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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 6, 2017)
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Case No.: PSH-17-0081

Issued: January 25, 2018

Administrative Judge Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXXX XXXX XXXX (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.”¹ For the reasons set forth below, I conclude that the Individual’s security clearance should be granted.²

I. BACKGROUND

A DOE contractor has offered the Individual an internship that requires him to hold a DOE security clearance. On June 13, 2017, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the Individual to address various security concerns, including concerns related to the Individual’s possession of marijuana and his association with marijuana users. Because the PSI did not resolve all of the LSO’s security concerns, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual informing him that he was entitled to a hearing before an Administrative Judge, in order to resolve the substantial doubt regarding his 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 November 8, 2017. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), I took testimony from the Individual, his former supervisor, his mother, and his father.

¹ 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.

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

See Transcript of Hearing, Case No. PSH-17-0081 (hereinafter cited as “Tr.”). The LSO submitted four exhibits, marked as DOE Exhibits 1 through 4 (hereinafter cited as “Ex.”). The Individual did not submit any exhibits.

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 his eligibility for a security clearance. That information pertains to Guidelines E, H and J of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, The White House (June 8, 2017) (the Guidelines).

Under Guideline E: Personal Conduct, the LSO alleges that the Individual has a continuing association with persons involved in illegal marijuana use. The LSO asserts that the Individual’s admissions that he had daily contact with friends who smoke marijuana, that he planned to rent an apartment with friends who smoke marijuana, and that he traveled with friends who had purchased marijuana raise security concerns under Guideline E. “Conduct involving questionable judgment . . . or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information.” Guideline E at ¶ 15. Association with persons involved in criminal activity may raise a security concern and be disqualifying. Guideline E at ¶ 16(g). These allegations adequately justify the LSO’s invocation of Guideline E.

Under Guideline H: Drug Involvement and Substance Misuse, the LSO raises a concern about the Individual’s involvement with illegal drugs through association with friends as well as the Individual’s alleged possession of illegal drugs.³ The LSO states that the Individual admitted to knowing that his friends planned to purchase marijuana while they were together on a ski trip,⁴ and that he was aware that they were transporting marijuana in his car on their return from the ski trip. Illegal drug possession and involvement can raise questions about an individual’s reliability and trustworthiness, because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Guideline H at ¶¶ 24, 25(c), 25(g). The Individual’s alleged involvement with marijuana through association and his alleged possession of marijuana while returning from the ski trip adequately justify the LSO’s invocation of Guideline H.

Under Guideline J: Criminal Conduct, the LSO alleges that the Individual has possessed marijuana and knowingly transported it across state lines. The LSO cites the Individual’s admission that he drove his car across several state lines while knowing that his friends had marijuana in the vehicle. Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness and calls into question a person’s ability or willingness to comply with laws, rules, and regulations.

³ Because state and federal law concerning the legal definition of marijuana is complicated and can vary depending on the particular jurisdiction involved, it is not readily apparent that the Individual was legally in possession of the marijuana; however, his counsel chose not to contest the Notification Letter’s characterization of marijuana being knowingly transported in his car as “possession.”

⁴ Under Guideline H, marijuana is considered to be an “illegal drug” because it is a “controlled substance” as defined in 21 U.S.C. § 802. Guideline H at ¶ 24.

Guideline J at ¶ 30. The allegations that the Individual possessed marijuana and knowingly transported marijuana across state lines adequately justify the LSO's invocation of Guideline J.

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

There is no evidence in the record that the Individual is himself a user of illegal drugs. The Individual testified that he has never used illegal drugs, and will not ever use illegal drugs. Tr. at 92-93.

A. Ski Trip Incident

The Individual testified that prior to a ski trip to Colorado in January 2017, he learned that some of his friends intended to buy marijuana in Colorado. Tr. at 85. He advised his friends against it, and informed his friends before the trip that he did not want them to bring any illegal drugs into his car. Tr. at 79, 86. They told him they would respect his wishes. Tr. at 80.

On or about January 8, 2017, the Individual and some of his friends left Colorado. Tr. at 92. The Individual testified that, minutes before leaving, he learned that two of his friends had marijuana

in their possession.⁵ Tr. at 80, 92. Concerned that his friends had no other way to return home, the Individual agreed to transport them. Tr. at 80. The Individual was upset with his friends, because he knew that it was against the law to transport marijuana across state lines. Tr. at 80; Ex. 4 at 18. Although the Individual did not see the marijuana in his car, he knew it was present. Ex. 4 at 16.

During his PSI, the Individual clearly demonstrated that he did not fully understand the implications and possible consequences of allowing his friends to transport marijuana in his vehicle and his association with illegal drug users. While he stated that he understood that it looked “very suspicious” that he had drugs in his car, and noted that, in hindsight, he understood the DOE’s security concerns and would act differently if presented with the same dilemma again, he also characterized the decision to transport the marijuana in his vehicle as his friends’ choice, noted it was just one event and suggested that he felt that it was “completely . . . insignificant.” Ex. 4 at 28-30, 51.

During the hearing, the Individual unambiguously recognized that he had made a poor decision when allowing the marijuana into his vehicle before returning from the ski trip; should not have allowed the marijuana into his car; and should have found alternative transportation for his friends’ return from Colorado. Tr. at 82. He testified that during the ski trip he had been “naïve and did not grasp the full severity of what was happening” and that he now recognizes that his mentality should be to “never break the law, no matter if someone will find out or not.” Tr. at 102. He described his actions during the ski trip as “foolish” and reflecting a “lapse in judgment.” Tr. at 82, 100. He stated, “I can assure you that same lapse will not happen again.” Tr. at 100.

