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

In the Matter of Personnel Security Hearing)
)
Filing Date: February 10, 2014) Case No.: PSH-14-0008
_____)

Issued: May 19, 2014

Administrative Judge Decision

Shiwali G. Patel, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) for 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 not grant the individual access authorization at this time.²

I. BACKGROUND

The individual is an employee of a contractor and is an applicant for a security clearance. During his Office of Personnel Management (OPM) background investigation, the individual was summoned for two interviews (PRSI) with an investigator on July 11, 2012, and January 10, 2013. Based on information revealed during the background investigation, the Local Security Office (LSO) determined that there was derogatory information that cast into doubt the individual’s eligibility for access authorization. The LSO informed the individual of this determination in a letter that set forth the DOE’s security concerns and the reasons for those concerns. DOE Exhibit (Ex.) 1. The Notification Letter also informed the individual that he was entitled to a hearing before an

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 access authorization or a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.energy.gov/oha>.

Administrative Judge in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and the OHA Director appointed me the Administrative Judge.³ The DOE introduced nine exhibits into the record of this proceeding (Exs. 1-9). The individual did not introduce any exhibits into the record. At the hearing, only the individual and one other witness testified. *See* Transcript of Hearing, Case No. PSH-14-0008 [hereinafter cited as “Tr.”].

II. 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 and unfavorable, that has a bearing on the question of whether restoring the individual’s 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).

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).

III. NOTIFICATION LETTER AND ASSOCIATED SECURITY CONCERNS

The Notification Letter cited information pertaining to subsections (k)⁴ and (f)⁵ of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8,

³ 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 (Aug. 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.

⁴ Criterion (k) defines as derogatory information when an individual 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, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k).

and the Bond Amendment. Ex. 1. The Bond Amendment prohibits federal agencies from granting or renewing the security clearances of persons who are addicted to, or are unlawful users of, illegal drugs. Under criterion (k), the LSO cited the following: (1) the individual tested positive for cocaine during a random urinalysis on April 15, 2012, while working part time at his previous job, and when he was informed of the drug test results on May 5, 2012, he did not deny using illegal drugs; 2) the individual possessed a security clearance at the time he tested positive for cocaine and consequently, his security clearance from his previous job was suspended on June 2, 2012; 3) the individual was separated from his previous job; and 4) on May 24, 2012, the individual completed his SF-86 (Questionnaire for National Security Positions) for his application for a position with a DOE contractor, just a month after he tested positive for cocaine. *Id.* Under criterion (f), the LSO cited the following misrepresentations by the individual: 1) his failure to report on his SF-86 that he has used illegal drugs within the last seven years, his outstanding debt and judgment for \$1,982.49 for medical expenses, and his arrest in mid-2005 for pulling a fire alarm at a high school; 2) his failure to disclose during his July 11, 2012, PRSI that he used illegal drugs and that his security clearance was suspended by his previous job; 3) his denial of using illegal drugs during his January 10, 2013, PRSI, and his statement that he was eligible for rehire at his previous job and that his clearance was ending, even though it was already suspended; and 3) his failure to list his 2005 arrest on the SF-86 that he submitted on May 7, 2009. *Id.*

The use of illegal drugs raises questions about an individual's reliability, trustworthiness and ability to protect classified information because it may impair judgment and it demonstrates that a person may not be willing to comply with laws, rules, and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House, Guideline H (December 19, 2005) [hereinafter *Adjudicative Guidelines*]. The failure to provide truthful and candid answers during a security clearance process also raises questions about an individual's reliability, trustworthiness and ability to protect classified information. *Id.*, Guideline E. Thus, the above information adequately justifies the LSO's invocation of criteria (f) and (k) and the Bond Amendment, and raises significant security concerns.

IV. FINDINGS OF FACT AND ANALYSIS

A. Criterion (k) and the Bond Amendment

The individual is 26 years old, and received a clearance for his previous job in May 2009. Three years later, in March 2012, he began working for a DOE contractor while working part time for his previous employer. On April 15, 2012, the individual tested positive for cocaine during a random urinalysis that was given by his previous employer. Ex. 8. When he was informed of the results on May 5, 2012, he signed a "Statement of Suspect/Witness/Complainant," with the following

⁵ Criterion (f) defines as derogatory information when an individual has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f).

declaration: “I have been advised that I am suspected of the following offenses: Failed Urinalysis Drug Test Reduction Program (Cocaine).” *Id.* On that form, he initialed next to a box indicating that he was not providing a statement. *Id.* As set forth above, the individual’s cocaine usage implicates the Bond Amendment and raises substantial security concerns under criterion (k) and *Adjudicative Guideline H*.⁶

