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June 18, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 12, 2009

Case Number: TSO-0715

This Decision concerns the eligibility of XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be restored. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should not restore the individual's access authorization at this time.

I. Background

The individual has worked for a DOE contractor since 1991, and has held a DOE access authorization since 1997. As part of a routine reinvestigation, the individual completed a Questionnaire for National Security Positions (QNSP) on May 31, 2007, in which he reported that he sought treatment for a mental health related condition within the preceding seven years, and had filed for bankruptcy within the last seven years. Exhibit 9 at 26, 31.² In subsequent Personnel Security Interviews (PSIs) conducted in September and October 2008, the individual admitted that he had smoked marijuana from the early 1990s until as recently as 2003, though he did not report this use on the QNSP he completed in May 2007, nor on one he completed in 1997. Exhibit 7 at 2; Exhibit 8; Exhibit 9 at 28. The Local Security Office (LSO) ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

² Though on the 2007 QNSP the individual reported the "Date of Action" of his bankruptcy as "04/2005 (estimated)," the record indicates that he initially filed for bankruptcy in December 2004. Exhibit 8 at 36.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual (1) has deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive Positions, a Personnel Qualifications Statement, a personnel security interview, in written or oral statements made in response to an official inquiry regarding his eligibility for DOE access authorization, or proceedings conducted pursuant to Part 710 Sections 710.20 through 710.31; (2) has trafficked 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, except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by law; and (3) 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 interests of the national security. Exhibit 3 (citing 10 C.F.R. § 710.8(f), (k), (l)).

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on March 13, 2008.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his wife, and his neighbor. The DOE Counsel submitted fifteen exhibits prior to the hearing; the individual presented seven exhibits.

II. Regulatory Standard

A hearing under Part 710 is held “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization,” *i.e.*, “to have the substantial doubt regarding eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). 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 eligibility in favor of the national security. *Id.*

I have thoroughly considered the record of 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).³ After due deliberation, I have determined that the individual's access authorization should not be restored. The specific findings that I make in support of this decision are discussed below.

III. The Notification Letter and the Security Concerns at Issue

As the basis for security concerns under Criterion F, the Notification Letter cites the fact that, despite having used marijuana from the early 1990s until as recently as 2003, the individual answered "no" to the following question on QNSPs he completed in 1997 and 2007: "Since the age of 16 or for the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Exhibit 7 at 2; Exhibit 9 at 28. In addition, on the 2007 QNSP, the individual answered "no" to the following question: "Have you *ever* illegally used a controlled substance while . . . possessing a security clearance . . . ?" Exhibit 9 at 28. Also cited under Criterion F is the individual's response to a May 2008 Letter of Interrogatory (LOI), specifically his failure to provide details regarding his 2003 hospitalization for depression and suicidal ideation,⁴ and his explanation for failing to report his December 2004 bankruptcy filing⁵ on his 2007 QNSP. Exhibit 10.

Under Criterion L, the Notification Letter cites the individual's response of "no" to the following question on Department of Defense (DOD) Personnel Security Questionnaires, in 1984 and 1986, despite having admitted in the October 2008 PSI that he smoked marijuana in the 1970s: "Have you ever used . . . Cannabis (*to include marijuana and hashish*) except as prescribed by a licensed physician?" Exhibit 12; Exhibit 13. Also cited are the individual's failures to report to DOE security his 2003 hospitalization and December 2004 bankruptcy filing at the time each event occurred, and the individual's admission in the September 2008 PSI that his use of marijuana while holding a security clearance was "contrary to the terms" of his clearance. Exhibit 8 at 40.

The allegations cited in the Notification Letter under Criteria F and L clearly raise questions regarding the individual's reliability, trustworthiness and ability to protect classified information.

³ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his 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 his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

⁴ The Notification Letter does not cite concerns related to individual's past or present mental condition.

⁵ The Notification Letter does not cite concerns related to the individual's finances, and the DOE Counsel confirmed at the hearing that the DOE's concern related to the individual's 2005 bankruptcy filing is limited to the his failure to report it to DOE security at the time it took place. Hearing Transcript [hereinafter Tr.] at 6.

