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

In the Matter of Personnel Security Hearing)

Filing Date: June 9, 2016)

Case No.: PSH-16-0048)

Issued: August 29, 2016

Administrative Judge Decision

William M. Schwartz, Administrative Judge:

This Decision concerns the eligibility of XXX XXX XXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As discussed below, after carefully considering the record before me in light of the relevant regulations and the Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines), I have determined that the individual’s access authorization should be restored.

I. Background

The individual works for a DOE contractor in a position that requires that he hold a DOE security clearance. While holding a security clearance, he used marijuana on one occasion in August 2014, during a visit to a long-time friend in a distant city. In August 2015, the individual completed an e-QIP, the electronic version of the Questionnaire for National Security Positions (QNSP). Responding to two questions on the form, the individual indicated that he had not illegally used any drugs or controlled substances in the past seven years, nor illegally used any drugs or controlled substances while holding a security clearance. During subsequent interviews, however, he admitted that he had smoked marijuana in 2014.

On May 17, 2016, the local security office (LSO) sent a letter (Notification Letter) to the individual advising him that it had reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In the attachment to the Notification Letter, the LSO

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

explained that the derogatory information fell within the purview of three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8(f), (k), and (l) (hereinafter referred to as Criteria F, K, and L, respectively).² The LSO also stated that the individual's use of marijuana indicates that he is an unlawful user of a controlled substance or an addict and is subject to the provisions of the Bond Amendment, 50 U.S.C. § 3343(b), which provides 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.

Upon receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations to request an administrative review hearing, and I was appointed the Administrative Judge in the case. At the hearing, the individual presented the testimony of one witness, a long-time friend, and testified on his own behalf. There were no witnesses for the LSO, but it submitted seven numbered exhibits into the record. The individual submitted one exhibit, which I labeled as Exhibit A. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or letter designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "will not endanger the common defense and security and will

² Criterion F concerns information that indicates that the individual has "deliberately 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..." 10 C.F.R. § 710.8(f). Criterion K relates to information that a person "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, ...) 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 concerns information that indicates that the individual has "engaged 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. Such conduct or circumstances include, but are not limited to, criminal behavior..." 10 C.F.R. § 710.8(l).

be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Administrative Judge’s Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person’s access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited three criteria as the basis for administrative review of the individual’s eligibility for security clearance, Criteria F, K, and L, as well as the Bond Amendment. Use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it creates doubt about a person’s ability or willingness to comply with laws, rules, and regulations. Adjudicative Guidelines at Guideline H, ¶ 24. Moreover, it is well established that conduct involving dishonesty or lack of candor can raise questions about an individual’s trustworthiness to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process, or any other failure to cooperate with the security clearance process. Adjudicative Guidelines at Guideline E, ¶ 15.

In support of its security concerns under Criterion K and the Bond Amendment, the LSO stated that the individual admitted during a Personnel Security Interview (PSI) conducted on March 3, 2016, that he had smoked marijuana in August 2014. Ex. 1.

The LSO’s security concerns under Criterion F arose when it realized that the individual had made inconsistent statements regarding his marijuana use. Completing his August 2015 QNSP, the individual answered “No” to two questions, one asking whether he had illegally used any drugs or controlled substances in the past seven years, and one asking whether he had illegally used any drugs or controlled substances while holding a security clearance. The LSO noted, however, that during the March 2016 PSI the individual admitted that he had in fact smoked marijuana in August 2014. *Id.*

As for its security concerns under Criterion L, the LSO relied on the individual’s use of marijuana while holding a security clearance and his failure to comply with reporting requirements when he did not report that use in a timely manner. *Id.*

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criteria F, K, and L and the Bond Amendment. The individual's smoking of marijuana could impair his judgment and, as illegal drug use, may indicate that he is unwilling to comply with laws, rules, and regulations. His failure to comply with reporting requirements placed on security clearance holders may indicate a similar frame of mind. Finally, his inconsistent statements reflect a failure to provide truthful and candid answers during the security clearance process and raise questions about his reliability, trustworthiness and ability to protect classified information.

