

KEYWORD: Drugs; Criminal Conduct

DIGEST: Applicant used marijuana at varying frequency from 1994 to early January 2005. Before ending his marijuana use in 2005, he began his unprescribed use of hydro-codeine in January 2004, and use hydro-codeine until June 2005. His unsubstantiated evidence in mitigation does not overcome his history of drug use under the drug involvement guideline. Though his handgun charge was cancelled in August 2005, his failure to adequately explain why he had the gun in his automobile precludes him from mitigating the pattern of criminal behavior under the criminal conduct guideline. Clearance is denied.

CASENO: 06-19569.h1

DATE: 04/20/2007

DATE: April 20, 2007

In Re:)	
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-----)	ISCR Case No. 06-19569
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
PAUL J. MASON**

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana at varying frequency from approximately 1994 until early January 2005. Before ending his marijuana use in 2005, he began his unprescribed use of hydro-codeine in January 2004, and used hydro-codeine until June 2005. His unsubstantiated evidence in mitigation does not overcome his history of drug use under the drug involvement guideline. Though his handgun charge was cancelled in August 2005, his failure to adequately explain why he had a gun in his automobile precludes him from mitigating the pattern of criminal behavior under the criminal conduct guideline. Clearance is denied.

STATEMENT OF CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On September 26, 2006, under Executive Order 10865 and Department of Defense Directive 5200.6, including revised Adjudicative Guidelines (AG) issued December 29, 2005, and implemented by the Department of Defense effective September 1, 2006, DOHA issued a Statement of Reasons (SOR) detailing the reasons for its security concerns raised under the drug involvement guideline (Guideline H), and the criminal conduct guideline (Guideline J) of the Directive. In his answer dated October 3, 2006, Applicant requested a decision be made on the record in lieu of a hearing.

A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the SOR) was sent to Applicant on January 12, 2007. Applicant received the FORM on January 24, 2007. Applicant's response to the FORM was due by February 23, 2007. No response was submitted. The case was assigned to me for decision on March 22, 2007.

FINDINGS OF FACT

The SOR alleges drug involvement and criminal conduct. Applicant admitted the factual allegations. His objective for seeking a security clearance is to provide more opportunities for his son that were not available for Applicant. He has done work on several military installations around the country and appreciates the meaning of national security. He believes he deserves forgiveness. Applicant is 33 years old and employed as a project engineer with a defense contractor. He seeks a secret security clearance.

Concerning the first drug allegation (1.a.), Applicant indicated the bulk of his marijuana use was in college. According to his security clearance application (SCA), he attended college in about 1993, during the time he was an intern at the Department of Energy in 1993 (Item 4). Applicant used the drug to: (1) increase his chances of getting accepted by his peers; (2) contend with a bad relationship with his father; and, (3) medicate serious back pain caused by a football injury and several car accidents. Applicant used the drug twice during New Year's Eve and New Year's day 2005 "for old time's sake." He has used no marijuana since then. (Item 3). Applicant used hydro-codeine (1.b.) between January 2004 and June 2005 to reduce lower back pain. He was offered the drug as a gift. When the intensity of his back pain reduced, Applicant replaced his hydro-codeine use with over-the-counter medications.

In October 1994, Applicant was arrested for possession of marijuana (1.c.). He pled guilty, performed community service and was fined. Twelve months later, Applicant was cited for the same offense. This time he paid a \$500.00 fine, and his driving privileges in the state were revoked for one year.

In May 1998 (1.e.), Applicant's friend needed a ride to the airport, and "being the Good Samaritan," Applicant agreed he would drive the friend. They were arrested and charged with (1) conspiracy to sell/deliver controlled substance marijuana, a felony, (2) possession with intent to sell/distribute marijuana, felony, (3) possession of marijuana, felony, and (4) maintaining a vehicle/dwelling of controlled substance, a felony. He pled guilty to a misdemeanor of maintaining a vehicle/dwelling of a controlled substance. He was sentenced to 45 months incarceration, placed on 24 months probation, and fined \$200.00. Though Applicant maintains that he was only providing

a ride for his friend to the airport, Applicant pled guilty to the plea bargain due to insufficient funds and a lack of confidence his friend would tell the truth at trial. Applicant no longer associates with drug users and is more conscious of the individuals he associates with.

The drug offenses in 1.c., 1.d., and 1.e. constitute criminal behavior (2.a. of the SOR) that Applicant acknowledges. His answer to 2.b. is that the charge (handgun in a vehicle) was cancelled as the gun is legally owned.

