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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: November 3, 2017)	Case No.: PSH-17-0079
)	
_____)	

Issued: February 12, 2018

Administrative Judge Decision

Richard A. Cronin, Jr., Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (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 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*, effective June 8, 2017 (Adjudicative Guidelines), I conclude that the individual should be granted an access authorization.

I. Background

The individual is employed by a DOE contractor. The individual’s employer requested that the DOE grant the individual an access authorization. In its investigation, the Local Security Office (LSO) received potentially derogatory information regarding the individual’s use and purchase of marijuana and other illegal drugs from 1979 to 2014. In order to address those concerns, the LSO conducted a personnel security interview (PSI) with the individual in April 2016.

On September 21, 2017, the LSO sent the individual a letter (Notification Letter) advising him that the DOE possessed reliable information that created substantial doubt regarding his eligibility to continue to possess an access authorization. In an attachment to the Notification Letter, the LSO

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.

explained that the derogatory information fell within the purview of Guidelines H (Drug Involvement) and E (Personal Conduct) of the Adjudicative Guidelines.

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 presented the testimony of a Human Resources co-worker (HR Co-Worker), the Director of the Security Office at the DOE facility (Director), an Associate Director (Associate Director) and the Deputy Laboratory Director (Deputy Director) of the DOE facility, as well as his own testimony. The DOE Counsel presented the testimony of the DOE psychologist. The DOE submitted four exhibits (Exhibits 1-4) into the record, and the individual tendered 11 exhibits (Exhibits A-K). The exhibits will be cited in the Decision as “Ex.” followed by the appropriate numeric or alphabetic 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 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 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.

In personnel security cases arising under Part 710, it is my role as the Administrative Judge 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

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.

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 eligibility in favor of the national security. *Id.*

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 continued eligibility for access authorization. The information in the Notification Letter specifically cited Guidelines H and E of the Adjudicative Guidelines. The LSO asserts that the individual's history of illegal drug use raises concerns under Guideline H as to the individual's reliability and trustworthiness. Further, the LSO alleges that the individual's use of illegal drugs and his alleged violation the DOE's facility's "drug free workplace" policy gave rise to security concerns under Guideline E.

In citing Guideline H, the LSO stated that it was relying upon the individual's admissions in a Questionnaire for National Security Positions (QNSP) and in his PSI that he had used hashish, psychoactive mushrooms, cocaine and ecstasy (a methamphetamine-like drug) during the period from 1979 to 1984. Ex. 1 at 1. He also admitted that he had smoked and purchased marijuana on occasions during the period June 1979 to January 2014. Ex. 1 at 1. The illegal use of controlled substances can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Adjudicatory Guideline H at ¶ 24.

The Notification Letter also cited the fact that the individual's use of illegal drugs and his alleged violation of the DOE facility's drug free workplace policy gave rise to security concerns under Guideline E. Unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Adjudicatory Guideline E at ¶ 15.

Given the information described in the Notification Letter, I find that the LSO had sufficient grounds to invoke Guidelines H and E of the Adjudicative Guidelines.

IV. Findings of Facts and Analysis

The individual does not challenge the factual accuracy of the Notification Letter but disputes whether his conduct violated the DOE facility's drug free workplace policy.

A. Guideline H

The individual has worked at the DOE facility for 16 years. Tr. at 56. In the autumn of 2014, the individual was asked to apply for a security clearance. Tr. at 62. During this process he disclosed his history of illegal drug use. The disclosures were made both on the QNSP and during the PSI. Tr. at 59. The individual stated that he used hashish, mushrooms, cocaine and ecstasy during the period 1979 to 1984 when he attended college. Tr. at 59-60. He used each of these substances once or twice during that period. Tr. at 60, 74. The individual testified that, during period from June 1979 to January 2014, he would mostly use marijuana approximately once or twice a year at home, mostly with his wife.³ Tr. at 82. Tr. at 61, 75. He stated that, on a few occasions, he purchased a small bag of marijuana from an acquaintance, but that he has not associated with that acquaintance for the past several years. Tr. at 66. However, the individual testified that he did not use marijuana during half of the years covered by that time span. Tr. at 74-75. The individual compared using marijuana to having a “nice bottle of wine.” Tr. at 62. The individual stated that he has never used illegal drugs or been under the influence of illegal drugs while at work. Tr. at 67. The individual testified that his last use of marijuana occurred in January 2014.⁴ Tr. at 62.

