



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



In the matter of:

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ADP Case No. 19-00995

Applicant for Public Trust Position

**Appearances**

For Government: Rhett Petcher, Esq.  
For Applicant: Leon J. Schachter, Esq.

01/09/2020

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant possessed and used marijuana on several occasions from about October 2008 to July 2018. Guideline H (drug involvement and substance misuse) trustworthiness concerns are not mitigated. Eligibility for a public trust position is denied.

**History of the Case**

On July 28, 2017, Applicant completed and signed a Questionnaire for National Security Positions (SF 86). (Government Exhibit (GE) 1) On June 7, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective on June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue access to sensitive information for him, and recommended referral to an administrative judge to determine whether eligibility for a public trust position should be granted, continued, denied, or revoked. Specifically, the SOR set forth trustworthiness concerns arising under Guideline H. (HE 2)

On August 9, 2019, Applicant provided a response to the SOR. (HE 3) On September 9, 2019, Department Counsel was ready to proceed. On September 16, 2019, the case was assigned to me. On October 7, 2019, the Defense Office of Hearings and Appeals issued a notice setting Applicant's hearing for October 21, 2019. (HE 1D) On October 15, 2019, the hearing was cancelled. (HE 1C) On November 4, 2019, the hearing was rescheduled for December 4, 2019. (HE 1A; HE 1B) The hearing was held as rescheduled.

The Government offered 2 exhibits; Applicant offered 19 exhibits; and all proffered exhibits were admitted without objection, except Department Counsel objected to admission of Applicant Exhibit (AE) G. (Tr. 12-18; GE 1-GE 2; AE A-AE G) Department Counsel's objection to AE G, the status of marijuana laws in the states and the District of Columbia, was overruled. (Tr. 15-18; AE G) The legalization of possession of small amounts of marijuana in a state where Applicant resided reduces his culpability because he would not be committing a state-criminal offense if he possessed a small amount of marijuana in that jurisdiction. Possession of marijuana continues to violate federal law and trustworthiness standards under Guideline H for persons holding a public trust position. (Tr. 17-18) A person may also violate an employer's standards by possession and using marijuana. On December 11, 2019, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, he admitted the two SOR allegations. (HE 3) He also provided extenuating and mitigating information. His admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 31-year-old software engineer, and a defense contractor has employed him since 2017. (Tr. 22-23; AE C) In 2008, he graduated from high school, and in 2011, he received a bachelor's degree in applied mathematics and statistics. (Tr. 24-25, 29; AE E) He has never married, and he does not have children. (Tr. 22; GE 1)

### **Drug Involvement and Substance Misuse**

In 2008, Applicant began using marijuana when he was a freshman in college and living in the college dormitories. (Tr. 25, 45) In college, he used marijuana with varying degrees of frequency about every three months. (Tr. 27, 48) He received marijuana from friends, and he did not purchase the marijuana that he used. (Tr. 27-28) He knew it was against the college's rules to use marijuana. (Tr. 28-29)

From 2012 to 2017, Applicant used marijuana two or three times a year. (Tr. 29) He used marijuana in his residence with his girlfriend in 2017, and his marijuana use occurred in a state where marijuana possession is illegal. (Tr. 43-44, 47) She procured the marijuana and brought it into his residence. (Tr. 43) Their live-in relationship ended in November 2018. (Tr. 43) He probably had marijuana in his residence as recently as November 2018. (Tr. 57) Applicant's most recent use of marijuana was in July 2018. (Tr.

29) Applicant used marijuana once in 2018. (Tr. 31) In July 2018, Applicant's sister provided edible marijuana to him in a state where possession of small amounts of marijuana does not violate state law. (Tr. 30, 48-49; AE G) Applicant did not consider whether he was in violation of any laws or whether marijuana possession and use would have an adverse effect on his employment when he used marijuana. (Tr. 31-33) He knew it violated federal law for him to use marijuana. (Tr. 32, 51) He did not think he would be caught and punished if he used marijuana. (Tr. 32)

When he completed his SF 86, Applicant admitted marijuana use, and he was aware that using marijuana was significant to the process of approval for a public trust position. (Tr. 33, 50; GE 1) He indicated on his SF 86 that he intended to continue to use marijuana. (Tr. 35; GE 1) He used marijuana after completing his SF 86 because he was in a state where possession of small amounts of marijuana is legal, and he was in the presence of his siblings, "and they were all using." (Tr. 33)

Recently, Applicant informed his siblings that they were not supposed to use marijuana in his presence in the future, and if they chose to do so, he would leave and it would adversely affect his relationship with them. (Tr. 38-39; AE D) Some of his friends used marijuana in his presence in 2017 and 2018, and Applicant did not want to sever his relationships with them. (Tr. 40, 52) Less than two months before his hearing, Applicant was at a party where marijuana was being used, and he did not leave the party. (Tr. 53) He subsequently asked some of his friends not to use marijuana in his presence, and he promised to leave their presence if they started using marijuana. (Tr. 24, 40-41, 54, 58) If someone started to use marijuana in his presence, Applicant would leave. (Tr. 25) Applicant said his employer's policy was to preclude use of marijuana at work, but he was unaware of any policy precluding marijuana use during off-duty time. (Tr. 54-55) His employer conducts drug testing. (Tr. 55-56) Applicant has never tested positive for the presence of an illegal drug in his body. (Tr. 56)

