

DATE: December 4, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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P Case No. 06-08234

**DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

**FOR APPLICANT**

David L. Mandell, Esq.

**SYNOPSIS**

Applicant is 35 years old and works part-time for a company that administers government health care benefits. From 1998 to December 2005, she has used marijuana with varying frequency and was convicted of two criminal offenses and cited for several disorderly conduct charges. When completing her SF-85P application, she failed to disclose three criminal offenses. She mitigated the trustworthiness concerns raised by her personal conduct, but did not mitigate those concerns raised by her drug involvement and criminal conduct. Eligibility for assignment to a sensitive position is denied.

**STATEMENT OF THE CASE**

On March 15, 2004, Applicant submitted a public trust position application (SF-85P), and resubmitted it on October 21, 2004. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987), as amended (Regulation), and Department of Defense Directive 5220.6, *Defense Industrial Security Personnel Review Program* (Jan. 2, 1992), as amended (Directive). On May 25, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guideline H (drug involvement), Guideline E (personal conduct), and Guideline J (criminal conduct) of the Directive.

In a sworn statement, dated July 24, 2006, Applicant responded to the SOR allegations and requested a hearing. On September 19, 2006, the case was assigned to another administrative judge, and reassigned to me on October 11, 2006. A Notice of Hearing was issued on October 12, 2006, setting the case for hearing on October 24, 2006. At the hearing, Department Counsel introduced Government Exhibits (GX) 1 through 12 into evidence. Applicant testified in her case-in-chief, called two witnesses, and introduced Applicant Exhibits (AX) A through I into evidence. DOHA received the hearing transcript (Tr.) on November 13, 2006.

**PROCEDURAL ISSUES**

On September 12, 2006, Department Counsel filed a Motion to Amend the SOR as follows:

1. Strike subparagraph 1.b and replace with the following: "You were arrested on September 30, 1990, by the Madison Police Department, Madison, Wisconsin and charged with Possession of THC/Marijuana and Disorderly Conduct. You pled no contest to Unlawful Possession of Marijuana and were fined."
2. Strike subparagraph 1.c.
3. In subparagraph 2.a. replace "16." with "20."
4. Strike subparagraph 2.a.(1) and replace with the following: "You were arrested on March 19, 1997, on an outstanding warrant for a disorderly conduct charge from February 7, 1997."
5. Strike subparagraph 3.c.

Applicant did not object to the Motion and it was granted.

### **FINDINGS OF FACT**

Based on the entire record, including Applicant's admissions in her Answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 35 years old, married and has two children. Since October 2001, she has worked part-time for a company that administers a government health insurance plan. According to her recent yearly performance review, she achieved all company expectations. (AX G) Prior to this job, she worked as a cosmetologist for seven years. (Tr. 79)

In her Answer, Applicant admitted using marijuana with varying frequency from approximately 1998 to March 2005. She also admitted that she was arrested and convicted of a drug related crime in May 2004, and a battery charge in May 1997. She acknowledged she was arrested and charged with possessing marijuana in September 1990, and disorderly conduct in August 1993, September 1994, February 1996, and a warrant charge in March 1997.

In September 1990, Applicant was arrested and charged with Possession of THC/Marijuana and Disorderly Conduct, after smoking it at a pro-marijuana rally. She pled no contest to Unlawful Possession and was fined. She was 19 years old. In August 1993, she was arrested and charged with Disorderly Conduct after a physical incident arose with her former boyfriend. She was fined \$37.00. (Tr. 66) In September 1994, she was arrested and charged with Disorderly Conduct and found guilty for another problem involving a physical altercation with him. (Tr. 68) In February 1996, she was arrested and charged with Disorderly Conduct for an incident involving her neighbor. She was fined \$148.00. (Tr. 69) In March 1997, she was arrested and held overnight in jail for failing to previously appear in court for the February 1996 disorderly conduct incident or pay the fine. (Tr. 40; 50; 82) All of these incidents were ordinance violations. (Tr. 48, 50, and 53)

In May 1997, Applicant, age 26, was arrested and charged with Count (1) Battery to Law Officers, a felony, and Count (2) Resisting or Obstructing Officer. In August 1997, the court found her guilty of the amended charge of Battery, a misdemeanor for Count (1), and sentenced her to four months in jail, withheld for 18 months. She was placed on probation, ordered to pay restitution and court costs, and to attend an alcohol and drug treatment program. She was also found guilty of Count (2) and placed on probation, withheld for 18 months, and ordered to pay court costs and attend the Treatment Alternative Program in lieu of jail time. (Tr. 83) This incident arose after she attempted suicide and the police took her to a detoxification center, and then jail. (Tr. 72-73) After spending some time in jail she went to a treatment program. After testing positive for marijuana during an alcohol and drug screening, she was moved to an inpatient treatment center. (Tr. 59; 84) While there she participated in weekly counseling sessions, underwent evaluations and

random drug tests. (Tr. 59; 83) She remained in the inpatient center for two months and was diagnosed as having an alcohol and drug problem. (Tr. 85-87) She completed the court imposed probation in February 1999. (GX I) About a year and a half after completing the treatment program, she resumed using marijuana and alcohol at a friend's party. (Tr. 60)

