



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



In the matter of:)	
)	
)	ADP Case No. 23-00638
)	
Applicant for Public Trust Position)	

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2024

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (drug involvement). Eligibility for access to sensitive information is denied.

Statement of the Case

On July 19, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H. 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 August 8, 2023, and he elected to have the case decided on the written record in lieu of a hearing. The Government's written case, a file of relevant material (FORM), which included documents identified as Items 1 through 5, was submitted on August 31, 2023. A complete copy of FORM was provided to Applicant, who was afforded an opportunity to submit material to refute, extenuate, or mitigate the security concerns, and note any objections to the documents proffered by the Government. Applicant received the FORM on November 5, 2023. His

response was due on December 5, 2023, but he did not submit one. The case was assigned to me on January 4, 2024. Items 1 through 5 are admitted in evidence without objection.

Findings of Fact

In his Answer, Applicant admitted SOR ¶¶ 1.a, 1.b, and 1.d, and he denied SOR ¶ 1.c. He is 39 years old. He has never married, and he does not have any children. He graduated from high school in May 2002. He attended college from September 2002 to December 2007 and earned a bachelor's degree. He has owned his home since 2018. (Items 1-4) He has worked as an audio video engineer for a private company since July 2014. He has never held a security clearance. He is being sponsored for a public trust position. (Items 3, 5)

Applicant used and purchased marijuana with varying frequency from January 1998 to at least February 2022, including after he completed an e-QIP on January 7, 2022, to obtain a DOD position of trust. (SOR ¶¶ 1.a-1.b) He purchased it for his personal use, and he used it once to twice weekly in the evenings, at home, to relax after work and to exercise his civil liberties. He maintained during his February 2022 background interview that he does not associate with individuals who use drugs illegally, and that he has never used marijuana in the presence of others. He intends to continue to use and purchase marijuana in the future. (SOR ¶ 1.d) He does not consider stopping to be an option. (Items 1-4)

Applicant denied that he used and purchased marijuana in February 2022, while employed in a sensitive position, as alleged in SOR ¶ 1.c (Item 1) In his Answer, he claimed that he was not employed in a sensitive position when he used and purchased marijuana in February 2022. The record does not contain any evidence that Applicant was employed in a sensitive position in February 2022. It only reflects that he has been sponsored for a public trust position since February 2022.

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 H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the trustworthiness 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 trustworthiness 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"; "(f) any illegal drug use while granted access to classified information or holding a sensitive position;" 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 marijuana with varying frequency from 1998 to at least February 2022. He intends to continue to use and purchase marijuana in the

future. AG ¶¶ 25(a), 25(c), and 25(g) apply. Although Applicant has been sponsored for a public trust position since February 2022, the record does not contain any evidence that he was employed in a sensitive position when he used and purchased marijuana in February 2022. AG ¶ 25(f) is not established. Accordingly, I find SOR ¶ 1.c in Applicant's favor.

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; 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.

Applicant has used and purchased marijuana for at least 24 years, and he intends to continue doing so in the future. AG ¶¶ 26(a) and 26(b) 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 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 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 H:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	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.

Candace Le'i Garcia
Administrative Judge