



**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. 17-00862

**Appearances**

For Government: Andrea M. Corrales, Esq., Department Counsel

For Applicant: *Pro se*

02/16/2018

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a public trust position. He did not present sufficient evidence to explain, extenuate, or mitigate the trustworthiness concern stemming from his history of drug involvement and substance misuse. 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 April 20, 2016.<sup>1</sup> Thereafter, on May 16, 2017, 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), which is similar to a complaint, detailing a trustworthiness concern under Guideline H for drug involvement.

Applicant answered the SOR on June 19, 2017, and he requested a decision based on the written record in lieu of a hearing. His answer consisted of handwritten

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<sup>1</sup> Exhibit 3.

responses on a copy of the SOR in which he admitted the factual allegations with some brief explanations. He did not submit any supporting documentation with his answer.

On October 31, 2017, Department Counsel submitted all relevant and material information that could be adduced at a hearing. The file of relevant material (FORM) consists of Department Counsel's written brief and supporting documentation. The FORM was mailed to Applicant, who received it on November 13, 2017. He did not reply to the FORM within the 30-day period provided for under the Directive. The case was assigned to me February 14, 2018.

### **Procedural Matters**

Department Counsel's FORM includes Exhibit 3, which is, in part, a report of investigation (ROI) summarizing Applicant's interviews that took place during his background investigation in October 2016 and January 2017. The ROI is properly authenticated by a witness, as required under ¶ E3.1.20 of the Directive, because Applicant authenticated the ROI in response to interrogatories issued to him. He pointed out two corrections to the factual information in the ROI, and he otherwise agreed with and adopted the summary as an accurate reflection of his interviews. Accordingly, the ROI is admissible and I will consider it in reaching my decision.

### **Findings of Fact**

Applicant is a 22-year-old customer service representative for a health-care contractor to the Defense Department. He has been so employed since about April 2016. He is seeking to obtain eligibility to occupy a position of public trust for his job responsibilities. Eligibility is necessary because his job involves access to sensitive but unclassified information, such as personally identifiable information (PII) or protected health information (PHI).

The SOR alleges and Applicant admits a history of drug involvement during 2012-2017. He used marijuana with varying frequency from September 2012 to at least March 2017. He purchased marijuana during 2015-2017. He purchased and used the prescription drug Adderall, which was not prescribed to him, during a three-month period in 2013. And he pleaded guilty to one count of possession of a controlled substance, which resulted in a sentence to (via a first-offender program) a fine, community service, and a drug and alcohol assessment. In addition to his admissions in his answer, the SOR allegations are established by the information in Applicant's SF 86 as well as information he provided during the processing of his case.<sup>2</sup>

In his April 2016 SF 86,<sup>3</sup> Applicant disclosed his involvement with Adderall (explaining he used it to help him focus in school), and a conviction for possession of a controlled substance (Adderall). He did not disclose his involvement with marijuana in

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<sup>2</sup> Exhibits 3 and 4.

<sup>3</sup> Exhibit 3.

his April 2016 SF 86.<sup>4</sup> Nor did he disclose his involvement with marijuana in an interview during the October 2016 background investigation. He eventually disclosed his marijuana involvement in an interview in January 2017.

In his April 2017 response to interrogatories,<sup>5</sup> Applicant stated that he first used marijuana in September 2012 and his last use occurred in March 2017 (although his use was not continuous during that time), and that he used marijuana about once a week. He admitted purchasing marijuana about once a month. He stated that he decided to stop using marijuana as of March 15, 2017, which was not a difficult decision for him, because marijuana is no longer acceptable in his life and his job. Although he continues to associate with people who use marijuana, he pledged not to use illegal drugs in the future as his job and well-being are more important.

### **Law and Policy**

This case is adjudicated under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Review Program* (Jan. 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.

### **Discussion**

Under Guideline H for drug involvement and substance misuse, the concern is that:

[t]he illegal use of controlled substances, to include the misuse of prescriptions and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are use in a manner 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. . .<sup>6</sup>

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law,

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<sup>4</sup> Applicant's nondisclosure of his marijuana involvement in his SF 86 and during the October 2016 interview were not alleged as a falsification or as another matter in the SOR. Because it is uncharged misconduct, I have considered it for the limited purpose of assessing Applicant's credibility as well as assessing his evidence in mitigation.

<sup>5</sup> Exhibit 4.

<sup>6</sup> AG ¶ 24.

including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state laws (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

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

AG ¶ 25(a) any substance abuse;

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

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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds of revocation of national security eligibility.

I have considered the totality of Applicant's drug involvement and substance misuse during 2012-2017. Overall, his behavior is relatively recent with the latest use of marijuana occurring in March 2017, less than one year ago. The March 2017 date is significant, because it means he used marijuana after submitting his April 2016 SF 86 and after interviews during the 2016-2017 background investigation.<sup>7</sup> His drug involvement was not infrequent. It happened multiple times over a period of years. And his illegal use of marijuana did not occur under circumstances that are unlikely to recur.

Although Applicant stated that he terminated his marijuana involvement in March 2017, I'm not persuaded that his behavior is safely in the past and will not recur. The best evidence on this point is threefold: (1) his nondisclosure of marijuana involvement in his SF 86; (2) his March 2017 use of marijuana, which was several months after

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<sup>7</sup> It's probable that Applicant's marijuana use during this time violated his employer's drug-free workplace policy. I note that the Drug-Free Workplace Act, 41 U.S. Code § 8101-8106, requires federal contractors with a contract over \$100,000 to establish certain drug-free workplace policies. See ISCR Case No. 16-00578 at 2 (App. Bd. Sep. 26, 2017).

submitting his April 2016 SF 86; and (3) his continued association with people who use marijuana. Taken together, the circumstances tend to undermine the credibility of his stated intent to abstain from all drug involvement and substance misuse.

Following the clearly-consistent standard, I have doubts and concerns about Applicant's 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 considered the whole-person concept. Accordingly, I conclude that he did not meet ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to sensitive information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
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Subparagraphs 1.a-1.d:	Against Applicant
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### **Conclusion**

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