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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: April 11, 2017** )  
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**Case No.: PSH-17-0024**

**Issued: June 22, 2017**

**Administrative Judge Decision**

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the Individual”) for access authorization under the Department of Energy’s (DOE) 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.”<sup>1</sup> For the reasons set forth below, I conclude that the Individual’s security clearance should not be restored.<sup>2</sup>

**I. BACKGROUND**

On October 31, 2016, the Individual tested positive for Tetrahydrocannabinol (THC), the main active ingredient of marijuana. This information raised concerns regarding the Individual’s eligibility to hold a security clearance. In order to address those concerns, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the Individual on December 6, 2016. Because the PSI did not resolve the security concerns raised by the Individual’s positive test for marijuana, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual informing her that she was entitled to a hearing before an Administrative Judge, in order to resolve the substantial doubt regarding her eligibility for a security clearance. *See* 10 C.F.R. § 710.21. The Individual requested a hearing and the LSO forwarded the Individual’s request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter on April 12, 2017. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), I took testimony from the Individual and her supervisor (the Supervisor). *See* Transcript of Hearing, Case No. PSH-17-0024 (hereinafter cited as “Tr.”). The LSO submitted five exhibits, marked as DOE Exhibits 1 through 5 (hereinafter cited as “Ex.”). The Individual submitted two exhibits, marked as Exhibits A and B.

<sup>1</sup> Under the Regulations, “Access authorization” means 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 also be referred to in this Decision as a security clearance.

<sup>2</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.energy.gov/OHA>.

## II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning her eligibility for a security clearance. That information pertains to Guidelines E and H of the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House (December 29, 2005) (the Guidelines).

Under Guideline H, the LSO alleges that the Individual tested positive for THC on October 31, 2016. Use of, or involvement with, an illegal drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Guideline H at ¶ 24. Under the Guidelines, marijuana is considered to be an "illegal drug." Guideline H at ¶ 24(a)(1). The LSO further alleges that the Individual's use of a controlled substance prohibits her from possessing an access authorization pursuant to the Bond Amendment which states that security clearances cannot be maintained by a "person who is an unlawful user of a controlled substance..." 50 U.S.C. § 3343(b). The Individual's positive test for THC adequately justifies the LSO's invocation of Guideline H and the Bond Amendment.

The LSO also alleges, under Guideline E, that the Individual used or was involved with a product containing marijuana or THC while maintaining a DOE security clearance. Use of, or involvement with, an illegal drug while maintaining a security clearance exhibits an unwillingness or inability to comply with rules and regulations which can, in turn, raise questions about that individual's judgment, reliability, trustworthiness, and ability to protect classified information. Guideline E at ¶ 15. The Individual's positive drug test and admission that she repeatedly applied a product containing marijuana or THC to her boyfriend's back, while holding a security clearance, adequately justifies the LSO's invocation of Guideline H.

## III. REGULATORY STANDARDS

The Administrative Judge's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that:

The decision on an access authorization request is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. *Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.*

10 C.F.R. §§ 710.7(a) (emphasis added). In rendering this opinion, I have considered the following factors:

The nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of

the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

*See* 10 C.F.R. § 710.7(c). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

#### **IV. FINDINGS OF FACT**

On October 31, 2016, the Individual provided a urine sample pursuant to her employer's random drug testing program. The sample tested positive for THC. Ex. 4. The Individual does not dispute the validity of this test. Ex. 5 at 38.

Because this test result raised concerns that the Individual had used an illegal drug while maintaining a DOE security clearance, the LSO conducted a PSI of the Individual on December 6, 2016. During this PSI, the Individual stated that she had never smoked marijuana in her life. Ex. 5 at 11. The Individual provided two alternative explanations for her positive drug test. Ex. 5 at 11, 37, 40.

The Individual first explained that five days before the drug test, she had been lying by the pool with her boyfriend after drinking "a couple of Piña Coladas or something." Ex. 5 at 11, 13-16. She further explained that there was a stranger at the pool with "a candy fudge cookie type thing." Ex. 5 at 11, 17-18. According to the Individual, the stranger offered the Individual some of the cookie, and the Individual ate some of it. Ex. 5 at 11, 16. The Individual stated that she felt different after eating the cookie and that she was nauseous later that evening. Ex. 5 at 12. She described the feeling as "dizzy" and "just a little nauseous." Ex. 5 at 19. Her boyfriend, who was with her but did not eat the cookie, felt fine. Ex. 5 at 12. She attributed her nausea to drinking the two Piña Coladas on an empty stomach. Ex. 5 at 12.

