



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



Appearances

For Government: John Hannink, Esquire, Department Counsel
For Applicant: *Pro se*

01/27/2025

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations, drug involvement and substance misuse, and personal conduct. Eligibility for a security clearance is denied.

Statement of the Case

On July 25, 2023, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On September 12, 2023, and on October 6, 2023, an investigator from the U.S. Office of Personnel Management (OPM) interviewed him. On May 29, 2024, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to those interrogatories on June 1, 2024. On June 27, 2024, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS), renamed the DCSA Adjudications and Vetting Services (AVS), issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as

amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline F (Financial Considerations), Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 28, 2024, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), including proposed Government Exhibits, identified as Items 1 through 9, was mailed to him by DOHA on August 21, 2024, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, he was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on August 27, 2024. His response was due on September 25, 2024, but as of October 23, 2024, Applicant had not submitted a response to the FORM. The case was assigned to me on December 6, 2024.

Administrative Notice

Department Counsel requested that I take administrative notice of certain enumerated facts pertaining to recreational cannabis use in one particular state as well as a DOD policy memorandum clarifying guidance concerning marijuana use for agencies conducting adjudications of persons proposed for eligibility for access to classified information or eligibility to hold a sensitive position, appearing in a state general assembly press release; an excerpt of a presentation from the state office of cannabis regulation; and an SEAD memo, all of which were attached to the request. Applicant did not object to the administrative notice request.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986); ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (citing internet sources for numerous documents).

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, although the request

with respect to the SEAD memo was not necessary, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts as set forth below under the Drug Involvement and Substance Misuse & Personal Conduct section.

Findings of Fact

In his Answer to the SOR, Applicant admitted all factual allegations pertaining to financial considerations (SOR ¶¶ 1.a. through 1.d.); drug involvement and substance misuse (SOR ¶ 2.a.); and personal conduct (SOR ¶¶ 3.a. and 3.b.), all with comments. Applicant's admissions and comments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Background

Applicant is a 32-year-old employee of a defense contractor for whom he has been serving as an outdoor machinist since August 2023. He previously worked for other employers as an extrusion apprentice; purchasing agent; delivery driver; rural carrier associate; room attendant/laundry attendant; lead driver; and assistant merchandising representative. He was unemployed from July 2021 through August 2022. He is a 2011 high school graduate. Although Applicant denies ever being granted a security clearance, and there is no documentation in the casefile to indicate otherwise, Department Counsel indicated that Applicant was sponsored by his current employer and granted an interim Secret clearance prior to the issuance of the SOR. He has never served in the U.S. military. He has never been married.

Financial Considerations

In his SF 86, Applicant reported that he had failed to file taxes for multiple years but claimed that he has not owed any federal or state taxes. (Item 3 at 37) He denied that in the last seven years he had any accounts that were over 120 days delinquent or that he had any accounts that were currently over 120 days delinquent. (Item 3 at 38) During his OPM interview, he again denied having any delinquent accounts, and when he was confronted with information to the contrary, as noted below, he claimed that he was unaware that any accounts were delinquent. (Item 4 at 7)

The SOR alleges, and Applicant admits, that he failed to timely file his federal and state income tax returns for the tax years (TY) 2018, TY 2020, and TY 2021. While not alleged in the SOR, Applicant also admits that he failed to timely file his federal and state income tax returns for TY 2022. In addition, there are two relatively modest delinquent accounts with unpaid balances of \$298 and \$118 that were placed for collection.

During his September 2023 OPM interview, Applicant stated that his failure to timely file his income tax returns was due to his assumption that "income taxes only had to be filed once every eight years." He acknowledged that he had not made any attempts to file or pay his federal or state income taxes but intended to contact the Internal Revenue Service (IRS) to do so. (Item 4 at 7) As for the two delinquent accounts, he contended

that he was unaware that they were delinquent but intended to contact both creditors to inquire about the debts and pay them off. (Item 4 at 7)

In his June 2024 response to the interrogatories, he explained that his income tax returns had not been filed because he either did not receive or lost his W-2s and had difficulty obtaining replacements. He still had not filed the income tax returns for the tax years specified in the SOR and explained that he had obtained transcripts for those years and was planning on seeking professional assistance on how to file his tax returns for those years. (Item 4 at 14-15) He still had not resolved the remaining delinquent accounts but planned to pay them both off as soon as possible by August 2024. (Item 4 at 16)

In his Answer to the SOR, Applicant claimed to have made “significant progress this year to being financially stable and now I am in a position to pay these past debts which I have started by filing 2 out of the 4 years of taxes.” (Item 2 at 2) Attached to his Answer was nearly illegible documentation from a professional income tax preparation service indicating the federal and state income tax returns for TY 2021 and TY 2022 had been filed in June 2024. (Item 2 at 4-5) He planned on filing the remaining unfiled income tax returns (for TY 2018 and TY 2020) before the end of July 2024. (Item 2 at 2) He again acknowledged the two delinquent accounts and indicated an intention to pay them off “as soon as financially possible.” (Item 2 at 2)

SOR ¶ 1.a. refers to unfiled federal income tax returns for TY 2018, TY 2020, and TY 2021. Despite his declared intentions to resolve them by the end of July 2024, Applicant has offered no evidence that the federal income tax returns for TY 2018 and TY 2020 have yet been filed. He did file the federal income tax return for TY 2021, but the other federal income tax return that he did file was not alleged in the SOR. The allegation has not been resolved.

