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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 23, 2003

Case Number: TSO-0053

This decision concerns the eligibility of XXXXXXXX XXXX (hereinafter referred to as "the Individual") to maintain 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." The local Department of Energy Office (the DOE Office) suspended the Individual's access authorization under the provisions of Part 710. This decision considers whether, on the basis of the evidence and testimony in this proceeding, the Individual's access authorization should be restored. For the reasons stated below, the Individual's access authorization should be restored.

I. BACKGROUND

On January 31, 2002, the Individual provided a urine specimen as part of a routine scheduled medical examination conducted by her employer, a DOE subcontractor. The urine specimen tested positive for a marijuana metabolite. On February 13, 2002, the results of this positive drug test were reported to the DOE Office. The DOE Office then suspended the Individual's access to classified matter or special nuclear materials. On March 20, 2002, the DOE Office conducted a Personnel Security Interview (PSI) of the Individual. During this PSI, the Individual steadfastly maintained that she had never used marijuana.

On the basis of this positive urine test and the Individual's denials that she had never used marijuana, the DOE Office determined that the Individual had used marijuana and then provided false information concerning her drug use to the DOE Office's security officials. An administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The DOE Office then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning her eligibility for access authorization (the Notification Letter). The Notification Letter specifies two types of derogatory information described in 10 C.F.R. § 710.8(f) and (k).

The Individual filed a request for a hearing in which she made a general denial of the allegations contained in the Notification Letter. This request was forwarded to the Office of Hearings and Appeals (OHA) and I was appointed as Hearing Officer.

At the hearing, the DOE Office presented two witnesses: the Medical Review Officer (MRO) who reviewed the results of her drug testing, and the Individual. The Individual presented four witnesses: a DOE Consultant Psychiatrist (the Psychiatrist) who evaluated the Individual on behalf of the DOE office, two co-workers and the Individual's husband. The Individual also testified on her own behalf. *See* Transcript of Hearing, Case No. TSO-0053 (hereinafter cited as "Tr.").

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the 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). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's 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. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FINDINGS OF LAW AND FACT

On January 31, 2002, the Individual provided a urine specimen (the January 31, 2002 Specimen). The January 31, 2002 Specimen was then transported to the Medtox Laboratory and subjected to an immunoassay screening test. The immunoassay screening test performed by Medtox indicated the presence of a marijuana metabolite. The January 31, 2002 specimen was then subjected to a confirmatory test using the High Performance Liquid Chromatography and Inductively Coupled Plasma/Mass Spectrometry analytical method. The confirmatory test performed by Medtox was positive. On February 2, 2002, Medtox issued a laboratory report indicating that the Individual's urine specimen tested positive for a marijuana metabolite, delta-tetrahydrocannabinol. On February 5, 2002, at the request of the MRO, a split sample from the January 31, 2002 Specimen was forwarded to a second laboratory, Labcorp, for analysis. Labcorp performed an immunoassay screening test on this split. 1/ The immunoassay screening test performed by Labcorp was negative. 2/ On February

1/ Medtox used a 50 nanograms per liter detection threshold on the first split, while Labcorp used a 100 nanograms per liter detection threshold on the second split.

2/ At the Hearing, the MRO testified that a confirmatory test performed on the second split of the
(continued...)

6, 2002, the Individual provided a second urine specimen at the office of her personal physician (the February 6, 2002 Specimen). The February 6, 2002 Specimen tested negative. 3/

On February 13, 2002, the positive drug test was reported to the DOE Office. The DOE Office requested that the Individual be evaluated by a DOE consultant psychiatrist (the Psychiatrist). On May 9, 2002, the Psychiatrist evaluated the Individual and issued a Report of Examination in which he opined that

Given the findings on this examination today as well as the fact that five days later her drug screen was negative for THC, she very well may have had a false positive reading. [The Individual] certainly presents no personality characteristics which would be consistent with substance abuse or antisocial behavior. In my opinion she shows no evidence of an illness or mental condition which causes or may cause a significant defect in her judgment or reliability. I do not find that she has been or is a user of illegal drugs. Of note a drug screen was performed after she left the office and was negative for all substances examined.

