

DATE: December 29, 2006

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In re:

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SSN: -----

Applicant for Trustworthiness Determination

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P Case No. 06-08696

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of recent criminal conduct and recent illegal drug involvement. As a result of her crimes, she is on probation until February 2007. She did not fully reveal her use of illegal drugs when asked to do so on an official questionnaire, and her explanation for her omission is not worthy of belief. Eligibility is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) reviewed Applicant's eligibility to occupy an information systems position designated as an ADP I, II, or III position to support a contract with the Defense Department. As a result of the review, the agency recommended Applicant's case be submitted to an administrative judge for a determination whether Applicant is eligible to occupy such a position. Under Department of Defense Regulation 5200.2-R (Jan. 1987), as amended (Regulation), and Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended (Directive), DOHA issued a Statement of Reasons (SOR) on August 14, 2006, detailing the basis for its action--concerns raised under Guideline J for Criminal Conduct, Guideline H for Drug Involvement, and Guideline E for Personal Conduct (falsification). Applicant answered the SOR in writing on August 31, 2006, and indicated she did not wish to have a hearing.

On September 26, 2006, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM) was mailed to Applicant and it was received by her on October 9, 2006. Applicant did not submit any information within the 30-day period after receipt. The case was assigned to me on December 13, 2006.

### **RULINGS ON PROCEDURE**

In its FORM, the government moved to amend the SOR in two ways. First, it moved to amend the preamble to the SOR allegations by deleting reference to DoD Regulation 5200.2-R and rely exclusively on DoD Directive 5220.6, which is also mentioned in the preamble. Second, it moved to amend SOR ¶ 1 by adding an additional allegation of criminal

conduct as subparagraph 1.h.

As Applicant did not respond to the FORM, she likewise did not respond to the motion. The proposed amendment to the preamble is denied, because the government did not provide a legal argument or analysis why such an amendment was proper and necessary to adjudicate this case. The proposed amendment to SOR ¶ 1 is granted by adding subparagraph 1.h.

### FINDINGS OF FACT

In response to the SOR, Applicant admits the factual allegations and provides some explanations. Her admissions are incorporated herein as findings of fact. In addition, I make the following findings of fact.

1. Applicant is a 23-year-old woman. She is employed as a claims representative for a company that provides services to the Defense Department. She has worked in this job since May 2002.

2. Her official questionnaire indicates she has never married and has no children. She graduated from high school in 2001. She then attended a vocational, technical, or trade school for about two years, but she did not receive a degree or diploma.

3. Applicant admits to a history of criminal conduct, which started in 2002. Her criminal conduct is summarized below:

- In April 2002, she was arrested and charged with (1) resisting or obstructing an officer, and (2) manufacturing/deliver 15-40 grams of cocaine, a felony. along with her April offenses. suspended her driver's license for six months. For the July offenses, she pleaded no contest to the resisting offense and the bail jumping felony was dismissed. The court sentenced her to a \$134 fine and credited her for one day served in jail. charges. The court sentenced her to jail for 15 days (work release), probation for three years, court costs of \$54, and restitution of \$1,500. The second took place two days later on February 12<sup>th</sup> when she was charged with a probation violation for failure to complete court-ordered treatment. As a result, she served about 15 days in jail and her probation was extended to February 2007.

To sum up, Applicant has had several arrests and convictions since 2002. And she will be on probation until February 2007.

4. Applicant also has a history of illegal drug involvement. She admits using marijuana on a periodic basis starting in 1997 and continuing until at least December 2003. She has also purchased marijuana. In addition to marijuana, she has used cocaine. In her explanation to her response to the SOR, she admits using cocaine three or four times during a one-week period in 2002. She has also used Vicodin, Percocet, and other pain pills, which were not prescribed to her, on a periodic basis from about 1999 to 2002.

5. Due to her illegal drug involvement, she received treatment from about December 2003 to February 2004. In her explanation, she admits the treatment was for a condition diagnosed as marijuana abuse. The treatment was ordered by a court as mentioned above.

6. On June 23, 2003, Applicant was required to complete a Questionnaire for Public Trust Positions, otherwise known in the bureaucracy as Standard Form (SF) 85P. Thereafter, in October 2003, she placed her initials in the margins of the questionnaire, and in October 2004, for some reason, she was asked to sign her name to it again. In signing the questionnaire, she certified that her statements were true, complete, and correct to the best of her knowledge and belief and were made in good faith. Also, she certified that a knowing and willful false statement on the questionnaire could be punished under federal law.

7. In response to Question 21 concerning illegal drugs, she was required to answer two questions. The first, Question 21a (the basis for the falsification allegation), asked whether in the last year she had illegally used any controlled substance, to which she answered no. The second, Question 21b, asked whether in the last seven years she had been involved in the illegal purchase, manufacture, trafficking, production, etc. of illegal drugs for her own intended profit or that of another, to which she answered yes. In the explanatory remarks section, she noted

that she had used cocaine once in February 2002.

7. In addition to her responses to Question 21 about illegal drugs, Applicant revealed part of her police record in response to Question 20 of the SF 85P. Her disclosure included the cocaine offense.

8. In her explanation to her response to the SOR, Applicant stated that she misunderstood Question 21a, because she thought it was about disclosing illegal drug charges. With that understanding, she listed the one time she delivered cocaine in February 2002. She also added that she has been drug free since January 2004.