SOR ¶ 1.b. refers to unfiled state income tax returns for TY 2018, TY 2020, and TY 2021. Despite his declared intentions to resolve them by the end of July 2024, Applicant has offered no evidence that the state income tax returns for TY 2018 and TY 2020 have yet been filed. He did file the state income tax return for TY 2021, but the other state income tax return that he did file was not alleged in the SOR. The allegation has not been resolved.

SOR ¶ 1.c. refers to a cellular telephone account with an unpaid balance of \$298 that was placed for collection. (Item 4 at 7, 16; Item 5 at 2; Item 6 at 1) The account has not been resolved.

SOR ¶ 1.d. refers to a wireless internet account with an unpaid balance of \$118 that was placed for collection. (Item 4 at 7, 16; Item 5 at 2) The account has not been resolved.

Aside from acknowledging that his father paid off one delinquent account with an unpaid balance of \$9,614 (that was not alleged in the SOR) and that Applicant owes his sister an unspecified amount for another loan, he offered no evidence of his current

financial status other than his characterization that it is “stable and improving.” (Item 4 at 8) He did not submit a personal financial statement indicating his monthly net income, monthly expenses, monthly debt payments, or if he has any remainder at the end of the month for saving or paying other expenses. There is no evidence of a budget or financial counseling.

Drug Involvement and Substance Misuse, and Personal Conduct

SOR ¶ 3.a. refers to Sec. 23: Illegal Use of Drugs or Drug Activity, of his SF 86, for which Applicant responded “no” to a series of questions regarding the illegal use, possession, or purchase of any controlled substance, including marijuana, during the last seven years. (Item 3 at 35) He certified that his responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith, but they were not. While acknowledging his use of marijuana for most of the period of his use was illegal, he claimed that because such use is now legal in the state (it was legalized in May 2022), it did not even cross his mind to report it. (Item 7; Item 8) Applicant contended that marijuana was the same as alcohol, not a controlled substance. In fact, tetrahydrocannabinol (THC), otherwise known as marijuana, is a Schedule I Controlled Substance. (Item 2 at 2; Item 3, Signature Form; 21 U.S.C. § 812(c))

SOR ¶ 3.b. refers to Applicant’s second OPM interview, when he again denied any involvement with illegal drugs. (Item 4 at 9) However, upon being confronted with evidence from a previous alcohol-related arrest that marijuana/THC was found in his vehicle, Applicant admitted that he had used marijuana claiming that he did not report his marijuana use for no reason other than not having thought of it. (Item 2 at 2; Item 4 at 9)

SOR ¶ 1.d. refers to Applicant’s use of marijuana, with varying frequency, from about 2008 to about September 2022. Sometimes he used marijuana once or twice a week and sometimes less than monthly. He typically used it while alone in his residence, or with his brother at his brother’s residence. Applicant told the OPM investigator that he “always” obtained the marijuana from his brother. He acknowledged that his motivation for using marijuana was for relaxation or social purposes and to relieve back pain from a previous vehicle accident. He also admitted that most of the time he used marijuana it was illegal under state law to do so. He claimed that he stopped using marijuana when he decided to put his career first to ensure that he does not need any rehabilitation. (Item 2 at 2; Item 4 at 10)

Applicant added some additional comments related to his substance abuse in his response to the interrogatories. He admitted that he had purchased marijuana when he was younger, without specifying the age, but claimed that he eventually used marijuana when someone else offered it to him, usually on a special occasion, without specifying the occasions. (Item 4 at 11) He also reported that the date he last used marijuana was September 21, 2022. (Item 4 at 17)

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 security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). “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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation, or mitigation, sufficient to overcome the doubts raised by the Government’s case. 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))

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends

normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.” (*Egan*, 484 U.S. at 531)

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” (See Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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 avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Based on the evidence in the record, I conclude that Applicant is not a candid historian and reporter regarding his finances; his use and purchase of marijuana; or the reasons for not reporting his financial issues and his use of a controlled substance on repeated occasions. He generally maintained his denial positions until confronted with irrefutable evidence that he was not being candid. The fluid nature of his eventual acknowledgments, as well as his belated explanations for his failures to be open and honest about such issues, raise substantial issues not only about his inability to be candid, or his questionable ability in displaying judgment and self-discipline to follow rules and regulations over time, but also raise significant doubts as to his current reliability, trustworthiness, and good judgment.

