



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



In the matter of:	)	
	)	
-----	)	ADP Case No. 07-00966
SSN: -----	)	
	)	
Applicant for Public Trust Position	)	

**Appearances**

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

June 5, 2009

**Decision**

GALES, Robert Robinson, Chief Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns regarding criminal conduct and drug involvement. Eligibility to occupy an Information Systems Position designated ADP I/II/III (public trust position) is denied.

**Statement of the Case**

On January 3, 2006,<sup>1</sup> Applicant applied for a public trust position and submitted a Questionnaire for Public Trust Positions (SF 85P). On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended and modified (Regulation); Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); a memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security), *Adjudication of Trustworthiness Cases*, dated

<sup>1</sup> Applicant erroneously dated the SF 85P as January 3, 2005, but he corrected the date when he reaffirmed it on February 7, 2006. Tr. at 119-120.

November 19, 2004; and a memorandum from the Deputy Director for Personnel Security, Office of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (C<sup>3</sup>I), *AIS Trustworthiness Determinations: Request for Adjudicative Assistance*, dated August 4, 1999.

The SOR alleged trustworthiness concerns under Guidelines J (Criminal Conduct), H (Drug Involvement), and E (Personal Conduct), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying an Information Systems Position designated ADP I/II/III to support a contract with the Department of Defense, and recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

It should be noted that on December 29, 2005, the President promulgated revised *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information*, and on August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing implementation of those revised Adjudicative Guidelines (hereinafter AG) for all adjudications and other determinations made under the Directive and the Regulation in which the SOR was issued on or after September 1, 2006. The AG are applicable to Applicant's case because his SOR was issued after September 1, 2006.

It is unclear when Applicant received the SOR. However, in a sworn, written statement, dated November 14, 2008, Applicant responded to the SOR allegations and requested a hearing before an Administrative Judge. Department Counsel indicated the Government was prepared to proceed on February 5, 2009, and the case was assigned to me on February 6, 2009. A Notice of Hearing was issued on March 5, 2009, and I convened the hearing, as scheduled, on March 26, 2009.

During the hearing, 10 Government exhibits and no Applicant exhibits were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on April 3, 2009.

### **Procedural Matters**

At the conclusion of Applicant's case, Department Counsel moved to amend the SOR to conform to the evidence presented. Specifically, she moved to correct certain alleged facts in SOR ¶¶ 1.a., 1.b., and 1.f., and withdraw SOR ¶ 3.a. There being no objection, the motion was granted.<sup>2</sup>

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the following factual allegations pertaining to Criminal Conduct in the SOR (¶¶ 1.c., 1.e., 1.g., and 1.j.; and the following

---

<sup>2</sup> *Id.* at 93, 96, 106-109, 118.

factual allegations pertaining to Drug Involvement in the SOR (§§ 2.c. and 2.d.). He denied the remaining allegations, including the factual allegation pertaining to Personal Conduct. During the hearing, he admitted the following amended factual allegations pertaining to Criminal Conduct (§§ 1.a., 1.b., and 1.f).

Applicant is a 28-year-old employee of a defense contractor, and he is seeking to retain his eligibility for occupying an Information Systems Position designated ADP I/II/III to support a contract with the Department of Defense. He has been gainfully employed by the same defense contractor since December 2005, and currently serves as a pharmaceutical customer telephone supervisor.<sup>3</sup> His employment history since 1998 includes a variety of positions with different employers, generally as a field technician or customer service representative. Applicant earned a B.S. degree in electrical engineering technology in October 2001.<sup>4</sup> He has never served in the U.S. military.<sup>5</sup> He was never married, but does have a nine-year-old daughter from a former relationship,<sup>6</sup> and a nine-month-old son with his current fiancé.<sup>7</sup> He and his fiancé are expecting another son soon.<sup>8</sup>

### **Criminal Conduct & Drug Involvement**

Applicant was a substance abuser whose substance of choice was cannabis marijuana (marijuana). He commenced using marijuana in about 1997, when he was 17 years old, with a friend, while in high school,<sup>9</sup> and continued using it, with some periods of abstinence, until March 7, 2005.<sup>10</sup> Initially, he used marijuana between one and three times a week while “hanging out” with friends.<sup>11</sup> Marijuana relaxed him.<sup>12</sup> He also experimented on one occasion with the hallucinogen phencyclidine (PCP), but contended he was not aware the cigarette had been dipped in PCP.<sup>13</sup> While attending college for three years, until he graduated in October 2001, he continued to smoke two

---

<sup>3</sup> *Id.* at 23.

