



DEPARTMENT OF DEFENSE

DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:)
)
) ISCR Case No. 23-02031
)
 Applicant for Security Clearance)

Appearances

For Government: Aubrey DeAngelis, Esq., Department Counsel
 For Appellant: Daniel P. Meyer, Esq.

08/06/2024

Decision

MASON, Paul J., Administrative Judge:

Applicant has provided persuasive evidence demonstrating that it is highly unlikely that she will use any illegal drugs in the future. She is genuinely remorseful for using drugs while possessing a security clearance. Guideline H (Drug Involvement) and Guideline E (Personal) have been mitigated.

Statement of the Case

On October 7, 2022, and January 30, 2021, Applicant submitted Electronic Questionnaires for Investigations Processing (e-QIPs) to obtain security clearance required for her position with a defense contractor. On November 22, 2022, and November 28, 2022, Applicant provided personal subject interviews (PSIs) to an investigator from the Office of Personnel Management (OPM). The Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) could not render affirmative findings required to grant a security clearance, and issued to Applicant a Statement of Reasons (SOR), dated October 24, 2023, detailing

security concerns raised by the guidelines for drug involvement (Guideline H) and personal conduct (Guideline E). The action was taken under Executive Order (E.O.) 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 in the DOD on June 8, 2017.

On October 31, 2023, Applicant provided an answer to the SOR admitting all allegations under drug involvement and personal conduct. She initially chose to have her case decided administratively without a hearing. On or about January 16, 2024, Applicant's request for a hearing in lieu of an administrative decision was granted. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 21, 2024, for a hearing on June 17, 2024. The hearing was held via Teams teleconference services as scheduled. The Government's three exhibits, (GE) 1 through 3, were entered into evidence without objection. Applicant's exhibits, originally identified as Tabs, are remarked as Applicant's Exhibits (AE) B, C, D, and E, were admitted into evidence without objection. The brief of Applicant's counsel contains other DOHA decisions that provide probative insight into the circumstances of this case. This brief and Applicant's closing statements have been evaluated. AE A and F are procedural items tracking the case and explaining Applicant's rights at the hearing. However, the brief and the two exhibits do not constitute evidence. DOHA received the hearing transcript (Tr.) on June 28, 2024, and the record closed the same day.

Findings of Fact

Applicant is 25 years old. She has been living with her partner since August 2022. In June 2021, she earned a bachelor's degree in computer science and linguistics. She is currently enrolled in a master's in computational statistics and is scheduled to graduate in May 2026. (GE 1 at 15, 32)

Applicant has been employed since August 2021 on the associate professor staff of a defense contractor. After receiving her bachelor's degree in June 2021, she was unemployed in July and August 2020. From August 2020 to June 2021, she was a software developer. From June 2020 to August 2020, she was a software intern. From January 2020 to June 2020, she initially was a software intern and became a software developer. Earlier, she worked as a teacher's assistant, a camp counselor, and a help desk technician. (GE 17-26; Tr. 12; AE E)

In December 2018, Applicant was a teacher's assistant at her college computer science department when she began ingesting edibles laced with marijuana. With her asthma, she preferred ingesting the drug through edibles because she could not tolerate the smoke emitted from cigarettes and marijuana. She used the drug less than ten times between December 2018 and September 2022, in homes or off-campus locations. She estimated that she used the drug recreationally about twice to three times a year during the period. She was motivated to use the marijuana by the peer

group influence of two friends who have rejected illegal drug use in favor of healthier activities like hiking. She never purchased the drug and has no ties to drug users. Her motivation to use mushrooms on one occasion in January 2021 was experimentation and peer group influence. (GE 1 at 65-66; GE 2 at 7; Tr. 14, 24-27)

