



**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. 15-04418

Appearances

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

10/26/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the trustworthiness concerns under Guidelines H (drug involvement and substance misuse) and J (criminal conduct). Eligibility for access to sensitive information is denied.

Statement of the Case

On September 12, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guidelines H and J. Applicant responded to the SOR on January 13, 2017, and January 18, 2017, and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on July 20, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 7, 2017, scheduling the hearing for September 12, 2017. The case was reassigned to me on September 11, 2017. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified, but he did not submit documentary evidence. The record was held open for Applicant to submit additional information. Nothing additional was submitted. DOHA received the hearing transcript (Tr.) on September 20, 2017.

Findings of Fact

Applicant is 62 years old. He has worked for his current employer since 1988. He is seeking eligibility to hold a public trust position. He has a degree from a technology institute, which was awarded in 1985. His first wife is deceased. He is remarried. He has five children and a stepchild between the ages of 14 and 39.¹

Applicant has a history of drug abuse, mostly marijuana. He smoked marijuana, sometimes on a regular basis, between about 1990 and November 2006. Applicant played softball and hosted a poker game about once a week in a shed behind his property. He and his friends would smoke marijuana. Someone decided to try and grow marijuana in an area by power lines. The area was adjacent to Applicant's property, but not part of it. The experiment worked, and more seeds were planted. Applicant and his poker friends shared the marijuana they grew.²

Applicant's friend was stopped by the police in November 2006. The police discovered marijuana in his car. He told the police he received the marijuana from Applicant. The police went to Applicant's home with a search warrant. The marijuana plants had already been harvested, but Applicant had a gallon zip lock bag full of marijuana. He also admitted to the police that he had OxyContin, a controlled-substance prescription pain medication, which he received from his mother for his back pain. Applicant testified that in about 2006, because of his back pain, he also took the prescription pain medication hydrocodone, which he received from his wife. He also took another prescription medication, but it was prescribed to him.³

Applicant was arrested and charged with possession with intent to distribute (felony); possession of a controlled substance (felony); and obstructing justice. He pleaded guilty in September 2007 to the first two charges, and the third charge was dismissed. As part of his plea agreement, Applicant forfeited a car, two motorcycles, a pickup truck, a trailer, and a boat. He was sentenced to two years in the penitentiary for the first charge and three years for the second charge. All of the confinement was suspended for five years. His driver's license was suspended for six months for each charge, and he was ordered to pay \$1,035 in court costs.⁴

Applicant received substance abuse counseling. He completed the terms of his suspended sentence, which he referred to as probation, without incident. He smoked marijuana on at least one occasion in about 2012 after completion of the suspended sentence. He stated that he has not used marijuana, any other illegal drug, or any

¹ Tr. at 33, 40; GE 1, 2.

² Tr. at 16, 24-28, 40-41; Applicant's response to SOR; GE 2.

³ Tr. at 20-21, 26-28, 34-36; Applicant's response to SOR; GE 1, 2.

⁴ Tr. at 19-20, 41-42, 49-51; Applicant's response to SOR; GE 1-3.

controlled substance without a prescription since that time. He no longer associates with the friends with whom he played poker and smoked marijuana.⁵

Policies

This case is adjudicated under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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(a), 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.

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.

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 and Substance Misuse

The trustworthiness concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner

⁵ Tr. at 17-19, 30-32, 36-39, 45-46, 52, 55; Applicant's response to SOR; GE 2.

inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes conditions that could raise trustworthiness concerns under AG ¶ 25. The disqualifying conditions potentially applicable in this case include:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant grew, possessed, and used marijuana. He also took OxyContin, a controlled-substance prescription pain medication, which he received from his mother for his back pain. The above disqualifying conditions are applicable.

SOR ¶ 1.d alleges that Applicant took a specific prescription drug without a valid prescription. He admitted taking OxyContin (alleged in SOR ¶ 1.e) and hydrocodone (not alleged) without a valid prescription, but not the specific drug alleged in SOR ¶ 1.d. SOR ¶ 1.d is concluded for Applicant.

AG ¶ 26 provides conditions that could mitigate trustworthiness concerns. 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;
- (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;
- (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.

Applicant's use of prescription pain medication was for pain relief and not for recreational purposes. That use ended more than ten years ago. His abuse of prescription pain medication is mitigated.

Applicant's arrest and conviction of the felony drug offenses occurred more than ten years ago. Applicant promises to refrain from illegal drug use in the future. However, he smoked marijuana on at least one occasion in about 2012 after completion of his suspended sentence.

Applicant appears to be sincere, but that is insufficient to mitigate the well-established pattern of illegal drug use and possession with intent to distribute a controlled substance. I am unable to determine that illegal drug involvement is unlikely to recur. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 26(a) is not applicable, and AG ¶¶ 26(b) and 26(d) are partially applicable.

Guideline J, Criminal Conduct

The trustworthiness concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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.

AG ¶ 31 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant illegally used controlled substances. He grew marijuana, which led to his arrest and conviction of the felony drug offenses. The above disqualifying condition is applicable.

Conditions that could mitigate criminal conduct trustworthiness concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual 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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has a long and steady work record. His conviction of the felony drug offenses are the only blemish on his criminal record, but it is a significant blemish. Of particular concern is that he returned to using marijuana after he completed his suspended sentence. I have unmitigated concerns under the same rationale discussed in the drug involvement and substance misuse analysis.

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.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns under Guidelines H and J.

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.c:	Against Applicant
Subparagraphs 1.d-1.e:	For Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Edward W. Loughran
Administrative Judge