



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



In the matter of: )  
)  
) ISCR Case No. 23-02224  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Mark D. Lawton, Esq., Department Counsel  
For Applicant: *Pro se*

09/27/2024

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline H, drug involvement and substance misuse, and Guideline J, criminal conduct. He mitigated the concerns under Guideline F, financial considerations.

**Statement of the Case**

On December 11, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F, H, and J. The DCSA CAS acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

On December 21, 2023, Applicant answered the SOR and elected to have his case decided by an administrative judge from the Defense Office of Hearings and

Appeals (DOHA) on the written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on March 27, 2024. The evidence included in the FORM is identified as Items 2-4. (Item 1 includes pleadings and transmittal information.) The FORM was mailed to Applicant, who received it on April 29, 2024. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did not submit any additional evidence or object to the Government's evidence. The case was assigned to me on August 13, 2024.

### **Findings of Fact**

In Applicant's answer, he denied the Guideline F allegation listed in the SOR. He admitted the SOR allegations under Guidelines H and J with some explanations. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 29 years old. He has worked as a programmer analyst for a defense contractor since May 2022. He holds an associate degree. He is single, never married, and has no children. He completed his security clearance application (SCA) on February 17, 2023. Before this time, he had never applied for or held a security clearance. His current employer is subject to the provisions of the Federal Drug-Free Workplace Act (41 U.S.C § 81) and has a written drug and alcohol-free policy. (Items 2, 4 (pp.14-21))

### **Financial Considerations**

Under Guideline F, the SOR alleged that Applicant failed to file his 2020 through 2022 federal income tax returns, as required. (SOR ¶ 1.a) (Item 1, p. 1)

Applicant admitted in his SOR answer that his 2020 and 2021 federal income tax returns (Return) were not filed with the IRS until after December 2023, the date of the SOR. Regardless, both returns were filed after the filing deadline established by the IRS for the respective years. He stated that his 2022 Return was filed in August 2023. He stated the reason he did not timely file his Returns was because he forgot about them. He indicated that he will timely file future returns. (Item 1, pp. 3-4, 7; Item 3, p. 11)

The record contains copies of Applicant's tax transcripts for tax years 2020, 2021, and 2022. For year 2020, a tax transcript created November 28, 2023, indicated that as of that date, no Return had been filed. However, it also shows he received a tax relief credit for \$1,200, which was issued on April 15, 2020. He stated that he sent his 2020 tax return to the IRS on February 20, 2024. He provided a copy of the mailing receipt to corroborate his statement. (Item 1 pp. 3, 8; Item 3 p.13)

Applicant's 2021 tax transcript, created February 22, 2024, indicated that he filed his Return on February 7, 2024, which was after the IRS filing deadline. However, a review of the transcript shows that his adjusted gross income for the year was only

\$9,941, which is below the minimum amount of \$12,550 that triggered the requirement to file a return. Since he was not required to file a return, his filing of a late return for that year becomes irrelevant. (Item 3, pp. 10-18)

As noted above, Applicant's 2022 tax transcript, created February 22, 2024, indicated that he filed his Return on August 6, 2023. He did not indicate that he filed an extension, which would have extended the filing deadline until October 2023. His tax transcript for 2022 does not show that he was assessed any penalties for late filing by the IRS, so I consider his 2022 Return timely filed within the extension period. (Item 3, pp. 19-26)

### **Drug Use and Criminal Conduct.**

Under Guideline H, the SOR alleged Applicant: used marijuana from about August 2016 to about January 2023; used hallucinogenic mushrooms from about June 2020 to about November 2021; and used THC from about May 2022 to about January 2023, while employed in a sensitive position. (SOR ¶¶ 2.a-2.c) All these allegations were cross-alleged as criminal conduct under Guideline J. (SOR ¶ 3.a) (Item 1, p. 2).

Applicant admitted using marijuana, THC, and hallucinogenic mushrooms in his SOR answer. However, his SOR answer, his answers to drug questions on his SCA, his personal subject interview with a background investigator, and his answers to Government interrogatories, differ somewhat on the details of his drug use. In his SOR answer, he admitted using marijuana at various times between August 2016 and December 2020. He also admitted his last use of marijuana was in February 2022, before he started his current job. He stated he used illegal mushrooms twice, once in June 2020 and once in November 2021. He has no future intent to use either of these drugs again. (Item 1, pp. 4-7)

In Applicant's answers to drug-related questions on his February 2023 SCA, he stated that within the last seven years from August 2016 to January 2023, he used THC, which he defined as marijuana, weed, pot, and hashish, approximately 70 times. He stated he used illegal mushrooms twice, once in June 2020 and once in November 2021. He stated his intention not to use any illegal drugs in the future.