When Applicant received a job offer from her current employer in November 2020, she did not believe that a security clearance would be required for the position. Before she filled out her first security clearance application in January 2021, she recalled several friends who were denied security clearance eligibility because of their illegal drug use. Even her brother's security clearance application was rejected for the same reason. Her decision to falsify the January 2021 security clearance application was partially based on her belief that telling the truth would simply put her in the same category as her friends who were denied security clearance eligibility because of their drug use. (The falsification was not the result of an oversight as she subsequently claimed in her November 2022 PSI.) Some of her friends even recommended that she conceal her illegal drug use from her application. Fortunately, Applicant took a drug test during the pre-employment process in late 2020 or early 2021, that resulted in negative findings for drug use. (Tr. 27-32)

Applicant received her security clearance in September 2021 and continued to illegally use marijuana. The nation was in the midst of the COVID pandemic (COVID) which saw her working remotely and waiting for OPM to interview her. That interview did not occur until November 2022. She had made few new friends at her new residential location and she was in the early portion of her master's program. (Tr. 12, 25, 32-37; AE C, E)

As COVID eased its grip on the nation, Applicant attained more responsibility at work, and more opportunities in 2022 to use her security clearance. She steadily increased her understanding of the importance of not using illegal drugs under any circumstances, specifically while holding a security clearance. When she was selected for a higher clearance, she decided she was going to "come clean" and tell the truth about her illegal drug use in her October 2022 e-QIP, although she anticipated experiencing much stress and anxiety during the subsequent security clearance adjudication. She also wanted to eliminate herself as a target for exploitation or coercion. By reporting her illegal drug use, she would have nothing to potentially conceal from an antagonistic entity. She decided that she did not want to use drugs in the future. To underscore her belief, she provided a signed sworn statement recognizing that future use of illegal drugs would be grounds for revocation of national security clearance eligibility. (Tr. 12, 16-17, 25, 32-37; AE C, E)

Applicant took a drug test in early January 2024, with negative test results for marijuana. Based on her counselor's biopsychosocial assessment in February 2024, she has an adjustment and anxiety disorder due primarily to the security clearance investigation where she could be denied security clearance eligibility. The counselor did not believe she met the criteria for a substance abuse disorder because: (1) there is no impaired control of her mental or physical faculties; and (2) no impaired social

functioning. Applicant is fully engaged in learning coping strategies to manage her stressors. (Tr. 38-40; AE E;)

Character Evidence

Applicant provided four character references from her supervisor, a coworker and two friends, one of whom is her partner. Reference #1 has known Applicant since college in 2019. The two became roommates in 2022. She considers Applicant to be trustworthy, ethical and honest. (AE D at #1) Reference #2 has been Applicant's supervisor. He lauded Applicant's reliability, work quality, and timeliness. He attributed Applicant's illegal drug use as a regrettable error in judgment that she will not repeat. (AE D at #2)

Reference #3, a data scientist at Applicant's employer, has known her since 2020. They have worked on large and small projects in the last two and a half years. She does not believe Applicant will use illegal drugs in the future. (AE D at #3)

Reference #4, Applicant's partner, is a journalist who began dating Applicant in 2019. Applicant's falsification of her security clearance application was based her misplaced belief that minor drug use did not have to be reported. According to Reference #4, Applicant appreciates the importance of not using drugs and complying with security regulations all the time. She is confident Applicant will not use illegal drugs in the future. (AE D at #4)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines, which should be applied with common sense and the general factors of the whole-person concept. All available and reliable information about the person, past and present, favorable and unfavorable, should be carefully reviewed before rendering a decision. The protection of the national security is the paramount consideration. AG ¶ 2(d) 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, 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.

Analysis

Drug Involvement and Substance Misuse

The security concern under the Drug Involvement/Substance Abuse Guideline is set forth 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.

In my analysis of this case, I have taken administrative notice of Executive Order (E.O.) 12564 signed by the then-President of the United States on September 15, 1986. The primary positions addressed in the E.O. are: (1) federal employees cannot use illegal drugs; (2) illegal drug use by federal employees, on or off duty, is contrary to the efficiency of the service; and (3) persons who use illegal drugs are not suitable for federal employment.

I have also taken administrative notice of the Director of National Intelligence Memorandum (October 25, 2014), *Adherence to Federal Laws Prohibiting Marijuana Use*, which clearly states that state laws do not authorize persons to violate federal laws, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule 1 controlled drug.

