

about the individual's falsification and drug use. On September 7, 2012, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO 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, subsections (f), (k) and (l) (hereinafter referred to as Criteria F, K and L, respectively).²

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented his own testimony and that of four witnesses. The DOE counsel did not present any witnesses. Both the DOE and the individual presented a number of written exhibits prior to the hearing.

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 denial"); *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).

² Criterion F pertains to information that a person has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personal security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). Criterion K concerns information that a person 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(l). Finally, Criterion L relates to information that a person 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).

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 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 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 Hearing Officer’s Decision

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). I am instructed by the regulations to resolve any doubt as to a person’s access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites three potentially disqualifying criteria as bases for suspending the individual’s security clearance, Criteria F, K and L. To support its reliance on Criterion F, the LSO alleges that the individual deliberately omitted information from three Questionnaires for National Security Positions (QNSPs) (August 2001, March 2007 and April 2012) regarding his illegal drug use. From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E of 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*).

The LSO’s Criterion K concerns are predicated on the individual’s admission that he used marijuana three to four times in 1996, once in 1998 and once in 2000. There are significant security concerns associated with past or current illegal drug usage. First, engaging in criminal conduct can raise questions about a person’s ability or willingness to comply with laws, rules and regulations. *See* Guideline H, *Adjudicative Guidelines*. Second, illegal drugs can impair a person’s judgment which, in turn, can raise questions about the person’s reliability and

trustworthiness. *Id.* Moreover, from a common sense standpoint, a person's reliability and trustworthiness is questionable when he or she knowingly associates with persons who use illegal drugs.

As for Criterion L, the LSO again alleges that the individual deliberately omitted information on three separate QNSPs regarding his illegal drug use. It also alleges that during an August 1999 PSI, the individual stated his intentions to not use any illegal drugs in the future and signed a DOE Drug Certification, certifying that he would not use or be involved with illegal drugs while in the possession of a security clearance. DOE relied on this statement to favorably resolve concerns regarding his drug use at that time. The LSO further alleges that in January 1999, the individual signed a DOE Security Acknowledgment, certifying that he understood that the use of any illegal drug could result in the loss of his DOE access authorization. However, despite his stated intentions and acknowledgment, the individual illegally used marijuana once in the Fall of 2000. The individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

On January 19, 1999, the individual completed a QNSP indicating that he used marijuana in 1996 and in 1998.³ DOE Exh. 1 and 3. This information prompted a PSI of the individual in August 1999. *Id.* During this PSI, the individual stated his intentions to not use any illegal drugs in the future and signed a DOE Drug Certification, certifying that he would not use or be involved with illegal drugs while in possession of a security clearance. *Id.* The individual's clearance was granted in September 1999. *Id.*

In August 17, 2001, the individual signed another QNSP, certifying that he had not used any illegal substances, including marijuana, since 1998. *Id.* Also, during an interview with an Office of Personnel Management (OPM) investigator conducted in December 2001, the individual stated that he had not used illegal drugs since 1998. *Id.* The individual went on to sign additional QNSPs, in March 2007 and in April 2012, in which he certified that he had not used any illegal substances, including marijuana, while possessing a security clearance. *Id.* However, in June 2012, the LSO received an Incident Report indicating that the individual recently recalled using marijuana sometime in the Fall of 2000, while holding a security clearance. *Id.* This information prompted a PSI which was conducted in July 2012. During the PSI, the individual admitted that he illegally used marijuana once in the Fall of 2000, while attending college and while holding a security clearance at the time. *Id.* The individual further

³ On January 19, 1999, the individual also signed a DOE Security Acknowledgment, certifying that he understood that the use of any illegal drug could result in the loss of his DOE access authorization.

stated that he was aware that his use of marijuana was illegal when he used it and assumed that it was against DOE policy. *Id.*

V. Analysis

I have thoroughly considered the record in 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)⁴ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization 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.

A. Criterion F

During the hearing, the individual maintained that he did not intentionally omit information from his 2001, 2007 and 2012 QNSPs. Transcript of Hearing (Tr.) at 65. He candidly testified that when he completed his August 2001 QNSP, he listed his 1996 and 1998 marijuana usage, but failed to list his one-time usage in 2000. *Id.* at 63. According to the individual, he did not recall his one-time usage in 2000 and unintentionally omitted this information from his 2001 QNSP. He stated that it was not his intention to mislead the DOE. The individual explained that he did not have an appreciation for the seriousness of the security form and simply transferred information from the previous 1999 QNSP. *Id.* at 65 and 66. Again, when the individual completed his 2007 QNSP, he stated that he did not disclose his one-time marijuana use in 2000 because he did not recall it. *Id.* at 67. He further explained that 2007 was a busy time in his life as his wife had just had twins and he was completing his thesis and coursework for his Master's degree. *Id.* The individual testified that on the 2007 QNSP, he again transferred the information from his previous QNSPs which only disclosed the 1996 and 1998 usage. He asserted again that he did not have a full appreciation for the seriousness of completing DOE security forms. *Id.* at 68. Likewise, when completing the third QNSP in April 2012, the individual testified again that he did not recall his one-time usage in 2000. *Id.*

⁴ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his 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 continuation or recurrence, and other relevant and material factors.

