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July 17, 2009

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 24, 2009

Case Number: TSO-0719

This decision concerns the eligibility of XXXXXXXX ("the Individual") for a DOE access authorization.<sup>1</sup> This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's suspended access authorization should not be restored at this time.

**I. BACKGROUND**

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) local security office (LSO), informing the Individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization.<sup>2</sup> See Notification Letter, January 26, 2009.

The Notification Letter cites facts pertaining to the Individual's August 2008 arrest for "Loitering for the Purpose of Engaging in Drug Activity and Possession of Drug Paraphernalia" as raising security concerns under 10 C.F.R. § 710.8. *Id.* Specifically, in addition to the arrest itself, the Notification Letter cites the fact that the Individual "admitted that he was planning to purchase two packages of methamphetamines" and the fact that "he had in his possession a glass pipe and lighter for smoking the drug" as security concerns under 10 C.F.R. § 710.8(k) and (l) (Criteria K and L, respectively).<sup>3</sup> In addition, the Notification Letter cites the following as

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<sup>1</sup> 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>.

<sup>2</sup> Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

<sup>3</sup> Criterion K pertains to information indicating that an individual has "trafficked in, sold, transferred, possessed, used, or experimented with" illegal substances. See 10 C.F.R. § 710.8(k). Criterion L concerns refer to conduct tending to show that the Individual is "not honest, reliable, or trustworthy, or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l).

additional concerns under Criterion L: the Individual violated the stipulations of a March 2003 Security Acknowledgment form when he attempted to purchase methamphetamines in August 2008; the Individual had his three-year-old daughter with him at the time of his arrest; and, according to the police report from the arrest, “the police officers and the security guard witness [the Individual] dropping one round package of methamphetamines of [his] vehicle after he tried to hide it under the seat.” The Notification Letter also refers to a September 2008 Personnel Security Interview (PSI) during which the Individual discussed these concerns as described below.

During the PSI, the Individual explained in detail the circumstances surrounding his arrest. DOE Ex. 14, pp. 9-23. He stated that he was taking his daughter to lunch and she fell asleep in the car on the way. *Id.* at 10. While waiting for his daughter to wake up, the Individual was on the phone with a utility company to ascertain the amount of his bill so he could pay it off and then have the account switched to his new home. He had \$600 in his pocket, and separated out \$300 to pay the utility bill. *Id.* During that time, a landscaper who had done work on his home came to his vehicle and asked him whether he knew of anyone who was hiring. *Id.* at 10-11. During their conversation, a security guard approached the two men and suspected drug activity. *Id.* The security guard found two small packages of methamphetamines in the landscaper’s truck and detained both the Individual and the landscaper until the local police arrived. *Id.* at 11, 13. Initially, the landscaper told the police that the Individual sold him the drugs, but later admitted that the drugs belonged to him. *Id.* at 14.

The Individual was later charged with loitering for the purpose of engaging in drug activity and possession of drug paraphernalia. *Id.* at 11, 14; *see also*, DOE EX. 10. The Individual stated that he had a scented oil warmer which his mother purchased for his then-wife, and that item was classified as drug paraphernalia despite the fact that it did not have any drug residue on it. *Id.* at 12. During the PSI, the Individual maintained that he did not attempt to purchase illegal drugs and he did not intend to use the scented oil warmer for illicit purposes. *Id.* at 17, 19.

The LSO determined that the information gathered during the PSI did not resolve the security concerns raised by the Individual’s arrest. Therefore, the LSO referred the matter to administrative review and issued the January 2009 Notification Letter to the Individual. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual’s Letter, February 17, 2009.

Prior to the hearing, both the Individual and the DOE counsel submitted several exhibits.<sup>4</sup> Among the DOE counsel’s exhibits is a copy of the transcript of the September 2008 PSI, cited above, as well as the police report from the Individual’s August 2008 arrest, which indicates that the Individual told the arresting officer that he was meeting the landscaper to purchase methamphetamines. DOE Exs. 14, 10. The Individual’s exhibits include documents indicating that his drug-related criminal charges were dismissed after the Individual pled guilty to Disorderly Conduct. *Indiv. Ex. A, D.* The Individual also submitted the results of a September 2008 drug test and a May 2009 drug test, which were negative for illegal drugs. *Indiv. Ex. B.*

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<sup>4</sup> The DOE exhibits have been numbered “DOE Exs. 1-10;” the Individual’s exhibits have been lettered “*Indiv. Exs. A-E.*”

At the hearing, the Individual presented his own testimony, as well as the testimony of his mother, his sister, his supervisor, and two co-workers. The DOE counsel did not present any witnesses.

