

DATE: November 19, 2007

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In re:)	
)	
-----)	ADP Case No. 06-14629
SSN: -----)	
)	
Applicant for ADP I/II/III Position)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
PHILIP S. HOWE**

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT

Mr. Scott B. Roberts

SYNOPSIS

Applicant is a 24-year-old unmarried person who works as a claims processor for a defense contractor in the health insurance business. He has several alcohol and marijuana-related arrests and incidents between 2002 and 2005. He failed to mitigate the drug involvement, alcohol consumption, personal conduct, and criminal conduct trustworthiness concerns. His eligibility for an ADP I/II/III position is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a position of trust for Applicant¹. On August 17, 2006, DOHA issued a Statement of Reasons² (SOR) detailing the basis for its decision—trustworthiness concerns raised under Guideline H (Drug Involvement) and Guideline G (Alcohol Consumption) of the Adjudicative Guidelines of the Directive issued on January 2, 1992, and as amended through Change 4, dated April 20, 1999. Applicant answered the SOR in writing on September 11, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on May 2, 2007. On August 8, 2007, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a trustworthiness determination for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on August 23, 2007.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 24 years old, unmarried, attending college part-time to obtain a business degree, and works for a defense contractor in the health insurance business. Applicant is a claims processor for his employer. He started working there in November 2004. His employee performance evaluations show he achieves or exceeds his supervisors' expectations on quality of work and productivity. A former supervisor of Applicant considers him hard-working, volunteering to do special projects and working overtime when necessary. The supervisor also considered Applicant to be honest and trustworthy. (Tr. 92, 103-111, 119, 174; Exhibits 1, 2, A-F)

Applicant started smoking marijuana when he was in high school, using it once or twice a month from 1998 to August 2001. He smoked it four or five times a week in college, from August 2001 to August 2004. His academic performance suffered because of his marijuana use and skipping classes. He continued to use marijuana with varying frequencies until March 2005. During this time period, Applicant would contribute money into a pool of funds that a friend used to buy the marijuana used by Applicant and his friends. (Tr. 119-131, 145, 169; Exhibit 3)

From the age of 16 in high school, Applicant has consumed alcohol, primarily beer. He drank in college, and continued to do so regularly until about September 2005. Now, he to drink a few beers each month with friends in bars while they watch televised athletic games. He drank three

¹Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of DoD Directive 5220.6 (Directive), pursuant to the memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004).

²Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and the Directive.

beers on the weekend before his trustworthiness hearing. He drank to intoxication with his friends once a month. (Tr. 122, 123, 154, 155, 171; Exhibit 3)

Applicant was charged on July 27, 2002, with disorderly conduct. Applicant admitted this incident occurred because he had been drinking previously at a wedding reception and was intoxicated. He got into an argument with other patrons in a restaurant. Applicant paid a \$337 fine for that incident. On June 5, 2003, Applicant was charged with underage drinking. He was 19 years old at the time. The state minimum drinking age is 21 years of age. His blood alcohol content (BAC) when tested was .01 %. Applicant was fined \$225 for this offense. Then, on June 25, 2003, Applicant was arrested for operating a motor vehicle with a prohibited alcohol content, operating a motor vehicle while his driving privileges were suspended on the basis of points for prior moving violations, and operating a motor vehicle under the influence of an intoxicant. His BAC was .13%. Applicant was found guilty of the first charge, and the other two charges were dismissed. Applicant paid a fine of \$250. (Tr. 156-162; Exhibit 3)

Applicant was with a friend on September 6, 2004, when the friend stopped his car and went into a house to make a sale of marijuana to a female. Applicant parked his car, and went into the house also, but did not participate in the sale, nor did he know it was going to happen before he got to the house. After leaving the house, Applicant and his friend drove their separate automobiles away, and were stopped by the local police not far away from the house. Applicant's car was searched by the police. He was arrested for manufacture and delivery of marijuana, and operating a motor vehicle while revoked. The manufacturing charge is a felony under state law. In February 2005, Applicant was offered a charge reduction by the prosecuting attorney to possession of THC, the active ingredient in marijuana. This charge is a misdemeanor offense. Applicant accepted the reduction, was placed on 14 months probation and fined \$273. The operating while revoked charge was dismissed. (Tr. 132-144, 169, 170; Exhibit 3)

