

KEYWORD: Guideline H

DIGEST: We note Applicant’s argument that many states have legalized marijuana for medical purposes or have simply decriminalized it. However, marijuana use remains an offense under Federal law. The Judge cited to a memorandum by the Director of National Intelligence (DNI) to the effect that states do not have authority to contravene Federal drug laws and that an applicant’s use of marijuana “remains adjudicatively relevant in national security determinations.” DNI Memorandum, dated October 25, 2014, at 2. This memorandum has not been rescinded and sets forth policy that a DOHA Judge must bring to bear in arriving at a clearance decision under Guideline H. We have long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information. Adverse Decision Affirmed.

CASE NO: 20-01772.a1

DATE: 09/14/2021

DATE: September 14, 2021

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 23, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On June 28, 2021, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge erred in his analysis of Applicant’s drug involvement. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact and Analysis**

Applicant, who is in his sixties, works for a Defense contractor, employment that he has held since 2014. He previously worked for the same contractor from 2007 until 2012. He has held a security clearance since 2008.

In 2014, Applicant completed a security clearance application (SCA) in which he denied illegal drug involvement. In a 2018 SCA, he disclosed occasional marijuana use from 2015 to late 2017, for a total of about five instances. He admitted to having used marijuana while holding a security clearance and stated that he intended to use marijuana in the future.

During a 2019 background investigation, Applicant stated that he began using marijuana “sometime before August 2012.” Decision at 2. He stated that he continued to use marijuana after having been awarded a top secret clearance in 2010 and reiterated that he intended to use the drug in the future. He stated that he only used marijuana in states in which it had been decriminalized.

In his Answer to the SOR, Applicant admitted that he: (1) used marijuana from April 2018 to the following July, after having completed his SCA; (2) purchased marijuana after having completed his 2018 SCA; (3) used marijuana from 2015 to 2018 while holding a clearance; (4) purchased marijuana after having been granted a clearance; and (5) intended future use of marijuana. He also admitted to using marijuana once in 2019 and once again in 2020.

The Judge noted Applicant’s history of marijuana use, including instances while holding a security clearance and in probable violation of his employer’s drug-free workplace policy. Although commending Applicant’s candor in admitting his security-significant conduct, the Judge cited to the recency of Applicant’s marijuana use and his professed intent to use it in the future. The Judge characterized Applicant’s case for mitigation as consisting in large measure on “rationalizations or minimizations or both.” Decision at 6. The Judge concluded that Applicant had not met his burden of persuasion regarding mitigation.

### **Discussion**

Applicant has not challenged the sufficiency of the Judge's findings of fact. Rather, he argues that the Judge erred in concluding that he had not mitigated the concerns raised in the SOR. He presents several arguments, including that (1) there is no social stigma regarding marijuana use and, therefore, no risk of blackmail; (2) he has held a clearance for many years without incident or concern; (3) his use did not rise to the level of substance abuse; (4) marijuana has been decriminalized in many states; and (5) he never came to work under the influence of marijuana.

The Directive provides that "illegal use of controlled substances . . . raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Directive, Encl. 2, App. A ¶ 24. This paragraph defines "substance misuse" as a generic term to describe, *inter alia*, the conduct just quoted. It does not limit Guideline H concerns to habitual drug use. Rather, the Directive provides that *any* use of an illegal drug can raise security concerns. *See, e.g.*, ISCR Case No. 12-06635 at 2 (App. Bd. Mar. 28, 2014). This clearly addresses the kind of use to which Applicant has admitted. We note Applicant's argument that many states have legalized marijuana for medical purposes or have simply decriminalized it. However, marijuana use remains an offense under Federal law. The Judge cited to a memorandum by the Director of National Intelligence (DNI) to the effect that states do not have authority to contravene Federal drug laws and that an applicant's use of marijuana "remains adjudicatively relevant in national security determinations." DNI Memorandum, dated October 25, 2014, at 2. This memorandum has not been rescinded and sets forth policy that a DOHA Judge must bring to bear in arriving at a clearance decision under Guideline H. We have long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). In the case before us, Applicant's SCAs and pre-employment drug test were sufficient notice that use of marijuana is not compatible with maintaining access to classified information. When viewed as a totality, and in light of Applicant's multiple statements of intended future marijuana use, the evidence that was before the Judge supports his overall adverse conclusion.

We note Applicant's contention that he has held a clearance for years without incident. This matter is entitled to little weight under the facts of this case. The government need not wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. Even those with good prior records can exhibit behaviors that call their judgment into serious question. *See, e.g.*, ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020).

We have considered the entirety of the arguments contained in Applicant's appeal brief. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

**Order**

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board