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

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| In the Matter of: Personnel Security Hearing | ) | |
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| Filing Date: August 25, 2017 | ) | Case No.: PSH-17-0059 |
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Issued: January 8, 2018

## Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization[1] under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710 entitled "Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the individual should not be granted an access authorization.

## I. Background

The individual is employed by a DOE contractor that requested a security clearance on his behalf. While completing a Questionnaire for National Security Positions (QNSP) in December 2016, the individual certified that, in the past seven years, he had not illegally used any drugs or controlled substances. Ex. 10 at 10. In January 2017, during the course of an Office of Personnel Management (OPM) investigation, an investigator asked the individual about any illegal drug use, and the individual did not disclose any such use. Ex. 9 at 47; Tr. at 56. In April 2017, however, when OPM confronted the individual with allegations of illegal drug use, the individual disclosed that he had used marijuana on two to three occasions over a two month period in the spring of 2014. *Id*. When the OPM investigator contacted the individual a third time in May 2017, the individual provided additional information about his illegal drug use, disclosing six occasions of marijuana usage from the spring of 2014 to the fall of 2015. *Id*. at 47-48. During a June 2017 Personnel Security Interview (PSI), the individual stated that he did not disclose his illegal drug use for fear that "any drug use would preclude [him] from getting a security clearance." Ex. 4 at 20. He further indicated that he felt that his "marijuana use was minor" and he did not believe that "any evidence of it would exist." *Id.*

On July 24, 2017, the Local Security Office (LSO) sent the individual a letter (Notification Letter) advising him that the DOE 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 indicated that the individual had "deliberately omitted, concealed, and falsified relevant facts from his personnel security questionnaire." This falls within the purview of Guideline E of the Adjudicative Guidelines.[1]

Upon receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the individual testified on his own behalf, but chose not to submit any other testimonial evidence or exhibits into the record. The DOE submitted twelve exhibits (Exhibits 1-12) into the record. The exhibits will be cited in the Decision as "Ex." followed by the appropriate numeric designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.[2]

## II. Regulatory Standard

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 regulations require me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of 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). 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 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).

The individual must come forward at the hearing with evidence to convince the DOE that granting him 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 evidence 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.

[1] The LSO did not specifically cite to Guideline E in the Notification Letter, but instead cited the language of Guideline E.

[2] OHA decisions are available on the OHA website at www.energy.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

## III. Notification Letter and Associated Security Concerns

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual's eligibility for access authorization. The Notification Letter stated that the individual "deliberately omitted, concealed, and falsified relevant facts from his personnel security questionnaire…[and] deliberately provided false or misleading information concerning relevant facts to an investigator during the security clearance process."[3] *See* Guideline E, ¶¶ 15-16. As a basis for the listed security concerns, the LSO cited: (1) the individual's admissions that he used marijuana, despite his failure to disclose such usage on the QNSP; and (2) his admission during a June 2017 PSI that the omission of his illegal drug use on the QNSP was not accidental. This conduct describes the security concerns addressed within Guideline E.[4]

In light of the information available, the LSO properly invoked security concerns under Guideline E.

## IV. Findings of Fact

The individual does not dispute the facts alleged in the Notification Letter, and at the hearing, he stipulated as to the factual accuracy of the summary of security concerns attached to the Notification Letter. Tr. at 8-9. In all areas where there are inconsistencies in the record, I have carefully considered the totality of the record in reaching the findings of fact set forth below.

While a university student, the individual used marijuana six times from the spring of 2014 through the fall of 2015. Tr. at 31; Ex. 9 at 47-48. During this time, the individual served on the university judiciary at a university where such drug use violated the university honor code. Tr. at 40, 52. Upon applying for a position on the university judiciary, the individual was asked if he used illegal drugs, and he denied any such usage despite having used marijuana. *Id*. at 52-53. The individual did not reveal his marijuana use in the application process as "it was expected that everyone would say no." *Id*. at 52.

