



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



In the matter of:)	
)	
[REDACTED])	ADP Case No. 19-00321
)	
Applicant for Public Trust Position)	

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
 For Applicant: *Pro se*
 08/29/2019

Decision

MARINE, Gina L., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant submitted an electronic questionnaires for investigations processing for a public trust position (eQIP) on November 17, 2017. On March 26, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging trustworthiness concerns under Guidelines H and E. The DOD CAF acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on April 22, 2019, and requested a decision on the record without a hearing. On June 4, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM) including documents identified as Items 1 through 9. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government’s evidence. He received the FORM on June 10, 2019, and timely submitted his response, to which the Government did not object. Items 1 and 2 are the pleadings in

the case. Items 3 through 5 are admitted into evidence. Items 6 through 9 are discussed below. Applicant's FORM response included a copy of the FORM, which is already part of the record. He also submitted one new document, which is admitted into evidence as Applicant Exhibit (AE) A. I *sua sponte* took administrative notice of several documents, as discussed below, which are identified in the record as Hearing Exhibits (HE) I through VI. The case was assigned to me on August 7, 2019.

Administrative Notice

I *sua sponte* took administrative notice of the fact that the use and possession of marijuana is a criminal violation of federal law. Relevant federal guidance, issued by the Office of Personnel Management (OPM) in May 2015 (HE I); by the Drug Enforcement Administration (DEA) in August 2016 (HE II); by the Office of the Attorney General (OAG) in January 2018 (HE III); by the Office of the Assistant Secretary of Defense (OASD) in February 2018 (HE IV); and by the Director of National Intelligence (DNI) in October 2014 (Item 9), make clear that marijuana remains a Schedule I controlled substance under federal law, that changes in the laws pertaining to marijuana by states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that federal marijuana laws supersede state laws.

In October 2014, the DNI advised that that “[a]n individual’s disregard of federal law concerning the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.” (Item 9 at 2).

In August 2016, the DEA denied a petition to reschedule medical marijuana as a Schedule II controlled substance, on the following basis: “[Marijuana] does not have a currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.” As of August 2019, marijuana remained listed by the DEA as a Schedule I controlled substance. (HE II; HE V).

Effective as of December 2008, the state in which Applicant resides enacted a law allowing for the medical use of marijuana, subject to various administrative rules and regulations, including that the qualifying patient be issued and possess a state-issued registry identification card. (HE VI).

Because neither party provided the May 2015, August 2016, January 2018, nor February 2018 memoranda, I *sua sponte* included them as HE I through IV, respectively. Similarly, I *sua sponte* included relevant portions of the August 2019 DEA Schedule I listing for marijuana and the state law, as HE V and VI, respectively. The January 2018 memoranda rescinded the previous memoranda of the Office of the Deputy Attorney General (ODAG), dated October 2009, June 2011, and 2013. Accordingly, I have not considered Items 6 through 8. Because these *sua sponte* actions did not affect either the relative positions of the parties or my decision, prior notice to the parties was not required.

Findings of Fact

Unless otherwise indicated by citation to another part of the record, I have extracted these findings of fact from Applicant's SOR answer (Item 2) and eQIP (Item 3).

Applicant, age 39, is unmarried without children. He received his high school diploma in 1998 and bachelor's degree in 2017. He has been employed as an administrator by a medical benefits provider since 2014. This is his first application for a position of trust.

The SOR alleged, under Guidelines H and E, Applicant's use of marijuana from May 2002 through present, and his intent to continue using it in the future. It also alleged that he was arrested and charged with driving while intoxicated and possession of marijuana in November 2012. Under Guideline E, the SOR alleged that Applicant was arrested and charged with arson in May 2004. In his SOR answer, Applicant admitted to each of the Guideline H and E allegations.

Applicant has smoked marijuana daily since May 2002. In one eQIP answer, he acknowledged that his use was recreational. However, in another eQIP answer and throughout the rest of the record, he maintained that his use was medicinal for the purpose of addressing sleep issues caused by another prescribed medication that he is required to take for an ongoing medical condition. He obtained a state-issued medical marijuana card in March 2017 for that purpose. The card expired in April 2019. A copy of that card is not in record. Before being issued the card, Applicant purchased marijuana illegally from an associate. He has friends who use marijuana, but he does not know whether they also have state-issued cards. He intends to continue using marijuana. (AE A; Item 2; Item 3 at 32; Item 4 at 9).

In 2012, Applicant did not feel impaired and believed that he was okay to drive after consuming alcohol. The facts and circumstances surrounding his consumption of alcohol or whether he used marijuana prior to driving are not specified in the record. The officer who pulled him over for a broken headlight noticed that Applicant's eyes were red and gave him a breathalyzer, which registered a blood alcohol content of .10%. The officer also found marijuana in Applicant's backpack, which was undisputed in the record. He was arrested and charged with driving under the influence and possession of marijuana. In 2013, he pled guilty to one lesser charge of operating while impaired, and the two initial charges were dismissed. He was sentenced to 93 days in jail (suspended), probation for 12 months, and fined \$1,945. Applicant completed the terms of his sentence, which included mental health counseling and 50 hours of community service. Neither a diagnosis nor prognosis stemming from that counseling was specified in the record. (Item 2 at 27-29; Item 4 at 7-8; Item 5).