The individual further stated that, when he began the process of applying for a security clearance in the fall of 2014, he began to understand the importance of avoiding illegal drugs, despite the fact that the state he resides in had recently legalized the possession and use of small amounts of marijuana. Tr. at 63, 68. The individual stated that his intent is to not use illegal drugs in the future. Tr. at 63-64. The individual also submitted a notarized statement indicating his intent not to use illegal drugs in the future and stating that, should he use illegal drugs in the future, he would consent to an “automatic revocation of my security clearance.” Ex. G. The individual states that, in retrospect, his decision to use marijuana represented “a poor choice.” Tr. at 77. The individual also submitted the results of two drug test conducted in August 2016 and October 2017. Ex. H. Both test indicated negative results for the presence of illegal drugs. Ex. H at 1-2.

The HR Co-worker, the Director, the Associate Director and the Deputy Director testified as to the individual’s superior work performance and their personal observations that they had never seen the individual under the impairment of illegal drugs. Tr. at 17, 34, 51, 91. The HR Co-worker testified that, if an employee had observed the individual seemingly under the influence of illegal drugs, her office would have been notified, and that she had never received any information to that effect. Tr. at 23. Each witness testified that the individual possesses a high standard of trustworthiness and reliability, and a strong moral character. Tr. at 11-12, 31-33, 50, 53, 89. All testified to the dedication the individual has to the mission of the DOE facility. Tr. at 14-15, 31-32, 49, 88.

After reviewing the testimony and evidence, I find that the individual has presented sufficient evidence to resolve the security concerns raised by his history of illegal drug use. With regard to

³ The individual testified that, prior to his acceptance of a position at the DOE facility 16 years ago, he would occasionally use marijuana with a co-worker. Tr. at 66, 81. He stated that he no longer associates with the co-worker. Tr. at 66.

⁴ The individual testified that, when he began the process to apply for a security clearance, he asked his wife to dispose of his marijuana. Tr. at 83.

his use of hashish, mushrooms, cocaine and ecstasy, I find the individual's testimony to be convincing as to the extent of his involvement with these drugs. Further, there is no evidence before me that indicates that the individual has used these drugs since 1984. More concerning is the fact that the individual has used marijuana intermittently for a period of approximately 25 years. However, I find the individual's testimony that he has not used marijuana since 2014 to be persuasive. This testimony is also supported by the convincing testimony of the HR Co-worker, the Director, the Associate Director and the Deputy Director, as well as the two negative drug tests that the individual has submitted. Further, I believe that the individual has internalized the need to avoid any involvement with illegal drugs. Specifically, I find that Adjudicatory Guideline G ¶ 26(b) provides mitigation in this case, in that the individual has acknowledged his drug involvement, and there is evidence of actions taken to overcome the problem, along with an established pattern of abstinence.⁵

B. Guideline E

The Guideline E security concern pertaining to the individual's personal conduct arises from the individual's involvement with illegal drugs and the LSO's allegation that the individual violated the DOE facility's drug free workplace policy. As discussed above, I find that the security concerns raised by the individual's involvement with illegal drugs has been resolved. With regard to the allegation that the individual violated the DOE facility's drug free workplace policy, the individual testified that his understanding of the policy was that an employee was barred from using illegal drugs at the DOE facility, or being under the influence of an illegal drug while at the facility. Tr. at 67, 71. The individual asserted that he never used illegal drugs at the DOE facility, nor had he been under the influence of illegal drugs while on duty at the DOE facility. Tr. at 71. As recounted above, none of the other witnesses had ever observed the individual being under the influence of illegal drugs at the facility. Further, each of the witnesses confirmed the individual's understanding of the drug free workplace policy. Tr. at 13, 52; Especially persuasive on this issue was the testimony of the Deputy Director who was responsible for approving the drug free workplace policy for the facility, and who confirmed the individual interpretation of the policy. Tr. at 92. My own reading and interpretation of the policy is consistent with this testimony. Ex. K.

I find that the individual has presented sufficient evidence to resolve the security concerns arising from the Guideline E derogatory information contained in the Notification Letter. For the concerns arising from the individual's involvement with illegal drugs, I find that that these concerns have been resolved for the reasons discussed in the Section IV.A. of this Decision. Based upon the convincing testimony of the individual and the other witnesses, I find that the individual did not violate the DOE facility's drug free workplace policy. Additionally, the witnesses have testified to

⁵ Paragraph 26(b) provides as a mitigating the individual acknowledges his or her drug involvement and substance misuse, provides as a mitigating factor "evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

the individual's personal character and integrity. I find that the mitigating factor described in Adjudicatory Guideline E ¶ 17(c) is applicable in this case ("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).

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 Guidelines H and E. After considering all of 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 sufficient evidence to resolve the security concerns associated with Guidelines H and E. I therefore find that granting the individual an access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the DOE should grant an access authorization to the individual.

Richard A. Cronin, Jr.
Administrative Judge
Office of Hearings and Appeals