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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Personnel Security Hearing)
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Filing Date: October 15, 2012) Case No.: PSH-12-0122
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Issued: February 15, 2013

Hearing Officer Decision

Kimberly Jenkins-Chapman, Hearing Officer:

This Decision concerns the eligibility of xxxxxxxxxxxxxx (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual’s access authorization should not be restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In December 2011, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual to address concerns about the individual’s falsification and drug use. On September 7, 2012, the LSO sent

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

a letter (Notification Letter) advising the individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f), (k) and (l) (hereinafter referred to as Criteria F, K and L, respectively).²

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented his own testimony and that of one witness, his father. The DOE counsel did not present any witnesses. The DOE presented a number of written exhibits prior to the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *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).

² Criterion F pertains to information that a person has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personal security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). Criterion K concerns information that a person has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(l). Finally, Criterion L relates to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . ." 10 C.F.R. § 710.8(l).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for Hearing Officer’s Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person’s access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites three potentially disqualifying criteria as bases for suspending the individual’s security clearance, Criteria F, K and L. To support its reliance on Criterion F, the LSO alleges that the individual deliberately omitted information from two Questionnaires for National Security Positions (QNSPs) (October 2009 and October 2010) regarding his illegal drug use. From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (*Adjudicative Guidelines*).

The LSO’s Criterion K concerns are predicated on the individual’s admission that he smoked marijuana while in high school. There are significant security concerns associated with past or current illegal drug usage. First, engaging in criminal conduct can raise questions about a person’s ability or willingness to comply with laws, rules and regulations. *See* Guideline H, *Adjudicative Guidelines*. Second, illegal drugs can impair a person’s judgment which, in turn, can raise questions about the person’s reliability and trustworthiness. *Id.* Moreover, from a

common sense standpoint, a person's reliability and trustworthiness are questionable when he or she knowingly associates with persons who use illegal drugs.

As for Criterion L, the LSO alleges that the individual, during an OPM investigative interview in November 2010, denied that he had ever had any involvement with any controlled substance. However, during a December 2011 PSI, the individual admitted that he smoked marijuana while in high school, last smoking marijuana in 2006 when he was 19 years old. The individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

On October 28, 2009 and October 11, 2010, the individual completed QNSPs certifying that he had not used any illegal substances, including marijuana, within the preceding seven years. DOE Exh. 4. In March 2011, the U.S. Office of Personnel Management (OPM), conducted a background investigation on the individual. *Id.* During the OPM interview, one source who was characterized as the individual's friend and as having had "extensive" contact with the individual from 1993 until the date of the OPM interview, reported that when the source and the individual were both approximately 14 years old (2001), they smoked marijuana together with two other friends. *Id.* In addition, a second interview source, who was characterized as an acquaintance of the individual and as having had regular contact with the individual from 1998 until the date of the interview, recalled an incident where the individual, who was 15 or 16 years old at the time, was caught being in possession of marijuana by the individual's father. *Id.*

This information prompted a PSI of the individual in December 2011. *Id.* During this PSI, the individual was questioned about his involvement with controlled substances. *Id.* The individual recalled that he graduated from high school in 2006. However, when asked whether he was involved with marijuana during that time frame, he responded, "No." He could not explain why it had been reported in his background investigation that he had smoked marijuana. *Id.* The individual characterized the reports about his marijuana use as a "false statement without a doubt" and denied ever smoking, buying or selling marijuana or any other controlled substance. *Id.* The individual was then offered an opportunity to participate in an exculpatory polygraph examination in order to determine the veracity of his denial. He initially agreed to participate, but later after being presented with a waiver and being advised that his participation was voluntary, the individual admitted that he smoked marijuana "a few times" in high school. When asked why he had denied having smoked marijuana earlier in his PSI, the individual stated that he had not been truthful because he was "just scared." *Id.*

Later, during the course of his PSI, the individual admitted that he first smoked marijuana when he was a freshman in high school, and from that time until he graduated, he smoked marijuana about 50 times. *Id.* He also estimated that he last smoked marijuana when he was 19 years old and added that he had “bought small amounts of it [marijuana] before with friends” In addition, the individual admitted that he had not reported his marijuana use on his QNSPs because he was scared. *Id.*

V. Analysis

I have thoroughly considered the record in this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. 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)³ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual’s access authorization should not be restored. I cannot find that restoring the individual’s DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Criterion F

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual’s misrepresentations was serious. The individual’s lack of candor concerning his marijuana use could increase his vulnerability to coercion or blackmail and raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful. This important principle underlies the criteria set forth in 10 C.F.R. § 710.8(f).

During the hearing, individual was asked why he answered “No” on his 2009 and 2010 QNSPs regarding whether, within the preceding seven years, he had illegally used any controlled substances, to include marijuana. Transcript of Hearing (Tr.) at 40. He testified that he answered “No” because he was not aware of the “severity” of his response. *Id.* The individual further testified that he did not want to portray himself in a negative light and answered falsely because he wanted to keep his job. *Id.* He stated that he read the security forms, although he admitted that he should have read the forms more carefully. *Id.* at 41. The individual further

³ Those factors include the following: 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 at the time of the conduct, the voluntariness of his 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 continuation or recurrence, and other relevant and material factors.

testified that he recalled certifying that he answered the security forms truthfully. Finally, the individual admitted that he deliberately misrepresented information on his QNSPs. *Id.* at 42. He reiterated that he answered “No” about his drug usage because he wanted to make a favorable impression and did not “want it to seem like [he] was irresponsible.” *Id.* at 43. Based on the foregoing, I find that the individual deliberately falsified his QNSPs, lied during his 2011 OPM interview and lied during the 2011 PSI.