IV. Findings of Fact

The individual has held a DOE security clearance for about six years. Tr. at 30. In early August 2014, he and a close friend (Friend #1) took a vacation to visit a mutual friend (Friend #2) who lives in a distant city. One evening, Friend #2 purchased some marijuana and began smoking a marijuana cigarette at his home, in the presence of the visitors. He then offered it to them, and they each smoked some. For the individual in particular, this was the first time he had ever smoked marijuana. He took a single inhalation from the marijuana cigarette. He then decided that he would not use marijuana in the future. *Id.* at 25-27. Friend #1 corroborated these facts in the testimony he provided at the hearing. He has been the individual's best friend since middle school, was present when the individual used the marijuana in August 2014, knows the individual never to have used illegal drugs before or since that evening, and was the person whom the individual told the next morning of his decision to refrain from future marijuana use. *Id.* at 14-16, 20.

In late August 2015, the individual completed a QNSP in which he answered "No" to questions asking whether he had illegally used any drugs or controlled substances in the past seven years or while holding a security clearance. Ex. 5, Section 23. At the hearing, he testified that his misrepresentation was an isolated incident and that he had not intended to mislead the LSO, and he offered the following explanation. He stated that at the time he was answering those questions, he felt that neither "Yes" nor "No" applied to his situation as a one-time, one-inhalation user. Tr. at 28. Faced with the two options, he chose "No" because he believed a "Yes" response would lead the LSO to infer that he used drugs routinely. *Id.* at 35. He noted that the form lacked a place to submit comments or explanations to those responses.³ *Id.* at 36. He knew, however, that he would have a personal interview when the Office of Personnel Management (OPM) conducted his background investigation, and he intended to explain his responses during that interview. *Id.* at 53 (co-workers had explained the process to him). In November 2015, during his interview, the OPM investigator reviewed each of his QNSP responses with him. When they reached the questions regarding illegal drug use, the individual volunteered that he had in fact used marijuana on one occasion in August 2014. *Id.* at 47.

The inconsistency between the individual's QNSP responses and the information he revealed to the OPM investigator raised questions for the LSO. The LSO conducted its own interview, the

³ At the hearing, the DOE Counsel pointed out to the individual that the QNSP does in fact have a section for additional comments at the very end of the form. The individual replied that he had not noticed that section at the time he was completing the form, and acknowledged that that would have been an appropriate place to explain his answers. *Id.* at 36.

PSI in March 2016, to inquire into the individual's drug use and forthrightness. Ex. 6. At the PSI, the individual again volunteered that he had used marijuana, and described the incident in a manner consistent with his testimony at the hearing. *Id.* at 9, 12-20.

At the hearing, the individual acknowledged that he clearly understood the questions on the QNSP regarding drug use. He acknowledged that he had committed an error by answering them as he did, and in the future he would answer them in the affirmative. Tr. at 28-29, 50.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's DOE security clearance should be restored. I find that restoring the individual's DOE security clearance will not endanger the common defense and security, and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

As an initial observation, I find that the individual was a very credible witness. His recounting of relevant events remained consistent throughout the access authorization process and was effectively corroborated by the testimony of Friend #1. Consequently, I will give considerable weight to his testimony at the hearing and his statements during his OPM interview and his PSI.

A. Criterion K and the Bond Amendment: Marijuana Use

The facts that support the LSO's security concern under Criterion K and the Bond Amendment relate to the individual's single inhalation of a marijuana cigarette on one evening in early August 2014. Nothing in the record supports finding that the individual had ever used any illegal drug before that evening or that he has done so since that evening. The individual has committed to not using illegal drugs in the future. I conclude that his use of marijuana in August 2014 was an isolated incident that is highly unlikely to recur.

The Adjudicative Guidelines set forth conditions that could mitigate security concerns arising from drug involvement. One of those conditions applies most appropriately to these circumstances: the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. Adjudicative Guidelines at Guideline H, ¶ 26(a). Although his marijuana use did not occur very long ago, it did take place under unusual circumstances, in a distant city, with an old friend whom he sees rarely. Moreover, it was an isolated incident; the individual had never used marijuana before and has not used marijuana since. I find that the individual has resolved the LSO's security concern under Criterion K.