<sup>4</sup> *Id.* at 5, 22.

<sup>5</sup> Government Exhibit 1 (SF 85P, dated January 3, 2006), at 6.

<sup>6</sup> Tr. at 21-22.

<sup>7</sup> *Id.* at 22.

<sup>8</sup> *Id.*

<sup>9</sup> Government Exhibit 3 (Applicant Affidavit, dated April 24, 2008), at 9. *But see Id.* at 24, wherein he contends he was “somewhere around 18, 19 years old.” He claims his affidavit, in this regard, is not accurate. *Id.* at 26.

<sup>10</sup> *Id.* at 91-92.

<sup>11</sup> *Id.* at 24, 26; Government Exhibit 3, *supra* note 9, at 9.

<sup>12</sup> *Id.* Government Exhibit 3.

<sup>13</sup> Tr. at 23, 33.

“joints” of marijuana each day.<sup>14</sup> From about October 2001 until about June 2002, the frequency of his marijuana use remained unchanged.<sup>15</sup> He abstained during a period when he resided with his mother (June 2002 through June 2004), but eventually, once again, resumed his relationship with marijuana.<sup>16</sup> He smoked one “joint” of marijuana per week, and contends he eventually stopped on March 7, 2005.<sup>17</sup> He claims he does not intend to use marijuana in the future, and wants to lead a “drug-free, criminal-free life”.<sup>18</sup>

Applicant purchased marijuana from friends “a couple times” while in high school, spending about \$5 or \$10.<sup>19</sup> While in college, he never purchased it for it was provided at no cost to him by friends.<sup>20</sup> After college, he purchased marijuana on one or two occasions.<sup>21</sup> He never sold marijuana.<sup>22</sup>

Over the years, from about April 2000 until about November 2005, Applicant was involved in numerous incidents with law enforcement authorities. Some of those incidents involved marijuana, and others did not. The SOR alleges 11 incidents, as follows:

SOR ¶ 1.k.: On April 15, 2000, when he was 19 years old, Applicant and his live-in girl friend, the mother of his oldest child, got into an argument during which he struck her in the jaw and chest, and kicked her in the stomach while she was lying on the floor.<sup>23</sup> He also kicked out her front window.<sup>24</sup> He was arrested and charged with one count of assault-intent/reckless/injure and one count of criminal damage-deface.<sup>25</sup> It

---

<sup>14</sup> Government Exhibit 3, *supra* note 9, at 9. *But see Id.* at 25, wherein he contends he used marijuana maybe “once or twice a week.”

<sup>15</sup> Applicant seemingly has confused dates during his testimony. His benchmark for abstaining commenced with his relocation into his mother’s residence in June 2002, not 2003, as stated in his affidavit, and he moved out in June 2004, not 2005, as stated in his affidavit. *Id.*; Tr. at 27-29; Government Exhibit 1, *supra* note 5, at 2.

<sup>16</sup> *Id.* Government Exhibit 3.

<sup>17</sup> *Id.*

<sup>18</sup> Tr. at 31-32.

<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Id.* at 26-27.

<sup>21</sup> *Id.* at 29.

<sup>22</sup> *Id.* at 27.

<sup>23</sup> Government Exhibit 10 (Police Department Report, dated April 15, 2000) at 2-4; Government Exhibit 2 (FBI Identification Record, dated February 28, 2006) at 3.

<sup>24</sup> *Id.* Government Exhibit 10, at 4.

<sup>25</sup> Government Exhibit 2, *supra* note 23, at 3.

appears that the victim either withdrew the complaint or one was not filed, and no further action was taken.<sup>26</sup>

SOR ¶ 1.j.: On July 2, 2000, at approximately 2 a.m., Applicant and a convenience store manager were in a heated argument over the manager's inability to sell a single cigar of a particular brand. Applicant became abusive and was ordered by the manager to leave the store, but as he was leaving, Applicant threatened the manager by stating "I'll blow this m----- f----- store up bitch." The police happened to be passing by at the time and intervened. Applicant remained belligerent and uncooperative, despite having a police officer's gun pointed at him. Applicant was placed into custody for disorderly conduct, and a search of him, incident to arrest, revealed a clear plastic baggy containing 1.2 grams of marijuana.<sup>27</sup> He was charged with one count of possession of marijuana, one count of criminal trespassing 3<sup>rd</sup> degree, one count of possession of drug paraphernalia, and one count of disorderly conduct (abusive/offensive language).<sup>28</sup> Applicant pled guilty to the marijuana charge and was sentenced to a fine and two years probation, along with a requirement that he complete drug counseling.<sup>29</sup> The drug paraphernalia charge was dismissed, and no complaints were filed for the remaining charges.<sup>30</sup> During the hearing, Applicant denied ever threatening to blow up the store, but his threat was overheard by both the store manager and the police officer. Furthermore, he denied to the police that the marijuana was his.

