

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
)
Filing Date: March 21, 2013)
)
_____)

Case No.: PSH-13-0036

Issued : June 27, 2013

Hearing Officer Decision

Wade M. Boswell, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual’s access authorization should be restored.

I. Background

The individual is employed by a DOE contractor in a position that requires that he hold a DOE security clearance and participate in the Human Reliability Program (HRP).² During a conversation with his sister-in-law in November 2012 about her weight loss, she mentioned that she was taking an appetite suppressant that she had been prescribed by her doctor, and offered to let him try a few. The individual took one of the “diet pills” the

¹ Access authorization is defined 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). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

² The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. Participants in the HRP are subject to random breath alcohol tests and drug screenings. *See* C.F.R. § 712.

next evening, several hours before going to work. At the end of his shift, he was selected for a random drug screening and tested positive for amphetamines.

As a result, the individual's HRP certification was suspended and the positive drug screen was reported to the Local Security Office (LSO). *See* Exhibits 4 and 5. The LSO conducted a personnel security interview (PSI) with the individual on January 7, 2013, to allow the individual to provide additional information and address concerns regarding his eligibility for access authorization. *See* Exhibit 7.

Since the PSI did not resolve the security concerns about the individual's positive drug screen, the LSO informed the individual in a letter dated February 15, 2013 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of 50 U.S.C. § 435c (hereinafter referred to as the Bond Amendment)³ and the potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (k) (hereinafter referred to as Criterion K).⁴ *See* Exhibit 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO presented no witnesses; the individual presented the testimony of five witnesses, including his manager, his sister-in-law, his wife and himself. The LSO submitted eight numbered exhibits into the record; the individual tendered two exhibits. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.⁵

³ The Bond Amendment states that a security clearance may not be granted or renewed for a "person who is an unlawful user of a controlled substance or an addict . . ." 50 U.S.C. § 435c(b). Within the DOE, cleared incumbents determined to have used a controlled substance within 12 months of the DOE becoming aware of such usage are considered subject to the Bond Amendment and all such cases are immediately processed for administrative review. *See* DOE Order 472.2, Appendix E at E-1.

⁴ Criterion K relates to information that a person has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine . . ." 10 C.F.R. §710.8(h).

⁵ OHA decisions are available on the OHA website at www.oha.doe.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the 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 clearance).

The individual must come forward with evidence to convince the DOE that restoring his 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 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). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites the Bond Amendment and Criterion K as the basis for suspending the individual's security clearance. Criterion K concerns information that a person has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine . . .” 10 C.F.R. § 710.8(k). Use of an illegal drug or misuse of a prescription drug raises concerns about an individual's reliability and trustworthiness, as well as a person's ability or willingness to comply with laws, rules and regulations. *See* Guideline H of the *Revised Adjudicative*

Guidelines for Determining Eligibility for Access to Classified Information, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). With respect to Criterion K, the LSO relied on (1) the individual's statements during the PSI that on November 8, 2012, he had consumed one "diet pill" that was not prescribed for him and contained an amphetamine, which is a controlled substance, and (2) the individual testing positive for amphetamines during a random drug screening on November 9, 2012. The individual's acknowledgment of consuming the "diet pill" was also the basis for the security concerns cited by the LSO under the Bond Amendment. *See* Ex. 1.

In light of the information available to the LSO, the LSO properly invoked the Bond Amendment and Criterion K.

IV. Findings of Fact

The individual has worked for DOE contractors at the same DOE site for over 30 years in positions in which he has been subject to random drug screenings. In the 28 years prior to the individual's positive drug screening in November 2012,⁶ the individual tested negative on all of his drug screenings.⁷ Tr. at 58 – 59, 101. *See* Ex. B.

As reflected in the medical records that the individual submitted, he has struggled with weight and obesity concerns for many years. *Id.* He also suffers from diabetes. *Id.*, Tr. at 26, 91 – 92. His wife believes that he has gained 30 to 40 pounds over the last three to five years. *Id.* at 27. The individual and other workers at the DOE contractor believe that employees have been terminated by the DOE contractor due being in poor health, being overweight or being in poor physical conditions. *Id.* at 18, 41, 75 – 77; Ex. 2.