## II. HEARING TESTIMONY

### A. The Individual

The Individual's testimony setting forth the events leading to his arrest was consistent with the facts he described during his September 2008 PSI. Hearing Transcript ("Tr.") at 83-114. As he did during the PSI, the Individual maintained at the hearing that he did not attempt to purchase illegal drugs. Tr. at 97. Rather, he was speaking to his former landscaper when they were approached by a security guard. Tr. at 87-88. He stated that he did not know that the landscaper was a user or seller of illegal drugs. Tr. at 123. According to the Individual, the security guard suspected that the Individual and the landscaper were making a drug deal and detained the two men. Tr. at 84.

The Individual added that the security guard became physically aggressive with him. He stated, "he stood me up and pushed me down a bunch of times." Tr. at 84. The Individual maintained that he did not voluntarily admit to being in the parking lot to purchase drugs. Tr. at 84-85. He stated, "I'd already told [the security guard] over and over again I was there to each lunch, and he kept telling me, 'Quit lying,' and pushed me down, and it was 118 degrees outside ... I was worried about my daughter, and I finally just said, 'Hey I'm sick of getting pushed down with handcuffs on, just you tell me what I was doing here.'" Tr. at 85. The Individual further alleged that he never told either the security guard or the police officer that he was there to purchase methamphetamines. Tr. at 97. He stated that they told him that he was there to purchase drugs and he eventually agreed with them in order to make the incident end because he "was really about ready to pass out" after standing outside in the heat and without water for so long. Tr. at 90, 97. The Individual did not file a complaint against the security guard because "I don't like filing lawsuits or anything like that. It's just not in my nature." Tr. at 92.

The Individual also discussed the disposition of his criminal charges. Tr. at 98-101. The Individual stated that he pled guilty to disorderly conduct in order to have the drug-related charges dropped, because he believed he could not have a drug-related conviction on his record and retain a security clearance. Tr. at 98. When asked why he would plead guilty to any charge if he did not commit a crime, he stated that, although his attorney did not believe there was enough evidence to convict him, the attorney believed the Individual should not take any chances by going to trial. Tr. at 99-100.

The Individual stated that he has not used any illegal drug since 1988 or 1989, when he used marijuana in college. Tr. at 108. He has been subject to random drug tests through his employment and has never tested positive for any illegal drugs. Tr. at 103. The Individual stated that he spends most of his free time with his daughter, taking her swimming, to parks and museums, or other similar activities. Tr. at 109. The Individual concluded, "I don't use drugs. I'd never put my daughter in that situation." Tr. at 124.

## **B. The Individual's Mother**

The Individual's mother stated that she has been an emergency room nurse for 45 years, has helped treat drug addicts and patients who have overdosed on drugs, and is able to recognize when a person has been using drugs. Tr. at 13. She stated that the Individual has never exhibited any signs typical of drug use. Tr. at 14. She has never witnessed the Individual use any illegal drugs and has never suspected that he has done so. Tr. at 23. After his arrest, she confronted the Individual about whether he uses drugs, and he was adamant that he did not. Tr. at 30. She stated that she also called his best friend, whom he has known since childhood, to ask whether the Individual has ever used drugs and the friend stated that he never knew the Individual to use any illegal substances. Finally, the Individual's mother sees him regularly, sometimes several times a week. Tr. at 18. She stated that he spends most of his free time caring for his daughter. Tr. at 29. On days when his daughter is not with him, the Individual spends his time either at work or at home. *Id.* The Individual's mother speaks with him on the telephone almost every night and "he's not out running around or sounding like he's drunk or on drugs or anything." *Id.*

The Individual's mother stated that she was "very surprised" by the Individual's arrest. Tr. at 16. She recalled that the Individual has, in the past, even refused over-the-counter allergy medication she offered him because he was concerned it might cause him to test positive for banned substances on random drug tests. Tr. at 16-17. She further added that the Individual never takes any drugs or medications, other than aspirin. Tr. at 17. Therefore, she was surprised and just "couldn't believe" that he was arrested for attempting to purchase methamphetamines. *Id.*

The Individual discussed the circumstances surrounding his arrest with his mother. Tr. at 16. She stated that the Individual told her he admitted he was in the casino parking lot to purchase illegal drugs prior to his arrest only because the security guard who detained him kept him outside in the heat, away from his daughter, and was being physically aggressive with him. Tr. at 25. The Individual did not know whether his daughter was safe in the car, so he finally said what the security guard wanted him to in order to end the incident and get back to his daughter. *Id.* She added that the Individual would never place his daughter in jeopardy. *Id.* The Individual's mother stated that she believed the Individual's version of the events surrounding the arrest. Tr. at 16. She further added that she had purchased the scented oil diffuser which the police alleged was drug paraphernalia. Tr. at 21. She stated that its purpose is to heat scented oil to disperse fragrance into a room. She purchased the diffuser as a birthday gift for the Individual's ex-wife. Tr. 21-22.