SOR ¶ 1.i.: On January 1, 2001, at about 12 a.m., Applicant was driving his vehicle when he made an unsafe lane change in front of a police car. The police officer stopped Applicant and, upon approaching the vehicle, detected the odor of marijuana emanating from it. Applicant was taken into custody and the officer's police dog, a specialist in detecting certain drugs, "sniffed" Applicant's vehicle. He alerted on the driver's side door in which a marijuana pipe was located. Further hand search by the officer discovered a useable quantity of what was field-tested and found to be marijuana.<sup>31</sup> He was charged with one count of possession of marijuana, and one count of possession of drug paraphernalia.<sup>32</sup> Applicant does not recall if he was ever convicted of the charges.<sup>33</sup>

---

<sup>26</sup> *Id.*

<sup>27</sup> Government Exhibit 9 (Police Department Report, dated July 2, 2000) at 1,3, 5-6, 9.

<sup>28</sup> Government Exhibit 2, *supra* note 23, at 3.

<sup>29</sup> Applicant's Response to SOR, dated November 14, 2008, at 2.

<sup>30</sup> Government Exhibit 2, *supra* note 23, at 3.

<sup>31</sup> Government Exhibit 8 (Sheriff's Incident Report, dated January 1, 2001) at 2.

<sup>32</sup> *Id.*

<sup>33</sup> Tr. at 77-78.

SOR ¶ 1.h.: On February 24, 2001, Applicant and his former girlfriend were picking up their daughter at someone's residence when they got into an argument. The former girlfriend was standing outside the vehicle with Applicant sitting in the driver's seat. She reached into the vehicle to retrieve her keys when he pushed her hand against the door. She retaliated by biting his hand. They were both taken into custody for assault and domestic violence. A search of Applicant, incident to arrest, revealed a package of cigarette rolling papers commonly used to smoke marijuana, and a search of the vehicle revealed a clear plastic baggie containing an unspecified amount of usable marijuana.<sup>34</sup> Applicant denied the marijuana was his. He was charged with one count of possession of marijuana, one count of possession of drug paraphernalia, and one count of assault.<sup>35</sup> The assault charge was dismissed,<sup>36</sup> but it is unclear as to what the disposition was for the marijuana-related charges. Applicant has offered two differing results of the incident. In his affidavit of April 2008, he believed the charges were dropped,<sup>37</sup> but during the hearing, he recalled being sentenced to probation for the marijuana-related charges.<sup>38</sup>

SOR ¶ 1.g.: On October 19, 2001, Applicant was arrested and charged with one count of failure to appear 1<sup>st</sup> degree.<sup>39</sup> No complaint was filed.<sup>40</sup> Applicant does not recall if he was ever convicted of the charge,<sup>41</sup> and there is no evidence to indicate that he was.

SOR ¶ 1.f.: On October 24, 2001, Applicant was arrested and charged with failure to appear in relation to the marijuana-related offenses of January 1, 2001.<sup>42</sup> The possession of marijuana charge was amended to marijuana violation, and he was found guilty of the amended charge and sentenced to 60 days in jail, a fine, and 3 years probation, with a discharge date of March 13, 2003.<sup>43</sup> The charge for possession of drug paraphernalia was dismissed.<sup>44</sup>

---

<sup>34</sup> Government Exhibit 7 (Police Incident Report, dated February 24, 2001) at 1-2.

<sup>35</sup> Government Exhibit 2, *supra* note 23, at 4.

<sup>36</sup> *Id.*

<sup>37</sup> Government Exhibit 3, *supra* note 9, at 3.

<sup>38</sup> Tr. at 79.

<sup>39</sup> Government Exhibit 2, *supra* note 23, at 4.

<sup>40</sup> *Id.*

<sup>41</sup> Tr. at 80.

<sup>42</sup> *Id.* at 110.

