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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: January 30, 2020) Case No.: PSH-20-0034
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Issued: January 28, 2021

Administrative Judge Decision

James P. Thompson III, 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 not be restored.

I. BACKGROUND

A DOE contractor employs the Individual in a position that requires him to hold a security clearance. The Individual signed an Electronic Questionnaire for National Security Positions (QNSP) on January 10, 2017. Exhibit (Ex.) 6.² Therein, he certified that in the last seven years he had not illegally used any drugs or controlled substances and that he had never illegally used a drug or controlled substance while possessing a security clearance. *Id.* at 51. However, he later admitted during an October 2018 Enhanced Subject Interview (ESI) that he had used marijuana on two occasions while possessing a security clearance. Ex. 7 at 118. The local security office (LSO) subsequently issued a Letter of Interrogatory (LOI) to the Individual seeking greater detail, and the Individual responded in writing. Ex. 5.

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 Numerous exhibits offered by DOE contain documents with printed page numbers that are inconsistent with the pagination of the exhibits. This decision cites to exhibits based on the pagination of the combined exhibits and not page numbers printed on documents contained within exhibits.

On November 7, 2019, the LSO issued the Individual a notification letter stating that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In a summary of security concerns (“SSC”) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guideline E and Guideline H 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 LSO forwarded the Individual’s request to the Office of Hearings and Appeals (OHA). On January 30, 2020, the Director of OHA appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. At the hearing, the Individual presented the testimony of three witnesses and testified on his own behalf. *See* Transcript of Hearing (Tr.). The LSO submitted seven exhibits, marked Exhibits 1 through 7. The Individual submitted five exhibits, marked Exhibits A through E.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline E (Personal Conduct) as the first basis for suspending the Individual’s security clearance. Ex. 1. It states that “[c]onduct 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.” Adjudicative Guidelines at ¶ 15. The Guideline places special emphasis on “any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” *Id.* Conduct that could raise a security concern includes “[d]eliberate . . . falsification of relevant facts from any personnel security questionnaire.” *Id.* at ¶ 16(a). The LSO relied upon the following information: in January 2017, the Individual submitted a QNSP certifying that he had not used illegal drugs or controlled substances in the past seven years, nor illegally used drugs or controlled substances while possessing a security clearance; however, he later admitted to using marijuana two times during that period. The above information justifies the LSO’s invocation of Guideline E.

The LSO also cited Guideline H (Drug Involvement and Substance Misuse) as a basis for suspending the Individual’s security clearance. Illegal use of controlled substances can raise “questions about a person’s ability or willingness to comply with laws, rules, and regulations.” Adjudicative Guidelines ¶ 24. Conditions that could raise a security concern include “any illegal drug use while granted access to classified information or holding a sensitive position.” *Id.* at ¶ 25(f). The LSO’s reliance on the Individual’s admitted illegal drug use justifies the invocation of Guideline H.

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) (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 his or 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.

IV. FINDINGS OF FACT

On October 3, 2018, the Individual participated in an ESI with an Office of Personnel Management (OPM) investigator during which the Individual admitted using marijuana on two occasions in early 2013 while possessing a security clearance. Ex. 7 at 118. The Individual claimed that he did not provide accurate information in his QNSP because he did not remember his previous marijuana use at the time he completed it. *Id.* He told the OPM Investigator that his then-wife (“ex-wife”), whom he previously identified in his QNSP, had started using marijuana in 2013, and he had tried using it with her in an attempt to save his marriage. Ex. 7 at 118; Ex. 6 at 40. He stated he has no intention of using marijuana in the future, acknowledged that he knew it was illegal, and stated it was “a stupid decision when trying to fix his marriage.” Ex. 7 at 118. The Individual also reported that he does not associate with individuals who use illegal drugs and “does not plan to be put in a situation again where others are using drugs around him.” *Id.* Finally, he reported that his ex-wife is the only other person aware of his past drug use, and he provided her telephone number during the interview. *Id.*

The record includes the Individual’s May 2019 response to the LOI, mentioned earlier, in which he further explained his marijuana use and why he failed to report it in his QNSP. Ex. 5. He admitted that he was aware of DOE’s policy regarding the use of illegal drugs while possessing a security clearance. Ex. 5 at 18. To explain why he provided incorrect information in the QNSP before later disclosing the truth, the Individual stated that his divorce was a low time in his life that he tried to forget, but sitting with that investigator jogged his memory, and he had “to tell the truth.” Ex. 5 at 19.