In November 2012, while the individual was concerned about gaining weight over the upcoming holidays, he had a conversation with his sister-in-law about her weight loss of 67 pounds over the prior year. Tr. 64, Ex. 7 at 10. His sister-in-law stated that she was taking an appetite suppressant (one pill per day) that she had been prescribed by her doctor and she offered to give the individual some of her pills to try to see if they might work for him. She gave the individual three "diet pills" which contained phentermine. Tr. at 62 – 66.

⁶ In October 1984, the individual tested positive for marijuana during a random drug screening while working for a DOE contractor. During the investigation that followed the individual testing positive on the November 2012 drug screening, the LSO found that any security concerns associated with the 1984 incident had been mitigated and the LSO did not include the 1984 incident as a supporting factor for the security concerns set forth in the Notification Letter. Therefore, the 1984 incident was not considered in the administrative review hearing or in reaching this Decision.

⁷ With respect to the results of the individual's drug screenings subsequent to 1984, I have relied on the individual's testimony as well as the testimony of his manager that he had reviewed the individual's entire medical record at the facility. The individual also submitted the voluminous medical records that he had received from the DOE pursuant to a request under the Freedom of Information Act; those records appear to be incomplete, notwithstanding their volume, but contain nothing inconsistent with the testimony. *See* Ex. B.

The next day, the individual took one pill several hours before going to work on the night shift. *Id.* at 99. The night shift is the individual's preferred shift, which he had worked the prior six months and had once worked continuously for five years. He does not experience drowsiness or sleepiness while working the night shift. *Id.* at 87.

The individual believed that "diet pill" would reduce his appetite, but he felt no effects from the pill on his appetite or in any other way. *Id.* at 90.

At the end of his shift, the individual was notified that he had been selected for random alcohol and drug testing. *Id.* at 100. The individual tested positive for amphetamines. *See* Ex. 6.

The individual did not take the remaining two diet pills that he had been given by sister-in-law; instead, he and his wife flushed both pills down the toilet. Tr. at 22 – 23, 88. Since that time the individual has tried to emphasize changes in his diet and exercise program to address his weight concerns. He has also reduced his intake of any non-food substances, including over-the-counter medications and vitamins. *Id.* at 33, 39 –40, 92, 95, 96.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)⁸ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be restored. Restoring the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

In assessing the testimony offered by the individual and his family members, two themes emerge with respect to the period preceding the individual's November 2012 random drug screening. First, the individual was conscious of his weight: his medical records describe him as frequently exhibiting obesity and his wife described him as having gained about 30 to 40 pounds over the prior three to five years. *Id.* at 27; *See* Ex. B. Additionally, he believed that failure to maintain good health and an appropriate weight could jeopardize his employment. Tr. at 18, 41, 92. His brother-in-law who works for the same DOE contractor and at the same facility also testified as to stories that circulated among workers at the facility of employees who had been fired for being overweight. *Id.*

⁸ Those factors include the following: 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 at the time of the conduct, the voluntariness of his 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.

at 75 – 77. I make no assessment of the accuracy of such reports, but note them as relevant to the individual’s state of mind. Second, his sister-in-law had lost a considerable amount of weight (67 pounds in the prior year according to her own testimony). *Id.* at 64. When the testimony of family members touched on her weight loss, they spoke of her accomplishment with obvious admiration. *Id.* at 26 – 27, 103.

The individual was also concerned that the holiday season was approaching and that he had commonly gained weight during the holidays. When he saw his sister-in-law one weekday evening after a church program, he inquired as to how she had lost weight. Ex. 7 at 10, Tr. at 66. She said that she had gotten an “appetite suppressant” from her doctor and offered to let him try a few of her “diet pills.” *Id.* at 64 –66. All witnesses with first-hand knowledge of the event credibly testified that the sister-in-law spontaneously offered the “diet pills” and that the individual had not asked for them. *Id.* at 64, 66, 69. She gave him three pills only and did so as a gift. The sister-in-law testified that it did not occur to her that it was illegal to give medications that had been prescribed for her to another person; she thought she was merely being helpful. *Id.* at 68, 69.