Applicant noted he traveled to foreign countries and accomplished “various lifetime achievements,” but none as important as being told that his wife was expecting a child. Applicant provided no evidence about those achievements. He provided no additional evidence about his reputation on or off the job.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) “[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant’s security suitability.” ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Drug Involvement (Guideline H)

Improper or illegal involvement with drugs raises questions regarding an individual’s willingness or ability to protect classified information. Drug abuse may impair social or occupational functioning.

Criminal Conduct (Guideline J)

Violating the law shows poor judgment and unreliability.

CONCLUSIONS

Drug abuse raises questions about a person's willingness to comply with drug laws and other laws, as well as security rules and regulations. If a person demonstrates a propensity to violate the law by using illegal or unprescribed drugs to satisfy his personal desires, then there is good likelihood he may adopt the same posture toward security regulations he disagrees with. Applicant used marijuana at varying frequencies from 1994 (during college) until January 2005. Drug Involvement (DI) disqualifying condition (DC) 25. (a) (*any drug abuse*) applies to Applicant's marijuana use, while DI DC 25. (a) and DI DC 24. (b) (*drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction*) apply to Applicant's hydro-codeine use from January 2004 to June 2005. It is reasonable to infer that marijuana use quickly became an integral part of his lifestyle as evidenced by his convictions for possession of marijuana in 1994 and 1995. The convictions exemplify poor judgment in that he was willing to possess and/or use the drug while driving his automobile. Applicant's conviction in 1998 for maintaining a vehicle/dwelling where a controlled substance is located raises even more concerns about the level of his involvement with marijuana. These concerns are substantiated by the severity of the sentence that included probation for two years. DI DC 25. ©) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution . . .*) applies.

There are four mitigating conditions that may apply to the evidence of drug abuse. DI mitigating condition (MC) 26. (a) (*the behavior happened so long ago, was so infrequent, or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*) does not apply as his drug use did not end until June 2005, less than 18 months before the date of the SOR. DI MC 26. (b) (*a demonstrated intent not to abuse any drugs in the future*) has not been established due to the lack of independent evidence to conclude Applicant's drug use is clearly in the past. The reason for Applicant's decision to use marijuana at the beginning of 2005, "for old time's sake," does not inspire sufficient confidence to conclude he will not use the same reason to use the drug in the future. The DI guideline is found against Applicant.

A pattern of criminal conduct (CC) raises doubt about a persons's judgment, reliability and trustworthiness. Applicant's criminal behavior from 1994 to August 2005 represents a pattern of adverse conduct that activates CC DC 31. (a) (*a single serious crime or multiple lesser offenses*) applies. Applicant's two convictions in 1994 and 1995 for marijuana possession, and the 1998 conviction for maintaining a dwelling where a controlled substance is located fall within the scope of CC DC 31. (a). Even though Applicant considers himself innocent of any of the offenses he was charged with in 1998, he has provided insufficient extenuation or explanation to warrant the application of CC MC 32. ©) (*evidence that the person did not commit the offense*), due to his criminal record for the same type of offense before 1998. The fact that the handgun offense in August 2005 was canceled because he had a license for the gun, does not eliminate the poor judgment associated with carrying a handgun in a automobile. There is no evidence Applicant is a law enforcement officer; there is no evidence he is a correctional officer or a deputy; there is no evidence Applicant had a specific reason for possessing the handgun in an automobile. The fact the gun was licensed to him does not adequately explain why he had the weapon in his vehicle. The CC guideline is found against Applicant.

Applicant's failure to satisfy the mitigating conditions under the specific guidelines is not necessarily dispositive, as the general factors of the whole person model may support an overall finding in Applicant's favor. While Applicant's drug use in 1994 and 1995 is extenuated by his youthful age during the period, Applicant continued to use marijuana, and then hydro-codeine until he was 31 years old. The three drug convictions demonstrate the degree to which drugs were a part of Applicant's lifestyle. While he claims that his life has changed now that he knows he will be a father, and he no longer associates with drug users, he has failed to produce the necessary evidence under 2. (a)(6) (*the presence or absence of rehabilitation and other permanent behavioral changes*) to support his drug-free claim in the future. Without ample evidence of permanent behavioral changes, there are inadequate bases for me to find for Applicant under the DI and CC guidelines.

FORMAL FINDINGS

Paragraph 1 (Drug Involvement, Guideline H):	AGAINST THE APPLICANT
Subparagraph a.	Against the Applicant.
Subparagraph b.	Against the Applicant.
Subparagraph c.	Against the Applicant.
Subparagraph d.	Against the Applicant.
Subparagraph e.	Against the Applicant.
Paragraph 2 (Criminal Conduct, Guideline J):	AGAINST THE APPLICANT.
Subparagraph a.	Against the Applicant.
Subparagraph b.	Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Paul J. Mason
Administrative Judge