



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



In the matter of:)	
)	
)	ADP Case: 11-12742
)	
)	
Applicant for Public Trust Position)	

Appearances

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

06/17/2013

Decision

DAM, Shari, Administrative Judge:

Applicant failed to rebut or mitigate the Government’s trustworthiness concerns raised under Guideline H, Drug Involvement. His eligibility for a public trust position is denied.

On February 14, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On January 9, 2013, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline H, (Drug Involvement). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing.¹ On March 30, 2013, Department Counsel prepared a File of Relevant Material (FORM), containing eight Items, and mailed Applicant a complete copy the same day. Applicant received the FORM on March 26, 2013, and had 30 days from its receipt to file objections and submit additional information. Applicant wrote on and resubmitted Items 1 and 2 as an additional response to the FORM.² On May 28, 2013, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

In his response to the SOR, Applicant admitted with modifications the allegations contained in Paragraphs 1.a and 1.b of the SOR. He neither admitted nor denied the allegation in Paragraph 1.c. His admissions, including those made in response to DOHA Interrogatories, are incorporated into the findings herein. (Items 2, 6.)

Applicant is 50 years old and has been married to his second wife since 2006. He has a 17-year-old son and two daughters ages 15 and 6. He has a bachelor's degree in management information systems. Since May 1999, he has worked as an applications consultant for a defense contractor. (Item 5)

In July 2011, a Government investigator interviewed Applicant and discussed his use of marijuana since January 2010, as disclosed on Applicant's February 2011 e-QIP. (Item 5.) Applicant said he used marijuana once a month in social settings because he liked its relaxing effect. He said he purchased it about every four months. He did not consider his use of marijuana to be illegal. He did not know if his employer had a drug policy, but thought he was subject to random drug screenings. He has never been diagnosed as having a drug problem or undergone drug treatment. He told the investigator that he had no intention to use any illegal drug, other than marijuana, in the future. His family and friends are aware of his usage. (Item 6.)

In his response to Interrogatories that he signed on November 15, 2012, Applicant wrote that he used marijuana "monthly to bi-monthly," and said he no longer purchased marijuana. (Item 6.) Along with the Interrogatories, he submitted a statement verifying that his statements to the investigator in July 2011 were correct. (Item 6.) In his handwritten note on the SOR, which was his Answer, Applicant contradicted the content of his interview, and claimed that he rarely used marijuana from June 2010 to October 31, 2012. He asserted the last time he used or purchased marijuana was October 30, 2012. (Items 1, 4.) He said he would not use it, if his employment required him to stop. (Item 6.)

¹ The Answer is undated.

² Applicant wrote on a copy of the SOR (Item 1) and DOHA's Transmittal Letter (Item 2).

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 the DoD CAF³ and 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 AGs. 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 AG ¶ 2(a), describing 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 the applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who applies for access to sensitive information seeks to enter 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

³ DOHA’s Initial Due Process Adjudication and Reapplication Division was consolidated into the DoD CAF during November 2012.

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 10865 provides that “Any determination under this order adverse to an applicant shall be a determination 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 articulates the trustworthiness concerns 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.

(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 trustworthiness concerns and may be disqualifying. The potentially disqualifying conditions established by the evidence in this case are:

(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 that he used and purchased marijuana illegally from January 2010 until at least October 30, 2012. The evidence raises trustworthiness concerns under the above two disqualifying conditions.

After the Government raised a potential disqualifying condition, the burden shifted to Applicant to rebut or prove mitigation of the resulting trustworthiness concerns under this guideline. AG ¶ 26 includes examples of conditions that could mitigate the trustworthiness concerns arising from illegal drug use:

- (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.

AG ¶ 25(a) does not apply because Applicant admitted regularly using illegal drugs from January 2010 to at least October 30, 2012, during which time he worked for a defense contractor. Given the frequency and two-year history of Applicant's illegal drug abuse, his behavior casts doubt on his current trustworthiness and good judgment. In his interview, Applicant said he intended to continue using marijuana in the future, unless his employment prohibited it. Hence, AG ¶ 25(b) cannot apply. The record does not contain evidence to support the application of AG ¶ 25(c). Applicant has not participated in substance abuse treatment or received a favorable prognosis by a qualified medical professional, which evidence is necessary to apply AG ¶ 25(d).

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 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 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination 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 50-year-old married man and father of three children, including two teenagers. He illegally used marijuana for at least two years, up to October 30, 2012, while employed with a defense contractor. His assertion that he will not use marijuana in the future, if prohibited by his employer, indicates a lack of appreciation for his duty to avoid illegal activities. He provided no independent corroboration from a qualified medical health care professional or other individual to support his claims that he does not have a drug problem. His rationalization that marijuana is not illegal raises ongoing issues pertinent to his reliability, judgment, and willingness to comply with rules and regulations.

Overall, the record evidence leaves me with serious questions as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not meet his burden to mitigate the trustworthiness concerns arising from his drug involvement.

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 through 1.c:	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 to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive ADP information is denied.

SHARI DAM
Administrative Judge