B. Living Arrangements and Association with Illegal Drug Users

The Individual acknowledged that members of his fraternity engaged in illegal drug use, but not while he was present. Ex. 4 at 20. Prior to the ski trip in January 2017, the Individual signed a lease to live in an apartment with three fraternity brothers starting in the fall of 2017. Tr. at 75. He testified that “[w]hen we signed the lease, none of them were drug users, none of them had used marijuana, to my knowledge.” Tr. at 75. However, by the spring of 2017, two of these friends had started to use illegal drugs. Ex. 4 at 55; Tr. at 75. One of the individuals who would be living with him was one of the friends who had brought marijuana into his car during the ski trip. Ex. 4 at 65. During his PSI in June 2017, the Individual stated his intention to live with these friends. Ex. 4 at 55.

In the fall of 2017, the Individual proceeded with his plan to move into the apartment with these individuals. Tr. at 75. Prior to moving in with them, he asked them not to bring drugs into the apartment. Tr. at 75. He believes that his friends adhered to that request. Tr. at 75-76. He described himself as having had a “zero tolerance policy for any sort of illegal actions in that apartment.” Tr. at 76. The Individual testified that several weeks prior to the hearing he moved to a new apartment, in order to further disassociate himself from marijuana use, and to demonstrate that dissociation for the purpose of this hearing. Tr. at 77, 87- 88. This move has required him to carry two leases. Tr. at 77-79. The Individual stated during the hearing that, in hindsight, he should

⁵ The Individual told his parents about the incident not long after the ski trip. Tr. at 32, 57. His claim that he was forced to make a last-minute decision matches the account that he told his parents. Tr. at 57.

have backed out of the first lease or arranged a sublease, and should not have moved into the apartment with those three friends. Tr. 82.

The Individual testified that he has taken other steps to dissociate himself from friends who use illegal drugs, and avoided contact with acquaintances who use illegal drugs. He continues to go to his fraternity house for lunch and for other meetings, but he does not attend fraternity parties. Tr. at 79, 97-98. He asserted during the hearing that he has “too much at stake” for drugs to have a place in his life. Tr. at 100.

C. Other Relevant Evidence

The Individual’s parents testified on his behalf at the hearing. The Individual’s mother described him as a “rule follower” who “takes his education and his personal character very seriously.” Tr. at 34. His father similarly attested to the Individual’s character. Tr. at 65.

The Individual’s former supervisor, who oversaw the Individual’s work at a university lab, described the Individual as responsible and honest. Tr. at 19-20. At the conclusion of the hearing, DOE Counsel expressed the belief that the Individual has “learned his lesson” and that he is someone whom the DOE can trust. Tr. at 107.

V. ANALYSIS

Guideline E

Guideline E describes conditions that can potentially mitigate security concerns arising from questionable personal conduct. One of these is when “the behavior is so infrequent, or 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.” Guideline E at ¶ 17(c). The ski trip incident was clearly the result of unique circumstances, in which the Individual’s responsibilities to his friends conflicted with his obligation to obey the law. Although the Individual exercised poor judgment in that circumstance, his testimony and actions since the PSI have convinced me that it is unlikely that such a scenario will occur again. Moreover, the Individual has, through his testimony and his decision to move to a new apartment, shown that he now understands the responsibilities inherent in maintaining a security clearance, and the importance of avoiding any association with persons engaged in criminal activity.

Another condition that can potentially mitigate security concerns arising from questionable personal conduct under Guideline E exists “when the individual has . . . taken 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.” Guideline E at ¶ 17(d). I find that that this mitigating factor relates to his association with individuals who use illegal drugs. The Individual has recognized the need to disassociate himself from illegal drug users, and taken a number of positive steps to alleviate the circumstances and factors when led to his poor choices. He no longer lives in a fraternity house where illegal drug use occurs and he has moved out of an apartment he shared with roommates who have a history of illegal drug use. The steps he has taken to dissociate himself from illegal drug users also reduce the chances that he will be asked to make questionable decisions, such as the ones that he made by traveling to Colorado with friends who

expressed interest in purchasing marijuana, and by allowing marijuana into his vehicle on the return trip. Guideline E provides that ceasing association with persons involved in criminal activities can mitigate security concerns arising under Guideline E ¶ 16(g). Guideline E at ¶ 17(g).

For the above reasons, I find that concerns raised under Guideline E by the Individual's conduct during the ski trip and his association with marijuana users have been sufficiently resolved.

Guideline H

Guideline H sets forth several conditions that can potentially mitigate security concerns arising from drug involvement. One condition that could mitigate this security concern is when the conduct "was so infrequent, or happened under such circumstances that it is unlikely to recur." Guideline H at ¶ 26(a). I find that this mitigating condition applies to the ski trip incident, because, as noted above, the incident was a unique situation that is unlikely to recur. Moreover, the Individual's testimony and his decision to move out of the apartment convinced me that he is committed to avoiding close association with illegal drug users, and that it is highly unlikely that the Individual will again become involved with illegal drugs. Accordingly, I find that concerns raised under Guideline H by the Individual's conduct during the ski trip and his association with marijuana users have been sufficiently resolved.

Guideline J

Guideline J sets forth several conditions that can potentially mitigate security concerns arising from criminal involvement. One condition that could mitigate this security concern is when the conduct "... is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Guideline J at ¶ 32(a). As I have discussed above, I have found that the Individual's criminal conduct is highly unlikely to recur, and that he has now demonstrated reliability, trustworthiness, and good judgment. Accordingly, I find that concerns raised under Guideline J by the Individual's involvement with transporting marijuana have been sufficiently resolved.

VI. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines E, J, and H. 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 Guidelines E, J, and H. Accordingly, the Individual has demonstrated that granting his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should be granted. The Local Security Office 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