In May 2004, Applicant was arrested and charged with Count (1) Possession THC/Marijuana, and Count (2) Possession of Drug Paraphernalia. She pled no contest to Count (1), and Count (2) was dismissed. She was fined \$459.00 and had her driver's license revoked for six months. This incident arose after she had a serious argument with her daughter that became physical and the police were called. After they arrived, her daughter disclosed to them that Applicant had marijuana hidden in a drawer. (Tr. 34 ) Applicant had purchased it for her birthday celebration the previous month and had some left. (Tr. 36) She subsequently attended anger management courses. (Tr. 69)

Applicant started using marijuana at the age of 12 and used it in high school about 20 times. After high school, she began using it more frequently, about once a month on the weekends with friends. (Tr. 56) She admitted using it with a varying frequency from about 1998 to December 31, 2005. In a March 2005 affidavit she stated, "I smoke marijuana for a sense of relaxation and its social interaction. I have not stopped smoking marijuana completely, but I would have no problem stopping if I had to." (GX 3) At the hearing, she acknowledged using it "about three times a year." (Tr. 36; 41) Although she knows it is illegal, she occasionally uses it socially because she enjoys it. (Tr.62-63; GX 2 at 4) She did not have a good explanation for smoking it in April 2004 after she completed her March 2004 application. She "wasn't thinking about the consequences" of her job at the time. (Tr. 89) Other than the May 2004 arrest, she does not think marijuana has had a "negative impact" on her life. She does not participate in any program supportive of sobriety because she believes her life is under control. (Tr. 88) At the conclusion of her testimony, she stated she intended to stop using marijuana. (Tr. 93)

As a teenager and young adult, Applicant drank frequently and at times significant amounts. (GX at 3-4) Currently, she consumes alcohol on a limited basis, maybe once or twice a month, and does not believe she has a problem with it. (Tr. 37-38) She never drinks and drives. (GX 2 at 4)

Some of Applicant's friends and family members submitted letters attesting to her trustworthiness. (AX A-F) One of her good friends testified. She has noticed behavioral changes in Applicant since the late 1990's. (Tr. 100) She believes Applicant will keep her promise to stop using marijuana. (Tr. 101) Her supervisors are aware of the reasons underlying this hearing. (Tr. 88-89.)

Applicant and her husband have been married since April 2006, but have been a couple for eight years. (Tr. 80) He and Applicant work for the same employer, but have different hours. He believes she has changed over the last couple years. (Tr. 96) He does not approve of his wife's marijuana use and thinks she will abstain from using it in the future. (Tr. 97)

When Applicant completed her SF-85P in March 2004, and later initialed and resubmitted it in October 2004, she certified that her answers were true, complete and correct to the best of his knowledge. In response to Question 20. Your Police Record (*In the last seven years, have you been arrested for, charged with, or convicted of any offense(s)?*), she answered "No," and failed to list the May 2004, March 1997 and May 1997 arrests. She denied that she intentionally falsified her answers, but attempted to answer them truthfully. (Tr. 41)

Applicant did not list the May 2004 battery on the March 2004 application because it had not yet occurred. When she reviewed and resubmitted her application in October 2004, she did not read it carefully and did not think she needed to include it because her supervisor knew about the charge, which she believed was sufficient notice to the government. (Tr. 43-44; 76) She left the two 1997 arrests off because she thought they were outside the seven year period, which she miscalculated by a couple months. Now, she realizes she should have disclosed them. (*Id.*) I find her explanations credible.

## 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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 12968, *Access to*

*Classified Information*, § 3.1(b) (Aug. 4, 1995), the President provided that eligibility for access to classified information shall be granted only to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information."

