that I will never, ever forget the rest of my life.⁷

Applicant was sentenced to three years in jail (two of which were suspended) and two years of supervised probation.⁸ He served the jail sentence through a work-release program administered by the county jail, which was in Applicant's own words, a "real eye-opening experience."⁹ He was released early from probation for good behavior.¹⁰ Applicant testified about the impact the probation had on him:

You can imagine some of the people that you're seeing when you're sitting in a probation office waiting to see your probation officer. . . . you see things in there and you think, "My God, am I really here? What, what have I done with my life?" And, I don't ever want to be in this situation again.¹¹

Following the 2010 DUI, Applicant also successfully completed an "extensive" six-month alcohol treatment program. He received a favorable prognosis from the treatment program.¹² In response to an inquiry from the Office of Personnel Management, a licensed clinical professional counselor with the treatment program opined that Applicant does not have a condition that could impair his judgment, reliability, or ability to properly safeguard classified information.¹³

Applicant has not been involved in an alcohol-related incident since the third DUI, now over seven years ago. He self-reported the DUIs on his application for a public trust position, including the first DUI, regarding which the Government conceded they were unable to locate any court records.¹⁴

Applicant made a number of lifestyle changes following the 2010 DUI. Primarily, he no longer drinks alcohol and drives. He is in a committed relationship and is the designated driver when he and his girlfriend go out to eat. He also changed his profession. He was a golf pro after graduating from college, and explained that alcohol was readily available and part of the culture. He no longer associates with old friends and colleagues.

⁷ Tr. 30-31.

⁸ Exhibit 3, Tr. 43-44.

⁹ Tr. 30.

¹⁰ Tr. 43-44.

¹¹ Tr. 44.

¹² Tr. 30, 49-52; Exhibits 6, 8.

¹³ Exhibit 8.

¹⁴ Exhibit 1; Tr. 40.

He now wakes up every morning at around 0500 and commutes about ninety minutes to work. He has a similar lengthy commute back to his home, which he purchased a few years ago. He loves his job, which he has been at for the past five years, because he helps frontline warfighters receive better medical care and treatment.¹⁵ Applicant's latest performance appraisal reflects the following assessment by his supervisor:

Applicant is the type of employee every manager wants to have. He understands the job, provides quality work, and is very dependable. . . . [He] frequently volunteers for additional tasks, seeking to assist his team during crunch time. His willingness to do "whatever it takes" is a quality found in few. I would recommend [him] to anyone seeking a dependable, trustworthy staff member who puts others before himself.¹⁶

Law, Policies, and Regulations

This case is decided by applying the applicable provisions of DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the adjudicative guidelines (AG) implemented on June 8, 2017, through Security Executive Agent Directive 4 (SEAD-4).¹⁷

Positions designated as ADP I and ADP II are classified as sensitive positions. 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.¹⁸

When evaluating an applicant's eligibility for a position of trust to support a federal contract, an administrative judge must consider the adjudicative guidelines and whole-person concept. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.¹⁹

The Directive sets forth the due process procedures that must be followed in all DOHA proceedings. Department Counsel must present evidence to establish

¹⁵ Tr. 28-35, 45-47.

¹⁶ Exhibit A.

¹⁷ SEAD-4, ¶ E.1 (the current guidelines "shall be used by all authorized adjudicative agencies when rendering a determination for initial or continued eligibility . . . to hold a sensitive position."); ADP Case No. 14-01655 (App. Bd. Nov. 3, 2015) ("the Guidelines apply to all adjudications under the Directive, including both security clearance and public trust cases.")

¹⁸ Directive, § 3.2; SEAD-4, ¶ E.4. ADP Case No. 14-00590 (App. Bd. Dec. 10, 2014) ("The standard applicable to trustworthiness cases is that set forth . . . regarding security clearances: such a determination 'may be granted only when 'clearly consistent with the interests of the national security'.")

¹⁹ See generally SEAD-4, Appendix A, ¶ 2.

controverted facts (i.e., SOR allegations denied by the applicant). An applicant, on the other hand, bears the burden of presenting evidence rebutting or mitigating concerns raised by their conduct or circumstances. An applicant also has the ultimate burden of persuasion to establish their eligibility for a position of trust.²⁰ Any doubt raised by the evidence, must be resolved by the judge in favor of the national security.²¹

Analysis

Guideline G, Alcohol Consumption

Excessive alcohol consumption can raise a concern about a person's ability to handle and safeguard sensitive information. The concern is explained at AG ¶ 21:

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.

In assessing Applicant's case, I considered all the disqualifying and mitigating conditions under Guideline G, including the following:

AG ¶ 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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder; and

AG ¶ 23(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 judgment.

Applicant made some poor decisions in his twenties involving alcohol. Following the last incident in 2010, when a judge sentenced him to jail, Applicant finally got the much needed "wake up" call. Since then, he has made significant lifestyle changes. He is a productive, reliable employee who is proud of his work in support of injured service members. He has not been involved in any alcohol-related incident in over seven years and self-reported the adverse information about his past alcohol problems on his application. After considering Applicant's testimony and the other record evidence, I find that AG ¶ 23(a) applies.

²⁰ Directive, ¶¶ E3.1.14, E3.1.15.

²¹ Directive, ¶ E3.1.25; SEAD-4, Appendix A, ¶ 1(d).

Guideline E, Personal Conduct

Applicant's past alcohol-related misconduct also raises a concern under Guideline E, which is explained at AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information.

For similar reasons noted above, I find that Applicant presented sufficient evidence to mitigate Guideline E concerns raised by his past poor decisions involving alcohol.²²

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G (Alcohol Consumption):	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record in this case, it is clearly consistent with the interest of national security to grant Applicant initial or continued eligibility for access to sensitive information. Applicant's request for a position of trust is granted.

Francisco Mendez
Administrative Judge

²² AG ¶ 17(c).