The individual testified that in June 2012, after submitting his April 2012 QNSP paperwork, he and his wife were discussing how they would educate their children about illegal drug use. *Id.* at 69 and 70. He further asserted that it was at this time that he recalled that he had not disclosed his one-time marijuana use in 2000 on his 2001, 2007 and 2012 QNSPs. *Id.* According to the individual, once he recalled his 2000 usage, he immediately notified DOE of his omission by e-mail. *Id.* at 71, *see also* Individual Exh. A. He also testified that he retrieved his QNSPs and was surprised he had not reported his 2000 one-time usage on them. The individual stated that once he recalled the 2000 marijuana use, there was no question for him that he needed to report the information. Tr. at 72.

The individual's wife, who has been married to the individual for ten years, corroborated the individual's testimony regarding a discussion they had on how to talk to their children about illegal drug use. *Id.* at 116. She testified that it was during their conversation in June 2012 that the individual remembered that he had used marijuana one time in 2000. *Id.* at 117. The wife further testified that as soon as the individual realized he had not reported this information on his security forms, he immediately notified DOE because he felt he needed to be honest and forthright. *Id.* The individual's wife also testified that she has never known her husband to use illegal drugs, although she stated that the individual has discussed his past use with her. *Id.* at 114.

The testimonial evidence adduced at the hearing convinces me that the individual did not deliberately omit information concerning his drug usage on his 2001, 2007 and 2012 QNSPs. First, I found the individual's testimony that he did not intentionally omit his one-time marijuana use in 2000 to be credible. I believe it is plausible that the individual forgot about his one-time usage in 2000 until he was engaged in a conversation with his wife about how they would discuss illegal drug usage with their children.⁵ Second, once the individual recalled his 2000 usage, he promptly took action to correct his omission. *See Adjudicative Guidelines* at Guideline E. Third, the individual acknowledged and accepted full responsibility for his omission. *Id.* In the end, I find that the requisite element of "deliberateness" is lacking under Criterion F in this case. For this reason, I find that the individual has mitigated the security concerns associated with Criterion F.

B. Criterion K

⁵ Having accepted that the individual did not remember his one-time marijuana use, I distinguish this case from other OHA decisions regarding falsifications where the individual knowingly maintained a falsehood for a period of time. In those cases, the individual's pattern of responsible conduct is compared to the length of time the individual maintained a falsification. *See Personnel Security Hearing*, Case No. TSO-0394 (2006) (six months of honest behavior not sufficient to mitigate dishonesty that spanned for nine months); *Personnel Security Hearing*, Case No. TSO-0302 (2006) (10 months of honest behavior not sufficient to mitigate falsehood that spanned 16 years); *Personnel Security Hearing*, Case No. VSO-0440 (2001) (18 months of responsible, honest behavior sufficient evidence of reformation from dishonesty that spanned six months in duration).

The Criterion K concern raised by the LSO is predicated on the individual's illegal use of marijuana three to four times in 1996, once in 1998 and once in 2000. During the hearing, the individual admitted to using marijuana in the years at issue. He testified that in 1996, he was 18 years old and just finishing high school, when he used marijuana with friends. *Id.* at 60. The individual stated that in 1998, he was just completing courses for his Associates Degree and used marijuana once with the same group of friends. *Id.* at 61. According to the individual, the last time he used marijuana was in the fall of 2000 with a different group of friends. The individual, who is now married and the father of two, testified that he has greatly matured since these time periods, no longer associates with the same friends and has no intention of ever using illegal drugs again. *Id.* at 62. He submitted documentary evidence of random negative drug screens in 2009 and 2012. *See* Individual Exhs. F, G and H. The individual's wife also testified that she has never known the individual to use illegal drugs, although he informed her of his use in the past. *Id.* at 114.

In evaluating the totality of the circumstances surrounding the individual's illegal drug use, I have determined that the following factors do not weigh in the individual's favor. First, the individual's willful disregard for the law by using illegal drugs is a serious matter. Second, the individual's conduct on the three occasions in 1996, 1998 and 2000 was both voluntary and knowing.

