* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

United States Department of Energy
Office of Hearings and Appeals

In the matter of Personnel Security Hearing	)	
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Filing Date: March 28, 2012	)	Case No.: PSH-12-0025
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Issued: August 7, 2012

Hearing Officer Decision

Steven J. Goering, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as "the individual") for 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."[1] For the reasons set forth below, I conclude that the DOE should not grant the individual an access authorization at this time.

I. BACKGROUND

The individual is an employee of a DOE contractor and an applicant for an access authorization. To address concerns related to the individual's past use of alcohol and marijuana, other prior criminal conduct, and certain discrepancies in the record regarding the individual's conduct, a Local Security Office (LSO) summoned the individual for an interview (PSI) with a personnel security specialist on August 29, 2011. Exhibit 10. After the PSI, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. The LSO informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. Exhibit 1. The Notification Letter also informed the individual that he was entitled to a hearing before a hearing officer in order to resolve the substantial doubt concerning his eligibility for an access authorization.

[1] An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and I was appointed the hearing officer. The DOE introduced ten exhibits into the record of this proceeding. The individual introduced one exhibit, and presented the testimony of four witnesses, in addition to his own testimony.

II. DEROGATORY INFORMATION AND THE ASSOCIATED SECURITY CONCERNS

The Part 710 regulations require that I "make specific findings based upon the record as to the validity of each of the allegations" in the Notification Letter. 10 C.F.R. § 710.27(c). In this case, the Notification Letter cites paragraphs (f) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Exhibit 1. I address below the validity of the allegations set forth in the Notification Letter in support of the cited criteria.

A. Criterion (f)

Under criterion (f),[2] the Notification Letter cites statements it alleges the individual made during an October 13, 2011, interview with a psychologist (hereinafter referred to as "the DOE psychologist") to whom the individual was referred by the LSO for an evaluation.[3] Specifically, the Notification Letter alleges that the individual admitted in the interview that he did not report his last use of marijuana in the August 29, 2011, PSI because "that is what would make him look good." Exhibit 1 at 1 (quoting Exhibit 6 at 3). The Notification Letter further alleged that the individual admitted in the October 13, 2011, interview that he did not admit at the PSI that he had purchased a fake identification, even though he did recall doing so. *Id.* (citing Exhibit 6 at 4). At the hearing, the individual testified that he did not recall what he told the DOE psychologist, and specifically that he did not remember telling him that he incorrectly reported his marijuana use in the PSI in order to "look good." Hearing Transcript (Tr.) at 28, 59.

With respect to whether the individual made the statements ascribed to him by the report of the DOE psychologist, weighing the near-contemporaneous report of the DOE psychologist against the individual's lack of recollection, I find that the individual likely did make the statements cited in the Notification Letter. Exhibit 6 at 3-4 (October 16, 2011 report of DOE Psychologist discussing, *inter alia*, October 13 interview).[4]

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[2] Paragraph (f) defines as derogatory information that an individual has an 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 personnel 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. § 708.8(f).

[3] The individual was referred to the DOE psychologist for an opinion as to whether there were concerns meeting criteria (h) and/or (j), pertaining to mental illness and alcohol use, respectively. Exhibit 6 at 1-2. The DOE psychologist did not render a diagnosis that would constitute derogatory information under either criterion, and did not testify at the hearing in this matter. *Id.* at 8-9.

[4] At the hearing, Counsel for the individual asked that I exclude from the record, as hearsay, statements attributed to the individual by the DOE psychologist's report, in part because of a purported discrepancy between alleged statement that the individual misrepresented facts in the PSI in order to "look good," and a statement by the DOE psychologist that the individual is "basically an honest person." Tr. at 8-10. Counsel argued that, "without our ability to examine this witness," the discrepancy could not be resolved. *Id.* at 10. I ruled that these statements would not be excluded from the record, Tr. at 11, noting that, as a general matter, hearsay is not, *per se*, excluded from the record of

The Notification Letter further cites, also under criterion (f), court records showing that the individual was arrested and charged with possession of controlled substance on June 20, 2003, but notes that he omitted this charge from a Questionnaire for National Security Positions (QNSP) he completed on May 19, 2011. Exhibit 1 at 1. At the hearing, the individual did not deny that he omitted this charge from his QNSP, but testified that he was not arrested on this occasion, only issued a citation. Tr. at 60-61. Here, the record supports a finding that the individual was charged with possession of controlled substance on June 20, 2003, and that this charge was omitted from the individual's QNSP, Exhibit 9, but does not support a finding that the individual was arrested on that date, as the evidence of the court records presented references only a charge, not an arrest. Exhibit 7 (page from OPM investigative report regarding court records).