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 (Adjudicative Guidelines) at ¶ 15 (“Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.”)

As the basis for security concerns under Criterion K, the Notification Letter cites the individual’s past use of marijuana. Exhibit 3 at 4-5. There are significant security concerns associated with illegal drug usage. Engaging in criminal conduct can raise questions about a person’s ability or willingness to comply with laws, rules, and regulations. *See* Adjudicative Guidelines at ¶ 24. Moreover, illegal drugs can impair a person’s judgment which, in turn, can raise questions about the person’s reliability and trustworthiness. *Id.*

IV. Hearing Testimony

A. The Individual

The individual served in the active-duty military from 1980 to 1986. Exhibit 9. At the hearing, the individual testified that, when he was going into the service, he admitted to his recruiter that he had smoked marijuana in the past, but his recruiter told him that “you have got to say you haven’t. I said, but I have. And he said, no, you haven’t, otherwise we would have to get a waiver and there is no way of knowing whether the waiver would go through” Tr. at 25. As noted above, the individual denied past marijuana use on two Department of Defense Personal Security Questionnaires, in 1984 and 1986. Exhibit 12; Exhibit 13. “[T]he lie perpetuated to the first DOD security clearance and the second DOD security clearance,” Tr. at 25.

The individual testified that when he met his second wife, whom he married in 1991, Exhibit 9, he began smoking marijuana again. Tr. at 45. Related to his resumption of using marijuana was the fact that he is, as he described himself in his October 2008 PSI, “transgendered.” Exhibit 11 at 37. The individual explained that he is “not a transsexual; I don’t plan on ever having a surgery.” Rather, the individual described “a very strong female side to me, as well as a male side, and I express the female side periodically.” Specifically, the individual expresses his female side by dressing as a female, which he testified that he has been doing at various times since he was four years old. Tr. at 62-63.

When his first marriage ended in 1991, “even though it says on paper for irreconcilable differences, the irreconcilable differences were because of my cross-dressing. And I numbed myself when I met [my second wife], she got me back to smoking marijuana.” Tr. at 45. The individual testified that he continued smoking marijuana until 2004. Tr. at 33. At the hearing, he acknowledged that, when he completed his 1997 QNSP, “I flat out lied about my marijuana use because I was in the process of smoking marijuana at the time. There is no doubt, I lied. And the second [QNSP in 2007], when I was up for reevaluation, I lied.” Tr. at 25.

In January 2003, the individual was experiencing serious emotional difficulties related to his cross-dressing, resulting in his hospitalization for seven days that month.

I almost committed suicide. I went to a doctor because I was afraid I was going to kill myself because of these demons in my mind. The marijuana was no longer working. I needed to do something to get rid of these demons and I realize when you are at that point, I don't know if you can understand how you can't see past the nose on the end of your face when you are that desperate to have something fixed. The marijuana was not doing it anymore. Nothing was working. I am not a drinker. And so drinking was not in the question. The only thing I could think of was to take my life. Everybody would be better off, my kids would be better off, they wouldn't have to deal with a cross-dressing father. My wife wouldn't have to deal with this man that does not know whether he is a woman or a man and all this kind of stuff.

Tr. at 18-19. The individual did not report, until completing his May 31, 2007, QNSP, that he had previously sought treatment for a mental health related condition, and testified that he was not aware that he was required to report this to DOE sooner than he did. Tr. at 43.

Regarding his failure to report his December 2004 bankruptcy filing until he completed the May 2007 QNSP, the individual testified: "I knew I was supposed to report it. I don't recall any time frame as far as a requirement as to when. I realize that three years is beyond any reasonable amount of time to report it but I did in that questionnaire. . . . I didn't withhold it," Tr. at 42-43.

