



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



In the matter of:)
)
) ADP Case No. 23-00436
)
)
Applicant for Public Trust Position)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro Se*

03/29/2024

Decision

MASON, Paul J., Administrative Judge:

Following a careful evaluation of the case record, including the pleadings and exhibits, Applicant has not mitigated the trustworthiness concerns raised by the guidelines for drug involvement and financial considerations. Eligibility for a public trust position is denied.

Statement of Case

On September 9, 2022, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP, Item 2) to obtain or retain a public trust position required for employment with a defense contractor. On December 12, 2022, he provided a personal summary interview (PSI, Item 4) to an investigator from the Office Personnel Management (OPM). After examining the background investigation, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudications Service (CAS) could not make the affirmative findings necessary to qualify Applicant for a public trust position. On June 23, 2023, the DCSA CAS issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under the guideline for drug involvement and substance misuse (Guideline H) and financial considerations (Guideline F). The action was taken by the Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4,

establishing in Appendix A the National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AGs), made effective in the Department of Defense (DOD) on June 8, 2017.

On July 11, 2023, Applicant admitted all allegations under the guidelines for drug involvement and financial considerations. He decided to have his case evaluated administratively on the written record in lieu of a hearing. On August 24, 2023, the Government sent a copy of its File of Relevant Material (FORM), the Government's evidence of four items in support of the allegations in the SOR, to Applicant. He received the FORM on August 31, 2023. He was provided 30 days after receipt of the FORM to submit a response. The response was due on September 30, 2023. DOHA received no response. I was assigned the case on January 1, 2024.

Findings of Fact

The SOR lists two allegations under the drug involvement and substance misuse guideline (Guideline H), and one allegation under the financial considerations guideline (Guideline J). He admitted the three allegations. He has a medical marijuana card that expired in August 2023. See *attachment* to July 2023 answer to the SOR. Applicant provided no additional information about how he uses the drug and whether he uses the drug under the guidance of a physician approved by the state, and purchases marijuana products at state-sanctioned dispensaries. He noted that he was having difficulty retrieving the appropriate tax transcripts to file all of the missing returns.

According to Applicant's e-QIP dated September 9, 2022 (Item 2), he is 33 years old. He received associate's degree in June 2019. He took courses from a technical school between September and December 2021, without receiving a degree. He has been employed as an applications analyst since July 2022. From January to June 2022, he was an applications support analyst. Before that position, Applicant was unemployed for four months. From July 2019 to September 2021, he was employed as a panel shop technician.

Drug Involvement and Substance Misuse

Regarding Applicant's use of marijuana from November 2017 to at least May 2023 (SOR ¶ 1.a), he admitted using marijuana in the last seven years. He did not disclose the use on his September 2022 e-QIP because he did not think he had to, probably because of a state marijuana card that he received from the state in April 2021, authorizing use at the state level. (Item 4 at 2). Between late 2017 and April 2021, he used the drug for enjoyment; since April 2021, he uses the drug to reduce anxiety. Marijuana lessens his anxiety and makes him more tired. Applicant predicted he would not use illegal drugs in the future. He uses the drug daily and intends to continue using marijuana for medicinal purposes. (Item 3 at 6) Understanding that marijuana use is illegal under Federal law, Applicant admitted that he used marijuana illegally. (SOR ¶ 1.b, Item 4 at 2, 6)

Financial Considerations

SOR ¶ 1.b alleges that Applicant failed to file Federal tax returns for tax years 2016 through 2022. In his September 2022 e-QIP, Applicant identified Federal tax years 2016 through 2022 as the years he did not file his Federal returns. (Item 2 at 43) In his December 2022 PSI, he claimed that he forgot to file the returns. He indicated that he filed the missing returns except for 2021. He intended to file the 2021 tax return when he files his 2022 return in April 2023. Applicant believed that he would be receiving a Federal refund, but did not identify the year or years that he was eligible for a refund. (Item 4 at 3)

However, in his answers to interrogatories relating to his December 2022 PSI, and current status of the missing Federal returns, Applicant provided conflicting information about the status of his Federal tax returns for years 2017 through 2022. (Item 3 at 5) He explained that when he was retrieving his Federal tax records, he discovered that he was only able to get access to his 2020 and 2021 tax transcripts. (Item 4 at 8-11) The only information on those two transcripts was information about the Covid-19 stimulus checks. Applicant provided no additional information about his drug use or the missing Federal tax returns.

Because Applicant requested an administrative determination on the record without a hearing, I had no opportunity to assess his credibility or demeanor.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." The standard that must be met for assignment to sensitive duties, is that based on all available information, the person's loyalty, reliability, and trustworthiness, are such that assigning the person to sensitive duties is clearly consistent with the interests of national interests Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. An administrative judge's objective is a fair, impartial, and commonsense decision that evidence all available, reliable, information about the person, past and present, favorable and unfavorable.

Under ¶ E3.1.14 of Department of Defense directive 5220.6, the Government must establish controverted facts. Under ¶ E3.1.15, the applicant is responsible for presenting witnesses and other evidence to rebut, explain, or extenuate, or mitigate facts admitted. The applicant has the ultimate burden of persuasion to obtain a favorable security position.