In December 2016, when he completed the QNSP, the individual answered "no" to the Section 23 question, asking whether the individual has used illegal drugs in the past seven years. Ex. 10 at 10. The individual understood that providing dishonest answers on the QNSP could result in fines, imprisonment, or both. Tr. at 65. He further understood the Section 23 question and knew that, given his past, the correct answer to the question was "yes." *Id*. at 52-53. Nonetheless, the individual answered "no" because he "wanted to see if" the QNSP was similar to his university judiciary application in that "it was expected that everyone would say no." *Id*. at 52. He also said he believed his marijuana usage was "minor" and "did not qualify as something that was of interest to DOE," and he was "worried that DOE would see any drug use as major" and would disqualify him from receiving a security clearance. *Id*. at 33-34.

[3] As previously indicated in footnote 1, *supra*, the Notification Letter did not specifically cite to Guideline E; however, it plainly described the security concerns contained within Guideline E.

[4] During a prehearing conference call, the LSO stated that in using the language of Guideline E in the Notification Letter, its intent was to clearly express that the security concerns at issue were those contained within Guideline E.

However, as part of his deliberation over the answer to the Section 23 question, the individual sought counsel from a friend, who was employed at another federal security agency, inquiring whether or not there was a general pattern of behavior to be dishonest on the QNSP. *Id*. at 53. His friend advised that it "was not common practice to disclose" marijuana usage on the QNSP. *Id*. Ultimately, the individual felt "quite reluctant to reveal [his] marijuana usage" and, therefore, chose not to "volunteer [the information] until confronted." *Id*. at 29.

When interviewed by the OPM investigator in January 2017, he was provided the opportunity to modify his answers on the QNSP; however, the individual declined. *Id*. at 28, 56. It was not until he was confronted by the investigator about illegal drug use on two separate occasions that the individual chose to disclose the entirety of his marijuana usage. *Id*.

## V. Analysis

I have thoroughly considered the record of 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) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's security clearance should not be granted. I cannot find that granting 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.

In mitigation of the Guideline E security concerns, the individual advocates that this dishonesty was uncharacteristic and a "serious mistake" that "came from a place of misunderstanding." Tr. at 41, 45. The individual asserted that the LSO's security concerns have been mitigated as his dishonesty was the result of poor advice. *Id*. at 42. Further, he does not believe he can be exploited or manipulated as he has now revealed his drug use and no longer associates with drug users. *Id*. at 42-43; *see* Guideline E, ¶ 17(b) and 17(g).

The individual's proffered mitigation diminishes the importance of a holder of (or applicant for) DOE access authorization being candid and honest under all circumstances in his dealings with the agency, especially with respect to information that might be personally adverse. Self-disclosure is critical to the protection of national security as security officials can only assess and address security risks if they receive timely and accurate information. For this reason, Guideline E emphasizes as a "special interest … any failure to cooperate or provide truthful and candid answers during national security or adjudicative processes." Guideline E, ¶ 15.

In this case, the individual knowingly provided false information during the investigation of his eligibility for access authorization, and reached out to other individuals for information to justify his decision to knowingly provide false information to the agency. When the individual was given the opportunity to correct the information, he initially declined to correct his responses. When later confronted with information that he had deceived the investigators, he partially corrected his answer but continued to provide false information. Only upon the investigator's third inquiry did the individual provide what he now states is the correct information. On these facts, I cannot

conclude that the individual made a timely or good faith effort to correct his falsifications. *Contra*. Guideline E, ¶ 17(a).

These falsifications all relate to information that is of critical importance in assessing one's eligibility for access authorization and have all occurred within approximately six months prior to the hearing. *Contra*. Guideline E, ¶ 17(c). The individual offers no information that mitigates these circumstances.

Based on the foregoing, I conclude that the individual has failed to mitigate the security concerns arising under Guideline E.

## VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE to raise serious security concerns under Guideline E. 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 not brought forth sufficient evidence to resolve the security concerns associated with that guideline. I therefore cannot find that granting the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the DOE should not grant the individual an access authorization at this time.

Wade M. Boswell
Administrative Judge
Office of Hearings and Appeals

Date: January 8, 2018