



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



In the matter of:	)	
	)	
XXXXXXXXXXXXX	)	ADP Case No. 23-00582
	)	
Applicant for Public Trust Position	)	

**Appearances**

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

09/01/2023

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**Decision**

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KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for a public trust position. Applicant did not produce evidence sufficient to explain, extenuate, or mitigate the trustworthiness concern stemming from his drug involvement and substance misuse. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant submitted his most recent public trust position application (SF 86 format) on September 27, 2022 (the 2022 Application). The Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) on April 27, 2023 detailing trustworthiness concerns under Guideline H, Drug Involvement and Substance Misuse, and Guideline E, personal conduct. The DoD acted under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

On May 5, 2023, Applicant submitted an answer to the SOR (Answer) and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On May 22, 2023, Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items 1 through 5 (Items). Applicant was sent the FORM on May 23, 2023, and he received it on June 6, 2023. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded to the FORM on June 7, 2023 (Response). Department Counsel did not object to the Response. The SOR and the Answer (Items 1 and 2, respectively) are the pleadings in this case. Items 3 through 5 and the Response are admitted without objection. The case was assigned to me on August 8, 2023.

### **Findings of Fact**

Applicant is 46 years old, married since July 2006, with two children, a daughter age 11 and a son age 8. Applicant is a college graduate holding a bachelor's and a master's degree. Since May 2010, he has been employed by a defense contractor. (Item 3.)

Under Guideline H, the SOR alleged that Applicant: (1) used marijuana with varying frequency from April 1997 to about April 2023; (In the FORM, Department Counsel amended the SOR to delete this first allegation in its entirety.) (2) used marijuana from March 2019 to about April 2023 while granted eligibility to access classified or sensitive information; (3) intends to continue to use marijuana in the future; (4) purchased and used hallucinogenic mushrooms with varying frequency from about July 2021 to about July 2022; (5) used hallucinogenic mushrooms while granted eligibility to access classified or sensitive information; and (6) intends to continue to use hallucinogenic mushrooms in the future. (Item 1.) Applicant admitted all Guideline H allegations. (Item 2.)

Under Guideline E, the SOR alleged that Applicant falsified material facts on a July 19, 2018 public trust application by failing to disclose his marijuana and mushroom use under circumstances described above. (Item 1.) There is no July 19, 2018 public trust application in the record. The only other application in the record is dated April 18, 2019 (the 2019 Application). (Item 4.) He denied this allegation and observed that he disclosed his marijuana use from May 1998 to April 2019 in his April 18, 2019 application. (Item 2, citing Item 4 § 23.) In his Response, he said that he did not have a copy of the 2018 Application and reiterated his denials.

### **The 2022 Application Drug Involvement and Substance Misuse disclosures. (Item 3 §23.)**

Applicant disclosed that he used marijuana from May 1998 to September 2022 about 10 to 15 times per month, "always outside of any work activities." He stated that he "used marijuana while [he] previously had the Public Trust clearance that [he is] applying

for again.” As to future use, he said: “Used as an occasional stress reliever. It is more effective and with fewer side effects than other substances, such as alcohol.”

Applicant disclosed that he used hallucinogenic mushrooms in July 2021 and July 2022 “3 times (across 3 different days).” As to future use, he said: “I found the experience very pleasant and it wears off in a couple of hours, much more easily to manage than drinking alcohol. I will likely do it again in the future, but would not make it a regular activity.”

**The 2019 Application Drug Involvement and Substance Misuse disclosures. (Item 4 §23.)**

Applicant disclosed that he used marijuana from May 1998 to April 2019 and said: “Occasional marijuana use, on nights or weekends, never in conjunction with work activities. Frequency: 5-10 times per year, not consistently. Number of times used: 50.” As to future use, he said: “Used as an occasional stress reliever. It is more effective and with fewer side effects than other substances, such as alcohol.” There were no disclosures of any other drug involvement or substance misuse.

