



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



In the matter of:	)	
	)	
	)	ADP Case No. 23-01608
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Nicholas Temple, Esq., Department Counsel  
For Applicant: *Pro se*

03/05/2024

**Decision**

BENSON, Pamela C., Administrative Judge:

Applicant did not mitigate the trustworthiness concerns arising from her alcohol consumption and drug involvement and substance misuse. Eligibility for a public trust position is denied.

**Statement of the Case**

On September 1, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guidelines G (alcohol consumption) and H (drug involvement and substance misuse). The DCSA CAS acted under the Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

On September 12, 2023, Applicant responded to the SOR (Answer). She admitted all of the SOR allegations, except one SOR allegation under Guideline G (SOR ¶ 1.b) and one SOR allegation under Guideline H (SOR ¶ 2.a). She requested a hearing before an

administrative judge. On January 8, 2024, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for January 24, 2024. The hearing proceeded as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4 into evidence, and a November 2023 disclosure letter was marked as Hearing Exhibit (HE) 1. Applicant did not offer any documents. She had no objections to GE 1-4, and I admitted them into evidence. Department Counsel requested I hold the record open until February 24, 2024, so that he could submit additional information about whether Delta-8 products meet the definition of tetrahydrocannabinols. I advised Applicant she could also supplement the record with additional documentation while the record was held open. Applicant timely provided two character-reference letters and her employer's drug policy. Department Counsel timely submitted a document from the U.S. Department of Justice, Drug Enforcement Administration, and requested that I take Administrative Notice of the information contained therein. I labeled Applicant's Exhibits (AE) A, B, and C, and I entered them into evidence without objection. I also labeled the Government's document as Administrative Notice (AN) 1, and I agreed to take administrative notice of the uncontroverted facts contained therein. DOHA received the hearing transcript (Tr.) on January 31, 2024, and the record closed on February 25, 2024.

### **Findings of Fact**

Applicant is 48 years old. She was previously married from 2001 to 2011. She married a second time in 2014, and she does not have any children. In 2012, she earned an associate degree in medical administrative duties and a technical degree in medical coding. Since January 2020, she has worked for a federal government contractor as a provider certification analyst. (GE 1)

### **Alcohol Consumption**

Applicant started consuming alcohol around the age of 13. When she was 14 years old, she was involved in an alcohol-related incident at high school. She and another friend skipped school that day to drink alcohol. During lunch period, they returned to school and were caught by a security guard. She was found to be intoxicated. In January 1989, she was sent to an inpatient adolescent treatment center for approximately six weeks due to her underage consumption of alcohol. (SOR ¶ 1.e) She resumed drinking alcohol after treatment, but she also had periods of time she did not use any alcohol at all. (Tr. 19-24)

Applicant was arrested in November 2005 and charged with operating while intoxicated (OWI). (SOR ¶ 1.d) She stated that she was drunk and was driving fast to get home. She was pulled over by the police for speeding. She was found guilty of speeding and OWI, was fined, was ordered to attend an educational substance abuse class, and was required to participate in an alcohol and drug assessment. Applicant admitted that she was drinking alcohol regularly because she worked as a bartender. She worked in a bar seven days a week, and about half of those workdays she would drink shots. (Tr. 27-31)

Applicant was arrested in September 2022 and charged with OWI. (SOR ¶ 1.c) She was found guilty of operating with a prohibited alcohol concentration. She was ordered to complete a substance abuse assessment, was sent to an educational substance abuse class, fined, and her driver's license was revoked for seven months. Applicant had been playing darts that night, and she had consumed five or six alcoholic beverages and some shots. She and her husband got into an argument, and she left the bar and went to a park. The police stopped her because she was driving in a park that was closed, and the officers soon realized she was under the influence of alcohol. About three hours after her arrest, Applicant had a blood test which showed her alcohol tested at .168%, well above the legal limit. (Tr. 34-41; GE 2)