The record also includes a history report from the Individual’s employer’s drug test program; it reflects that he received negative results for drug tests taken in July 2018, January 2019, and November 2019. Ex. B.

At the hearing, the Individual’s former supervisor, who is also his friend, testified that he met the Individual at the Individual’s previous employer. Tr. at 16–17, 20. He has known the Individual for approximately nine years, and they maintain regular contact with each other. *Id.* at 16–17, 20.

He testified that the Individual was an excellent employee and dependable, including whenever he requested that the Individual work unanticipated work shifts. *Id.* at 17–18. He testified that the Individual has good judgment, and he has never doubted the Individual’s honesty. *Id.* at 21–22. The former supervisor stated that the Individual underwent random drug tests as part of their employer’s drug testing program, and the consequence for illegal drug use was automatic termination of employment. *Id.* at 18. He testified that the Individual took a minimum of two employer-issued, random drug tests per year in the time they worked together, not including drug tests issued by their job site. *Id.* at 23. The Individual never tested positive. *Id.* The former supervisor also testified that he had never known the Individual to use illegal drugs. *Id.* at 18–19.

The Individual’s childhood friend also provided supportive testimony. He testified that, although he moved to a different state three years ago, he still talks to the Individual at least once a month. Tr. at 8–9. The childhood friend was surprised to learn of the Individual’s drug use, and he thought it was uncharacteristic of the Individual. *Id.* at 11. He stated that the Individual told him that he used marijuana “quite a while ago,” and the friend understood and believed it to be a “one-time mistake.” *Id.* at 10–11. Regarding the Individual’s character, the witness testified that the Individual is trustworthy, dependable, and always willing to help him. *Id.* at 12–14. He asserted that the Individual exercised good judgment, providing the example that the Individual always makes sure his friends do not drive after consuming alcohol. *Id.* at 13.

As the penultimate witness, the Individual’s current wife testified about her seven-year relationship with the Individual. Tr. at 25. She knew about the Individual’s problems in his previous marriage, but she did not know that he had used marijuana until he disclosed it to her approximately two years ago when his security clearance re-investigation began. *Id.* at 25–26. She was surprised at his disclosure because he had previously spoken to her children about the importance of not using drugs. *Id.* at 26. She testified that she is only aware of the Individual using marijuana twice back in 2013 in an attempt to better understand his ex-wife and cope with the circumstances surrounding his failing relationship.³ *Id.* at 27–28, 34. She testified that he is unlikely to use marijuana in the future because of the impact of this security clearance process. *Id.* at 30–31. She and the Individual discussed his failure to report his marijuana use, and she believes the Individual forgot the information as opposed to trying to hide it. *Id.* at 29. She stated that his failure to report was the result of unique circumstances that are no longer present. *Id.* at 30. Finally, the Individual’s wife testified that the Individual is reliable, trustworthy, loyal, and of good character, based on his care of their children, their relationship, the fact that he keeps his word, and his honest communication. *Id.* at 30–31, 36.

The Individual testified last. He did not dispute the allegations in the SSC but rather attempted to clarify and supplement the record. He first received a clearance around early 2012. Tr. at 39. He testified that he had never used illegal drugs prior to 2013, and he has not used illegal drugs since. *Id.* He confirmed that he has not socialized with anybody who uses illegal drugs since 2013. *Id.* He added that he used marijuana with his ex-wife because “she talked [him] into it.” *Id.* at 40. He also indicated that he did not consider the consequences at the time, but he soon realized the risk to his career. *Id.*

³ The transcript indicates the Individual’s current wife testified that he used marijuana five times. Tr. at 28. However, she actually testified at the hearing that he used marijuana only twice. Therefore, I consider the transcript to contain a typographical error.

The Individual also admitted that, at the time, he knew that his employer had a zero-tolerance illegal drug use policy. *Id.* at 43. When asked why he did not report his drug use to his employer, he stated, “I can’t think of a reason why I didn’t report it. I wish I had.” *Id.* However, he also testified that reporting it “never crossed [his] mind” because he did not use a clearance at that job.⁴ *Id.* at 42. The Individual denied, several times, that his failure to report his drug use was motivated by a fear of facing the consequences of his employer’s illegal drug use policy. *Id.* at 43, 48. He stated that he failed to supply the information on his QNSP because he buried the memory away due to the pain and trauma he experienced during his failed marriage. *Id.* at 42, 44, 46.