At the hearing, the individual claimed that he never ingested cocaine and that his body building supplements may have created a false positive on the drug test or that the night before his drug test, while he was at a bar with his friends, someone may have slipped cocaine into his beverage. Tr. at 24, 67-69. However, the individual did not provide any evidence – through documentation or witness testimony other than his own – in support of either proposition for why he tested positive for cocaine. For example, he neither provided the packages containing the supplements to ascertain whether any of the ingredients in the supplements could have contributed to a false positive for cocaine, nor presented the testimony of any witnesses to support his claim that he was unknowingly given cocaine at the bar the night before his drug test. Regarding the possibility that cocaine was slipped into his drink without his knowledge, the individual testified that when he was the bar, he did not feel any of the physical symptoms associated with cocaine use, *i.e.*, elevated mood, high energy, feeling “high.” Tr. at 69.

Furthermore, at the hearing, the individual did not dispute signing the “Statement of Suspect/Witness/Complainant” on May 5, 2012, informing him that he tested positive for cocaine. Ex. 7; Tr. at 33-34. Yet, during his PRSI on January 10, 2013, the individual stated that he was not informed of what narcotic for which he tested positive. Ex. 4 (Dec. 19, 2012 – Jan. 11, 2013 Investigation) at 2. In addition, the individual testified that when confronted about the urinalysis results, he disputed the results, claiming that he never ingested cocaine. Tr. at 21. On the other hand, he also testified that he did not dispute the drug test results because he was advised not to. Tr. at 30.

Despite his assertions to the contrary, the information gathered during the individual’s background investigation establishes that he was administratively discharged from his previous job because of his drug use.⁷ Nonetheless, the individual claimed that he *requested* to be discharged during his background investigation. In consideration of the individual’s inconsistent testimony and statements at the hearing and his background investigation, and in the absence of corroborating evidence in his favor, I cannot conclude that he never ingested cocaine, particularly in light of the strong probative

⁶ Among the conditions listed in the *Adjudicative Guidelines* ¶ 25 that “could raise a security concern and may be disqualifying” are 1) any illegal use of a drug; 2) testing positive for illegal drug use; and 3) any illegal drug use after being granted a security clearance.”

⁷ The individual’s previous supervisor informed the investigator that in May or June 2012, the individual was administratively discharged from his job because he tested positive for drugs. Ex. 4 (Jul 11, 2012 – Jul. 24, 2012 Investigation) at 15. The supervisor approached the individual about his positive drug test result, informing him that he would be administratively discharged as a result of the test results. *Id.* The investigator’s notes indicate that the individual apologized to his supervisor for “letting source [supervisor] down” and “did not offer any explanation regarding his positive urinalysis.” *Id.* at 16. Another individual, who was also in a supervisory position (“manager”) and a witness at the hearing, informed the investigator that the individual tested positive for cocaine on a random urinalysis. *Id.* (Dec. 13, 2012 – Dec. 18, 2012 Investigation) at 1. The manager told the investigator that on June 2, 2012, the individual’s security clearance was suspended as a result of the urinalysis. *Id.* At the hearing, the manager confirmed that the individual did not dispute the positive drug test results when he was notified of the results. Tr. at 78.

evidence relied upon by the LSO, namely, the positive urinalysis.

As the individual did not present sufficient evidence, I cannot ascertain how recently or frequently the individual uses illegal drugs, or whether he associates with anyone who uses illegal drugs. *Adjudicative Guidelines* ¶ 26(a) & (b). Similarly, he has not presented any evidence indicating that the chances of future usage are remote or that he was abstinent for any period of time. *Id.*, ¶ 26(b). Upon consideration of these factors, and the record as a whole, I must conclude that the individual is an unlawful user of a controlled substance under the Bond Amendment. Additionally, he has failed to demonstrate that he mitigated the concerns associated with his drug usage, and therefore, the security concerns remain under criterion (k).

B. Criterion (f)

The individual's failure to list his previous arrest, his security clearance suspension, and his outstanding debt in his SF-86 forms raises serious security concerns under criterion (f) and *Adjudicative Guideline* E. At the hearing, the individual admitted that sometime around June 2005, he was arrested for pulling a fire alarm in his school, pled guilty to that offense and was subsequently assessed a fine. Tr. at 53-54. His arrest was expunged from his records as it occurred before he turned 18 years old. However, in the SF-86 that he completed on May 7, 2009 (2009 SF-86), which was four years after he was arrested, he answered "no" to the question: "Have you ever been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer [in the past *seven* years?"] Ex. 5 (emphasis added). The SF-86 also specified that the individual should report the arrest even if it was expunged from his records. *Id.* Moreover, in his SF-86 that he completed on May 24, 2012 (2012 SF-86), just seven years after his arrest, the individual again answered "no" for that same question. Ex. 3. In addition, the individual failed to list a \$1,982.49 judgment for past medical expenses that was entered on April 16, 2009, on his 2012 SF-86, which asked him to list any judgment from the previous seven years. Ex. 3. During his PRSI on January 10, 2013, the individual acknowledged that he was aware of the unpaid medical bill in early 2012 that resulted in the judgment against him, yet he still failed to list it in his 2012 SF-86. Ex. 4 (Dec. 29, 2012 – Jan. 10, 2013) at 1.

