



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



In the matter of: )  
)  
) ISCR Case No. 21-02355  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrea M. Corrales, Esquire, Department Counsel  
For Applicant: *Pro se*

05/20/2022

**Decision**

GALES, Robert Robinson, Administrative Judge:

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

**Statement of the Case**

On October 15, 2020, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories, and also asked him to verify the accuracy of an investigator’s summary of an interview. He responded to those interrogatories and verified the summary on October 15, 2021. On December 13, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) 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; 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 H (drug involvement and substance misuse) and detailed reasons why the DCSA CAF 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.

In a sworn statement, dated January 4, 2022, 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) was mailed to Applicant by DOHA on February 18, 2022, 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, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on March 11, 2022. His response was due on April 10, 2022. Applicant chose not to respond to the FORM, for as of April 26, 2022, no response had been received. The case was assigned to me on May 13, 2022. The record closed on April 10, 2022.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted, with extensive comments, the factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.a. through 1.c.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

#### **Background**

Applicant is a 43-year-old employee of a defense contractor. He has been serving as a project manager with his current employer since February 2007. A 1996 high school graduate, he received a bachelor's degree in 2000. He has never served with the U.S. military. He has never been married. He has never been granted a security clearance.

#### **Drug Involvement and Substance Misuse**

Applicant was a recreational multi-substance abuser whose substances of choice during a 25-year period were tetrahydrocannabinol (THC), known as marijuana [used with varying frequency from about March 1997 to at least December 2020, and apparently until the present time; and psilocybin mushrooms, called magic mushrooms, [used from about August 1997 to at least December 2002] – both Schedule I Controlled Substances; and alprazolam (the prescription medication Xanax® which was not prescribed for him) [used from about January 2018 to at least May 2021 – a Schedule IV Controlled Substance. (Item 2; Item 3; Item 4; (<https://www.deadiversion.usdoj.gov/schedules/>; 21 U.S.C. § 812 (c)) He purchased the marijuana he used from a legal dispensary licensed by the state since 2019, and before that, he obtained it from illegal sources. (Item 3 at 26; Item 4, at 8) His purchase and use of magic mushrooms was not alleged in the SOR.

In his SF 86, Applicant reported that he had smoked marijuana on a daily basis recreationally, as well as to fend off panic attacks, anxiety, and stress. (Item 3 at 24-25) He used magic mushrooms, without reporting either a frequency or a reason for such use. (Item 3 at 25) He also used Xanax® during extremely stressful circumstances, but failed to identify such circumstances or report the frequency for such use. (Item 3 at 25)

Applicant expanded on his history of drug involvement and substance misuse during an interview with an investigator from the U.S. Office of Personnel Management (OPM) on December 1, 2020. During that interview, he reported smoking one or two bowls of marijuana on a daily basis, either with friends whom he refused to identify, or by himself at home. He also refused to identify the individual(s) from whom he illegally purchased the marijuana before 2019. (Item 4 at 8) He reported that he “experimented” with magic mushrooms on eight occasions during concerts and social gatherings, essentially to be social. He refused to identify those friends as well as the individual(s) from whom he illegally purchased the magic mushrooms. (Item 4 at 9) He also reported that he used one 50 mg. of Xanax® about twelve times a year to deal with panic attacks. The drug was not prescribed for him, but was provided by a friend whom he refused to identify. (Item 4 at 9-10)

Applicant’s future intentions regarding his use of certain identified drugs or controlled substances differs depending on the substance. With respect to marijuana and the Xanax®, in his SF 86, he admitted that he intended to use both substances in the future. (Item 3 at 24-25) He claimed to have no intention of using magic mushroom in the future. (Item 3 at 25) During his OPM interview, he essentially repeated those future intentions with one caveat: if his future use of Xanax® became an issue, he would seek assistance from a healthcare provider to obtain it legally. (Item 4 at 10) In his Answer to the SOR, he repeated those intentions. He argued that his candor and honesty in revealing his intent to continue using marijuana should be proof of his trustworthiness. He added that marijuana use is legal where he uses it. (Item 2) Applicant has never received drug-counseling or treatment. (Item 4 at 8-9)

## **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 a number of 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 (4<sup>th</sup> 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 into 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

### 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 . . . , Questionnaire for National Security Positions.

As discussed by the DOHA Appeal Board, conduct not alleged in an SOR (in this case, his purchase and use of magic mushrooms) 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. April 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 purchase and use of magic mushrooms will be considered only for the five purposes listed above.

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

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

Applicant was admittedly a recreational multi-substance abuser of two Schedule I and Schedule IV Controlled Substances. He frequently purchased marijuana and continues to use it on a daily basis as he has for the last 25 years; and used the prescription medication Xanax®, which was not prescribed for him, for three and one-half years, ending in May 2021. He intends to continue using marijuana, but indicated that in order to continue using Xanax®, he would seek a prescription for it. AG ¶¶ 25(a), 25(c), and 25(g) have 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;

(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.

None of the mitigating conditions apply. After approximately 25 years of regular multi-substance drug involvement and substance misuse, and despite knowing that there are serious security clearance eligibility concerns regarding such drug involvement, Applicant intends to continue using marijuana in the future. It is significant that he was candid about his use of illegal substances when he completed his SF 86 and during his OPM interview, and for that candor, he is given some credit. While he has acknowledged his drug involvement, he has refused to identify those from whom he purchased his illegal drug(s), or those with whom he used the illegal drugs. He has never undergone drug treatment and therapy or changed or avoided the environment where the drugs were used. Because he refused to identify certain individuals involved in his drug involvement, he has precluded evidence that he has disassociated from drug-using associates and contacts. The above factors continue to cast doubt on his current reliability, trustworthiness, and good judgment.

### **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 in light of 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))

There is some evidence mitigating Applicant's conduct. Applicant is a 43-year-old employee of a defense contractor. He has been serving as a project manager with his current employer since February 2007. A 1996 high school graduate, he received a bachelor's degree in 2000. When completing his SF 86, he was candid in acknowledging that he had used a variety of illegal substances. When questioned by an OPM investigator, he was again candid regarding his illegal drug involvement and substance misuse.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was admittedly a recreational multi-substance abuser of two Schedule I and Schedule IV Controlled Substances. He frequently purchased marijuana and continues to use it on a daily basis as he has for the past 25 years; and used the prescription medication Xanax®, which was not prescribed for him, for three and one-half years, ending in May 2021. He also "experimented" using magic mushrooms on eight occasions during concerts and social gatherings, essentially to be social. He intends to continue using marijuana. His refusal to furnish full information regarding the sources of his drug purchases or the identity of his drug-using friends; the absence of any drug-counseling or treatment; his apparent refusal to disassociate himself from his drug-using associates by failing to identify them; and his intentions regarding future marijuana use, continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse. 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 H:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.c.:	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.

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ROBERT ROBINSON GALES  
Administrative Judge