Finally, the Individual reaffirmed that the memory of his marijuana use only reemerged during the ESI. *Id.* at 47. He denied knowing whether the OPM investigator had talked with his ex-wife prior to the interview. *Id.* He then testified that he disclosed his marijuana use to the investigator because he “wanted to be honest, because that’s who [he] is.” *Id.* The Individual expressed remorse that he had not disclosed his marijuana use to his former employer when it first occurred and that he did not disclose it on the QNSP. *Id.* at 48. He considers his conduct a mistake, and he expressed his intent to permanently abstain from illegal drug use. *Id.* at 49–50.

V. ANALYSIS

A. Guideline E Considerations

The following relevant conditions could mitigate a security concern under Guideline E:

(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;

Adjudicative Guidelines at ¶ 17.

The Individual’s lack of candor is centered on his failure to provide truthful and candid answers in his January 2017 QNSP concerning his prior use of marijuana while possessing a security clearance. I find that the Individual has not mitigated the concern under the first factor listed above. I do not find sufficient evidence to conclude there were any unique circumstances surrounding his completion of the QNSP. Furthermore, I do not find so much time has passed, his behavior so infrequent, or his failure to provide truthful answer so minor as to thereby mitigate the security concerns. Only two years have passed since he finally disclosed his 2013 drug use. Furthermore,

⁴ He explained that he had performed work for DOE and other companies, and he therefore did not use his clearance day-to-day. *Id.* at 42-43, 55–56.

I found his hearing testimony regarding the circumstances of his failure to report the conduct in both 2013 and 2017 less than candid.

While his failure to disclose, at the time, his conduct in 2013 is not a basis for concern stated in the SSC, his testimony on the topic provided an opportunity to evaluate his truthfulness and candor. The Individual did not dispute that he knew he was placing his security clearance and his job at significant risk by using marijuana in 2013. He stated that his recognition of the risk to his career is one of the reasons why he stopped. However, during the hearing, he denied that his failure to report his drug use was motivated by his fear of the likely consequences. Instead, he explained that he did not report his conduct at the time because he was not actively working on classified matters, and he therefore never thought to disclose it. I find this explanation dubious.

Turning to his failure to answer truthfully in his 2017 QNSP, the Individual explained that his reason for not disclosing his marijuana use was due to burying the memory of it along with the pain he experienced during his failed marriage. To believe that, one would need to believe that his memories did not resurface while reading and answering two direct questions about prior drug use in the QNSP, nor did the memories resurface when he provided information about his ex-wife in a separate section. Rather, the memories only reemerged when he responded to similar questions during the ESI. I find this explanation dubious as well.

It seems much more likely that, knowing the risks, the Individual failed to disclose his concerning conduct in each instance because he did not want to suffer the consequences of his behavior. Furthermore, I cannot ignore that his recollection and ultimate disclosure coincided with questioning from a background investigator who, from the Individual's admitted perspective, could have already interviewed and discovered the information from the only other person with knowledge of the Individual's marijuana use, his ex-wife. Consequently, I remain concerned that the Individual's falsifications of relevant information on the QNSP were deliberate. Therefore, I conclude that the Individual has not mitigated the Guideline E security concerns.

Regarding the second mitigating factor above, I do not find the Individual has taken sufficient positive steps to alleviate the factors that contributed to his concerning behavior for the same reasons contained in the preceding paragraphs. I make my finding despite the positive testimony provided by his current wife and friends, all who testified in support of his character. However, based on my continuing concerns regarding his candor, I conclude that he has not mitigated the Guideline E concerns.

B. Guideline H Considerations

An individual may mitigate security concerns under Guideline H, in relevant part, if "the behavior 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." Adjudicative Guidelines at ¶ 26(a).

The Individual testified that he has not used marijuana since 2013, and he provided objective evidence of three random drug tests in 2018 and 2019, all of which were negative. There is no evidence to dispute that he only used marijuana on two occasions within a two-month period over

seven years ago. Furthermore, he established that his previous drug use was under unusual circumstances due to specific problems related to his previous marriage, and he expressed remorse for his conduct.

I find nothing in the record that would indicate that the Individual continues to engage in illegal drug use. The record convincingly suggests that the Individual's past drug use was infrequent, and it occurred long ago under life circumstances that no longer exist. As such, I find that the Individual's previous illegal drug use is unlikely to recur, and that he has mitigated the Guideline H security concerns.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised security concerns under Guidelines E and H of the Adjudicative Guidelines. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the Guideline E security concerns set forth in the Summary of Security Concerns. Accordingly, I have determined that the Individual's access authorization should not be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

James P. Thompson III
Administrative Judge
Office of Hearings and Appeals