

KEYWORD: Criminal Conduct

DIGEST: Applicant, a 31-year-old customer service representative for a defense contractor, was arrested and convicted of assault, drug use, drug possession with intent to sell, possession of drug paraphernalia, and probation violations from 1993 to 2002. He presented insufficient information to show he has been successfully rehabilitated. Eligibility is denied.

CASENO: 06-22121.h1

DATE: 07/30/2007

DATE: July 30, 2007

In Re:)	
)	
)	
-----)	ADP Case No. 06-22121
SSN: -----)	
)	
Applicant for Public Trust Position)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
THOMAS M. CREAN**

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

____ Applicant, a 31-year-old customer service representative for a defense contractor, was arrested and convicted of assault, drug use, drug possession with intent to sell, possession of drug paraphernalia, and probation violations from 1993 to 2002. He presented insufficient information

to show he has been successfully rehabilitated. Eligibility is denied.

STATEMENT OF THE CASE

On February 1, 2007, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny an application for a position of public trust for Applicant. The action was taken under Department of Defense Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation), and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), using the Revised Adjudicative Guidelines (AG), issued by the President on December 29, 2005, and implemented by the Department of Defense on September 1, 2006. The revised guidelines were provided to Applicant and he was aware that the case would be adjudicated under those guidelines. Applicant acknowledged receipt of the SOR on February 15, 2007. The SOR alleges security concerns under Guideline J (Criminal Conduct). Applicant answered the SOR in writing on February 23, 2007, admitting all eight factual allegations under Guideline J with an explanation for his conduct. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on May 10, 2007. Applicant received a complete file of relevant material (FORM) on May 16, 2007, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. He did not provide any additional information. The case was assigned to me on July 19, 2007.

FINDINGS OF FACT

Applicant is a 31-year-old college student working part time in customer service for a defense contractor. He is married with two children. Applicant submitted a questionnaire for a public trust position on October 17, 2005.¹

Applicant was arrested for second and third degree assault, and unlawful use of a weapon in December 1993 after an incident with his step-father. He was convicted of only third degree assault, and sentenced to two years probation. Applicant was charged with and fined for speeding in April 1996, and in May 1997. Applicant was charged with and convicted of possession of a controlled substance, approximately 35 grams of marijuana, with intent to distribute in January 1998. He was sentenced to five years supervised probation. Applicant was charged with and convicted of possession of marijuana in August 1999, and sentenced to seven years incarceration. This conviction was overturned on appeal. In March 2000, Applicant violated his probation by testing positive for use of a controlled substance. In December 2001, he was charged with possession of drug paraphernalia. In March 2002, Applicant was charged with and convicted of distribution of a controlled substance. He was sentenced to seven years incarceration, and served almost two years

¹Item 4.

in

prison. Applicant admitted to all of these offenses² and the information was confirmed by criminal justice reports.³

Applicant stated his conduct in the past was irresponsible. He felt the decisions he made were, in part, caused by his environment, and he is ashamed of the decisions. Upon his release from prison, he relocated to another state to be away from the previous bad environment. He has become a productive citizen and is now a full time student in a technical college and working part time. He is now more responsible in his actions and decision making.⁴

POLICIES

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.”⁵ To be eligible to occupy an Information Systems Position designated ADP II/III, an applicant must meet the security guidelines contained in the Regulation. The standard that must be met 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.⁶

The Regulation sets out the adjudicative guidelines for making trustworthiness determinations, and lists the disqualifying conditions and mitigating conditions for each guideline. The adjudicative guideline at issue in this case is:

Guideline J - Criminal Conduct: A security concern exists because criminal actions 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.⁷

Conditions that could raise an eligibility concern and may be disqualifying, as well as those which would mitigate eligibility concerns, pertaining to the adjudicative guideline, are set forth and discussed in the conclusions section below.

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 position of public trust. An

²Item 3.

³Item 5.

⁴Item 3, at 3.

⁵*Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶Regulation ¶ C6.1.1.1.

