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July 2, 2009

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 26, 2009

Case Number: TSO-0707

This Decision concerns the eligibility of XXXXXXXX (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 should be restored.

I. Background

The individual is employed by a Department of Energy (DOE) contractor. The contractor requested a clearance for the individual, and DOE granted that clearance in 2007. In June 2008, the individual contacted the local security office (LSO) and informed the LSO that he had smoked marijuana earlier that month. The LSO conducted a personnel security interview (PSI) with the individual in August 2008, but that interview did not resolve the security concerns and DOE suspended the individual's clearance in September 2008.

In January 2009, 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. Notification Letter (January 12, 2009). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (f), (k) and (l) (Criteria F, K and L).

Criterion F concerns information that the individual has "misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive Positions, Personnel Qualifications Statement, a Personnel Security interview, written or oral statements made in response to an official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization . . ." 10 C.F.R. 710.8 § (f). DOE invoked Criterion F because the individual had denied using illegal drugs in the seven years prior to completing an electronic questionnaire for investigations processing, but later admitted drug use within that seven-year period in an August 2008 PSI.

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). DOE invoked Criterion K because the individual admitted in an August 2008 PSI that he had used drugs occasionally from 1980 through June 2008.

Criterion L is concerned with information in the possession of DOE that 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 furnish reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of the national security. 10 C.F.R. § 710.8 (l). With respect to Criterion L, the Notification Letter refers to derogatory information that raises concerns about the individual's honesty, reliability and trustworthiness. The individual signed a DOE security acknowledgment in November 2006 declaring his understanding that the use of drugs may raise a doubt as to his eligibility for access authorization. Despite holding an active clearance beginning in July 2007, the individual used drugs in June 2008.

In a letter to DOE Personnel Security on February 2, 2009, 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, who was represented by counsel, testified on his own behalf and called two other witnesses. DOE counsel called the individual as a witness. 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): 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 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. After due deliberation, I find that the individual's access authorization should be restored because I conclude that such a restoration would not endanger the common defense and security and would be clearly 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. Findings of Fact

The individual first smoked marijuana as a college sophomore in 1981. Tr. at 16. He continued to use marijuana between one and four times per week until he graduated in 1984. After graduation, his marijuana use was minimal until 1999, when he and his then fiancée smoked every month. The couple married in 2001. From 2001 to 2003, the individual was busy renovating a "fixer upper" house that the couple bought, and his marijuana use became much less frequent. PSI at 21-23. He described his marijuana use as "fairly intermittent" use that started to taper off as he aged, got married, and had children. Tr. at 16. After the birth of their first child in 2004, he and his wife had a serious discussion about their new responsibility as parents and he described his subsequent use as very infrequent. PSI at 17, 22-23; Tr. at 23.

In November 2006, the individual completed a Questionnaire for National Security Positions (QNSP) at the request of his employer. Ex. 7. The individual answered "No" in response to a question asking if he had illegally used any drugs in the last seven years (since 1999). He also signed a DOE Security Acknowledgment, confirming that he understood that any use of illegal drugs may raise a doubt as to his eligibility for an access authorization.

In June 2007, the individual attended a music festival with two college friends who lived in another city, and he smoked marijuana a couple of times with one of his friends.¹ DOE granted the individual's security clearance and he received his badge in August 2007. Tr. at 37. The individual attended another music festival in June 2008 with the same two college friends, and he used marijuana on two days. The last day of his use was June 15, 2008. *Id.* at 18. However, he began to think about the impact that his marijuana use could have on his security clearance. On June 21, 2008, the individual reported his drug use to his managers. According to the individual, his managers were not sure what to do with the information and asked him to report his drug use to the human resources office. On June 30, 2008, the individual enrolled in a six-week intensive outpatient treatment program. Ex. A. The individual called the personnel security specialist at the LSO repeatedly to secure the forms he needed to officially report his marijuana use. Tr. at 19.

¹ According to the individual, one of the friends did not use drugs. Tr. at 40.

