



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



In the matter of:	)	
	)	
-----	)	ADP Case No. 06-13929
SSN: -----	)	
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Stephanie Hess, Esquire, Department Counsel  
For Applicant: *Pro Se*

April 28, 2008

**Decision**

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HOWE, Philip S., Administrative Judge:

On May 20, 2003, Applicant submitted his original Questionnaire for Public Trust Position (SF 85P). On October 3, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the trustworthiness concerns under Guidelines J, H, and E.. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 27, 2007. He answered the SOR in writing in an undated Answer, and requested a hearing before an administrative judge. DOHA received the request on November 13, 2007. Department Counsel was prepared to proceed on December 18, 2007. The case was assigned originally to another administrative judge on December 27, 2007. Because of case load

requirements, the case was transferred to me on January 4, 2008. DOHA issued a Notice of Hearing on January 25, 2008. An Amended Notice of Hearing was issued on January 31, 2008, because of a change in hearing location. I convened the hearing as scheduled on February 12, 2008. The Government offered Exhibits (Ex.) 1 through 4, which were received without objection. Applicant did not submit any exhibits. I let the record remain open until February 26, 2008, to allow Applicant to submit an alcohol evaluation form, but I never received any documents from Applicant after the hearing (Tr. 78). DOHA received the transcript of the hearing (Tr.) on February 22, 2008. The record closed on February 26, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all factual allegations in the SOR, except the allegation in ¶ 3.a. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is 27 years old, unmarried, and works for a defense contractor in the health insurance business. He started with this employer five years and five months ago. He has been promoted several times. He works in the scheduling and processing area of the business. He has two and a half years of college. His income is \$45,000 and he owns his home. (Tr. 19, 39, 53-58; Exhibits 1, 2)

Applicant was arrested and given a citation to appear in court on May 8, 1998, when he was at a friend's house for a party. The citation was for trespassing and entry of a vehicle on the property of another person. Applicant pled not guilty, and eventually the charges were dismissed. (Tr. 21, 22; Exhibit 3)

Applicant was arrested on July 2, 1999, and charged with underage possession of alcohol. The police ticketed Applicant, but he cannot remember the details of the incident or the disposition of the offense. (Tr. 22; Exhibit 3)

Applicant was arrested on August 5, 1999, on charges of underage drinking, possession of alcohol (first offense), and adult failure to prevent underage drinking. He was convicted of underage drinking and possession of alcohol. His fine was approximately \$209. The adult failure charge was dismissed. This incident occurred at his parent's lake house where he invited friends to visit him. (Tr. 23, 24; Exhibit 3)

On or about November 2000, Applicant was again arrested on two counts of operating a motor vehicle while intoxicated (OWI). He was convicted of one count of OWI. His sentence was one year probation, 30 days in jail, and a fine of \$453. His driver's license was suspended for one year. He obtained a restricted driving permit for work purposes. The other OWI charge was dismissed. Applicant attended a friend's wedding, drank too much alcohol, and drove home. He blew .17% on his breathalyser test. The terms of his probation included periodic reports to his probation officer, drug education classes, and alcohol treatment classes. At that time Applicant was 19 years old. He is not certain why he was arrested on two counts of OWI. (Tr. 24-26; Exhibit 3)

On or about September 2002, Applicant was arrested for identification card violations and underage drinking. He was convicted and fined \$674. Applicant had a fake identification card. He tried to enter a bar with the identification card, and he was not 21 years of age. The police were called and Applicant was arrested. (Tr. 26; Exhibit 3)

Applicant was charged with disorderly conduct on October 26, 2003. He was later convicted of this offense and fined \$160. He does not remember much of the circumstances of this offense because he was drunk. He does remember playing darts in a bar. Applicant committed this offense while working for his current government contractor employer. (Tr. 26, 27, 39; Exhibit 3)