The individual credits two temporary assignments in a foreign country, first in 2004 and the second in late 2007 and early 2008, as putting "purposes" in his life, stating that "[s]ince 2004 there has been more learning in my life as far as who I am." Tr. at 19, 53. The individual testified that, before the first trip in 2004, he quit smoking marijuana. "I knew that I could possibly have gotten tested prior to going. And I wanted to make sure that I was going to be able to go so I quit in plenty of time to be able to make the mission and I haven't smoked since." Tr. at 59. "Why isn't the marijuana use still an issue? It is because of the understanding since then. Does that make sense? The combination of the clarity of who I am now and what I am and the purpose that I have for life that I didn't have before." Tr. at 20. "I don't care to smoke marijuana anymore. I don't have a need to smoke marijuana anymore. I don't want to smoke marijuana anymore. I want to be a good example for my kids." Tr. at 48-49.

The individual testified that, two months prior to the hearing, he had seen a psychologist who had diagnosed him as "a transsexual and I couldn't believe that I was and I'm not. I'm not a transsexual." Tr. at 64. As a result, the individual decided to engage in "fasting and prayer." *Id.*

And fasting and prayer, fasting is amazing how clear your mind gets when you fast. I call it an epiphany but I feel so much better about myself. I understand who I am. Where I am in this, where my person fits in this universe of ours a lot better than I used to. . . . I do feel better about myself. Purpose, work, my kids, and myself. As far as my cross-dressing is concerned: is it still there? Yes, it is still there. Is it a problem? It is not a problem to me anymore.

Id. at 60.

When I asked the individual if he could see the possibility of emotional problems returning that would lead him to again smoke marijuana, he responded that he did not “see that happening with me because of how I feel about myself right now.” *Id.* At 61. Referring to the present proceeding, the individual stated: “[Y]ou would have thought that this would have made me want to dress more, the stress of this. And I actually feel better about myself that it didn't. I feel good about me, I feel good about where I'm headed in my life and where things are going” *Id.*

B. The Individual's Wife

The individual's wife corroborated the individual's account of smoking marijuana from the time he met her until stopping in 2004, before his first of two overseas assignments. *Id.* at 10. According to his wife, the individual used marijuana “sporadically” until 1995 or 1996, and after that began to smoke more regularly. She believes this increased usage was due to issues related to his cross-dressing. “It would take away the anguish of him fighting two sides; [the individual] and his cross-dressing side. It was a constant battle with him. And the only way that he felt that he could cope was smoking pot.” Though the individual's wife still uses marijuana, *id.* at 28, she does not believe that the individual has been tempted to use marijuana again since quitting. *Id.* at 10.

The individual's wife, with apparent affection for her husband, expressed her opinion that the individual did not report his hospitalization or bankruptcy to the DOE at the time each took place because the individual is a “moron,” but “not ever” because he was trying to conceal information from the DOE. Tr. at 11-12. Asked about his reputation for trustworthiness among his friends and family, his wife testified that they “trust you with our lives, all of our lives.” *Id.* at 12. Regarding whether the individual would ever reveal information that he should not, his wife stated that it was “[n]ot going to happen. I didn't even know where he was [on assignment] until he got home for two months. . . . Never happen. He loves his job, he is too into it. He is very patriotic, he loves his country, he loves his job and there is no way.” *Id.*

C. The Individual's Neighbor

The individual's neighbor testified that he knows the individual fairly well, having lived next door to him for eighteen or nineteen years. Tr. at 36. The neighbor never knew or suspected that

the individual ever smoked marijuana or was a cross-dresser until the individual told him. *Id.* at 36-37. “That was a surprise.” *Id.* at 37. The neighbor, who is retired but previously held a DOE security clearance, expressed his opinion that the individual is trustworthy enough to hold a clearance. *Id.*

V. Hearing Officer Evaluation of Evidence

A. Illegal Drug Use - Criterion K

As noted above, the use of illegal drugs raises significant security concerns. Those concerns are heightened in this case by the fact that the individual used illegal drugs over a long period of time, from the early 1990s to 2004, including seven of those years while holding a security clearance.

Weighing most heavily in the individual’s favor is the fact that five years have now passed since he quit smoking marijuana. *See* Adjudicative Guidelines at ¶ 26(a) (listing as a condition that could mitigate concerns arising from illegal drug use that “the behavior happened so long ago, . . . that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment”); Adjudicative Guidelines at ¶ 26(b) (listing as a condition that could mitigate such concern “a demonstrated intent not to abuse any drugs in the future, such as: . . . [by] an appropriate period of abstinence”). Because of his past falsifications, which I address separately below, it would be difficult to believe that the individual quit smoking marijuana in 2004 based solely on his own testimony. On the other hand, there is certainly no allegation or evidence in the record of more recent marijuana use, and the individual’s account is supported by the sworn testimony of his wife, whose demeanor I found to be particularly frank and credible, in general and on this specific issue.

