



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



In the matter of:)	
)	
)	ADP Case No. 08-05539
SSN:)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro Se*

May 26, 2009

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the trustworthiness concern that arises from his long history of illegally using marijuana, most recently in November 2007.

On November 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing to Applicant its trustworthiness concerns.¹ The SOR alleges a security concern under Guideline H (Drug Involvement). Applicant submitted a response to the SOR that was received by DOHA on December 15, 2008. He denied both SOR allegations and requested a hearing.

The case was assigned to me on February 5, 2009. A notice of hearing was issued on March 5, 2009, scheduling the hearing for April 23, 2009. The hearing was conducted as scheduled. The government submitted three documentary exhibits that were marked

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), DoD Regulation 5200.2-R, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

as Government Exhibits (GE) 1-3 and admitted into the record without objection. Applicant testified and submitted one documentary exhibit that was marked as Applicant's Exhibit (AE) 1 and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Two documents were timely received, marked as AE 2 & 3 and admitted into the record without objection. Department Counsel's forwarding memorandum was marked as Appellate Exhibit (App. Ex.) I and is included in the file. The transcript was received on May 4, 2009.

Procedural Matters

At the hearing, Department Counsel moved to withdraw SOR subparagraph 1.b. That motion was allowed without objection.

Findings of Fact

After a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 34 years old. He has been employed as a manager of billing and enrollment by a defense contractor since November 2007. He was employed by a manufacturing company outside the defense industry from April 1998 until November 2007. His last position with that company was as a supervisor.

Applicant attended college from 1992-97, but did not obtain a degree until 2002 because of an administrative issue at the college he attended. He completed his studies at a junior college after he was married and had begun full-time employment. He received a bachelor degree in economics in 2002. He was awarded a master's degree in industrial engineering in August 2006.

Applicant has been married since February 1996. He has three children, ages nine, six and two. Applicant has known his wife since middle school and they began dating while in college.

Applicant began using marijuana while in college. From early 1993 until about December 1996, he smoked marijuana about two to three times a week. However, there were also weeks during his college years when he did not smoke marijuana at all. Applicant sometimes purchased marijuana and at other times used marijuana that had been provided by friends.

Applicant was interviewed on April 16, 2008, at which time he stated he used marijuana once a month to once every other month from 1996 until 2007. However, he also stated there were some years during which he did not use marijuana at all. He testified his use of marijuana from the time he left college until his last reported use in November 2007 was sporadic and infrequent. He again asserted that several years would pass by during which he totally abstained from using marijuana. In the Questionnaire for Public Trust Positions Applicant executed on November 16, 2007, he admitted he used marijuana four times between November 2006 and November 2007.

Applicant's use of marijuana occurred in social settings. He used marijuana with co-workers from his previous employer even though he was a supervisor. He denies he ever used marijuana with his subordinates. Applicant's last reported use of marijuana occurred at his going-away party from his last employer. He held the party at his in-laws house and hired a band to entertain. During the party, he went outside with the band members and shared in a joint they were passing around. Applicant had been interviewed and hired by his present employer at the time of his last reported use of marijuana and was aware he would have to apply for a public trust position.

Applicant submitted a letter of recommendation from a friend with whom he previously smoked marijuana. That friend has known Applicant since they attended college together. He attests that Applicant is a trustworthy individual as best exemplified by the fact that the friend had selected Applicant and his wife to serve as guardians of his two children if necessary. Applicant also submitted a copy of a letter he sent to his employer renouncing the future illegal use of controlled substances and acknowledging that future use would be grounds for revocation of his trustworthiness entitlement and termination of his employment. His employer acknowledged receipt of the letter.

POLICIES

Positions designated as ADP I and ADP II are classified as sensitive positions.² The standard to 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.³ Trustworthiness adjudications apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management.⁴ Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination is made.⁵

An administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines when evaluating an Applicant's suitability for a public trust position. The administrative judge must also consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The protection of the national security is the paramount consideration, and any doubt concerning personnel being considered for access to sensitive information

² Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

³ Regulation ¶ C6.1.1.1.

⁴ Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004.

⁵ Regulation ¶ C8.2.1.

will be resolved in favor of national security. Decisions are made in terms of the national interest and are not determinations as to the loyalty of the applicant concerned.⁶

The Government is required to present evidence to establish controverted facts alleged in the SOR.⁷ The Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel.⁸ The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

Analysis

Guideline H, Drugs

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.

Applicant illegally used and purchased marijuana on a regular basis between 1993 and 1997 while he attended college. He continued to use marijuana on a less frequent basis after college until his last reported use in November 2007. Between November 2006 and November 2007, Applicant used marijuana four times. Disqualifying Conditions (DC) 25(a): *any drug abuse*; and DC 25(c): *illegal drug possession, including . . . purchase . . .* apply.

Applicant's last use of marijuana occurred about 18 months ago. However, that use occurred after he had been hired for a position of trustworthiness and while he was aware he would have to apply for a trustworthiness determination. His use of marijuana after college included using the illegal drug with co-workers while he was employed in a supervisory position. His last use of marijuana occurred with members of a band he had hired to play at his going away party from work as he was about to commence work in a trustworthiness position. In the preceding year, he used marijuana on four occasions despite being married, the father of three young children, and employed in a long-term and very responsible job. Applicant's admitted repeated abuse of marijuana between 2006 and 2007 under these circumstances was a gross display of lack of judgment. Accordingly, I find Mitigating Conditions (MC) 26(a): *the behavior happened so long ago . . . 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*; and MC 26(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; . . .* do not apply.

⁶ Section 7 of Executive Order (EO) 10865.

⁷ Directive ¶ E3.1.14.

⁸ Directive ¶ E3.1.15.

Applicant submitted a letter to his employer renouncing the future illegal use of any controlled substance and acknowledging that such use would be grounds for revocation of his trustworthiness eligibility and termination of his employment. Accordingly, he is entitled to application of MC 26(b): *a demonstrated intent not to abuse any drugs in the future, such as: (4) a signed statement of intent with automatic revocation of clearance for any violation*. However, considering the circumstances described above about his continuing use of marijuana after college, I find application of this mitigating condition insufficient to mitigate the security concern caused by Applicant's long-term use of marijuana through November 2007.

The objective of a trustworthiness determination is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to sensitive information. Indeed, the "whole person" concept recognizes we should view a person by the totality of her acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to mitigate the drug involvement security concern. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant access to sensitive information. Guideline H is decided against Applicant.

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 H:	AGAINST APPLICANT
Subparagraph 1.a:	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 Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Henry Lazzaro
Administrative Judge

