



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



In the matter of: )  
 )  
XXXXXXXXXX, XXXXX ) ADP Case No. 14-02822  
 )  
Applicant for Public Trust Position )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: Robert Akouri, Esq.

07/28/2015

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to Guidelines H (drug involvement) and E (personal conduct). His eligibility to occupy a public trust position is denied.

**Statement of the Case**

On February 21, 2013, Applicant submitted a Questionnaire for National Security Positions version of an application for a public trust position (SF 86). (Item 3) On August 1, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guidelines H (drug involvement) and E (personal conduct). (Item 1) The SOR detailed reasons why DOD was unable to find that it is consistent with the national interest to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (Item 1) The DOD CAF recommended referral to an administrative judge to

determine whether access to sensitive information should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations by an undated answer, and he did not request a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated December 29, 2014, was provided to him on January 16, 2015.<sup>1</sup> After receipt of the FORM, Applicant retained counsel and through counsel Applicant submitted information within the 30-day time period after receipt of the FORM. Department Counsel did not object to Applicant's post-FORM submissions. The case was assigned to me on March 30, 2015.

### **Findings of Fact**

In his SOR Answer, Applicant admitted and denied in part the allegations contained in SOR ¶ 1.a, and admitted the allegations contained in SOR ¶¶ 2.a and 2.b and incorporated his answer to SOR ¶ 1.a to SOR ¶ 2.c. He also provided mitigating information. (Item 2) His admissions are accepted as findings of fact.

Applicant is a 57-year-old application developer employed by a defense contractor since January. He graduated from high school in June 1976, and attended college from September 1976 to March 1985, but did not graduate. Applicant married in October 1993, and has a 19-year-old son and a 17-year-old daughter. He has never served in the military. There is no evidence of felony or misdemeanor charges or alcohol abuse. There is no evidence of security or rule violations. (Items 3, 4)

### **Drug Involvement/Personal Conduct**

Applicant's SOR alleges that he used and purchased marijuana twice a week from 1985 to 2011. In his SOR answer, he disputes that characterization of his marijuana use. Applicant asserts that during his March 20, 2013 Office of Personnel Management Personal Subject Interview (OPM PSI), he told the investigator that he used marijuana two times a week off and on. (SOR ¶ 1.a; Items 2, 4)

During his OPM PSI, Applicant claims that he stopped using marijuana in January 2011 at his wife's request because it was illegal. On his own initiative, he sought drug treatment for his marijuana usage from October 2010 to January 2011. (Item 4) In his SOR answer, Applicant provided documentation from the drug treatment clinic that he was initially assessed on July 17, 2010, and subsequently attended nine personal counseling sessions with his last session on November 13, 2010. (Item 2) In his SOR answer, Applicant stated that he was "off" marijuana until 2014 when he was issued a medical marijuana card on January 28, 2014 with an expiration date of

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<sup>1</sup>The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated January 6, 2015, and Applicant's receipt is dated January 16, 2015. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

February 1, 2016. He did not indicate how frequently he has used marijuana since 2014. (Item 2)

Applicant's SOR alleges and Applicant admits that he falsified his February 2013 SF 86 when asked in the preceding seven years whether he illegally used any drugs or controlled substances and whether he had been involved in the illegal purchase, receiving, handling or sale of any drug or controlled substance. (SOR ¶¶ 2.a – 2.c; Item 2) Applicant explained, "I further state that at the time I was embarrassed of what I was doing, that prior to my interview I actually attempted to stop (Please see attached) succeeded for over 3 years, was still having difficulty, sought treatment and procured a medical marijuana card (Please see attached)." (Item 2)

Applicant's counsel stated, among other things, that Applicant's employer and family support him, that he is a person of good moral character, and a loving husband and father to his wife and two children. He further stated that Applicant has no intention of using marijuana in the future. (FORM response) Applicant did not submit any primary source character evidence.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. *See Id.* at 527.

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. "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 security." Regulation ¶ C6.1.1.1. 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. *See* Regulation ¶ C8.2.1.

When evaluating an applicant's suitability for a public trust position, an 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. An 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.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. 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 (4<sup>th</sup> 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 and trustworthiness 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 [or access to sensitive information].” 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 [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

## **Drug Involvement**

AG ¶ 24 articulates the security concern pertaining to drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes eight drug involvement-related conditions that could raise a security concern and may be disqualifying. Two of those drug involvement disqualifying

conditions are applicable in this case: “(a) any drug abuse;” and “(c) illegal drug possession, including cultivation, processing, manufacture, purchase, or sale or distribution; or possession of drug paraphernalia.”<sup>2</sup> The Government established its case through Applicant’s admissions and the evidence presented.

AG ¶ 26 provides for potentially applicable drug involvement 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) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the drug involvement mitigating conditions are fully applicable. All of Applicant’s marijuana use and purchases before receiving his January 2014 medical marijuana card were both illegal under state and federal drug laws. Despite his medical marijuana card, Applicant’s marijuana use remains illegal under federal drug laws. Apart from Applicant’s assertion through counsel in his FORM response, there is no evidence that Applicant intends to cease his marijuana use. Applicant did not provide an explanation for obtaining his medical marijuana card. Lastly, there is no evidence that Applicant has disassociated himself from drug-using associates and contacts.

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<sup>2</sup>AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

## Personal Conduct

AG ¶ 15 articulates the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes seven personal conduct concerns that could raise a security concern and may be disqualifying. One of those disqualifying conditions is applicable in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personal security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The Government established this condition through Applicant's admissions and the evidence presented.

AG ¶ 17 provides seven potential conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply. Embarrassment does not constitute sufficient grounds to deliberately lie when completing an SF 86.<sup>3</sup> Applicant's falsifications were recent and material. The security application process does not make allowances for anything other than truthful and complete answers.

Applicant's concealment of relevant and material information demonstrates a lack of candor required of cleared personnel. Applicants are expected to give full and frank answers during the clearance process. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate Government interest.

### **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 the relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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

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<sup>3</sup>Deliberate and materially false answers on a security clearance application may violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995) as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the Government to deny his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).

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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). My comments in the Analysis section are incorporated in the whole-person discussion.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his service as a defense contractor. Apart from his statements of remorse, he provided limited evidence corroborating rehabilitation. If other favorable evidence exists, Applicant did not provide it. A 26-year history of intermittent drug use and relatively recent falsification about that drug use is inconsistent with the standards required of those entrusted with holding a public trust position. A trustworthiness adjudication is aimed at evaluating an applicant's judgment, reliability, and trustworthiness.

Lastly, in requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the security concerns. By failing to provide such information, and in relying on only several uncorroborated limited paragraphs of explanations, security concerns remain.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.c:	Against Applicant



## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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ROBERT J. TUIDER  
Administrative Judge