<sup>43</sup> Government Exhibit 2, *supra* note 23, at 4.

<sup>44</sup> *Id.*

SOR ¶ 1.e.: On May 5, 2002, at about 12:30 a.m., Applicant and some friends were parked in adjacent vehicles listening to loud music while smoking. They were initially approached by a police officer because of the noise. However, because of the strong odor of marijuana coming from both vehicles, the officer asked Applicant and the other vehicle owner for consent to search both vehicles. Consent was given. The search of Applicant's vehicle uncovered a hand rolled cigar containing over 1 gram of marijuana in brown rolling paper in a cardboard box on the front passenger seat and a small plastic bag containing 1.49 grams of marijuana in the center console. Applicant acknowledged the marijuana was his, but stated the cigar belonged to a friend. He also admitted he was currently on probation for marijuana. He was arrested and charged with one count of possession of marijuana and one count of possession of drug paraphernalia, both felonies.<sup>45</sup> Applicant apparently failed to appear for his required court date, and it was not until his arrest on March 5, 2005, on charges set forth below, that it was discovered there was an active warrant for his arrest. He was subsequently found guilty of the possession of marijuana charge, a felony, and sentenced to supervised probation for 3 years, beginning March 3, 2006, a fine, and required to undergo drug and alcohol testing.<sup>46</sup>

SOR ¶ 1.d.: On March 7, 2005, at approximately 11:00 p.m., police responded to complaints about loud noise and a disturbance coming from an apartment. Applicant and his friends were drinking and smoking marijuana.<sup>47</sup> When the police arrived, they looked through the window and observed one of the occupants sitting at a table, packaging what appeared to be marijuana. There were two plastic bags containing marijuana inside an unzipped canvass duffel bag on the table. Although Applicant denied the bag was his, he acknowledged the bag contained some of his "important papers." In fact, the canvass duffel bag contained five plastic bags filled with marijuana, a pipe with residue, two scales for measuring ounces, a notebook, and miscellaneous papers with Applicant's name appearing on them. Subsequent analysis determined the plastic bags contained 89.1 grams of marijuana, and marijuana residue in the pipe.<sup>48</sup> Applicant was arrested and charged with two counts of possession of marijuana and one count of possession of drug paraphernalia, all felonies.<sup>49</sup> The police also discovered there was an active warrant for Applicant's arrest.<sup>50</sup> Applicant has offered two differing results of the incident. In his affidavit of April 2008, he believed the charges

---

<sup>45</sup> Government Exhibit 6 (Police Offense/Incident Report, dated May 5, 2002) at 3-4, 7.

<sup>46</sup> Applicant's Response to SOR, *supra* note 29, at 2.

<sup>47</sup> Government Exhibit 3, *supra* note 9, at 5.

<sup>48</sup> Government Exhibit 5 (Police Offense/Incident Report, dated March 8, 2005) at 2-4, 10.

<sup>49</sup> Government Exhibit 2, *supra* note 23, at 5.

<sup>50</sup> Government Exhibit 5, *supra* note 47, at 2-3.

were dropped,<sup>51</sup> but during the hearing, he recalled pleading guilty but did not recall the sentence.<sup>52</sup>

SOR ¶ 1.c.: Applicant obtained a position in telemarketing and chose to be paid an hourly wage as opposed to a commission. Two weeks later, when he went to pick up his paycheck, a dispute arose and he was advised by his employer that since he had selected the commission option he had no paycheck coming. In retaliation, upon departing, Applicant took a television from his supervisor's desk and went home. He never returned to work, and never returned the television because he considered it compensation for his work.<sup>53</sup> On June 7, 2005, Applicant was charged with theft-control prop. On August 27, 2005, he was arrested for the charge,<sup>54</sup> in addition to another charge, specified below. He subsequently pled guilty and a \$500 fine was imposed.<sup>55</sup>

SOR ¶ 1.b.: On August 27, 2005, as noted above, Applicant was arrested and charged with failure to appear in relation to the theft-related offense of June 5, 2005, referred to above.<sup>56</sup>

SOR ¶ 1.a.: On November 18, 2005, Applicant was arrested on outstanding bench warrants related to the marijuana-related offenses of May 2002 and March 2005, as well as a non SOR-alleged marijuana-related offense of March 2003.<sup>57</sup> It appears that there were three counts of marijuana violation and one count of drug paraphernalia violation involved.<sup>58</sup> As noted above, Applicant was subsequently found guilty of the possession of a marijuana charge, a felony, and sentenced to supervised probation for 3 years, beginning March 3, 2006, a \$2,500 to \$3,000 fine, and required to undergo drug and alcohol testing.<sup>59</sup> Applicant's period of probation ended in March 2009, only weeks before the hearing, but approximately five months after the SOR was issued.

