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United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Personnel Security Hearing	)	
		)	
Filing Date:	April 22, 2013	)	
		)	Case No.: PSH-13-0050
		)	

Issued: August 8, 2013

Hearing Officer Decision

William M. Schwartz, Hearing Officer:

This Decision considers the eligibility of XXXXXXXXXXXXX (the individual) to hold an access authorization[1] under the regulations at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As I explain below, I find that the Department of Energy (DOE) should restore the individual's access authorization.

I. Background

The individual is an employee of the DOE and holds a DOE access authorization, now in suspension. In 2006, the individual admitted to using marijuana while in college some 35 years ago, but provided inconsistent responses as to the number of times he used the substance and the period within which he used it. These responses prompted the Local Security Office (LSO) to conduct Personnel Security Interviews (PSIs) in August 2011 and February 2012, at which he provided further inconsistent responses.

Because the PSIs did not resolve the security concerns raised by the individual's inconsistent reporting, the LSO issued the individual a Notification Letter in April 2013, advising him that it possessed reliable information that created a substantial doubt about his eligibility to hold an access authorization. Ex. 1. In an attachment, the LSO

[1] An access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

explained that the derogatory information falls within the potentially disqualifying criterion in the security regulations at 10 C.F.R. § 710.8(f) (Criterion F).[2]

After the individual received the Notification Letter, he invoked his right to an administrative review hearing. Ex. 2. On April 23, 2013, the Director of the Office of Hearings and Appeals (OHA) appointed me Hearing Officer, and I conducted the hearing. The DOE counsel introduced six numbered exhibits into the record, and the individual tendered two exhibits. At the hearing, the individual was the sole witness.

II. Regulatory Standard

The regulations governing the individual's eligibility for access authorization are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." The regulations identify certain types of derogatory information that may raise a question concerning an individual's access authorization eligibility. 10 C.F.R. § 710.10(a). Once a security concern is raised, the individual has the burden of bringing forward sufficient evidence to resolve the concern.

In determining whether an individual has resolved a security concern, the Hearing Officer considers relevant factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). In considering these factors, the Hearing Officer also consults adjudicative guidelines that set forth a more comprehensive listing of relevant factors. *See* 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).

Ultimately, the decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id. See generally Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials").

[2] Criterion F concerns circumstances in which an individual "[d]eliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for . . . National Security[] Positions, . . . a personnel security interview, [or] 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." 10 C.F.R. § 710.8(f).

III. The Notification Letter and the Security Concerns

In its Notification Letter, the LSO supported its Criterion F security concern by alleging that the individual had provided it with the following false information. In the Questionnaire for National Security Positions (QNSP) that the individual completed in 2006 for employment with another agency, the individual reported that he had used marijuana on two occasions between June and August 1974. On a follow-up form two months later, he reported that he had used marijuana two to four times between 1974 and 1975. One month later, during a polygraph examination, he stated he believed a more accurate assessment of his use would be five to ten occasions. At an August 2011 PSI, he increased his estimate of marijuana use to 10 to 25 times between 1972 and 1975. Finally, during a February 2013 PSI, the individual admitted that his earliest report of using marijuana only twice was not correct. He further admitted that his marijuana use could have been as frequent as 30 times, and that his presence at a party where there was marijuana could have occurred as late as 1980. The LSO also referred to the polygraph examiner's opinion in 2006 that some of the individual's responses to questions about his past use of illegal drugs were "indicative of deception." Ex. 1.

I find that the above information constitutes derogatory information that raises questions about the individual's conduct under Criterion F. Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Adjudicative Guidelines at Guideline E, ¶ 17.

IV. Findings of Fact

The facts as set forth in the Notification Letter are not in dispute. At the hearing, the individual testified about the context in which he provided those estimates of his past marijuana use, in order to mitigate the LSO's concerns about their inconsistency.

