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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: September 13, 2019) Case No.: PSH-19-0054
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Issued: December 11, 2019

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXXXX (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, “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.

I. BACKGROUND

The Individual is employed by a DOE Contractor in a position that requires her to hold a security clearance. During a background investigation, derogatory information regarding the Individual’s history of drug use was uncovered. The Individual underwent a Personnel Security Interview (PSI). The Local Security Office (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 to hold 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 September 13, 2019. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual presented the testimony of eight witnesses, and testified on her own behalf. *See* Transcript of Hearing, Case No. PSH-19-0054 (hereinafter cited as “Tr.”). The LSO submitted seven exhibits, marked as Exhibits 1 through 7 (hereinafter cited as “Ex.”). The Individual submitted 11 exhibits, marked as Exhibits A through K.

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.

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, H, and J of 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).

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's overarching adjudicative goal is to issue a fair, impartial and common sense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." Adjudicative Guidelines ¶ 2(a). The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration.

Guideline E (Personal Conduct) relates to conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations, which raises questions about an individual's reliability, trustworthiness and ability to protect classified information. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. *See* Adjudicative Guidelines ¶ 15.

Guideline H (Drug Involvement and Substance Misuse) relates to security risks arising as a result of an individual's illegal use of controlled substances, including misuse of prescription and non-prescription drugs, and use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose. Illegal drug use raises concerns about an individual's reliability and trustworthiness because such drug use may impair a person's judgment and because using drugs illegally raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *See* Adjudicative Guidelines at ¶ 24. The conditions set forth in the Guidelines that could raise a disqualifying security concern are any substance misuse; testing positive for an illegal drug; illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; possession of drug paraphernalia; a Substance Use Disorder diagnosis by a duly qualified medical or mental health professional; failure to successfully complete a drug treatment program prescribed by a duly qualified medical or mental health professional; any illegal drug use while granted access to classified information or holding a sensitive position; and expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Guideline J (Criminal Conduct) provides that "[c]riminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations." Adjudicative Guidelines at ¶ 30. The conditions that could raise a security concern and may be disqualifying include a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or

trustworthiness; evidence of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; an individual is currently on parole or probation; an individual's parole or probation was violated or revoked; an individual's failure to complete a court-mandated rehabilitation program; and discharge or dismissal from the Armed Forces for reasons less than "Honorable." Adjudicative Guidelines at ¶ 31.

The LSO alleges that the Individual's husband used and stored marijuana two to three times per year in the garage of their home; that the Individual's husband used marijuana in her presence the weekend before her PSI; that the Individual was present while marijuana was used on a camping trip and that the Individual attended social events with marijuana use three to five times per year; that the Individual used marijuana occasionally from 2007 to 2013; that the Individual used and purchased ecstasy three to four times from 2008 to 2011; and that the Individual was involved with the sale and transfer of \$20 to \$40 worth of mushrooms once in 2011. Accordingly, the LSO's security concerns under Guidelines E, H, and J are justified.

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 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 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). The Individual is afforded a full opportunity to present evidence supporting her 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.

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

The Individual's husband testified that he had known the Individual for 14 years. Tr. at 9. He testified that the Individual had not used any illegal drugs in six or seven years. *Id.* at 10. He stopped using ecstasy when the Individual did. *Id.* He has used marijuana occasionally since then, typically a couple of times per year. *Id.* The husband stopped using marijuana entirely after the Individual's

PSI. *Id.* at 11. He last used marijuana in Denver in 2018. *Id.* at 13–14. The Individual was not with him on the trip. *Id.* at 14. When he returned, he discussed his use with the Individual, who informed him that his marijuana use in a state with legalized recreational use still jeopardized her security clearance. *Id.* The husband had been to Colorado several times since and neither he nor anyone he was traveling with had used marijuana on any of those trips. *Id.* at 15–16.

The husband testified that the Individual had avoided being around marijuana use in the past by leaving the area where it was being used. Tr. at 12. Since the PSI, he and the Individual had stopped going to places where marijuana was likely to be used so that the Individual would not have to be around it at all. *Id.* They have modified their social group since the Individual's PSI. *Id.* at 16. They do not have regular contact with anyone using marijuana and have tailored their social circle to comply with security guidelines. *Id.* The husband has also turned to therapy to cope with his depression and anxiety so that he would not need to turn to marijuana in the future. *Id.* at 17.