Applicant leased a vehicle in his name for the benefit of his then boyfriend. After they broke up, Applicant no longer wanted the vehicle because it reminded him of his ex-boyfriend. In late 2001, he conspired with another friend's boyfriend (X) to commit insurance fraud. X agreed to steal the vehicle and set it on fire, while Applicant would report the vehicle stolen and file an insurance claim. Although Applicant regretted his

actions and realized his “grave mistake” immediately upon receiving notice from the police station of the theft and arson, he proceeded with the plan anyway because he was “scared of the consequences.” In late 2003, a detective contacted Applicant to advise him to obtain an attorney because X, who was in prison for another crime, had confessed to his conspiracy with Applicant. Applicant was charged with felony insurance fraud, to which he pled guilty. In mid-2004, the court placed him in a diversion program, consisting of 12 months of probation, five days of community service, and \$16,000 restitution. Applicant successfully completed the program. (Item 2; Item 3 at 30-31; Item 4 at 8-9).

Applicant’s marijuana use never negatively impacted his work performance. His current employer promoted him three times. Applicant acknowledged the “grave error” of his decision to commit insurance fraud. He attributed that decision to being “very immature” and “very young and stupid.” He described his 2001-self as a “naïve” 22 year old, who was “stuck” paying for a car that he could not afford after his then boyfriend had “talked [him] into leasing it” for him. He understood then, and now, that what he did was “terribly wrong” and was “happy to face the consequences so that [his] conscience would be clear.” He is now a “grown man” who is “responsible” and has “built a career.” He has no intention of participating in insurance fraud or any criminal activities in the future. (AE A; Item 2; Item 4 at 5-6, and 9).

Applicant acknowledged that his marijuana use and insurance fraud “could make one question [his] moral character,” but argued that a “whole-person assessment” would reveal that those actions “have not determined the course of [his] life” and that he is “by-and-large a law-abiding, upstanding citizen.” He also stated the following with regard to his marijuana use: “I understand the denial of my application for [a position of trust] since marijuana is still a federally illegally drug.” (AE A).

Policies

Positions designated as ADP I and ADP II are classified as sensitive 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. (Directive, § 3.2).

When evaluating an applicant’s eligibility for a position of trust to support a DOD contract, an administrative judge must consider the disqualifying and mitigating conditions in the AG. (Directive, Enclosure 2). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

In addition to the guidelines, the Directive sets forth procedures that must be followed in trustworthiness adjudications. The Government must present evidence to establish controverted facts alleged in the SOR. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. An applicant has the ultimate burden of

persuasion to establish their eligibility for a public trust position. (Directive, Enclosure 3, ¶¶ E3.1.14, E3.1.15). 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 national security eligibility will be resolved in favor of the national security.” 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 concern under this guideline 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.

Applicant's ongoing marijuana use, expressed intent to continue using marijuana, and marijuana possession charge establishes the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g): expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Neither of the following potentially applicable mitigating conditions under this guideline are established:

AG ¶ 26(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

AG ¶ 26(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 has used marijuana daily since 2002 for an ongoing medical condition and recreationally. The state in which he resides has allowed medical marijuana use since December 2018 for individuals who obtain and possess a state-issued registry identification card. Not only has Applicant used marijuana in contravention of federal law, but he also violated state law for a significant period, including while he was not in possession of a valid card. Of particular significance is his continued use of marijuana despite knowing that state laws permitting medical or other marijuana use do not alter the federal prohibition or existing national security guidelines concerning marijuana use.

Arguably, Applicant's 2012 charge would lack security significance if viewed in isolation, especially given that it was dismissed by the court. However, together with his ongoing marijuana use, it underscores a pattern of questionable judgment that also calls into question his ability or willingness to comply with laws, rules, and regulations.

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information.

Applicant's marijuana use, marijuana possession charge, and insurance fraud establish the general concern involving questionable judgment and unwillingness to comply with rules and regulations. The insurance fraud also establishes the following specific disqualifying condition:

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 individual may not properly safeguard classified or sensitive information

Applicant has not established either of the following potentially applicable mitigating conditions under this guideline:

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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Not only did Applicant demonstrate an egregious error in judgment when he chose to commit insurance fraud in 2001, but he did not own up to it until years later and only after he was caught. While he expressed sincere remorse about the incident, which is not likely to recur, the gravity of the offense and his delayed atonement precludes mitigation, especially because he has also chosen to continue using marijuana illegally. Incorporating my comments under Guideline H, I conclude that Applicant's behavior continues to cast doubt on his good judgment and willingness to comply with rules and regulations.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis, and I have considered the factors AG ¶ 2(d). I considered his positive work performance history, the years that have passed without criminal charges, and the compelling medical reason underlying his ongoing marijuana use. However, after weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated trustworthiness concerns raised by his marijuana use and insurance fraud. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security to grant him eligibility for a public trust position.

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 H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Gina L. Marine
Administrative Judge