The Individual then provided a second explanation for her positive test. She claimed that her boyfriend uses "a marijuana-based oil-type salve" for "extreme muscle spasms in his back." Ex. 5 at 23-24. She further described the salve as a "homemade product" that her boyfriend gets from a friend of his (whom he has not been able to locate). Ex. 5 at 25, 28. The Individual described the salve as "the only thing that's helped [her boyfriend]" and stated that she always used rubber gloves, when applying the salve, because she knew it was illegal. Ex. 5 at 25, 29. However, she claimed, during the early morning hours on the day before her positive test, she was in bed with her boyfriend who was in "horrific pain." Ex. 5 at 25-26. She then massaged his back for him, after he had applied the salve. Ex. 5 at 26. On the morning before her positive drug test, she did not use her rubber gloves because she had begun massaging his back without initially realizing that he had applied the salve. Ex. 5 at 26. To compound the matter, she stated she "had a scratch, a big old cat scratch," on her arm, indicating that the THC may have entered her system through the scratch. Ex. 5 at 26. The Individual claimed, however, that as soon as she finished applying the salve to her boyfriend, she cleaned her arm off with bleach. Ex. 5 at 36. The Individual stated that her positive drug test "had to have been that or the candy, because, like I said, I have never in my life smoked it." Ex. 5 at 27, 37. When the interviewer asked her if her boyfriend was an illegal drug

user, the Individual described her boyfriend as a recovering drug and alcohol user.<sup>3</sup> Ex. 5 at 30, 61. The Individual noted that she is a long term employee who had never failed a drug test before. Ex. 5 at 68. She stated that she intends to completely avoid any involvement with marijuana in the future. Ex. 5 at 66.

Two witnesses testified at the hearing: the Individual and her Supervisor.

The Supervisor, a personnel security professional, testified that she has supervised the Individual for 16 years. Tr. at 9, 14. She testified that the Individual had explained to her that she had applied a cream to her boyfriend's back that contained THC on the day before the random test. Tr. at 10. The Supervisor testified that she believed this explanation, because she has known the Individual for a long time, and considers the Individual to be "very honest . . . kind of honest to a fault almost." Tr. at 10-11. The Supervisor testified that the Individual told her that her boyfriend did not have a medical marijuana license at the time of the Individual's positive drug test. Tr. at 12. The Supervisor further testified that the Individual shared the results of several drug tests she has taken since her positive drug test, each of which were negative. Tr. at 17.

The Individual testified that she has never used marijuana, and would never use marijuana, because it would jeopardize her career. Tr. at 24-25. She further testified "I have never even drunk in my life," even though she reported consuming Pina Coladas during her PSI. Tr. at 30; Ex. 5 at 11. The Individual testified that her boyfriend has been using the marijuana salve for about a year, but no longer uses the salve around her.<sup>4</sup> Tr. at 18-19, 24. The Individual testified that the marijuana salve did not make her or her boyfriend intoxicated or "high," noting that he had been drug and alcohol free for 15 years.<sup>5</sup> Tr. at 29. The Individual testified that she normally used rubber gloves when applying the marijuana salve to her boyfriend's back, however, on the day before the positive drug test, she massaged his back without knowing that he had applied the marijuana salve.<sup>6</sup> Tr. at 19, 24, 30. She first testified that she did not realize she was engaging in an illegal activity by applying the marijuana salve, but then testified "Yes, I knew it was illegal, but I was not getting it on me. I was using rubber gloves." Tr. at 19-20. She testified that she used the rubber gloves because she did not want to experience the effects of the THC or risk her security clearance. Tr. at 22-23. She did note that she had a cut on her arm when she touched her boyfriend's back on the day she applied the salve without gloves. Tr. at 29-30. The Individual did not question the accuracy of the drug test. Tr. at 26. During the hearing, the Individual did not discuss her poolside consumption of a confection offered by a stranger, which she had previously offered as the potential basis for her positive drug test.