The Individual's former office mate had known the Individual for about 18 months. Tr. at 25–26. He testified that they work together and also socialize outside of work. *Id.* at 26. They see each other daily at work and two to six times per month socially. *Id.* at 26–27. He had spoken to the Individual about past drug use on multiple occasions because they were going through the security clearance process at the same time. *Id.* at 27. He testified that the Individual was forthcoming and candid about her history of drug use. *Id.* at 29–30. The colleague testified that he did not believe the Individual had used an illegal drug since around the time she was in college. *Id.* at 29. He testified that he believed the Individual intended to comply with security requirements regarding drug use in the future. *Id.* at 37.

The Individual's friend had known the Individual for many years. Tr. at 38. He was also one of her husband's best friends. *Id.* at 39. He testified that he last witnessed the Individual using an illegal drug seven or eight years prior. *Id.* at 40. He further testified that he had seen the Individual mature over the course of their friendship. *Id.* at 41–42.

The Individual's colleague had known the Individual for about one year. Tr. at 48. They worked in the same building and communicated daily for about the first four months. *Id.* at 48–49. They also socialized outside of work once or twice per month. *Id.* at 49–50. He had never seen the Individual consume illegal drugs while the Individual was employed by the DOE Contractor. *Id.* at 50. He testified that the Individual has recently refused to enter establishments where she suspects there is the possibility that someone may be using marijuana. *Id.* at 51–52.

The Individual's workplace mentor had known the Individual for about two years. Tr. at 60. They saw each other about four times per week and did not socialize outside of work. *Id.* She testified that she did not believe the Individual had used illegal drugs since being employed by the DOE Contractor. *Id.* at 61. She testified that the Individual had good judgment and was very cautious with security at work. *Id.* at 61–62. She believed the Individual was very reliable and trustworthy and that the Individual was compliant with rules. *Id.* at 62.

The Individual's project Principal Investigator had known the Individual for about a year. Tr. at 65. They met every week or every other week while they were on the same project, but did not meet regularly after the project ended in September 2019. *Id.* at 66. They occasionally saw each other outside of work. *Id.* She believed the Individual had not used illegal drugs while being

employed by the DOE Contractor. *Id.* at 67. She testified that the Individual demonstrates good judgment and is a rule follower. *Id.* For example, when left alone by her escort, the Individual had proactively sought a new escort to ensure that no security violation occurred. *Id.* at 67–68.

The Individual’s senior manager had known the Individual for about two years in a professional context only. Tr. at 75–76. He had discussed the security concerns at length with the Individual and was certain that she had not used illegal drugs while employed by the DOE Contractor. *Id.* at 77. He testified that the Individual diligently follows rules and that she has good judgment and is trustworthy. *Id.* at 78. He believed that the Individual would not have issues with illegal drug use in the future. *Id.* at 84.

The Individual’s direct manager had known the Individual for about two years. Tr. at 86. They have rare contact outside of work at work-related social events. *Id.* at 87. He did not believe that the Individual had consumed illegal drugs while employed by the DOE Contractor. *Id.* He testified that there were no concerns with the Individual’s judgment and that she was compliant with rules. *Id.* at 88. He believed the Individual was trustworthy. *Id.* at 89.

The Individual last smoked marijuana in 2013, her last year of college. Tr. at 95. She stopped because it made her paranoid, it was illegal, and it was a risky behavior that was not integral to her life. *Id.* She last used ecstasy in 2011. *Id.* at 95–96. She tried it because she wanted to see what it felt like. *Id.* at 96. She stopped using ecstasy because it is illegal and harmful to one’s health. *Id.* The Individual intends to abstain from using illegal drugs indefinitely. *Id.* She testified that drugs were never an integral part of her life, so abstaining had not been difficult. *Id.* at 119. The Individual testified that she did not profit from the conveyance of mushrooms and was not dealing in drugs. *Id.* at 97–98. She had been asked if she knew where to find mushrooms, and, because she did not know, she helped find a source. *Id.* at 97. She had not used mushrooms and did not intend to do so in the future. *Id.* at 98–99. She intends to abstain indefinitely from conducting or brokering the sale or transfer of illegal drugs. *Id.* at 99.