As part of his court-mandates, Applicant underwent probation with group drug counseling and classes, on two separate occasions (2001-02 and 2005) but was never evaluated or diagnosed as a drug abuser or drug dependent.<sup>60</sup> Initially, he did not

---

<sup>51</sup> Government Exhibit 3, *supra* note 9, at 6.

<sup>52</sup> Tr. at 81.

<sup>53</sup> Government Exhibit 3, *supra* note 9, at 6-7; Tr. at 82-83.

<sup>54</sup> Government Exhibit 4 (Arrest/Booking Record, dated August 27, 2005) at 1-2.

<sup>55</sup> Applicant's Response to SOR, *supra* note 29, at 1.

<sup>56</sup> Government Exhibit 4, *supra* note 54.

<sup>57</sup> Tr. at 109.

<sup>58</sup> Government Exhibit 2, *supra* note 23, at 5.

<sup>59</sup> Government Exhibit 3, *supra* note 9, at 8.

<sup>60</sup> Tr. at 34, 83-84.



appreciate those sessions and did not believe they were very helpful. However, in retrospect, after the second set of 20-30 sessions, he believes they were.<sup>61</sup> Despite taking that counseling and those classes, what he had learned did not have a lasting effect on him, and he continued using marijuana after he had completed them.<sup>62</sup> Between 2001 and 2003, he tested positive for marijuana on two occasions, neither of which were during a period of probation.<sup>63</sup> As a result of his use of PCP, Applicant became incoherent and out of control, resulting in his being hospitalized at a drug and alcohol treatment facility for three or four days.<sup>64</sup>

Applicant's testimony during the hearing was replete with "I do not recall" responses to inquiries regarding the circumstances of his arrests, the dispositions of those arrests, and whether or not he had used marijuana prior to the individual incidents. Likewise, when questioned pertaining to a particular incident, he sometimes responded by referring to other incidents. He referred to incidents with the wrong dates and frequently revised his testimony.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."<sup>65</sup> As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. Positions designated as ADP I/II/III are classified as "sensitive positions."<sup>66</sup> "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."<sup>67</sup> 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.<sup>68</sup>

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the adjudicative guidelines. In addition to brief

---

<sup>61</sup> *Id.* at 86.

<sup>62</sup> *Id.* at 85.

<sup>63</sup> Tr. at 101.

<sup>64</sup> Applicant's Response to SOR, *supra* note 29, at 3.

<sup>65</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>66</sup> Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

<sup>67</sup> *Id.* at ¶ C6.1.1.1.

<sup>68</sup> *See Id.* at ¶ C8.2.1.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."<sup>69</sup> The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.<sup>70</sup>

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.<sup>71</sup> 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.

## Analysis

---

<sup>69</sup> "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>70</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>71</sup> See *Egan*, 484 U.S. at 531.

## **Guideline J, Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), "a single serious crime or multiple lesser offenses" is potentially disqualifying. Similarly, under AG ¶ 31(c), an "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," may raise security concerns. In addition, if the "individual is currently on parole or probation," AG ¶ 31(d) may apply. Applicant's lengthy history of criminal conduct, involving about 11 arrests and a substantial number of convictions (along with a number of dismissals), is documented in his police records, his affidavit, and the evidence, including his testimony, presented during the hearing. The Government has established AG ¶¶ 31(a) and 31(c). Applicant was on court-imposed probation from March 3, 2006, until some unspecified date in March 2009. While he was no longer on probation at the time of the hearing, when the SOR was issued, he was still on probation. AG ¶ 31(d) was established, but is no longer applicable.

The guidelines also include examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Similarly, AG ¶ 32(d) may apply when "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."

