



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



In the matter of: )  
)  
) ISCR Case No. 22-02003  
)  
Applicant for Security Clearance )

**Appearances**

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

01/29/2024

**Decision**

LAFAYE, Gatha, Administrative Judge:

Applicant failed to provide sufficient evidence to mitigate security concerns alleged under Guidelines H (drug involvement and substance misuse) and E (personal conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant signed and submitted a security clearance application (SCA) on May 3, 2022. On November 9, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) alleging security concerns under Guidelines H (drug involvement and substance misuse) and E (personal conduct). The 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) effective within the DOD on June 8, 2017.

Applicant responded to the SOR and requested a hearing before an administrative judge. The case was assigned to me on July 11, 2023. On November 15, 2023, the

Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for December 6, 2023. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified and at the end of the hearing, I left the record open until January 3, 2024 to allow him additional time to submit documentary evidence. He timely submitted Applicant's Exhibits (AE) A and B, which were admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on December 18, 2023.

### **Findings of Fact**

In Applicant's response to the SOR, he admitted allegations in SOR ¶¶ 1.a, 1.c, 2.b, and 2.c; and denied allegations in SOR ¶¶ 1.b and 2.a. Applicant's admissions are incorporated in my findings of fact.

Applicant is 23 years old. Born in Ghana, he arrived in the United States with his parents in 2006 at the age of six. He attended schools in the United States and became a naturalized U.S. citizen in 2016 at age 16.

Applicant received his high school diploma in May 2018. He attended an out-of-state college after graduation from May 2018 to about December 2019, until he withdrew from school as a result of the arrest alleged in SOR ¶ 1.c discussed below. In January 2020, he enrolled in a different college. In May 2023, he was awarded a bachelor's degree in business management and information systems. Applicant has never been married and has no children. (GE 1; and Tr. 17-20)

Since August 2022, Applicant has worked for a defense contractor as an administrative support technician. His duties involve work accomplished on a federal installation. He previously held an interim secret security clearance, which was removed when he did not initially clear. In November 2023, he was placed in an administrative leave status pending the outcome of this adjudication process. (Tr. 17-20)

Applicant was raised in State 1. In October 2019, while attending a college in State 2, he was arrested by campus police for possession of marijuana after marijuana was found in his dorm room. His arrest was then processed by local police, and he later appeared in court. Applicant testified that all charges were subsequently dropped. (GE 1 and GE 2; and Tr. 17-33)

As a result of the arrest, however, Applicant faced discipline from college officials. He testified he was given the option to either leave the university voluntarily within a week, or risk defending himself before a college disciplinary board where he faced formal expulsion and an unfavorable student record. He chose the former and signed a voluntary permanent separation from the college in November 2019. As a result, he was banned from all campuses and unable to re-enroll. (GE 2 at 8; Tr. 26-30) As discussed above, Applicant soon enrolled in college elsewhere, and eventually earned his degree.

When Applicant submitted his May 2022 SCA, he did not disclose any prior drug involvement; nor did he disclose his 2019 arrest for marijuana possession. Specifically, he answered “no” in response to two questions in Section 23, Illegal Use of Drugs or Drug Activity, which asked whether, in the last seven years, Applicant had: (1) illegally used any drugs or controlled substances; and (2) illegally purchased, received, handled, etc., any drug or controlled substance. He also answered “no” in response to a question in Section 22, Police Record, which asked whether he had ever been charged with an offense involving alcohol or drugs. (GE 1 pp. 27-29) (SOR ¶¶ 1.c, and 2.a - 2.c)

In Applicant’s June 2022 interview with DOD investigators, authenticated in October 2022, he disclosed he first used marijuana in May 2018, and that he last used it in June 2022, prior to his DOD interview. He also disclosed he acquired the marijuana by either purchasing it from multiple dealers or receiving it as a gift from others. (GE 2 at 10; Tr. at 26) (SOR ¶¶ 1.a and 1.b)