Applicant's next arrest occurred on September 30, 2004, for felony bail jumping (he was on bail for the felony charge resulting from the September 6, 2004, arrest), reckless driving, refusal to take the breath test, and operating a motor vehicle while intoxicated (second offense). The first three charges were dismissed, and Applicant pled guilty to the fourth offense. He paid a fine of \$1,280, ordered to undergo an alcohol assessment, and sentenced to 60 days in jail. He served five days in jail, and the remainder of the time was served on house arrest with an electronic ankle bracelet worn by him. His driving privileges were revoked for 18 months, and an ignition interlock system attached to his car to prevent him from driving after using alcohol. Applicant does not recall the results of the alcohol assessment beyond finding he was not an alcoholic, except to claim he "successfully completed" his required alcohol assessment. He has not had any treatment or counseling regarding his alcohol use. His driving privileges were reinstated. Applicant does not drink and drive since that incident, to avoid further legal problems. (Tr. 164-167, 170, 179, 181; Exhibit 3)

On November 15, 2004, Applicant submitted his Questionnaire for Public Trust Position (QPTP) for his current employment position. He answered Question 21.a, which asked if he had used illegally any controlled substance in the past year, including marijuana. Applicant marked the "no" box, thereby denying he had used controlled substances between November 2003, and November 2004, when he had used marijuana during that time period. The QPTP contains a certification signature block which Applicant signed stating his answers to all questions were "true,

complete, and correct to the best of my knowledge and belief and are made in good faith.” (Tr. 128, 132, 172; Exhibits 1, 2)

In March 2005, while on probation for his September 6, 2004, marijuana arrest and conviction, Applicant used marijuana with some friends. His monthly urinalysis showed the presence of marijuana in his body. Applicant was working for his current government contractor employer at this time. He claims he does not use marijuana anymore because it is illegal. (Tr. 101, 145-150; Exhibit 3)

Applicant asserts he learned several valuable lessons over the past three years, including choosing his friends wisely, making his own decisions, and deciding wisely to become a successful person. He denies ever having gone to work under the influence of alcohol or controlled substances. When he told his mother about his drunk driving and drug arrests, he admitted he felt “like the smallest person in the world.” Applicant also claimed to have suffered depression while in college, including stress from his part-time job at a pizza restaurant. He rationalized the marijuana use as helpful in his academic studies, but found it only made him lethargic. Presently, he claims he has the motivation to improve his work performance resulting from his purported cessation of marijuana use. (Tr. 99, 118, 125, 169; Exhibit 3)

Applicant’s mother and step-father testified on his behalf. His mother thinks Applicant is honest and sincere. She confronted him about his actions, and advised him that further actions could jeopardize the lease to purchase agreement they have with him to buy the home in which he currently lives with a friend and his girlfriend. She told her son his actions would reflect on her. Applicant’s stepfather considers Applicant to have a good character. He drinks socially with Applicant on weekends, having a few beers while watching televised athletic events. He also told Applicant he must remain drug-free to be able to complete the home purchase agreement. He was not aware of Applicant’s controlled drug use until the 2004 arrest. He did see Applicant drink in 2001 at his high school graduation. His girlfriend also testified that she has not known him in the past two years to use drugs or drink to excess. (Tr. 18-89)

POLICIES

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 occupy a position . . . that will give that person access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). By direction of the Under Secretary of Defense for Counterintelligence and Security, adjudications of cases forwarded to DOHA by the Defense Security Service or the Office of Personnel Management (OPM) for a trustworthiness determination shall be conducted under the provisions of the Directive. Eligibility for a position of trust is predicated upon the applicant meeting the guidelines contained in the Directive and a finding it is clearly consistent with the national interest to do so. See Directive ¶ 2.3. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his trustworthiness determination.” See Directive ¶ E3.1.15

The adjudication process is based on the whole person concept. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required. The decision to deny an individual eligibility to occupy a position of trust is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a such a determination.

