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OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 2, 2011

Case Number: TSO-1003

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization ("security clearance" or "clearance") should be granted.¹

I. Background

The individual has been employed by a Department of Energy (DOE) contractor since 2010. His employer requested that DOE grant the individual a clearance. The individual completed a Questionnaire for National Security Positions (QNSP) in August and September 2010, and on the QNSPs he indicated that he had used a controlled substance that was prescribed to his wife. The local security office (LSO) conducted a personnel security interview (PSI) with the individual in November 2010, and he admitted that, over a two-day period in February 2010, he had used three pain pills that were prescribed for his wife.

In December 2010, the LSO informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his continued eligibility for access authorization. See Notification Letter (December 2, 2010). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (k) (Criterion K) and also section 1072 of the National Defense Authorization Act for Fiscal Year 2008 (50 U.S.C. § 435b, section 3002) (the Bond Amendment), which statutorily prohibits federal agencies from allowing "an unlawful user of a controlled substance or an addict" to hold a security clearance. 50 U.S.C. § 435c(b).

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

DOE invokes Criterion K when a person has allegedly trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances except as prescribed or administered by a physician or as otherwise authorized by Federal law. 10 C.F.R. § 710.8 (k). DOE invoked Criterion K because of the individual's admission that, in February 2010, he used three of his wife's Vicodin tablets over two days to relieve pain.

The individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual testified on his own behalf and called seven other witnesses. DOE counsel did not call any witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the parties during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." DOE exhibits are numbered, and the individual's exhibits are lettered.

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, I find that the individual's access authorization should be granted because I conclude that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

The individual worked for a private employer for over 25 years in a job that was physically demanding on his knees. Over the years, he had three knee surgeries, and his doctors prescribed pain killers for his pain. Tr. at 129. The individual resigned from his job in September 2009. *Id.* at 122. When he resigned, he also lost his reasonably priced group health insurance. *Id.* at 125. His wife had pre-existing health conditions that required expensive monthly prescriptions, but he could not afford to buy health insurance because the monthly premiums were costly, from \$800 to \$1500 per month. *Id.* at 125-126. After he resigned, he began doing remodeling work that was also physically demanding. In February 2010, he was working on a house with a very steep roof that required frequent trips up and down a ladder. *Id.* at 123. The family was low on money and food, had experienced a very lean Christmas, and barely managed to pay their utilities. *Id.* at 47. One Friday evening in February 2010, he arrived home in excruciating pain with a swollen knee. He could barely walk, and his knee was swollen to the size of a cantaloupe, and felt like someone had drilled a hole in it. *Id.* at 130. When he came home that night, he could not walk up the final step to their home, and his wife had to help him inside to a chair. He sat down to rest, told his wife that he was in extreme pain, and she brought him a pill and some water. He took the pill without questioning her, and then took two others the next day.² The next morning his knees were still swollen and he had to use crutches. *Id.* at 46-48.

The individual's friend recommended him for a job at the DOE facility. He was hired, and the employer requested that DOE grant him a clearance. He completed a QNSP in August and September 2010 (Ex. 4-5), and noted that he had used three Vicodin for knee pain in February 2010. Ex. 4-5. The LSO conducted a PSI with the individual in November 2010 (Ex. 6), but that did not resolve the security concerns. In December 2010, the LSO sent him a Notification Letter with information on how to resolve the security concerns.

B. DOE's Security Concerns

Criterion K deals with the use of controlled substances. Drug abuse (defined as the use of a legal drug in a manner that deviates from approved medical direction) may impair judgment and cause questions about the ability of an individual to comply with laws, rules and regulations. See *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, Memorandum from Assistant to the President for National Security Affairs to Director, Information Security Oversight Office (December 29, 2005) (Guidelines), Guideline H, ¶ 24. The Bond Amendment precludes the granting of a security clearance to an individual who "is an unlawful user of a controlled substance." 50 U.S.C. § 435c(b); Case No. TSO-956 (2010). As stated above, the individual admitted that during a two-day period he took three Vicodin tablets that were prescribed for his wife. The

² The wife testified that she did not have any aspirin in the home. Tr. at 48.

individual's use of his wife's prescription painkiller is well documented in the record, and validates the concerns under Criterion K and the Bond Amendment.

C. Hearing Testimony

The individual testified at the hearing, and also called his wife, daughter, sister, and four colleagues as character witnesses. At the hearing, the individual did not deny that he had used his wife's prescription medicine. Rather, he provided testimony that he was not an unlawful user of a controlled substance and that this was an isolated event that was unlikely to recur.

