



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



In the matter of:

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Applicant for Public Trust Position

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ADP Case No. 14-06749

**Appearances**

For Government: Mary Margaret Foreman, Esq., Department Counsel

For Applicant: *Pro se*

05/31/2017

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny her eligibility for a public trust position. Her frequent and recent recreational use of marijuana disqualifies her from eligibility for access to sensitive information. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on May 14, 2013. Thereafter, on September 21, 2015, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), detailing a trustworthiness concern under Guideline H for drug involvement, Guideline J for criminal conduct, and Guideline F for financial considerations. The SOR is similar to a complaint. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Review Program* (Jan. 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the

DOD on September 1, 2006.<sup>1</sup> She submitted a complete answer to the SOR by July 2016, and she requested a hearing.

The case was assigned to me on August 23, 2016. The hearing was held as scheduled on November 9, 2016. Department Counsel offered Exhibits 1-8, and they were admitted. Applicant testified on her own behalf and offered Exhibits A-C, and they were admitted. The hearing transcript (Tr.) was received on November 17, 2016.

### **Findings of Fact**

Applicant is a 33-year-old enrollment specialist for a health-care contractor to the Defense Department. She is married and has four minor children. She has worked for this company since May 2013. She started as a customer-service representative in a call center, and she has worked her way up to her current position in which she has an office on a military installation where she in-processes arriving military personnel. She is seeking to obtain eligibility to occupy a position of public trust for her job responsibilities. Eligibility is necessary because her job involves access to sensitive but unclassified information, which may include personally identifiable information (PII).<sup>2</sup> She expressed a good understanding of PII, including her obligation to protect and safeguard such information.<sup>3</sup>

The SOR alleges a history of financial problems, which Applicant does not dispute. In particular, the SOR alleges 28 delinquent debts in amounts ranging from \$37 to \$11,530 for about \$41,733. Ten of the debts are student loans she obtained to attend college during 2006-2009. She attributes her financial problems to her husband becoming seriously ill in 2009 and his subsequent periods of unemployment and underemployment. He was no longer able to work his construction job and became unemployed in the early part of 2009. She dropped out of college in about September 2009 and went back to work. He was unemployed, on and off, until about February 2016, and he now works less than 40 hours weekly in a gift shop. Her hearing testimony and Exhibits B and C show that the student loans are in the process of being consolidated and rehabilitated. Likewise, her hearing testimony and Exhibit A show that the remaining delinquent debts are largely resolved or are being resolved.

Applicant also has a history of criminal conduct, although these matters are relatively minor and well in the past. About 14 years ago in 2003, she was charged in her then state of residence with the misdemeanor offenses of possession of marijuana and possession of drug paraphernalia.<sup>4</sup> The charges went unaddressed until about

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<sup>1</sup> The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>2</sup> PII means information that can be used on its own or with other information to identify, contact, or locate a single person, or to identify an individual in context.

<sup>3</sup> Tr. 43-44.

<sup>4</sup> Exhibit 4.

2006, when a bench warrant was served upon her. The charges were resolved in 2007 when she appeared in court and agreed to pay a \$360 fine and then completed an informal 12-month diversion program. These matters are alleged separately in SOR ¶¶ 1.b and 2.b.

The second incident occurred about six years ago in 2011, when she was charged with the misdemeanor offense of criminal use of a weapon due to the presence of her husband's knife in the cup holder of a car she was driving.<sup>5</sup> The charge was dismissed in December 2011 after she completed a diversion program.

Since about March 2013, Applicant has lived in a state that has approved the medical use of marijuana and no longer criminalizes personal use of marijuana. She did not disclose use of marijuana in her May 2013 Questionnaire for National Security Positions, because at the time she had no such involvement. That situation changed in early 2014, when she began smoking marijuana. Her husband qualifies for medical use of marijuana based on his ongoing illness. She disclosed her personal use of marijuana during the July 2014 background investigation.<sup>6</sup> At the hearing, she explained that she began using marijuana because doing so is not illegal in her state of residence, the marijuana helps her deal with stress, and she did not foresee that it would be an issue with her job.<sup>7</sup> She estimated that she uses marijuana two to three times monthly.<sup>8</sup> She estimated using marijuana about 30 times in 2016.<sup>9</sup> Her most recent use of marijuana occurred a couple of weeks before the hearing.<sup>10</sup>

### **Discussion**

Under Guideline F for financial considerations,<sup>11</sup> the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is:

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 and regulations, all of which can raise questions about a [person's] reliability, trustworthiness, and ability to protect [sensitive] information.<sup>12</sup>

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<sup>5</sup> Exhibit 5.

<sup>6</sup> Exhibit 3.

<sup>7</sup> Tr. 50-54.

<sup>8</sup> Tr. 54-55.

<sup>9</sup> Tr. 54-55.

<sup>10</sup> Tr. 53.

<sup>11</sup> AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

<sup>12</sup> AG ¶ 18.

The concern is broader than the possibility that a person might knowingly compromise sensitive information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions:

AG ¶ 19(a) inability or unwillingness to satisfy debts;

AG ¶ 19(c) a history of not meeting financial obligations;

AG ¶ 20(b) the conditions that resulted in the financial problems were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separation), and the [person] acted responsibly under the circumstances;

AG ¶ 20(c) [t]here are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The evidence supports a conclusion that Applicant has a problematic financial history sufficient to raise a security concern under Guideline F. With that said, her financial problems are due, in part, to her husband's illness and resulting unemployment and underemployment. Moreover, she established that she has made a good-faith effort to resolve her delinquent student loans and other delinquent debts. Accordingly, the concern under Guideline F is decided for Applicant.

Under Guideline H for drug involvement, the concern is that "use of an illegal drug or misuse of a prescription drug can raise questions about a [person'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."<sup>13</sup> In applying Guideline H to the facts of this case, I note that in an October 24, 2014 memorandum, the Director of National Intelligence reaffirmed that the disregard of federal law concerning use, sale, or manufacture of marijuana is relevant in national security determinations regardless of changes in state laws concerning marijuana use. Marijuana remains a Schedule I controlled substance under federal law, which means it is a drug that has no currently accepted medical use and has a high potential for abuse.<sup>14</sup>

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<sup>13</sup> AG ¶ 24.

<sup>14</sup> For information on federal drug schedules, go to <http://www.dea.gov/druginfo/ds.shtml>.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions:

AG ¶ 25(a) any drug abuse;

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 26(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.

I have considered the totality of Applicant's use of marijuana since she began using it in early 2014 and such use continued up to a few weeks before the hearing. Using marijuana approximately 30 times during the last calendar year is fairly described as frequent and recent. I also considered the drug-related incident that led to misdemeanor charges in 2003, which were resolved in 2007. Taken together, Applicant's history of illegal drug involvement is not minor or trivial misconduct, and it needs to be weighed accordingly.

Applicant presented little in the way of reform and rehabilitation. She did not demonstrate an intent not to use marijuana in the future. By all appearances, I had the distinct impression she intends to continue using marijuana. Nevertheless, she receives credit in mitigation because she voluntarily reported the information about marijuana use, and she has been truthful and complete in responding to questions.<sup>15</sup> Her willingness to self-report is an important aspect of this case. But I remain concerned due to Applicant's frequent and recent use of marijuana. Accordingly, the concern under Guideline H is not mitigated.

Under Guideline J for criminal conduct, the concern is that criminal activity creates doubt about a person's judgment, reliability, and trustworthiness, because, by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.<sup>16</sup> The evidence supports a conclusion that Applicant has a problematic criminal history sufficient to raise a security concern under Guideline J. With that said, I am not concerned about the two misdemeanor criminal cases from 2003 and 2011. Both are relatively minor offenses, and they are mitigated by the passage of time without recurrence. But I cannot reach the same conclusion concerning Applicant's frequent and recent use and concurrent possession of marijuana, which is in disregard of federal law. Accordingly, the concern under Guideline J is not mitigated.

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<sup>15</sup> See generally AG ¶ 2(e)(1) – (2).

<sup>16</sup> AG ¶ 30.

Applicant's frequent and recent recreational use of marijuana, although permitted under state law, disqualifies her from eligibility for access to sensitive information, because her marijuana use creates doubt about her reliability, trustworthiness, good judgment, and ability to protect sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. For all these reasons, I conclude Applicant did not meet her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for a public trust position.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b – 2.c:	For Applicant
Paragraph 3, Guideline F:	For Applicant
Subparagraphs 3.a – 3.bb:	For Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to sensitive information.

Michael H. Leonard  
Administrative Judge