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B. Criterion (l)

Under criterion (l),[5] the Notification Letter lists a number of alleged charges brought against the individual, including one traffic violation in 2009, two in 2005, two in 2004, two in 2003, and one in 2000. Also cited are charges of possession of marijuana, possession of tobacco, DUI-metabolite, and counterfeit driver's license on one occasion in 2004, and the 2003 charge of possession of controlled substance discussed above. Finally, the Notification Letter alleges that, while serving in the U.S. military, the individual received an Article 92 under the Uniform Code of Military Justice (UCMJ) in 2006 after being cited for underage drinking and failure to obey a lawful order, and that in 2007 he received an Article 112A under the UCMJ and received a "Captain's Mast" punishment after he failed a drug test while on active duty and holding an active security clearance, and subsequently received an "Other Than Honorable Discharge." Exhibit 1 at 2-3.

In his hearing testimony, the individual affirmed the accuracy of the allegations cited in the Notification Letter under criterion (l). Tr. at 34. There being no dispute at to these allegations, I find them to be valid. The individual also testified that he cannot account for why he tested positive for a controlled substance, and had not used any controlled substance that would show up on a drug test. Tr. at 36-37. I address this below is discussing whether the concern raised by the positive drug test has been resolved.

C. The Security Concerns

The allegations in the Notification Letter discussed above, adequately justify the DOE's invocation of criteria (f) and (l), and raise significant security concerns. Failure to provide truthful and candid

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these proceedings, but rather accorded appropriate weight, such as in the case of the hearsay statements found in Office of Personnel Management (OPM) investigative reports that are routinely admitted into the record of Part 710 cases. *Id.* at 11-12. I also noted that, at the pre-hearing conference in this matter, I offered to issue a subpoena for the testimony of the DOE Psychologist if the individual was disputing the veracity of the statements the psychologist made in his report. *Id.* at 11. In response, Counsel for the individual neither requested a subpoena for the testimony of the DOE psychologist nor stated that it was disputing the factual accuracy of the relevant statements in his report. Memorandum to File, Case No. PSH-12-0025 (June 4, 2012). Finally, I do not find the "discrepancy" noted by Counsel for the individual when considering the following full statement of the DOE psychologist in his report: "I believe that he is basically honest but has willfully misrepresented some facts due to wanting to enhance his chances of obtaining a clearance." Exhibit 6 at 7.

[5] Paragraph (l) defines as derogatory information that an individual 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. § 708.8(l).

answers during the security clearance process, of concern under criterion (f), demonstrates questionable judgment, lack of candor, dishonesty, and/or unwillingness to comply with rules and regulations. *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information,* The White House (December 19, 2005) (*Adjudicative Guidelines*), Guideline E. While the individual disputes that he *intentionally* misrepresented or omitted information in the QNSP or PSI, the allegations that I found above to be valid clearly are sufficient to raise a concern as to the individual's intent. Under criterion (l), the individual's undisputed criminal activity creates doubt about his judgment, reliability and trustworthiness, as it calls into question a person's ability or willingness to comply with laws, rules and regulations. *Id.* at Guideline J.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a hearing officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring 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 regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. ANALYSIS

For the reasons discussed below, I find that the valid concerns in this case raised under criterion (l) have been largely, if not completely, resolved. However, there remain serious concerns, under criterion (f), regarding the individual's responses in his QNSP and PSI, and it is for this reason primarily that I cannot find that the individual should be granted a security clearance at this time.

First, there a number of factors that mitigate the concerns raised under criterion (l). The individual was born in July 1985. Exhibit 9 at 1. Thus, the transgressions at issue took place when the individual was 15 (speeding ticket), 17 (speeding and possession of controlled substance), 18 (possession of marijuana, possession of tobacco, DUI-metabolite, counterfeit driver's license, driving an unsafe vehicle, no proof of insurance), 19 (careless driving, leaving scene of and failing to

report accident, speeding), 20 (underage drinking and failure to obey order), 21 (failed drug test and other than honorable discharge), and 23 or 24 (driving without registration).

Applying the factors set forth at 10 C.F.R. § 710.7(c) cited above, while I note the frequency of the concerning conduct, particularly in the 2003 to 2005 period, I also must take into consideration the relatively young age of the individual (17 to 19 years old) when the activity of most frequency and concern took place. By contrast, only one incident cited under criterion (l) (driving without registration) took place in the over five years since he was discharged from the military.

