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

In the Matter of: Personnel Security Hearing)

Filing Date: January 5, 2012)

Case No.: PSH-12-0002

Issued : March 30, 2012

Hearing Officer Decision

Valerie Vance Adeyeye, Hearing Officer:

This Decision concerns the eligibility of XXXXXX (hereinafter referred to as “the individual”) to hold an 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.” As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual’s access authorization (“security clearance” or “clearance”) should not be restored at this time.¹

I. Background

The individual has been employed by a Department of Energy (DOE) contractor since 1997, and has held a DOE access authorization for over 10 years. In October 2011, the individual tested positive for marijuana on a random drug test. The local security office (LSO) conducted a personnel security interview (PSI) with the individual in October 2011, and he admitted that he had used marijuana from 2007 to 2011 while in possession of a DOE security clearance. He also admitted that although he had certified on a January 2011 personnel security questionnaire that he had never illegally used a controlled substance while possessing a security clearance, he had been using marijuana since 2007.

¹ 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>.

In November 2011, the LSO informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his continued eligibility for access authorization. See Notification Letter (November 2011). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. §§ 710.8(f), (k), (l) (Criteria F, K, and L); and section 1072 of the National Defense Authorization Act for Fiscal Year 2008 (50 U.S.C. § 435b, section 3002) (the Bond Amendment), which statutorily prohibits federal agencies from allowing “an unlawful user of a controlled substance or an addict” to hold a security clearance. 50 U.S.C. § 435c(b).

DOE invoked Criterion F because the individual admitted in his PSI to using and purchasing marijuana from 2007 to 2011, even though he had certified on a Questionnaire for National Security Positions (QNSP) that he had never illegally used a controlled substance while possessing a security clearance or in the previous seven years.² The individual admitted that he lied on the QNSP because he was afraid that he would lose his job.

DOE invoked Criterion K because of the individual’s admission in his October 2011 PSI that: (1) he used marijuana from 2007 until 2011 when he tested positive for marijuana during a random drug test; (2) he purchased marijuana on September 11, 2011, from a stranger at a concert after seeking out a group because he knew they were smoking marijuana; (3) he owned drug paraphernalia, (4) he sought out marijuana users at a sporting event and tried to purchase from them, (5) he intended to stop smoking marijuana in December 2008 after taking a random drug test but instead resumed smoking, (6) he actively sought out a physician known to prescribe medical marijuana, and (7) he lied to the physician about his symptoms in order to legally obtain medical marijuana.³

DOE invoked Criterion L because of the individual’s admission that he used illegal drugs while holding a security clearance from 2007 until October 2011.⁴

DOE invoked the Bond Amendment because of information in its possession (specifically the individual’s admission that he used marijuana from 2007 to 2011) that indicates that the individual is an unlawful user of a controlled substance or an addict. This behavior is subject to the provisions of the Bond Amendment, 50 USC § 435c(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.

² DOE invoked Criterion F based on information in the possession of the Department of Energy indicating that XXXXXXXX has deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a questionnaire for Sensitive Positions, and questionnaire for 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. This behavior is subject to the provisions of 10 C.F.R. § 710.8(f).

³ DOE invokes Criterion K when a person has allegedly trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances except as prescribed or administered by a physician or as otherwise authorized by Federal law. 10 C.F.R. § 710.8 (k).

⁴ DOE invokes Criterion L when information in the possession of the DOE indicates that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interest of the national security. 10 CFR 710.8 (l).

The individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual testified on his own behalf and called one witness. DOE counsel did not call any witnesses. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Various documents that were submitted by the parties during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.” DOE exhibits are numbered, and the individual’s exhibits are lettered.

II. Analysis

The applicable regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual’s future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (clearly consistent with the national interest standard for the granting of 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).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. 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)⁵. In personnel security cases arising under Part 710, it is my role as the Hearing Officer 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); 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 (Guidelines). 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.* After due deliberation, I find that the individual’s access authorization should not be restored at this time because I cannot conclude that such a grant would not endanger the common defense and security and would be clearly

⁵ The applicable factors are: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and regency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. 10 C.F.R. §710.7 (c).

consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. DOE=s Security Concerns

DOE has noted two security concerns related to the individual's admitted drug use-- Criterion K deals with the use of controlled substances and the Bond Amendment precludes the granting of a security clearance to an individual who "is an unlawful user of a controlled substance." 50 U.S.C. § 435c(b); *Personnel Security Hearing*, Case No. TSO-956 (2010). Drug abuse (defined as the use of a legal drug in a manner that deviates from approved medical direction) may impair judgment and cause questions about the ability of an individual to comply with laws, rules and regulations. See Guideline H, ¶ 24. As stated above, the individual admitted that he used marijuana between 2007 and 2011. This validates the security concerns under Criterion K and the Bond Amendment.