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<sup>3</sup> Earlier in the interview, the Individual had stated: "Wednesday before we left, we were, my boyfriend and I were at the pool and I, we'd, *we had been drinking excessively*, 'cause neither one of us drink." Ex. 5 at 11 (emphasis added). This statement suggests that her boyfriend may have been consuming alcohol with her, when she later claimed that he was drug and alcohol-free.

<sup>4</sup> She further testified that her boyfriend now has a prescription for the marijuana salve, Tr. at 24, however, she did not provide evidence of the prescription for the record.

<sup>5</sup> The Individual testified that her boyfriend was not present to testify at the hearing because "the whole thing just freaked him out. He just -- it scared him." Tr. at 32-33.

<sup>6</sup> This testimony is similar to the account she provided in her request for a hearing. Ex. 2.

The Individual submitted a Patient Progress Report (PPR) dated February 25, 2017. The PPR indicates that the Individual completed eight weeks of chemical dependency classes, which she started on November 26, 2016.<sup>7</sup> Ex. A. at 1. The PPR further states that the Individual was tested for illegal drugs on November 28, 2016, January 21, 2017, February 4, 2017, and February 17, 2017, and that no illegal drugs were detected by any of these tests. Ex. A at 1. The PPR noted that the Individual “completed recommended treatment and submitted [urine] samples as required, with no detected substances throughout [the] program.” Ex. A. at 1.

The Individual also submitted a written statement by her boyfriend, who explained that he was unavailable to attend the hearing because of his work schedule. Ex. B at 1. His statement indicates that he has a painful back injury which has not responded to traditional treatments. Ex. B at 1. This statement explains that he had obtained the salve from people he had met when riding his motorcycle, who said the salve had helped them with their back pain. Ex. B at 1. He tried the ointment and found that it helped his back. Ex. B at 1. He further stated:

There have only been a few occasions that [the Individual] has helped me put it on. Each time she would put on rubber gloves because she did not want to harm herself. I woke up early Sunday morning. That was October 30, 2016. I had extreme pain in my lower back and tried putting the salve on myself. I got back into bed and [the Individual] woke up seeing me in pain. She had no idea that I had already put the salve on and started massaging my back before I could stop her. She got up and washed right away but she had a scrape on her wrist so some of the salve must have gotten into the cut. After this happened she has never gone near the stuff and I no longer have it around her.

Ex. B at 1.

## V. ANALYSIS

As an initial matter, I note that although the Supervisor has testified that she considers the Individual to be highly credible, I am not sufficiently convinced that the Individual’s explanation for her positive drug test is credible. It is well settled that Part 710 places the burden of persuasion on the individual, because it is designed to protect national security interests. *See, e.g., Personnel Security Hearing*, PSH-17-0015 at 3 (2017). This is not an easy burden for an individual to sustain. 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

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<sup>7</sup> Guideline H also provides that: “Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, *and* a favorable prognosis by a duly qualified professional,” may mitigate security concerns arising under Guideline H. Guideline H at ¶ 26(d) (emphasis added). However, the Individual has not acknowledged a drug or alcohol problem and she presented no expert testimony, or testimony of her own, showing that she had benefited from attending those classes or counseling. Therefore ¶ 26(d) is not relevant to the present case.

clearance). Accordingly, an individual must come forward with evidence to convince the DOE that granting or restoring his or her 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).

I find that the Individual’s explanation for her positive drug test is not credible, for a number of reasons. First, the only evidence in the record supporting the Individual’s explanation is her statements during the PSI, her hearing testimony, and her boyfriend’s written statement (to which I assign limited weight, since he was not available for cross examination). Moreover, the Individual has provided almost no information concerning the alleged marijuana salve. In order for her explanation to suffice, the Individual would need to establish that the salve contained a sufficient concentration of THC to have caused a positive test result. (On the contrary, the Individual testified that her exposure was limited, and did not intoxicate either her or her boyfriend). Furthermore, the Individual’s explanation for her positive drug test is based upon an unlikely coincidence, namely that her inadvertent exposure happened on the day before her random drug test. Finally, I am also troubled by the Individual’s initial provision of two alternative explanations for her positive drug test, one of which (implying that she unknowingly accepted a drug-laced cookie from a stranger) she choose not to raise at the hearing. For these reasons, the Individual’s explanation for her positive drug test is not credible.

