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

In the Matter of Personnel Security Hearing)

Filing Date: October 31, 2013)

Case No.: PSH-13-0116)

Issued: January 29, 2014

Administrative Judge Decision

Richard A. Cronin, Jr., Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the 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 DOE should restore the Individual’s access authorization.

I. BACKGROUND

The Individual is a contractor employee at a DOE facility and possessed a security clearance. Exhibit (Ex.) 3 at 1. In July 2013, the police entered the Individual’s house pursuant to a search warrant and, after a search, arrested the Individual’s two sons on various illegal drug charges including Possession of Marijuana and “Crack” Cocaine and Intent to Sell Marijuana and Crack Cocaine. Ex. 4 at 4. The Individual was also arrested on charges of Facilitating the Manufacture or Sale of Schedule II and VI drugs (Cocaine and Marijuana) and Child Neglect. Ex. 4 at 4. The DOE facility’s Local Security Office (LSO) subsequently conducted a personnel security interview (PSI) with the Individual in July 2013 (July 2013 PSI). Ex. 4. Because the July 2013 PSI did not resolve the concerns arising from the Individual’s and her sons’ arrests, the Individual’s security clearance was suspended in September 2013. Ex. 2. In September 2013, the Individual received a detailed notification letter (Notification Letter) from the LSO outlining the

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as an access authorization or a security clearance.

specific derogatory information, described under 10 C.F.R. § 710.8 (k) and (l) (Criterion K and L, respectively), upon which it relied upon in making the decision to suspend the Individual's security clearance. Ex. 3.

The Notification Letter also informed the Individual that she was entitled to a hearing before an Administrative Judge² to present evidence to resolve these doubts. Ex. 1. The Individual requested a hearing in this matter. The LSO forwarded this request to OHA and the OHA Director assigned me as the Administrative Judge in this matter. The DOE introduced 6 exhibits (Exs. 1-6) into the record of this proceeding. The Individual introduced two exhibits (Exs. A and B) and presented the testimony of 10 witnesses in addition to her own testimony.

II. FACTUAL FINDINGS AND THE ASSOCIATED SECURITY CONCERNS

The Part 710 regulations require that I “make specific findings based upon the record as to the validity of each of the allegations” in the Notification Letter. 10 C.F.R. § 710.27(c). In this case, the Notification Letter cites Criteria K and L of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Ex. 1.³ The Individual does not dispute the factual accuracy of the Criterion K and L derogatory information described in the Notification Letter and I set forth my factual findings below.

A. Criterion K

In a personnel security interview conducted in November 2003 (November 2003 PSI), the Individual confirmed to an interviewer that she had been arrested for Possession of Marijuana in 1986. The Individual was arrested when marijuana was found inside a vehicle in which she was riding. Ex. 6 at 47-54.

During the July 2013 PSI, the Individual related that local police had entered and searched her house and arrested her and her sons. One son (Son 1), 21 years old, was arrested for Possession of Marijuana with the Intent to Resell and Possession of Crack Cocaine with the Intent to

² Effective October 1, 2013, the titles of attorneys in the Office of Hearings and Appeals (OHA) changed from Hearing Officer to Administrative Judge. See 78 Fed. Reg. 52389 (August 23, 2013). The title change was undertaken to bring OHA Hearing Officers in line with the title used at other federal agencies for officials performing identical or similar adjudicatory work. See *Personnel Security Hearing*, Case No. PSH-13-0114 at 1 n.1 (2014).

³ Criterion K describes derogatory information suggesting that an individual may have “[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, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k). Criterion L refers to information indicating that an individual has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. . . .” 10 C.F.R. § 710.8(l).

Resell.⁴ Ex. 4 at 4. The other son (Son 2), 19 years old, was arrested for possession of drug paraphernalia and possession of marijuana. Ex. 4 at 5. The Individual was arrested for Facilitating the Manufacture or Sale of Cocaine and Marijuana and Child Neglect. The Child Neglect charge arose from the fact that her 17-year old daughter (Daughter) was living at the Individual's house where 6.57 grams of marijuana and 5.5 grams of crack cocaine were discovered along with a digital scale and a gas mask modified to permit the inhalation of marijuana. The Individual's automobile was also seized when a small amount of a green leafy substance, presumed to be marijuana, was discovered inside of the vehicle. Ex. 4 at 8. During this PSI the Individual again confirmed that she had been arrested in 1986 for Possession of Marijuana when a marijuana cigarette was found inside a vehicle in which she was riding. Ex. 5 at 122-29; Ex. 6 at 47-54.

Involvement with the transfer illegal drugs 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. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines), Guideline H.* Given the Individual's and her sons' arrests involving illegal drugs, the LSO had sufficient grounds to invoke Criterion K.