The agency also sets forth two concerns regarding the individual's personal conduct. Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Guideline E, ¶ 15. Such conduct includes the deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, and the violation of a written commitment made by the individual to the employer as a condition of employment. *Id.* at ¶ 16(a), (f). The individual admitted that he used drugs while holding a security clearance, in violation of his commitment not to use illegal substances while holding a clearance, and also admitted that he lied on his QNSP about his drug use in order to keep his job. This validates the security concerns under Criteria F and L.

B. Findings of Fact and Analysis

The individual testified at the hearing, and also called his supervisor as a character witness. As an initial matter, the individual does not dispute any of the allegations contained in the Notification Letter. At the hearing, the individual provided testimony and evidence to support his argument that he did not have a recurring drug problem and that his drug use was unlikely to recur. Rather, he contends that his drug use was a method to gain relief from psychological pain, depression, anxiety and stress resulting from a divorce, relief he now receives from the tools acquired from counseling. Tr at 35.

The individual has held a clearance since 1999. Tr. at 32. In 2006, he went through a painful and debilitating divorce; the individual could not eat, had trouble getting out of bed, and had trouble carrying out his daily routine. *Id.* at 35. He went to see an Employee Assistance Program (EAP) psychologist for one month in summer 2006 and got tools to deal with his domestic problems. *Id.* at 36-38. However, he continued to lose weight and by the end of the year was concerned that he had lost 40 pounds. He decided to explore the use of medical marijuana to increase his appetite, even though he was aware that was against DOE rules for holding a security clearance. *Id.* at 41-2. In December 2006, he sought out a doctor known to prescribe medical marijuana, made up a back injury, and the doctor issued a card. Through 2007, he used marijuana five times a week, when he got

home from work, and never in the presence of his children. *Id.* at 45-48. He slowly regained weight and became more relaxed. *Id.* at 50. He did not renew his card after 2008, and instead stocked up some marijuana beginning in November 2007. *Id.* at 52. From January 2008 to summer 2008, he used marijuana up to five times per week. *Id.* at 53. When his employer advised employees that drug testing would start soon, he decreased his usage to once a month when he was stressed, and began to exercise to help with the stress. *Id.* at 55. In December 2008, he passed a random drug test that was administered three weeks after his last use of marijuana. He then decided to abstain. *Id.* at 58. However, ten months later he began to use marijuana again if he felt stress. *Id.* at 60-62. From 2009 to 2011, he used marijuana three or four times, and he did not use it at all between October 2009 and October 2010. *Id.* at 34, 64. In September 2011, the individual purchased marijuana at a concert, and smoked some the night before his random test. *Id.* at 68. He threw his remaining drugs in the toilet. *Id.* at 69.

As a result of the positive test, he attended a one-week outpatient drug treatment program and learned how to manage stress without drugs. Ex. A. He enjoyed the class, and has taken others on depression and stress management. *Id.* at 73; Ex. B-C. He was angry at his ex-wife, but now has tools to deal with the anger. *Id.* at 75. He visits the EAP psychologist once a month for tools on work life and also sees an EAP counselor every two weeks, who provides practical tools for relationships, stress and anxiety management, communication, and parenting. Ex.C. He feels healthy, has a good relationship with his ex-wife and children, is excited about life, and has skills to deal with his problems that he never had before. *Id.* at 88. He has been to a sporting event, but was not tempted to use marijuana. *Id.* at 87. He has passed several drug tests and does not associate with people who use drugs and testified that he does not intend to use drugs in the future. *Id.* at 71, 95.

C. Mitigation of Security Concerns

1. Drug Use - Criterion K and the Bond Amendment

According to the regulations, I must rely on the record and my observations at the hearing, and make a common-sense judgment on this matter as directed by 10 C.F.R. § 710.7(c). I have weighed several variables, including the circumstances surrounding the conduct and the motivation for the conduct. For the reasons set forth below, I find that the individual has presented sufficient evidence to mitigate the security concerns regarding his marijuana use.

