

pill), and that in the same month she was arrested for possession of a prescription drug not prescribed to her (another lorazepam pill).² It finds that this information raises a concern that the individual may be an unlawful user of a controlled substance and disqualified from holding a security clearance under 50 U.S.C. § 435c (hereinafter “the Bond Amendment”).³ It also finds that this information raises a security concern under 10 C.F.R. § 710.8 (k) (hereinafter “Criterion K”). *See* DOE Exhibit 1. The Notification Letter also informed the individual that she was entitled to a hearing before a Hearing Officer in order to resolve the security concerns. *Id.*

The individual requested a hearing on this matter. DOE Ex. 2. The LSO forwarded her request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. At the hearing, the individual, who was represented by counsel, testified and presented the testimony of four witnesses: her supervisor, her former division leader/personal friend, a work colleague/personal friend, and a longtime friend. *See* Transcript of Hearing, Case No. PSH-12-0049 (cited herein as “TR”). At the hearing, the individual introduced a sworn affidavit from her sister. Individual’s Exhibit G. Following the hearing, the individual submitted a second sworn affidavit from her sister, and a sworn affidavit from her general practitioner.⁴

II. REGULATORY STANDARD

The regulations governing the individual’s eligibility for access authorization are set forth at 10 C.F.R. Part 710, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” The regulations identify certain types of derogatory information that may raise a question concerning an individual’s access authorization eligibility. 10 C.F.R. § 710.10(a). Once a security concern is raised, the individual has the burden of bringing forward sufficient evidence to resolve the concern.

In determining whether an individual has resolved a security concern, the Hearing Officer considers relevant factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). In considering these factors, the Hearing Officer also consults adjudicative guidelines that set forth a more comprehensive listing of relevant factors. *See* 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) (the Adjudicative Guidelines).

² The lorazepam pill was discovered by police when the individual was searched following her arrest in November 2011 for Aggravated DWI. Lorazepam is a prescription anxiolytic. Report at 4.

³ On August 12, 2009, the DOE Deputy Secretary issued DOE Notice 470.5, which implemented the Bond Amendment in the DOE. In that Notice, the Deputy Secretary, among other things, asserted that persons subject to the Bond Amendment (1) will continue to be processed for Administrative Review in cases where the agency is unable to “waive” the Bond Amendment; and (2) will receive the same due process rights that existed before the implementation of the Bond Amendment.

⁴ Affidavits were submitted from these persons in lieu of testimony because the individual’s general practitioner was not available to testify on the hearing date, and because the individual’s sister was experiencing seizures following surgery for a brain tumor. *See* June 12, 2012, e-mails from the individual’s counsel to the DOE Counsel and the Hearing Officer.

Ultimately, the decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a). “Any doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” *Id.* See generally *Dep’t of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of national security” test indicates that “security clearance determinations should err, if they must, on the side of denials”).

III. ANALYSIS

A. The Individual’s Conduct Has Raised Security Concerns

The Bond Amendment precludes the grant of a security clearance to an individual who “is an unlawful user of a controlled substance.” 50 U.S.C. § 435c(b). In addition, use of illegal drugs or misuse of controlled substances raises security concerns under Criterion K. See Adjudicative Guidelines, Guideline H, ¶ 24 (“Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.”). See also *Personnel Security Hearing*, Case No. TSO-0956 (2010); *Personnel Security Hearing*, Case No. TSO-0938 (2009).⁵ In the Notification Letter, the LSO cited the individual’s admission that she consumed one lorazepam pill and was found to be in possession of another lorazepam pill as a basis for invoking the Bond Amendment. The LSO also invoked Criterion K, citing the individual’s admitted use and possession of the lorazepam pills. I agree with the LSO’s conclusion that the individual’s admitted use and possession of lorazepam raises concerns of unlawful use under the Bond Amendment and misuse of a controlled substance under Criterion K. However, as discussed below, I find that the individual’s explanation and supporting evidence concerning her use and possession of lorazepam mitigate these concerns.

B. The Individual’s Testimony and Evidence Mitigates These Concerns

According to the Adjudicative Guidelines, among the factors that may serve to mitigate security concerns raised by an individual’s illegal use of drugs are that “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, Guideline H, ¶ 26.