Against these factors, I weighed the following positive ones. First, the individual voluntarily reported his 1996 and 1998 marijuana use to the DOE when he executed his 1999 QNSP. Once he recalled his 2000 marijuana use, he promptly reported it to DOE. Second, the individual's testimonial evidence convinced me that he understands the seriousness of his past drug usage and is taking full responsibility for his actions. The individual's current behavior demonstrates that he is now comporting himself in an honest, trustworthy and responsible manner. Third, the evidence convinced me that the individual's youth, particularly in 1996, and immaturity at the time he used marijuana contributed to his poor judgment in using illegal drugs. Fourth, the individual convinced me that he has not used illegal drugs since the occurrence in 2000 and does not associate with the same friends or with any persons who use drugs. Fifth, the individual's family and friends are aware of his past illegal drug use, a fact that lessens his susceptibility to blackmail, coercion and undue duress. The individual's wife and co-worker provided persuasive testimony to corroborate the individual's testimony on this point. Sixth, the individual has provided compelling testimonial evidence that he will not use drugs in the future. In the end, the individual has provided compelling testimonial and documentary evidence that lead me to conclude that his past use of illegal drugs is unlikely to recur. On balance, the weight of the evidence demonstrates that the individual is a responsible and focused adult who now understands the importance of following rules and laws. Accordingly, after carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has presented compelling evidence to mitigate the Criterion K security concerns at issue.

C. Criterion L

The key issue under Criterion L is whether the individual has brought forward sufficient evidence to demonstrate that he is reliable and trustworthy, and that he is no longer subject to pressure, coercion, exploitation or duress. For the reasons set forth below, I find that the individual has provided sufficient information to resolve the Criterion L concerns at issue.

The DOE's first concern under Criterion L is that the individual omitted his one-time marijuana use in 2000 on his 2001, 2007 and 2012 QNSPs after certifying that he had not used any illegal substances, including marijuana. The DOE's second concern under Criterion L is that the individual signed a DOE Security Acknowledgment and DOE Drug Certification form in 1999, and that during the individual's August 1999 PSI, the individual stated his intentions to not use any illegal drugs in the future. The signing of a Drug Certification form represents a personal commitment by an individual to DOE to refrain from the use of illegal drugs and reflects an understanding by the individual that, but for the employee's personal commitment to refrain from drug use in the future, his prior drug use would have precluded him from holding a clearance. *See Personnel Security Hearing*, Case No. TSO-0555 (2008). There is no question that a violation of a written commitment to DOE raises security concerns. *See Adjudicative Guidelines* at Guideline E.

Among the factors which could serve to mitigate the security concerns raised by the individual's omission on his QNSPs and his violation of a written commitment to the DOE are (1) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; (2) the passage of time, the infrequency of the behavior, or that the behavior happened under such unusual circumstances that it is unlikely to recur in the future; and (3) the individual has acknowledged the behavior or has taken positive steps to alleviate the factors that caused untrustworthy, unreliable behavior and such behavior is unlikely to recur. *Id.* at ¶ 17 (a), (c) and (d). In this case, with respect to the individual's omission on his QNSPs, the individual readily acknowledged his drug usage and omission. Although the individual was negligent in omitting information regarding his marijuana use from his QNSPs, once he recalled his 2000 usage, he promptly reported it to the DOE to correct his omission and in an effort to be honest and forthright with the DOE. *See Adjudicative Guidelines* at Guideline E.

Regarding the DOE Security Acknowledgment and the DOE Drug Certification, when questioned about these security forms during the hearing, the individual stated that he did not

specifically recall signing these documents. *Id.* at 74. He acknowledged that he did not understand and recognize the seriousness of completing the forms. *Id.* at 68. The individual testified that he has matured since then, when he was 21 years old, and is now “painfully aware” of the seriousness of completing security forms and entering into a promise with the DOE. *Id.* at 76 and 77. Given the individual’s acknowledgment and remorse for his behavior as well as the time that has passed since his violation and subsequent drug usage, I am convinced that the individual’s behavior is unlikely to recur. *Id.*; *See Personnel Security Hearing*, Case No. TSO-0764 (2009); *see also Personnel Security Hearing*, Case No. TSO-0783 (2009). While the violation of a Drug Certification is a serious matter, I am mindful that the violation was a one-time use that occurred more than twelve years ago. I am persuaded that this isolated incident of poor judgment has been overcome by the pattern of honesty, reliability and trustworthiness that the individual has established since that time, as reflected by his decision to self-report the one-time use. In addition, during the hearing, the individual asserted that he has greatly matured and no longer associates with the persons involved in using marijuana in the past. All of the individual’s witnesses testified that he is an honest, trustworthy and reliable person. Tr. at 17, 20, 26, 27, 34, 51. After considering the “whole person,” I am convinced that the DOE can rely on the individual’s ability to make sound judgment calls regarding the safeguarding of classified information. *See Adjudicative Guidelines* at (2)a. I therefore find that the individual has sufficiently mitigated the LSOs concerns under Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion F, K and L. After considering all the relevant information, favorable and unfavorable in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criterion F, K and L. I therefore 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 be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Officer of Hearings and Appeals

Date: February 4, 2013