In evaluating the trustworthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶E2.2 of the Directive and the Guidelines. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible to occupy a position of trust. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's trustworthiness suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his trustworthiness determination. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2

Based upon a consideration of the evidence as a whole, I find the following four adjudicative Guidelines most pertinent to an evaluation of the facts of this case:

Guideline H: Drug Involvement: *The Concern. Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. E2.A8.1.1*

Guideline G: Alcohol Consumption: *The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.* E2.A7.1.1

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.* E2.A10.1.1

“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.” (Regulation ¶C6.1.1.1) Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation ¶ C8.2.1)

CONCLUSIONS

Drug Involvement: Applicant used marijuana from 1998 to March 2005. He used it once after starting his work at the defense contractor office in November 2004, and after he completed his QTPT in November 2004. That form asked him about his prior controlled substance use, so he was on notice that the use of controlled substances was a concern of the Government. Applicant's marijuana use increased while he was in college to several times per week, and then tapered off to less frequent use. He purchased marijuana with friends by contributing to a common purchase fund. Applicant admitted his college academic performance was adversely affected by his marijuana use. The local police arrested and charged him with manufacturing and delivering marijuana, but the felony charge was later reduced to possession of THC, the active ingredient of marijuana. In February 2005, he was found guilty of this offense. Then, while on probation for that offense, he smoked marijuana with a friend in March 2005, and tested positive for marijuana in his regular urinalysis.

The Disqualifying Conditions (DC) applicable here are DC 1 (any drug abuse, defined as the illegal use of a drug. Drugs are further defined as mood and behavior-altering substances, listed in the Controlled Substances Act of 1970, including marijuana. E2.A8.1.2.1), and DC 2 (illegal drug possession, including purchase). E2.A8.1.2.2).

The Mitigating Conditions (MC) that might apply are MC 1 (the drug involvement was not recent. E2.A8.1.3.1), and MC 3 (a demonstrated intent not to abuse any drugs in the future. E2.A8.1.3.3). MC 1 does not apply because Applicant's drug usage occurred within the past two years, making it recent. He used marijuana for seven years starting in high school. He used it even after he was hired by his government-contractor employer. MC 3 requires, for applicability, a “demonstrated intent.” Applicant has to show by his actions and objective testing that he is not

longer using marijuana. He has no such evidence, and the burden of proof is on him. He has not produced test results beyond the March 2005, positive test, documenting the absence of drug use. His mere declaration when contrasted to his history of use is not persuasive. His current work product is favorable according to his supervisor's statement, but those standing alone are not persuasive in view of Applicant's history. Neither of the other two MC could apply based on the evidence, as Applicant has not attended voluntarily a drug treatment program.

Alcohol Consumption: Applicant has three alcohol-related arrests between June 5, 2003, and September 30, 2004. He drank alcohol from 1998 to at least September 2005, in quantities sufficient for him to become intoxicated. His 2002 disorderly conduct charge was also caused by alcohol consumption, so he really has four alcohol-caused incidents between 2002 and 2004. He continues to drink alcohol, claiming only to be drinking beers on social and sporting occasions, and on weekends. His driving privileges were revoked, but have now been restored. He does not recall the diagnosis of the court-ordered alcohol assessment resulting from the September 2004, arrest.

The DC applicable are DC 1 (alcohol-related incidents away from work, such as driving while under the influence, or other criminal incidents relating to alcohol use. E2.A7.1.2.1), and DC 5 (habitual consumption of alcohol to the point of impaired judgment. E2.A7.1.2.5).

The MC which might apply are MC 2 (the problem occurred a number of years ago and there is no indication of a recent problem. E2.A8.1.3.2), and MC 3 (positive changes in behavior supportive of sobriety. E2.A8.1.3.3). However, with Applicant's current consumption of alcohol in view of his history of alcohol-related incidents, I am not persuaded this MC applies. There are insufficient positive changes in his behavior supportive of sobriety. He has not changed his pattern of consumption that led to his two arrests for operating a motor vehicle while intoxicated. The burden of proof is on Applicant to show the MC should apply. He failed to accomplish that task.

Personal Conduct: Applicant completed his QTPT on November 15, 2004, and failed to disclose in answer to Question 21.a. that he used marijuana in the previous year. His recent marijuana use had to be fresh in his recollection because of its recency in time to the completion of the form.

