

KEYWORD: Criminal Conduct

DIGEST: A charge of possession of marijuana filed against Applicant in 1997 was dismissed for lack of evidence. He was convicted of driving under the influence of alcohol in November 2002 and was placed on probation. The charge was dismissed in December 2003 after he completed all conditions of probation. Applicant has mitigated the security concern caused by his criminal conduct. Trustworthiness determination is granted.

CASENO: 03-25755.h1

DATE: 01/04/2005

DATE: January 4, 2005

In Re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 03-25755

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

A charge of possession of marijuana filed against Applicant in 1997 was dismissed for lack of evidence. He was convicted of driving under the influence of alcohol in November 2002 and was placed on probation. The charge was dismissed in December 2003 after he completed all conditions of probation. Applicant has mitigated the security concern caused by his criminal conduct. Trustworthiness determination is granted.

STATEMENT OF THE CASE

On May 27, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy a sensitive position requiring ADP clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J (criminal conduct). Applicant submitted a response to the SOR, that was notarized on June 25, 2004, admitted both SOR allegations, and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on July 26, 2004, that was mailed to Applicant the same date. The FORM was apparently not received by Applicant, and thus it was resent on September 16, 2004. Applicant acknowledged receipt of the FORM on September 23, 2004. The FORM informed Applicant he had 30 days from receipt of the documents to submit his objections or information he wished to be considered. Applicant did not submit any objections or otherwise respond to the FORM within the time allotted. The case was assigned to me November 16, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 26 years old and has been employed in customer support by a defense contractor since June 2002. He was previously employed outside the defense industry as a shipping clerk from August 2000 to May 2002, as a maintenance worker from April 2000 to July 2000, and a warehouse manager from August 1998 to April 2000. Applicant graduated from high school in May 1998, and was pursuing an associates degree at the time he submitted his security clearance application in September 2002. He has never been married and has no children.

Applicant was arrested on March 7, 1997, and charged with possession of marijuana. He was 18 years old and apparently a high school student at the time of this arrest. The only explanation of the circumstances surrounding this arrest are contained in a statement Applicant provided on June 19, 2003. (GE 5) He stated he was at a party, the police were called because music was reportedly being played too loud, and the police searched a couch on which Applicant had been sitting. Upon finding a small bag of marijuana [0-2 ounces (GE 7)] in the couch, the police arrested Applicant because he was the closest person to it. He denies the marijuana belonged to him. Although he admits to infrequently smoking marijuana prior to his arrest, he asserts he has not smoked the substance subsequent to that arrest. The charges were dismissed because of insufficient evidence approximately six months after Applicant was arrested.

Applicant was arrested in approximately September 2002, and charged with driving under the influence of alcohol/drugs (DUI) and excessive blood alcohol. The only explanation of the circumstances surrounding this arrest are contained in a statement Applicant provided on June 23, 2003. (GE 6) He stated he had consumed about 12 beers and one mixed drink while visiting at a friend's house with his girlfriend. After arguing with his girlfriend, he attempted to drive home and was stopped by police for driving the wrong way on a one-way street. He failed a field sobriety test, and registered about a .24 blood alcohol concentration on a breathalyser test that was administered.

Applicant entered a plea of guilty to the DUI and the remaining charge was dismissed. He was sentenced to probation for five years, and ordered to attend a first-time offender's program, perform community service work in lieu of jail, fined \$1,450.00, required to have an interlock device installed in his vehicle, and had his driving privileges restricted for three months. Applicant completed all conditions of probation and the charge to which he pled guilty was thereupon dismissed. (GE 3)

Since being charged with the DUI, Applicant's consumption of alcohol is minimal, consisting of drinking maybe one beer every three months. He stated the following about the lesson he learned from his arrest and conviction:

I learned a valuable, powerful and financial lesson. It was very expensive, overwhelming, and it was not worth driving that night. I would never drink and drive again, and I feel I have no problem with my use of alcohol, and I can deal with being sober.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a trustworthiness position. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline F, pertaining to financial considerations, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and C, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a trustworthiness determination is to decide if it is clearly consistent with the national interest for an applicant to be granted eligibility to hold a position requiring such trust. The government has the burden of proving controverted facts. The burden of proof is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.

The clearly consistent standard indicates that trustworthiness determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. While there is insufficient evidence to support finding that Applicant

committed the possession of marijuana charge, (2) he unquestionably committed the DUI and excessive blood alcohol offenses. DC 2: *A single serious crime or multiple lesser offenses* apply.

As noted, there is insufficient evidence to conclude Applicant committed any criminal offenses other than the DUI and his admitted use of marijuana on infrequent occasions while in high school, or to indicate he has an alcohol problem that might suggest a repeat of any criminal conduct in the future. Further, his statement explaining how the offense came to occur, the lessons he learned from the experience, and the minimal alcohol consumption he has engaged in since the DUI arrest strongly support finding he has been rehabilitated and the conduct is unlikely to recur. Mitigating Conditions (MC) 2: *The crime was an isolated incident*; MC 4: . . . *the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* apply.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has mitigated the security concern that arises from his criminal conduct. He has overcome the case against him and satisfied his ultimate burden of persuasion. Guideline J is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy a sensitive position requiring an ADP clearance.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Department Counsel's reliance upon Applicant's admission to the allegation in SOR subparagraph 2.b. to support the government claim that he committed the offense is misplaced. While Applicant admits the SOR allegation, the SOR allegation consists only of assertions that he was arrested, charged, and that the charges were dismissed. There is no assertion he committed the offense, and, accordingly, his admission to the SOR allegation is totally consistent with his denial of actually committing the offense.