The individual is now 27 years old. He has a two-year-old daughter and is engaged to be married. His mother and fiancée testified persuasively at the hearing as to how the individual has matured, worked hard, is a good father, and primarily associates with other parents. *See, e.g.,* Tr. at 94, 100, 106-107, 109. Taking all of the above into account, I find that the concerns raised under criterion (l) have been, in large part, resolved.

There remains, however, under criterion (l), the fact that the individual tested positive for an unspecified controlled substance in 2007. While not denying this, the individual stated in his PSI and his interview with the DOE psychologist, and testified at the hearing, that he was tested again three or four days after the positive test, and the second time tested negative. *Id.* at 37; Exhibit 6 at 4; Exhibit 10 at 54. In a letter submitted after the hearing, Counsel for the individual referenced a statement by the DOE psychologist in his report that "[r]esearch has indicated that up to 10% of [drug] tests can result in false positive findings." Letter from Counsel for individual to Steven Goering (July 10, 2012) (quoting Exhibit 6 at 8). The letter asks that I consider that the individual "was forthright about his prior drug use and that no reason exists to believe he would not have admitted any use in the [military] if it were true." *Id.*

First, the statement of the DOE psychologist cited by Counsel for the individual supports a finding that there is a very high likelihood (90% or greater), in the absence of evidence to the contrary, that the positive drug test revealed a controlled substance used by the individual, *i.e.*, not a false positive. In this case, the evidence to the contrary is a negative test taken three days later and the individual's assertion that he did not use a controlled substance. The DOE psychologist concluded that "[b]ecause of his denial, the subsequent negative test, and the possibility of a false result, there is no compelling evidence that his marijuana has ever interfered with his work." Exhibit 6 at 8.

The DOE psychologist made this statement, however, in the context of finding that the individual could not be diagnosed with Cannabis Dependence or Abuse. It is reasonable to conclude that the DOE psychologist found that the likelihood that the individual used marijuana prior to his drug test was reduced (below 90%) to the point where the positive test was not "compelling" evidence of marijuana use, sufficient for a diagnosis made to a reasonable degree of medical certainty. Yet, there is no statement in the DOE psychologist's report reflecting an opinion that the individual likely *did not* use marijuana (or another controlled substance) prior to the test.

Even if there were such a statement, the DOE psychologist's opinion was based, in part, on the individual's denial of use, and therefore the psychologist's assessment of the credibility of that denial. I cannot substitute that assessment for my own, which is less favorable. In particular, as I discuss in more detail below, I disagree with the statement of Counsel for the individual that the individual has been "forthright about his prior drug use" and that he has no reason to deny his use of

a controlled substance while serving in the military. Based on the evidence in the record and my assessment of the credibility of the individual's denial, I find it more likely than not that the individual did, in fact, use a controlled substance prior to the positive drug test. If he did, over five years has passed since his last use of any illegal drugs, which mitigates to an extent the concern raised by that use under criterion (l). However, without knowledge of the circumstances of this most recent use, and a denial of use that I find to be not credible, I cannot find that the concerns raised in the Notification Letter under criterion (l) have been sufficiently resolved.

In any case, there are, in my view, much more serious unresolved concerns in this case under criterion (f). These concerns are based on allegations of very recent behavior, an intentional omission from a May 2011 QNSP and false statements in an August 2011 PSI, and these allegations bear directly on the trustworthiness and reliability of the individual in his dealings with the DOE.

In his PSI, the individual stated that the last time he used marijuana was in 2003 or 2004. Exhibit 10 at 10. Contradicting this statement is the individual's response, on a QNSP completed on September 30, 2005, in connection with his enlistment in the military, that his last use of marijuana was on April 1, 2005. Exhibit 8 at 8 (QNSP referred to in record by reference to its form number, SF-86). I find this statement, against the interest of the individual and closer in time to his use of marijuana, to be the most reliable evidence of the date of his actual last use of the drug. Thus, I also find the individual's response in his August 2011 PSI to be false.

Under criterion (f), however, a false statement in a PSI is considered derogatory only if made "[d]eliberately." 10 C.F.R. § 708.8(f). The individual testified that he was truthful in the PSI, and therefore clearly denies any deliberate falsification. *Id.* at 30; *see also* Exhibit 2 at 2 (individual's response to Notification Letter). There is, however, evidence that the individual intentionally sought to minimize the extent of his marijuana use in reporting it to the DOE.