The SOR alleged that Applicant currently consumes alcohol in excess and to the point of intoxication, since at least November 2005 until at least May 2023. (SOR ¶ 1.a) She admitted this in her Answer, however she denied that she currently consumed alcohol to the point of intoxication three or four times a week. (SOR ¶ 1.b) She listed that she currently consumed alcohol to the point of intoxication once or twice a week. During the hearing, Applicant stated that she generally drinks three or four times per week and that she has between five or six drinks per occasion. She admitted that she consumes sufficient alcohol to be over the legal limit to operate a vehicle a couple times a week. She used to drink vodka, but that made her mean, so she switched to drinking beer. She has never been referred for treatment following her alcohol assessment, and she does not drink and drive. She does not believe she has a problem with her current use of alcohol. (SOR Answer; GE 2; Tr. 31, 33, 41-44)

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

Applicant first used marijuana at the age of 12. When she was 16 years old, she was using marijuana multiple times each day. After her possession of marijuana arrest in 1995 as set forth below, she stopped using marijuana for approximately 10 years. She resumed her use of marijuana again in 2005 due to back pain. In about 2018, she switched from using marijuana to using "Delta-8," which she purchased from a gas station. The SOR alleges under Guideline H that Applicant had used marijuana/tetrahydrocannabinols (THC) with varying frequency from about August 1987 until at least March 2023. (SOR ¶ 2.a) She denied this allegation in her SOR Answer. She currently has several health issues involving pain, so she intended to use Delta-8 to help her sleep in the future. She believed the use of Delta-8 was lawful, and her continued use does not adversely impact her trustworthiness or ability to perform her employment duties. (Tr. 45-46, 49-53, 55)

SOR ¶ 2.b alleges that Applicant was arrested in January 1995 and charged with felony possession with intent to deliver/manufacture a controlled substance, maintain premises/vehicle for a controlled substance, and dealer possess a controlled substance. In March 1995, she was found guilty of a misdemeanor charge and sentenced to a week of detention. Applicant stated during the hearing that the circumstances of the arrest occurred unexpectedly after she returned to the apartment from work, and the police

busted down the door. They conducted a search and found a little over a pound of marijuana in the apartment. She was unaware of the marijuana, and her then husband explained to Applicant the guy from the apartment below was in trouble and had asked the husband to hold the marijuana. She denied they were dealers or selling marijuana. (Tr. 45-49)

SOR ¶ 2.c alleges that Applicant listed in her January 2023 position of trust application that she intended to continue using marijuana/THC in the future. She admitted this allegation in her Answer.

After the hearing, Applicant provided her employer's "Drug-Free Workplace Policy." Her employer's policy prohibits the "use of any Controlled Substance or other illegal drugs, including marijuana regardless of legal status under state law" while the employee is working for the employer. "This Policy does not prohibit employees from the lawful and appropriate use or possession of prescribed medications. However, because marijuana remains an illegal drug under federal law, its use or possession is prohibited." (AE C)

### **Character Evidence**

Applicant provided letters from her supervisor and the director of operations. Both references described Applicant as professional, productive, and a valuable asset to the team. Both references recommended Applicant be granted CAC access to continue supporting the team and contributing to its overall success. (AE A, B)

### **Administrative Notice**

Department Counsel submitted documentation (AN 1) from the U.S. Department of Justice, Drug Enforcement Administration (DEA), dated February 13, 2023, concerning the chemical structures of Delta-9 and Delta-8, and the application of federal law. I hereby take Administrative Notice of the DEA's findings, as set forth below:

The Controlled Substances Act (CSA) classifies tetrahydrocannabinols (THC) as controlled in schedule I. 21 U.S.C. Section 812, Schedule I(c)(17); 21 CFR 1308.11(d)(31). Subject to limited exceptions, for the purposes of the CSA, the term 'tetrahydrocannabinols' means only those naturally contained in a plant of the genus cannabis plant... Delta-9 and Delta-8 do not occur naturally in the cannabis plant and can only be obtained synthetically, and therefore do not fall under the definition of hemp. Delta-9 and Delta-8 are tetrahydrocannabinols having similar chemical structures and pharmacological activities to those contained in the cannabis plant. Thus, Delta-9 and Delta-8 meet the definition of tetrahydrocannabinols, and they (and products containing Delta-9 and Delta-8) are controlled in schedule I by 21 U.S.C. Section 812(c) Schedule I; and 21 CFR Section 1308.11(d).