The derogatory facts surrounding the Bond Amendment concern are identical to those described above. As stated in the Background section, the Bond Amendment prohibits a federal agency from granting or renewing a security clearance for a covered person who is an unlawful user of a

controlled substance or an addict. The term “addict,” as it applies to the Bond Amendment, refers to a person “who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.” 21 U.S.C. § 802. The individual clearly does not meet this definition. In contrast to the term “addict,” the Bond Amendment does not define “unlawful user of a controlled substance.” However, because the individual’s usage was an isolated event that is unlikely to recur, the individual does not fall within the parameters of any reasonable definition of that term. Due to the isolated nature of the incident and the individual’s commitment to abstain from illegal drugs in the future, I have determined that he is neither an addict nor an unlawful user of drugs for the purposes of the Bond Amendment. Consequently, I find that he has resolved the LSO’s security concern under the Bond Amendment.

B. Criterion F: Misrepresentation, Falsification or Omission

The Criterion F concern centers on the individual’s misrepresentations in his QNSP: that he certified that he had not illegally used any drugs in the past seven years, and that he had not ever illegally used any drugs while holding a security clearance. The individual has admitted that he intentionally answered these questions in the negative, feeling that positive responses would imply that he was a regular drug user, and knowing that he would be able to explain the circumstances of his one-time marijuana use at his upcoming interview. The Adjudicative Guidelines provide a list of conditions that could mitigate this type of security concern, including:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) 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;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Adjudicative Guidelines at Guideline E, ¶ 17(a)-(d).

After considering the facts underlying the Criterion F concern and the mitigating factors listed above, I have concluded that the individual has resolved this concern. Regarding the first factor listed above, the individual volunteered the information about his one-time marijuana use during his interview with the OPM background investigator. He offered this information before the investigator confronted him with any evidence of his drug use; in fact, it was highly unlikely that the investigator could possibly have known of the incident had he not reported it to her. Although the individual does not precisely meet all the conditions of the remaining three factors, he does meet portions of each one and, when considered as a whole, his behavior mitigates the LSO's concerns in a number of ways. Ever since providing incorrect answers on the QNSP, the individual has consistently disclosed the full extent of his involvement with marijuana. He now clearly acknowledges that he should have answered the questions "Yes," even if he had not been offered the opportunity to explain his answers. In addition, the morning following his marijuana use, he committed himself to abstain from using marijuana, and nothing in the record disputes his testimony that he has abided by his commitment. Moreover, in light of his testimony and that of his long-time friend, the individual's one-time marijuana use and misrepresentation on his QNSP do not cast doubt, in my opinion, on his reliability, trustworthiness, or good judgment. Accordingly, I find that these factors, and the record's reflection of the individual's whole person, adequately resolve the concern.

A. Criterion L: Failure to Report Marijuana Use

The Criterion L concern focuses on the individual's marijuana use and his failure to report that use as required of him as a security clearance holder. The concern regarding his one-time marijuana use has been addressed and resolved above. The remaining issue is his failure to report that use in a timely manner as required. The applicable mitigating factors are those set forth in the above section. When asked about this failure at the hearing, the individual responded that it was not intended to mislead at all, but rather that reporting would not allow him to explain himself fully. He again emphasized that he voluntarily disclosed the full details of his marijuana use at his background investigation interview, which took place less than three months after the incident. Tr. at 29-30. While I cannot condone his failure to comply with reporting requirements, I find that his intention to explain himself fully when offered the opportunity to do so at a one-on-one interview (with the OPM investigator) mitigates his behavior to some degree. Adjudicative Guidelines at Guideline E, ¶ 17(a). The fact that he did so, even though he believed that, but for his self-reporting, the incident would likely never have been discovered, speaks well of his character. In addition, the individual now fully understands his responsibilities as a holder of access authorization, and I am convinced that he will comply with all security requirements in the future. *Id.* at ¶ 17(c). I therefore find that his failure to report the marijuana incident, given the circumstances of this case, does not cast doubt on his reliability, trustworthiness, or good judgment. As above, I find that these factors, and the record's reflection of the individual's whole person, adequately resolve this concern.

VI. Conclusion

Upon consideration of the entire record in this case, I find that there was evidence that raised doubts regarding the individual's eligibility for a security clearance under Criteria F, K, and L of the Part 710 regulations and under the Bond Amendment. I also find that the individual has

presented sufficient information to fully resolve those concerns. Therefore, I conclude that restoring the individual's DOE access authorization "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should restore the individual's DOE access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: August 29, 2016