AG ¶¶ 32(a) and 32 (d) are similar and only partially applicable. Applicant's history of criminal conduct involving the police, as set forth in the SOR, commenced in April 2000, when he was 19 years old, but in actuality, it commenced several years earlier, in 1997, when he was 17 years old, and using marijuana. His criminal conduct continued repeatedly until 2005 with few significant breaks between incidents. Criminal conduct, sometimes only months apart from each other, occurred largely because of Applicant's apparent disinterest and attitude towards authority and regulations, including the law. His multiple incidents of criminal conduct included possession and use of drugs and drug paraphernalia, assaults, theft, and failure to appear in court. Over an extensive period, arrests and judicial punishment failed to stem the tide of his criminal activities. Instead, he was emboldened by some relatively light fines, brief periods of confinement, probation, and mandated counseling, as well as some dismissals of charges. His misconduct continued unabated, until at least 2005.

The circumstances of Applicant's criminal conduct were not so unusual that they would be unlikely to recur. To the contrary, the circumstances cast substantial doubt as to Applicant's reliability, trustworthiness, and good judgment. Furthermore, Applicant was unable or unwilling to explain or describe the circumstances of various incidents, and as noted above, his testimony was replete with "I do not recall" responses to inquiries regarding the circumstances of his arrests, the dispositions of those arrests, and whether or not he had used marijuana prior to the individual incidents. Likewise, when questioned pertaining to a particular incident, he sometimes responded by referring to other incidents. He referred to incidents with the wrong dates and frequently revised his testimony. All of the above seriously eroded his credibility.

Applicant has argued that sufficient time has elapsed since the criminal behavior occurred to support mitigation of such conduct. He contends the last incident occurred in June 2005 (theft); he ignores the arrest in August 2005 (failure to appear); and contends that the November 2005 arrest was merely the culmination of earlier criminal conduct. That arrest resulted, in part, in Applicant being sentenced to supervised probation for 3 years, beginning March 3, 2006. Applicant's period of probation ended in March 2009, only weeks before the hearing, but approximately five months after the SOR was issued. He served his sentence, paid his fine, and completed his court-mandated counseling. Other than the absence of any more recent SOR-alleged criminal conduct, and the completion of probation and court-mandated counseling, there is insufficient evidence of successful rehabilitation.

While a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future. As noted above, Applicant is a repeat criminal, having been arrested and convicted numerous times, repeatedly punished, and on two separate occasions, placed on probation. There were periods when he abstained from criminal conduct, only to eventually return to it. Considering the six year period of SOR-alleged criminal conduct, the three and one-half years since his last SOR-alleged arrest, and the two months since he completed his probation stemming from that conviction, I believe the time elapsed does not yet satisfy the full intent of AG ¶¶ 32(a) and 32 (d).

#### **Guideline H, Drug Involvement**

The security concern relating to the guideline for Drugs is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970,<sup>72</sup> as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 25(a), “any drug abuse,” is potentially disqualifying. Similarly, “testing positive for illegal drug use,” may apply under AG ¶ 25(b). In addition, when there is evidence of “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” AG ¶ 25(c) may raise security concerns. Applicant has admitted the use and purchase of marijuana, and acknowledged his two positive tests for marijuana. He repeatedly possessed drug paraphernalia. There is eyewitness police evidence of his involvement in packaging marijuana. He was arrested and convicted for drug-related criminal charges on several different occasions between 2000 and 2005. The Government has established AG ¶¶ 25(a), 25(b), and 25(c).

The guideline also includes examples of conditions that could potentially mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” When there is “a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation,” AG ¶ 26(b) may apply. In addition, AG ¶ 26(d) may apply when there is “satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.”

AG ¶¶ 26(a) and 26(d) are very similar to AG ¶¶ 32(a) and 32 (d), discussed above, and only partially apply. Concerning AG ¶ 26(a), there are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.”<sup>73</sup> For example, if the evidence shows “a significant period of time has passed

---

<sup>72</sup> Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Sch. I (c)(9). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

<sup>73</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”<sup>74</sup>

Applicant’s history of drug involvement, as set forth in the SOR, commenced in 1997, when he was about 17 years old, and continued repeatedly at least until 2005 with few significant breaks between incidents. His drug involvement – multiple incidents of purchase, possession, and use of drugs, and drug paraphernalia, and failure to appear in court pertaining to the various charges against him – occurred sometimes only months apart from each other. It reflected Applicant’s apparent disinterest and attitude towards authority and regulations, including the law. Over that period, arrests and judicial punishment failed to stem the tide of his drug involvement. Instead, he was emboldened by some relatively light fines, brief periods of confinement, probations, and mandated counseling, as well as some dismissals of charges. His drug involvement continued unabated, until 2005.