Even assuming, *arguendo*, that the Individual’s explanation for her positive drug test was credible, her involvement with marijuana or THC violated Federal law and DOE security policies and therefore raises significant security concerns. Those security concerns are made more significant by her possession of a DOE security clearance when these violations occurred.

### **Guideline E Concerns**

The Individual’s willingness to repeatedly disregard the law and DOE policy raises security concerns about her judgment, reliability, and trustworthiness, as well as her willingness to comply with rules and regulations. Guideline E at ¶ 16(d)(3). These concerns are magnified by her possession of a DOE security clearance while she used, or was involved with, illegal drugs. These concerns remain present regardless of whether or not the explanation she provided for her positive drug test is accurate.<sup>8</sup>

If the Individual’s explanation for her positive drug test is materially inaccurate, then she has exhibited particularly significant defects in judgment, reliability, and trustworthiness which have continued as recently as her hearing. Guideline E specifically states: “of special interest is any failure to provide truthful and candid answers during the security clearance process.” Guideline E at ¶ 15. Therefore, an Individual’s failure to provide truthful and candid answers to questions posed during a security clearance hearing would demonstrate a continuing unwillingness or inability to follow security rules. If, on the other hand, the Individual’s explanation for her positive drug test is materially accurate, it still raises security concerns because the Individual was repeatedly involved with an illegal substance even though she was aware that her actions violated Federal law and DOE security policies.

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<sup>8</sup> While Guideline H discusses drug *use*, the Individual claims that she did not use the drug, but rather facilitated her boyfriend’s marijuana use. Guideline H, however, cites a number of activities other than ingestion, including possession, which can raise security concerns. Guideline H at ¶ 25(c).

Security concerns under Guideline E may be mitigated when “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances<sup>9</sup> that it is unlikely to recur and does not cast doubt the Individual’s reliability, trustworthiness, or good judgment.” ¶ 17(c). The Individual’s violation of Federal law and DOE security policies concerning marijuana use or involvement is not considered a minor matter in these security proceedings. *See* 50 U.S.C. § 3343(b) (the Bond Amendment) (prohibiting illegal drug users from maintaining a security clearance). Moreover, the Individual’s violation of Federal law and DOE security policies occurred fairly recently, and if her explanation for her positive drug test is inaccurate, has continued at the hearing. I am therefore not sufficiently convinced that the doubts raised about her reliability, trustworthiness, and judgment by her illegal drug involvement while maintaining a DOE security clearance have been resolved.

Security concerns under Guideline E may also be mitigated when “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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” Guideline E at ¶17(d) (emphasis added). As discussed below, as far as her illegal drug use or involvement are concerned, the Individual has acknowledged the behavior, and changed her behavior. She has taken positive steps to alleviate the stressors, circumstances, or factors that caused her illegal drug use or involvement, and I am convinced she is unlikely to engage in future drug use or involvement. However, since the Individual has not convinced me that the explanation she has provided for her positive drug test is valid, I am not convinced that the Individual has sufficiently demonstrated that her unwillingness or inability to follow DOE security rules will not recur.<sup>10</sup>

Accordingly, I find that the security concerns raised under Guideline E have not been resolved.

### **Guideline H and Bond Amendment Concerns**

Guideline H states that illegal drug use raises questions about an Individual’s reliability and trustworthiness, because illegal drugs can impair judgment and because the decision to become involved with them raises questions about an individual’s willingness to comply with laws, rules

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<sup>9</sup> If the Individual’s explanation for her positive drug test is accurate, then it would make the circumstances “unique.” If she did not use the salve to become intoxicated and in fact used the salve in order to provide pain-relief to her boyfriend, those circumstances would provide some mitigation of the security concerns arising from the positive test. But the fact would remain that she had knowingly violated Federal law and DOE security policies while attempting to provide pain relief to her boyfriend.