Applicant’s responses to interrogatories and his January 11, 2023 personal subject interview (PSI) were consistent with the responses in his 2022 and 2019 Applications, with one notable exception. The interrogatories asked: “When, if ever, did you decide to stop using illegal substances (list the substance and date of last use)?” He responded: “I have not decided to stop marijuana or mushrooms at this time.” That response was verified on April 10, 2023. In his January 11, 2023 PSI, he was asked: “[If] he would discontinue use of the above drugs [marijuana and mushrooms] if it was required for a favorable clearance adjudication, which he replied yes.” His PSI was also verified on April 10, 2023. (Item 5.)

**Law and Policies**

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

When evaluating an applicant’s suitability for a public trust position, an administrative judge must consider the adjudicative guidelines. These guidelines are flexible rules of law that apply together with common sense and the general factors of the whole-person concept. An administrative judge must consider all available and 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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, then the applicant is

responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . .” The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

### **Guideline H – Drug Involvement and Substance Abuse**

Under this guideline, suitability of an applicant may be questioned or put into question a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24 sets forth the concern, as follows:

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.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 25(a) any substance misuse (see above definition);

AG ¶ 25(c) illegal possession of a controlled substance . . .

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position; and

AG ¶ 25(g) expressed intent to continue drug involvement and substance abuse, or failure to clearly and convincingly commit to discontinue such misuse.

The only potentially applicable mitigating factor here is quoted below:

AG ¶ 26(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.

Marijuana is a Schedule I controlled substances, and possession of it is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq.* The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment, a fine or both. 21 U.S.C. § 844. In an October 25, 2014

memorandum, the Director of National Intelligence affirmed that the use of marijuana is a security concern. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). See also <http://www.dea.gov/druginfo/ds.shtml>

More recently, on December 21, 2021, the Director of National Intelligence signed the memorandum, *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*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior medicinal, or recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

Hallucinogenic mushrooms are Schedule I controlled substances under 21 U.S.C. § 812 (c).

Applicant admitted using marijuana with varying frequency from about May 1998 to September 2022. He admitted to using marijuana from March 2019 to April 2023 while holding a position of public trust. In 2019, his frequency of use was 5 to 10 times per year. In 2022, that frequency had increased dramatically to 10 to 15 times per month. He used mushrooms about three times in July 2021 and July 2022, also while holding a position of public trust. He was inconsistent about future drug use if his clearance was at stake, because he said unequivocally that he had no plans to stop using those controlled substances.

Facts admitted by an applicant in an application, an answer to an SOR, or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995). Applicant’s years of past use of marijuana, his recent use of mushrooms, and his intent to keep using them trigger disqualifying conditions AG ¶¶ 25(a), (c), (f), and (g).

I have considered mitigating factor AG ¶ 26(a). On this record, Applicant began using marijuana 25 years ago. Therefore, the inception of his use was long ago. Applicant has, however, continued his regular, and not infrequent, use of marijuana. In fact, the frequency of his use has increased significantly between 2019 and 2022. And he has added mushrooms to his menu of controlled substances. His history of drug involvement and substance misuse shows an inability and certainly an unwillingness to comply with federal law and casts doubt on his trustworthiness and reliability. Applicant’s use of controlled substances is not mitigated by AG ¶ 26(a).

## **Guideline E - Personal Conduct**

The SOR alleged that Applicant falsified material facts on a July 19, 2018 public trust application by failing to disclose his marijuana and mushroom use. There is no July 19, 2018 public trust application in the record. Therefore, the Government has not established SOR ¶ 2. I find in favor of Applicant on SOR ¶ 2.

### **Whole-Person Concept**

The record raises doubt about Applicant's reliability, trustworthiness, judgment, and ability to protect sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). Accordingly, I conclude that Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to sensitive information.

### **Formal Findings**

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Withdrawn
Subparagraphs 1.b-1.f:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant access to sensitive information.

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Philip J. Katauskas  
Administrative Judge