



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



In the matter of:)	
)	
[Name Redacted])	ADP Case No. 14-04849
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

06/23/2015

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on April 17, 2014 for a position of public trust. On December 5, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline G, Alcohol Consumption. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); 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 on September 1, 2006.

On December 12, 2014, Applicant answered the SOR and requested a decision be made based on the administrative record. Department Counsel prepared a File of Relevant Material (FORM) on March 4, 2015. Applicant received the FORM on March 23, 2015. Applicant had 30 days from the receipt of the FORM to submit additional matters in response to the FORM. She did not submit additional matters. The case was forwarded to the Hearing Office on May 22, 2015, and assigned to me on May 26, 2015.

Based upon a review of the case file, pleadings, and exhibits, eligibility for a position of public trust is denied.

Rulings on Evidence

Item 11 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The five-page document is a summary of an interview of Applicant which occurred on July 1, 2014, in conjunction with her background investigation. DoDD 5220.6, enclosure 3, ¶ E3.1.20 states, “An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence.” (see ISCR Case No. 11-13999 (App. Bd., Feb. 3, 2014). In the FORM, the Government mentioned the requirement in a footnote on page 2.

Applicant did not respond to the FORM. For this reason, I cannot conclude that Applicant made a knowing waiver of the rule. Waiver means “the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” *Black’s Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009). Item 11 is not authenticated and is not admissible. It will not be considered in this Decision.

Findings of Fact

In her Answer to the SOR, Applicant admits to the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 1.d, and denies the allegations in SOR ¶¶ 1.e and 1.f.

Applicant is a 36-year-old employee of a Department of Defense contractor who seeks a position of public trust. She has been employed with the company since December 2013. This is her first time applying for a position of public trust. The highest level of education she completed is an associate’s degree. She is single and has no children. (Item 5)

The SOR alleges that Applicant struggled with excessive alcohol use since 2008. She was arrested and charged with three alcohol-related driving offenses between December 2008 and September 2012. She was also arrested for Disorderly Conduct in April 2010. (Item 7; Item 9) Her arrest history includes:-

An arrest and charge in December 2008 of Operating with PAC .08 or More. Applicant was convicted of this offense and fined. (Item 4) (Note: The state law where Applicant resides refers to PAC as opposed to BAC. PAC is the equivalent of PAC.)

On March 29, 2009, Applicant was arrested and charged with Operating While Under the Influence and Operating with PAC .08 or More (2nd). She plead No Contest to Operating with PAC .08 or More (2nd). She was sentenced to 20 days in jail, and her driver’s license was revoked for 14 months. (Item 6)

An April 4, 2010, arrest for Disorderly Conduct. Applicant plead guilty on April 26, 2010. She was fined for this offense. There is nothing in the record evidence which

indicates that Applicant was under the influence of alcohol when she was arrested for Disorderly Conduct. Based on this reason, SOR ¶ 1.c is found for Applicant. (Item 7; Item 9)

On September 12, 2012, Applicant was arrested and charged with Operating While Under the Influence (3rd). On October 12, 2012, Applicant plead guilty to Operating with PAC (3rd). She was sentenced to 45 days in jail; her driver's license was revoked for 24 months; an ignition interlock device was installed in her car for 24 months; and she was ordered to attend an alcohol assessment. (Item 8; Item 9)

Between November 12, 2012, and March 23, 2013, Applicant attended alcohol counseling. Her Certified Substance Abuse Counselor (CSAC) diagnosed her with alcohol dependence. Treatment records indicate Applicant started drinking when she was 27. In her alcohol counseling records, Applicant admits to being "a mean drunk." When she drinks a lot of alcohol, she "starts cussing people out, getting physical." She admits her alcohol use has resulted in binge use, blackouts, employment problems, legal problems, family conflict, guilt/remorse about using behaviors, increase/decrease tolerance, loss of control, loss of friends or damaged relationships, mood swings, passing out, unplanned use, and spending excess money on alcohol. (Item 10 at 1-11)

Applicant's alcohol counseling records indicated that she is concerned her alcohol use can hold her back and keep her from having a family. She indicated others are concerned about her driving drunk and her mood swings. She does not believe she is an alcoholic. She does not crave alcohol and she does not drink it every day. (Item 10 at 12)

In a section of Applicant's counseling records pertaining to the likelihood of relapse, the following question was asked: "How aware is the client of relapse triggers, ways to cope with cravings to use and the skills to control impulses to use or impulses to self-harm or others?" Applicant's CSAC replied that Applicant "was not aware. She denies alcohol is a problem." The CSAC also noted in a section called "Psychosocial and Environmental Problems" that Applicant "does not have a sober support network and does not see any reason to develop a sober support network." The CSAC informed Applicant that she diagnosed her with alcoholism. She recommended that she continue with outpatient therapy to gain knowledge about her alcoholism and the process of recovery. (Item 10 at 17-20) It is not clear whether Applicant continued outpatient therapy.

In her response to the SOR, Applicant states that she has reduced her alcohol consumption. She has learned from her previous mistakes and is aware of her limits. Her current level of usage is a bottle of wine over a two week period. She is aware of her past bad choices. She claims she is no longer making those choices. She is now a responsible adult who legally owns and operates a car and has a good job. (Item 4) Applicant did not provide information related to her duty performance.

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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge’s over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out in 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.

The guideline notes several disqualifying conditions that could raise security concerns. The following disqualifying conditions are relevant to Applicant’s case:

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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent) applies. Applicant has been arrested and convicted of driving while under the influence of alcohol on three occasions between December 2008 and September 2012. Her alcohol counseling records indicate that Applicant’s alcohol use has caused other problems in her life to include black outs, fighting, and conflicts with family and friends.

AG ¶ 22(c) (habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the person is diagnosed as an alcohol abuser or alcohol dependent) applies. Applicant does not believe she is an alcoholic, but admits to binge drinking alcohol. Her admissions in her counseling records indicated that she is “a mean drunk”; has lost friendships as a result of her drinking; and has suffered from blackouts after drinking alcohol. Applicant’s admissions lead to the reasonable conclusion that she has consumed alcohol to the point of impaired judgment.

I find AG ¶ 22(d) (diagnosis by a duly qualified medical professional (e.g., physician, clinical social psychologist, or psychiatrist) of alcohol abuse or alcohol dependence) and AG ¶ 22(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) do not apply because the record does not establish that the CSAC who evaluated Applicant and made the diagnosis of alcohol dependence was a duly qualified

medical professional or a licensed clinical social worker. However, the CSAC's evaluation is still considered when reviewing other disqualifying factors under the alcohol consumption guideline.

The guideline also includes examples of conditions that could mitigate security concerns arising from alcohol consumption. Applicant has the burden to establish these mitigating concerns. Two of the mitigating conditions potentially apply:

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 and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and

AG ¶ 23(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)).

While Applicant maintains that she has significantly reduced her drinking, concerns remain because of Applicant's three arrests and convictions related to drinking and driving offenses. In her alcohol counseling records, Applicant admits that her alcohol use created a lot of problems. Her CSAC diagnosed Applicant as alcohol dependent. The fact that Applicant still consumes alcohol remains a concern based on her past problems related to her alcohol use. Applicant has not provided sufficient evidence to mitigate the concerns raised under alcohol consumption. Guideline G is found against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's past history of alcohol use and her three arrests and convictions related to driving while under the influence of alcohol. Applicant's continued consumption of alcohol despite her history of alcohol problems and alcohol-related offenses raise serious issues about her ability to protect sensitive information. Applicant did not mitigate the concerns raised under alcohol consumption.

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:	AGAINST APPLICANT
Subparagraphs 1.a – b; 1.d -1.f:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant eligibility for a position of public trust. Eligibility for a trustworthiness position is denied.

ERIN C. HOGAN
Administrative Judge