In addition, the individual misrepresented the circumstances regarding his departure from his previous job. In his 2012 SF-86, he answered "no" when asked whether he ever had a security clearance denied, suspended or revoked. However, as revealed during his background investigation, the individual's security clearance at his previous job was suspended on June 2, 2012. *Id.* During his PRSI on July 11, 2012, he failed to disclose that his security clearance was suspended, instead stating that he left that job on favorable circumstances, and at his PRSI on January 10, 2013, he stated that he left his previous job for personal reasons, and falsely claimed that he was eligible for rehire. *Id.*; Ex. 4 (Jul. 11, 2012 – Jul. 24, 2012). He was also asked during his PRSI whether he left a job under unfavorable circumstances, and he said no. Ex.4 (Jul. 11, 2012 – Jul. 24, 2012). Yet, the record clearly demonstrates that he was released from his previous job because of the positive drug test results. In his 2012 SF-86, the individual further indicated that he never illegally used or otherwise has been involved with a controlled substance while possessing a security clearance, which I cannot find honest in light of the results of the urinalysis. Ex. 4 (Dec. 29, 2012 – Jan. 10, 2013) at

1. Hence, I find that the individual deliberately misrepresented, falsified and omitted significant information from his personnel security questionnaire and during his background investigation.

At the hearing, the individual acknowledged that he failed to disclose his arrest, security clearance suspension, outstanding debt and drug test result on his SF-86 forms. He admitted to falsifying his answer regarding his arrest in his 2007 and 2012 SF-86s, stating that he “didn’t think it would come up in the investigation,” and that “I guess I figured because it was so long ago, I didn’t think that it would be an issue or come up.” Tr. at 41, 57. Regarding his failed drug test, he had a similar response, stating “I didn’t know that it would show up as a failed urinalysis.” Tr. at 42. While he admitted that his security clearance was suspended because of the drug test and as he signed the “Statement of Suspect/Witness/Complainant” on May 5, 2012, indicating that he tested positive for cocaine, he still failed to disclose this information on his 2012 SF-86. Tr. at 44. He also admitted that he made additional misrepresentations when he told the investigator that he did not have any problems at his previous job, explaining, “I just – honestly, I just didn’t – I didn’t think that what was brought to her attention would be brought to her attention, I guess.” Tr. at 48. With regards to the outstanding debt, the individual stated that he did not list it in his 2012 SF-86 because he did not know the status of the judgment, stating: “I hadn’t heard anything about it in quite some time,” and “I guess I kind of knew it was out of sight, out of mind kind of thing.” Tr. at 52. Hence, the individual repeatedly acknowledged that he failed to disclose information during his background investigation, even falsifying and deliberately misrepresenting information at times, because he did not believe that the DOE would later discover this information, which I find particularly troubling. His misrepresentations were not unintentional or even minor. They were, in fact, deliberately made to conceal significant information that raised multiple security concerns.

Accordingly, I cannot conclude that the individual has mitigated the concerns associated with criterion (f). His answers on his personnel security questionnaire and during his background investigation were deliberately misleading in order to conceal information that he believed would not be discovered by the DOE. Indeed, he consistently explained that he failed to be honest in his SF-86 regarding his outstanding debt, arrest, drug test result and security clearance suspension because he did not think those issues “would come up.” Tr. at 60, 61. He now acknowledges that he should have been forthright, but he never made any good-faith efforts to correct the concealments or falsification before this proceeding began. *Adjudicative Guidelines* ¶ 17(a). Moreover, considering the grave consequences for providing false and misleading answers in the personnel security questionnaire and during his background investigation, I find that the individual has demonstrated poor judgment and is unreliable. For all these reasons, I cannot find that the individual has mitigated the security concerns raised under criterion (f) associated with his lack of honesty, reliability and trustworthiness.

V. CONCLUSION

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under criteria (k) and (f) of the Part 710 regulations. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to fully resolve the

security concerns at issue. I therefore cannot find that granting the individual DOE access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the DOE should not grant the individual access authorization. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Shiwali G. Patel
Administrative Judge
Office of Hearings and Appeals

Date: May 19, 2014