



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ADP Case No. 20-00155  
 )  
Applicant for Public Trust Position )  
 )

**Appearances**

For Government: Aubrey De Angelis, Esquire, Department Counsel

For Applicant: *Pro se*

January 26, 2021

**Decision**

ROSS, Wilford H., Administrative Judge:

On January 26, 2019, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). (Government Exhibit 1.) On May 1, 2020, 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 Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on May 16, 2020, and requested a decision without a hearing before an administrative judge. On or about August 2, 2020, Department Counsel converted the case to one requiring a hearing before an administrative judge pursuant to Paragraphs E3.1.7 and E3.1.8 of the Additional Procedural Guidance at Enclosure 3 of the Directive. Department Counsel

was prepared to proceed on August 2, 2020. The case was assigned to me on August 11, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on October 13, 2020. I convened the hearing as scheduled on December 8, 2020.

The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant offered Applicant Exhibit A at the hearing, which was admitted without objection, and testified on his own behalf. The record then closed. DOHA received the transcript (Tr.) of this hearing on January 6, 2021.

### **Findings of Fact**

Applicant is 50 years old, and married. He has a Bachelor of Science degree. Applicant requires access to personally identifiable information in order to perform his work duties. He has been employed by his current employer since 2018 as a Field Support Engineer. (Tr. 5-6, 14.)

#### **Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)**

The Government alleges in this paragraph that Applicant is ineligible for access to sensitive information because he has used illegal drugs. Applicant admitted all three allegations under this paragraph.

Applicant has used marijuana with varying frequencies from 1985 until the present. He used it on an infrequent but regular basis until 2015. In 2015 he moved to his current state of residence, which allows marijuana use by people possessing a medical marijuana card. Applicant has possessed a medical marijuana card since that time. Applicant stated that he currently uses marijuana on almost a daily basis because of a medical condition for which marijuana provides relief. Applicant stated that he only buys marijuana from legal marijuana dispensaries. Applicant testified that he last used marijuana two days before his hearing on December 8, 2020. Applicant also stated that he knew marijuana use was not allowed by people applying for, or granted, access to sensitive information, but that he intended to continue to use marijuana in the future. (Tr. 15-16, 19-20, 23-29; Government Exhibits 1 and 2; Applicant Exhibit A.)

Applicant told the Human Resources manager at his current employer about his drug use before beginning work with them in 2018. That was because Applicant knew that he would have to take a drug test and marijuana would be detected. Applicant testified that he was told by the Human Resources manager that his employer's policy was to allow drug use that was legal in the state of employment. (Tr. 21-23.)

## Policies

Positions designated as ADP I/II/III are classified as “sensitive positions.” The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. DoD 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, the administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines (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 AG ¶ 2(d), describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 national security eligibility will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to 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 the applicant or proven by Department Counsel and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

A person who applies for access to sensitive information seeks to enter 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.

Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

### **Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)**

The trustworthiness concern relating to Drug Involvement and Substance Misuse is set forth 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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has a long history of purchasing and using illegal drugs. This occurred from 1985 until the present day. Since 2015 Applicant has used marijuana on almost a daily basis, including two days before his hearing. While Applicant may have a medical marijuana card provided by his state, he indicated his knowledge that drug use was incompatible with holding a position of trust with the United States. In addition, Applicant stated that he intended to continue marijuana use into the future. All of the named disqualifying conditions apply to the facts of this case.

The following mitigating conditions under AG ¶ 26 have also been considered:

(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.

As stated. Applicant has used marijuana from 1985 onwards. Applicant is a smart, capable, and mature individual. He has knowledge of the Federal laws, rules, and regulations prohibiting illegal drug use by individuals attempting to obtain, or holding, national security eligibility for access to personally identifiable information. He fully intends to continue to use marijuana for what he believes are valid medical reasons. Neither of the mitigating conditions apply. Paragraph 1 is found against Applicant.

### **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 relevant 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination 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. As stated, Applicant has used marijuana for many years, and evinced a credible intent to continue to use it in the future. Accordingly, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for access to sensitive information, under the whole-person concept. His longstanding drug involvement includes frequent and recent misuse of marijuana, which is likely to continue and recur in light of his expressed intentions. The potential for exploitation remains undiminished in light of his knowing refusal to comply with applicable Federal laws, rules, and regulations. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns under the whole-person concept.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a - c:	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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Wilford H. Ross  
Administrative Judge