The individual consistently stated, at the hearing, and at every instance in which he was questioned about it, that he could not recall the extent of his marijuana use. The report filed by polygraph examiner who conducted a polygraph of the individual in 2006 states that the individual told the examiner that he was "truly uncertain as to the exact number of times he used marijuana," that he had used it "typically with friends at a party." Exhibit 5 at 20. The individual reviewed with the polygraph examiner two forms he had completed three months and one month before the examination, on which he had disclosed using marijuana two times and two to four times, respectively. *Id.* at 19. As a result of that uncertainty, he stated that a more accurate assessment was five to ten times. This interaction appears to have occurred before the polygraph examination itself. After the examination, the individual revised his estimate of marijuana to 10 to 15 times. *Id.* at 20.

During his 2011 PSI, at which the individual again revised his estimate of past marijuana use, he stated that he could not recall how often he had used it with any accuracy. Exhibit 4 at 18, 30 (referring to an earlier occasion where another agency sought

specifics). The interviewer expressed his dissatisfaction with those statements and pressured the individual to respond with specific figures regarding the frequency and duration of his marijuana use. *Id.* at 18, 19. The individual ultimately offered an estimated range of 10 to 25 times that he used marijuana between 1972 and 1975. *Id.* at 20.

The transcript of the 2012 PSI is replete with statements by the individual that he was unable to recall his marijuana use of more than 30 years earlier. Exhibit 3 at 15, 17-18 (explaining that use was sporadic, occasional, not on a regular basis), 24, 25, 38-39, 48, 50-51, 55, 56. As in the 2011 PSI, the interviewer pressed for specific figures even after the individual reported his inability to produce them. *Id.* at 23-25 ("What would be the most extreme number? Well, 15? 25? . . . [I]f you want to go a higher number, go a higher number."). In response, the individual revised yet again his estimate of marijuana use, now stating that he had used it no more than 30 times. *Id.* at 25. The interviewer agreed at the time that that figure was "the most extreme possibility," and later reiterated that the individual was not admitting that he had actually used marijuana 30 times. *Id.* at 25, 38.[3] *See also* Tr. at 62, 66-67.

At the hearing itself, the individual continued to maintain that he had no recollection of the details of his marijuana use over 30 years earlier. Tr. at 14, 56, 65. He testified that, despite the various figures he has provided, none can be accurate, because he has never known what the correct figures are. *Id.* at 18-19. Nevertheless, he candidly admitted that he deliberately understated his first estimates of marijuana use, on the forms he completed in 2006, when he was an applicant for a security clearance from another agency. *Id.* at 17. Although he did not know what the accurate figures were, he acknowledged that he minimized his estimates on those two occasions, because he did not want what he considered to be an unimportant aspect of his past to overshadow his professional accomplishments. *Id.* at 17, 38-42. He stated that he wanted to correct those figures with the polygraph examiner, in order to start his relationship with his new employer on the right foot. *Id.* at 20.

V. Analysis

As set forth above, Criterion F concerns arise from information that an individual has "*deliberately* misrepresented, falsified, or omitted *significant* information" on forms completed or in statements made relevant to a determination regarding his or her eligibility for access authorization. 10 C.F.R. § 710.8(f) (emphasis added).

The LSO's security concerns arise from two categories of derogatory information. In the first category is the 2006 opinion of a polygraph examiner that some of the individual's

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[3] The individual also stated, in response to questioning, that he may have been at parties as recently as 1980 at which marijuana was used. While he had no recollection of any such occasion, he offered this date as it was the last time he might have possibly attended a party in a college environment, because by that time all of his friends had graduated. *Id.* at 42-43. There is no evidence that the individual was ever questioned about his associations other than at the 2012 PSI. Consequently, I cannot conclude that he has provided inconsistent or false information about his association with illegal drug users.

recorded responses during the polygraph he conducted "were either inconclusive or indicative of deception." Exhibit 1. The second category comprises the individual's multiple, inconsistent statements regarding the extent of his past marijuana use.