During Applicant's background investigation in April 2023, he told the interviewer that he smoked marijuana approximately 70 times from August 2016 to May 2022. He also stated that he ingested THC gummies approximately six times from May 2022 to January 2023. He further stated the active ingredients in these gummies were Delta 8 THC and Delta 10 THC. There is some question whether these two types of THC are controlled substances. (Item 3, p.10)

In Applicant's answers to Government interrogatories signed on November 28, 2023, he stated that his marijuana use was "infrequent" from August 2017 to January 2021. His illegal mushroom use was "rare" from June 2020 to November 2021. In both cases, he stated he had no intent to use them in the future. In his answers to

Government interrogatories signed on August 28, 2023, he stated his last use of marijuana was in January 2021 and his last use of illegal mushrooms was in November 2021. (Items 3, p. 4; Item 4, p. 4)

Since Applicant chose to have his case decided on the written record, without a hearing, I had no opportunity to question him about some of these differences in his statements or to clarify some ambiguities.

### **Policies**

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 careful weighing 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 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.

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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline F, Financial Considerations**

AG ¶ 18 expresses the security concern for financial considerations:

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. I have considered all of them under AG ¶ 19 and the following potentially apply:

(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.

Applicant's tax transcripts establish that he failed to timely file his 2020 Return. His 2021 income was too low to meet the requirement to file a 2021 tax return, so his late filing of his 2021 Return is irrelevant. His 2022 Return was filed in August 2021, which was within the period allowed for filing if an extension was requested. I construe the evidence such that Applicant filed an extension since his 2022 tax transcript indicated he was not assessed a penalty for filing a late return. Only Applicant's 2020 Return establishes the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and the following potentially apply:

(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; 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.

Applicant failed to file his 2020 Return in a timely manner because he forgot about it. He was young at the time and obviously did not understand the significance and importance of timely filing his federal tax returns. He has rectified his dilatory action by providing documentation showing he submitted his 2020 Return to the IRS. Both of the above mitigating conditions substantially apply.

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

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Two that are potentially applicable in this case include:

(a) any substance misuse; and

(f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana, THC, and illegal mushrooms during the dates alleged. AG ¶ 25(a) applies to SOR ¶¶ 1.a and 1.b. There is no evidence that Applicant was in a sensitive position before he completed his SCA in February 2023. The Appeal Board has stated that a person cannot hold an initial sensitive position before commencing the associated background investigation, which in this case was his completion of his SCA in February 2023. ISCR Case No. 22-02623 at 4 (App. Bd. Jan. 24, 2024). AG ¶ 25(f) does not apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(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.

Applicant used marijuana approximately 70 times in the past and illegal mushrooms on two occasions. While Applicant has claimed that he now abstains from using illegal drugs, the beginning of the abstention is unclear regarding his use of marijuana. He has stated that his last use of marijuana was in January 2021, or it was February 2022, or it was May 2022, or it was January 2023. Given this ambiguity about when his abstention began and its recency, there is insufficient evidence to overcome the doubt cast upon his reliability, trustworthiness, and judgment. He has not established a sufficient pattern of abstinence. He receives some mitigating credit for stating his future intent not to use drugs, but at this point it is too early to tell whether he will carry through with his stated intent. AG ¶¶ 26(a) and 26(b) do not substantially apply.

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

Applicant's marijuana and illegal mushroom use support the application of AG ¶ 31(b). The allegation listed in SOR ¶ 2.c, as referenced in SOR ¶ 3.a, is duplicitous with SOR ¶ 2.a.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

For the same reasons stated above under Guideline H, AG ¶¶ 32(a) and 32(d) do not substantially apply.

### **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 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 in light of all the facts and circumstances surrounding this case. Applicant provided insufficient evidence to mitigate the alleged security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Although Applicant mitigated the Guideline F concerns, I conclude he failed to mitigate the security concerns under Guidelines H and J.

### **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: Subparagraph 1.a:	FOR APPLICANT For Applicant
Paragraph 2, Guideline H: Subparagraphs 2.a - 2.b: Subparagraph 2.c:	AGAINST APPLICANT Against Applicant For Applicant
Paragraph 3, Guideline J: Subparagraph 3.a:	AGAINST APPLICANT Against Applicant (except when referring to SOR ¶ 2.c)

### **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 E. Coacher  
Administrative Judge