



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



In the matter of: )  
)  
) ADP Case No. 22-01509  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Michelle P. Tilford, Esq., Department Counsel  
For Applicant: *Pro se*

02/01/2023

**Decision**

MURPHY, Braden M., Administrative Judge:

Applicant has used marijuana since September 2016, and indicated that he intends to continue doing so. Marijuana use remains illegal under federal law, so Applicant’s history of marijuana use and declared intention to continue using marijuana remain a trustworthiness concern. Trustworthiness concerns under Guideline H (drug involvement and substance misuse) are not mitigated. Applicant’s eligibility for a position of trust is denied.

**Statement of the Case**

Applicant submitted a questionnaire for national security positions, also known as an application for a position of public trust, on August 24, 2021. On August 29, 2022, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline H (drug involvement and substance misuse). The DOD CAF issued the SOR under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8,

2017. When Applicant answered the SOR on September 2, 2022, he requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) based on the administrative (written) record, without a hearing.

On September 16, 2022, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 4. Items 1 and 2 are the pleadings in the case, the SOR and the Answer. Item 3, Applicant's application for a position of public trust, and Item 4, the summary of his background interview, are offered as substantive evidence.

The FORM was mailed to Applicant on September 16, 2022. He was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. Applicant received the FORM on October 5, 2022. No subsequent response from Applicant was received by DOHA, and the case was assigned to me on January 6, 2023. Since Applicant did not respond to the FORM, he did not submit any evidence after answering the SOR, nor did he offer any objection to Items 3 or 4, which are, therefore, admitted without objection.

### **Findings of Fact**

In his Answer, Applicant admitted SOR ¶¶ 1.a and 1.b, without further comment. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 30 years old. He has never married and he has no children. He earned a bachelor's degree in 2017. In June 2020, he began working for his current employer and sponsor for a position of public trust. On his application, he disclosed "at least" daily use of marijuana from September 2016 to August 2021, the month he submitted his application. He indicated that he enjoyed smoking marijuana, and would continue to do so. He also said:

I am aware of the consequences for smoking weed, and I know what type of trouble I can get in if this is a concern to anybody. I am a respectful user and only smoke when I am in the apartment and have no intentions to go anywhere. (Item 3 at 32)

In his background interview two months later, Applicant indicated that he had continued purchasing and using marijuana and would continue to do so. (Item 4)

The SOR alleges Applicant's purchase and use of marijuana with varying frequency, from September 2016 to August 2021, and his stated intention to continue using it. (SOR ¶¶ 1.a and 1.b, respectively) Applicant admitted both allegations in his answer to the SOR without further comment. He did not respond to the FORM, so he offered no new information that could mitigate his past conduct or future intentions.

## Policies

It is well established that no one has a right to a security clearance, or, as here, a position of public trust. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance and trustworthiness determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988).

When evaluating an applicant’s suitability for a position of public trust, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to sensitive information.

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 national security eligibility will be resolved in favor of the 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 not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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

AG ¶ 24 expresses the trustworthiness concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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 considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are applicable:

- (a) any substance misuse (see above definition); and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

It is illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844) All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. (§§811, 812) Marijuana is classified as a Schedule I controlled substance, §812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. (§812(b)(1); See *Gonzales v. Raich*, 545 U.S. 1 (2005))

Applicant disclosed on his August 2021 application that he has used marijuana on a daily basis for the previous five years. AG ¶ 25(a) applies.

Applicant indicated his intention to continue to use marijuana, despite being aware of the consequences. He also failed "to clearly and convincingly commit to discontinue" his marijuana use, so AG ¶ 25(g) applies.

I have considered the mitigating conditions under AG ¶ 26, including the following:

- (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 is grounds for revocation of national trustworthiness eligibility.

Applicant's use of marijuana is frequent, recent, and likely ongoing, as he stated an intention to continue using marijuana because he enjoys it, notwithstanding any resulting consequences. Applicant's pattern and use of marijuana continues to cast doubt on his current reliability, trustworthiness, and good judgment with respect to his eligibility for a position of public trust, or access to sensitive information. He gave no indication that he intends to stop using marijuana. AG ¶¶ 26(a) and 26(b) do not apply.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a trustworthiness clearance 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness clearance 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.

Applicant offered no whole-person evidence to consider. He admitted both allegations without comment and did not offer any additional evidence. The only exhibits are his application and his interview summary. He disclosed his extensive

history of frequent, often daily use of marijuana and purchase of it, and indicated without reservation that he would continue to do so.

Applicant seeks eligibility for a position of public trust, granted by the U.S. Department of Defense, and marijuana remains a Schedule 1 controlled substance under Federal law. He has a recent history and pattern of disregarding Federal law in using and purchasing marijuana. He offered no mitigating evidence to suggest a change of heart.

I conclude Applicant did not provide sufficient evidence to mitigate the trustworthiness concerns arising from his drug involvement and substance misuse. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a trustworthiness clearance. Granting of eligibility for a position of public trust and eligibility for access to sensitive information is not warranted.

### **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, it is not clearly consistent with the national interest to grant Applicant a position of public trust. Eligibility for access to sensitive information is denied.

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Braden M. Murphy  
Administrative Judge