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

In the Matter of Personnel Security Hearing )

Filing Date: June 5, 2015 )

Case No.: PSH-15-0045 )

Issued: August 24, 2015

**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.”<sup>1</sup> For the reasons set forth below, I conclude that the Department of Energy should restore the individual’s access authorization at this time.<sup>2</sup>

**I. BACKGROUND**

The individual is an employee of a Department of Energy (DOE) contractor and has a suspended access authorization. A Local Security Office (LSO) summoned the individual for a Personnel Security Interview (PSI) with a personnel security specialist in January 2015, in order to address issues concerning his use of medical marijuana, which he reported during an interview with an Office of Personnel Management (OPM) investigator during a reinvestigation for his security clearance. Ex. 3. Based on information revealed during the reinvestigation, the Local Security Office (LSO) determined that there was derogatory information that cast into doubt the individual’s continued eligibility for access authorization. The LSO informed the individual of this determination

<sup>1</sup> 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.

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

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 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. The DOE introduced seven exhibits into the record of this proceeding (Exs. 1-7). The individual introduced one exhibit into the record, labeled Exhibit A. The individual presented the testimony of five witnesses, including himself. *See* Transcript of Hearing, Case No. PSH-15-0045 [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 stated that the LSO possessed information pertaining to subsections (k)<sup>3</sup> and (l)<sup>4</sup> of the criteria for eligibility for access to classified matter or special nuclear material set forth at

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<sup>3</sup> 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).

10 C.F.R. § 710.8. Ex. 1. Under criteria (k) and (l), the LSO stated that following: (1) during his PSI in January 2015, the individual admitted that he used medical marijuana on ten occasions from December 2000 to June 2001, while he possessed a security clearance, and he knew that marijuana was against Federal law; (2) in July 2014, he signed a Questionnaire for National Security Positions (QNSP) certifying that he never illegally used or been involved with a drug or a controlled substance while possessing a security clearance; (3) in July 2011, he signed a QNSP certifying that he never illegally used a controlled substance while possessing a security clearance; and (4) in March 2001, he signed a QNSP certifying that he never illegally used a controlled substance while possessing a security clearance, nor illegally used any controlled substance in the previous seven years. Ex. 1. 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 (k) and (l).

#### IV. FINDINGS OF FACT

Summarized below are my findings, which are based on the testimony presented at the hearing and the exhibits submitted into the record by the DOE and the individual.

The individual is an employee of a DOE contractor and obtained a security clearance in 2001. Tr. at 78. The individual suffered from headaches since he was a child and in 1999, he learned that his headaches were migraines. Tr. at 71-72. After years of trying different medications without success and getting tested for various pharmaceutical drugs, he obtained a recommendation from a doctor at a treatment facility in May 2007, to use medical marijuana for a year, or until May 2008.<sup>5</sup> Ex. A. He explained that the recommendation from the doctor was considered a certificate from his state to lawfully obtain medical marijuana from a dispensary. Tr. at 73. The individual used medical marijuana approximately 10 to 12 times in an eight-month period and he stopped using it after realizing that it was ineffective for treating or preventing his migraines. Tr. at 73, 75. He took medical marijuana either on the weekends or during the weekdays only if he stayed home from work due to his migraines. Tr. at 78. He never came to work after ingesting marijuana. *Id.*

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<sup>4</sup> Criterion (l) defines as derogatory information when 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).

<sup>5</sup> While the individual stated that he used medical marijuana from 2000 to 2001 during his PSI in January 2015, he clarified that he actually used it from 2007 to 2008 and submitted documentation from the treatment center to corroborate his testimony. Ex. A; Tr. at 84.

In 2008, also around when the individual stopped ingesting marijuana, his employer began requiring that employees undergo random drug screening.<sup>6</sup> He was not concerned by the random drug tests because he did not think his usage of marijuana was illegal as it was for medical purposes only and recommended by a physician. Tr. at 76, 82. However, he testified: “I just didn’t want to borrow trouble that, you know, would mean that I would have to explain to someone more than I needed to,”<sup>7</sup> when explaining why he stopped using the medical marijuana in 2008. Tr. at 76. Nonetheless, the individual maintains that he “never knew that medicinal marijuana was not legal to DOE” and that at the time, he believed that his use of marijuana was legal as it was recommended by a doctor. Tr. at 82.