To be eligible for assignment to sensitive duties, an applicant must meet the security guideline contained in DoD 5200.2-R. "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." DoD 5200.2-R, ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth personnel security guidelines as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

**Guideline H - Drug Involvement:** Improper or illegal involvement with drugs raises trustworthiness concerns. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

**Guideline E - Personal Conduct:** A trustworthiness concern may arise when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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

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

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 participation; (6) the presence or absence of rehabilitation and other 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

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 for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability. *See* ISCR Case No. 95-0611 at 3 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government. *See* ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *See* Directive ¶ E3.1.15. An applicant

"has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." *Id.*

## CONCLUSIONS

I considered all of the facts in evidence and the application of the appropriate legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the SOR:

### Guideline H: Drug Involvement

Based on Applicant's admissions that she has used marijuana and contemplated using it in the future, the Government established a potential case for disqualification under Drug Involvement Disqualifying Condition (DI DC) 1: (*Any illegal drug use, which includes marijuana*).

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. Applicant has not used marijuana since December 2005, which may provide some mitigation under Drug Involvement Mitigating Condition (DI MC) 1: (*The drug involvement was not recent*). However, her drug usage spans 20 years and has not been isolated or infrequent, as required under DI MC 2: (*The drug involvement was an isolated or infrequent event*). More importantly, Applicant did not assert her intention to stop using marijuana until the final minutes of her testimony when she realized that the social and occasional use of it is a basis for denying her application for an ADP position. Up to that point she testified about possible future use. Hence, DI MC 3: (*A demonstrated intent not to abuse any drugs in the future*) cannot apply.

### Guideline E: Personal Conduct

The Government alleged that Applicant falsified her SF-85P by failing to disclose three arrests, constituting a disqualification under 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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). During her testimony Applicant made it clear that she did not intentionally conceal information from her application.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant explained she failed to disclose the 2004 charge initially because it had not occurred at the time she submitted her first application, and by the time she resubmitted it several months later, she believed her employer's knowledge of it was sufficient. She failed to disclose the two 1997 arrests because she thought they fell outside of the seven-year time period listed in Question 20. She miscalculated the date of the offenses by a couple months. Both explanations are reasonable. Hence, the allegations contained in SOR ¶ 2.a are concluded in her favor. Accordingly, Guideline E is decided for her.

### Guideline J: Criminal Conduct

Based on the conclusion that Applicant did not deliberately falsify her SF-85 P, in violation of 18 U.S.C. § 1001, the Government did not establish a potential disqualification, as to the allegations contained in SOR ¶ 3.a.

However, based on Applicant's admissions of several disorderly conduct incidents arising from physical altercations, the use of marijuana, and two criminal convictions, the Government raised a potential disqualification under 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 of multiple lesser offenses*). Although some of the offenses were ordinance violations, the underlying conduct involved assault and battery incidents, which could have been charged criminally.

The 1990 possession incident was initially brought as a criminal violation.

Two of the mitigating conditions, Criminal Conduct Mitigating Condition (CC MC) 1: (*The behavior was not recent*), and CC MC 3: (*. . . or the factors leading to the violation are not likely to recur*) offer some mitigation. Applicant has not been involved in any criminal conduct since May 2004, more than two years ago, and she appears to be in a stable relationship with her husband and children, and no longer with her former boyfriend with whom she had problems. However, those conditions are outweighed by her refusal, up to the hearing, to stop using marijuana or participate in an appropriate recovery program, which would have provided evidence triggering the application of CC MC 5: (*There is clear evidence of successful rehabilitation*), a critical mitigating condition under these circumstances.

### The Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, I considered the totality of the evidence in view of the "whole person" concept, including Applicant's age, her candid testimony about her marijuana and alcohol use, her current performance evaluations, and the support from her employer, friends and husband. However, I gave great weight to the length of time she used marijuana, the lack of ongoing participation in a substance abuse program in view of her previous diagnoses and subsequent use, and the fact she used marijuana after she submitted her SF-85P in March and again in October 2004, knowing the Government's concern about illegal drug usage. While I believe she is now aware of the employment implication of her habit, she needs to commit to and establish a track record of complete sobriety, in order to demonstrate good judgment and warrant access to sensitive information. Applicant failed to mitigate the security concerns raised by her drug involvement and criminal conduct. She mitigated those raised by her personal conduct. Accordingly, Guideline E is concluded for her and Guideline H and Guideline J are concluded against her.

### **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 as follows:

#### Paragraph 1: Guideline F (Drug Involvement) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Stricken

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

#### Paragraph two: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraph 2.a: For Applicant

#### Paragraph three: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraph 3.a: For Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Stricken

Subparagraph 3.d: Against Applicant

Subparagraph 3.e: Against Applicant

Subparagraph 3.f: Against Applicant

Subparagraph 3.g: Against Applicant

Subparagraph 3.h: Against Applicant

Subparagraph 3.i: 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. Her application for eligibility is denied.

Shari Dam

Administrative Judge