On November 16, 2003, Applicant was arrested on charges of two counts resisting arrest and obstructing an officer, possession of drug paraphernalia, and unlawful deposit of human waste. Applicant was traveling from bar to bar this night, drinking, and could not find a bathroom at 1:00 a.m. in the morning. He urinated by a dumpster. A bar security officer saw him, told him to stop and come over to him. The security officer apprehended him, but Applicant did not think the security officer was a real policeman, so they got into a fight, ending when the security officer wrestled Applicant to the ground. Applicant admitted he had the drug paraphernalia and was urinating publicly, but did not think the resisting arrest charge was valid. Applicant also did not want to hire a lawyer to represent him. He did not appear in court on the appointed day, and an arrest warrant was issued for him. The police found him when he had an automobile accident on August 25, 2004. The police checked their computer records for outstanding warrants, and found Applicant had one. He later appeared in court, was convicted of the offense of unlawful deposit of human waste, ordered to complete the first offender's program, which included drug and alcohol counseling, 60 hours of community service. He was fined \$243. The other charges were dropped by the court. The alcohol counseling included a 30-day outpatient program for four hours a week day. Applicant completed the program. Applicant worked for his current employer when this incident occurred. (Tr. 27-31, 39; Exhibits 3, 4)

On December 20, 2003, Applicant was arrested on charges of possession of marijuana and reckless driving, endangering safety, and operating while intoxicated. He was convicted of these offenses and fined \$507. His driving privileges were suspended for one year. Applicant had a .09% result on his breathalyzer test. Applicant claims this arrest (alleged in Subparagraph 1.h of the SOR) is the same offense as alleged in the Subparagraph 1.i of the SOR. Applicant worked for his current employer when this incident occurred. (Tr. 31-33, 39; Exhibits 3, 4)

On April 20, 2004, Applicant was arrested for possession of marijuana, reckless driving, and driving under the influence of alcohol (DUI). He was convicted of reckless driving and fined \$151. The other charges were dropped by the court. Applicant worked for his current employer when this incident occurred. (Tr. 31-33, 39; Exhibit 3)

Applicant was arrested on May 4, 2004, for operating a motor vehicle after his driver's license was suspended. He was convicted of this offense and fined \$181.

Applicant does not remember why the police stopped his vehicle that night. He also does not remember whether his driver's license was suspended for a longer period of time because of this offense. Applicant worked for his current employer when this incident occurred. (Tr. 33, 34, 39; Exhibit 3)

Applicant was arrested on November 17, 2006. The charges against him were possession of marijuana and drug paraphernalia. He was convicted of these offenses, fined an unknown amount, and had his driver's license suspended for another six months. Applicant was at a casino in his home state when this incident occurred. He put his coat in one place, and went to another place. The casino security officer thought the coat was abandoned, so they searched it to find identification to be able to return it to its owner. During that search they found the marijuana and drug paraphernalia. He admitted the coat was his, and was arrested. The marijuana in the coat was about one gram, according to Applicant. This incident occurred while Applicant worked for his current employer. (Tr. 34, 35, 39; Exhibit 3)

Applicant started using marijuana when he was 16 years old and in high school. He used it once or twice a month at that time when he was with other students at parties. He guesses he last used marijuana in November 2007, at the age of 26. He does not remember the circumstances of that last use. He claims he stopped using it because he does not like it anymore. He stopped using marijuana about two years ago, and was going to Alcoholics Anonymous (AA) meetings. The older members there talked about God and Applicant had an "epiphany" at one meeting, concluding God wanted humans to be happy, and marijuana use made him happy, so he quit going to AA meetings and started using marijuana again. He did not like AA meetings because he felt he did not fit into the demographic mix of the membership. Applicant was younger than they were. He also saw the members smoking tobacco and drinking coffee, and thought there were "uppers and downers" in those substances also. Applicant did not submit a urine screen for drug use to verify his recollection that he stopped using marijuana. (Tr. 36-39, 60)

Applicant resumed drinking alcohol at the same time he started using marijuana again. He has no intent to stop drinking alcohol, particularly because he is now over 21 years of age. (Tr. 38, 39, 60, 68)

Applicant was in drug and alcohol counseling from November 9, 2004 to December 9, 2004. This counseling was court-ordered, apparently resulting from his November 2003, December 2003, and April 2004, arrests. Applicant admitted that the counselor assessed him to be an alcoholic, but he does not have a copy of that assessment. He was in additional counseling from December 17, 2004, to February 18, 2005. The counselor in that program also concluded Applicant had an alcohol problem. Since then, Applicant has not had any counseling or treatment for his alcohol or drug problem. Applicant was given until February 26, 2008, to submit the alcohol assessment from those sessions, but did not send it. (Tr. 61-66, 78)

Applicant disclosed on his Interrogatories and during the hearing that he is currently under the care of a psychiatrist for schizophrenia. He takes two medications

to help control his mental condition. He started treatment after being involuntarily committed by his mother. Applicant was in a hospital for a two week period, and then later for a one week period. He has been under the care of the psychiatrist for a year and a half since the original commitment. His condition has not affected his work. This event was not alleged in the SOR. (Tr. 66-76; Exhibit 3)

Applicant signed his SF 85P, on May 20, 2003. On that SF 85P he listed, in response to Question 20 (Police Record), that he was arrested for DUI in 2000, and underage drinking and false identification offense in 2002. Applicant did not list other offense occurring in the past seven years, as required by Question 20. Those offenses were the 1998, July 1999 and August 1999 incidents. Applicant claims any omissions in response to that question were unintentional. He used the available two lines on the form to list two offenses. The same SF-85P was signed again on April 26, 2005, and has attached to it a "Form 85P Continuation Sheet" with Applicant's initials on it and signed May 4, 2005. The Continuation Sheet contains offenses from March 31, 2003, to August 25, 2004. He does not recall the circumstances surrounding the signing of this document. The Continuation Sheet contains a March 31, 2003, speeding arrest not alleged in the SOR. It also contains the August 25, 2004, date for offenses of resisting and obstructing an officer, and possession of drug paraphernalia, which in the SOR are alleged to have occurred on November 16, 2003. Applicant completed the Continuation Sheet when he and the investigator discussed his application. Applicant got the additional information about his arrests from the court website. Applicant used the words, "guesses," "believes," "I think so," and "I don't remember," when answering questions at the hearing on this application issue. Applicant's answer to the Interrogatories on this issue were that he pushed these matters out of his mind. (Tr. 41-48; Exhibits 1-3)

### **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 J, Criminal Conduct**

The trustworthiness concern relating to the guideline for criminal conduct is set forth 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 trustworthiness concerns, one of which may be applicable in this case. Under AG ¶ 31(a), “a single serious crime

or multiple lesser offenses,” and AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” may raise trustworthiness concerns. Applicant has 11 arrests or citations involving alcohol and drugs over an eight- year period, nine of which resulted in convictions with fines and driving privileges suspensions as parts of the court sentences. Six of these offense occurred while Applicant worked for his current defense contractor employer. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from criminal conduct, three of which may be applicable: AG ¶ 32(a), “so much time 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;” AG ¶ 32(b), “the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;” and AG ¶ 32(d), “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(c) requiring evidence that Applicant did not commit the alleged offenses, and AG ¶ 32(e) regarding waivers of dishonorable military discharges and convictions with jail sentences of at least a year, are not applicable to this case on the facts.

Applicant has the burden of proof and persuasion that the mitigating conditions should apply. Looking at those conditions and the facts of the case, Applicant’s latest offense was November 2006, so insufficient time has elapsed to make AG ¶ 32(a) applicable. Nor were there unusual circumstances not likely to recur. Consequently, this mitigating condition is not applicable. Applicant introduced no evidence of any pressure to commit these 11 offenses, as required under AG ¶ 32(b). Finally, while Applicant showed he had been promoted by his employer over the past five years of employment, that is insufficient evidence of successful rehabilitation for eight years of criminal transgressions of the alcohol and drug laws of his state, and AG ¶ 32(d) is not applicable. Therefore, Applicant failed to meet his burden, and no mitigating conditions are applied.

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

The trustworthiness concern relating to drug involvement is set forth 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, 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,” and AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” are potentially disqualifying. Applicant has a ten-year history of marijuana use. His last use of marijuana, according to his testimony, was in November 2007. He did not submit a drug screen test result to confirm he is not currently using marijuana. He was arrested four times between November 2003 and November 2006, for marijuana and drug paraphernalia possession.

