



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



In the matter of:	)	
	)	
	)	ADP Case No. 22-01849
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Sakeena Farhath, Esq., Department Counsel  
For Applicant: *Pro se*

03/21/2023

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**Decision**  
\_\_\_\_\_

GARCIA, Candace Le'i, Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns under Guideline H (drug involvement) and Guideline F (financial considerations). Eligibility for access to sensitive information is denied.

**Statement of the Case**

On October 6, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline H and Guideline F. 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on November 2, 2022, and she elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on January 3, 2023. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the trustworthiness concerns. Applicant received the FORM on January 12, 2023, and she

timely responded on February 12, 2023 (FORM Response). The case was assigned to me on March 9, 2023. The Government's documents identified as Items 1 through 4, and Applicant's FORM Response, are admitted in evidence without objection.

### **Findings of Fact**

In her Answer, Applicant admitted SOR ¶¶ 1.a through 1.c under the financial considerations guideline and 2.a under the drug involvement and substance misuse guideline. She neither admitted nor denied SOR ¶ 2.b, and I am construing her silence as a denial of that allegation. She is 56 years old, married, and she has an adult stepchild. She earned a bachelor's degree in 1988. She was unemployed from June 2014 to July 2015 and August 2018 to May 2021. She found short-term employment from May 2021 to November 2021, but then she was unemployed for a third time from November 2021 to August 2022. Since then, she has worked as an administrator for her employer. She has never held access to sensitive information. She has owned her home since 2009. (Items 1-4; FORM Response)

Applicant failed to file and pay, as required, her federal and state income tax returns for tax years (TY) 2015 through 2018 and 2021. Since she was unemployed in 2019 and 2020, she was likely not required to file an income tax return and did not owe taxes for those tax years. (SOR ¶¶ 1.a-1.b) She also has delinquent federal student loans totaling approximately \$155,777. (SOR ¶ 1.c) She attributes her financial issues to her family's ongoing health issues after her spouse suffered from a heart attack in 2010, and she consequently became the primary source of income for her household. Her spouse suffered a second heart attack at a date not in the record, and he was admitted into the emergency room twice in December 2022. In addition, she was diagnosed with a chronic medical condition in 2017, which led to her periods of unemployment and underemployment, as discussed above. (Items 1-4; FORM Response)

Applicant stated in her June 2022 Questionnaire for National Security Positions (SF 86) and in her Answer that she met with an Internal Revenue Service agent to resolve her outstanding tax issues. Having brought their mortgage current in February 2023, she was working to address her family's other financial obligations. She intended to resolve her delinquent student loans when she had the financial means to do so. There is no further evidence in the record about her student loans, to include whether her payments are paused under the COVID-19 relief for federal student loans. There is also no evidence in the record that she received credit counseling. (Items 1-4; FORM Response)

Applicant used and purchased tetrahydrocannabinol (THC) with varying frequency from approximately December 2018 until at least July 2022. (SOR ¶ 2.a) As of the date of the SOR, she intended to use THC in the future. (SOR ¶ 2.b) As noted above, she has suffered from a chronic medical condition since approximately 2017. None of the 13 medications she was previously prescribed provided effective treatment, so she used THC, at her neurologist's recommendation, to do so. She used "cannabis

edibles” approximately four to five times weekly between 2018 and 2022. She denied using THC recreationally. (Items 1-4; FORM Response)

Applicant purchased marijuana in her state, where it is legal under state law, and she is aware that federal employees and contractors are not permitted to use marijuana. She hoped to have access to better medication through her employer’s health insurance, and she stated in her Answer, “As soon as I am able to get prescription medication to control [my medical condition], I will not use THC.” After the new medication prescribed by her neurologist was approved by her insurance in January 2023, she stated in her FORM Response, “I have been able to begin transitioning from cannabis to the prescription medication,” and she hoped to be completely transitioned within two weeks. (Items 1-4; FORM Response)

Applicant’s supervisor favorably rated her performance in November 2022. He attested to her reliability and noted that she was an outstanding employee. In addition, Applicant’s program manager attested to Applicant’s trustworthiness, reliability, and judgment. (Item 2; FORM Response)

## **Policies**

The Under Secretary of Defense’s Memorandum of November 19, 2004, treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. The standard set out in the adjudicative guidelines for assignment to sensitive duties is that 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. AG ¶ 2.b.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The 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.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶

E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

## **Analysis**

### **Guideline F: Financial Considerations**

The trustworthiness concern for financial considerations is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds . . . .

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant has a history of being unable to pay her debts. She also failed to file her federal and state income tax returns, and pay her taxes, for TY 2015 through 2018, as required. The evidence is sufficient to raise AG ¶¶ 19(a), 19(c), and 19(f) as disqualifying conditions.

Conditions that could mitigate the financial considerations trustworthiness concerns are provided under AG ¶ 20. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Conditions beyond Applicant's control contributed to her financial problems. Thus, the first prong of AG ¶ 20(b) applies. For the full application of AG ¶ 20(b), she must provide evidence that she acted responsibly under the circumstances. Although she stated that she has met with an IRS agent to resolve her outstanding tax issues, she has not demonstrated that she filed her relevant federal and state income tax returns or made any arrangements with the IRS or the state tax authority to pay her outstanding taxes. She has not yet made efforts to address her delinquent student loans, and there is no evidence in the record about whether her payments are paused under the COVID-19 relief for federal student loans. There is also no evidence in the record that she received financial counseling. I find that Applicant's financial difficulties continue to cast doubt on her current reliability, trustworthiness, and judgment. AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(g) do not apply.

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

AG ¶ 24 expresses the security concern pertaining to drug involvement and substance misuse as:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant: "(a) any substance misuse . . ."; "(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 used and purchased THC with varying frequency from 2018 to 2022. Although she stated in her FORM response that she expected to wean herself off THC, she had yet to find a medication effective at controlling her symptoms for her to no longer use THC. AG ¶¶ 25(a), 25(c), and 25(g) apply.

AG ¶ 26 provides the following potentially relevant mitigating conditions:

(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: . . .

(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 not established a pattern of abstinence, as she used THC from 2018 to as recently as 2022, and only began transitioning from cannabis to her recently approved prescription medication for her chronic migraines as of her FORM Response. She did not provide a signed statement of intent to abstain from all drug involvement and substance misuse. She also kept open the possibility of using THC again in the future if her prescription medication was ineffective at managing her symptoms. I find that AG ¶¶ 26(a) and 26(b)(3) are not established.

### **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.

Under AG ¶ 2(c), 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 and Guideline F in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for access to sensitive information. I conclude Applicant did not mitigate the drug involvement and financial considerations 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 F:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a-2.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's eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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Candace Le'i Garcia  
Administrative Judge