B. Criterion L

During the November 2003 PSI, the Individual admitted that she had used marijuana one to two times a month from 1983 to 1992. Ex. 6 at 47-54; *see also* Ex. 5 at 111-20. The Individual also admitted to having been arrested for Larceny Shoplifting in the early 1990s. Ex. 6 at 36-38.

In the July 2013 PSI, the Individual admitted that her Daughter had been arrested in February 2013 for Possession of Marijuana. The Individual's Daughter was placed on probation. In March 2013, her Daughter failed a drug test for marijuana administered by her probation officer. During this interview, the Individual also stated that she believed that her Daughter and Sons 1 and 2 were then currently using marijuana. The Individual related during the interview that Son 2 had been expelled from high school for possessing marijuana in his backpack and had been arrested in 2010 for Possession of Cocaine. Ex. 5 at 187-93. The Individual also confirmed that Son 1 had been arrested in 2010 for Aggravated Assault when he pointed a gun into a vehicle containing people. Ex. 5 at 171-75, 183-85. Further, the Individual admitted that, in 2009 or 2010, both sons had been arrested for assault after being involved in a physical altercation with another individual. During the interview, the Individual admitted that she continued to let Sons 1 and 2 and her Daughter live with her despite their history of arrests and then current use of marijuana.

Criminal activity or association with persons involved in criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, criminal activity calls into question a person's ability or willingness to comply with laws, rules and regulations. *Adjudicative Guidelines*, Guideline E, ¶ 16(g); Guideline J, ¶ 30(c). Given her and her Sons' arrests the LSO had sufficient grounds to invoke Criterion L in the Notification Letter.

⁴ Son 1 subsequently entered into a plea agreement with the local prosecutor where Son 1 would plead guilty to a lesser charge and receive six years of probation. Tr. at 71-73.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictates that, in these proceedings, an Administrative Judge must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether granting the Individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the Individual’s conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the Individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c). In considering these factors, the Administrative Judge also consults the *Adjudicative Guidelines* that set forth a more comprehensive listing of relevant factors.

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the Individual to produce evidence sufficient 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 regulations further instruct me to resolve any doubts concerning the Individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. ANALYSIS

A. Criterion K

An examination of the police report regarding the July 2013 arrest indicates that the local police found crack cocaine (weighing 5.50 grams) inside a hole in one of the walls in Son 1’s bedroom. Ex. 4 at 8-10. Inside a locked black safe inside Son 1’s bedroom closet local police discovered marijuana (6.57 grams). Ex. 4 at 8. On a dresser in Son 2’s bedroom was a small baggie containing marijuana, a digital scale containing a white residue, and a gas mask “fashioned in a manner to smoke marijuana.” Ex. 4 at 8. Additionally, a small amount of marijuana was discovered in the Individual’s vehicle. Ex. 4 at 8. During the arrest, Son 1 informed local police that the marijuana in the automobile was his and that he had used the Individual’s automobile while his vehicle was being repaired. Both Son 1 and Son 2 informed the police during the arrest that the illegal drugs and paraphernalia belonged to them. Ex. 4 at 8. The police report indicated that the Individual stated that she knew that Son 1 used to sell drugs and that she was away from her house from 10 to 13 hours while she worked at the facility. Ex. 4 at 8. Because the local police believed that there was probable cause to find that the Individual knew of her sons activities “regarding the sale of controlled substances out of her residence,” they charged the

Individual with Facilitating the Manufacture or Sale of Crack Cocaine and Marijuana. Additionally, because the Individual had allowed her Daughter to live at her residence where the Individual “knowingly allowed her sons to smoke marijuana and sell narcotics” they charged the Individual with Child Neglect.

The Individual presented testimony and documentary evidence to establish that all charges regarding her July 2013 arrest have been dropped by the local prosecutor. See Ex. A (Local Court’s Order of Nolle Prosequi regarding charges against the Individual); Tr. at 13, 36. All of the witnesses, comprising a number of coworkers who have worked with her from periods of time from three to ten years, her Pastor for the last 23 years, a sister (Sister), a cousin (Cousin), and the Individual’s two Sons, testified that, in the years they have work with and known the Individual, they have not seen any evidence that the Individual has used or been involved with illegal drugs. Tr. at 23, 31, 39, 52, 66, 106, 117. The Sister, while being aware of the Individual’s arrest for possession of marijuana in 1986, had not seen any other evidence that the Individual had been involved with illegal drugs since that date. Tr. at 107. The Sister also testified that the Individual spoke to her about the Individual’s concern that her children were having involvement with illegal drugs in high school and that the Individual spoke to her children about that concern. Tr. at 107. Son 2 affirmed that the Individual had spoken to him concerning her request that they avoid using illegal drugs. Tr. at 118 (Son 2). The Sister testified that she had been to the Individual’s house on a weekly basis and never had detected any smells or other indications that illegal activities were being conducted at the house. Tr. at 108. The Cousin testified that she visited the Individual’s house in July 2013 and did not detected anything that would lead her to believe anything illegal was going on. Tr. at 65-66.

