

the derogatory information fell within the purview of 50 U.S.C. § 435c (the Bond Amendment) and one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsections (k) (Criterion K).

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge in this case. At the hearing, the individual presented his own testimony and that of five witnesses, including his supervisor, three colleagues and his wife. The DOE counsel did not present any witnesses. Both the DOE Counsel and the individual submitted a number of written exhibits prior to the hearing.

II. The Notification Letter and the Associated Security Concerns

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual's continued eligibility for access authorization. The information noted in the letter specifically cites to the Bond Amendment and Criterion K.

The Bond Amendment provides, in pertinent part, that a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict. 50 U.S.C. § 435c(b). As support of its invocation of this amendment, the Notification Letter cites the individual's misuse of his wife's prescription drug, Oxycodone, on September 10, 2013.²

Criterion (K) pertains to information indicating that the individual has transferred, possessed or used a drug listed in the Schedule of Controlled Substances established pursuant to Section 202 of the Controlled Substances Act of 1970, except as prescribed or administered by a physician or otherwise authorized by federal law. In support of this Criterion, the Notification Letter cites the individual's admission that despite being told by a nurse practitioner to use Tylenol for his pain associated with a hernia and kidney stones, he elected to use his wife's prescription Oxycodone on September 10, 2013. The Notification Letter also states that the individual acknowledged that he understood it is illegal to use someone else's prescription medication but did so anyway. *See Infra*, Footnote 3.

This derogatory information adequately justifies the DOE's invocation of Criterion (K), and raises significant security concerns. Conduct involving questionable judgment, untrustworthiness, or unwillingness to abide by rules and regulations could indicate that a person may not properly safeguard classified information. In addition, improper or illegal involvement in drugs may also indicate that a person may be unable to safeguard such information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines H and J (Adjudicative Guidelines)*.

² On August 12, 2009, the DOE Deputy Secretary issued DOE Notice 470.5, which implemented the Bond Amendment in the DOE. In that Notice, the Deputy Secretary, among other things, asserted that persons subject to the Bond Amendment (1) will continue to be processed for Administrative Review in cases where the Agency is unable to "waive" the Bond Amendment; and (2) will receive the same due process rights that existed before the implementation of the Bond Amendment.

III. Regulatory Standards

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate 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 or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise the national security. 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 material factors. 10 C.F.R. § 710.9(c).

The purpose of a DOE administrative proceeding under 10 C.F.R. Part 710 is to provide the individual an opportunity to submit information in support of her 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. Findings of Fact and Analysis

At the hearing, the individual did not dispute the allegations in the Notification Letter. Instead, he attempted to demonstrate, through his testimony and that of his witnesses, that this behavior is unlikely to recur.

Criterion (K) and the Bond Amendment

The *Adjudicative Guidelines* that pertain to the individual’s improper usage of his wife’s prescription drug provide that the isolated nature of the conduct, unusual circumstances leading up to the conduct, and the likelihood that the conduct will not be repeated, can act as mitigating factors. *See Adjudicative Guidelines H and J.*

During the hearing, the individual acknowledged that he took one pill of his wife’s prescription of Oxycodone on September 10, 2013. Transcript of Hearing (Tr). at 106. According to the individual, on September 5, 2013, he began to experience significant pain in his lower abdomen. *Id.* at 99. By the next day, the individual was in excruciating pain and on September 7, 2013, he visited an urgent care facility where he was diagnosed as having a hernia and kidney stones. *Id.* The individual testified that he was told to take Tylenol for the pain and that no other medication was prescribed. *Id.* Doctors at the urgent care facility advised the individual to follow up with

an ultrasound evaluation on the following Monday. Prior to leaving for his appointment on Monday, the individual testified that his wife expressed concern for him because he was in a great deal of pain. She gave the individual her bottle of prescription Oxycodone. According to the individual, after his appointment on Monday, he did not feel well, but managed to drive a number of hours to work for a late afternoon meeting. *Id.* at 100. The individual further testified that once he arrived at work he was still in excruciating pain, although he had taken Tylenol. At noon, he decided to take one of his wife's prescription pills to help with his pain and so that he could continue his work day. *Id.* at 106. The individual explained that after the pill began to relieve his pain, he went to talk to a co-worker who had previously expressed her concern about his hernia pain. *Id.* He told his co-worker that he felt better and showed her the bottle of what he had taken. *Id.* at 109. The co-worker looked at the bottle, noticed the individual's wife's name on it and asked the individual if the medication was his wife's prescription. When the individual told the co-worker that the medication was that of his wife's, the co-worker informed him that his use had to be reported to his employer.

