



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ADP Case No. 08-04661
)
)
Applicant for Public Trust Position)

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

November 25, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns arising from his falsification of two public trust position applications and his long-term illegal use of marijuana while in a position of trust. Applicant’s eligibility to occupy an ADP I/II/III position is denied.

Statement of the Case

On July 13, 2000 and on September 26, 2007, Applicant submitted Public Trust Position Applications (SF 85P). On April 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, detailing the basis for its preliminary decision to deny Applicant eligibility for a public trust position, citing trustworthiness concerns under Guideline E (Personal Conduct) and Guideline H (Drug Involvement). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD)

Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant him eligibility for a public trust position, and it recommended referral to an administrative judge to determine whether eligibility should be granted, denied or revoked.

On May 4, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on June 9, 2009. DOHA issued a notice of hearing on June 15, 2009. The hearing was convened as scheduled on July 10, 2009. The government offered Government Exhibits (GE) 1 through 5, all of which were admitted without objection. Applicant testified on his own behalf and submitted Applicant Exhibits (AE) 1 through 10, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on July 16, 2009.

Findings of Fact

Applicant admitted all SOR allegations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 39-year-old software development engineer working for a defense contractor. He attended college and received a Bachelor of Science (computer science) degree in 1992. He has never been married.

Applicant has been employed in the same position since August 1996, albeit under different company names (Tr. 37). He submitted his first public trust position application in September 2000, and he was granted a public trust position (automated data processing (ADP-II) shortly thereafter. He has held that position continuously since then.

Applicant has worked as a software development engineer during the last 16 years. He testified that he is considered to be an above-average software developer and he has extensive specialized experience in his field. He is a leader and the "go-to guy" in his company. Based on his references' statements, he is considered to be an outstanding employee, hard working, dedicated, responsible, and diligent. He has a reputation as a trustworthy and honest person.

Applicant started to use marijuana illegally around 1990, when he was in his 20s and attending college (Tr. 38). He knew that his use of marijuana was illegal (Tr. 41). He used marijuana because it enhanced his music-listening experience and made him feel mellow (Tr. 39). He smoked marijuana every weekend, and went to class at least five times under the influence of marijuana (Tr. 41). Applicant continued to use marijuana

illegally from the 1990s to October 2007. Since around 2000, he used marijuana illegally at least once every two or three months (Tr. 87). He also purchased marijuana for personal consumption.

In his July 2000 public trust position application, Applicant answered "Yes," to question 16 (asking whether in the last seven years he had been arrested, charged with, or convicted of any offenses). He listed a 1994 arrest for Driving Under the Influence (DUI), but deliberately failed to disclose that he was arrested in June 1994, and charged with Controlled Dangerous Substance – Possession Marijuana and Possession Drug Paraphernalia With Intent to Use. He answered "No," to question 17, asking whether in the last year he had used any controlled substance (marijuana). He deliberately failed to disclose he had illegally used marijuana with varying frequency from 1990 to July 2000.

In his September 2007 public trust position application, Applicant answered "No," to question 21, asking whether in the last year he had used any controlled substance (marijuana). He deliberately failed to disclose he had illegally used marijuana with varying frequency from 1990 to September 2007. Applicant continued to use marijuana after he submitted his 2007 application.

In December 2007, Applicant was confronted by a government investigator about his failure to disclose his 1994 drug-related arrest. After he was confronted, Applicant decided to be truthful and forthcoming about his illegal drug use and provided additional information concerning his drug-related behavior. Applicant admitted that he deliberately falsified both public trust position applications because he was embarrassed and ashamed of his drug use. He believed it would tarnish his professional reputation and affect his livelihood if it were known publicly that he was an illegal drug user (Tr. 45).

Applicant explained that when he took the government job in 2000, he knew the rules had changed and that he was required to comply with the law, and that his use of illegal drugs would negatively impact his ability to hold a public trust position. Knowing the consequences, he elected to continue his drug-related behavior, he just "dialed it back" (Tr. 47-51). He also knew his employer had a policy against the use of illegal drugs (Tr. 58).

Applicant continues to associate with many of his drug-using friends, most of whom he has known for over 20 years. He considers most of his marijuana using friends his "brothers." He has no intention of disassociating himself from his long-time friends regardless of the fact that some of them continue to use marijuana (Tr. 69).

Applicant believes he has an alcohol problem and that he drinks too much. He goes out to party every weekend with the same long-time drug-using friends he has know for the last 20 years. His friends frequently use marijuana when they go to parties. However, his friends are aware of his situation and they do not smoke marijuana in his presence (Tr. 84). They go to a different room or go outside the house to use the marijuana.

Applicant expressed remorse for his illegal drug-related behavior and for falsifying both public trust position applications. He wants to continue working for the government, and believes he has a lot to offer. He promised never to use illegal drugs again, and stated his intent never to break the laws again (Tr. 63-65). He also submitted a statement of intent to never use illegal drugs in the future with automatic revocation for any violation (Tr. 17, AE 9).

Applicant blames his employer for his falsification of both of his public trust position applications. He alleged that his employer failed to provide him with adequate advice about the adverse consequences he would face for not being truthful in his applications (Tr. 17, 89-90).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. “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. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. See Regulation ¶ C8.2.1.

When evaluating an applicant’s suitability for a public trust position, an administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s controlling adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

A person who seeks access to sensitive information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to

sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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 [or access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct is a security/trustworthiness concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant deliberately falsified material facts on his 2000 public trust position application when he failed to disclose that in 1994, he was arrested and charged with illegal drug-related offenses. He also deliberately falsified material facts on both his 2000 and 2007 public trust position applications when he failed to disclose that he used and purchased marijuana illegally from around 1990 to at least September 2007, while he held a public trust position. Applicant continued to use marijuana after submitting his 2007 application.

Applicant's actions create trustworthiness concerns under two disqualifying conditions: AG ¶¶ 16(a) "deliberate omission, concealment, or falsification of relevant 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," and 16(e) "personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing."

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find none apply. Applicant falsified both of his SF 85Ps. It was not until after he was confronted during the interview process that he admitted his arrest and charges for illegal drug-related behavior. He then provided truthful information concerning his long history of illegal drug abuse. His falsifications are serious offenses (felony), they are recent, and they cast doubt on his reliability, trustworthiness, and judgment. Moreover, Applicant's drug-related behavior increased his vulnerability to exploitation, manipulation, or duress.

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a): "any drug abuse;"¹ AG ¶ 25(c): "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;" and AG ¶ 25(g): "any illegal drug use after being granted a security clearance."

Between 1990 and October 2007, Applicant illegally used, possessed, and purchased marijuana with varying frequency. While in college he used marijuana most weekends. More recently, he used marijuana illegally once every two to three months. His behavior triggers the applicability of AG ¶¶ 25(a), 25(c), and 25(g).² The other disqualifying conditions listed in AG ¶ 25 are not applicable.

¹ AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

² AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

After considering the above mitigating conditions, I find none apply. Applicant's long-term history of illegal use of marijuana is recent. His use of marijuana was part of Applicant's partying lifestyle with his long-time college friends. He continues to associate with his marijuana-using friends. Applicant specifically ruled out the possibility of disassociating himself from these friends. Thus, his questionable behavior is likely to recur. Applicant does not understand what is required of him to have the ability to serve in a public trust position.

Applicant receives credit for his two-year period of abstinence. He also receives credit for his signed statement of intent not to use illegal drugs with automatic revocation of eligibility for any violation. Notwithstanding, considering the evidence as a whole, I find the drug involvement concerns are not mitigated.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Cocaine and methamphetamine are Schedule II Controlled Substances. See 21 U.S.C. § 812(c)II(a)(4) (cocaine), and II(c) (methamphetamine); *United States v. McCourty*, 562 F.3d 458 (2nd Cir. 2008) (cocaine); *United States v. Wheeler*, 535 F.3d 446 (6th Cir. 2008) (methamphetamine).

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

The ultimate determination of whether to grant eligibility for a public trust position, must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature, well educated man. He has been successful working for a defense contractor since 1996. He is considered to be an above-average software developer and has extensive specialized experience in his field. He is also considered to be an outstanding employee, hard working, dedicated, responsible, and diligent. He has a reputation as a trustworthy and honest person. There is no evidence of any security violation, or that he is not a competent worker. These factors show some responsibility and mitigation.

On the other hand, there are more substantial circumstances that weigh against Applicant in the whole person analysis. He has been illegally using and purchasing marijuana with varying frequency since the 1990s. When he started working in government contracts in 2000, he was aware of what was required of him to be eligible for a public trust position. He deliberately falsified two public trust position applications because of his concerns about the adverse effects such information would have on his professional reputation and ability to hold a government job. Notwithstanding, he continued to illegally use marijuana until October 2007, and he continued to associate with his long-time drug-using friends until his hearing date.

Applicant's behavior and personal conduct raise doubts about his suitability to have access to sensitive information, his trustworthiness, and his willingness to comply with laws, rules, and regulations. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his personal conduct and drug involvement.

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 APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a and 2.d:	Against Applicant

Conclusion

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 to occupy an ADP I/II/III position. Applicant's eligibility to occupy an ADP I/II/III position is denied.

JUAN J. RIVERA
Administrative Judge