### **POLICIES**

Positions designated as ADP I or ADP II are classified as sensitive positions; ADP III positions are not. Regulation ¶ AP10.2. By memorandum, dated November 19, 2004, the Deputy Under Secretary of Defense for Counterintelligence and Security directed DOHA to decide all contractor cases submitted for trustworthiness determinations, including ADP I, II, and III, under the Directive. Thus, even though they are nonsensitive positions, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases.

"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." Regulation ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. Regulation ¶ C8.2.1.

### **CONCLUSIONS**

#### ***1. The Criminal Conduct Concern***

Under Guideline J, criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures for safeguarding and handling sensitive information.

Here, based on the record evidence, a criminal conduct concern is raised under Guideline J. The record evidence shows Applicant has engaged in a pattern of criminal conduct starting with her February 2002 cocaine offense. Thereafter, she was convicted of multiple low-level crimes. She violated her probation three times and it was extended as a result. She is currently serving probation until February 2007. Given these circumstances, a concern is raised by Applicant's pattern of criminal conduct.

I reviewed the mitigating conditions under the guideline and conclude none apply in Applicant's favor. Her pattern of criminal conduct is recent and it cannot be viewed as an isolated incident. Applicant remains on probation until February 2007, and her probationary status militates against mitigation of the criminal conduct concern.

#### ***2. The Drug Involvement Concern***

Under Guideline H, a concern may exist based on improper or illegal involvement with drugs. Improper or illegal involvement with drugs is relevant to an applicant's trustworthiness for various reasons, including that drug abuse indicates unwillingness or inability to obey the law and calls into question an individual's willingness or ability to protect sensitive information.

Here, based on the record evidence, the government established its case under Guideline H. Applicant's history includes use of marijuana and cocaine, which can only be characterized as drug abuse. Her drug abuse resulted in, among other things, court-ordered treatment. She was also involved in drug-related criminal conduct (the cocaine

offense). Given these circumstances, a concern is raised by Applicant's drug involvement because it is indicative of irresponsible behavior and poor judgment.

I considered the mitigating conditions under the guideline and conclude none apply in Applicant's favor. First, she used illegal drugs as recently as December 2003, which is too soon to be considered remote in time or not recent. This is especially so given her years of marijuana use and her relatively young age of 23. Second, she used marijuana on a periodic basis from about 1997 to December 2003, a period of several years. Given these circumstances, her drug abuse cannot be considered an isolated or aberrational event. Third, given her periodic marijuana use over several years, her use of cocaine, her recent use of illegal drugs in December 2003, her difficulty in completing treatment, and her false statement about her illegal drug use (discussed below), Applicant has not convinced me of her intention to abstain from illegal drug use in the future. Indeed, she continued her illegal use of drugs after she completed her SF 85P in June 2003.

### **3. The Personal Conduct Concern**

Personal conduct under Guideline E is always a concern because it asks the central question: Does a person's past conduct justify confidence the person can be trusted to properly safeguard and handle sensitive information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government is a concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Here, based on the record evidence, a concern is raised under Guideline E. Although Applicant denies making a deliberately false statement in her response to Question 21a, her explanation is not credible. First, her claim that she misunderstood the question is contradicted by the question itself. The language of Question 21a is clear and unequivocal--it asks an applicant to report any illegal use of controlled substances in the last year. Nowhere in Question 21a does it ask about drug-related criminal activity, the basis of Applicant's claim of misunderstanding. Second, her misunderstanding is contradicted by Question 21b, which does ask about drug-related criminal activity, and to which she answered yes. Given her affirmative answer to Question 21b, it's fair to conclude that she understood that question, which suggests she understood Question 21a too. Finally, to accept Applicant's claim as a good-faith misunderstanding would require me to leap to the conclusion that she thought she did not have to report any of her illegal drug use in the last year. No reasonable person could read Question 21 in its entirety in such a way. Accordingly, I conclude Applicant deliberately provided a false answer in response to Question 21a when she failed to disclose her illegal drug use within the last year. Her false statement shows questionable judgment, lack of candor, unreliability, and untrustworthiness.

I reviewed the mitigating conditions under the guideline and conclude none apply in Applicant's favor. Making a false statement on an official questionnaire is a serious matter. Given the record evidence, it has not been explained away, extenuated, or mitigated.

### **4. The Whole-Person Concept**

I have also considered the available information in light of the whole-person concept. Applicant is a 23-year-old woman who has had more than her share of problems at a relatively young age. The record evidence establishes that she engaged in a pattern of criminal conduct--including drug-related criminal conduct--for which she is currently serving probation until February 2007. She also has a history of illegal drug use (mostly marijuana), and she was untruthful when she failed to disclose her illegal use of drugs on an official questionnaire. The falsification is most troubling and it cannot be taken lightly, because it suggests she cannot be counted on to report matters when doing so is contrary to or inconsistent with her own self-interest. Taken together, these circumstances create doubt about Applicant's trustworthiness. Accordingly, I conclude Applicant failed to establish it is in the interests of national security to grant her eligibility for an ADP I/II/III position.

Applicant is applauded for not using illegal drugs since December 2003. Unfortunately, her past actions have consequences. But experience teaches that if Applicant completes her probation without further incident, becomes a law-abiding citizen, continues to live a drug-free lifestyle, and leads a responsible and honest life, then her

problems from her past should be less significant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

SOR Paragraph 1-Guideline J: Against Applicant

Subparagraphs a-h: Against Applicant

SOR Paragraph 2-Guideline H: Against Applicant

Subparagraphs a-f: Against Applicant

SOR Paragraph 3-Guideline E: Against Applicant

Subparagraph a: Against Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for an ADP I/II/III position. Eligibility is denied.

Michael H. Leonard

Administrative Judge