The Individual was not aware until her PSI that it was a security concern to be around others who used marijuana. Tr. at 100. At that time, she believed that simply walking away while marijuana was being used was enough to comply with security regulations. *Id.* The Individual testified that she now understood that it was against DOE policy to associate with people who use marijuana, regardless of the drug’s legal status in the state. *Id.* at 101–02. She now avoids people and places that she suspects may be associated with marijuana use, including modifying her social circle to exclude people who use illegal drugs. *Id.* at 102–03. After the PSI, the Individual explained to her husband that it was unacceptable for him to use marijuana because it would be a security concern. *Id.* at 105. She testified that her husband used marijuana once after that while in Colorado, after which she explained to him that marijuana is federally illegal and that the security concerns remained, regardless of marijuana’s legality in the state. *Id.* at 106. The Individual sees marijuana use as a deal-breaker; if her husband decides to start using marijuana in the future, she will leave him. *Id.* at 108. She intends to follow all rules, laws, and regulations applicable to her as a clearance holder if granted a security clearance. *Id.* at 121.

V. ANALYSIS

A person who seeks access to classified information enters into a fiduciary relationship with the federal government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government places a high degree of trust and confidence in individuals to whom it grants access authorization. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all the evidence, both favorable and unfavorable, in a common sense manner. “Any doubt concerning personnel being considered for access for national security eligibility will be resolved in favor of the national security.” Adjudicative Guidelines ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting and restoring security clearances, I must deny the security clearance if I am not convinced that the LSO’s security concerns have been mitigated such that granting the Individual’s clearance is not an unacceptable risk to national security.

Guideline E provides that the following conditions (in relevant part) may mitigate Personal Conduct security concerns: (1) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; (2) 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; (3) 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; and (4) 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(a), (c), (d), (g).

Guideline H security concerns may be mitigated when (a) the behavior was so infrequent or so long ago that it is unlikely to recur and does not cast doubt on his or her current reliability, trustworthiness, or judgment; (b) the individual acknowledges his or her drug involvement, provides evidence of actions taken to overcome this problem, and has established pattern of abstinence, including dissociating from drug-using associations, avoiding the environment where he or she used drugs, and providing a signed statement of intent to abstain from all drug-involvement; (c) the drug use was prescription drug abuse after a severe illness for which the drugs were prescribed and the drug use has ended; and (d) the individual has satisfactorily completed a drug treatment program, including aftercare requirements, without relapse and has a favorable prognosis from a qualified medical professional. Adjudicative Guidelines at ¶ 26(a)–(d).

Guideline J provides that security concerns arising from criminal conduct can be mitigated when (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; (b) the individual was pressured or coerced into

committing the act and those pressures are not prescribed, the pressures are no longer a part of the individual's life, and the abuse has since ended; (c) there is no reliable evidence to support that the individual committed the offense; and (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement. Adjudicative Guidelines at ¶ 32.

The Individual's drug involvement occurred so long ago that it is unlikely to recur and no longer casts doubt on her reliability, trustworthiness, or judgment. Her drug use occurred while she was still quite young and she has abstained for at least six years, despite ample opportunity to use. Furthermore, her abstinence was a voluntary choice, beginning years before her need for a security clearance. Her drug sale, while unarguably a more serious offense, was a one-time event, occurring over eight years ago while she was in college, for which she received no profit. She has not participated in the transfer of illegal drugs before or since and her testimony on the subject was credible such that it appears unlikely that she will do so again in the future.

The Individual believed she was in compliance with DOE drug guidelines before her PSI. When she learned that she was violating the rules by associating with drug users, she immediately and successfully took steps to become compliant. This included giving her husband an ultimatum and severing associations with other marijuana users. The Individual's commitment to leading a drug-free life is unequivocal. She has created a social circle that supports and participates in her drug-free lifestyle. She has also educated herself on DOE's requirements of clearance holders to prevent misunderstandings in the future. The Individual's efforts, as well as her results, mitigates the DOE's doubt as to her judgment, reliability, and trustworthiness.

For the foregoing reasons, I find that the Individual has mitigated the security concerns under Guidelines E, H, and J.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guidelines E, H, and J of the Adjudicative Guidelines. I further find that the Individual has succeeded in fully resolving those concerns. Therefore, I conclude that granting DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should grant access authorization to the Individual at this time.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Administrative Judge
Office of Hearings and Appeals