



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



In the matter of: _____)
)
) ADP No. 24-00644
)
Applicant for Public Trust Position)

Appearances

For Government: Allison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*:

02/27/2025

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate drug involvement, personal conduct, and financial considerations concerns. Eligibility for access to hold a public trust position is denied.

Statement of the Case

On July 25, 2024, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the drug involvement, personal conduct, criminal conduct, and financial considerations guidelines the DCSA CAS could not make the preliminary affirmative determination of eligibility to hold a public trust position, recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, Department of Defense (DoD) Directive 5220.6 (January 2, 1992) (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), effective June 8, 2017.

Applicant responded to the SOR on August 8, 2024, and requested that his case be resolved on the written record without a hearing. Applicant received the File of Relevant Material (FORM) on December 9, 2024, and timely responded to the FORM with the resubmission of his response to the SOR. The case was assigned to me on February 18, 2025. Both the Government's exhibits (Items 1-6 and 8) and the Applicant's single exhibit (Item 7) were admitted without objection.

Procedural Issues

Incorporated in the FORM is a multi-allegation amendment to the SOR. The amendment was added prior to the forwarding of the case file to the hearing office for resolution on the written record, and did not, as such, require leave to amend. The Government's pleading amendments added two additional allegations to Guideline E (added SOR ¶¶ 2.b-2.c); withdrew the allegations covered by Guideline J (SOR ¶ 3.a); and added seven additional allegations to Guideline F (add SOR ¶¶ 4.b-4.h).

Afforded the opportunity to respond to the Government's SOR amendments in his FORM response, Applicant neither objected to the amendments nor addressed the specifics of the individual amendments with admissions and/or denials of the individual allegations. While the Government's notice to Applicant did not specifically address the included amendments in the FORM, it was sufficient to afford Applicant his fair notice rights afforded him by the Directive's Enclosure 3 procedural guidance. Considering all of the circumstances in the record, Applicant's non-response to the Government's FORM amendments will be treated as a denial for pleading purposes.

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana with varying frequency between November 2020 to about December 2021 while holding a sensitive position, i.e., one in which he held a security clearance. The allegations are cross-alleged under Guideline J, which have since been withdrawn.

Under Guideline E, Applicant allegedly falsified material facts on an electronic questionnaires for investigations process (e-QIP) he completed in April 2023 by deliberately failing to disclose his marijuana use. By amendment to the SOR the Government added subparagraph 2.b to include deliberate falsification of material facts in the April 2023 e-QIP by failing to disclose the Government's past investigation of his background and granting of a security clearance and 2.c to include deliberate falsification of material facts by deliberately failing to disclose his past failure to file and/or pay his federal income tax years for tax years 2018-2019 and 2022.

Under Guideline J, the Government initially alleged cross-alleged the allegations covered by Guideline H under the criminal conduct provisions of Guideline J. By amendment, the Guideline J allegations were withdrawn.

Under Guideline F, Applicant allegedly failed to file, as required, Federal income tax returns for tax years 2018 and 2019. Allegedly, his tax returns remain unfiled. By amendment to the SOR, the Government added subparagraphs 4.b-4.e to include allegations of Applicant's failure to (a) timely file his federal tax returns for tax years 2018-2019 and 2022, as required, and pay back taxes owed for these tax years. The Government also added subparagraphs 4.f-4.h to its amendment, to include Applicant's three delinquent consumer debts exceeding \$11,000.

In his responses to the SOR, Applicant admitted the allegations covered by Guidelines H, E, and J with explanations and clarifications. He denied the allegations covered by Guideline F, claiming he filed his tax returns for tax years 2018 and 2019 and attaching his undated, unsigned returns to his response. (Items 2 and 7)

In responding to the falsification allegations, Applicant claimed his omissions of his past drug use was a mistake and were entirely unintentional. He also claimed to have missed an opportunity to demonstrate honesty and integrity.