The four DC which might apply are: DC 2 (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities); DC 4 (personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4); DC 5 (a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. E2.A5.1.2.5); and, DC 6 (association with persons involved in criminal activity. E2.A5.1.2.6). Applicant deliberately did not list his marijuana use on the QTPT. That failure increases his vulnerability to coercion, exploitation or duress because he kept a law violation secret from the Government. His action was part of his pattern of rule or law violations involving the use of alcohol and drugs. Applicant was arrested in September 2004, because of his association with his friend who was delivering THC, the active ingredient of marijuana, a felony offense under state law. He also was part of a group of

friends who pooled their money in college and afterward to purchase marijuana. In March 2005, he associated with another friend of his who had marijuana and Applicant used it again.

The burden of proof is on Applicant to show any of the Personal Conduct MC apply and predominate over the DC. He failed to accomplish that task. Nothing he presented on this issue was credible or persuasive that he did not deliberately falsify his QTPT. Applicant did not disclose his marijuana use history until March 2005, when he was confronted by the Government investigator. It was a recent incident of falsification. While he may not associate with the persons involved with criminal activity anymore, the key action, of which Applicant is responsible, is the falsification of the answer on his QTPT.

Criminal Conduct: Applicant committed a disorderly conduct offense in July 2002, caused by his alcohol consumption. He has the September 2004, drug-related offense on his record. He also has the June 2003, and September 2004, alcohol and driving arrests on his record. He also deliberately falsified his answer to Question 21.a. on his QTPT. That deliberate failure to disclose was knowing and willful under the terms and requirements of 18 U.S.C. §1001, which constitutes a felony offense.

Applicant made his record of violations in three short years. Based on that record, the DC which apply are: DC 1 (allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1); and, DC 2 (a single serious crime or multiple lesser offenses. E2.A10.1.2.2).

Applicant has the burden of proof to show the MC under this trustworthiness guideline apply. His criminal activity is recent, not isolated, but part of a pattern caused by alcohol and marijuana usage. He was not pressured by others into committing these acts, but committed them voluntarily. He was not acquitted of the alcohol and drug offenses. There is no clear evidence of rehabilitation, which is Applicant's burden to show. Therefore, I conclude none of the MC listed under the Guideline apply to Applicant.

Whole Person Analysis: "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is." eligible for a trustworthiness decision. (Guidelines ¶E2.2.1a) "Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." In evaluating Applicant's case, I have considered the adjudicative factors listed in the Guidelines, contained in ¶E2.2.

I considered all nine criteria. The nature and extent of Applicant's drug and alcohol use, and the results on the roads, are serious offenses. He participated in those actions, and the falsification of his answer on the QTPT knowingly and voluntarily. His drinking and use of marijuana were frequent, recent in time, and all occurring in the past nine years. Applicant's age from the commencement of these actions started at 16 to his present 24 years of age. He has not shown any rehabilitation by objective and professional agencies, other than his personal statement and the passage of time with an absence of further arrests. In view of the nature and extent of his actions, that position is not persuasive. His own pleasure was the motivation for the consumption of alcohol

and marijuana. His actions could lead to pressure, coercion, exploitation or duress by someone outside his employer's operations seeking information or access, especially in view of his history. Finally, the likelihood of continuation or recurrence is high, both for alcohol, because he continues to drink, and marijuana because of his history over seven years of using it.

Therefore, based on the total evidence presented by the Government and the Applicant, I conclude each of the trustworthiness concerns, and the "whole person concept," in the following manner. The drug involvement concern I conclude against Applicant. I conclude the alcohol consumption concern against Applicant. I conclude the personal conduct concern against Applicant. I conclude the criminal conduct concern against Applicant. Ultimately, I conclude the "whole person concept" against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H: AGAINST APPLICANT

 Subparagraph 1.a to 1.e: Against Applicant

Paragraph 2. Guideline G: AGAINST APPLICANT

 Subparagraph 2.a to 2.d: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

 Subparagraph 3.a: Against Applicant

Paragraph 4. Guideline J: AGAINST APPLICANT

 Subparagraph 4.a to 4.c: Against Applicant

DECISION

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 for assignment to sensitive duties. His application for eligibility for an ADP I/II/III position is denied.

Philip S. Howe

Administrative Judge