<sup>10</sup> Guideline E further provides that security concerns can be mitigated when “association with persons involved in criminal activities 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.” Guideline E at ¶ 17(g). In the present case, this provision does not support a conclusion that the security concerns about the Individual raised under Guideline E have been resolved. The record shows that the Individual continues to associate with her boyfriend, who continues to use the marijuana salve, albeit with an alleged prescription, and with the understanding that he will not use the marijuana salve in her presence. Moreover, this provision does not provide any mitigation for the concerns raised by the Individual’s demonstrated unwillingness or inability to follow DOE security rules.

and regulations. If we accept the Individual's account of her marijuana involvement (*i.e.*, that her involvement was limited to her rubbing an illegal substance on her boyfriend's back without her having experienced any psychoactive effects), any concerns arising about her experiencing drug induced impaired judgment would be resolved because she was not experiencing any psychoactive effects. However, those security concerns raised by her decision to violate federal law and DOE security policy would remain unresolved.

Guideline H sets forth four conditions that can potentially mitigate security concerns arising from illegal drug use, two of which are relevant to the present case. Guideline H at ¶ 26. The first of these conditions exists when an individual's illegal drug use "happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." Guideline H at ¶ 26 (a). While it cannot be said that the Individual's illegal drug use or involvement "happened so long ago," I am convinced that the Individual has been impacted enough by her adjudicative review experience that she sincerely intends to avoid marijuana or THC use in the future.<sup>11</sup> While I am convinced that the Individual will avoid future illegal drug use or involvement, I am not sufficiently convinced that she is currently trustworthy and reliable, and that she exhibits good judgment. As I have discussed above, her explanation for her positive drug test is not sufficiently convincing, and even if it is accurate, she still exhibited poor judgment when she facilitated another person's illegal drug use, and when she became involved with an illegal drug and an illegal drug user. Even if her explanation of her positive drug test is accurate, her testimony did not convince me that she has learned from her mistakes, other than to avoid future illegal drug use, and therefore her judgement remains impaired. Moreover, if the Individual's explanation for her positive drug test is materially inaccurate (as I believe it is), her judgement, trustworthiness, and reliability clearly remain significantly impaired.

A second potentially mitigating condition exists when an individual has established, "a demonstrated intent not to abuse any drugs in the future, such as: (1) Disassociation from drug-using associates and contacts; (2) Changing or avoiding the environment where drugs were used; [or] (3) An appropriate period of abstinence." Guideline H at ¶ 26(b). The Individual has testified that she intends to abstain from future marijuana use, and that she intends to avoid any future involvement with it. As I have stated above, I am convinced that the present proceeding has made the very substantial consequences of future illegal drug use apparent to the Individual, and that her stated intention to avoid future illegal drug use is sincere. Moreover, I find that the Individual has established a period of abstinence of approximately seven and a half months,<sup>12</sup> which (given her apparently minor drug involvement), is sufficient to constitute an appropriate period of abstinence. These factors convince me that the Individual is unlikely to return to the use of, or involvement with, illegal drugs.

Furthermore, because I am convinced that the Individual is no longer using drugs and is likely to continue abstaining from illegal drug use, I find that she is no longer a "user" of illegal drugs.

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<sup>11</sup> This conclusion is supported by the evidence in the record indicating that the Individual has had at least four negative drug tests since her positive drug test. Ex. A at 1.

<sup>12</sup> The Individual's positive drug test occurred at the end of October 2016. As noted previously, the Individual has had at least four negative drug tests since that time. Ex. A at 1.



Therefore, I find that the security concerns raised by the LSO under the Bond Amendment are resolved.

However, I find that the security concerns raised under Guideline H by the Individual's marijuana use or involvement have not been sufficiently resolved. While I am convinced that the Individual will likely avoid future marijuana use, the concerns about the defects in the Individual's judgment, reliability, and trustworthiness exhibited by her violations of Federal law and DOE security policies while holding a DOE security clearance remain unresolved.

## **VI. CONCLUSION**

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines E and H, as well as the Bond Amendment. After considering all the evidence, both favorable and unfavorable, in a common sense manner, I find that the Individual has sufficiently mitigated the concerns raised under the Bond Amendment, but has not sufficiently mitigated the security concerns raised under Guidelines E and H. Accordingly, the Individual has not demonstrated that restoring her security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should not be restored at this time. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine  
Administrative Judge  
Office of Hearings and Appeals

Date: June 22, 2017