

DATE: October 31, 2006

In re:

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SSN: -----

Applicant for Trustworthiness Determination

P Case No. 06-00598

**DECISION OF ADMINISTRATIVE JUDGE**

**MARC E. CURRY**

**APPEARANCES**

**FOR GOVERNMENT**

J. Theodore Hammer, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant falsified two public trust position applications completed in December 2002 and August 2004, respectively, by failing to disclose a criminal charge and some financial delinquencies, as required. These falsifications generate unmitigated trustworthiness concerns. Eligibility to occupy a sensitive position is denied.

**STATEMENT OF THE CASE**

On March 14, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; Department of Defense Regulation 5200.2-R., *Personnel Security Program*, dated January 1987, as amended and modified (the Regulation); and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended and modified (Directive).

The SOR detailed reasons under Guideline E (personal conduct), and Guideline J (criminal conduct) why DOHA could not make a preliminary affirmative finding that it was clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying an Information Systems Position, designated ADP I/II, to support a contract with the Department of Defense, and recommended a referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked. Applicant answered the SOR on March 27, 2006, and requested an administrative determination in lieu of a hearing.

Department Counsel mailed the government's file of relevant material (FORM) to Applicant on July 25, 2006. She received it on August 7, 2006, and was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. On August 9, 2006, she submitted additional evidence to Department Counsel who did not object. The case was assigned to me on August 22, 2006.

**FINDINGS OF FACT**

I have incorporated the SOR admissions into the findings of fact. After a thorough review and consideration of the evidence in the record, I make the following additional findings of fact.

Applicant is a 33-year-old single woman with a high school education. One morning in October 2003, while driving to work, she was stopped by the police, and ordered to return home. When she arrived at her home, the police searched it and discovered crack cocaine. She was then arrested and charged with possession with intent to distribute crack cocaine. A subsequent investigation revealed that the cocaine belonged to her boyfriend who lived with her. The charge against her was dismissed, and her boyfriend was ultimately sentenced to seven years incarceration.

In November 2000, the police searched Applicant's home, pursuant to a search warrant, and discovered a bag of marijuana. She was issued a citation charging her with possession of marijuana.<sup>(1)</sup> Later, she pled guilty and completed a comprehensive, pre-trial intervention program consisting of counseling, education, and community service work,<sup>(2)</sup> whereupon the court dismissed the charge.<sup>(3)</sup>

Applicant failed to list this charge, as required on a public trust application (SF-85P), dated December 9, 2002, in response to Question 20 (*In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? Leave out traffic fines of less than \$150.*)<sup>(4)</sup> When confronted by an investigator, she stated that she omitted it because she did not believe she had been arrested in that she was not taken into police custody, and was only issued a citation.<sup>(5)</sup>

The SF-85P completed by Applicant in December 2002 also required her to disclose whether she was currently more than 180 days delinquent on any debt payments.<sup>(6)</sup> She did not list a delinquency owed to a department store in the amount of \$141,<sup>(7)</sup> and a delinquency owed to a credit card company in the amount of \$966.<sup>(8)</sup> When asked by an investigator about these omissions, she stated that she satisfied the department store delinquency before completing the SF-85P,<sup>(9)</sup> and knew the credit card debt was more than 180 days delinquent when she completed the application.<sup>(10)</sup>

Applicant completed another SF-85P in August 2004. She was again required to list debts that were currently 180 days delinquent. In addition to omitting the delinquencies that she had omitted from the 2002 SF-85P, she omitted three additional delinquent phone accounts in the respective amounts of \$284,<sup>(11)</sup> \$570,<sup>(12)</sup> and \$979.<sup>(13)</sup> Also, she did not list a delinquent cable television bill in the amount of \$240.<sup>(14)</sup>

## POLICIES

The adjudicative guidelines set out in the Regulation apply to ADP trustworthiness determinations. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable determination may be made.<sup>(15)</sup>

Positions designated as ADP I and ADP II are classified as "sensitive positions."<sup>(16)</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>(17)</sup> Appendix 8 of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

"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 security clearance."<sup>(18)</sup> Each eligibility determination must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Regulation. An administrative judge should consider: 1) the nature 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 voluntariness of the participation; (6) the absence or presence 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.<sup>(19)</sup>

The following adjudicative guidelines are raised:

**Guideline E - Personal Conduct:** 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.

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

Conditions pertaining to these adjudicative guidelines that could raise trustworthiness concerns and may be disqualifying, as well as those which could mitigate trustworthiness concerns, are set forth in the conclusions below.

