

KEYWORD: Drugs; Criminal Conduct; Personal Conduct

DIGEST: The Applicant's Drug Involvement is not recent. He last used marijuana in 1997, about ten years ago. He "got religion," turned his life around, and has no intention of marijuana in the future. The Applicant's one and only conviction for Promoting Contraband in the 1st Degree - Class C Felony, occurred nearly 20 years ago in 1988. This conviction was "set aside" by a court order in 1990. As a result, the Applicant thought he did not have to disclose this conviction in answer to question 23.a. on his November 2005 Electronic Questionnaires for Investigations Processing (e-QIP). As his last marijuana usage occurred in 1997, he did not disclose this Drug Involvement in answer to question 24.a. on his e-QIP. Mitigation is shown. Clearance is granted.

CASENO: 06-19905.h1

DATE: 04/18/2007

DATE: April 18, 2007

In Re:)	
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-----)	ISCR Case No. 06-19905
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
RICHARD A. CEFOLA**

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esquire, Department Counsel

FOR APPLICANT

Alan L. Schmitt, Esquire, Applicant's Counsel

SYNOPSIS

The Applicant's Drug Involvement is not recent. He last used marijuana in 1997, about ten years ago. He "got religion," turned his life around, and has no intention of marijuana in the future. The Applicant's one and only conviction for Promoting Contraband in the 1st Degree - Class C Felony, occurred nearly 20 years ago in 1988. This conviction was "set aside" by a court order in 1990. As a result, the Applicant thought he did not have to disclose this conviction in answer to question 23.a. on his November 2005 Electronic Questionnaires for Investigations Processing (e-QIP). As his last marijuana usage occurred in 1997, he did not disclose this Drug Involvement in answer to question 24.a. on his e-QIP. Mitigation is shown. Clearance is granted.

STATEMENT OF THE CASE

On September 29, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on October 25, 2006.

The case was originally assigned to another Administrative Judge, but was reassigned to the undersigned on March 19, 2007. A notice of hearing had already been issued on February 27, 2007, and the case was heard on April 4, 2007. The Government submitted documentary evidence, and called one witness to testify. Testimony was taken from the Applicant, who called four witnesses to testify on his behalf, and also submitted documentary evidence. The transcript (TR) was received on April 13, 2007. The issues raised here are whether the Applicant's past Drug Involvement, past Criminal Conduct, and perceived Personal Conduct militate against the granting of a security clearance. [The Applicant denies all of the allegations, except for 1.b. and 2.a. as they both related to his 1988 arrest and subsequent conviction.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 45 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional Findings of Fact.

Guideline H - Drug Involvement & Guideline E - Personal Conduct

1.a. and 1.b. The Applicant used marijuana, with varying frequency from about 1983 until his last usage during "the first six months" of 1997 (TR at page 99 line 16 to page 100 line 2, at page 110 lines 7-22, and at page 122 line 16 to page 123 line 13). During the 1980's, he smoked

marijuana mostly with his sister in state A, and in the 1990's mostly with others in state B (*Id*). Since moving back to state A from state B, in 1997, he no longer associates with his sister, has become a religious person, and has ceased any Drug Involvement (TR at page 99 line 16 to page 100 line 2, at page 110 lines 7~22, and at page 122 line 16 to page 123 line 13). His “getting religion” and last marijuana usage is corroborated by three witnesses (TR at page 56 lines 7~23, at page 66 line 23 to page 69 line 14, at page 73 line 20 to page 74 line 12, and at page 84 lines 3~20).

2.b. and 3.b. In answering question 24.a. on his November 2005 e-QIP, the Applicant did not disclose his past Drug Involvement, as it did not occur “in the last 7 years” (TR at page 89 line 13 to page 91 line 19, and Government Exhibit (GX) 1 at page 23).

Guideline J - Criminal Conduct & Guideline E - Personal Conduct

2.a. In 1988, the Applicant was arrested for, and subsequently pled no contest to, Promoting Contraband in the 1st Degree - Class C Felony (GX 2). He was a guard at a correctional facility, and introduced some marijuana into the facility in order to avoid a threat from an inmate (GX 3). In 1990, this conviction was “set aside” by a court order (AppX A).

2.b. and 3.a. In answering question 23.a. on his November 2005 e-QIP, the Applicant did not disclose his felony conviction, as he thought it was “set aside;” and as such, he did not have to disclose it (TR at page 102 line 2 to page 103 line 7, at page 122 lines 3~15, and GX 1 at page 22). He had no intention of keeping this information from the Government (TR at page 122 lines 3~15).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out a case under Guidelines H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

A pattern of Criminal Conduct and illegal Drug Involvement raise questions regarding an individual's willingness or ability to protect classified information. Unacceptable Personal Conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

Considering first the Applicant's past Drug Involvement, the Applicant used marijuana from about 1984 until his last usage in 1997. The first and third disqualifying conditions are therefore applicable. There was "drug abuse," and a "distribution." However, I find the first and second mitigating conditions applicable here, as "the behavior happened so long ago [in 1997] . . . that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," and the Applicant has a "demonstrated intent not to abuse any drugs in the future."

Considering next his Criminal Conduct, there was a conviction in 1988 that was later set aside. I find the first disqualifying condition applicable, as there is "single serious crime." This is countered, however, by the first and fourth mitigating conditions. The "so much time has elapsed since the criminal behavior, 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." There is also "evidence of successful rehabilitation."

Finally as to his alleged Personal Conduct, I find no wilful falsification here. His last drug involvement occurred more than 7 years ago; and as such, there was no requirement that it be disclosed. As to the failure to report the felony conviction, the Applicant thought that by it being set aside, he was not required to disclose it.

Furthermore, I am not limited to the mitigating conditions, delineated in the Directive, in deciding if an Applicant has demonstrated extenuation or mitigation. Here, those who know the

Applicant at the workplace, and in the community, speak most highly of his character, credibility and trustworthiness (AppXs B~D). The totality of the Appellant's conduct and circumstances, as set forth at length above, clearly warrants a favorable Decision under the "whole person concept." Mitigation is shown; and as such, Guidelines H, J and E are found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his Drug Involvement, Criminal Conduct, and Personal Conduct. The Applicant has thus met the mitigating conditions of Guidelines H, J and E, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guideline H, J and E.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.

Paragraph 3: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Richard A. Cefola
Administrative Judge