In the hearing Applicant testified he subsequently used marijuana twice after his June 2022 background interview: in October 2022 before completing his response to interrogatories; and in December 2022. This last use he stated was due to the depression and sadness he felt after the death of his grandmother with whom he enjoyed a close relationship. His December 2022 marijuana use occurred after the issuance date of the SOR, November 9, 2022, though it is unclear if Applicant actually received it beforehand. He testified that December 2022 was the last time he used marijuana, and that he has no future intent to use it. (Tr. 23-29, 40-45)

During the hearing, Applicant admitted he deliberately falsified his answers to the above SCA questions because he was concerned that admitting his illegal drug involvement, including his drug use, purchase, and his drug-related arrest for possession of illegal drugs would hinder his ability to obtain a security clearance. He also testified his employer has a drug-free workplace policy, and that he signed an agreement not to use illegal drugs. (Tr. 18-19, 28, 35-36)

Applicant testified he made the decision to “do better” after his grandmother passed away. His grandmother’s passing and his current job motivated him to graduate from college and to stop using marijuana. He discussed his feelings of depression with his medical doctor, but was never clinically diagnosed with depression. He also disclosed his use of marijuana to his doctor, but stated he was never prescribed medical marijuana. He used marijuana primarily for recreational purposes. (Tr. 32-34, 41-45) Applicant submitted two supplemental documents: a personal statement, and a copy of his job offer from a federal agency, both of which were considered in this case. (AE A and AE B)

### **Policies**

“[N]o 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.” *Id.* at 527. The

President has authorized the Secretary of Defense or his designee to grant applicants 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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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 guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

## Analysis

### Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is described 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.

Applicant's admissions and the evidence presented in this case establish the following disqualifying conditions:

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

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 26(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 before and during college. He continued to use marijuana despite his arrest for possession of marijuana in his college dorm room, followed by a forced withdrawal from college without the possibility of returning.

Applicant also continued to use marijuana well after the initiation of the security clearance process. He submitted his SCA in May 2022, and used marijuana in June 2022 just before his interview with DOD investigators on June 15, 2022. He used marijuana again in October 2022 before completing his response to interrogatories. Finally, he used marijuana in December 2022, which he said was the last time. Applicant's employer has a drug-free workplace policy, and as a condition of employment, he signed an agreement not to use illegal drugs. None of the mitigating conditions are applicable here. Applicant has not mitigated the drug involvement and substance misuse security concerns in this case.

#### **Guideline E, Personal Conduct**

The security concern under this guideline is described 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

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

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

At the hearing, Applicant admitted he deliberately falsified responses to the above SCA questions. He testified he took this action because he was concerned that admitting his illegal drug involvement, including his drug use, purchase, and being arrested for illegal drug possession would hinder his ability to obtain a security clearance. AG ¶¶ 16(a) and 16(e) are applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

AG ¶ 17(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; and

AG ¶ 17(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.

AG ¶¶ 17(a) and 17(d) are only partially applicable. Applicant's subsequent discussion with DOD investigators concerning his drug involvement, including his unlisted prior drug use, periodic purchases, and his arrest for drug possession is insufficient to mitigate his personal conduct security concerns. Moreover, these subsequent disclosures to DOD investigators did not amount to a prompt, good-faith effort to correct his prior omission in this case. Applicant is credited with abstaining from illegal drug involvement for about a year, but he has not obtained counseling or taken other objective steps to demonstrate he has changed his behavior towards illegal drug involvement. The evidence in this case leaves me doubts about whether he has overcome his personal conduct security concerns with respect to drug involvement.

AG ¶ 17(c) is not applicable. Comments discussed in Guideline H above also apply here. Applicant exercised extremely poor judgment by continuing to use marijuana. He also falsified multiple questions on his SCA. His conduct casts doubt on his reliability, trustworthiness and judgment, and demonstrates an unwillingness to comply with federal rules and regulations.

### **Whole-Person Concept**

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. In applying the whole-

person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all evidence in the whole-person context, I conclude Applicant did not mitigate security concerns under Guidelines H (drug involvement and substance misuse) and E (personal conduct).

### **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 - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a - 2.c:	Against Applicant

### **Conclusion**

It is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Gatha LaFaye  
Administrative Judge