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to

engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

The SOR alleged, and Applicant admitted, that he failed to timely file his federal and state income tax returns for TY 2018, TY 2020, and TY 2021. He finally filed his federal and state income tax returns for TY 2021 in June 2024, but as of October 2024, Applicant offered no evidence that the federal and state income tax returns for TY 2018 and TY 2020 had yet been filed. As for the two modest debts for \$118 and \$298, there is no evidence that Applicant made any efforts to contact the creditors or make any payments, although he claimed he intended to pay them both off as soon as possible by August 2024. He characterized that his finances are “stable and improving,” but furnished no evidence of a budget or financial counseling. The record is silent regarding his monthly net income, monthly expenses, monthly debt payments, or if he has any remainder at the end of the month for saving or paying other expenses.

Applicant was afforded multiple opportunities to submit documentation reflecting that his federal and state income tax returns have been filed, and that the two modest delinquent debts have been resolved, but he has repeatedly failed to submit such evidence. AG ¶¶ 19(a), 19(c), and 19(f) have been established, but in the absence of evidence indicating an unwillingness to satisfy debts regardless of the ability to do so, AG ¶ 19(b) has not been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties under AG ¶ 20:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear

victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

None of the mitigating conditions apply. The nature, frequency, and recency of Applicant's continuing failure to conclusively resolve those delinquent TY 2018 and TY 2020 federal and state income tax issues, as well as the two modest delinquent debts, despite repeated stated intentions to do so, make it rather easy to conclude that they were not infrequent. Moreover, considering the length of time it has taken to address those financial issues and most of them are still unresolved, and Applicant apparently has additional unalleged debts, his financial problems are likely to remain unchanged in the future. The failure to timely file the TY 2018 and TY 2020 federal and state income tax returns occurred well before he became unemployed in July 2021. He resumed employment in August 2022, but he still did not file his federal and state income tax returns for TY 2021 until June 2024. Over time, Applicant attributed his financial issues essentially to three causes: his assumption that "income taxes only had to be filed once every eight years," his inability to locate or obtain W-2s, and his insufficient finances. It is unclear what his explanations are for his repeated failures to furnish verification and confirmation that all the federal and state income tax returns have finally been filed, and the two modest delinquent accounts have been resolved.

An applicant who begins to resolve his or her financial problems only after being placed on notice that his or her security clearance is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018). In this instance, Applicant simply continued to ignore his income tax filing responsibilities and his outstanding accounts essentially until after he was interviewed by OPM.

Clearance decisions are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. They are not a debt-collection procedure. The guidelines do not require an applicant to establish resolution of every debt or issue alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant immediately resolve issues or make payments on all delinquent debts simultaneously, nor is there a requirement that the debts or issues alleged in an SOR be resolved first. Rather, a reasonable plan and concomitant conduct may provide for the payment of such debts, or resolution of such issues, one at a time. Mere promises to pay debts in the future, without further confirmed action, are insufficient. Applicant clearly stated that he intended to pay

off his two delinquent debts, but to date, despite being given the opportunities to start doing so, he did not, even though those two modest debts are only for \$118 and \$298.

Applicant completed his SF 86 in June 2023; was interviewed by OPM in September and October 2023; completed his responses to the interrogatories in June 2024; the SOR was issued in June 2024; and the FORM was issued in August 2024. Each step of the security clearance review process placed him on notice of the significance of the financial issues confronting him. With respect to his still unfiled federal and state income tax returns, there is no verifiable evidence that Applicant has yet filed those income tax returns. Likewise, he has not submitted evidence that he has resolved the two modest delinquent debts. By failing to present such evidence, he has not demonstrated the high degree of good judgment and reliability required of those granted access to classified information.

The DOHA Appeal Board has observed:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), aff'd, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

There is no verifiable evidence of a budget or financial counseling. The absence of evidence that he has maintained contact with his creditors, or that he has entered into repayment plans reflects negative actions by him. While there is evidence that some previously unfiled federal and state income tax returns that were not alleged in the SOR have finally been filed, Applicant's actions, or inaction with regard to those financial problems that were alleged in the SOR, under the circumstances continue to cast doubt on his current reliability, trustworthiness, and good judgment. (See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).)

Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse 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 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.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

[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 (Reference H and I). 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.

In addition, on December 21, 2021, the DNI issued Memorandum ES 2021-01529, *Security Executive Agent 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*, which states in part:

. . . 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....

Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use

upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF 86), Questionnaire for National Security Positions.

The guideline notes a condition under AG ¶ 25 that could raise security concerns in this case:

- (a) any substance misuse (see above definition).

