



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 08-04879
)	
Applicant for Public Trust Position)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

January 13, 2011

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a position of trust is denied.

On November 29, 2007, Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) to obtain eligibility for an ADP I/II/III position¹ required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding² that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust. On April 29, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts

¹ As defined in Chapter 3 and Appendix 10 of DoD Regulation 5220.2-R, as amended (Regulation).

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)³ for personal conduct (Guideline E) and criminal conduct (Guideline J).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on August 3, 2010. Pursuant to a Notice of Hearing issued on August 6, 2010, I convened a hearing on August 24, 2010. The Government presented six exhibits that were admitted without objection as Government's Exhibits (Gx.) 1 - 6. Applicant testified in his own behalf. DOHA received a transcript of the hearing on September 10, 2010.

Findings of Fact

Under Guideline E, the Government alleged at SOR 1.a that Applicant deliberately made false statements to the Government when he answered "no" to SF 85P question 21.a (*Illegal Drugs. A. In the last year, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics, ... amphetamines, depressants, ... hallucinogenics, ... or prescription drugs?*). By doing so, he omitted his marijuana use between about June 2003 and January 2007, which is alleged in SOR 1.b, and that he tested positive through urinalysis for marijuana while on active duty in the U.S. Army in January 2007, as alleged in SOR 1.d.

The Government further alleged that in June 2003, Applicant also tested positive for marijuana in a urinalysis test while on active duty in the Army (SOR 1.c); and that in April 2007, Applicant was administratively separated from the U.S. Army with a General Discharge Under Honorable Conditions after his second positive drug test (SOR 1.e). At SOR 1.f, the Government cross-alleged as disqualifying personal conduct, the SOR 2 allegations of criminal conduct, below.

Under Guideline J, the Government alleged that in July 2004, Applicant received non-judicial punishment under the Uniform Code of Military Justice (UCMJ), Article 15, for wrongful use of marijuana (SOR 2.a); that in January 2007, Applicant again received non-judicial punishment for wrongful use of marijuana (SOR 2.b); that in November 2008, Applicant was arrested and charged with child neglect (SOR 2.c); and that his deliberate falsification of his SF 85P was also criminal conduct, as it violated 18 U.S.C. § 1001 (SOR 2.d).

In response to the SOR, Applicant denied the SOR 1.a allegation, but admitted the remaining allegations. Applicant's admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 31 years old, and is employed by a defense contractor in a logistics support position that requires he have access to sensitive automated information and

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

high-value inventory to perform his duties. He has held his current job since April 2007. (Tr. 23) After graduating from high school in June 1998, he worked as an office assistant at a law firm. Mindful that his father and grandfather had served in the U.S. Army, Applicant enlisted in the Army in February 2001, and served until April 2007. He was trained in artillery and related maintenance missions, and twice deployed to Iraq for a total of about 28 months. (Gx. 1; Tr. 27 - 29, 34 - 35)

By 2003, Applicant had attained the rank of specialist (E-4). He knew at all times during his Army enlistment that the Army did not tolerate illegal drug use. (Tr. 29) However, on June 9, 2003, he tested positive through a command-directed urinalysis for marijuana. On July 9, 2004,⁴ Applicant was found guilty of Wrongful Use of Marijuana, a violation of UCMJ Article 112A. He was reduced in rank to private first class (E-3), fined one-half his month's pay for two months, placed on restriction for 45 days, and given 45 days of extra duty. He was also ordered to attend a two-day drug awareness class. (Gx. 2; Gx. 5; Gx. 6) Applicant subsequently deployed to Iraq and regained his previous rank. (Tr. 36 - 37)

Applicant was later promoted to Sergeant (E-5), a leadership rank in which he assumed duties of increased responsibility, such as ammunition chief and team leader. (Tr. 30) In late December 2006, he went on leave after returning from his second deployment to Iraq. On January 8, 2007, when he reported in from leave, he again tested positive for marijuana, which he had smoked the day before. (Tr. 41 - 42) On January 14, 2007, he was ordered to complete another two-day drug awareness class. On February 13, 2007, Applicant again was found guilty at an Article 15 hearing of violating UCMJ Article 112A. He was reduced in rank to Specialist and given 45 days of extra duty. In April 2007, he was given a General Discharge Under Honorable Conditions. (Gx. 2; Gx. 3; Gx. 4)

In an October 2009 interview with a Government investigator, Applicant stated that marijuana was the only illegal drug he had ever used, and that he only used it twice, just before each urinalysis test. (Gx. 2) However, at this hearing, he acknowledged that he used marijuana at least five times. (Tr. 31)

When he submitted his SF-85P on November 29, 2007, Applicant did not list his drug use in January 2007 as required by Question 21.a (illegal drug use in the preceding year). In his October 2009 interview, he stated that he did not omit that information intentionally. Rather, he claimed he must have read through the SF-85P too quickly and that his omission was an unintended oversight. (Gx. 1; Gx. 2) However, at this hearing, he acknowledged that he made a conscious decision to omit his drug use because he was concerned such a disclosure would might jeopardize his employment. (Tr. 32 - 33)

Applicant was married from April 2002 until he and his ex-wife divorced in October 2008. (Gx. 1; Tr. 39) They had one child together, a son. Applicant also has a

⁴ The record does not indicate why more than a year elapsed between Applicant's positive test and the Article 15 hearing.

daughter by a different woman before his marriage. (Tr. 34) In November 2008, Applicant was arrested for child neglect. He was living with his daughter's mother at the time, and left his son unattended while Applicant went to the store. Neighbors called the police, who took the child into custody and arrested Applicant. Applicant was sentenced to 18 months unsupervised probation, and both children were removed from the home. Applicant and his girlfriend were ordered to complete a 15-week parenting class as a condition of regaining custody. Applicant now has custody of his daughter, but his son lives with Applicant's ex-wife. (Gx. 2; Tr. 40 - 41)

Applicant last used marijuana on January 7, 2007. He testified that he has passed multiple urinalysis tests administered by his employer since April 2007. He also testified that he passed urinalysis tests as part of his efforts to regain custody of his children in 2008. (Tr. 26, 42)

Policies

Positions designated as ADP I/II/III are classified as "sensitive positions."⁵ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is "clearly consistent with the interests of national security" to do so.⁶ The Regulation also requires that DoD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁷

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁸ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case

⁵ Regulation, ¶ C3.6.15.

⁶ Regulation, ¶ C6.1.1.1.

⁷ Regulation, ¶ C8.2.1.

⁸ Directive. 6.3.

can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Personal Conduct

The Government presented sufficient information, in addition to Applicant's admissions, to support all of the allegations under this guideline. The facts thus established raise a security concern that is stated at AG ¶ 15 as follows:

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 has a history of adverse personal conduct characterized by multiple acts of criminal conduct and by an willingness to mislead the Government to protect his own interests. He used marijuana, which is illegal in the Army and in most other jurisdictions, at least five times between 2003 and 2007. He also failed to disclose his drug use as required by SF 85P question 21.a. The record shows that Applicant's omission of his marijuana use was a deliberate attempt to mislead the Government about relevant information in his background because he feared it might adversely impact his employment. At hearing, it was further determined that Applicant was not truthful about his drug use during his October 2009 interview with a Government investigator. Although this conduct was not specifically alleged as a security concern, I would be remiss if I did not consider it in my overall assessment of Applicant's trustworthiness under this guideline.

Available information also showed that Applicant was disciplined by the Army in 2004 for illegal drug use. Three years later, despite his earlier punishment, and while he was in a leadership position, Applicant again used marijuana and was discharged from the Army for his conduct. Also, about 19 months after he left the Army, Applicant was

arrested after he left his young son unattended while he went to the store. In addition to reflecting adversely on his judgment and untruthfulness, Applicant's drug use was a criminal violation of the UCMJ. His deliberate false statements through his SF 85P and at his interview were violations of 18 U.S.C. § 1001, which makes it a crime to deliberately make a false statement or representation to any department or agency of the United States concerning a matter within its jurisdiction.

All of the foregoing requires application of the disqualifying conditions at 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 AG ¶ 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*).

As discussed below, the allegations of criminal conduct under SOR 2 are sufficient to disqualify Applicant from holding a position of trust. Accordingly, I have not applied the disqualifying conditions at AG ¶ 16(c) (*credible adverse information in several adjudicative issue areas **that is not sufficient for an adverse determination under any other single guideline**, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*) (emphasis added).

Additionally, his illegal drug use is specifically addressed by AG ¶ 24 (Guideline H). Therefore, I have not applied AG ¶ 16(d) (*credible adverse **information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination**, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources;*) (emphasis added). Nonetheless, the information about Applicant's drug use and arrests is sufficient to invoke the general security concern expressed at AG ¶ 15.

The Government's information was sufficient to shift the burden of persuasion to Applicant to mitigate the security concerns established under this guideline. Of the disqualifying conditions under AG ¶ 17 pertinent to these facts, none apply. AG ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) and AG ¶ 17(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) do not apply, because Applicant did not show that he was in any way guided by others when he completed his SF 85P. Further, he compounded his false answers to his SF 85P by lying to an investigator about how many times he actually used marijuana.

The mitigating conditions at AG ¶ 17(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*) and AG ¶17(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*) do not apply because multiple falsifications, which are violations of federal criminal law, cannot reasonably be characterized as minor. Nor can I conclude that such conduct is not likely to recur because he smoked marijuana as a non-commissioned officer after being punished for the same conduct less than three years earlier. Also, after he deliberately lied on his SF 85P, in his October 2009 interview, rather than correct his falsifications, he added to them. His November 2008 arrest, at age 29, for child neglect also precludes a conclusion that he will not engage in future acts of poor judgment. On balance, Applicant has not mitigated the security concerns about his personal conduct.

Criminal Conduct

The Government presented sufficient information, in addition to Applicant's admissions, to support all of the allegations under this guideline. The facts thus established raise a security concern that is stated at AG ¶ 30 as follows:

Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

More specifically, Applicant's conduct requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*), and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

By contrast, for the same reasons the Guideline E mitigating conditions do not apply, none of the mitigating conditions at AG ¶ 32 apply. The mitigating conditions at AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) and AG 32(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) do not apply. Applicant's falsifications must be considered recent insofar as the SF 85P is part of his current request for a position of

trust. Further, he also lied to a Government investigator two years after he submitted the SF 85P, and there is nothing unusual about circumstances that require candid disclosure of an applicant's background information.

The mitigating condition at AG ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) does not apply. Applicant repeated his criminal conduct despite his age and experience, which should engender improved judgment and willingness to comply with the law. Applicant did not present any information about his current circumstances that would show he is somehow rehabilitated. On balance, Applicant has failed to mitigate the security concerns about his criminal conduct.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and J. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 31 years old. By virtue of his age and his experience in the U.S. Army, he is presumed to be a mature, responsible adult. However, since he was 23 years old, he has repeatedly engaged in conduct that undermines any confidence in his reliability, truthfulness, and judgment. Applicant did not present any information about his civilian employment performance or other indicators of his character that might counter the adverse inferences drawn from the Government's information. Applicant had the burden of resolving the doubts raised about his suitability for a position of trust, but he failed to meet that burden. As a result, those doubts remain. Because protection of the national interest is paramount in these determinations, those doubts must be resolved in favor of the Government.

Formal Findings

Formal findings 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.f:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a - 2.d:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security to allow Applicant to have access to sensitive information. Request for a position of trust is denied.

MATTHEW E. MALONE
Administrative Judge