However, I remain somewhat troubled by the apparent connection between the individual’s past use of marijuana and his history of emotional difficulties related to his transgendered status. The fact that the individual’s emotional well-being has apparently improved more recently is, to a degree, reassuring. Nonetheless, the recency of the individual’s self-described “epiphany,” taking place after he saw a psychologist only two months prior to the hearing, does not give me a high degree of confidence in the individual’s long-term emotional stability. The risk of a return to emotional difficulties, combined with the ready availability of marijuana in his house, given his wife’s continued use of the drug, precludes me from finding that the concern related to the individual’s illegal drug use has been sufficiently mitigated in this case. It is worth noting, however, that I find this concern to be, while not insignificant, relatively minor compared to those raised under Criteria F and L, which I discuss below.

B. Falsification and Failure to Report Required Information - Criteria F and L

When a security concern arises due to an individual’s past falsifications to the DOE, the key issue is whether the individual has brought forward sufficient evidence to demonstrate that he

can now be trusted to be consistently honest and truthful with the DOE. 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 individual's admission. *See Personnel Security Hearing*, Case No. VSO-0327 (2000), *affirmed* (OSA, 2000) (less than a year of truthfulness insufficient to overcome long history of falsification). *See also Personnel Security Hearing*, Case No. VSO-0289 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use); *Personnel Security Hearing*, Case No. VSO-0319 (2000), *affirmed* (OSA, 2000).⁶

In the individual's favor is the fact that he did voluntarily report, on his 2007 QNSP, his prior treatment for a mental health related condition and his 2004 bankruptcy filing, though the individual acknowledges that he was required to report the bankruptcy in a much more timely manner.⁷ There is, on the other hand, a very long-term pattern of falsification by the individual regarding his use of marijuana, spanning over twenty years and four government agency security questionnaires, from the individual's 1984 DOD Personnel Security Questionnaire to his 2007 QNSP.⁸ Moreover, the individual did not disclose his past use of marijuana until he was confronted in his September 2008 PSI, less than eight months prior to the hearing, with medical records from 2003 indicating that he was at that time "marijuana positive." Exhibit 8 at 39.

Given this history, the concern going forward is clear. I am simply not convinced that the individual can be relied upon to provide accurate information to the DOE in the future, especially when that information may negatively affect his eligibility to hold a clearance. This aspect of honesty, reliability, and trustworthiness is critical to an individual's suitability to hold a clearance. Unfortunately, because of the individual's long, and only recently ended, pattern of

⁶ 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>.

⁷ Though the Notification Letter cites the fact that the individual did not come forward to report his January 2003 hospitalization at the time it occurred, it appears that he was not required to do so at that time. A DOE order, DOE O 472.1C, approved on March 25, 2003, contains the requirement that clearance holders report, "within 2 working days followed by written confirmation within the next 3 working days . . . hospitalization or other treatment for a mental illness; . . ." DOE O 472.1C (March 25, 2003) at 19. However, the prior relevant DOE order that DOE O 472.1C superseded contained no such requirement. DOE O 472.1B (March 24, 1997).

⁸ As noted above, the individual testified that his military recruiter advised him to lie about his past marijuana use when he joined the military in 1980. Tr. at 25; Exhibit 9. Even if true, this does little to mitigate the individual's falsification on the DOD questionnaires over four and six years later, in 1984 and 1986, particularly when viewed as merely the beginning of a pattern of falsification that continued until very recently.

falsification and concealment, and the circumstances under which the derogatory information came to light, I cannot find that the concerns in this case have been sufficiently mitigated.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises security concerns under Criteria 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 have found that the individual has not brought forth evidence to mitigate sufficiently the security concerns advanced by the LSO. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not 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.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: June 18, 2009