The individual testified that he immediately self-reported his one-time use of his wife's prescription Oxycodone. He stated that he was surprised and did not know that his use of his wife's medication was a reportable offense, although he acknowledged that he had taken a security training. *Id.* at 107 and 124. The individual further testified that he did not know that the use of his wife's medication was illegal and reiterated that he was unaware of the serious nature of his action, also adding that he did not know that Oxycodone is on the Controlled Substance list. *Id.* at 111 and 112.³ He stated that now that he is aware that it is illegal, he will never take anyone's prescription medication again. *Id.* at 111. The individual further testified that the day after he reported the use of his wife's prescription, he visited his doctor who confirmed that he had a hernia and kidney stones. He was prescribed ibuprofen for the pain and he had surgery about three weeks later. *Id.* at 116. After the surgery, the individual's doctor prescribed Oxycodone to help with the pain. *Id.* at 117. The individual testified that he has never exceeded his doctor's recommended dosage of the medication, nor has he ever used the medication recreationally. *Id.* at 118. He testified that he has never abused drugs, does not associate with people who use illegal drugs and is not an addict. *Id.* at 119. Finally, the individual reiterated that he will never again take anyone's prescription medication or any illegal drug in the future. *Id.* at 125, *Indiv. Exhibit J.*

The individual's testimony was supported by his wife, his direct supervisor, and three colleagues. His wife corroborated the individual's testimony that he is not a drug user or an addict. *Id.* at 18. She testified that the individual was in excruciating pain when she offered him her prescription medication. *Id.* at 15. According to the individual's wife, her husband did not know it was illegal to take someone else's prescription medication, nor did she know it was illegal when she offered the medication to him. *Id.* at 17. The individual's colleague, who informed him of the

³ During the hearing the individual explained that at the time of use, he thought it was "medically unethical" to take someone else's medication because of the side effects, but he did not know that it was "illegal" to do so. *Id.* at 135-137. While the Notification Letter states that the individual acknowledged during the PSI that he understood that is illegal to use someone else's prescription medication and still did so, a review of the PSI and the context of the question suggests that the individual was stating that he was aware only at the time of the PSI that it was "illegal" to use the medication and not at the time of use. DOE Exh. 7 at 19. I therefore find the individual's hearing testimony to be consistent with his statement during the PSI that he understood, only at the time of his PSI and not at the time of use, that it was illegal to use someone else's prescription medication.

reporting requirement, testified that the individual is an honest and trustworthy individual. *Id.* at 45. She recalled that the individual came to her office and told her he was feeling better and had taken some of his wife's medication. *Id.* at 47. The individual's colleague testified that when she told the individual about his duty to report his use, he was surprised. She stated that she believed from the individual's reaction that he was sincere and that he did not know it was illegal to use his wife's prescription. *Id.* at 48. The individual's colleague believes that the individual made a mistake and does not believe that the individual is a drug user. *Id.* at 55. Likewise, the individual's supervisor and other two colleagues all testified that the individual is an honest and trustworthy individual and all believed the individual when he stated that he did not know that taking someone else's prescription medication was illegal. *Id.* at 34, 62 and 77.

Considering these facts, I conclude that the individual's use of his wife's prescription medication happened under unusual circumstances that are unlikely to recur in the future; and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. There is ample evidence in the record establishing that the individual is a very honest, reliable, and trustworthy person, both professionally and personally, who can be relied upon to exercise good judgment, and who follows laws and rules. *See, e.g.,* Tr. at 34, 45, 62 and 77 (testimony of the individual's wife, supervisor and colleagues). In addition, the individual has demonstrated an intent not to abuse drugs in the future. During the hearing, the individual testified that he does not associate with individuals who use illegal drugs. He also testified and signed a statement of intent that he will never use illegal drugs in the future. Again, in this case, the individual's behavior occurred under such unusual circumstances that his behavior is unlikely to recur. *Adjudicative Guideline H* at ¶ 26 (a) and (b). To the extent that the behavior raised security concerns under Criterion K, I conclude that such concerns have been successfully mitigated. I further conclude, for the same reasons, that the individual is not "an unlawful user of a controlled substance or an addict," within the meaning of the Bond Amendment. *See id.; Personnel Security Hearing, Case No. TSO-0938 (2010).*

V. Conclusion

I find that no valid security concerns remain regarding the Bond Amendment and Criterion (K). I therefore conclude that the individual has demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual's security clearance should be restored. Any party may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals

Date: On April 30, 2014