A person who seeks access to a public trust position enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship extends beyond dur hours and on-duty hours. Decisions include, by necessity consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions embrace a certain amount of legally permissible extrapolation of the potential, rather than the actual, risk of compromise of sensitive information.

Analysis

Drug Involvement and Substance Misuse

The trustworthiness concern under the Drug Involvement/Substance Abuse Guideline 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.

In my analysis of this case, I have taken administrative notice of Executive Order (E.O.) 12564 signed by the then-President of the United States on September 15, 1986. The primary positions addressed in the E.O. are: (1) federal employees cannot use illegal drugs; (2) illegal drug use by federal employees, on or off duty, is contrary to the efficiency of the service; and (3) persons who use illegal drugs are not suitable for federal employment.

I have also taken administrative notice of the Director of National Intelligence Memorandum Adherence of Federal Laws Prohibiting Marijuana Use, (October 25, 2014), which clearly states that state laws do not authorize persons to violate federal law, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule 1 controlled drug.

Changes in state laws or the District of Columbia, pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Security Executive Agent Directive 4 (SEAD 4), effective June 8, 2017). An individual's disregard of the federal law pertaining to marijuana involvement remains adjudicatively relevant in national security determinations.

On December 21, 2021, the Director of National Intelligence signed the memorandum, Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for access to Classified Information or Eligibility to Hold a Sensitive Position. Agencies are required to employ the "whole person concept" stated under SEAD 4, to determine if an applicant's behavior raises a security concern that has not been mitigated.

AG ¶ 25. Conditions that could raise a trustworthiness concern and may be disqualifying include:

(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 commit clearly and convincingly to discontinue such misuse.

Applicant used marijuana from 2017 to April 2021. He claims that until April 2021, he was using the drug for enjoyment. Since that date, he has been using marijuana for anxiety with a medical marijuana card.

Applicant replied affirmatively to the drug interrogatory that he had been using marijuana daily since 2017 and he intended to use the drug in the future. Applicant's illegal ongoing use of marijuana, and his intention to use the drug in the future falls within the scope of AG ¶¶ 25(a), 25(c), and 25(g).

AG ¶ 26. Conditions that could mitigate trustworthiness concerns include:

(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's use of marijuana since 2017 and his conscious decision to continue using the drug in the future, demonstrates poor judgment and unreliability that removes AG ¶ 26(a) from consideration.

Though Applicant admits his illegal use of marijuana, he has furnished no independent evidence of action taken to overcome his illegal drug use, with an objective for abstinence from illegal marijuana use. The record contains no signed statement of

intent by Applicant that any future drug involvement will constitute grounds for revocation of national security eligibility. AG ¶ 26 is inapplicable.

As noted under National Security Adjudicative Guidelines (Security Executive Agent Directive 4 (SEAD 4), effective June 8, 2017), an individual's disregard of the federal law pertaining to marijuana involvement remains adjudicatively relevant in national security determinations. Accordingly, a state's medical marijuana card does not shield an applicant from Federal law which makes it illegal to use marijuana under any circumstances.

Financial Considerations

AG ¶ 18 expresses the trustworthiness concerns related to financial considerations:

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

One condition that may be disqualifying AG ¶ 19 is:

19(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 failed to file Federal tax returns for tax years 2016 through 2022. Engaging in a pattern of neglecting his legal obligation of filing federal tax returns for five years shows poor judgment and unreliability. Though he produced tax transcripts for Federal tax years 2020 and 2021, he has provided no evidence of filing any of the Federal tax returns at issue. AG ¶ 19(f) applies.

To provide sufficient mitigating evidence to overcome AG ¶ 19(f), an applicant must show that he has made the necessary arrangements with the appropriate tax authority to file the missing Federal tax returns, showing compliance with those arrangements. (AG ¶ 20(g)) Applicant's evidence does not show that he has filed the missing Federal returns,

and when he filed them. Therefore, insufficient evidence has been presented to find in Applicant's favor under the guideline for financial considerations.

Whole-Person Concept

I have examined the evidence under the guideline for financial considerations and drug involvement/substance misuse in the context of the nine general factors of the whole-person concept 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 access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant is 33 years old. He has been using marijuana since late 2017 because he thinks that state law authorizes its use. State law controlling marijuana use within the state does not preempt the authority of the Federal government to control the use of illegal drugs and controlled substances by those employed on Government projects. Hence, by working in a public trust position for a defense contractor on a United States (U.S.) Department of Defense project, an applicant must abide by Federal law. A medical marijuana card confers no unique significance or exception under the adjudicative guidelines and/or supplemental regulatory policies. See ISCR Case No. 20-02974 at 5 (App. Bd. Feb. 1, 2022) A medical marijuana card does not excuse a holder of a public trust position from the Department of Defense (DOD)-around-the-clock prohibition against use of illegal drugs while working on Federal government projects. Considering the entire record under the specific guidelines for drug involvement and financial considerations, in the context of the whole person, Applicant's evidence in mitigation does not overcome the adverse evidence presented under Guidelines H and F.

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-b:	Against Applicant

Paragraph 2, Guideline F:

AGAINST APPLICANT

Subparagraph 2.a:

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 of the United States to grant Applicant access to a public trust position. Eligibility for access to a public trust position is denied.

Paul J. Mason
Administrative Judge