



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



In the matter of:)
)
) ADP Case No. 15-02177
)
Applicant for Public Trust Position)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

08/26/2016

Decision

CERVI, Gregg A., Administrative Judge:

Applicant has not mitigated the drug involvement concern. Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86) on January 25, 2013.¹ On February 18, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline H: Drug Involvement.²

¹ Applicant is requesting a trustworthiness determination for access to sensitive information, also known as a "public trust" determination, to occupy an automated data processing (ADP) position.

² The Department of Defense acted 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* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant responded to the SOR on October 14, 2015, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on January 13, 2016.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit documentary material to refute, extenuate, mitigate or explain the trustworthiness concerns. Applicant received the FORM on January 21, 2016. He did not submit a response to the FORM or assert any objections to the Government's evidence. The case was assigned to me on July 1, 2016. The Government's exhibits included in the FORM (Items 1 to 3) are admitted into evidence.

Findings of Fact

The SOR alleges Applicant purchased and used marijuana (specifically THC), with varying frequency from 2006 to 2012. Applicant admitted the SOR allegation. The SOR allegations are supported by Applicant's SF 86, his summary of personal subject interview (PSI), and answer to the SOR.

Applicant is a 56-year-old information technology systems management consultant for a Government contractor. He is a high school graduate and has been married since 2000. This is his first application for a public trust position.

Applicant acknowledged his illegal drug purchases and use in his SF 86, completed in January 2013. He stated he used THC from about May 2006 to about September 2012 for pain relief and recreationally, on a monthly basis. He also admitted to purchasing THC two to three times per year for personal use, from about May 2006 to about July 2012.

In his PSI, he described his severe loss of cartilage in his joints which cause chronic muscle aches. In 2006, Applicant self-medicated his condition by purchasing and using marijuana in his residence about twice per month. He purchased marijuana from friends about two to three times per year, and his spouse, family and most friends are aware of his use. He claimed to have stopped marijuana use so that he could obtain a public trust position.

Policies

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 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. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The 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.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline H: Drug Involvement

The concern under this guideline is set out in AG ¶ 24:

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 in AG ¶ 24(a)(1) as “[d]rugs, 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).

The guideline notes several conditions that could raise trustworthiness concerns. Based on the evidence, I find that the following disqualifying conditions apply:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction,” and

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

Applicant has a long history of marijuana purchases and use, including use through September 2012.

The following mitigating conditions are potentially relevant:

AG ¶ 26(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

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.

Based on the record evidence, no mitigating conditions are applicable. Although Applicant claimed his last use was in 2012, he has a long history of marijuana purchases and use for self-medication, ending when he applied for a public trust position. His claim of use twice a month to alleviate chronic pain, is troubling, since he has not shown medical evidence for his condition, or plans to substitute his self-medication with a legal pain reliever. Additionally, he has not shown a disassociation from other illegal substance users or dealers, nor has he expressed a clear intent to stop all illegal drug use.

Although Applicant claims that he stopped using marijuana in anticipation of obtaining a public trust position, the circumstances in which he used drugs in the past remain the same today. He has not provided evidence from close friends, family or co-workers with knowledge of his past drug use to substantiate his claims of abstinence, nor has he undergone a drug treatment program or drug counseling to assist him to refrain from future use or to aid me to determine his current status. Applicant failed to provide sufficient evidence for me to make a determination as to his current circumstances, or his future intentions with regard to marijuana use. His long history of marijuana use outweighs his claim of abstinence from illegal drug use.

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.

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 all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated the evidence, my findings of fact, and comments under Guidelines H in this whole-person analysis.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a position of public trust. I conclude Applicant did not mitigate the drug involvement concerns.

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
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Subparagraph 1.a:	Against Applicant
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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 information is denied.

Gregg A. Cervi
Administrative Judge