In July 2008, the individual filed for divorce from his wife. He also joined a church-based support group that offered substance abuse and family counseling. *Id.* at 28; PSI at 14. The individual successfully completed the six-week treatment program on August 11, 2008, at which point he entered an aftercare program. Ex. A. On August 14, 2008, the individual participated in a PSI and discussed his drug use. Ex. 8. In October 2008, the individual's divorce was finalized and the court awarded the individual custody of his two young daughters. At the time of the hearing, the individual remained an active participant in his aftercare program and the church support group. Tr. at 28.

B. DOE's Security Concerns

Criterion K deals with the use of illegal drugs. Illegal drug use may cause an individual to act in a manner that is inconsistent with the best interests of national security while under the influence of such substances. See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, Assistant to the President for National Security Affairs (December 29, 2005) (Guidelines) at 11. Also, illegal drug use indicates a willingness to ignore the law that could be reflected in the clearance holder's attitude toward security requirements. See, e.g., *Personnel Security Hearing*, Case No. VSO-0448 (2001); *Personnel Security Hearing*, Case No. VSO-0350 (2000). The individual's drug use is well documented in the record, and validates the charges under Criterion K.

Criteria F and L set forth security concerns regarding personal conduct, honesty, and reliability. As regards Criterion F, the individual provided false answers in connection with a personnel security determination. The individual's dishonest conduct raises questions about his reliability and trustworthiness. As for Criterion L, the LSO alleges that during his PSI the individual admitted using illegal drugs while in the possession of a security clearance. Such behavior demonstrates an unwillingness to comply with rules and regulations which indicates that the individual may not properly safeguard protected information. See Guidelines, ¶ 15. Thus, the security concerns under the criteria are valid.

C. Hearing Testimony

1. The Individual

At the hearing, the individual discussed his drug use, which began when he was a sophomore in college. Tr. at 16. The individual also admitted that he had used drugs occasionally in the seven years prior to completing his QNSP (i.e. between 1999 and 2006), and that he had used marijuana at music festivals in June 2007 after he submitted his QNSP and in June 2008 while he possessed a security clearance. According to the individual, he last used marijuana on June 15, 2008, and then reported the drug use to his managers on June 21, 2008. *Id.* at 17, 18, 22. The individual began to realize that he was in denial about the effect that marijuana use had on his life. *Id.* at 22-23. On June 30, 2008, he enrolled in an intensive outpatient program, where he received individual counseling two to three times a week for six weeks. *Id.* at 27. The individual described the program as more than just a drug treatment program because of the many intense counseling sessions that dealt with the underlying personal issues in his life. *Id.* at 27-28.

He contacted the LSO in early July 2008, and told a security specialist in a phone conversation about his “historic marijuana use” and his enrollment in the treatment program. *Id.* at 19. The LSO then scheduled a PSI in August 2008. *Id.* at 20. The individual testified that he currently attends a religious recovery program once a week that is based on the 12-Step Program. He disclosed his previous marijuana use to his friends, and states that he does not miss using marijuana.² See *also* Ex. D.

During the relapse prevention training segment of the six-week intensive outpatient program, the individual completed a workbook that teaches him his “triggers” and how to avoid allowing those triggers to cause him to relapse into drug use. *Id.* at 71. After the divorce, he was not invited to social events with his old friends. He explained that he has stopped seeking out his old friends and is now an active member of a single parents group at his church. He has been in that group for over six months and spends free time with church members or members of his recovery group. *Id.* at 74.

2. Character Witness

A friend of the individual’s testified that she met the individual at church and she has known the individual for six weeks. Tr. at 67-69. She has visited his home approximately 12 times, and sees him every other day. She knows about his previous marijuana use, but has not seen any marijuana in his home, nor has she seen evidence of drugs in the home. She has cared for his children in his home, and considers him very trustworthy. She trusts the individual enough to allow him to meet her child. She knows about his counseling, and he has told her that he plans to continue the counseling.