As an initial matter, I will address the polygraph examiner's opinion. The LSO submitted he Polygraph Report generated after the individual's 2006 polygraph into the record. Exhibit 5 at 19-20. Heavily redacted, this document reveals that the polygraph examination consisted of three series of questions, and the polygraph examiner's opinion was that the individual's recorded responses to Series I was "not indicative of deception," to Series II was "inconclusive," and to Series III was "indicative of deception." Due to redaction, the document does not reveal the topics covered in each of the series of questions. *Id.* Moreover, the LSO offered no additional evidence on the matter. Consequently, I cannot evaluate the basis for the polygraph examiner's opinion, the responses on which he based his opinion, nor process by which he evaluated those responses to arrive at his opinion. I therefore can give no weight to his opinion in the context of this decision.

Turning to the individual inconsistent statements about his past marijuana use, I find that the individual deliberately misrepresented his marijuana use on two forms he submitted to another agency in March and May 2006. The individual consistently stated, at the hearing, and at every instance in which he was questioned about it, that he could not recall the extent of his marijuana use. Nevertheless, he willfully understated his first estimates of marijuana use, to place himself in a better light. He acknowledged that misrepresentation, and admitted to somewhat greater illegal drug use, to the polygraph examiner in June 2006, of his own volition. His sincerity and candor at the hearing convince me, particularly given the absence of any evidence to the contrary, that he determined to correct his understatements in June 2006 and from then on to provide information as accurately as possible.

I find that the remainder of the individual's inconsistent statements concerning his marijuana use, including all statements made to the LSO, were not deliberate attempts to misrepresent or falsify the true extent of his marijuana use. He was first questioned about his involvement with marijuana in 2006, at least 30 years after his last marijuana use. At the hearing, the individual testified that in 2006, and at all times thereafter, he could not accurately recall his marijuana use, but knew that it did not extend beyond college. He stated that his use was casual and, to him at the time, not important or remarkable in any way. He credibly testified that in 2006 he had no recollection of the number of times or the duration of the period in which he used marijuana. He also credibly testified that he told every interviewer that he did not recall the extent of his marijuana use, but each pressured him to quantify his use, and he did so. A review of the 2011 and 2012 PSI transcripts support his testimony. I also consider the manner in which the individual altered his estimates of marijuana use: they grew successively larger. If he had been deliberately aiming to mislead the LSO, he would not have increased his estimate of usage. He would instead have withheld the truth of the matter, and much more likely have confirmed his original statements. But the individual did not know the truth because he did not recall his use, and was doing the best he could, trying to respond to the

pressure of the interviewers to provide an accurate estimate, which was impossible in his case, as he repeatedly stated. He may have a poor memory of his habits during his college years, but his behavior does not convince me that he was deliberately misrepresenting his past marijuana use to the LSO.

I also find that the discrepancies in the information the individual reported to the LSO and its counterpart at another agency, whether deliberately false or not, are not significant. The individual's history of marijuana use is certainly relevant to a security clearance determination. The discrepancies in his reporting, even disregarding the context in which he made them, are not significant, however. Whether he used marijuana two times within two months—his lowest, and admittedly understated, estimate—or no more than 30 times over the course of three years—his last, and admittedly overbroad, estimate—the fact remains that his illegal drug use took place when he was in college well more than 30 years ago. He left that environment long ago, joined the federal workforce, and took on all the duties and privileges of a responsible member of society. There is no evidence in the record, and the individual affirmatively denied at the hearing, that he has not used marijuana since his college days. Tr. at 30-31. In light of the fact that his marijuana use occurred 30 years ago in an environment totally distinct from his present circumstances, and in light of my finding that the individual did not deliberately misrepresent his marijuana use to those charged with determining his eligibility for DOE access authorization, I find that his inconsistencies regarding the frequency and duration of his marijuana use are not significant.

I therefore find that the individual has mitigated the LSO's Criterion F concerns regarding his inconsistent statements to the LSO about his past marijuana use. After carefully considering the record before me, in particular the individual's testimony at the hearing, I do not find that the individual deliberately misrepresented or falsified significant information regarding a matter relevant to his access authorization determination.

VI. Conclusion

Because the individual has resolved the security concerns, I find that he has demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Therefore, I find that the DOE should restore his access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: August 8, 2013