The Individual testified that on the night of the July 2013 arrest, she had been watching movies with Sons 1 and 2 and their girlfriends along with her Daughter. Tr. at 129-30. The Individual and the Daughter then went to bed and afterwards she was awakened by the local police. Tr. at 130. The Individual was surprised that her sons had been involved with or kept illegal drugs in her house especially since she had spoken to them about the fact that she could not be around illegal drugs given her security clearance. Tr. at 125, 127-28. She admitted, however, that she knew that her sons had smoked marijuana in the past. Tr. at 125. The Individual testified that she would not do anything illegal because she fears for her employment. Tr. at 127. She is concerned that this incident will prevent her from trying to obtain custody of another child which she thinks of as her grandson. Tr. at 126.

The Individual testified that the hole in the wall had been created by Son 1 and that she did not repair the hole because she believed Son 1 should have to pay for the repair. Tr. at 121. Son 1 had moved in with her two or three months before the July 2013 arrests. Tr. at 122. Three weeks after the arrests, after the July 2013 PSI, Son 1 came to her and told her that he and Son 2 should have not been living in her home since they were adults. Tr. at 131. The Individual then asked Son 1 and Son 2 to leave her house and live with their father. Tr. at 131. Both Son 1 and 2 moved out of the Individual’s house. Tr. at 128-29; Tr. at 36, 61 (coworkers testimony); Tr. at 76 (Son 1 now living at girlfriend’s residence); Tr. at 116 (Son 2 now living with father). The Individual testified that she has increased her scrutiny of her Daughter and has informed her that, if she cannot honor the Individual’s rules, she will have to live with her father. Tr. at 128-29; Ex. 5 at 235.

The Daughter was unable to attend the hearing but submitted a notarized statement affirming that she has made poor choices which have impacted her mother. Ex. B. She also states that in addition to attending high school she is now in counseling which is teaching her to make better decisions regarding her life and that drugs can only have a negative effect in her life. Ex. B. She believes that her counseling will help her to put others ahead of herself, make good decisions about her life, and be a better role model for her nephew. Ex. B. She does not believe that her mom, the Individual, should be punished for the mistakes she made with using marijuana in the past. Ex. B.

After reviewing all of the evidence in this case, I find that the Individual has resolved all of the Criterion K concerns arising from the July 2013 arrest. I found the testimony of the Individual, the Sister and the Cousin convincing on the issue of whether the Individual currently used or had any other connection to the manufacture or sale of illegal drugs. Further, I believe that, despite the charges, the Individual did not deliberately endanger her 17-year old Daughter. Son 1's drugs were concealed in a hole in the wall and his safe. A search of the Individual's room in the house during the arrest did not reveal the presence of any illegal drugs. Ex. 4 at 8. While the Individual testified that she would go into Son 1's room to clean, she never observed the presence of any illegal drugs. Further, the Individual would be away from the house 10 to 13 hours on any day she had to work. Ex. 4 at 8. Neither the Sister nor the Cousin, when visiting the Individual's house, observed any indication that any type of illegal activity was occurring on the premises. The Individual testified that she had never observed any of her children using illegal drugs. Tr. at 125. Further, Sons 1 and 2 no longer live with the Individual. All of the Individual's witnesses testified that the Individual is an honest and reliable person in whom they could not detect any indication that she was involved with illegal drugs or any other illegal activity. The July 2013 charges against the Individual themselves were dropped by the local prosecutor. While this fact is not dispositive with regard to the Individual's involvement with illegal drugs, I find that it does support my finding that the Individual did not intentionally facilitate the use or transfer of illegal drugs or was aware that such use or distribution may be occurring in her home.

With regard to the marijuana that was found in the Individual's vehicle, Son 1 testified that the Individual had no involvement with any of the illegal drugs found during the July 2013 arrest. Tr. at 70-71. At the time of the July 2013 arrests, Son 1 admitted that the marijuana found in the Individual's automobile belonged to him. Ex. 4 at 8 (arrest statement). Further, the search of the Individual's room revealed no illegal drugs. Given the evidence before me, I find that the marijuana found in the Individual's vehicle did not belong to the Individual. As to the Individual's use of marijuana in the 1980s and early 1990s and her 1986 arrest for possession, I find that these events occurred so long ago that the passage of time has mitigated any concerns arising from these incidents. *See Adjudicative Guidelines*, Guideline H ¶ 26(a). Given the findings above, I find that the Individual has resolved the Criterion K concerns in this case.