Conversely, the individual testified that he was aware of the prohibition on taking drugs that had been prescribed for another person. However, from the individual’s demeanor while testifying, I did not doubt that at the time his sister-in-law gave him the “appetite suppressants” he made no conscious connection between these “appetite suppressants” and the prohibition on the misuse of prescription drugs: he was caught up in the excitement of possibly controlling his weight over the holidays and replicating his sister-in-law’s success. *Id.* at 84, 85, 103. This is an oversight which the individual has credibly testified that he regrets and never intends to make again. *Id.* at 85 – 86, 96, 98. His wife testified that since his November 2012 positive drug screen, the individual refuses to take even over-the-counter medications like aspirin. *Id.* at 33, 39 – 40. Both he and his wife testified that neither of them had ever taken diet pills in the past and that they did not know that some contained amphetamines. *Id.* at 18 – 19, 86.

To the individual’s credit, he only took one of the “diet pills” and, after he learned of the positive result on his drug screening, he and his wife both testified that the two of them flushed the remaining two pills down the toilet. *Id.* at 22 – 23, 88.

In addition to testimony by family members as to the individual’s reliability and trustworthiness, his manager testified that the individual was a role model for others in the church, community and workplace. *Id.* at 49. The individual is one of 175 people who is under the direction of the manager. *Id.* at 57. When the manager was a junior employee at the facility, the individual was someone who he respected and hoped to emulate; as a manager, he pairs the individual with new employees and employees who are experiencing problems with rules, procedures and processes because of the positive influence that the manager expects the individual will have on such employees. *Id.* at 49, 55 – 57.

Security concerns triggered under Criterion K are subject to mitigation when “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 Guideline H ¶ 26(a). In this case, the individual took a single “diet pill” without consciously making the connection that this was prohibited behavior. Once he became aware that the pills were prohibited, he destroyed the remaining pills that he had in his possession. The individual’s one-time use of a single pill is clearly within the definition of “infrequent” use. Further support that this was “infrequent” and unlikely to recur is found in the individual being subjected to random drug screenings during the 28 years immediately preceding this incident and testing negative on all of those screenings. Therefore, I find that the individual has resolved the security concerns arising under Criterion K.

As noted above, the Bond Amendment precludes a security clearance for a “person who is an unlawful user of the controlled substance or an addict . . .” There is no contention that the individual’s use of a diet pill reflects habitual use or an addiction, as required to be within the definition of an “addict” under the Bond Amendment. The Bond Amendment does not define “an unlawful user of a controlled substance.” The individual’s usage was an isolated event which is unlikely to recur (the mitigation factor under Criterion K noted above) and, therefore, the individual does not fall within the meaning of “an unlawful user” under the Bond Amendment. *See Personnel Security Hearing*, Case No. PSH-12-0031 (2012) (ingestion of four hydrocodone tablets prescribed for someone in a suicide gesture is an isolated event unlikely to recur and, therefore, the individual is not an unlawful user under the Bond Amendment); *Personal Security Hearing*, Case No. TSO-1059 (2011) (use of spouse’s prescription drug four or five times over a 16 month period prior to obtaining one’s own prescription for the same drug does not constitute being an unlawful user under the Bond Amendment); *Personnel Security Hearing*, Case No. TSO-0926 (2010) (mitigation under Criterion K of one-time use of an illegal drug resolves security concerns under the Bond Amendment).

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises security concerns under Criterion K and the Bond Amendment. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has brought forth sufficient evidence to mitigate the security concerns associated with Criterion K and the Bond Amendment. Accordingly, I have determined that the individual’s access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade M. Boswell
Hearing Officer
Office of Hearings and Appeals

Date: June 27, 2013