3. Expert Witness

The individual’s drug counselor testified at the hearing. He is a board-certified professional counselor with over 20 years of experience. Tr. at 49. He directs a rehabilitation facility, and also has a private drug treatment practice with physician partners. The counselor began treating the individual in June 2008. *Id.* at 42; Ex. A. The counselor first completed a psychosocial history of the individual and then reviewed this history with his partners, who are psychiatrists. Tr. at 50. Based on the history, the counselor created a treatment plan for the individual. The plan consisted of 12 sessions, seven hours a week, for six weeks. The sessions covered relapse prevention, therapy, and aftercare planning. The counselor also gave the individual random drug test and assignments. The individual passed all of the drug tests and completed all of his assignments. The counselor stressed that the individual did not merely do a few exercises in a workbook, but that he completed a true relapse prevention plan while “in the real world,” i.e., while dealing with the stressors of his job, family life with small children, and his divorce. *Id.* at 56-57. During sessions, the individual and the counselor had extensive discussions about the individual’s family life, his difficult marriage and then his divorce. *Id.* at 44; 50. The counselor was impressed that the individual on his own initiative became very active in the church-based recovery program, and he considers that a positive factor in the individual’s recovery. The individual is now in

² He continues to associate with the college friends who accompanied him to the concert, but testified that the friend that smoked marijuana with him now no longer uses drugs. Tr. at 39.

the aftercare portion of his counseling. Tr. at 45. He has weekly sessions with the counselor, phone counseling, and also attends a support group. The counselor described the individual's attendance as "wonderful" and concluded that the individual has been rehabilitated from his use of marijuana. *Id.* at 46. He considers the individual to be very honest, especially since the individual not only voluntarily reported his drug use to his employer, but did so against the recommendation of his divorce lawyer because the individual was embroiled in a custody battle at the time. *Id.* at 46. He considers the individual a "success story." *Id.* at 47.

The counselor was very impressed that the individual is helping newcomers to his recovery group. The counselor considered that an important indicator of the individual's progress. *Id.* at 47. He found the individual to be mentally healthy, with an affect that matched the events in his life. *Id.* at 51. He gave the individual high marks on a discharge evaluation due to the individual's honesty, and his conscience. *Id.* at 52; Ex. A (Discharge Summary dated August 11, 2008). A treatment team (a psychiatrist, physician, and the counselor) evaluates patients weekly and all members of the team found the individual to be honest. *Id.* at 53, 58. Because of that honesty, the members of the team believed that the treatment would be successful and that they could change the individual's life for the better. *Id.* at 53. The counselor testified that the team concluded that the individual has an excellent prognosis; and that he was not marijuana dependent. *Id.* at 58. They will continue their sessions until August 2009, when they will have completed one year of aftercare. *Id.* at 57. In general, the counselor spoke very highly of the individual based on his observations during their one year professional relationship.

D. Mitigation of Security Concerns

1. Criterion K – Drug Use

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, the potential for coercion, and the motivation for the conduct. It is troubling that the individual's drug use occurred when he was a mature adult. However, for the reasons set forth below, I find that he has presented sufficient evidence to mitigate the security concerns regarding his illegal drug use.

First, the individual has presented evidence of satisfactory completion of a drug treatment program, without recurrence of abuse. Guideline H, ¶ 26 (d). His counselor, who works with a team of medical professionals, testified that the individual has an excellent prognosis for avoiding a relapse. Tr. at 54-58. Second, the expert witness concluded that there is a low probability that the individual suffers from substance abuse or dependence and that his drug use was not habitual. The counselor testified that all of the individual's test results were negative for the presence of any illegal drug. *Id.* at 44; see also Ex. A.³ Third, there is documentary and testimonial evidence that the individual is now reliable, trustworthy, and exercises sound judgment. The counselor testified that he maintains a relationship with the

³ I note that there is no evidence in the record of a psychiatric diagnosis of any substance problem.

individual and continues to think of him highly. The court awarded him custody of his two young daughters. Finally, the individual has demonstrated his intent not to abuse drugs in the future. Guideline H, ¶ 26(b) (stating that security concern may be mitigated by demonstration of intent not to abuse drugs in future). He has disassociated himself from drug-using associates, and provided corroborating testimony regarding his new lifestyle. *Id.* at ¶ 26(b) (1). His last drug use was in June 2008, when he self-reported. Based on the foregoing, I find that the individual's illegal drug use is unlikely to recur. *Id.* at ¶ 26 (a).