In the QNSP that he signed in July 2011, in response to questions asking whether he ever illegally used drugs in the previous seven years or ever illegally used a controlled substance while possessing a security clearance, the individual answered “no.” Ex. 5. He gave the same response to those questions in the QNSP that he signed in July 2014.<sup>8</sup> Ex. 4. He took the admonitions in the QNSPs very seriously and he did not know that medical marijuana was deemed illegal by the DOE. Tr. at 77, 82. He was also not aware about the federal law with regard to medical marijuana.<sup>9</sup> Tr. at 82-83. As he believed that he did not illegally use drugs, he thought his responses to those questions were truthful. Tr. at 80-82. I observed his demeanor while he testified and I credit his testimony that he believed that his usage of medical marijuana was legal while he used it and when he completed his QNSPs.

The individual has never used marijuana at any other time in his life or any illegal drug for recreational purposes. Tr. at 72, 84. During his interview with the OPM investigator in 2014, when

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<sup>6</sup> In total, he has had three random drug tests since 2008, and he testified that they were all negative. Tr. at 77, 88.

<sup>7</sup> To provide more context, here is the text from the transcript of the individual’s testimony on this issue:

A. But in 2008, or thereabouts, we were told at the laboratory that random drug screening would begin and that this was basically a urine test and any – any drugs that were in your system would be detected and – and you would be asked about those if they weren’t prescribed.

Q. Were you worried about the drug testing?

A. Well, basically, I wasn’t worried about it. I just didn’t want to borrow trouble that, you know, would mean that I would have to explain to someone more than I really needed to.

Q. And you didn’t feel that you needed to explain, is that correct?

A. That’s correct.

Q. And can you be very clear as to why you felt you didn’t need to explain?

A. Well, because I had a recommendation from a physician, I felt this was a valid use of the medical marijuana as a – medical treatment, I guess, and I did not feel in that context that it was illegal.

Tr. at 76.

<sup>8</sup> The following are the questions in the 2014 QNSP to which the individual answered “no”: 1) “In the last seven (7) years, have you illegally used any drugs or controlled substances?”; 2) “In the last seven (7) years, have you been involved in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or controlled substance?”; and 3) “Have you ever illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed?” Ex. 4. These questions are almost identical to the questions in the 2011 QNSP pertaining to illegal drug use. Ex. 5.

<sup>9</sup> When asked if he had “any knowledge about the federal law approach to medical marijuana,” he responded, “No. I -- I knew that it was – you know, that I --- I basically knew that marijuana was illegal under both state and federal laws, but for medicinal purposes, the state permits it under – under those circumstances,” which he relied on. Tr. at 82-83.

the investigator specifically asked him whether he ever used marijuana, he replied “yes.” Tr. at 85. The individual stated that it was the first time he was directly asked about whether he used marijuana and he answered truthfully. *Id.* He reiterated during the hearing that he has not used marijuana since he used it in 2007-2008, he has never used it for illegal purposes and he will not use it again for any purpose. Tr. at 86.

The individual’s former colleague and friend, who has known the individual for over 20 years, testified. Tr. at 22. The witness held high level positions at the facility where he worked with the individual and at one point he was an associate director of a division. Tr. at 25. He testified that he interviewed the individual to work at their facility and participated in his reviews at work. Tr. at 23. He described the individual as having “impeccable” judgment, explaining that “[h]e was very careful not to overstate his work, not to overstate anything, and to be, you know, very careful in this regard.” Tr. at 27. He and the individual socialized together in the 1990s and he stated that they are both “very drug phobic,” and that he has never observed the individual in a setting where anyone was using marijuana or any drug. Tr. at 31. He also described the individual as very responsible, stating that he would trust him with his children. Tr. at 33. He also acknowledged that he was never aware of a DOE regulation specifically forbidding the use of medical marijuana, despite his management responsibilities.<sup>10</sup> Tr. at 33.

