



**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. 17-03464

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel

For Applicant: *Pro se*

05/29/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate the trustworthiness concerns regarding his drug involvement and personal conduct. Eligibility for a public trust position is denied.

Statement of Case

On November 15, 2017, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the affirmative determination of eligibility to hold a public trust position, and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Directive 4 of the Security Executive Agent Directive (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position were established to

supercede all previously issued national security adjudicative criteria or guidelines, effective June 8, 2017.

Applicant responded to the SOR on December 7, 2017, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on July 29, 2016. He did not supplement the record with objections to any of the exhibit items in the FORM. Nor did he provide supplemental information pertaining to his responses.

Summary of Pleadings

Under Guideline H, Applicant allegedly used marijuana, with varying frequency, from about 2006 to at least February 2017. Allegedly, Applicant used marijuana after being granted a position of trust in about 2007.

Under Guideline E, Applicant allegedly falsified his security clearance application of December 10, 2016 by omitting his use of illegal drugs within the previous seven years. Allegations of drug use covered by Guideline H are cross-alleged under Guideline E.

In his response to the SOR, Applicant admitted the allegations pertaining to his substance abuse and his continued use while holding a position of trust. He claimed his marijuana use was never routine and used only at social gatherings two to three times a year. He claimed he no longer engages in this behavior and fully abstains from any drug use.

Addressing the falsification allegations covered by Guideline E, Applicant admitted the allegations with explanations. He claimed that he fully disclosed his drug use during his ensuing personal interview. He explained that his admissions during his personal interview represented his attempts to correct the record regarding his mistake.

Findings of Fact

Applicant is a 36-year-old junior management analyst for a defense contractor who seeks eligibility for a public trust position. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant never married and has no children. (Item 3) He earned a bachelor's degree 2003 from a respected university. He reported no military service.

Since January 2016, Applicant has worked for his current employer in an analyst capacity. (Items 3-4) Between April 2008 and December 2015, he was employed for a resource management firm in various job capacities. (Items 3-4) Most recently (between September 2014 and December 2015), he was employed as the firm's project manager.

Applicant's drug involvement

Between 2006 and February 2017, Applicant used marijuana while holding a position of trust. (Items 3-5) He used marijuana in social gatherings two to three times a year. He last used marijuana in February 2017 and expressed conflicting intentions about using marijuana in the future. In a June 2017 interview with an agent from the Office of Personnel Management (OPM), he reserved the possibility of continuing to use marijuana in the future. (Item 5) By contrast, in his answers to interrogatories propounded to him in November 2017, he expressed no intentions of using marijuana in the future. (Item 4) Without more detailed current information about his intentions to resume marijuana use, his conflicting statements about his future intentions cannot be reconciled. At this time, Applicant cannot be absolved of recurrence risks.

E-QIP omissions

Asked to complete an electronic questionnaires for investigations processing (e-QIP) in December 2016, Applicant omitted his past use of marijuana within the previous seven years while holding a position of trust. (Items 3-5) He attributed his omissions of his past marijuana use to a lack of candor.

In his ensuing interview with an OPM agent in June 2017, Applicant admitted using illegal drugs without any prompting from the OPM agent. (Item 5) Nothing in the OPM summary of interview contradicts Applicant's assurances that he provided voluntary and accurate answers to the OPM agent's questions about his prior drug use. Without substantive evidence to challenge Applicant's good-faith claims of prompt, good-faith disclosures, Applicant's claims are accepted.

Policies

The SEAD 4, App. A, lists guidelines to be used by administrative judges in the decision-making process covering trustworthiness cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect privacy information. These guidelines include conditions that could raise a concern about trustworthiness access and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate trustworthiness concerns.

These guidelines must be considered before deciding whether or not eligibility to hold a public trust decision should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with App. A, ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in App. A, ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trustworthiness risk. The following App A, ¶ 2(d) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case.

Drug Involvement

The Concern: 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 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. . . , AG ¶ 24

Personal Conduct

The Concern: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . , AG ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a sensitive position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the

evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a sensitive position depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain eligibility to hold a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused privacy information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard privacy information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trustworthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances and related eligibility to hold sensitive positions be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[Trustworthiness] determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Trustworthiness concerns are raised over Applicant's use of marijuana while holding a position of trust. Additional trustworthiness concerns are raised over his falsifying his e-QIP by omitting his marijuana use within the previous seven years.

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in protecting and guarding personally identifiable information (PII). DOD Manual 5200.02, which incorporated and canceled DOD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive national security positions for civilian personnel. See 5200.02, ¶ 4.1a(3)(c)3. Positions designated as Category I and Category II automated data processing positions (ADP) were previously classified as critical-sensitive and non-critical sensitive positions under DOD Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987, as amended) (the Regulation), ¶¶ C3.1.2. 1.1.7. Other positions that did not meet ADP criteria were classified as non-sensitive positions under the Regulation.

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, ¶ 4.1a (3)(c) contain descriptions similar to those used to define ADP I and II

positions under DOD Regulation 5200.2-R. (32 C.F.R. § 154.13 and Part 154, App. J) ADP positions are broken down as follows in 32 C.F.R. § 154.13 and Part 154, App. J: ADP I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in DOD Regulation 5200.2-R refine and explain the same critical-sensitive and non-critical-sensitive positions covered in DOD Manual 5200.02, ¶ 4.1a (3)(c) and are reconcilable as included positions in 5200.02.

So, while ADP trustworthiness positions are not expressly identified in DOD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to service members that is otherwise protected from disclosure by DOD 5400.11-R. . . “. DOD 5200.02, Sec. 4.1, ¶ 3(c). See DOD Directive 5220.6 ¶¶ D5(d) and D8. By virtue of the implied retention of ADP definitions in DOD Manual 5200.02, ADP cases continue to be covered by the process afforded by DOD 5220.6 in accordance with the governing principles of Exec. Or. 10865.

Drug Involvement concerns

Over an 11-year period spanning 2006 to February 2017, Applicant used marijuana on a recurring basis (generally two to three times a year) while holding a position of trust for most of the elapsed time (since 2007). He has been ambivalent about his future intentions to resume his use of marijuana. His past use of marijuana while holding a position of trust warrants the application of two disqualifying conditions: DC ¶¶ 25(a), “any substance misuse;” and 25 (f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

Applicant’s recurrent use of marijuana over an extended number of years is incompatible with his holding a position of trust over much of the same period. Without more corroborating and substantive proof of Applicant’s assured avoidance of marijuana use in the future, potentially applicable mitigating conditions (MCs) covered in the drug involvement guideline are not available to Applicant under the developed facts of this case. At this point in Applicant’s development, it is too soon to make safe predictive judgments about his ability to avoid risks of recurrent marijuana use. Unfavorable conclusions are warranted with respect to the allegations covered by Guideline H and incorporated under Guideline E.

Personal conduct concerns

Applicant’s implicit acknowledgment of his falsifying the e-QIP he completed in December 2016 relieve the Government of having to prove intent and motive. His omissions, when considered collectively, reflect knowing and wilful omissions of material information in his e-QIP and throughout the adjudication review process. Application of ¶ DC 16(a), deliberate omission, concealment, or falsification of relevant facts from any

personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits of status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities,” is fully warranted in Appellant’s case.

Afforded an opportunity to further explain his marijuana use and e-QIP omissions in a follow-up OPM interview in June 2017, Applicant fully acknowledged his past marijuana use without prompting from the interviewing OPM agent. His admissions entitle him to the mitigating benefits of MC ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Applicant’s prompt, good-faith corrections enable him to mitigate the falsification allegations covered by Guideline E.

Whole-person assessment

From a whole-person perspective, Applicant has established independent probative evidence of his increased understanding of DoD policy constraints on the use of illegal substances. However, he has not provided enough demonstration of overall reliability to dispel continuing concerns about recurrence risks relative to his considerable history of marijuana use. To his credit, Applicant has made good progress in developing his technical skills with his current employer and earning his bachelor’s degree.

Considering the record as a whole, at this time there is insufficient probative evidence of sustainable mitigation to make predictable judgments about Applicant’s ability to avoid illegal drugs in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant’s past drug use, he fails to mitigate security concerns with respect to the allegations covered by the drug involvement guideline and incorporated in the personal conduct guideline. Unfavorable conclusions are entered with respect to the marijuana use allegations covered by the drug and personal conduct guidelines. Favorable conclusions are warranted with respect to the falsification allegations. Eligibility to hold a position of trust under the facts and circumstances of this case is inconsistent with the national interest.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H (DRUG INVOLVEMENT):	AGAINST APPLICANT
Subparas 1.a-1.b:	Against Applicant
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subpara 2.a:	For Applicant

Subpara. 2.b:

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a public trust position. Eligibility to hold a public trust position is denied.

Roger C. Wesley
Administrative Judge

