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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 18, 2022)	Case No.: PSH-23-0010
)	
_____)	

Issued: January 18, 2023

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (the Individual) to hold an access authorization under the United States Department of Energy's (DOE) regulations, set forth at 10 C.F.R. Part 710, "Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material."¹ 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's access authorization should be granted.

I. BACKGROUND

In April 2022, the Individual completed and signed a Questionnaire for National Security Positions (QNSP) in connection with acquiring his access authorization. Exhibit (Ex.) 6 at 34; Hearing Transcript (Tr.) at 27. He checked the box marked "no" on the QNSP in response to the question asking whether he had illegally used any drugs or controlled substances within the last seven years. *Id.* at 34. However, during the Enhanced Subject Interview (ESI) in April 2022, conducted by an Office of Personnel Management (OPM) investigator, the Individual voluntarily admitted that he regularly used marijuana one time a week between 2013 and 2017. Ex. 7 at 61. He also admitted that he used marijuana approximately once a year between 2016 and 2021,² with his last use in November 2021. *Id.*

¹ The regulations define access authorization 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). This Decision will refer to such authorization as access authorization or security clearance.

² The beginning date of this period overlaps with the ending date of the previous period. This overlap was not explained or corrected in the OPM Report, in the LOI, or at the hearing.

In July 2022, the Individual completed a Letter of Interrogatory-Questionnaire (LOI) regarding his drug use and omission from the QNSP. Ex. 5. In the LOI, the Individual admitted that he knew marijuana was a federally controlled substance. *Id.* at 3. He also admitted that he omitted his illegal drug use from the QNSP because “I was afraid it would cause me to lose my job, and the frequent substance use was so long ago.” *Id.* at 4.

After receipt of the derogatory information, the local security office (LSO) issued the Individual a letter notifying him that it possessed reliable information that created substantial doubt regarding his eligibility for access authorization. Attached to the letter was a Summary of Security Concerns (SSC), in which the LSO explained that the derogatory information raised security concerns under Guideline E (Personal Conduct) of the Adjudicative Guidelines. Ex. 1.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted seven exhibits (Ex. 1–7). The Individual submitted two exhibits (Ex. A–B). The Individual testified on his own behalf and presented the testimony of his friend. Tr. at 11, 23. The LSO did not offer any witnesses.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline E (Personal Conduct) of the Adjudicative Guidelines as the basis for its security concerns. Ex. 1.

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

Adjudicative Guidelines at ¶ 15. The LSO’s allegation that the Individual deliberately omitted information regarding his illegal drug use that he was required to disclose on the QNSP justifies its invocation of Guideline E. *Id.* at ¶ 16(a).

III. REGULATORY STANDARDS

A DOE administrative review proceeding under Part 710 requires me, 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 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 Dep’t 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) (strong presumption against the issuance of a security clearance).

An individual must come forward at the hearing with evidence 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). An individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. *Id.* § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

IV. FINDINGS OF FACT

The Individual omitted his marijuana use from his QNSP in April 2022. Ex. 6 at 34; Tr. at 29. In the LOI and during the hearing, he admitted that he was concerned he would lose his employment, if he admitted to the drug use. Ex. 5 at 3; Tr. at 29. The Individual testified that his marijuana use was minimal in the three years prior to his completing the QNSP. Ex. 5 at 1; Tr. at 34–35. During the ESI, he asserted that during high school, between 2012 and 2017,³ he used marijuana approximately once a week. Ex. 7 at 61. He also declared that he used marijuana approximately one time per year between 2016 and 2021, with his last use in November 2021. *Id.* Conversely, in the LOI, the Individual stated that his last use was in November 2021, but within the three years prior to that use, he “smoked almost never.” Ex. 5 at 1. The Individual testified at the hearing that most of his marijuana use was during high school, which he attended between 2012 and 2017, and prior to the age of 18. Tr. at 35; Ex. 6 at 14. In addition, he testified, all his marijuana use was prior to his acceptance of the employment for which a security clearance is required. *Id.* at 26.

The Individual testified that he was surprised by the depth of questions in the QNSP. Tr. at 28. Prior to completing the QNSP, he knew that he would be questioned about his drug use, but when he answered the question, he did not think about it, because it was near the end. *Id.* at 29. He did know that he was concerned that admitting his drug use would cause him to lose his job. *Id.* The Individual acknowledged that being interviewed in person led him to be honest in his ESI, stating:

I would say just by being in front of a person I was more led to be honest. And I -- I don't think it was like a very conscious decision. It was just like very natural that I would want to be honest when I was kind of face-to-face, like virtually with somebody.

Id. at 30. He did declare that he volunteered the information regarding his drug use, and he was not confronted by the OPM investigator claiming that she had learned the information from another source. *Id.* at 34. This is corroborated by his testimony that his college friend, who the OPM investigator spoke to at length, would not have known about his marijuana use. Tr. at 34. It is also

³ I will note that if the Individual graduated from high school in 2017, as he testified to and listed in his QNSP, he probably did not start high school until 2013. Yet, the QNSP states that he attended high school from 2012 through 2017. Ex. 6 at 14.

confirmed by a review of the OPM Report, which shows that the Individual was the first person interviewed by the OPM investigator. Ex. 7.