First, there is the statement made by the individual to the DOE psychologist that he did not correctly report his last use of marijuana "because that is what would make him 'look good.'" Exhibit 6 at 3. Further, I note that, in his 2005 QNSP, the individual stated that he used marijuana from July 15, 1999, to April 1, 2005, Exhibit 8 at 8, whereas in his 2011 QNSP he estimated that his use spanned only from February 2003 to March 2004. Exhibit 9 at 9. There is also the fact, discussed separately below, that the individual omitted from his 2011 QNSP that he was charged with possession of a controlled substance in June 2003. Based on all of this evidence, and on my assessment of the credibility of his hearing testimony, I find it likely that the individual's statement in the PSI regarding his last use of marijuana was not only false, but deliberately so.

Similarly, I find that the individual deliberately made a false statement in the August 2011 PSI, when he denied that he had ever purchased a fake identification. Exhibit 10 at 43-44. The individual admitted at the hearing that he had, in fact, purchased a fake identification. Tr. at 31. There is evidence of the individual's intent, again, in the report of the DOE psychologist, which states that individual admitted that, at the PSI, he remembered purchasing a fake identification, but nonetheless denied doing so. Exhibit 6 at 3. At the hearing, the individual testified that he had more than one fake identification, including one that he purchased and one that he found, and that his denial in the PSI was with respect to the fake identification that he found. Tr. at 29.

The individual admits that the first time he told the DOE that he had more than one fake identification was at the hearing in this matter, and has no explanation why he did not disclose this in response to the questions posed in the PSI. *Id.* at 48, 51. Aside from this, the individual's account of having more than one fake identification, as an explanation for denying at the PSI that he had purchased one, strains logic and credulity, particularly in light of a plain reading of the relevant portion of the PSI transcript. Exhibit 10 at 43-44.

Finally, there is the individual's omission of his June 2003 charge for possession of a controlled substance from his May 2011 QNSP. The individual testified that when he "was filling out the questionnaire, I completely just forgot about it. It just slipped my mind. It was just another traffic citation, because the marijuana ticket got dropped, so I just completely forgot about it until" it was brought up at the PSI. Tr. at 33. Even though this incident occurred nearly eight years before he completed the 2011 QNSP, I find it difficult, on its face, to believe that the individual forgot something as significant as the first time, and one of only two, that he was stopped by law enforcement while in the possession of marijuana.

Further undermining the credibility of his hearing testimony are the individual's statements in his PSI. First, when asked about any "drug related contact with law enforcement authorities," the individual reported only one. Exhibit 10 at 20-21. Later, and only after being asked specifically about an incident in 2003, the individual admitted that he received a "marijuana ticket" that year. Exhibit 10 at 29. When asked why he did not report this charge in his 2011 QNSP or earlier in the PSI, he first stated it was because he "assumed all that was dropped." *Id.* at 30. Pressed further, he responded that, because the charge occurred when he was under 18, he did not think it needed to be reported. *Id.* Neither of these two explanations is consistent with his statement at the hearing that the charge "slipped his mind." Because of the lack of a consistent explanation, and the inherent lack of credibility of the explanation that he settled on at the hearing, I find it more likely than not that the individual deliberately omitted this 2003 charge from his May 2011 QNSP.

As to whether the concerns raised by the individual's deliberate omission and false statements remain unresolved, hearing officers have generally taken into account a number of factors, including whether the individual came forward voluntarily to renounce his falsifications, the timing of the falsification, the length of time the falsehood was maintained, whether a pattern of falsification is evident, and the amount of time that has transpired since the individual's admission. *Personnel Security Hearing*, Case No. TSO-0307 (2007), and cases cited therein.[6] None of these mitigating factors, nor any of those set forth in the relevant Adjudicative Guideline, *Adjudicative Guidelines* at Guideline E, apply in the present case. Considering this, and the entirety of the record, including testimony attesting to the individual's honesty and trustworthiness, *see, e.g.,* Tr. at 86, 107-08, 114-15, I must conclude that the very serious concerns raised under criterion (f) have not been resolved. *Adjudicative Guidelines* at Guideline E.

V. CONCLUSION

For the reasons set forth above, I conclude that the individual has not resolved the DOE's security concerns under criteria (f) and (l). Therefore, the individual has not demonstrated that granting him

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[6] 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.

access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not grant the individual a security clearance at this time. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: August 7, 2012