May 9, 2002 Report of Examination at 3. 4/ On March 20, 2002, the DOE Office conducted a PSI of the Individual. During this PSI, the Individual steadfastly maintained that she had never used marijuana. PSI at 8-9. On April 14, 2002, the DOE Office issued the Notification Letter.

Criterion K

The Notification Letter alleges that the Individual 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

2/ (...continued)

January 31, 2002 Specimen was positive. Tr. at 15. However, there is no documentary support for this assertion in the Record. The Lab Report for the second split of the January 31, 2002 Specimen issued by Labcorp indicates that the immunoassay screening test it performed on the second split was negative and does not contain any indication that a confirmatory test was performed on the second split.

3/ Both the Psychiatrist and the Individual’s personal physician expressed concern that the Individual’s positive drug test resulted from medications she was taking. May 9, 2002 Report of Examination at 3. The MRO testified convincingly that none of the medications the Individual reported using were known to cause positive drug tests for marijuana. Tr. at 19-21.

4/ While the Psychiatrist’s examination was conducted, at DOE’s expense and request, for the purposes of determining whether the Individual had any mental or substance abuse disorder which might negatively affect her judgment and reliability, the Individual had previously sought and received treatment by the Psychiatrist for depression.

Federal law.” 10 C.F.R. § 710.8(k). The only evidence cited in the Notification Letter in support of its allegation that the Individual violated Criteria K is the Medtox Laboratory Report indicating that the January 31, 2002 Urine Specimen had tested positive for marijuana.

Drug testing is a valuable tool for ensuring that DOE facilities remain drug free. When they are conducted, administered, analyzed and interpreted correctly, positive drug test results constitute highly probative and reliable evidence of illegal drug use. However, if urine drug tests are not conducted, administered, analyzed and interpreted correctly, their results are not as reliable. ^{5/} Because positive drug tests constitute such powerful evidence, Hearing Officers must exercise caution not to confer the the same status to those tests that are not conducted, administered and analyzed in the correct manner to those that are. Because of these concerns, the DOE has adopted safeguards to ensure that urine drug testing for illegal drugs conducted by the DOE and its contractors are conducted, administered, analyzed and interpreted correctly. These safeguards are codified at 10 C.F.R. Part 707. 10 C.F.R. § 707.5(a) incorporates by reference, the latest version of the Department of Health and Human Services’ (HHS) Mandatory Guidelines for Federal Workplace Drug Testing Programs (the Drug Testing Guidelines).

The Record shows that the urine drug test administered to the Individual on January 31, 2002 did not meet the standards set forth by Part 707 and the Drug Testing Guidelines. Under the Drug Testing Guidelines, urine samples are first subjected to an immunoassay screening test. The Drug Testing Guidelines identify this first test as the Initial Test. Mandatory Guidelines for Federal Workplace Drug Testing Programs, § 1.2. If the screening test determines that a certain amount of illegal drug residue or metabolite is present, a second test must be conducted. The Drug Testing Guidelines identify this second test as the Confirmatory Test. *Id.* The Drug Testing Guidelines require that “All specimens identified as positive on the initial test shall be confirmed for the class(es) of drugs screened positive on the initial test *using gas chromatography/mass spectrometry (GC/MS)*” Mandatory Guidelines for Federal Workplace Drug Testing Programs, § 2.4(f) (emphasis supplied). 10 C.F.R. § 707.4 specifically requires that “the confirmatory test must be by the gas chromatography/mass spectrometry method.”