Applicant used marijuana – a Schedule I Controlled Substance – with varying frequency (sometimes once or twice a week and sometimes less than monthly), from about 2008 to about September 2022. Most of the time, at least until May 2022, it was illegal to use marijuana within the state. It was and is still illegal under federal law. AG ¶ 25(a) has been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

- (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 or misuse is grounds for revocation of national security eligibility.

As noted above, Applicant claimed that he stopped using marijuana when he decided to put his career first to ensure that he does not need any rehabilitation. But, as of the closing of the record, his period of purported abstinence has only been a little over two years, following nearly a decade and one-half of marijuana use. A person should not be held forever accountable for misconduct from the past, and continued abstinence is to be encouraged. Based on his lengthy history of marijuana use over the years; Applicant's acknowledgment that during most of the period of such use it was illegal to use marijuana in the state where he lives; and his subsequent concealments and/or omissions of such marijuana involvement when he was expected to honestly reveal such involvement, it is difficult to conclude that such involvement is unlikely to recur or that it does not cast doubt on his current reliability, trustworthiness, or good judgment. Also, given his repeated lack of candor, he has failed to furnish a verified pattern of abstinence, and has not submitted verifiable proof that he had disassociated himself from drug-providing associates. Neither of the mitigating conditions apply.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes some conditions that could raise security concerns under AG ¶ 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 or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and
- (b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

My discussions related to Applicant's drug involvement and substance misuse are adopted herein. Applicant knowingly falsified, concealed, and omitted drug involvement information from his SF 86, and, until he was confronted with irrefutable evidence to the contrary, he failed to provide full, frank, and truthful answers to lawful questions of investigators and security officials during his subsequent OPM interviews. Individuals with

integrity and high moral character do not routinely violate the law by illegally using drugs, lying on forms, or lying to investigators. AG ¶¶ 16(a) and 16(b) have been established.

The guideline also includes some examples of conditions under AG ¶ 17 that could mitigate security concerns arising from Personal Conduct:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

None of the mitigating conditions apply. Applicant did not make prompt, good-faith efforts to correct his actions, omissions, concealments, and falsifications until he was confronted with them. There was nothing unique about the circumstances that resulted in his drug involvement or subsequent cover-up actions. He now acknowledges and takes responsibility for his prior drug involvement, and while admitting he lied on the SF 86 and to the OPM investigator as alleged in the SOR, he offered an interesting explanation for doing so: he did not report his marijuana use for no reason other than not having thought of it because such use is now legal in the state (it was legalized in May 2022), it did not even cross his mind to report it.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case considering the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

Unalleged conduct can be considered for certain purposes, as discussed by the DOHA Appeal Board. (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3). See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant's unalleged financial issues; unalleged falsification on his SF 86 regarding financial issues; unalleged lying to OPM regarding financial issues; and his unalleged purchase of marijuana, will be considered only for the five purposes listed above.

I have incorporated my comments under Guideline F, Guideline H, and Guideline E in my whole-person analysis, and I have considered the factors in SEAD 4, App. A. There is some evidence in favor of mitigating Applicant's various issues. Applicant is a 32-year-old employee of a defense contractor for whom he has been serving as an outdoor machinist since August 2023. He previously worked for other employers as an extrusion apprentice; purchasing agent; delivery driver; rural carrier associate; room attendant/laundry attendant; lead driver; and assistant merchandising representative. He is a 2011 high school graduate. Although there is no documentation in the casefile to indicate that he was ever granted a security clearance, Department Counsel indicated that Applicant was sponsored by his current employer and granted an interim Secret clearance prior to the issuance of the SOR. There is no evidence of any security violations. Applicant has finally addressed some unalleged financial issues pertaining to previously unfiled federal and state income tax returns.

The disqualifying evidence under the whole-person concept is simply much more substantial and compelling. Claiming that income tax returns were only required to be filed every eight years, Applicant failed to timely file federal and state income tax returns during TY 2018 through TY 2021 (alleged), and TY 2022 (unalleged). He also ignored two creditors with whom he had modest delinquent accounts. As noted above, Applicant is not a candid historian and reporter regarding his finances; his use and purchase of marijuana; or the reasons for not reporting his financial issues and his use of a controlled substance on repeated occasions. He maintained his denial positions until confronted with irrefutable evidence that he was not being candid. He did not respond to the FORM with any updated status information, despite the arguments presented by the government that focused on his inaction and other financial failures as well as other security concerns.

Applicant's track record of efforts to resolve his unfiled federal and state income tax returns and this two modest debts is lacking. Although he had declared his intention to resolve those financial issues, to date, with one exception, he has failed to do so.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude he has failed to mitigate the security concerns arising from his financial considerations, drug involvement and substance abuse, and personal conduct. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

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 F:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.c.:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a. and 3.b.:	Against Applicant

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge