

DATE: December 11, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ADP Case No. 06-10299

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant committed several alcohol- and/or drug-related offenses between 1983 and 1995. Although the offenses are not recent, he failed to establish that he was successfully rehabilitated or that factors leading to the violation are not likely to recur. Eligibility for an ADP I/II/III position is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by 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 29 June 2006 detailing the basis for its decision-concerns raised under Guideline J (Criminal Conduct) of the Regulation. Applicant answered the SOR in writing on 8 and 30 August 2006 and elected to have a hearing before an administrative judge. The case was assigned to me on 16 October 2006. With the consent of the parties, I convened a hearing on 14 November 2006 to consider whether it is clearly consistent with the interest of national security to grant or continue Applicant's eligibility to occupy an ADP I/II/III position. DOHA received the hearing transcript (Tr.) on 29 November 2006.

**FINDINGS OF FACT**

Applicant is a 44-year-old beneficiary congressional relations representative for a defense contractor dealing with medical records of military personnel and their dependents. He is well-respected by his previous supervisor, and has been promoted by his current employer from a customer service representative position after only a year on the job. He is divorced and has a 10-year-old daughter.

Applicant began smoking marijuana in 1979. In April 1983, he was arrested after leaving a vehicle in which one of the other passengers was holding another passenger for ransom. The police found one-quarter pound of marijuana Applicant

had placed under the seat of the car and a small amount on his person. He was originally charged with extortion, kidnaping, possession of dangerous drugs, and possession of marijuana for sale. He was found guilty of possession of marijuana and given three years' probation. At the time, he sold marijuana for the money "to who[m]ever needed it and people [he] knew." Ex. 2 at 3; Tr. 20-21.

In February 1987, he was arrested for driving while intoxicated (DWI) and possession of marijuana. He pled guilty to both charges and was sentenced to 12 month's probation. Tr. 20.

Applicant was arrested in October 1987 for theft of services. He was with a group at a drive-in movie and not every passenger in the vehicle had a ticket. The charges were eventually dropped, as Applicant had a ticket stub. Tr. 20.

Applicant was pulled over by police for speeding in December 1989 and charged with DWI on a suspended license and driving on a suspended license. He failed a field sobriety test and was administered a breath test. He pled guilty to misdemeanor DUI. His driver's license had previously been suspended for failing to pay fines. He spent 60 days in jail as a result. Tr. 18.

Applicant was arrested in June 1990 and charged with DWI with a blood-alcohol content (BAC) of more than .10 and DWI on a suspended license (a felony). He was convicted of DWI on a suspended license. He was sentenced to three years of probation and ordered to complete substance abuse counseling and a victim's impact program. Tr. 20.

In November 1995, Applicant became intoxicated at a football game and at a party held after the game. He knew he was intoxicated, but drove home anyway. He ran a red light and drove his vehicle into another vehicle. He tried to elude police, but was eventually stopped. He was arrested for felony hit and run, driving under the influence (DUI) of alcohol, and aggravated DUI. He eventually pled guilty to felony charges and was sentenced to four and one-half years in prison. He served three and one-half years and was then released on parole for another year. <sup>(1)</sup> Tr. 27-28.

Applicant completed an affidavit on 7 June 2005 concerning his criminal activity. Ex. 2. In it, he discussed his consumption of alcohol, especially as it related to his criminal acts, in pertinent part, as follows:

I began drinking alcohol in 1979 (exact date not recalled). I drank 4-5 beers weekly until sometime in 1991 (exact date not recalled). I did not drink again until sometime in 1994 (exact date not recalled). After that, I drank 6 or more beers weekly. From 6/96 until 2003 (exact date not recalled) I did not drink. Since then, I have drunk 2-3 beers weekly which is the pattern I will continue into the future.

In the past, I drank to intoxication weekly. However since 2003, I drink to intoxication quarterly. I become intoxicated after around six beers. I just become mellow. I feel I did have a problem w/ alcohol. while in prison I did seek out and took classes regarding alcohol. Also, while on parole I attended AA meetings. The classes were voluntary.

Ex. 2 at 6.

During his hearing, Applicant testified as follows:

All of this, it, you know, whatever I did admit, any of this that has happened has happened a long time ago, most of it. Since then I have been to counseling. I'm a member of AA. I've been sober for a long time. [Tr. 22.]

...

Department Counsel: Since when have you been sober?

Applicant: Oh, over four years.

Q: Over four years?

A: Uh-huh. three, let me think, 2003.

Q: 2003 was the last time you had a drink.

A: I believe so.

AJ: Do you know a date? Do you have a date when your last drink was?

