



**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. 18-01036

Appearances

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

11/05/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant used marijuana once or twice a week from June 2016 to March 11, 2018, and he intends to continue to use marijuana. Guideline H (drug involvement and substance misuse) trustworthiness concerns are not mitigated. Eligibility for access to sensitive information is denied.

Statement of the Case

On November 28, 2016, Applicant completed and signed an Electronic Questionnaire for National Security Positions (e-QIP) (SF-86). (Item 3) On April 24, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an statement of reasons (SOR) to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)*, which became effective on April 3, 2017, and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which became effective “for all covered individuals” on or after June 8, 2017.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue his access

to sensitive information, and recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued, denied, or revoked. (Item 1) Specifically, the SOR set forth trustworthiness concerns arising under Guideline H. (Item 1)

On May 21, 2018, Applicant provided a response to the SOR, and he did not request a hearing. (Item 2) On June 19, 2018, Department Counsel completed the File of Relevant Material (FORM), and on July 17, 2018, the FORM was provided to Applicant. Applicant did not respond to the FORM.

Findings of Fact¹

Applicant's SOR response admitted the allegations in SOR ¶¶ 1.a and 1.b. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 31-year-old web developer, and he has been employed by a DOD contractor since September 2016. He reports no military service. In 2012, he received a bachelor's degree. In 2015, he married, and he does not have any children. He reports no arrests or convictions.

Drug Involvement and Substance Misuse

In Applicant's November 28, 2016 SCA, he admitted recreational marijuana use, once or twice a week from June 2016 to November 2016. He noted that marijuana use was legal under local law. He offered to not continue to use marijuana while having access to classified or sensitive information.

In his March 20, 2018, responses to DOHA interrogatories, he said he used marijuana as recently as March 11, 2018. (Item 4 at 3) Applicant said he was aware of the federal law involving marijuana; however, he intended to continue to use marijuana so long as marijuana use is legal under local law. He denied that he used marijuana at work, and he said his marijuana use had not adversely affected his work on behalf of his employer. He concluded that he saw no reason to change his behavior relating to his marijuana use.

In his SOR response, Applicant reiterated that he did not use marijuana at work. He claimed it did not affect his work performance, and he intended to continue his marijuana use, citing the local law that permitted marijuana possession and use. Under local law, adults may possess up to two ounces of marijuana, grow up to six marijuana plants in their homes, and transfer up to one ounce of marijuana to another individual. The sale, purchase, and public consumption of marijuana remains illegal.

¹ Some details were excluded to protect Applicant's right to privacy. Unless stated otherwise, the facts in the statement of facts are from Applicant's November 28, 2016 Questionnaire for National Security Positions or SF-86, Applicant's March 20, 2018 responses to interrogatories, and May 21, 2018 response to the statement of reasons. (Items 2-4)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a [public trust position].” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions formerly designated as ADP I and ADP II are classified as noncritical-sensitive positions and include those personnel “[w]ith access to automated systems that contain military active duty, guard, or reservists’ personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DOD 5400.11-R where such access has the potential to cause serious damage to the national security.” DOD Manual 5200.02 ¶ 4.1a(3)(c).

When evaluating an applicant’s suitability for a public trust position, an 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 an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly

consistent with the national interest to grant or continue his or her access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

The protection of national security and sensitive records is paramount. 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.”

Analysis

Drug Involvement and Substance Misuse

AG ¶ 24 articulates the trustworthiness concern caused by drug involvement:

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. 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.

Director of National Intelligence (DNI) Memorandum ES 2014-00674, “Adherence to Federal Laws Prohibiting Marijuana Use,” October 25, 2014, indicates:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

AG ¶ 25 provides two conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) any substance misuse (see above definition)”; and “(c)

illegal possession of a controlled substance” Applicant possessed and used marijuana² on numerous occasions. AG ¶¶ 25(a) and 25(c) are established.

AG ¶ 26 details conditions that could mitigate trustworthiness concerns:

(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) 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 for revocation of national security eligibility;

(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.

The DOHA Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security [or trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See Directive ¶ E3.1.15*. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified [or sensitive] information will be resolved in favor of the national security.” *Directive, Enclosure 2 ¶ 2(b)*.

² Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. *See* Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. *See also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant provided some mitigating information. He indicated an intention to comply with local law. Aside from his marijuana possession and use, he is a law-abiding person.

The evidence against mitigating drug involvement and substance misuse trustworthiness concerns is more substantial. Applicant possessed and used marijuana from about June 2016 to March 11, 2018. He indicated he intended to continue to use marijuana unless it conflicted with holding a sensitive position or having access to classified information. Each time he possessed marijuana, he committed a federal crime. His marijuana use in March 2018 is recent. He did not respond to the FORM, and he did not indicate whether he used marijuana after March 2018. Drug involvement and substance misuse trustworthiness concerns are not mitigated.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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), "[t]he ultimate determination" of whether to grant a public trust position "must be an overall commonsense judgment based upon careful consideration" of the guidelines and the whole-person concept. My comments under Guideline H are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 31-year-old web developer, and a DOD contractor has employed him since September 2016. In 2012, he received a bachelor's degree. He reports no arrests or convictions.

The evidence against granting Applicant access to sensitive information is persuasive. Applicant possessed and used marijuana on several occasions from about June 2016 to March 11, 2018. Each time he possessed marijuana, he committed a federal crime. He indicated he intends to continue to use marijuana unless it would cause him to be ineligible for access to sensitive or classified information. His marijuana possession and use "raises questions about [his] ability or willingness to comply with laws, rules, and regulations." AG ¶ 24.

It is well settled that once a concern arises regarding an applicant's eligibility for a public trust position, there is a strong presumption against granting eligibility for access to sensitive information. See *Dorfmont*, 913 F. 2d at 1401. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, DOD Manual 5200.02, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that drug involvement and substance misuse trustworthiness concerns are not mitigated. It is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position.

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
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Subparagraphs 1.a and 1.b:	Against Applicant
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Conclusion

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

MARK HARVEY
Administrative Judge