## **Policies**

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. SEAD 4, ¶ E.4. 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 adjudicative guidelines. 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), any doubt 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 assignment to a public trust position.

## **Analysis**

### **Guideline G: Alcohol Consumption**

The trustworthiness concern for alcohol consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses and can raise questions about an individual's reliability and trustworthiness.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 22. The following are potentially applicable in this case:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

Applicant engaged in alcohol-related criminal conduct in 2005 and 2022 that resulted in two arrests and two convictions. Her most recent OWI arrest showed that her alcohol concentration was extremely high, registering at about 0.168%. She currently consumes alcoholic beverages three or four times per week, between five or six drinks per occasion, and she gets legally intoxicated a couple times a week. AG ¶¶ 22(a) and 22(c) apply.

Conditions that could mitigate the alcohol consumption trustworthiness concerns are provided under AG ¶ 23. The following are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome the problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge's grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and

capricious. See also ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (reversing grant of a security clearance where most recent alcohol-related incident was three years before hearing because of overall history of alcohol consumption).

None of the mitigating conditions fully apply. Applicant admittedly drinks to intoxication a couple times a week. This pattern of alcohol use demonstrates a habitual and binge consumption of alcohol to the point of impaired judgment. She was recently arrested for operating a motor vehicle while having a high alcohol concentration level of 0.168%. She does not believe she has an issue with her current use and has no plans to modify or reduce her consumption of alcohol. Accordingly, her behavior casts doubt on her reliability and judgment. As such, Applicant has not mitigated the alcohol consumption trustworthiness concerns.

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

The trustworthiness concern relating to the guideline for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances . . . 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25 and the following are potentially applicable:

- (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 marijuana frequently in her early teens and adult life until her arrest in 1995. She resumed her illegal use of marijuana from about 2005 to about 2018. In approximately 2018, she began to use Delta-8, which she purchased legally from a gas station. She stated that she resumed her use of marijuana and Delta-8 to help with her pain and inability to sleep. She listed in her January 2023 position of trust application that she intended to continue to use Delta-8 in the future. The above disqualifying conditions apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

AG ¶ 26(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

AG ¶ 26(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 a 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 was candid about her long history of using marijuana and Delta-8. She did not fully understand that, although Delta-8 was legal in her state of residence, it was still considered a controlled substance under federal law. Her employer's drug-free workplace policy also noted that even though marijuana use may be legal in a state, it is still prohibited since it is considered illegal under federal law. This policy should have put her on notice. More importantly, however, the SOR issued in September 2023 should have put her on notice that her use of Delta-8 was a concern to the government. At that time, she could have checked with her employer about the use of Delta-8 and whether her continued use of Delta-8 was permissible for a position of trust. As of the date of the hearing, Applicant has not abstained from using Delta-8. There is no history of her commitment to comply with federal law or a period of abstinence. None of the mitigating conditions apply. The drug involvement and substance misuse trustworthiness concerns are not mitigated.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security 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 position of trust 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 Guidelines G and H and the factors in AG ¶ 2(d) in this whole-person analysis.

The Federal government must be able to repose a high degree of trust and confidence in persons granted access to protected information. In deciding whether to grant a position of trust, the Federal government can take into account facts and circumstances of an applicant's personal life that shed light on the person's judgment, reliability, and trustworthiness. Furthermore, trustworthiness decisions are not limited to consideration of an applicant's conduct during work or duty hours. Even if an applicant has a good work record, his or her off-duty conduct can have dependability significance and may be considered in evaluating the applicant's position of trust eligibility.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a position of trust in the future. With more time without any trustworthiness concerns, and a track record of constructive actions she has taken to overcome the problems outlined above, she may be able to demonstrate persuasive evidence of her trustworthiness. I have carefully applied the law, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate the alcohol consumption and drug involvement and substance misuse consumption 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 G:	AGAINST APPLICANT
Subparagraphs 1.a - 1.e:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a – 2.c:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a position of trust. Eligibility for access to sensitive information is denied.

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Pamela C. Benson  
Administrative Judge