An employee of the same contractor, who is two levels above the individual and has known him for 20 years, testified. Tr. at 42. Their interactions are mostly professional and related to work. Tr. at 43. He characterized the individual’s judgment as “sound,” saying that he is “very, very thoughtful” and that “he tends to be pretty conservative in his views.” Tr. at 45-46. Another colleague of the individual, who has known him for 10 years, testified. Tr. at 49. She, too, stated that he is an “extremely thoughtful person with very good judgment” and that he is “absolutely trustworthy.” Tr. at 52, 55. Like the other witness and the individual, she was not aware of the DOE regulations pertaining to the use of medical marijuana and while she remembers trainings and discussions on illegal drugs, she does not remember any specifically related to medical marijuana. Tr. at 54.

A close friend of the individual and his wife testified about their relationship and his headaches. Tr. at 57. She stated that his wife has had concerns about his headaches and that when the individual has headaches, he goes into his room and is “incognito.” Tr. at 61-62. She corroborated his testimony that he has tried various pharmaceutical medications to cope with his headaches and has also tried other approaches, such as changing his diet. Tr. at 62. Furthermore, he stated that “[h]e has the self-control and the self-discipline to regulate his own behavior.” Tr. at 62. She has never observed the individual or his wife use drugs for recreational purposes, saying “that has been a point of some pride and self-respect on their part.” Tr. at 62-63. She further stated that he is “consistent, reliable [and] honest.” Tr. at 63.

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<sup>10</sup> In the discussing his lack of awareness of the regulations pertaining to medical marijuana use, the witness stated that “we were absolutely buried in regs, . . . . For some reason that I don’t – can’t account for, I never encountered this particular regulation. It never came up.” Tr. at 33-34.

## V. ANALYSIS

### A. Criterion (k)

I find that the individual has mitigated the concerns associated with criterion (k) regarding his use of medical marijuana on 10 to 12 occasions during an eight-month period in 2007-2008. He credibly testified that his use of marijuana was only for medical purposes after other medications did not work on his headaches and it was recommended by a doctor to treat his migraines; he tried it for a limited period until realizing that it did not alleviate the pain or reduce his migraines. *See* Adjudicative Guidelines H, ¶ 26(a) (mitigation when “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”). While he was aware that marijuana is illegal under federal law, he was not aware that ingesting medical marijuana with a doctor’s recommendation in a state where it legalized medical marijuana was unlawful under federal law. He also credibly testified that he has never used any illegal drugs for recreational purposes and has no intention to in the future. This was corroborated by the testimony of his witnesses, specifically by his friend, who has known the individual for years and socialized with him and his wife on many occasions. She stated that she knew that he and his wife did not use drugs for recreational purposes, noting that it has “been a point of some pride and self-respect on their part.” *See id.*, ¶ 26(b) (mitigation through a “demonstrated intent to not abuse any drugs in the future.”). For these reasons, I find that he has mitigated the concerns associated with his use of medical marijuana under criterion (k). *See Personnel Security Hearing, Case No. TSO-0586 (2007)* (finding mitigation of criterion (k) concerns raised by the individual’s use of medical marijuana to alleviate a headache, without a doctor’s prescription or recommendation, due to the solitary nature and the pain reduction motivation of the use, the lack of evidence that she has used it at any other time, the testimony of witnesses and evidence provided by a psychologist’s report).

### B. Criterion (l)

I also find that the individual has mitigated the concerns associated with criterion (l) pertaining to his responses in the QNSPs in 2014, 2011 and 2001, regarding his use of illegal drugs. First, as to the 2001 QNSP, the individual clarified that he did not ingest any marijuana in 2001 and accordingly, he never gave an inaccurate response in the questionnaire regarding his drug use. He credibly explained why he informed the interviewer during his PSI that he used medical marijuana in 2001, instead of 2007-2008, because he was focused on the issue of the legality of his usage and just gave an estimate of when the usage occurred. Moreover, he provided a note from the treatment center corroborating his testimony on that point, and I thus find that the individual has resolved the concerns that relate to his 2001 QNSP. *See* Adjudicative Guidelines E, ¶ 17(f) (mitigation when the information was unsubstantiated).

I also credited his testimony explaining that he did not realize medical marijuana was deemed an illegal drug for purposes of filling out his QNSP and his eligibility for a security clearance. Indeed, the relevant questions in the QNSP ask about illegal use of drugs or illegal drug activity, without specifying that the illegality should be considered under federal law, rather than state law, or regardless of its prescribed use for medical purposes. While the responsibility ultimately falls on the

clearance holder to understand the questions in the QNSP and respond accurately, I find that the individual did not deliberately answer incorrectly in the QNSPs as he believed he was being truthful because his use of marijuana was limited for medical purposes, which was legal in the state where he resided.<sup>11</sup> *Id.*, ¶ 17(c) (mitigation when “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.”). He also credibly stated that he was not aware of the federal law or DOE view on the use of medical marijuana. His testimony as to his lack of awareness of the DOE view on medical marijuana is also corroborated by one of his former colleagues, who held a high level position, and another colleague, who both testified that they were not aware of the DOE policy concerning medical marijuana.

Moreover, when the individual was specifically asked about using marijuana by the OPM investigator, he was honest and informed the investigator about when he used medical marijuana to cure his migraines, which prompted this administrative process. I therefore do not find that his responses in the QNSPs pertaining to his illegal drug use were a deliberate omission, concealment or falsification.<sup>12</sup> While there are no mitigating factors in the Adjudicative Guidelines that apply specifically to this point, it is similar to ¶ 17(b), in that his omission was caused by his own misunderstanding as to the federal law and DOE policy concerning usage of medical marijuana, rather than through the improper or inadequate advice of authorized personnel or legal counsel. Finally, the testimony provided by his witnesses as to his honesty and reliability was very credible and further supported the individual’s contention that he does not use illegal drugs for recreational purposes and that he is reliable and trustworthy. For these reasons, I believe that the individual is honest, reliable and trustworthy,<sup>13</sup> and that he has mitigated the concerns under criterion (I) regarding his responses in the QNSPs in 2014, 2011 and 2001.

I have considered the nature, extent, and seriousness of the individual’s conduct pertaining to his use of medical marijuana in 2007-2008 and his responses in the QNSPs, the circumstances surrounding his conduct, the frequency and recency of his conduct, the likelihood of continuation or recurrence of this conduct, and any other relevant and material factors, as I am required by the regulations. Based

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<sup>11</sup> When the individual stated that he did not want to “borrow trouble that, you know would mean that I would have to explain to someone more than I really needed to,” in reference to his employer’s random drug testing in 2008, he was actually concerned about the administrative hurdle in having to explain for his medical marijuana use, instead of believing that it would reveal that he violated the law. In all, I deem his testimony to be forthright as to his belief that he was being honest about his drug use and am persuaded by his own subjective belief in the legality of his use of medical marijuana.

<sup>12</sup> See *Personnel Security Hearing, Case No. TSO-0586 (2007)* (finding that the individual mitigated the concerns under criterion (I) associated with her one time use of medical marijuana to treat her migraine after signing a security acknowledgment form, stating, “it is clear that by signing the form the [i]ndividual indicated her understanding she was not to use illegal drugs while holding a security clearance. However, the concerns regarding the [i]ndividual’s honesty in connection with her one-time use of marijuana under the circumstances discussed above have been resolved.”).

<sup>13</sup> See *id.* (despite the individual providing inconsistent statements about her understanding of whether her use of marijuana for medical reasons was legal because she acknowledged that the state required a doctor’s prescription, which she did not have, the Hearing Officer noted that he believed the inconsistency to be minor and credited her testimony as to the subjective belief in the legality in her use of marijuana).

on all of these factors and the Adjudicative Guidelines, I conclude that the individual has resolved the security concerns presented by the LSO. 10 C.F.R. § 710.7(c).

## **VI. 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 (l) 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 brought forth sufficient evidence to fully resolve the security concerns at issue. I therefore find that restoring the individual's 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 restore 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: August 24, 2015