After carefully assessing the record, I conclude that the individual's use of drugs happened under such circumstances that it is unlikely to recur, and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. See Guideline H, ¶ 26(a) (stating that security concern may be mitigated by behavior that happened under such circumstances that it is unlikely to recur). He has demonstrated his intent not to use drugs by disassociation from drug-using contacts, avoiding the environment where drugs were used, and abstinence. *Id.* at ¶26 (b). The individual also completed a prescribed drug treatment program, attends regular counseling sessions, and has passed monthly random drug tests. *Id.* at ¶ 26 (d), Ex. A, Ex. B. The record contains a favorable prognosis by the EAP psychologist, who opined that the individual "does not present with a risk of relapse."

Ex. B (also stating that the treatment program facilitator expressed to psychologist his opinion that individual did not suffer from chemical dependency but rather had a problem managing stress). Through his testimony and documentary evidence, the individual has convinced me that his marijuana use is not likely to recur. Guideline H, ¶ 26 (a). Therefore, taking into account all of the facts and circumstances, I conclude that he has mitigated the Criterion K concern.

The Bond Amendment provides that “the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance. . . .” 50 U.S.C.A. § 435c(b). The evidence in the record supports a finding that the individual is not actively engaged in drug use, is not an addict or a habitual user, and has a low risk of relapse. The individual has successfully completed a drug treatment program, participates in counseling, and has a positive prognosis from a psychologist. *See Personnel Security Hearing, Case No. TSO-1091 (2011); Personnel Security Hearing, Case No. PSH-11-0030 (2012) (finding that low risk of relapse mitigates security concern of Bond Amendment).* Thus I conclude that the individual has sufficiently mitigated the security concern relating to the Bond Amendment.

2. Unusual Conduct

In reviewing the record, I conclude that the individual has partially mitigated the security concerns related to his conduct. The individual has introduced evidence that confirms that his experience with counseling since November 2011 has alleviated the stressors, circumstances or factors that caused the untrustworthy, unreliable, or other inappropriate behavior. Guideline E, ¶17(d). He testified credibly about his satisfaction with his current life and his good relationship with, and absence of anger towards, his ex-wife. In fact, his ex-wife submitted a letter for the record explaining the positive changes in their relationship, which has now evolved to mutual friendship, admiration, and respect. Ex. F. He continues to attend counseling sessions and classes through his healthcare provider.

Nonetheless, balancing the relatively recent positive changes in his life with the long period of untrustworthy behavior, I cannot find that the individual has fully mitigated the Criterion L security concerns. The individual has admitted that he used drugs from 2007 to 2011, while holding a security clearance. In addition, although he knew that such use was proscribed for clearance holders, he nonetheless sought out a doctor known to prescribe medical marijuana and lied to the doctor about his symptoms in order to get a medical marijuana card. When his card expired after one year, he purchased large quantities of the drug from strangers, and did not stop smoking marijuana until he failed a drug test. Tr. at 52. Thus, I conclude that the individual has not mitigated the security concerns related to Criterion L.

3. Falsification

The individual admitted that he deliberately lied on his QNSP and concealed his marijuana use from 2007 to 2011. Such dishonesty and lack of candor can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Guideline E, ¶15. The individual had many opportunities to disclose the truth and as a clearance holder was aware of the consequences of non-disclosure. See *Personnel Security Hearing*, Case No. TSO-0911 (2010); *Personnel Security Hearing*, Case No. TSO-0415 (2007) (an individual's willingness to conceal information from DOE in order to avoid adverse consequences is unacceptable among clearance holders). This dishonesty creates a vulnerability to exploitation, manipulation or duress that can be a security concern. *Id.* at ¶ 15(e), (f).

Although my observation of the individual's demeanor at the hearing leads me to conclude that his falsifications are unlikely to recur, I cannot find that he has presented adequate mitigating evidence under the Adjudicative Guidelines that control this proceeding. The individual did not make a prompt, good-faith effort to correct the falsification and there is no evidence that he would have admitted his marijuana use had he not failed the drug test in October 2011. Guideline E, ¶ 17(a). The individual did not admit the falsification until five months prior to the hearing, when confronted with the facts at his PSI. In this case, five months of PSI-induced honesty is insufficient to mitigate the four years that the individual concealed his drug use. Thus, I cannot find that the individual has mitigated this concern.

III. Conclusion

As explained in this Decision, I find that the LSO properly invoked Criteria F, K, L, and the Bond Amendment. After a review of the record, I find that the individual has presented adequate mitigating factors to alleviate the security concerns under Criterion K and the Bond Amendment. However, under guidance of the Adjudicative Guidelines, he has not fully mitigated the concerns under Criteria F and L. Thus, in view of the criteria and the record before me, I cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored at this time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: March 30, 2012