In summary, the individual has convinced me through his demeanor and testimony and that of his witnesses that there is little likelihood that he will use illegal drugs again. He has submitted expert testimony that he does not suffer from substance abuse or dependence, he continues to be an active, model participant in a drug program and has learned tools of relapse prevention, and he has demonstrated his intent not to abuse drugs in the future by severing his ties to associates who used drugs and becoming involved in his church and a church-based recovery group. The witnesses testified credibly that the individual has reformed his behavior and is now reliable and trustworthy. Thus, I conclude that the individual has mitigated the Criterion K security concerns in the Notification Letter.

2. Criterion F – Falsification

In a number of decisions, DOE hearing officers have considered the implications of prior falsifications. The factors considered in these cases include the following: whether the individual came forward voluntarily to admit his falsifications, *compare Personnel Security Hearing, Case No. VSO-0037 (1995), affirmed (OSA, 1996)* (voluntary disclosure by the individual) with *Personnel Security Hearing, Case No. VSO-0327 (2000), affirmed (OSA, 2000)* (falsification discovered by DOE security); the length of time the falsehood was maintained; whether a pattern of falsification is evident; and the amount of time that has transpired since the individuals' admission.

In the individual's favor is the fact that he self-reported his most recent drug use within a week of its occurrence. This good-faith effort to correct the falsification before he was confronted with the facts of his concealment is a condition that mitigates the security concern. *See Personnel Security Hearing, Case No. TSO-0628 (2008)* (falsification mitigated by self-reporting drug use to LSO); Guideline E, ¶ 17 (a). *Compare Personnel Security Hearing, Case No. TSO-0715 (2009)* (long term falsification of individual who held clearance for many years and did not disclose drug use until confronted in 2008 PSI).⁴ Further, there is no evidence in the record that DOE would have discovered his drug use

⁴ It is true that the length of time that the individual maintained the falsification (20 months) exceeds the length of his responsible conduct (10 months). OHA has found this to be an important factor in previous cases that have been decided against the individual. However, I distinguish this case because those cases contain other negative factors that are not present in the case currently under review. For instance, a previous case found that six months of responsible behavior was insufficient to mitigate nine months of dishonesty. *Personnel Security Hearing, Case No. TSO-0394 (2006)*. However, the individual in that case did not self-report and had a pattern of discrepancies in her communications with security personnel spanning several years. *See also Personnel Security Hearing, Case No. TSO-0708 (2009)* (mitigating falsification by distinguishing case from OHA cases where the individual knowingly maintained a falsehood for a period of time).

were it not for his voluntary disclosure.⁵ The disclosure reflects his stated remorse and his intent to correct the falsification despite possible negative consequences. I note that even after he reported to his managers, they did not know what to do with the information, but the individual continued to search for the appropriate person at the LSO to process his information. Tr. at 18. The individual initiated the contact with the personnel security specialist, calling the specialist repeatedly for the forms to report his marijuana use and then promptly enrolling in a treatment program. *Id.* at 19-20. The individual's persistence in attempting to rectify his deliberate omission is a factor that weighs heavily in his favor.

The decision of a Hearing Officer in a Part 710 case is a predictive assessment, in this case an assessment of the likelihood that the individual will engage in dishonest or untrustworthy behavior in the future similar to the past falsification and concealment of derogatory information. My common-sense impression of the individual, formed over the course of this proceeding, is that he is an honest person whose conscience made him realize not only that he made a mistake by concealing his drug use, but that he also needed to change his lifestyle. He was willing to risk his career and the custody of his children to rectify that mistake. The circumstances under which the individual made the falsification no longer exist and are unlikely to appear in the future—he no longer uses marijuana, he has successfully completed an intensive outpatient program with relapse prevention training, and he is an active and model participant in aftercare and a religious support group. See Guideline E, ¶17 (d) (security concern mitigated when individual acknowledges dishonest behavior and takes positive steps to alleviate the circumstances that caused the behavior, and such behavior is unlikely to recur). His current lifestyle is very different than his previous lifestyle. He has new friends, he is an active participant in a church singles program and a religious recovery program, and he is a busy single father of two young children. The individual has revealed his past transgressions in lying to the DOE to his managers and human resource officials, as well as to his friends and colleagues. These actions significantly reduce or eliminate the possibility that the individual will be susceptible to coercion, pressure, exploitation or duress based on his falsification of the drug questions on his QNSP. See Guideline E, ¶ 17 (e). I also find significant that the individual's efforts to reform his behavior were favorably noted by the DOE counsel representing the LSO at the hearing who commented that the individual “really has taken steps and actually gone above and beyond to make sure they rectify a situation that they found themselves in.” Tr. at 74-75. In the end, looking at the totality of the facts in this case, I conclude that the individual has mitigated the Criterion F security concern and that his past behavior is unlikely to recur.

