



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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ISCR Case No. 24-02263

Applicant for Security Clearance)

Appearances

For Government: William H. Miller, Esq., Department Counsel

For Applicant: *Pro se*

07/01/2025

Decision

MURPHY, Braden M., Administrative Judge:

Applicant's illegal drug use is too recent and too frequent for him to provide sufficient evidence to mitigate the resulting security concerns under Guideline H, drug involvement and substance misuse. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 23, 2024. On January 17, 2025, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement and substance misuse). The DOD issued the SOR 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 the Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

When Applicant answered the SOR on January 23, 2025, he admitted all the allegations in the SOR without further comment, and requested a decision based on the administrative (written) record, without a hearing, before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

On February 10, 2025, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 4. Items 1 and 2 are the SOR and the Answer. Item 3 is Applicant's May 2024 security clearance application (SCA) and Item 4 is an Interrogatory Response from Applicant.

The FORM was mailed to Applicant on February 24, 2025. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. Applicant received the FORM on March 3, 2025. Applicant did not respond to the FORM, nor did he note any objections to the Government's proposed evidence. FORM Items 3 and 4 are admitted into evidence without objection. The case was forwarded to the DOHA Hearing Office for assignment on or about May 18, 2025, and it was assigned to me on June 10, 2025.

Findings of Fact

Applicant admitted the four allegations in the SOR (¶¶ 1.a - 1.d) without further comment. His admissions are incorporated into the findings of fact. Additional findings follow.

Applicant is 28 years old. He has never married and he has no children. He graduated from high school in 2015 and he earned his bachelor's degree in 2019. Since June 2019, he has worked for his current employer and clearance sponsor as an engineer. (Item 3)

The SOR alleges Applicant's marijuana use with varying frequency from April 2021 to December 2024 (SOR ¶ 1.a); his purchase of marijuana on various occasions between April 2021 and November 2024 (SOR ¶ 1.b); his one-time use of hallucinogenic mushrooms (SOR ¶ 1.c); and his stated intent to use and purchase marijuana in the future (SOR ¶ 1.d). Applicant admitted each allegation under Guideline H without comment. (Items 1, 2)

On his May 2024 SCA, Applicant disclosed that he used marijuana "many" times between about March 2021 and April 2024. He said he did it because it is legal in his state of residence, as well as cheap and fun. He also disclosed one-time use of

hallucinogenic mushrooms in April 2024. (Item 2) He said he “had no plans to” use marijuana in the future but said he “wouldn’t turn it down if offered by a friend.” He checked “Yes,” in answer to a question asking about future intended use. He denied any “illegal” purchase of any drug or controlled substance, noting that “purchase was legal at point of sale.” (Item 2)

Applicant said he purchased and used marijuana socially with friends, mostly on Fridays after work or on weekends, for recreational purposes. He discussed his one-time use of hallucinogenic mushrooms. He had been given it as a gift by a friend and he used it alone at home. He did not intend to use hallucinogenic mushrooms again. (Item 3)

Applicant acknowledged that marijuana is considered illegal by the federal government. He said he would continue to use and purchase marijuana, both in gummy form and by smoking it once or twice a month. He clarified his statement to state that “marijuana is legal where I live, not that there are no legal consequences.” Applicant otherwise accepted the summary of his background interview and adopted it as accurate. (Item 4)

In Applicant’s interrogatory response, he updated his information to reflect that he last purchased marijuana in November 2024 and he last used it on New Year’s Eve, 2024. He used marijuana monthly and purchased it once or twice a year. He said he intended to both use and purchase marijuana in the future. He had not used hallucinogenic mushrooms since the one time in April 2024 and renewed his intention not to do so in the future. When given the chance to address and detail any changes in his lifestyle “away from your past drug usage,” he said, “Not applicable.” (Item 4)

Applicant also disclosed that he also used cannabis-derived and/or cannabidiol products in November and December 2024, and he stated he would continue to do so. (Item 4)

Applicant checked “Yes” to Question 12 of the Interrogatory, which asked:

12. Regardless of state laws “legalizing” the use of marijuana, the possession, use, and sale of marijuana remains illegal under the Federal Controlled Substances Act (CSA). As such, continued marijuana purchase and use is inconsistent with being granted access to classified information. In light of the foregoing, do you intend to continue to use marijuana and/or THC or other illegal drugs in the future? (Item 4)

Applicant was also asked to provide a copy of his employer’s drug policy and he did so. (Item 4) The policy chiefly bars illegal drug use and other illegal drug involvement,

including working while impaired by or under the influence of illegal drugs or alcohol while on company property or company business. (Item 4)

Applicant did not respond to the Government's FORM or otherwise offer any mitigating evidence beyond what he had previously stated.