After his April 20, 2019 Office of Personnel Management (OPM) personal subject interview (PSI) Applicant decided that he would not use marijuana in the future because he realized it would have a serious negative effect on his employment and access to sensitive or classified information. (Tr. 36-37, 41, 63) On October 31, 2019, Applicant received a substance abuse evaluation from a person who is a licensed clinical social worker (LCSW), certified substance abuse counselor (CSAC), master addiction counselor (MAC), and substance abuse professional (SAP). (AE B) Appellant advised the evaluator that he "sometimes" used marijuana with his girlfriend, and his use was limited to "a couple of hits' every six to nine months." (AE B1 at 2) He indicated his most recent marijuana use was in July 2018. (AE B1 at 2) The evaluator concluded Applicant has "a low probability of an alcohol/substance use disorder" and he "is not at risk of relapse or return to his previous behavior." (AE B1 at 4) She did not diagnose Applicant with a substance use disorder, and she concluded no treatment was warranted. (AE B1 at 4) She believes Applicant "is fully capable of safeguarding classified information," and she said he is "fit for duty in a position affecting national security." (AE B1 at 4)

Applicant has increased his physical exercises for better health and wellbeing. (AE F) Applicant does not believe that marijuana use is important to him, and he does not intend to use it in the future. (Tr. 37; AE A) Applicant agreed "to random drug testing and

to immediate and unqualified revocation of [his] security clearance in the event of any future positive drug test.” (AE A)

### **Character Evidence**

Applicant received excellent performance reviews. (AE C) The general sense of Applicant’s eight written character statements is that Applicant is honest, loyal, reliable, trustworthy, and sober. (AE D) He has ended his marijuana use and has made it clear that he will not remain in the vicinity when marijuana is being used by others. (AE D)

### **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, “no one has a ‘right’ to a security clearance [or a public trust position].” *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.

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. 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.

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 overarching adjudicative goal is a fair, impartial and commonsense 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 (4<sup>th</sup> 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. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her 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 and sensitive records is of 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**

### **Drug Involvement and Substance Misuse**

AG ¶ 24 articulates the trustworthiness concern for drug involvement:

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.

Director of National Intelligence (DNI) Memorandum ES 2014-00674, “Adherence to Federal Laws Prohibiting Marijuana Use,” October 25, 2014, indicates:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines . . . . An individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in

national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

AG ¶ 25 provides two conditions that could raise a trustworthiness concern and may be disqualifying in this case: "(a) any substance misuse (see above definition)"; and "(c) illegal possession of a controlled substance . . . ." Applicant possessed and used marijuana<sup>1</sup> on several occasions from 2008 to July 2018. AG ¶¶ 25(a) and 25(c) are established.

AG ¶ 26 details conditions that could mitigate trustworthiness concerns:

(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) 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;

(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.

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<sup>1</sup> Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Drug Enforcement Administration listing at [http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308\\_11.htm](http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm). See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's [eligibility for a public trust position], there is a strong presumption against the grant or maintenance of [access to sensitive information]. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [trustworthiness] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant provided some important mitigating information. He ended his marijuana possession and use in July 2018, and he leaves locations if marijuana use occurs. He advised several friends and his siblings that it will adversely affect his relationship with them if they use marijuana in his presence. He received a favorable evaluation from a LCSW, CSAC, MAC, and SAP who did not diagnose Applicant with a substance use disorder. She also concluded no treatment was warranted. She believes Applicant "is fully capable of safeguarding classified information," and she said he is "fit for duty in a position affecting national security." (AE B1 at 4) Applicant understands that marijuana involvement is inconsistent with holding a public trust position. He provided 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. He promised not to use marijuana in the future.

The evidence against mitigating drug involvement and substance misuse trustworthiness concerns is more substantial at this time. Applicant possessed and used marijuana on multiple occasions from 2008 to July 2018. Each time he possessed marijuana, he committed a federal crime. He used marijuana in 2018 after completing an SF 86. He did not establish that his current employer, a DOD contractor, had no objection to his off-duty marijuana use. His marijuana use in July 2018 is recent. Drug involvement and substance misuse trustworthiness concerns are not mitigated at this time.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a public trust position 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.

Under AG ¶ 2(c), “[t]he ultimate determination” of whether to grant access to a public trust position and access to sensitive information “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 31-year-old software engineer, and a defense contractor has employed him since 2017. In 2008, he graduated from high school, and in 2011, he received a bachelor’s degree in applied mathematics and statistics. Applicant received excellent performance reviews. The general sense of Applicant’s eight written character statements is that Applicant is honest, loyal, reliable, trustworthy, and sober. He has ended his marijuana use and has made it clear that he will not remain in the vicinity when marijuana is being used by others. He received a favorable evaluation from a LCSW, CSAC, MAC, and SAP. He understands that marijuana involvement is inconsistent with holding a public trust position. He provided 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. He promised not to use marijuana in the future.

Appellant is credited with volunteering the information about his misuse of illegal drugs. His marijuana possession and use was not detected through a urinalysis test, a police report, or through witness statements. An honest and candid self-report of drug abuse is an indication that a security-clearance holder will disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or professional reputation.

The evidence against granting Applicant access to sensitive information is more persuasive at this time. Applicant possessed and used marijuana on several occasions from 2008 to July 2018. Each time he possessed marijuana, he committed a federal crime. His marijuana possession and use “raise questions about [his] ability or willingness to comply with laws, rules, and regulations.” AG ¶ 24.

It is well settled that once a concern arises regarding an Applicant’s eligibility for a public trust position, there is a strong presumption against the granting access to sensitive information. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated drug involvement and substance misuse trustworthiness concerns lead me to conclude that grant of a public trust position to Applicant is not warranted at this time. Applicant clearly has the potential to receive access to sensitive information in the future; however, more time without misuse of illegal drugs is necessary to fully mitigate trustworthiness concerns.



I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person. Guideline H trustworthiness concerns are not mitigated at this time.

**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 and 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 national security to grant Applicant's eligibility for a public trust position. Eligibility for a public trust position is denied.

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Mark Harvey  
Administrative Judge