Changes in state laws or the District of Columbia, pertaining to marijuana use do not change the existing National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8, 2017). An individual's disregard of the federal law pertaining to marijuana involvement remains adjudicatively relevant in national security determinations.

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 illegal use, possession, production, and distribution of marijuana. Disregard of federal law relevant to marijuana use (including prior recreational marijuana use) remains relevant, but not determinative to adjudications of security clearance eligibility. Agencies are required to employ the "whole-person concept" stated under SEAD 4, to determine if an applicant's behavior raises a security concern that has not been mitigated.

AG ¶ 25. Conditions that could raise a security concern and may be disqualifying include:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant's illegal use of marijuana from December 2018 to September 2022, meets the definition of AG ¶ 25(a). In order to use the drug, Applicant had to possess it as defined by AG ¶ 25(c). AG ¶ 25(f) applies because she continued to use marijuana after she was granted a security clearance or a sensitive position in September 2021.

AG ¶ 26. Conditions that could mitigate security concerns include:

- (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.

Though Applicant's drug use did not cease until September 2022, it was infrequent and no longer raises doubts about her reliability, trustworthiness, and good judgment. While she and her two close friends used illegal drugs in the past, they have abandoned drug use for a healthy environment. She is significantly involved in important job assignments while pursuing a master's degree that she plans to complete in 2026. She provided a signed statement of intent to refrain from any drug use, acknowledging

that future drug use is grounds for revocation of security clearance eligibility. Applicant has taken complete responsibility for her past illegal drug use before and after receiving her security clearance in September 2021. AG ¶¶ 26(a), 26(b)(1), 26(b)(2), and 26(b)(3) apply to mitigate Applicant's illegal drug use.

Personal Conduct

The security concern for personal conduct is set forth 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 information. Of special interest is any failure to provide truthful and candid answers during the national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation or further processing for national security eligibility.

The potential disqualifying conditions under AG ¶ 16 are:

(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

(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....

Applicant demonstrated poor judgment and unreliability when she intentionally concealed her illegal drug use, including her drug use after she received a security clearance in September 2021. AG ¶ 16(a) applies due to Applicant's deliberate falsification of marijuana and mushrooms. AG ¶ 16(e)(1) applies based on Applicant's concealment of information about her illegal drug use that exposes her to vulnerability through exploitation or duress.

AG ¶ 17. Conditions that could mitigate security concerns include:

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

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

While Applicant exercised poor judgment in January 2021 by deliberately concealing her illegal drug use from her security clearance application, she voluntarily disclosed her drug use in her October 2022 e-QIP, because she wanted to tell the truth and eliminate her potential vulnerability to exploitation or duress. Though use of illegal drugs while possessing a security clearance is not a minor offense, I do not believe Applicant will return to illegal drug use in the future. AG ¶¶ 17(a), 17(c), 17(d), and 17(e) apply.

Whole-Person Concept

I have examined the evidence under the guideline for drug involvement/substance misuse in the context of the nine general factors of the whole-person concept 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 access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant is 25 years old. She has been living with her partner since 2022. She has been employed by a defense contractor since August 2021. Reference #2, Applicant's supervisor commended her reliability, work quality and timeliness. Based on

his observations of her, she is regretful that she used illegal drugs and Reference #2 does not believe she will repeat her past drug use.

The favorable evidence supporting a security eligibility is sufficient to overcome Applicant's illegal marijuana and one-time mushroom use between December 2018 and September 2022, including her use of marijuana after receiving a security clearance in September 2021. I found Applicant to be a credible witness who demonstrated remorse at the hearing. Considering all the evidence for and against Applicant under the two guidelines, together with the favorable character evidence from four character references, including her supervisor, Applicant has successfully met her burden of persuasion under Guidelines H and E.

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:	FOR APPLICANT
Subparagraphs 1.a,b:	For Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT
Subparagraphs 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

Paul J. Mason
Administrative Judge