Applicant further claimed to have demonstrated consistent trustworthiness and reliability in delivering on his commitments and exhibiting a strong work ethic in all of his undertaken tasks. And, he claimed to consistently prioritize his tasks, manage his time effectively, and stay focused to ensure he meets his obligations and achievement goals.

Addressing his past drug use allegations, Applicant claimed his use of marijuana in 2020-2021 was a mistake of judgment that should not be taken to convey a lack of reliability and trustworthiness. He also claimed that his past involvement with drug experimentation is not a part of his current lifestyle. He claimed, too, that he has successfully passed several random drug tests without any issues.

Applicant further claimed to have taken time to reflect on his past mistakes and his experiences of personal growth and commitment to being a positive role model for his two very young children. He claimed to have no dependence on substances (i.e., illegal drugs). And, he claimed to have no intention of engaging in drug use in the future.

Findings of Fact

Applicant is a 41-year-old employee of a defense contractor who seeks a trustworthiness eligibility determination. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in February 2021 and has no children. (Item 1) He reported no additional educational studies or military service. Since April 2023, Applicant has worked for his current employer as an aircraft servicer. (Item 3) Previously, he worked for other employers in various flight service and other types of jobs. (Item 3) Applicant

reported an involuntary termination in January 2022 attributable to violating a company policy banning the use of marijuana. (Item 3) Applicant held a security clearance between approximately 2010 and January 2022. (Item 4) Applicant is currently sponsored by the U.S. Government. (Item 8)

Applicant's drug use history

Applicant used marijuana on at least two occasions from about February 2021 to May 2022. (Items 3-4) He obtained the marijuana from a friend, and he purchased a pipe to use in smoking his marijuana. (Item 4) His history of illegal drug activity, which includes a prior randomized drug test administered by a previous employer in January 2022, is material to establishing eligibility to hold a security clearance. (Item 4)

Applicant assured that since his submission of his e-QIP in April 2023, he has not used marijuana. (Item 4) However, on the occasions that he used marijuana, he held a security clearance. (Item 4) In December 2021, Applicant was randomly tested for illegal drugs and tested positive for marijuana. As the result of his positive test, he was terminated. (Item 4) Applicant attributed his marijuana use to depression over the illnesses that afflicted his grandmother and in-laws. In an updated personal subject interview (PSI) conducted in May 2023, he assured that he no longer associates with the friends with whom he used illegal drugs. (Item 4)

Responding to the SOR, Applicant assured he has taken time to reflect on his past mistakes and cited his experiences of personal growth and commitment to being a positive role model for his two very young children. (Items 2 and 7) He assured, too, to have no dependence on substances (illegal drugs) and no intention of engaging in illegal drug use in the future.

While encouraging, Applicant's commitments to avoid illegal drugs while holding a security clearance cannot be endorsed or accepted without a showing of either exigent circumstances or credible independent evidence of suspended drug use. Neither of these potential exceptions are present in Applicant's case.

Applicant's e-QIP omissions

Asked to complete an e-QIP in April 2023, Applicant failed to disclose his use of marijuana in November and December of 2021. He also failed to disclose his prior security clearance investigation and ensuing grant of a security clearance. And, he failed to disclose his failure to file his federal tax returns for tax years 2018-2019 and 2022 and the assessed amounts owed for these tax years. Without more information from Applicant as to why he omitted this material information from his April 2023 e-QIP, inferences of knowing and willful omission cannot be averted.

When asked by an investigating agent of the Office of Personnel Management (OPM) about past drug use, his past clearance investigation and holding of a security clearance, and his past failures to file his federal tax returns, as required, in an August

2023 personal subject interview (PSI), Applicant provided full and accurate answers without any evidence of confrontation. (Item 4)

Applicant's finances

Records document Applicant's failure to file his federal tax returns for tax years 2018-2019 and 2022, as required. Transcripts produced for these tax years report no tax filings for these years in issue. (Item 4) Whether Applicant has since filed his federal tax returns for these tax years is unclear. Taxes owed for these tax years exceed \$10,000 and are not supported by any documented tax payments documented by Applicant.

