



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-03361

**Appearances**

For Government: Caroline E. Heintzelman Esq., Department Counsel

For Applicant: *Pro se*

10/05/2016

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**Decision**

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CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, eligibility for a public trust position is denied. Applicant did not present sufficient information to mitigate drug involvement trustworthiness concerns.

On July 25, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) to obtain eligibility for a public trust position with a defense contractor. (Item 3) Applicant was interviewed by a security investigator from the Office of Personnel Management (OPM) on November 26, 2014. (Item 4) After reviewing the results of the OPM investigation, the Department of Defense (DOD) could not make the preliminary affirmative findings required to grant Applicant access to sensitive information. On October 28, 2015, DOD issued Applicant a Statement of Reasons (SOR) for drug involvement trustworthiness concerns under Guideline H. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended; Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG).

Applicant answered the SOR in writing on November 11, 2015. He admitted the seven drug use allegations without explanation. Applicant requested a decision on the record. Department Counsel submitted the Government's written case on February 24, 2016. Applicant received a complete file of relevant material (FORM) on March 3, 2016, and was provided the opportunity to file objections and submit material to refute,

extenuate, or mitigate the disqualifying conditions. Applicant did not submit any information in response to the FORM. I was assigned the case on September 27, 2016.

### **Procedural Issues**

Applicant was advised in the FORM that the summary of the Personal Subject Interview with an OPM investigator (Item 6) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate, and could object to the admission of the summary as not authenticated by a Government witness. He was additionally advised that if no objection was raised to the summary, the Administrative Judge could determine that he waived any objection to the admissibility of the Personnel Subject Interview summary. Applicant did not respond to the FORM, so he did not raise any objection to consideration of the Personal Subject Interview. Since there is no objection by Applicant, I will consider information in the Personal Subject Interview in my decision.

### **Findings of Fact**

After a thorough review of the case file, I make the following findings of fact. Applicant is a 25-year-old high school graduate with at least two years of college credit. He has been a software development intern for a defense contractor since January 2014. He did work part time jobs while attending college. He has never married and has no children. (Item 3, e-QIP; Item 4, PSI)

The SOR alleges that Applicant used marijuana daily from July 2007 until July 2014 (SOR 1.a); that he used mushrooms on approximately four occasions from June 2008 until October 2012 (SOR 1.b); that he used ecstasy twice from October 2008 until November 2011 (SOR 1.c); that he purchased marijuana from approximately July 2007 until July 2014 (SOR 1.d); that he sold marijuana from July 2007 until July 2014 (SOR 1.e); that he intends to continue to use marijuana in the future (SOR 1.f); and that he intends to continue to use mushrooms in the future (SOR 1.g).

Applicant reported on the e-QIP (Item 4) that he used marijuana daily from approximately July 2007 until he completed his e-QIP in July 2014. He also noted that he intended to continue to use marijuana. He reported that he used hallucinogenic mushrooms four times from June 2008 until October 2012. He also noted that he intended to use the drug in the future. He reported using the stimulant ecstasy two times from October 2008 until November 2011. He does not intend to use this illegal drug in the future because "it is not my thing." (Item 3)

Applicant admitted drug use to the security investigator during his PSI. He admitted he used marijuana daily since 2007 when he was in high school. He usually smoked the drug in a cigarette or a pipe. He continued using marijuana when he started college in the fall of 2009 but at a reduced rate. He lived in the school dormitory making drug use more difficult, had different friends, and was busy with studies. During his second year of college when he lived off-campus, he increased his use of marijuana

back to daily use. He intended to continue to use marijuana. He admitted spending about \$80 monthly to purchase marijuana. He sold marijuana to friends who visited him and were unable to obtain their own drugs. He is aware that marijuana is illegal and that his employer has a policy to test for drug use. He has not yet been tested. The employer's policy and testing and the illegal nature of marijuana has not stopped him from using marijuana.

He also admitted to using hallucinogenic mushrooms. He experimented with hallucinogenic mushrooms in high school. He also used once in college with friends. Mushrooms alter reality for him and he likes the effect. He intended to use the drug in the future.

He admits using ecstasy as a stimulant once in high school and once in college. His last use of ecstasy was in November 2011. He does not intend to use the drug in the future since it had no effect on him. (Item 4 at 3 and 4)

### **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 over-arching adjudicative goal is a fair, impartial and common sense 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**

#### **Drug Involvement**

The use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, because it may impair judgment and raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. Drugs are defined as mood and behavior-altering substances, including drugs material and other chemical compounds identified and listed in the Controlled Substances Act of 1970. Marijuana or cannabis, hallucinogenic mushrooms, and ecstasy are included in the Schedule I list. (AG ¶ 24)

Applicant admits using marijuana from 2007 until completing his e-QIP in July 2014. His use is significant and continuous. He admits to selling and purchasing marijuana. He admits using hallucinogenic mushroom four times from June 2008 until October 2012. He intends to use hallucinogenic mushrooms in the future. He admits to using ecstasy twice from October 2008 until November 2011. He does not intend to use ecstasy in the future. Applicant's use, of marijuana, mushrooms, and ecstasy, and his purchase and sale of marijuana raise the following Drug Involvement Disqualifying Conditions under AG ¶ 25 (a) (any drug use); ¶ 25 (c) (illegal drug possession, including cultivation, processing manufacture, purchase, sale, or distribution; or possession of drug paraphernalia); and ¶ 25 (h) (expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use).

I considered the following Drug Involvement Mitigating Conditions under AG ¶ 26:

(a) the behavior happened so long ago, was so infrequent, or happened under such unusual 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 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.

These mitigating conditions do not apply. Applicant started using marijuana and mushrooms in high school and his use continues to present. He intends to continue using the drugs. There does not appear to be a period of time that he did not use marijuana or hallucinogenic mushrooms. His statement of intent to continue to use marijuana and mushrooms in the future is strong and firm. His daily use of marijuana and his intent to use in the future show that his use will recur. He used ecstasy as a stimulant from October 2008 until November 2011, but he no longer uses the illegal drug and does not intend to use it in the future. However, his intent to continue to use marijuana and hallucinogenic mushrooms is an indicator that his use of ecstasy could recur. Applicant has not been in a drug abuse treatment program or received counseling for drug abuse.

Applicant's substance abuse history shows that he could easily continue abusing illegal substances. Applicant has not met his burden to establish that he will not abuse illegal drugs in the future. Applicant has not mitigated security concerns for drug involvement.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance 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 security clearance 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 admitted using marijuana from 2007 until at least 2014. He used hallucinogenic mushrooms and ecstasy during

the same period. He intends to continue to use marijuana and mushrooms in the future. Overall, these facts leave me with questions and doubts about Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for access to sensitive information. For all these reasons, I conclude that Applicant has not mitigated drug involvement trustworthiness 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
Subparagraphs 1.a - 1.g:	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 security clearance. Eligibility for access to sensitive information is denied.

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THOMAS M. CREAN  
Administrative Judge