B. Criterion L

The two concerns raised by the Criterion L derogatory information are the Individual's association with individuals involved with criminal conduct and the Individual's pattern of

criminal conduct. After my review of the evidence and hearing testimony, I find that the Individual has resolved all of the Criterion L concerns raised in this case.

1. Association with Individuals Involved in Criminal Conduct

This Office has found on previous occasions that individuals should take appropriate steps to distance themselves from people who engage in the use of illegal drugs. However, while the Individual has presented evidence that she has removed Sons 1 and 2 from her home, she is still caring for her 17-year old daughter. OHA has recognized that, with regard to clearance holders, they may have family members who may use illegal drugs from whom a person cannot simply withdraw. *See, e.g., Personnel Security Hearing, Case No. TSO-0874 (2010)* (security concerns from association with father and sister who used illegal drugs when individual indicated to both that they cannot use illegal drugs in his presence, nor can he bring them to the individual's family home and individual limits contact with each); *Personnel Security Hearing, Case No. TSO-0766 (2009)* (access authorization restored where wife set very clear rules against husband's possessing or using illegal drugs in her presence or in her vehicle). Under the present circumstances, for example, the Individual cannot realistically be expected to disassociate herself entirely from her daughter, especially since she is below the age of majority and needs to complete high school.

The Individual testified that her sons no longer live with her and has provided convincing testimony confirming that fact. The Individual also testified that her 17-year-old daughter, who still lives with her, is currently receiving outpatient treatment for her marijuana usage and intends not to use illegal drugs in the future. Ex. B. The Individual informed her Daughter and Sons 1 and 2 that they should avoid illegal drugs and that such substances are not allowed at her house. Tr. at 126-27; *see* Ex. 5 at 96-98. When she was informed about the arrest, she made arrangements for her Daughter to attend an outpatient treatment center to receive counselling regarding her marijuana use. Tr. at 79, 127.

From the evidence before me, it is apparent that the Individual knew that Sons 1 and 2, as well as her Daughter, had a history of using illegal drugs yet the Individual continued to let her children live with her until she asked Sons 1 and 2 to move. As recounted above, I find that the testimony provided by the Individual, the Individual's Sister and Cousin, Sons 1 and 2, and the Daughter convincing on the issue as to whether the Individual had actual knowledge that anything illegal was occurring at her home. Further, I find the relative youth of Sons 1 and 2 and the Daughter along with the Individual's understandable concern with her children to be a mitigating factor as to the concern arising from her intentional association with individuals who have committed criminal conduct. Given the evidence before me, I find that the Individual has resolved any Criterion L security concern arising from her association with her children and their past criminal activities.

2. Pattern of Criminal Conduct

The testimony of the Individual's Sister, Cousin and co-workers indicates that the Individual is a capable worker and has a reputation of being honest and trustworthy. Tr. at 17, 23, 28, 38, 47, 52, 55, 62-63. As an example of this testimony, the Pastor testified as to the Individual's position

at the church where she is responsible for working with the youth and directing the youth choir. Tr. at 46. The Pastor stated that he would trust his life with the Individual and has no doubts as to the Individual's integrity or her judgment. Tr. at 46, 48, 52.

As discussed above, I find that the Individual did not intentionally facilitate the possession or sale of illegal drugs by Sons 1 and 2.⁵ I also find, as described above, that the Individual has mitigated the concerns arising from the Child Neglect charge. As for the remaining instances of criminal conduct, her arrest in 1986 for possession of marijuana, her arrest in the early 1990s for Larceny Shoplifting, and her use of marijuana during the 1980's until 1992, I find that the passage of time, approximately 20 years, has sufficiently mitigated any concerns arising from these incidents. *See Adjudicative Guidelines*, Guideline J ¶ 32(a). Therefore, I conclude that any Criterion L concerns arising from the Individual past criminal conduct have been resolved.

V. CONCLUSION

For the reasons set forth above, I conclude that the Individual has resolved the DOE's security concerns under Criteria K and L. Therefore, the Individual has demonstrated that restoring her access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should restore the Individual's access authorization. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.
Administrative Judge
Office of Hearings and Appeals

Date: January 29, 2014

⁵ During the hearing, several witnesses, including the Individual and Son 1, suggested the possibility that the search and arrest were motivated by the fact that Son 1 had, in the previous month, been given a \$50,000 settlement in a suit against the local police department for misconduct. Tr. at 49, 76, 99; *see* Ex. 5 at 47-48. I have given this testimony no weight since, in the absence of any evidence of police misconduct during the July 2013 arrest, such testimony would be irrelevant as to the facts of the arrest that constituted derogatory information recorded in the Notification Letter.