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." 484 U.S. 518, 531 (1988).

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

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 several 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 national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern regarding drug involvement:

The illegal use of controlled substances, to include the misuse of prescription drugs, and the use of other substances that can cause physical or mental impairment or are used in a manner inconsistent with their intended use 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 Controlled Substances Act ("CSA") makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. (Controlled Substances Act, 21 U.S.C. § 801, et seq. See § 844.) All controlled substances are classified into five schedules, based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. §§ 811, 812. Marijuana is classified as a Schedule I controlled substance, § 812(c), based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. § 812(b)(1). See *Gonzales v. Raich*, 545 U.S. 1 (2005).

Further, in October 2014, the Director of National Intelligence (DNI) issued a memorandum entitled "*Adherence to Federal Laws Prohibiting Marijuana Use*," (2014 DNI Memo) which makes clear that changes in the laws pertaining to marijuana by the various states, territories, and the District of Columbia do not alter the existing National Security Adjudicative Guidelines, and that Federal law supersedes state laws on this issue:

[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.

The DOHA Appeal Board has cited the 2014 DNI Memo in holding that "state laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3-4 (App. Bd. Feb. 18, 2016).

The current National Security Adjudicative Guidelines went into effect on June 8, 2017, after the 2014 DNI memo was issued. Nevertheless, the principle continues to apply.

Moreover, on December 21, 2021, then-DNI Avril D. Haynes issued a memorandum entitled, "*Security Executive Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position.*" (2021 DNI Memo) The memo incorporates the AGs (at reference B) and the 2014 DNI Memo (at reference G) among various other relevant federal laws, executive orders, and memoranda. I take administrative notice of the 2021 DNI memo here, given its relevance to this case, its reliance on the AGs, and its recency.

The 2021 DNI memo specifically notes that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations." Thus, consistent with these references, the AGs indicate that "disregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position." (2021 DNI Memo)

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

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant's use of marijuana on a monthly or at times more frequent basis and his one-time use of hallucinogenic mushrooms establishes AG ¶ 25(a). AG ¶ 25(c) is also applicable to Applicant's marijuana purchases. Applicant has repeatedly expressed an intent to continue to use and purchase marijuana in the future.

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) 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 is grounds for revocation of national security eligibility.

Applicant used hallucinogenic mushrooms once as an experiment, about a year ago. He does not intend to do so again. This was recent but also isolated use. It is therefore mitigated. SOR ¶ 1.c is found for Applicant.

Applicant's marijuana involvement is another matter. He has used marijuana about monthly since April 2021. He used it a month before he submitted his SCA, in May 2024. He purchased marijuana as recently as November 2024 and used it as recently as New Year's Eve 2024. He has been advised four times, on his SCA, in his background interview, in the Interrogatory, and in the SOR, that marijuana use and involvement is a security concern. He has been advised at least twice, in his background interview and the Interrogatory, that marijuana remains illegal under federal law. Yet Applicant declared on multiple occasions, including in answering the SOR, that he intends to continue using and

purchasing marijuana. He declined to address or detail any circumstances in his life that would lead him away from future illegal drug use. No mitigating conditions apply.

Applicant offered no mitigating evidence in his response to the SOR and he did not respond to the Government's FORM. Since he elected a decision on the written record, in lieu of a hearing, I did not have the opportunity to ask him questions about his conduct. I also had no opportunity to observe his demeanor during a hearing, and thus, to assess his credibility beyond the documentary record. The fact that I cannot assess his credibility undercuts the strength of his case in mitigation. The recency of his most recent use, and its circumstances, preclude full application of either AG ¶ 26(a) or AG ¶ 26(b).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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(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), the ultimate determination of whether to grant eligibility for a security clearance 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 under all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Considering the frequency and recency of his marijuana involvement and his stated intent to continue using and purchasing marijuana, I conclude Applicant did not provide sufficient evidence to mitigate the security concerns about his drug involvement and substance misuse. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility for a security clearance.

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.b: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: Against Applicant

Conclusion

Under all the circumstances, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge