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United States Department of Energy
Office of Hearings and Appeals

In the Matter of Personnel Security Hearing)
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Filing Date: August 26, 2015)
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Case No.: PSH-15-0068

Issued: January 19, 2016

Administrative Judge Decision

Robert B. Palmer, 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 individual’s security clearance should not be restored at this time.²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, and was granted a security clearance in 1989 in connection with his employment. In July 2014, the individual tested positive for marijuana usage during a random drug screening. Because of this result, the local security office (LSO) summoned the individual for an interview with a personnel security specialist. After this Personnel Security Interview (PSI) revealed additional information that raised security concerns, the LSO determined that derogatory information existed that cast into doubt the individual’s eligibility for access authorization. It informed the individual of this determination in a letter that set forth the DOE’s security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter

¹An 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 also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov> . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

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 on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Administrative Judge. The DOE introduced 12 exhibits into the record of this proceeding. The individual introduced 23 exhibits and presented the testimony of five witnesses, in addition to testifying himself.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (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, and to the Bond Amendment (section 1072 of the National Defense Authorization Act for Fiscal Year 2008).

Criterion (k) defines as derogatory information tending to show that the individual has "sold, transferred, possessed, used, or experimented with a . . . 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, . . . etc.) except as prescribed or administered by a physician" or otherwise authorized by federal law. Under this criterion, the Letter cites the individual's positive drug test results and statements that he made during his 2014 PSI indicating that he used marijuana repeatedly over a twenty year period while holding a security clearance despite knowing that such usage was forbidden, and that he used marijuana on a weekly basis over a two to three year period while remodeling his home and purchased it every two to three weeks to smoke after his grandson's death in August 2013.

Criterion (l) refers to information indicating that the individual has engaged in criminal or any other unusual conduct or is subject to any circumstances which tend to show that he is not honest, reliable or trustworthy, or that he may be subject to pressure, coercion, exploitation or duress which may cause the individual to act contrary to the best interests of national security. Such conduct or circumstances also include violation of any commitment or promise upon which the DOE previously relied to favorably resolve an issue of clearance eligibility. As support for its invocation of this criterion, the Notification Letter cites the individual's usage of marijuana mentioned above and statements that he made during the 2014 PSI indicating that he continues to associate with friends who use marijuana, and that he violated a DOE Drug Certification that he signed in 1989.³

The Bond Amendment prohibits federal agencies from granting or renewing the security clearances of persons who are addicted to, or unlawful users of, illegal drugs. In this regard, the

³ This Drug Certification was not submitted into evidence by the LSO. However, DOE Drug Certifications generally require the signatory to agree that he or she will not use or be associated with any illegal drug (as listed in the Controlled Substances Act of 1970) while holding a security clearance, unless lawfully prescribed by a licensed physician. They also generally provide that if the signatory violates this commitment even once, he or she could lose his or her access authorization.

Letter alleges that the individual “has used marijuana within the last 12 months while holding an access authorization, which is a Bond Act violation.”

The derogatory information set forth above adequately justifies the DOE’s invocation of the Bond Amendment and criteria (k) and (l), and it raises significant security concerns. Use of an illegal drug raises doubts about an individual’s reliability and trustworthiness, both because such usage may impair judgment and because it calls into question a person’s ability or willingness to comply with laws, rules, and regulations. An unwillingness to comply with rules and regulations can also raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E, H and J (Adjudicative Guidelines).*

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 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). *See Personnel Security Hearing, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (affirmed by OSA, 1996), and cases cited therein.* 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) and The Bond Amendment

During the PSI, the individual described his history of marijuana usage. He started in 1973, when he was 21 years old. He used marijuana on a weekly basis, often during fishing trips with his friends. From 1979 to 1983, his usage dropped considerably because he was in college and did

not have the money to purchase the drug. After leaving college and getting a job in 1983, he began “a chronic [marijuana] use pattern at that point” because he was “making regular money.” DOE Exhibit (Ex.) 9 at 69. After leaving that job in late 1987 or early 1988, he decided to stop smoking marijuana in case he was drug tested for any new job. *Id.* He was then hired by his current employer.

At the hearing, the individual testified about his marijuana usage after receiving his security clearance. He said that he remained abstinent until approximately 1995. At that time, he became the primary caregiver for his father, who was terminally ill. Tr. at 163. This was especially stressful for the individual because his father had sexually abused him from the age of 14 years old until he left home at 17. Tr. at 152-155. He explained that he did not want the last few years of his father’s life “to be full of strife and wrought with arguments and all that kind of thing.” To the individual, “the marijuana helped . . . sort out the bitterness that I had towards my dad,” and helped him “process the notion that I could treat him and be with him and not be bitter.” Tr. at 163. His father died in 1998. Tr. at 165. He also said that using marijuana right at bedtime helped him to sleep. He had had problems with sleep and nightmares since childhood, but using marijuana allowed him “to have a perfectly sound night of sleep,” and wake up the next morning “without remembering a single dream.” Tr. at 164. When he would take sleep medications, they would not produce a dreamless sleep. *Id.* From then until 2008, the individual’s marijuana usage was “intermittent.” Tr. at 168. From 2008 to 2010, he was remodeling his house with the assistance of friends, and he would use marijuana with them on weekends. Tr. at 230-231. From 2010 to 2011, he returned to his “intermittent” pattern of use. He explained that he was “an opportunist.” He purchased marijuana “maybe a couple of times a year,” and his other usages would occur when friends would visit and bring marijuana with them. He said that those visits “were not all that frequent.” Tr. at 232.

In 2011, the Management and Operations contractor at the facility at which the individual was employed changed, and the individual stopped using marijuana because he suspected that he might be tested for illegal drug usage. *Id.* He began using marijuana again shortly after the death of his grandson in 2013. The individual was very close to his grandson, who lived with him, and he had trouble sleeping after his grandson’s death. He used marijuana as a “nightcap” for the same reason that he did so while he was caring for his father: so that he could sleep soundly and without having nightmares. Tr. at 169. He stopped again in May 2014 because he “heard” that his employer “did random drug screens.” *Id.* The individual used marijuana again on July 3, 2014, with friends, one of whom was visiting from another state. That was his last usage of the drug. Tr. at 170. He testified that he is now in treatment for the trauma caused by his father’s sexual abuse, that he is no longer suppressing that abuse and trauma, and that he no longer uses marijuana to suppress his dreams. Tr. at 198. When he has a bad dream about his father’s abuse, he now can go to his therapist to discuss it. Tr. at 200. He added that he no longer associates with his drug-using friends. Tr. at 197. This testimony was confirmed by the individual’s wife. Tr. at 75. The individual concluded by saying that he is now coming to terms with the things that have bothered him for most of his adult life, and that it was these things, *i.e.*, his father’s abuse and the loss of his grandson, that led him to use marijuana. There is nothing else in his character that should concern the DOE, and his marijuana usage is the “single aberration” in his life. Tr. at 207. It is his intention to permanently refrain from future marijuana use. Tr. at 144, Ind. Ex. V.

The individual's psychiatrist submitted a report (Ind. Ex. B) and also testified at the hearing. In his report, he opined that the individual used marijuana for medicinal purposes, *i.e.*, to deal with the trauma caused by his father's abuse, and the deaths of his mother and grandson, rather than for recreation. Ind. Ex. B at 10-11. He concluded that the individual self-medicated with marijuana rather than seeking counseling due to shame associated with his father's sexual abuse. *Id.* at 11. The individual's psychiatrist diagnosed the individual as suffering from Post-Traumatic Stress Disorder (PTSD), due to his father's abuse, and Unspecified Cannabis-Related Disorder. He concluded that the Cannabis-Related Disorder was in sustained full remission, due to the individual's abstention from marijuana usage since July 2014. *Id.* at 12. At the hearing, he testified that the individual's usage of marijuana while taking care of his father in 1995 was not a deliberate, conscious act, but was instead "a pre-conscious act," driven by emotion, "where a person goes ahead and does something without a full cognitive knowledge of why they are doing it." Tr. at 248. According to the psychiatrist, it was a means of coping with the very stressful situation of taking care of the father who had abused him. Tr. at 250. Based on what he knows about the individual and his treatment, he believes that the individual's stated intent to abstain from all future marijuana use is very realistic. Tr. at 265.

The individual's therapist also submitted a written report and testified at the hearing. In her report, the therapist diagnosed the individual as suffering from Cannabis Use Disorder, Moderate (by history) and PTSD. She stated that he participated in, and successfully completed, two sessions of group therapy designed to address, respectively, his substance use disorder and relapse prevention. She opined that his diagnosed conditions do not presently impair his judgment and reliability, and that his prognosis for continued abstinence from marijuana is "good." Ind. Ex. H. At the hearing, the individual's therapist said that the individual sought her out after he tested positive for marijuana in 2014. She recommended that he participate in treatment for his substance use disorder and for PTSD, but the individual was treated only for substance use at that time because he wanted to return to work as soon as possible. He informed her that he might come back for additional treatment at a later date. Tr. at 116. In May 2015, he began seeing her again for treatment for PTSD. Since then, they have focused on the trauma caused by his father's sexual abuse and by the sudden and unexpected demise of the individual's grandson. Tr. at 117. The individual has "definitely" progressed in addressing these traumatic events. Tr. at 124. He used marijuana at least in part to deal with these issues, she opined, and as he learns to address them in other ways, the impulse for him to use drugs, illegal or prescribed, will decrease. Tr. at 124-125. Based on her knowledge of the individual, she estimated his chances of relapsing as being "very low." Tr. at 127.

The individual also submitted an alcohol and drug assessment from a local substance treatment facility and laboratory test results. The treatment facility concluded that the individual is not currently suffering from any substance use disorder, and the laboratory results indicate that the individual has not used any illegal drugs with the last 12 months. Ind. Exs. C and D.

After reviewing this evidence, I find that the individual has adequately addressed the DOE's security concerns regarding his use of marijuana. First, the individual has demonstrated an intent to not use marijuana in the future. *See Adjudicative Guidelines*, ¶ 26(b) (a demonstrated intent not to abuse any drugs in the future is a potentially mitigating circumstance). Specifically, the

evidence shows that he has disassociated himself from his drug-using friends, has definitively stated his intent to refrain from all future use of marijuana, and had abstained from all illegal drug usage for over one year as of the date of the hearing. Second, the individual has satisfactorily completed a drug treatment program, and has been given positive prognoses by both his therapist and his psychiatrist. *See Adjudicative Guidelines*, ¶ 26(d) (completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, with a favorable prognosis by a duly qualified medical professional, is a potentially mitigating factor). For these same reasons, I conclude that the individual is no longer addicted to, or an unlawful user of, illegal drugs. Consequently, I conclude that no significant security concerns remain under criterion (k), and that the Bond Amendment does not stand as a bar to restoring the individual's access authorization.

B. Criterion (l)

I reach a different conclusion, however, with regard to criterion (l). The individual's repeated and knowing violations of the law, of DOE security requirements, and of his drug certification raise serious doubts about his judgment and reliability. Moreover, the individual's intentional provision of false information about his drug usage on his 2004 and 2014 Questionnaires for National Security Positions (QNSPs), Tr. at 213-215, raises significant security concerns about his honesty and trustworthiness.⁴

The individual and his witnesses attempted to address these concerns at the hearing. The individual testified that he didn't tell the DOE the truth about his marijuana usage because if he had, he would have had to come to terms with his father's abuse and address those issues with the DOE, and he was not prepared to do that. Tr. at 183. Other than in this one area of his life, he added, he has been "a good person and trustworthy." *Id.* He has not had any criminal charges brought against him except for driving with an open container of alcohol, which he reported on his 1993 QNSP. Tr. at 193-195. He further stated that he pays his taxes on time, does not speed, and that he carries this respect for laws and rules over into the workplace. Tr. at 200-201.

The individual's psychiatrist testified that the individual's feelings of shame associated with his father's abuse kept him from reporting his marijuana usage to the DOE. Tr. at 243-247. The individual's supervisor said that individual follows rules at work, successfully protects classified information, and has not exhibited any dishonest or untrustworthy behavior. . Tr. at 21-27, 42. The individual's wife testified that he is an honest, reliable and trustworthy person. Tr. at 98-99. The individual's therapist stated that he was very open and honest with her during their sessions. Tr. at 132.

Despite this testimony, I continue to have serious doubts about the individual's honesty, judgment and reliability. As an initial matter, I did not find credible the individual's contention that he did not reveal his marijuana usage to the DOE because he was not prepared to address the

⁴ The LSO did not cite the individual's falsifications of his QNSPs in the Notification Letter. However, the individual was put on notice that his honesty and trustworthiness would be at issue in this matter by the LSO's invocation of criterion (l). Moreover, the DOE provided those QNSPs to the individual in agency exhibits 8 and 10. My consideration of these falsifications therefore does not raise due process concerns.

issues that he claimed caused that usage with the DOE. The record clearly indicates that the individual's pattern of marijuana usage during the period of time leading up to his current employment, and during the approximately 20 years that he used marijuana while holding a security clearance, was that when he was apprehensive about his usage being detected, he stopped, and when he believed that his usage would probably go undetected, he resumed. As previously stated, the individual indicated during his PSI that he stopped smoking marijuana during the late 1980s in anticipation of being drug-tested in connection with any new job. DOE Ex. 9 at 69. At various times during his tenure at his current workplace, his usage depended on his perception of the likelihood of being tested at that time. Tr. at 168-170, 233-234. This pattern strongly suggests that the primary reason that the individual did not reveal his drug usage to the DOE was not to avoid having to come to terms with the traumas in his life, but because he feared losing his security clearance and his job.

Much of the individual's testimony and that of his expert witnesses was devoted to demonstrating that the individual used marijuana to "self-medicate" because of the effects of the traumas associated with his father's sexual abuse and his grandson's sudden death. While I have no doubt that these events were very traumatic, I note that much of the individual's usage was recreational in nature, with no direct connection to any of the apparent effects of the abuse or of his grandson's untimely death. As previously mentioned, during at least a two-year period in the late 2000s, the individual used marijuana on a weekly basis with friends who were helping him remodel his home. From 2010-2011, he was a self-described "opportunist," purchasing marijuana perhaps once or twice a year and using the drug when his friends would bring it with them during their visits. *See Adjudicative Guidelines*, ¶ 17(c) (mitigating circumstance that the offense was so minor, or so much time has passed, or the behavior was 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 not applicable).

However, even if all of the individual's marijuana usage could properly have been described as "self-medication," it would not change the fact that that usage was a violation of federal law, of DOE security requirements, and of the individual's drug certification. For a period of over 20 years, the individual used marijuana while holding a DOE security clearance. On at least several occasions during this period, he calculated the risks associated with getting caught, weighed them against the "benefits" of continued use, and decided either to continue using the drug or to resume his usage after a period of abstinence. This violation of the DOE's trust outweighs the testimony of the individual and his witnesses regarding the individual's judgment, reliability and trustworthiness, and leads me to conclude that the DOE's security concerns under criterion (l) remain unresolved.

V. CONCLUSION

For the reasons set forth above, I find that the individual has mitigated the DOE's security concerns under criterion (k), but has not adequately addressed the DOE's concerns under criterion (l). Consequently, he has failed to convince me that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not restore the individual's security clearance at

this time. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Administrative Judge
Office of Hearings and Appeals

Date: January 19, 2016