The individual testified that he had never taken any illegal drugs or another person's prescription medications at anytime prior to February 2010, and that he had not allowed anyone to take any of his prescription medications. *Id.* at 131. He explained that if he has another injury, he would go to the doctor. He now has medical insurance again. Because he wanted to tell the truth on all of his documentation, he was very honest on his QNSP and admitted that he took his wife's prescription drug. *Id.* at 133-134. He does not intend to use anyone's prescription medications again. *Id.* at 135. He would have signed a drug certification, if one had been offered to him. *Id.* at 137.

All of the character witnesses described the individual as an honest and truthful person. Tr. at 17-45; 102-109. In fact, they note that the hearing process began when he self-reported his one-time use of the prescription drug. They considered him extremely dependable, hardworking, and an exemplary human being. His wife testified that he was not the type of person that usually takes any medication, but instead prefers to "work through" his pain. *Id.* at 49. However, he was in such severe pain that night in February 2010, that she told him to take one of her pain pills so that he would not suffer any longer. *Id.* at 48. None of the witnesses has seen any evidence that the individual used drugs. *Id.* at 39-73. They testified that he spends his free time with his family, working on his farm, and helping his daughter to renovate her house.

D. Mitigation of Security Concerns

1. Criterion K – Drug Use

According to the regulations, I must rely on the record and my observations at the hearing, and make a common-sense judgment on this matter as directed by 10 C.F.R. § 710.7(c). I have weighed several variables, including the circumstances surrounding the conduct and the motivation for the conduct. For the reasons set forth below, I find that the individual has presented sufficient evidence to mitigate the security concerns regarding his isolated use of his wife's prescription pain medicine over one year prior to the date of the hearing.

After carefully assessing the credibility of all the witnesses and considering their demeanor, I conclude that the individual's use of the prescription drugs in question was isolated, and happened under such circumstances that it is unlikely to recur, and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. See Guideline H, ¶ 26(a) (stating that security concern may be mitigated by behavior that happened under

such circumstances that it is unlikely to recur).³ The circumstances surrounding this incident were clearly atypical for the individual. First, the individual had been putting unusual strain on his already damaged knees—he did not typically spend his days ascending and descending a ladder because his knees were weakened by years of hard physical work earlier in his career. Thus, by the end of that day in February 2010, he suffered excruciating pain and his knee was extremely swollen. Further, for the first time in over 25 years he did not have access to health insurance that would have enabled him to see a doctor at an affordable cost. His financial situation was precarious at the time, and his wife’s required prescriptions for her medical conditions already ate deeply into the family budget. In addition, he was self-employed, had no helpers, and had a job to finish, so that he needed to alleviate the pain in order to resume work on Monday morning. Finally, the individual had been prescribed pain medicine for knee pain in the past.

I also find that the security concern is mitigated by the passage of time. There is credible evidence that the individual’s last, and only, use of his wife’s prescription pain medicine occurred 16 months prior to the hearing. *See Personnel Security Hearing, Case No. TSO-0625 (2008)* (finding that 15 months of abstinence lends credence to testimony of individual that she does not intend to use drugs in future); Guideline H, ¶ 26(b)(3) (stating that security concern may be mitigated by an appropriate period of abstinence). All of the witnesses testified credibly that the individual did not use any type of illegal drugs, and did not abuse legal drugs.

The individual has convinced me that the isolated use of his wife’s prescription pain pills is very unlikely to recur. Guideline H, ¶ 26 (a). Therefore, taking into account all of the facts and circumstances surrounding his isolated use of a prescription drug, I conclude that he has mitigated the Criterion K concern.

2. Bond Amendment

The Bond Amendment provides that “the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance. . . .” 50 U.S.C.A. § 435c(b). The evidence in the record supports a finding that the usage was isolated, and was not recent enough to indicate that he is actively engaged in the conduct or is a habitual user.⁴ *See Personnel Security Hearing, Case No. TSO-0938 (2010)* (finding that misuse of prescription drugs was an isolated incident and thus individual is no longer an unlawful user of a controlled substance or an addict within the meaning of the Bond Amendment); *see also* Memorandum from Mark Pekrul, DOE Office of Departmental Personnel Security, Bond Clarification (December 21, 2010) (comparing one-time use with habitual use).

³ I also note that the individual demonstrated his honesty and trustworthiness when he self-reported the use of his wife’s painkillers, because there is no evidence that the LSO would have discovered this information otherwise.

⁴ In August 2010, the LSO had prepared to remove the individual from the site immediately, but abruptly stopped, apparently because the individual was not determined to be a current user of a controlled substance. PSI at 50-52, 56-57.

III. Conclusion

As explained in this Decision, I find that the LSO properly invoked 10 C.F.R. § 710.8 (k) and the Bond Amendment. However, after a review of the record, I find that the individual has presented adequate mitigating factors to alleviate the security concerns under Criterion K and the Bond Amendment. Thus, in view of the criteria and the record before me, I find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be granted. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: July 15, 2011