There were periods during which Applicant abstained from any drug use, but those periods of abstinence ended when he resumed the drug use. There were two periods of court-ordered probation, with the earlier one followed by Applicant’s resumption of drug use. There were court-mandated group therapy sessions followed by his resumption of drug use. It is significant that in March 2005, Applicant and his associates were observed by police packaging 89.1 grams of marijuana, and his papers and a scale were found in a duffle bag, leading one to surmise that dealing or selling of marijuana might have been intended. However, that specific allegation does not appear in the SOR and was not charged.

Applicant’s drug involvement occurred under three general circumstances or environments: high school, college, and post-college. Each period involved different drug-using associates and contacts, yet they all had two things in common: they were Applicant’s friends and associates and they, as well as Applicant, used drugs. Changing the circumstances, environments, geographical locations, or friends and associates, made no difference, for he continued using drugs. Abstinence was followed by drug use. Counseling was followed by drug use. Arrest and punishment was followed by drug use. The circumstances of Applicant’s drug involvement were not so unusual that it would be unlikely to recur. To the contrary, the circumstances, as well as his written responses to inquiries and the nature of his hearing testimony, and my assessment of his poor credibility, cast substantial doubt as to Applicant’s reliability, trustworthiness, and good judgment. He has abstained from drug use since March 7, 2005, and apparently now recognizes the negative impact his drug involvement has had on him. This is obviously a positive consideration. However, considering the eight year period of SOR-alleged drug involvement pertaining to marijuana, the three and one-half years since his last SOR-alleged drug-related arrest, and the two months since he completed his probation stemming from that conviction, I believe the time elapsed does not yet satisfy the full intent of AG ¶¶ 32(a) and 32 (d). However, as it pertains to Applicant’s

---

<sup>74</sup> *Id.*

involuntary use of PCP, in the absence of evidence indicating it was intentional use, AG ¶ 26(a), applies.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. While he has repeatedly disassociated from his drug-using associates and contacts, his history reflects his ability to make new relationships with other drug-using associates. As noted above, despite altering his circumstances, environments, and geographical locations where drugs were used, and he doesn't currently use drugs, he remains in one of those same environments. It appears he may have, at last, changed his own life with respect to illegal drug use. He has abstained from drug abuse since March 2005. However, he did not provide "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) does not fully apply.

AG ¶ 26(d) does not apply because Applicant has not offered any specific evidence regarding the nature of the programs he was enrolled in other than to generally describe them as court-mandated group counseling and classes. It is, therefore, unclear if the programs described qualify as a "prescribed drug treatment program." Furthermore, even if the programs did so qualify, there is no evidence of a "favorable prognosis by a duly qualified medical professional." Moreover, it is clear that Applicant resumed his drug involvement after completion of the initial court-mandated group counseling and classes.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance, and by inference, a public trust position, 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, and by inference, a public trust position, must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have addressed some of those factors in my analysis under Guidelines J and H above, but some additional comment is warranted.

Applicant’s drug involvement and criminal conduct, was, in many instances, felonious conduct, the seriousness of which cannot be minimized. His decisions to purchase, possess, and use marijuana, and possess drug paraphernalia, over a substantial period, were knowledgeable, voluntary, and intentional. While the early conduct of merely using marijuana while in high school can be looked at in one way, the continued drug involvement as an adult, in college and after graduation, was much more serious, and had major implications with the police and court systems. He was fully responsible for such conduct. The voluntary continuation of such drug involvement and criminal conduct, even after he had been arrested on numerous occasions, punished, and required to attend group drug counseling, indicates judgment lapses and raises serious concerns which cannot be overlooked. Using the analogy from the Appeal Board in financial cases, Applicant has not established a “meaningful track record” of drug abstinence or steadfast compliance with the law. Taken together, his conduct over the years vitiates any other mitigation. (See AG ¶¶ 2(a)(1), 2(a)(2), 2(a)(3), 2(a)(4), 2(a)(5), 2(a)(6), 2(a)(7), and 2(a)(9).)

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant’s eligibility and suitability for a public trust position. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the criminal conduct and drug involvement security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government’s case. For the reasons stated, I conclude he is not eligible for access to sensitive information.

### **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 J:	AGAINST 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
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant



Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	Against Applicant

Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	Withdrawn - 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 interest to grant Applicant eligibility to occupy an Information Systems Position designated ADP I/II/III to support a contract with the Department of Defense. Eligibility for a public trust position is denied.

---

ROBERT ROBINSON GALES  
Chief Administrative Judge