



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



In the matter of: )  
)  
) ADP Case No. 18-00166  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Carroll Connelley, Esq., Department Counsel  
For Applicant: *Pro se*

09/17/2018

**Decision**

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the drug involvement trustworthiness concerns. Applicant's eligibility for access to sensitive information in a public trust position is denied.

**Statement of the Case**

On February 7, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline H, drug involvement and substance misuse. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG's) effective within the DOD for SORs issued after June 8, 2017.

Applicant timely answered the SOR on March 1, 2018, and elected to have a hearing before an administrative judge. The case was assigned to me on April 16, 2018.

The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing (NOH) scheduling the hearing on August 8, 2018. Government Exhibits (GE) 1 – 2 and

Applicant's Exhibit (AE) A were admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 21, 2018.

Applicant is 55 years old. She graduated from high school in 1980. She has been employed as a team lead for support staff at a federal contractor since 2007. (Tr. 10) Applicant married in 1985 and divorced in 1995. She has a 28-year-old daughter.

Applicant disclosed that she used marijuana (MJ) twice in section 23 of her May 12, 2017, Electronic Questionnaires for Investigations Processing, also known as her security clearance application (SCA). She testified that she smoked MJ on her houseboat on a lake over the July 4<sup>th</sup> weekend in 2016 when a cigarette-joint was provided by her boyfriend. (Tr. 14-16) It was Applicant's opinion that MJ should be legalized. So, she thought she would try it to see what she was promoting. The MJ cigarette had no discernible effect on Applicant. (Tr. 16) She continues to see her boyfriend approximately once a week. (Tr. 17) Applicant attended a Christmas evening party in 2016 with the same boyfriend, and somebody provided hard candy laced with MJ. Applicant ingested the candy. Again, it had no impact on her. (Tr. 18) She did not purchase the MJ on either occasion.

The SOR contains two allegations under Guideline H, drug involvement and substance misuse. Applicant admitted both allegations in her Answer to the SOR, including SOR ¶ 1.b, which alleged that she used MJ, from about July 2016 to August 2017, while holding a position of trust. She testified that she did not even think about her federal position of trust when she used MJ, and it was just "bad judgment." (Tr. 20) It is unclear that Applicant understood that use of illegal drugs was prohibited by her public position of trust before she completed the SCA in May 2017. Applicant explained that when she filled out the SCA, it then became obvious to her that such illegal drug use was a concern to the federal government, based on the questions in section 23 of the SCA. (Tr. 22-23) She answered "no" to the question about any intentions to use illegal drugs in the future. Applicant was aware that her employer maintained a drug-free workplace and required her to have a drug screen as part of the in-processing when she obtained her job as a team-lead for support staff in 2007. (Tr. 22)

Applicant testified that she used MJ with her boyfriend a third time in August 2017, after she completed the SCA and became aware of the government's concern. (Tr. 24) Again, it occurred on their houseboat on the lake when her boyfriend encouraged Applicant to try a stronger MJ cigarette to see if it would have any physiological impact. (Tr. 24) It did not, but it does impact her eligibility for a public position of trust. Consistent with her answer in section 23 of the SCA, Applicant testified that she has no intention to use MJ again in the future. (Tr. 21) She also completed a

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<sup>2</sup> Unless otherwise indicated, these facts were taken from Applicant's Electronic Questionnaires for Investigations Processing (e-QIP) also known as a security clearance application (SCA) dated May 12, 2017 (GE 1), and the summary of Applicant's enhanced subject interview conducted on October 19, 2017 (GE 2).

hand-written statement at the hearing to the effect that she agreed to abstain from all future use of MJ subject to revocation of her public position of trust if she violated this agreement. (AE A) Applicant testified that her boyfriend is not a frequent MJ user and she admits she made “a bad choice” and learned a valuable lesson. (Tr. 34) She never used MJ until age 54, and used it fewer than five times total. (Answer)

## **Policies**

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Code of Federal Regulations Title 32 – National Defense, part 154.13 and part 154, Appendix J – ADP Position Categories and Criteria for Designating Positions) “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.” The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in DOD Directive 5220.6 before any final unfavorable access determination may be made.

When evaluating an applicant’s suitability for a public trust position, the 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 the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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.” The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

## **Analysis**

### **Guideline H, Drug Involvement and Substance Misuse**

The trustworthiness concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant deliberately ingested MJ three times in the presence of her boyfriend. The third time was after she became aware of the government's concern that this was a breach of her public position of trust. The above disqualifying conditions are applicable since she intended to ingest the MJ while holding a public position of trust.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this

problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant provided credible testimony that she believes MJ should be legalized and she wanted to experience the drug's effect. While she is not a habitual user, this was not a one-time innocent ingestion. She testified that she has not completely disassociated from friends, such as her boyfriend, who use illegal drugs. Although she signed a statement of her intent to abstain from future use, she violated that same assurance when she re-offended after answering the questions in section 23 of her SCA. Since she used MJ as recently as August of 2017, there has been insufficient passage of time to confidently conclude that she will not violate again. I have remaining concerns about her reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable, and AG ¶ 26(b) is only partially applicable.

#### **Whole-Person Concept**

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

- (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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Applicant has served for 11 years as a team-lead for

a federal contractor. She self-disclosed her MJ use, and cooperated fully in the process. Yet, in her own words she exercised bad judgment and made a mistake, learning a hard lesson.

Applicant's drug use remains a trustworthiness concern. She has not met her burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the drug involvement and substance misuse trustworthiness concerns.

### **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
Subparagraphs 1.a – 1.b:	Against Applicant

### **Conclusion**

In light of all of 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.

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Robert J. Kilmartin  
Administrative Judge