As discussed below, I find that the individual has mitigated the concerns raised by her misuse of lorazepam in November 2011. The evidence in the record supports a finding that the individual’s misuse of a controlled substance was confined to two lorazepam pills provided to

⁵ 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>.

her by her sister to treat a legitimate medical condition, and that this is not indicative of a more widespread problem with illegal drug use on the individual's part.

The individual has consistently provided the following explanation for her use and possession of lorazepam in November 2011. The individual testified that she suffers from chronic abdominal pain caused by a malfunction of the bile duct. TR at 65. Her condition worsened about ten years ago, and although she consulted numerous specialists, the only relief they could provide was the regular use of pain medication. The individual testified that in 2010, she decided to stop the use of pain medication through a pain management program at the Mayo Clinic where she was given information concerning alternative life skills such as exercise and goal-setting aimed at dealing with chronic pain. TR at 66-74. However, she testified that her father's illness and death in the summer of 2011 produced emotional and physical stress that aggravated her abdominal condition and led her to resume the use of pain medication through September 2011. TR at 74-75.

The individual testified that her sister visited her in early November 2011, and that her sister had recently been prescribed lorazepam to help with issues of sleep and anxiety relating to a brain tumor. Her sister asked the individual if she would like to try a couple of lorazepam pills to see if they might provide stress relief and ease the individual's chronic abdominal problems. TR at 56. The individual testified that she accepted two lorazepam pills from her sister. The individual stated that she took one of the pills at bedtime a couple days later, and placed the second pill in her purse in one of her prescription bottles. She testified that this pill was discovered by police at the time of her November 2011 DWI arrest. *Id.*

There is considerable evidence in the record to confirm the individual's explanation for this limited use and possession of lorazepam. In his Report, the DOE-consultant Psychologist stated the individual's medical history confirmed that she suffered from a chronic and painful abdominal condition, that she had rejected the long-term use of narcotic pain medication, and that she had made efforts to implement non-narcotic pain management therapies. Report at 5-6.⁶ The DOE-consultant Psychologist opined that for some people, a police search revealing the possession of an unprescribed lorazepam pill "could be the tip of a serious drug abuse problem." *Id.* at 4-5. However, in light of the individual's medical condition, the DOE-consultant Psychologist accepted the individual's explanation and concluded that her admitted use and possession of lorazepam "does not represent a problem with using illicit drugs or an intentional disregard of DOE rules." *Id.* at 5.⁷ In addition, the individual's sister submitted two affidavits which confirm that she had a prescription for lorazepam, and that she offered the individual two pills to ease her abdominal condition without realizing that such an action was illegal. *See* June

⁶ The individual's medical records confirming her medical condition and treatment can be found in DOE Exhibit 6 and in the individual's exhibits E and F. *See also* June 22, 2012, Affidavit of the individual's General Practitioner. Individual's June 27, 2012 submission.

⁷ The DOE-consultant Psychologist did find that the individual exhibited a "withholding and emotionally constricted" demeanor at her psychological assessment that made it difficult to evaluate her fully and to assess her honesty. Report at 6-7. At the hearing, however, the individual provided full, candid and credible testimony concerning these issues. Based on her testimony and on the character evidence provided by her witnesses, I conclude that the individual has provided complete and truthful information concerning her use of lorazepam.

13 and June 21, 2012, affidavits of individual's sister, Individual's Exhibit G and Individual's June 27, 2012, submission.

Other testimony and evidence in the record also supports the individual's contention that she is not an abuser of prescription drugs. The individual testified that prior to November 2011 incident, she was subjected to four random workplace drug tests, and that she passed them all. She also stated that for about the past two months, she has been subject to weekly drug testing, which she has also passed. TR at 80-81. *See* Laboratory Reports, Individual's Exhibit D. The individual's supervisor testified that she has had daily workplace contact with the individual for the last ten years, and has had no concerns that the individual was abusing drugs. She also asserted that the individual is honest and reliable, and has committed no security breaches. TR at 48-53. The individual's work colleague/personal friend testified that he has worked with the individual on a daily basis for nine years and also has had some limited social contacts with her. He stated that the individual is totally honest, and that he has no concerns that she abuses drugs. TR at 34-42. The individual's former division leader/personal friend testified that she has known the individual for 20 years in the workplace and through family social contacts. She stated that she believes the individual to be honest and reliable, a very good mother to her children, and not a drug or alcohol abuser. TR at 9-17. Finally, the individual's longtime friend testified that she has known the individual since 1985, that they have roomed together a couple of times, and that they have shared interests that bring them together on a weekly to monthly basis. She stated that the individual is wonderfully honest, and that she has never known the individual to abuse prescription drugs or to use illegal drugs. TR at 23-32.

