

DATE: November 27, 2006

In re:

SSN: -----

Applicant for Trustworthiness Determination

P Case No. 06-07674

DECISION OF ADMINISTRATIVE JUDGE

MARC E. CURRY

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant's history of drug abuse and criminal conduct generate unmitigated security concerns. Eligibility for occupying a public trust position is denied.

STATEMENT OF THE CASE

On May 17, 2006, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (the Regulation); and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended. (Directive).

The SOR detailed reasons under Guideline J (criminal conduct) and Guideline H (drug involvement) 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 a public trust position 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 June 12, 2006, and elected to have the case decided on the written record.

Department Counsel mailed the government's file of relevant material (FORM) to Applicant on June 28, 2006. He received it on July 5, 2006. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant neither objected to any of the FORM submissions, nor filed any additional evidence to be considered. The case was assigned to me on August 29, 2006.

RULINGS ON PROCEDURE

In the FORM, Department Counsel moved to amend the SOR by adding the following allegation:

1.d. You were arrested on about August 13, 2005 in Dane County, Wisconsin, and charged with Resisting or Obstructing an Officer, a misdemeanor. You pled no contest on January 24, 2006, and were sentenced to five days in jail and required to pay court costs and fines.

Department Counsel also moved to replace the phrase, "subparagraph 1.d.," with the phrase, "subparagraph 1.b.," in subparagraph 2.c., and the phrase "subparagraph 1.g." with the phrase "subparagraph 1.c.," in subparagraph 2.d. Applicant did not file a response.

This motion is granted. As amended, subparagraphs 2.c. and 2.d., with the amended portions italicized, read as follows:

2.c. That information as set forth in *subparagraph 1.b* above.

2.d. You received treatment as a condition of your probation, as set forth in *subparagraph 1.c.*, above, from about October 2004 to at least about December 2004, at Gateway Recovery, Madison, Wisconsin, for a condition diagnosed as Cannabis Dependence.

I interpret Applicant's failure to file a response to this motion as a denial of the amended allegations.

FINDINGS OF FACT

I have incorporated Applicant's 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 23-year-old single man with a high school education who works for his employer as a data analyst. He has a history of criminal conduct. In August 2000, while in high school, he was cited for disorderly conduct after fighting with another student in the school library. Three years later, in February 2003, he was charged with possession of a controlled substance after the police, pursuant to a routine traffic stop, discovered marijuana in his glove compartment.⁽¹⁾ Immediately before the stop, he had been smoking marijuana while driving his automobile. He was ultimately fined \$159.00.

Approximately five months later, Applicant, who was then 20 years old, began dating a 16-year-old girl. She later accused him of sexual assault, prompting the police to arrest and charge him with felony sexual assault. Subsequently, he pled guilty to the lesser offense of fourth degree sexual assault. The court then placed him on probation for two years, and ordered him to attend counseling.⁽²⁾ He began counseling in July 2004, and completed it, as ordered.⁽³⁾

In August 2005, Applicant was charged with resisting or obstructing a police officer.⁽⁴⁾ In April 2006, he pled no contest, and was fined \$88.00.

Applicant's arrest history corresponds with a history of drug use. By age 16, he had begun sporadically using marijuana. By age 18, he was using it daily. While attending counseling related to the sexual assault offense, Applicant was diagnosed with cannabis dependence. As of March 2005, he was no longer using marijuana.⁽⁵⁾ It is unclear from the record exactly when he stopped.

Applicant's drug abuse also included the use of cocaine and ecstasy. His cocaine use ranged from February 2003 through July 2003. For one month during this period, he used it daily.⁽⁶⁾ His use of ecstasy was more sporadic. By 2003, he had used it approximately six times. He has used neither drug since 2003.

POLICIES

The adjudicative guidelines set out in the Regulation apply to ADP trustworthiness determinations. DoD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable determination may be made.⁽⁷⁾

An administrative judge need not view the adjudicative guidelines as inflexible rules of law. Instead, acknowledging the

complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist in reaching fair and impartial common sense decisions.

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."⁽⁸⁾ Appendix 8 of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The following adjudicative guidelines are raised:

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

Drug Involvement: Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information.

Conditions pertaining to these guidelines that could raise a security or trustworthiness concern and may be disqualifying, as well as those which could mitigate security or trustworthiness concerns, are set forth and discussed 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 a public trust position is "clearly consistent with the national interest."⁽⁹⁾ 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.⁽¹⁰⁾ 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.⁽¹¹⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽¹²⁾ These same burdens of proof apply to trustworthiness determinations for ADP positions.

CONCLUSIONS

Criminal Conduct

Applicant's history of criminal conduct triggers the applicability of DC 1⁽¹³⁾ and DC 2.⁽¹⁴⁾ I have considered all of the mitigating conditions and conclude none apply. His criminal activities span a period of six years, and his most recent offense was less than two years ago. Applicant has not mitigated the criminal conduct security concern.

Drug Involvement

Applicant's history of heavy marijuana use, in tandem with his experimentation with cocaine and ecstasy, trigger the applicability of DC 1⁽¹⁵⁾ and DC 2.⁽¹⁶⁾ Although he told a security clearance investigator that he was diagnosed with cannabis dependence, the record contains no evidence of the credentials of the person who diagnosed him, nor any

records detailing his treatment history. Therefore, DC 3⁽¹⁷⁾ does not apply.

I have considered all of the mitigating conditions and conclude none apply. Although Applicant asserted in his Affidavit that he is no longer abusing marijuana, he did not specify when he stopped. Also, his rationale for stopping was glib and equivocal. Because of the extent and recency of his past marijuana abuse, it is too soon to conclude that it no longer poses a security concern. Applicant has not mitigated the drug involvement security concern.

Whole Person Concept

Nearly every year of Applicant's life since age 16 has been characterized by criminal conduct and drug involvement. His most recent arrest in 2005 demonstrates that he has neither matured, nor rehabilitated himself. Consequently, the potential for pressure, coercion, exploitation, or duress remains unacceptably high. Eligibility is denied.

FORMAL FINDINGS

I conclude Applicant is not eligible to occupy a public trust position. 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 THE APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2., Guideline H.: AGAINST THE APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying a public trust position. Eligibility is denied.

Marc E. Curry

Administrative Judge

1. Item 4, Affidavit, signed by Applicant on March 23, 2005, at 3.

2. *Id.* at 2.

3. *Id.*

4. Item 7, State Criminal Records, dated August 16, 2005, at 1.
5. *See generally*, Item 4.
6. *Id.* at 4.
7. Regulation ¶C8.2.1.
8. Regulation ¶ C6.1.1.1.
9. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
10. Directive ¶E3.1.14.
11. Directive ¶E3.1.15.
12. Directive ¶E2.2.2.
13. Any conduct, regardless of whether the person was formally charged.
14. A single serious crime or multiple lesser offenses.
15. Any drug abuse.
16. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
17. Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional.