



**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. 15-07464

**Appearances**

For Government: Chris Morin, Esq., Department Counsel

For Applicant: *Pro se*

02/13/2017

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the drug involvement and criminal conduct trustworthiness concerns. Eligibility for access to sensitive information is granted.

**Statement of the Case**

On April 1, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline H, drug involvement, and Guideline J, criminal conduct. The action was taken 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 the DOD on September 1, 2006.

On April 25, 2016, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on October 5, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 20, 2016, and the hearing was convened as scheduled on January 26, 2017. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection.

Applicant testified and submitted Appellant Exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript (Tr.) on February 3, 2017.

### **Findings of Fact**

Applicant admitted all of the allegations in SOR. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 23 years old. He attended college from 2011 to 2013, but has not earned a degree. He is not married and has no children. He has worked for his present employer, a government contractor, since November 2014.<sup>1</sup>

Applicant used marijuana from 2010 until August 2014 when he was between the ages of 17 and 20. While attending college in February 2012, he was arrested and charged with possession of less than an ounce of marijuana. A small amount was found in his dorm room where his friends were smoking it. He was not present at the time, but because it was in his room, he was arrested. He completed a pretrial diversion program and performed community service. The charge was dismissed. His friend admitted to the college dean that the marijuana did not belong to Applicant, so Applicant was permitted to remain in school.<sup>2</sup>

In November 2012, Applicant was arrested and charged with possession of less than an ounce of marijuana. He was stopped at a traffic checkpoint and admitted to the police officer he had marijuana in his possession. He was placed in a pretrial diversion program, fined, ordered to complete community service, and was placed on probation for a one year. He also submitted to random drug screenings. All results were negative. He completed the terms of the program and the charge was dismissed.<sup>3</sup>

In August 2014, Applicant was stopped by the police for not wearing a seat belt. He admitted he had marijuana in his possession. He was arrested and charged with possession of less than an ounce of marijuana. He was again placed in a pretrial diversion program, placed on probation for six months, ordered to complete community service, submit to random drug screening and to complete a drug evaluation course. He completed the terms of the program and the charge was dismissed.<sup>4</sup>

Applicant has not used or possessed marijuana since his 2014 arrest. He has never used any other illegal drugs. He no longer associates with people who use illegal drugs. He understands that the use and possession of marijuana is illegal. He does not attend parties or activities where illegal drugs may be present. He credibly testified that

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<sup>1</sup> Tr. 17-19; GE 1.

<sup>2</sup> Tr. 21-24, 28; GE 3.

<sup>3</sup> Tr. 24-29; GE 3.

<sup>4</sup> Tr. 29-32; GE 2, 3.

if he were in a place where illegal drugs were present, he would leave the premises. He does not intend to use illegal drugs in the future. His use of illegal drugs occurred when he was young and immature. He has learned from his past choices and their consequences.<sup>5</sup>

Applicant has been working hard for the past two years and has excelled at his job. He provided character letters that describe him as, dependable, responsible, honest, courteous, and respectful. He is a team player, who willingly takes on new challenges and exercises initiative and a willingness to help others.<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.”

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 to obtain a favorable trustworthiness decision.

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<sup>5</sup> Tr. 20, 32-38.

<sup>6</sup> AE A.

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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

## **Analysis**

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

AG ¶ 24 expresses the trustworthiness concern for 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.

I have considered the disqualifying conditions for drug involvement under AG ¶ 25, and the following are potentially applicable:

(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 from 2010 to August 2014. He was arrested three times for possession of marijuana from 2012 to 2014. The above disqualifying conditions apply.

I have considered the mitigating conditions under AG ¶ 26. The following are potentially applicable:

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

Applicant admitted using marijuana when he was between 17 and 20 years old. He does not socialize any longer with people who use illegal drugs. He has abstained from any illegal drugs use since August 2014. He indicated that he would extricate himself from a situation if illegal drugs were present. Applicant clearly understands that his previous behavior was immature, and he does not intend to use illegal drugs in the future. I find Applicant's two and a half year abstention is an appropriate period and future use is unlikely to recur. He fully demonstrated his intention not to abuse drugs in the future. AG ¶¶ 26(a) and 26(b) apply.

#### **Guideline J, Criminal Conduct**

AG ¶ 30 sets out the security concern relating to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following two are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Appellant was arrested and charged three times from 2012 to 2014 with possession of marijuana. The above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32, and the following are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, 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; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

The same analyses under the drug involvement mitigating conditions apply under the criminal conduct mitigating conditions. A sufficient period has elapsed since his last arrested. Applicant admitted he was immature and is now focused on making responsible choices. Applicant provided sufficient evidence of successful rehabilitation, such that future criminal conduct is unlikely to recur. AG ¶¶ 32(a) and 32(b) 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 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 the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under these guidelines, but some warrant additional comment.

Applicant is 23 years old. He was arrested for marijuana possession and admitted he used marijuana while in college. He has abstained from marijuana use since his last arrest in August 2014. He credibly testified that he has matured and understands that his decisions have serious consequences. He does not intend to use illegal drugs in the future. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the drug involvement and criminal conduct 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a-2.c:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of 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