The Individual's friend, who has known the Individual since approximately 2013 when the Individual was a sophomore in high school and the friend was a senior in high school, testified that the Individual is honest and reliable and that he trusts him. Tr. at 17. He also said that the Individual is a "well intentioned dude." *Id.* at 18. When questioned if he could remember a situation when it would have been easier for the Individual to be dishonest, the friend said, "I don't really think [the Individual] puts himself in a position to benefit from dishonesty very often." *Id.* at 17. The friend testified that the Individual was the "good child" in his family and the conscience in their friend group. *Id.* at 16. He stated that he was the levelheaded friend that would remind them to make good decisions. *Id.* The friend concluded that he would characterize the Individual's omission as unintentional, because the Individual ceased using marijuana entirely in college. *Id.* at 18–19. In support, the friend claimed that the Individual "occasionally gets flustered and says the wrong word on accident." *Id.* at 16.

The Individual concluded his testimony by saying that he is not really a drug user, because he did not and does not intend to use drugs again. Tr. at 40. He believes that, in addition to his concern that he would lose his job if he positively answered the question, the fact that he is not intending to use drugs again led him to answer the question incorrectly. *Id.*

V. ANALYSIS

A. Guideline E

The LSO's allegation that the Individual deliberately failed to disclose his marijuana use on his QNSP justifies its invocation of Guideline E. Adjudicative Guidelines at ¶ 16(a). Conditions that could mitigate security concerns under Guideline E include:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) 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;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

- (f) the information was unsubstantiated or from a source of questionable reliability; and,
- (g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Adjudicative Guidelines at ¶ 17.⁴

The Individual completed his QNSP on April 8, 2022, and was interviewed by the OPM investigator on April 29, 2022, just 21 days later. The Individual voluntarily informed the OPM investigator that he had used marijuana, prior to being confronted by his use by the investigator.⁵ As the Individual's disclosure was prompt and occurred before being confronted by the fact by the OPM investigator or any LSO officials, I find the first mitigating condition applicable. *Id.* at ¶ 17(a). The Individual's omission from the QNSP appears to be abnormal behavior for him, as supported by his friend's testimony regarding the Individual's character. The friend's testimony, in combination with the Individual's self-report of the information to the OPM investigator, leads me to find that the third mitigating condition is also applicable. *Id.* at ¶ 17(c). The Individual's admission that he omitted the information from his QNSP, without first being confronted with the information, is a positive step that alleviated the factors that contributed to the untrustworthy, unreliable, or other inappropriate behavior. I believe the Individual is unlikely to commit such behavior in the future. Thus, I find the fourth mitigating condition applicable. *Id.* at ¶ 17(d). By admitting his marijuana use to the OPM investigator, the Individual has taken a positive step to eliminate vulnerability to exploitation, manipulation, or duress. Thus, I find the fifth mitigating condition applicable. *Id.* at ¶ 17(e).

I found the Individual and his friend to be creditable witnesses. Especially convincing to me was the friend's statements that, "I don't really think [the individual] puts himself in a position to benefit from dishonesty very often" and that the Individual was the conscience of their friend group. The Individual struck me as an honest, forthright person, who made a mistake by omitting his marijuana use on the QNSP and realized that mistake while being interviewed by the OPM investigator. I believe that he has learned from the experience and knows that he must be totally honest during the access authorization process.

For the aforementioned reasons, I find that the Individual's omissions on the QNSP, while it presents a security concern, was mitigated by his prompt self-report of the omission before being confronted with the facts. There is nothing that causes me to doubt that the Individual will

⁴ The second mitigating condition is inapplicable to the facts of this case because the Individual has not asserted that he relied on the advice of counsel in failing to disclose his marijuana use on the QNSP, but rather than he was concerned about losing his job. Adjudicative Guidelines at ¶ 17(b). The sixth mitigating condition is not relevant because the LSO's allegations were based on the Individual's own admission that he used marijuana within the previous seven years. *Id.* at ¶ 17(f). The seventh mitigating condition is also inapplicable because the LSO did not assert that the Individual associated with persons involved in criminal activities. *Id.* at ¶ 17(g).

⁵ Although there is some confusion about the years that the Individual used marijuana, that inconsistency does not change my decision, because the Individual acknowledged the fact that he used marijuana regularly over many years. Whether he ceased his weekly use in 2016 or 2017 is immaterial to my final decision.

proactively disclose any derogatory information in the future. For these reasons, I find that the Individual has resolved the security concerns asserted by the LSO under Guideline E.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE to raise security concerns under Guideline E of the Adjudicative Guidelines. 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 sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns. Accordingly, I have determined that the Individual's access authorization should be granted. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Janet R. H. Fishman
Administrative Judge
Office of Hearings and Appeals