



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



In the matter of: )  
)  
) ADP Case No. 08-07848  
)  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Eric Borgstrom, Esquire, Department Counsel  
For Applicant: *Pro Se*

November 18, 2009

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the government’s trustworthiness concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant’s eligibility for access to sensitive information is granted.

On May 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines H and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing May 13, 2009, and did not request a hearing before an administrative judge. On June 17, 2009, Department Counsel requested a hearing. I was assigned the case on July 27, 2009. DOHA issued the

Notice of Appearance on August 6, 2009. I convened the hearing as scheduled on September 24, 2009. The government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified on his own behalf. He offered Exhibits (AE) A and B, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 14, 2009.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all of the factual allegations in the SOR. His admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 27 years old, single and has no children. He graduated from college in 2004. He has worked as a systems analyst for a federal contractor since 2005. He completed a public trust application (PTA) and signed it on January 17, 2008. In response to a question asking if he used illegal drugs in the past year, he answered "no." In response to a question asking if he had been involved in the purchase, transfer, trafficking, or shipping of illegal drugs in the past, he answered "no."<sup>1</sup>

In May 2008, while on a camping trip with friends from high school and college, Applicant used marijuana one time. He did not buy the marijuana. He and his friends were in a secluded area in the woods. On the same night, he also used hallucinogenic mushrooms. He did not hallucinate. The marijuana and mushrooms belonged to one of the many friends who were on the trip. Applicant has not used marijuana, mushrooms, or any other illegal drug since May 2008. Applicant does not live with or work with any of the people with whom he went camping.<sup>2</sup>

Applicant acknowledges he made a "stupid" mistake when he used the drugs. He regrets his actions. He socializes with people from work. Some of them are aware of his drug use. Applicant does not believe any of the friends that he socializes with use illegal drugs. He did not intend on using drugs when he went on the camping trip. The camping trip is an annual occurrence and he credibly testified that he did not use illegal drugs during the other years he attended, to include 2007 and 2009. He admitted he did not think about the fact that he had completed a PTA and was waiting for the determination when he used the drugs. He forgot he had completed the application and did not think of the impact his one-time use would have on it.<sup>3</sup>

While attending college, primarily as a freshman, Applicant used marijuana less than ten times. After graduating from college in 2004, he may have used it one other time. He never purchased marijuana. He did not use any other illegal drugs during this

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<sup>1</sup> Tr. 14-20; GE 1, 2.

<sup>2</sup> Tr. 18-20.

<sup>3</sup> Tr. 29-32, 39-47.

time. He does not intend to use any illegal drugs in the future. He admitted he was wrong to use the drugs and is sorry for his actions.<sup>4</sup>

Applicant provided character letters from his manager and a coworker. He is described in the letters as a dedicated worker with integrity. He is respected for his achievements. He is recognized for his leadership and resourcefulness. He has a positive attitude and is able to handle demanding challenges. He has also demonstrated exceptional knowledge, discipline and dedication to his employer.<sup>5</sup> Applicant provided a copy of his performance appraisal which reflects he is an excellent employee.<sup>6</sup>

## Policies

Positions designated as ADP I and ADP II 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. 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.

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<sup>4</sup> Tr. 20 29, 41.

<sup>5</sup> AE A.

<sup>6</sup> AE B.

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.

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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

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

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. 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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered all of the drug involvement disqualifying conditions under AG ¶ 25 and have especially considered the following:

(a) any drug abuse; and

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

Applicant used marijuana and hallucinogenic mushrooms one time in May 2008, after he completed his PTA, but before a determination was made. To use the illegal substances, he must have possessed them. I find both of the above disqualifying conditions apply.

I have considered all of the drug involvement mitigating conditions under AG ¶ 26 and especially considered the following:

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

Applicant used marijuana and mushrooms one time in May 2008, while on a camping trip with high school and college friends. He minimally experimented with marijuana when he was a freshman in college and may have used it one other time. He has not used any illegal drugs since May 2008. He understands he made a mistake. He does not intend to use any illegal drugs in the future. The camping trip is an annual event and he did not use drugs during the trip the year before or the year after 2008. He attributes his use to youthful indiscretion and a one-time occurrence. I find his behavior was infrequent. Applicant has matured to the point that he understands that his youthful indiscretions have consequences. Applicant has not used illegal drugs since May 2008, even after being placed in the same environment. He acknowledged his poor judgment and does not intend to use illegal drugs in the future. I find his conduct is unlikely to recur. He has grown up and moved past this type of conduct. I find mitigating conditions (a) and (b) apply.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses 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.

I have considered all of the personal conduct disqualifying conditions under AG ¶ 16 and especially considering the following:

(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.

Applicant completed a PTA in January 2008. Pending the adjudication of his PTA, he used illegal drugs in May 2008. I find the above disqualifying condition applies.

I have considered the all of the personal conduct mitigating conditions under AG ¶ 17 and especially considered:

(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 reported his drug use during his interview. He was honest and forthcoming. He acknowledged he made a stupid mistake and regrets his conduct. He has matured and does not intend to use any illegal drugs in the future. Some of his coworkers are aware of his prior drug use. I find based on these facts and the same rationale discussed under the drug involvement guideline, that all of the above mitigating conditions apply.

### **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). They are:

(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 is a young man with no significant drug history, who went on a camping trip with high school and college friends, and used marijuana and hallucinogenic mushrooms one time. He has not used any illegal drugs since then and acknowledges he made an irresponsible decision. He regrets it and does not intend on repeating it. He is a valued employee. Applicant has matured and it is unlikely he will repeat his mistake. Overall, the record evidence does not leave me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising under the guidelines for drug involvement and personal conduct.

### **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:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

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Carol G. Ricciardello  
Administrative Judge