



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-04223

Appearances

For Government: Andrea Corrales, Esquire

For Applicant: John V. Berry, Esq.

10/18/2018

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On January 9, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement).¹ Applicant answered the SOR allegations on March 5, 2018, and also requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I was assigned the case on May 10, 2018. On August 8, 2018, DOHA issued a notice of hearing setting the hearing for September 12, 2018. The hearing was convened as scheduled.

The Government offered three documents, accepted without objection as exhibits (Exs.) 1-3. Applicant gave testimony, introduced two character witnesses, and offered one packet of materials, which was accepted as Ex. A. The transcript (Tr.) was received on September 20, 2018, and the record was closed. Based on my review of the documentary evidence, testimony, and the Applicant's demeanor, I find that Applicant failed to mitigate Guideline H security concerns.

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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 or after June 8, 2017.

Findings of Fact

Applicant is a 40-year-old software engineer who has worked for the same defense contractor since he received his undergraduate degree in May 2000. He currently maintains a security clearance, first granted in approximately 2010-2011. Applicant is considered an excellent employee and has received near-yearly bonuses for performance. He has been married for about 15 years.

In July 2016, Applicant and his wife were on vacation, most of which took place on a cruise liner. On the day in question, the ship was docked in a foreign country in which there was debate concerning the possible decriminalization of recreational marijuana. The couple debated purchasing a couple of edible marijuana cookies they saw for sale on the street. After checking the Internet, they confirmed marijuana was still illegal in that country. (Tr. 35) They were familiar with the actual decriminalization of marijuana in the United States at the state level in at least two states. In a vacation "state of mind," curiosity got the best of them.² They noted that although decriminalization had not yet occurred where they were, police were not stopping the sale of marijuana edibles on a public square. They were curious about the products, even though Applicant was then maintaining a security clearance and drug use was antithetical to company policy. Seeing no arrests, the couple felt it was safe to purchase the drug-laced treats. (Tr. 36)

Although part of Applicant's mind told him it would be a mistake, the couple contemplated trying the cookies.³ (Tr. 18) Confident that his security officer was understanding, and that she⁴ was more interested in recurring patterns of poor behavior or activity that could be used as leverage for blackmail, he assumed that all would be fine as long as he reported any experimentation while on his "own time" when he returned to work.⁵ (Tr. 18-19) In the end, they bought about three of the cookies for about \$20 and returned to their hotel. They agreed to consume about half a cookie each, then go for a walk, carrying the other cookie halves with them for later.

After eating the marijuana treat and beginning their walk, both Applicant and his wife "had a terrible time." (Tr. 20) Feeling paranoid and lethargic, they returned to the hotel and laid down for about eight hours before going to sleep. On his first day back to work after vacation, Applicant reported the incident to his security officer, who was

² Applicant had previously tried marijuana in school, before applying for a security clearance. (Tr. 39)

³ Elsewhere, Applicant termed this mistake a "wrong decision" and a "bad decision." (Tr. 30-31)

⁴ Applicant's use of the feminine gender referenced his company's former security office, not the male security office to whom he ultimately reported his marijuana use. (see Tr. 18-25, 29-30, 37)

⁵ At the hearing, Applicant testified that, in retrospect, his former security officer was not totally accurate. He noted that it had not been stressed that "if the Government entrusts you with security clearance that you are – you should repay that trust with not breaking any of the Government's laws." (Tr. 25) He continued by stating, "[Y]ou know, it's one of those things that shouldn't have to be said, but is. You know, so I totally understand that you don't get a pass or any kind of lenience if you have a clearance." (Tr. 25)

disappointed in Applicant's behavior. (Tr. 21) Applicant has not used any illegal drugs since that time, and he has no intention to do so in the future. He has signed a statement of intent not to use drugs in the future under which, should he again use drugs, he will accept the revocation of any security clearance granted.

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. 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(c), 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 decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence.

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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can

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. This is 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. Such use also raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Here, Applicant maintained a security clearance when he purchased and consciously ingested a marijuana pastry, knowing it contained marijuana, knowing marijuana was illegal both in the United States and in his host country, and knowing that such illegal drug use was antithetical to the possession of a security clearance. His decision was deliberate and calculated, it was not spontaneous. It was made after observing local police react to the sale and use of such edibles and after conducting Internet research on the legal status of the drug. This is sufficient to raise AG ¶ 25:

- (a) any substance abuse . . . ,
- (b) illegal possession of a controlled substance, including [purchase]; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The Government's substantial evidence raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns. Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant's 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 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 purchased and ingested the marijuana baked good just over two years ago, so its use cannot be realistically considered to be "long ago." While it appears to have been an isolated instance of both purchase and of consumption, the

circumstances raise multiple atypical concerns. Applicant knowingly and intentionally broke drug laws while a guest on foreign soil. He did so after considerable thought, planning, research, and discussion. He knew marijuana was illegal back at his home in the United States and was barred from his workplace. He knew drug use was antithetical to the maintenance of a security clearance. In short, this was not a momentary lapse of judgment occasioned by a spontaneous act. This sort of consideration and rationalization has the potential for recurrence and clearly casts serious doubt on the Applicant's trustworthiness and judgment. Therefore, AG ¶ 26(a) does not apply.

On the upside, Applicant seems genuinely contrite for his judgment lapse. He has expressed his commitment to not use illegal drugs again in the future. He and his spouse are no longer in the foreign country at issue or in a domestic state in which marijuana may be legal to some degree at the state level. He has signed a statement of intent not to use drugs in the future under which, should he again use drugs, he will accept the revocation of any security clearance granted. While such factors tend to raise the mitigating conditions set forth at AG ¶ 26(b)(2)-(3), insufficient time has passed since the incident at issue to establish a meaningful pattern of abstinence and, indeed, to demonstrate a more inflexible understanding of the responsibilities incumbent on one granted a security clearance.

Whole-Person Concept

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant's conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed at AG ¶ 2(d). The final determination must be an overall commonsense judgment based on 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, and conducted a whole-person analysis based on the record. In addition to Applicant's past drug involvement and substance misuse, as well as issues of personal conduct, I considered his past and present personal life, developing career, references, education, candor and bearing at the hearing, and the entire record as a whole.

Applicant is a 40-year-old college graduate working as a software engineer. He is successful at work and a valued employee. Applicant has been married for over a decade. He was granted a security clearance during the 2010-2011 time frame. Then, just a little over two years ago, he illegally purchased and consumed a recreational marijuana product while abroad.

In this case, Applicant actively researched the local drug scene while a guest on foreign soil; intentionally broke that country's laws regarding marijuana; and knowingly breached the trust extended to him by the Government in terms of illegal drug use while entrusted with a security clearance. He apparently did so, at least in part, while under

the impression that any consequences could be ameliorated with his security officer after the conclusion of his holiday. His actions reflect more than a “bad decision” or a “wrong decision.” At best, this scenario reflects either exceptionally poor judgment or a troubling degree of naiveté. Regardless, more time is needed for Applicant to demonstrate his ability to comport his behavior properly, adhere to laws and regulations, and reflect a clear understanding of the responsibilities expected of one seeking a security clearance.

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
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Subparagraphs 1.a-1.b:	Against Applicant
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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 a security clearance. Eligibility for access to classified information is denied.

Arthur E. Marshall, Jr.
Administrative Judge