A: It was August 1<sup>st</sup>, I believe, of 2003. [Tr. 30-31]

## POLICIES

The adjudication process extends only to sensitive positions. Positions designated as ADP I or ADP II are classified as sensitive positions; ADP III positions are not. Regulation ¶ AP10.2. By memorandum dated 19 November 2004, the Deputy Under Secretary of Defense for Counterintelligence and Security directed DOHA to extend the adjudication process to ADP III positions as well.

"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

### **Guideline J--Criminal Conduct**

In the SOR, DOHA alleged Applicant served more than three years in prison as a result of a conviction for a 1995 felony hit and run, DUI, and aggravated DUI (¶ 1.a); was arrested for shoplifting in 1981 and 1995 (¶ 1.b, 1.m); charged with driving on a suspended license and failing to appear (¶ 1.c); was convicted of DWI while his driver's license was suspended (felony) for a 1990 arrest (¶ 1.d); was arrested in 1990 and charged with DWI while his license was suspended (¶ 1.e); was arrested in January 1990 for felony DUI (¶ 1.f); was convicted after a December 1989 arrest for driving on a suspended driver's license (¶ 1.g); was arrested for DWI in October 1989 (¶ 1.h); was arrested for theft of service in October 1987 (¶ 1.i); was convicted of a 1987 possession of marijuana and DWI (¶ 1.j); was arrested in June 1983 for possession of marijuana (felony) and possession of dangerous drugs (felony) (¶ 1.k); was convicted of possession of marijuana after an April 1983 arrest (¶ 1.l). In the Answer, Applicant admitted the allegations in 1.i, 1.j, and 1.l but denied the others.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Regulation (app. 8) at 150. It is potentially disqualifying for an applicant to engage in criminal conduct (DC 1), especially when it involves a single serious crime or multiple lesser offenses (DC 2). The evidence established Applicant engaged in the criminal conduct alleged in ¶¶ 1.a, 1.d, 1.g, 1.i, 1.j, and 1.l. It is insufficient to establish any of the other allegations. His conviction for the felony hit and run while intoxicated, stemming from his November 1995 arrest, was for a serious offense--he served more than three years in prison for it.

It is possibly mitigating if an applicant can establish that the criminal behavior was not recent (MC 1); the crime was an isolated incident (MC 2); the applicant was pressured or coerced into committing the act and those pressures are not longer present in his life (MC 3); the applicant did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur (MC 4); or there is clear evidence of successful rehabilitation (MC 5). The evidence potentially raised three of these conditions--MC 1, MC 4, and MC 5.

An "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. In evaluating the evidence presented, the administrative judge has the duty to assess the credibility of the witnesses and the weight to give his evidence.

Applicant established his criminal conduct was not recent. The last criminal act alleged in the SOR occurred more than 11 years ago. (2) MC 1 is established.

Applicant failed to establish that the factors leading to the violation are not likely to recur (MC 4) or that there is clear evidence of successful rehabilitation (MC 5). Both of these mitigating conditions rely in large part on the credibility of Applicant's testimony. Although he appears to perform his duties well, evidence of his rehabilitation is limited to his own testimony and the lack of evidence Applicant has been involved in a criminal offense since 1995. I carefully considered the evidence, his testimony, his demeanor, and the disparity between his affidavit and his testimony about his abstinence from alcohol. I found him to be not credible. MC 4 and MC 5 are not established.

### **Whole Person Analysis**

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Regulation (app. 8) at 132. It involves "the careful weighing of a number of variables known as the "whole person concept." *Id.* An administrative judge should consider the following factors: (1) the nature, extent, 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 participation; (6) the presence or absence 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. *Id.*

Applicant engaged in several alcohol- and/or drug-related criminal offenses between at least 1983 and 1995, some of it serious. These were not youthful indiscretions. The last alleged incident, the most serious offense, occurred when he was 33 years old. Based on his lengthy criminal record coupled with his failure to establish that he was rehabilitated or that the factors leading to the violations are not likely to recur, I conclude Applicant failed to establish it is in the interests of national security to grant him eligibility for an ADP I/II/III position.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: For Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: For Applicant

**DECISION**

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

James A. Young

Administrative Judge

1. As this is not a security clearance case, the prohibition against granting a clearance to an applicant who serves more than a year in jail does not apply. *See* 10 U.S.C. § 986.
2. The evidence supports a finding that Applicant violated 18 U.S.C. § 1001 by providing materially false information in either his affidavit or in his hearing testimony. As it was not alleged, and therefore Applicant did not have notice he would have to defend against such an allegation, I did not consider it as a criminal offense for purposes of this security clearance proceeding. I did consider it in weighing his credibility.