^{5/} Even relatively small error rates can have significant effects on the reliability of positive test results. The courts have recognized this fact. See e.g., *Ishikawa v. Delta Airlines*, 343 F.3d 1129 (9th Cir. 2003) (*Ishikawa*); *Gonzalez v. Metropolitan Transit Authority*, 174 F.3d 1016 (9th Cir. 1999). In *Ishikawa*, the court provided an explanation of what is known as the “Bayes’ Theorem Problem”:

[I]f a test give false positives 1% of the time, and the tested population has genuinely ‘dirty’ urine in one case out of ten, then out of a thousand tests, 100 of the ‘positive’ reports will be true and ten false; but if the tested population has genuinely ‘dirty’ urine in only one case in a thousand, then the very same test performed with the very same care will yield ten false positives for every true positive.

Ishikawa, 343 F.3d at 1131.

In the present case, the analytical method used on the confirmatory test was not the gas chromatography/mass spectrometry method, but rather the High Performance Liquid Chromatography and Inductively Coupled Plasma/Mass Spectrometry method. Medtox Laboratory Results Report dated February 2, 2002. Accordingly, it is clear that the drug test which the Notification Letter cites as evidence that the Individual violated Criterion K was not conducted, administered, analyzed and interpreted in accordance with the DOE's regulations. 10 C.F.R. § 707.4; Drug Testing Guidelines § 2.4(f). Accordingly, I have assigned significantly less evidentiary weight to the positive test result reported by Medtox, than I would have if the test been conducted in accordance with the DOE regulations.

Moreover, other evidence in the Record supports the conclusion that the Individual had not used Marijuana. The Psychiatrist, who had served both as the Individual's treating psychiatrist and as the DOE Consultant Psychiatrist, expressed, in both his written report and his testimony at the hearing, his belief that the Individual was not a drug user. Tr. at 89, 93-4, 97, 109-13; May 9, 2002 Report of Examination at 3. The negative immunoassay test performed on the second split from the January 31, Specimen is evidence suggesting that the Individual might not have used marijuana, although the fact that there is no evidence that Labcorps immunoassay screening of the January 31 Specimen was conducted in accordance with the DOE regulations weakens its probative value. Moreover, my own impression of the Individual was that of an honest person who was too careful and conscientious an employee, to have used illegal drugs immediately before a regularly scheduled and previously announced drug test.

After reviewing the evidence in the Record, I find that the weight of the evidence indicating that the Individual had used marijuana, i.e. the Medtox Laboratory report, is outweighed by the evidence indicating the Individual had not used marijuana, i.e. (1) the testimony and report of the Psychiatrist, (2) the Individual's testimony at the hearing and (3) the negative immunoassay report issued by Labcorp for the January 31, 2002 Specimen. For these reasons, I find that the DOE office has not provided sufficient evidence of the Individual's illegal drug use to allow me to conclude that she violated Criterion K.

Criterion F

The Notification Letter alleges that the Individual has "deliberately misrepresented, falsified, or omitted significant information from a . . . a personnel security interview, . . . 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). Specifically, the Notification Letter alleges that the Individual, by stating that she had never used marijuana, during her March 20, 2002 PSI, violated Criterion F.

False statements 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 e.g., Personnel Security Hearing*

(*Case No. VSO-0281*), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000); *Personnel Security Hearing (Case No. VSO-0013)*, 25 DOE ¶ 82,752 at 85,515 (1995), 25 DOE ¶ 82,752 (1995) (affirmed by OSA, 1995).

The Notification Letter allegation that the Individual violated Criteria F is based upon the Medtox Laboratory Report indicating that the January 31, 2002 Specimen had tested positive for marijuana. Since I have found that the probative value of the Medtox Laboratory Report is outweighed by other evidence indicating that the Individual had not used marijuana, I must also conclude that the DOE has not shown that the Individual provided false information in the PSI as alleged in the Notification Letter. Accordingly, I find that the DOE Office has not shown that the Individual violated Criterion F.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has resolved the security concerns raised under Criteria F and K. Therefore, the Individual has demonstrated that restoring her security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's access authorization should be restored at this time. The DOE may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: October 27, 2003