



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ADP Case No. 14-01114  
 )  
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Applicant for Public Trust Position )

**Appearances**

For Government: Pamela C. Benson, Esquire, Department Counsel  
For Applicant: *Pro se*

08/28/2015

**Decision**

HOWE, Philip S., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on December 5, 2013. On August 19, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) for Applicant. The action was taken under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DoD Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the adjudicative guidelines (AG) effective within the DoD after September 1, 2006.

Applicant answered the SOR in writing in an undated Answer, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on March 25, 2015, and I received the case assignment on April 2, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 1, 2015, and I convened the hearing as scheduled on May 14, 2015. The Government offered Exhibits (Ex.) 1 through 3, which were received without objection. Applicant testified and submitted Exhibits A and B without objection. DOHA received the transcript of the hearing (Tr.) on May 20, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

## **Procedural and Evidentiary Rulings**

### **Motion to Amend SOR**

Department Counsel moved to amend the SOR by deleting the caption notation of "ISCR" and replacing it with "ADP" because the case is a public trust position application. Applicant had no objection. I granted the motion and the amendment made. (Tr. 8, 9)

### **Findings of Fact**

In his undated Answer to the SOR, Applicant admitted the factual allegations in Subparagraphs 1.a, 1.b, and 1.c of the SOR, with explanations. He denied the factual allegations in Subparagraph 2.a of the SOR. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is 21 years old and employed by a defense contractor as a customer service representative since January 2013. He is unmarried. He graduated from high school in June 2012. (Tr. 19-23; Exhibit 1)

Applicant started smoking marijuana at the age of 14 or 15, from about 2009 to 2013. He smoked it two or three times per week. He needed it to help him through stressful times, he claimed. He purchased marijuana on various occasions between 2009 and February 2013 (Subparagraphs 1.a and 1.b). His buying frequency was once or twice in a two-week period. He last bought marijuana in February 2013 before his arrest for possession of marijuana and drug paraphernalia (Subparagraph 1.c). Applicant claimed he was immature and did not spend his money wisely. (Tr. 23-26; 34; Answer; Exhibits 2, 3)

Applicant was arrested for speeding in February 2013 after taking a friend back to college. The police officer smelled marijuana in the car when he stopped it. The officer searched the car and found marijuana residue and smoking implements (a grinder) in his car. This arrest occurred a month after Applicant started working for his employer, for whom he now seeks a trustworthiness determination. (Tr. 27-29, 31, 34; Exhibits 2, 3)

Applicant spent a night in jail and he testified it was not a comfortable situation that he ever wanted to repeat. Since then he has remained free of marijuana use, according to him. He did not submit any professional medical drug evaluation or counseling documents to support his contention. (Tr. 36)

Applicant answered the drug use questions on the e-QIP in Section 23 with negative answers. The relevant questions asked if he had used illegal substances in the past seven years and if he illegally purchased any drug or controlled substance. Applicant answered "no" to each question. In fact, he had used marijuana in the past seven years. Applicant claims he misread the question, thinking it pertained to his present use. He claims his later admission to the government investigator showed he

did not intend to lie about his marijuana use. The investigation summary states Applicant “volunteered his arrest in 02/13.” It does not state how the investigator learned about Applicant’s marijuana use from 2009 onward. Applicant stated he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) at the age of eight. He struggles to read comprehensively. He did not submit any medical documentation of his condition. In Section 22 of the e-QIP Applicant disclosed his arrest for speeding, marijuana and paraphernalia possession. (Tr. 29-31, 39; Exhibits 1, 2, 3)

Applicant submitted two character letters on his behalf. One letter was from a co-worker and the other from a supervisor. They both write that Applicant is a responsible and reliable employee. They state he is also enrolled in college and works full-time at their company. (Tr. 43-46; Exhibits A and B)

Applicant testified in a forthright and direct manner. He is articulate and frank about his personal history.

### **Policies**

Positions designated as ADP I/II/III are classified as “sensitive positions.” (See 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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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, the administrative judge must consider the disqualifying and mitigating conditions in the AG (AG ¶ 2 (a)). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

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.

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 expresses the trustworthiness concern pertaining to illegal drugs:

Use 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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a trustworthiness concern and may be disqualifying:

(a) any drug abuse (see above definition); and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.

Applicant admitted he used marijuana since 2009 at least two or three times per week until February 2013 when he was arrested for speeding and marijuana possession. He also admitted he purchased marijuana one or two times in a two-week period from 2009 to 2013. He also used marijuana from January 2013 to February 2013 while employed at his current position with a defense contractor. These two disqualifying conditions are established.

AG ¶ 26 provides conditions that could mitigate trustworthiness concerns. Two conditions may apply:

(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) 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.

Applicant's arrest for marijuana possession occurred 30 months ago. He claims he has not used or purchased it since then. He used it while in high school. It was frequent use. He does not have a support network to maintain his drug abstinence, nor did he submit any professional medical evaluation of his relationship with illegal drugs to bolster his claim he no longer uses marijuana. AG ¶ 26 (a) is not established.

Applicant changed his pattern of drug use to abstinence two and a half years ago after spending a night in jail. He stated that he has not used drugs for two and a half years. However, he used them for a month while employed at the defense contractor and it was only a serious incident that frightened him enough to stop his use. There is no professional medical diagnosis or prognosis, no treatment recommendation, or not objective evidence he stopped using marijuana. AG ¶ 26(b) is only partially established.

## Guideline E, Personal Conduct

AG ¶ 15 expresses the trustworthiness 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. Two conditions may apply to Applicant's falsification and drug use allegations:

(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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

Applicant did not answer Section 23 on his e-QIP with a disclosure of his past marijuana use from 2009 to February 2013. The question was clear and concise. He intentionally did not disclose his four-year marijuana use. AG ¶ 16(a) applies.

Applicant's history of marijuana use is an activity, which if it became known in the community could affect his personal standing. AG ¶ 16(e) applies.

AG ¶ 17 provides conditions that could mitigate security concerns. Three mitigating conditions may apply:

(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; and

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

Applicant disclosed his marijuana arrest in 2013 in response to Section 22 of the e-QIP, thereby putting the government on partial notice that he has a controlled substance incident. However, he did not disclose the totality of his marijuana use starting in 2009, which was within the seven-year period requested in Section 23. Therefore, there is no mitigating factor established for his deliberate falsification.

Applicant's marijuana use is not mitigated by his assertions that he has not used marijuana for 30 months. That time has to be contrasted with four years of frequent use of marijuana and while working for his employer for a month. His usage was not unique and was frequent. It does cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) is not established.

There is some evidence that Applicant's behavior changed after his arrest. Although there is no evidence he obtained drug counseling to change his behavior, he claims his positive steps to alleviate the circumstances and factors that caused his marijuana use were his ceasing his marijuana use after his arrest. That action is not sufficient in view of his long-term marijuana use. AG ¶ 17(d) is not established.

Applicant showed he took some positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress by ceasing his marijuana use 30 months ago. AG ¶ 17(e) has limited application.

### **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 the 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 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. Applicant used marijuana for four years from 2009 to 2013. He voluntarily gave up its use only after a night's incarceration on a speeding and marijuana possession charge got his attention as to the seriousness of his offense. He has not submitted any objective medical or rehabilitation documentation corroborating his assertions that he ceased using marijuana in February 2013. Applicant deliberately failed to disclose on his e-QIP his four-years use of marijuana on a frequent basis.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising from his drug involvement and personal conduct. I conclude the whole-person concept against Applicant.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant



## **Conclusion**

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

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PHILIP S. HOWE  
Administrative Judge