I accept the individual's assertion that she did not consciously violate her commitments to the DOE when she accepted the lorazepam pills from her sister. The individual testified that she did not realize that sampling her sister's medication was illegal. She stated that when her sister gave her two lorazepam pills, she did not realize that lorazepam was a controlled substance. While she acknowledged at the hearing that she had signed Security Acknowledgments indicating that she would not misuse prescription drugs, she testified that when her sister offered her the lorazepam pills, she did not "put the two together at the time." TR at 59-60. The individual's former division leader/personal friend supported this testimony. She stated that when the individual informed her she had accepted the lorazepam pills from her sister, the individual did not say that she knew that accepting the pills was an illegal act. The division leader/personal friend stated that she thought the individual's failure to be aware of the illegality in this instance was understandable. TR at 18-19.

I also accept the individual's assertion that her experience following her misuse of lorazepam has raised her awareness concerning the misuse of prescription medication, and that she will not do so in the future. The individual testified that she regretted her decision to accept the pills, and would never use another person's prescription medication again. TR at 60. In addition, the individual has presented evidence that there is no need to misuse prescription medication in order to relieve her symptoms of anxiety and physical pain. The individual testified that following her November 2011 arrest, she obtained a prescription for lorazepam from the medical practitioner at her doctor's office in order to establish that she had a medical condition that made it appropriate for her to consume that medication. However, she stated that she ultimately disposed of the five lorazepam pills prescribed to her, because her preferred methods of treating stress and pain with

diet, exercise and other pain management techniques have been effective in controlling the stress and pain associated with her abdominal condition. TR at 62-64. In addition, her General Practitioner states in his Affidavit that he is available in the future to prescribe medications or treat her medical issues if she is in need of help. *See* General Practitioner's Affidavit attached to Individual's June 27, 2012, submission.

Accordingly, I conclude that the individual's inadvertent misuse of her sister's lorazepam happened under unusual circumstances that are unlikely to recur in the future and, to the extent that it raised security concerns under Criterion K, such concerns have been mitigated. I also find that the individual has mitigated concerns that the Bond Amendment bars her from holding a DOE access authorization. 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 or an addict" 50 U.S.C.A. § 435c(b). Because the individual's misuse of lorazepam in November 2011 was an isolated incident and is unlikely to recur, I find that the individual is not now an "unlawful user" or "addict" within the meaning of the Bond Amendment, and that the LSO's concerns in this regard have been resolved. *See Personnel Security Hearing*, Case No. TSO-1003 (2011) (concern raised by individual's misuse of wife's prescription medication occurred under unusual circumstances unlikely to recur and was mitigated by the passage of time).⁸

IV. 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 the Bond Amendment and Criterion K of the Part 710 regulations. I also find that the individual has presented sufficient information to resolve those concerns. Therefore, I conclude that restoring the individual's DOE 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). Accordingly, I find that the DOE should restore the individual's 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.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: July 18, 2012

⁸ This finding agrees with the guidance provided in DOE Notice 470.5, which states that "[u]ltimately, because of the continued application of the [Adjudicative Guidelines], it is anticipated that the adjudicative determination on any case with a Bond Amendment disqualifier will be the same under the Bond Amendment as it would have been before the Bond Amendment was implemented." Accordingly, neither Criterion K nor the Bond Amendment preclude the individual from holding a security clearance based solely on her one-time misuse of a prescription medication which is unlikely to recur. *See Personnel Security Hearing*, Case No. TSO-0926 (2010) at 6, ft. 4.