Besides owed federal taxes, Applicant is indebted to three consumer creditors for delinquent accounts exceeding \$11,000. (Items 3-4) He provided no evidence of his addressing any of these listed consumer debts, and they remain unresolved and outstanding.

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." [or implicitly a public trust position]. As Commander in Chief, "the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. Eligibility for access to classified information [or public trust position] may only be granted "upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in protecting and guarding personally identifiable information (PII). DoD Manual 5200.02, which incorporated and canceled DoD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive security positions for civilian personnel. See 5200.02, ¶ 4.1a(3)(c)

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, ¶ 4.1a(3)(c) contain descriptions similar to those used to define ADP I and II positions under DoD Regulation 5200.2-R. (32 C.F.R. § 154.13 and Part 154, App. J) ADP positions are broken down as follows in C.F.R. § 154.13 and Part 154, App. J): ADP I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the design, operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in DoD Regulation 5200.2-R refine and explain the same critical-sensitive positions covered in DoD Manual 5200.02, ¶ 4.1a(3)(c) and are reconcilable as included positions in 5200.02.

So, while ADP trustworthiness positions are not expressly identified in DoD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DoD 5400.11-R . . .” DoD 5200.02, ¶ 4.1a(3)(c). See DoD Directive 5220.6, ¶¶ D5(d) and D8. By virtue of the implied retention of ADP definitions in DoD Manual 5200.02, ADP cases continue to be covered by the process afforded by DoD 5220.6.

Eligibility to hold a public trust position is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified and privacy information potentially accessed in public trust positions.

The AG guidelines include conditions that could raise a security or public trust concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security clearance eligibility and public trust concerns, if any. These guidelines must be considered before deciding whether or not eligibility to hold a security clearance or public trust position should be granted, continued, or denied.

Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified and other sensitive information.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security or public trust risk. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Personal Conduct

The Concern: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, and trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes . . . AG ¶

Drug Involvement

The Concern: The illegal use of controlled substances, to include the misuse of 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.

Financial Considerations

The Concern: Failure or inability 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 or 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 acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burdens of Proof

The Government reposes a high degree of trust and confidence in persons holding public trust positions, as well as those with access to classified information. 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 classified and sensitive information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified and sensitive information. Clearance and public trust decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 (Feb 1960), § 7. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information, or to hold a public trust position. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531.

“Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security [public trust] suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance” and eligibility (implicitly) to hold a public trust position. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations [and implicitly public trust position eligibility] should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Public trust concerns are raised over Applicant’s use of marijuana, falsification of his e-QIP, failure to timely file his federal tax returns, as required, and his accumulation of owed federal tax debts and delinquent consumer accounts. Raised security concerns over cross-alleged criminal conduct allegations were withdrawn.

Personal conduct concerns

Applicable to Applicant's e-QIP omissions is DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.," Applicant's e-QIP omissions are well documented and support drawn inferences of knowing and willful withholding of material information to OPM investigators about his past marijuana use, holding a security clearance, and failure to timely file his federal tax returns for tax years 2018-2019, and 2022.

Without any evidence of confronting him with information pertaining to his e-QIP omissions by the interviewing OPM investigators in his ensuing PSI, Applicant's documented voluntary corrections of his omissions when asked about his past use of marijuana, clearance eligibility, and tax filing lapses entitle him to the mitigation benefits of MC 17(a), "the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,"

Drug concerns

Applicant's admissions to using illegal drugs (marijuana) raise security concerns over judgment and risks of recurrence. On the strength of the evidence presented, two disqualifying conditions (DCs) of the AGs for drug involvement apply to Applicant's situation: DC ¶¶ 25(a), "any substance misuse" and 25(c), "illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of illegal drugs or drug paraphernalia."