Since the protection of national security (and sensitive information) is the paramount consideration, the final decision in each case must be reached by applying the standard that the determination of an applicant's eligibility for occupying an Information Systems Position is "clearly consistent with the national interest."<sup>(20)</sup> In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted.<sup>(21)</sup> The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable trustworthiness determination.<sup>(22)</sup> "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."<sup>(23)</sup> These same burdens of proof apply to trustworthiness determinations for ADP positions.

## CONCLUSIONS

### **Personal Conduct**

Applicant's SF-85-P omissions, and her statement to an investigator of October 2, 2003 raise the issue of the applicability of Personal Conduct Disqualifying Condition (PC 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.* Her explanation for failing to list the marijuana charge on Question 20 of the SF-85P was disingenuous. Question 20 required her to disclose both arrests and charges. Therefore, she had a responsibility to list the charge regardless of whether it resulted in her arrest. PC DC 2 applies to Applicant's falsification of Question 20 of the 2002 SF-85P without mitigation.

Applicant's lack of credibility in response to Question 20 of the 2002 SF-85P fatally undermines her credibility with respect to her explanation for omitting the financial information from the SF-85P applications. PC DC 2 applies to these omissions without mitigation, as well.

SOR subparagraph 1.e. misstates Applicant's signed, sworn statement of October 2, 2003. Contrary to subparagraph 1.e. which alleges she stated that she had no other problems related to illegal drugs, Applicant, in fact, stated she had no additional problems with illegal drugs "as a result of this matter."<sup>(24)</sup> She was clearly discussing the 1994 arrest when she made this statement. Subparagraph 1.e. is defective on its face.

### **Criminal Conduct**

Applicant's drug-related arrests and subsequent falsification of two SF-85P's demonstrate a pattern of criminal behavior. Criminal Conduct Disqualifying Condition (CC DC) 1: *Any conduct, regardless of whether the person was formally charged,* and CC DC 2: *A single serious crime or multiple lesser offenses,* apply. Applicant's outlandish explanation for her marijuana arrest of 2000 and her willingness to violate federal law by failing to disclose the arrest, in addition to a number of delinquencies on successive SF-85Ps generate trustworthiness concerns that she failed to mitigate.

## **Whole-Person Concept**

Given the seriousness of Applicant's conduct, its repetitive nature, and the absence of any rehabilitation, the possibility of its recurrence is unacceptably high. Her application for eligibility for a trustworthiness position is denied.

## **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 E: AGAINST THE APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b(1): Against Applicant

Subparagraph 1.b(2): Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d(1): Against Applicant

Subparagraph 1.d(2): Against Applicant

Subparagraph 1.d(3): Against Applicant

Subparagraph 1.d(4): Against Applicant

Subparagraph 1.d(5): Against Applicant

Subparagraph 1.d(6): Against Applicant

Subparagraph 1.e: For Applicant

### Paragraph 2., Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

## **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for occupying an Information Systems Position. Eligibility is denied.

Marc E. Curry

Administrative Judge

1. Item 3, Answer to SOR, dated March 27, 2006, at 21.
2. Item 3, Answer to SOR, dated March 27, 2006, at 26.

3. *Id.* at 7.
4. Item 4, SF-85P, dated December 9, 2002, at 7.
5. Item 6, Signed, Sworn Statement, dated October 9, 2003, at 3.
6. *See* note 4.
7. Item 9, Credit Bureau Report, dated August 26, 2004, at 5.
8. *Id.* at 2.
9. Item 8, Signed, Sworn, Statement, dated December 27, 2004, at 2.
10. *Id.*
11. Item 10, Credit Bureau Report, dated July 13, 2006, at 1.
12. *See* note 7, at 5.
13. *Id.* at 6.
14. *See* note 9, at 6.
15. Regulation ¶C8.2.1.
16. Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.
17. Regulation ¶ C6.1.1.1.
18. Appendix 8 at 132.
19. *Id.*
20. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
21. Directive ¶E3.1.14.
22. Directive ¶E3.1.15.
23. Directive ¶E2.2.2.
24. Item 5, Signed, Sworn, Statement dated October 2, 2003, at 5.