The guideline also contains potentially mitigating conditions under AG ¶ 26. Applicant has not shown by the evidence he introduced at the hearing that any of these mitigating conditions apply. AG ¶ 26(a) requires “the behavior occurring so long ago, or so infrequent, or happening under circumstances which are not likely to happen again, so as not to cast doubt about the individual’s current reliability, trustworthiness, or good judgment.” His marijuana use is recent and frequent, so this AG is not applicable. AG ¶ 26(b) requires “a demonstrated intent not to abuse any drugs in the future,” manifested by four criteria, none of which Applicant has satisfied. In fact, Applicant did not use marijuana for two years, then started using it again because it made him “happy” to do so. He has not shown there has been an appropriate period of abstinence at present. AG ¶ 26(c) refers to abuse of prescription drugs, which is not the situation here. AG ¶ 26(d) requires a “satisfactory completion of a prescribed drug treatment program . . . including a favorable prognosis from a duly qualified medical professional.” Applicant does not have any assessments from the programs he attended in 2004 and 2005, so it cannot be determined if he successfully completed the programs, or what prognosis, favorable or unfavorable, was issued. This AG is not applicable.

### **Guideline E, Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set forth in 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.



Under the facts of this case, AG ¶16.a (involving deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, or determine trustworthiness), and AG ¶16.b (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, or other official government representative) would seem to apply.

Applicant disclosed two of his arrests, one in 2000 and the other in 2002, in Question 20 of the SF 85P he completed on May 20, 2003. He had two lines on the form to use, and he used them. The form does state, "If you answered 'Yes', explain your answer(s) in the space provided." Applicant did that in the two lines provided. Later, in 2005, when interviewed by the Government investigator, he disclosed other arrests that he obtained from the state court website. He did not intend to leave off his other offenses from the AF 85P in 2003, but only followed directions explicitly. In addition, throughout the hearing, Applicant testified he could not remember details of some of the various arrests. His Interrogatory answers on the disclosure issue were that he pushed his arrests out of his mind. He did disclose all of his arrests in 2005 on the Continuation Sheet. The Government was on notice in 2003, and then again in 2005, that Applicant had arrest problems for alcohol-related problems. Finally, whatever the cause of his lack of precise recollections, I believe he genuinely could not remember all of these arrests, and find his explanation of a lack of intent to deceive and falsify to be persuasive and credible. Therefore, I conclude no disqualifying conditions apply, and as a result, no mitigating conditions need be considered or applied.

### **Whole Person Concept**

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for 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) 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 public trust position 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. When these problems first began, Applicant was a young man. (See AG ¶ 2(a)(4).) He knowingly used marijuana for 10 years, and had 11 criminal arrests or citations over a nine-year period. (See AG ¶ 2(a)(2).) His offenses were serious, including driving while under the influence of alcohol, using false identification for the purposes of obtaining alcohol while a minor,

and possessing drug paraphernalia AG ¶ 2(a)(1). His use of marijuana, and alcohol, were frequent, and his alcohol use continues to the present. It is also voluntary on his part. AG ¶ 2(a)(3), (5), (7), and (9). Applicant has not undergone significant behavioral changes. He attended two alcohol and drug counseling programs, and AA meetings, but returned to abusing alcohol and marijuana. (See AG ¶ 2(a)(6).) His past marijuana usage, and current alcohol consumption when placed against his history of driving under the influence of alcohol, makes the potential for coercion, pressure, exploitation, or duress greater than normal, and demonstrates his overall lack of good judgment. (See AG ¶ 2(a)(8).)

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising from his criminal conduct and drug involvement. I conclude those trustworthiness concerns against Applicant. I also conclude the "whole person" concept against Applicant. I conclude Applicant mitigated the personal conduct trustworthiness concern.

### **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
Subparagraphs 1.a to 1.k:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a to 2.d:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

### **Conclusion**

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

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PHILIP S. HOWE  
Administrative Judge