Without more time of sustained abstinence from the use of marijuana, none of the mitigating conditions are available to Applicant at this time. Longstanding illegal drug use without a substantial and corroborated period of sustained abstinence is incompatible with the application of any of the mitigating conditions covered by Guideline H. See, e.g., ISCR Case No. 11-00193 (App. Bd. Jan. 24, 2013).

Applicant's limited period of cessation of his illegal drug involvement (which includes a prior positive drug test) makes it too soon to absolve him of risks of recurrence. While this is not a close case, even close cases must be resolved in the favor of the national security where doubt exists. See *Dept. of Navy v. Egan*, *supra*.

Financial concerns

Applicant's multiple tax-filing lapses and accumulated tax and consumer debts warrant the application of three of the disqualifying conditions (DC) of the financial consideration guidelines. DC ¶¶ 19(a), "inability to satisfy debts"; 19(c), "a history of not meeting financial obligations"; and 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,” apply to Applicant’s situation.

Financial stability in a person cleared to protect covered privacy information is required precisely to inspire trust and confidence in the holder of a public trust position that entitles the person to access protected privacy information. While the principal concern of a public trust position holder is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving delinquent debts.

Historically, the timing of addressing and resolving tax-filing failures are critical to an assessment of an applicant’s trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified and privacy protected information or to holding a sensitive position. See ISCR Case No. 14-06808 at 3 (App. Bd. Nov. 23, 2016); ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015); ISCR Case No. 14-00221 at 2-5 (App. Bd. June 29, 2016).

Without any evidence of approved extensions of the times allotted for his filing his federal tax returns, or good cause demonstrated for his untimely filing of tax returns for tax years 2018-2019, and 2022, none of the potentially available mitigating conditions are available to Applicant. In the past, the Appeal Board has consistently imposed evidentiary burdens on applicants to provide documentation corroborating actions taken to resolve financial problems, whether the issues relate to back taxes, consumer, medical, or other debts and accounts. See ISCR Case No. 19-02593 at 4-5 (App. Bd. Oct. 18, 2021); ISCR Case No. 19-01599 at 3 (App. Bd. Jan. 20, 2020).

Besides his failure to timely file his federal tax returns, Applicant has failed to provide any documentation of his addressing his owed back taxes for tax years 2018-2019 and 2022, and paying or otherwise resolving his three SOR-listed delinquent consumer debts. Without probative evidence of addressing his tax and consumer debt delinquencies, none of the potentially available mitigating conditions are applicable to his financial situation.

Whole-person assessment

Whole-person assessment of Applicant’s clearance eligibility requires consideration of whether his history of drug use while holding a sensitive position, tax-filing lapses, and accumulation of delinquent taxes and consumer debts is enough to preclude him from holding a public trust position. While he is entitled to considerable credit for his contributions to the defense industry, his contributions are not enough to overcome security concerns over his past use of marijuana and still active financial concerns. Overall trustworthiness, reliability, and good judgment have not been established.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, I conclude that drug involvement, and

financial considerations public trust concerns are not mitigated. Personal conduct concerns are mitigated. Eligibility to hold a public trust position is denied.

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:

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| GUIDELINE H (DRUG INVOLVEMENT): | AGAINST APPLICANT |
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| Subparagraphs 1.a: | Against Applicant |
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| GUIDELINE E (PERSONAL CONDUCT): | FOR APPLICANT |
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| Subparagraphs: 2.a-2.c: | For Applicant |
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| GUIDELINE J (CRIMINAL CONDUCT): | WITHDRAWN |
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| GUIDELINE F (FINANCIAL CONSIDERATIONS): | AGAINST APPLICANT |
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| Subparagraphs 4.a-4.n: | Against Applicant |
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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 eligibility to hold a public trust position. Eligibility to hold a public trust position is denied.

Roger C. Wesley
Administrative Judge