3. Criterion L- Unusual Conduct

The individual's use of illegal drugs after receiving a security clearance in August 2007 is a serious matter, and raises questions about his judgment, reliability, trustworthiness and

⁵ DOE granted the individual a clearance one year prior to his disclosure. There is no evidence in the record that the pre-clearance investigation uncovered any derogatory information relating to drug use by the individual.

honesty. Further, the individual was old enough to realize that he was breaking the law and that he was breaking his commitment to DOE to avoid illegal drugs. To mitigate the Criterion L concerns based on his drug use while holding a security clearance, the individual presented credible testimony from witnesses who described him as honest, reliable and trustworthy. I conclude for the following reasons that the individual has mitigated the security concerns of Criterion L.

First, the individual made a prompt, good-faith effort to correct the falsification. I found the individual sincere and forthright in expressing his remorse over his falsification. Tr. at 22. He testified that he disclosed his drug use to the LSO, and he was persistent in making sure that this disclosure got to the right office. There is no evidence in the record that the LSO would have discovered the individual's use of illegal drugs had he not reported it himself. Second, I find that he has mitigated the security concerns relating to the possibility of blackmail. The individual presented testimony and documentary evidence that he has disclosed his past drug use to his friends and family. Ex. D. This evidence supports a conclusion that he is not subject to pressure, coercion or blackmail regarding his use of illegal drugs. Guideline E, ¶ 17(e). The counselor described the individual as exhibiting a high level of honesty despite possible negative repercussions to his career and custody of his young children. See *Personnel Security Hearing*, Case No. TSO-0210 (2005) (finding that credibility of witnesses is a mitigating factor in security concern regarding the honesty of an individual who used drugs while holding a clearance). His counselor was very credible and enthusiastic in describing the individual's good character, honesty, and cooperation with the program.

Third, the individual has presented evidence that he no longer associates with persons involved in illegal drug use and no longer uses illegal drugs. Guideline E, ¶ 17(g). See also *Personnel Security Hearing*, Case No. TSO-0327 (2006) (stating that the Criterion L concern of using drugs while holding a security clearance cannot be resolved without resolution of the illegal drug use itself). There is credible testimony describing how the individual confronted his drug problem, and then stopped using drugs. During the hearing, the witnesses described the steps the individual took to change his life and to reform his behavior. Therefore, I find, based on the credible testimony of the individual and his witnesses, that the individual has acknowledged his past drug problem, has stopped using drugs, has reformed his behavior, and has taken positive steps to alleviate the stressors, circumstances or factors that caused the untrustworthy behavior. I also find that the problematic behavior is unlikely to recur. Guideline E, ¶ 17(d). His behavior demonstrates that he now comports himself in an honest, trustworthy and responsible manner. Moreover, the individual convinced me that he has maintained a drug-free and responsible lifestyle and that he will continue to be an active participant in his support groups. In addition, the individual has been honest throughout the proceeding in discussing his past activities and has not misrepresented or omitted any relevant information. His maturity and life experience demonstrate that he will no longer employ the poor judgment he exercised in the past. See *Personnel Security Hearing*, Case No. TSO-0681 (2009) (using "whole-person concept" to weigh important factors in a period of individual's life sufficient to make an affirmative determination that the person is an acceptable security risk); *Revised Adjudicative Guidelines* at ¶ 2. Therefore, I conclude that the individual has mitigated the Criterion L concerns.

III. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (f), (k), and (l). However, after carefully reviewing the testimonial and documentary evidence in a common-sense manner, I find that the individual has presented adequate mitigating factors for all of the criteria. Thus, in view of the criteria and the record before me, I 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. 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: July 2, 2009