To determine whether the individual has mitigated the Criterion F concerns, I considered the relevant factors set forth in Adjudicative Guideline E. I find that none of the relevant factors apply in this case. Specifically, the individual did not meet ¶ 17(a) because the individual did not make prompt, good-faith efforts to correct his omission, concealment, or falsification before being confronted with the facts during his 2011 PSI. He did not meet ¶ 17(c) because the individual’s four verified falsifications were serious and relatively recent. The individual’s behavior did not occur under such unique circumstances that it is unlikely to recur. In addition, the individual did not meet ¶ 17 (e) because he has not demonstrated that he has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.⁴ *See Adjudicative Guidelines* at Guideline E. Considering this, and the entirety of the record, I must conclude that the very serious concerns raised under Criterion F have not been resolved.

B. Criterion K

The Criterion K concern raised by the LSO is predicated on the individual’s illegal use of marijuana while in high school. During the hearing, the individual admitted to smoking marijuana, primarily in high school, from about the age of 15 to 19 years old. *Tr.* at 31. According to the individual, he smoked marijuana on about 50 occasions with friends. *Id.* The individual testified that he last used marijuana about six years ago, and testified that he no longer associates with the friends he used marijuana with in high school. *Id.* at 44. He further testified that he has no intention of ever using illegal drugs again. *Id.* at 45.

In evaluating the totality of the circumstances surrounding the individual’s illegal drug use, I have determined that the following factors do not weigh in the individual’s favor. First, the individual’s willful disregard for the law by using illegal drugs is a serious matter. Second, the individual’s conduct was both voluntary and knowing.

⁴ Guideline E Paragraph 17 outlines the conditions that could mitigate security concerns raised under Criterion F. Paragraph 17 (a) states that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Paragraph 17(c) states that “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.” Finally, Paragraph 17(e) states that “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” *The Adjudicative Guidelines* at Guideline E.

Against these factors, I weighed the following positive ones. First, the individual's testimonial evidence convinced me that he understands the seriousness of his past drug usage and is taking full responsibility for his actions. The individual's current behavior demonstrates that he is now comporting himself in an honest, trustworthy and responsible manner. Second, the evidence convinced me that the individual's youth and immaturity at the time he used marijuana contributed to his poor judgment in using illegal drugs. Third, the individual convinced me that he has not used illegal drugs for the last six years and does not associate with the same friends or with any persons who use drugs. Fourth, the individual's family is aware of his past illegal drug use, a fact that lessens his susceptibility to blackmail, coercion and undue duress. The individual's father testified that the individual has admitted his past drug usage to him. Fifth, the individual has provided convincing testimonial evidence that he will not use drugs in the future. In the end, the individual has provided credible testimonial evidence that lead me to conclude that his past use of illegal drugs is unlikely to recur. On balance, the weight of the evidence demonstrates that the individual is a responsible and focused adult who now understands the importance of following rules and laws. Accordingly, after carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has presented sufficient evidence to mitigate the Criterion K security concerns at issue.

C. Criterion L

The key issue under Criterion L is whether the individual has brought forward sufficient evidence to demonstrate that he is reliable and trustworthy, and that he is no longer subject to pressure, coercion, exploitation or duress. For the reasons set forth below, I find that the individual has not provided sufficient information to resolve the Criterion L concerns at issue.

The DOE's concerns under Criterion L are that 1) during a November 2010 OPM interview, the individual denied ever having any involvement of any kind with any controlled substance, and 2) the individual later admitted, during his December 2011 PSI, that he smoked marijuana while in high school and had "bought small amounts of it before" with friends.

Among the factors which could serve to mitigate the security concerns raised by the individual's dishonesty during his OPM interview and later admission to drug usage are (1) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; (2) the passage of time, the infrequency of the behavior, or that the behavior happened under such unusual circumstances that it is unlikely to recur in the future; and (3) the individual has acknowledged the behavior or has taken positive steps to alleviate the factors that caused untrustworthy, unreliable behavior and such behavior is unlikely to recur. *Id.* at ¶ 17 (a), (c) and (d). In this case, although the individual has acknowledged his dishonesty and has admitted to his past drug use, he did not make a prompt, good faith effort to correct his concealment, but only when he was confronted with the facts during his December 2011 PSI and

offered an opportunity to take a polygraph. Moreover, the individual has concealed his marijuana use for over three years, since completing his first QNSP in October 2009. Given that the individual's behavior with respect to his dishonesty is relatively recent, I am not yet convinced that the individual's behavior is unlikely to recur. After considering the "whole person," I am not convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. *See Adjudicative Guidelines* at (2)a. I therefore find that the individual has not sufficiently mitigated the LSO's concerns under Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Criterion F, K and L. After considering all the relevant information, favorable and unfavorable in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criterion K. However, I cannot find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criteria F and L. I therefore cannot find that restoring 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 not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Officer of Hearings and Appeals

Date: February 15, 2013