⁷AG ¶ 30.

administrative judge must apply the “whole person concept,” and consider and carefully weigh the available, reliable information about the person. An administrative judge should consider: (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 applicant’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 of recurrence.⁸

DoD contractor personnel are afforded the rights to the procedures contained in the DoD Directive before any final unfavorable eligibility determination may be made.⁹ Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for a position of public trust.¹⁰ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.¹¹ An applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to occupy a position of public trust.¹² “[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.”¹³ Any doubt as to whether eligibility for a position of public trust is clearly consistent with national security will be resolved in favor of the national security.¹⁴ Each eligibility decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in new adjudicative guidelines. A person granted a position of public trust enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants such a position. The decision to deny an individual a public trust position is not necessarily a determination as to the loyalty of the applicant.¹⁵ It is merely an indication that the applicant has not met the strict guidelines established for eligibility for a public trust position.

CONCLUSIONS

⁸AG ¶ 2(a).

⁹DoD 5200.2-R, ¶ C8.2.1.

¹⁰Directive ¶ E3.1.14.

¹¹ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

¹²ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹³ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

¹⁴*Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

¹⁵*See* Exec. Or. 10865 § 7.

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Applicant's convictions for assault, drug use, drug possession with the intent to sell, possession of drug paraphernalia, and violation of probation within a ten year period of time raises Criminal Conduct Disqualifying Condition (CC DC) ¶ 31(a) (*a single serious crime or multiple lesser offenses*).¹⁶ In this case, a series of serious crimes, drug possession with the intent to sell, drug use, possession of drug paraphernalia and violations of probation have been established. The third degree assault in 1993 and the speeding offenses by themselves do not amount to serious crimes. But these acts, taken in conjunction with the serious crimes committed by Applicant, establish a pattern that contributes to the raising of security concerns.

The Criminal Conduct Mitigating Conditions (CC MC) have been considered, and only CC MC ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, 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*); and CC MC ¶ 31(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*) have some applicability. Applicant used marijuana from at least 1998 until 2002. He was released from prison in approximately 2004, and stated he has not used drugs since that time. He presented no evidence of attendance at any counseling or rehabilitation programs. His drug use was voluntary and not under any unusual circumstances. Applicant presented no information from which to conclude that his drug use is unlikely to recur. There is only limited information on rehabilitation. There is a passage of only about four years since he was incarcerated for drug use. Rehabilitation information consists of the facts he is now married, has children, and is holding a steady job. This limited information is offset by his previous voluntary drug use, his other crimes, and I violation of probation. Insufficient time has elapsed since his last criminal act, and there is only limited evidence of successful rehabilitation, to conclude he has been rehabilitated and should be granted eligibility for a position of public trust. Applicant has not met his burden of establishing that he is rehabilitated and his past criminal actions do not indicate a security concern. I find against Applicant for criminal conduct.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for a position of public trust.

¹⁶There is a statutory prohibition to granting a security clearance for an Applicant convicted in a State court of a crime, sentenced to a prison term exceeding one year, and incarcerated as a result of that sentence for not less than one year. 10 U.S.C. 986. Since the statutory provision pertains to granting of security clearances and not to eligibility for positions of public trust, the statutory provision is not applicable in this case. However, the new adjudicative guidelines include the prohibition as a disqualifying condition. AG ¶ 31(f). The new adjudicative guidelines were made applicable to determination of eligibility for public trust positions. The provision in ¶ 31(f) was added to the adjudicative guidelines initially promulgated by the President by DoD because of 10 U.S.C. 986 and its applicability to DoD adjudications. Since the DoD adjudicative guidelines were never published for review and comment in the Federal Register, it is unclear whether the provisions of ¶ 31(f) can pertain to eligibility for public trust position determinations. Since this disqualifying condition is not alleged in the SOR or addressed in the FORM, its applicability to eligibility for public trust positions determinations need not be resolved and will not be further discussed in this decision.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations 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. thru 1.h.:	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 security to grant or continue eligibility for assignment to sensitive duties for Applicant. Eligibility is denied.

Thomas M. Crean
Administrative Judge