## **C. The Individual's Sister**

The Individual's sister and the Individual live in the same city, and the Individual lived with her and her husband for a short time several years ago. Tr. at 56. During that time, he and his then-fiancée spent most of their time house-hunting. When they were not searching for a house, they spent most of their time at home with the family. Tr. at 57. The Individual did not go out to clubs or parties. *Id.* Currently, the Individual and his sister speak almost daily and see each other about once a month. Tr. at 62, 63. She stated that he spends most of his free time at home, either alone or with his daughter. Tr. at 66-67.

The Individual's sister was "shocked" by the Individual's arrest. Tr. at 58. She stated that she has never known the Individual to use illegal drugs. Tr. at 60. The arrest was "very out of character" for the Individual. Tr. at 60. She believes the Individual is honest, even if it is not in his best interests. Tr. at 64. Finally, the Individual's sister believes that he would never do anything to place his daughter in a compromising or dangerous position. Tr. at 65.

#### **D. The Individual's Supervisor**

The Individual has known his supervisor since 2003, when they began working together. Tr. at 68. The supervisor learned of the Individual's arrest shortly after it happened. Tr. at 71-72. The Individual's supervisor sat with the Individual to discuss the arrest when the Individual returned to work and they undertook the proper reporting procedures. Tr. at 72-73. The Individual discussed the events surrounding the arrest with him. Tr. at 73. He told the supervisor that he was taking his daughter to lunch, but they were in the car because his daughter had fallen asleep. *Id.* While he was waiting for her to wake up, the Individual was speaking with a man who had previously done landscaping work at his home and wanted to know if he knew of anyone who was hiring landscapers. *Id.* The Individual and the landscaper were approached by a security guard who believed the two men were engaging in drug activity. *Id.* The security guard detained them and called the police. *Id.* The Individual told the supervisor that the security guard would not listen to him and "kept shoving him down, being pretty rough with him, until [the Individual] just basically said 'Well, I'm here for whatever you say I'm here for,' just to try to get it to quit." Tr. at 74.

The supervisor stated that he read the police report from the arrest, and still believed the Individual's version of events, even though they were not consistent with the contents of the police report. Tr. at 75-76. He added, "I still believe [the Individual] because, you know, you work with someone every day and you ride with them to work, and he just – you know, I've been around other people [who have been] on drugs, and he was on time every day, he showed up every day, you know, so it's like there is no way [the Individual was using drugs]." Tr. at 76. In addition, the supervisor has interacted with the Individual outside of work and has never known him to use illegal drugs. Tr. at 77-78. He has also visited the Individual's home and has never seen any evidence of drugs or drug paraphernalia. Tr. at 77. Finally, the supervisor stated that the Individual's daughter is "all [the Individual] cares about" and he would never place her in a dangerous situation. *Id.*

#### **E. The Individual's Co-Workers**

Both Co-worker 1 and Co-worker 2 have known the Individual since 2003, when the Individual was hired to work in their group. Tr. at 33, 43. The Individual told both Co-worker 1 and Co-worker 2 about his arrest. Tr. at 34, 44. Co-worker 2 stated that the Individual told him about the events leading to the arrest during their carpool. The Individual told Co-worker 2 that the security guard who detained him became physically rough with him and he finally admitted to what the security guard wanted him to admit to in order to make the incident stop. Tr. at 47.

Co-worker 1 and Co-worker 2 both believe the Individual to be honest, even if it may be detrimental to him. Tr. at 36, 48. Neither of them has ever known the Individual to use illegal drugs, nor have they suspected him of doing so. Tr. at 37, 50. Co-worker 1 has had many personal conversations with the Individual and believes he would know if the Individual were experiencing substance abuse problems. Tr. at 40. Co-worker 2 stated that it is “absolutely not” in character for the Individual to purchase illegal drugs. Tr. at 49. Co-worker 2 described the Individual as “a technical person” and “a subject matter expert” in his field and added that the Individual “could not function if he had a drug problem.” Tr. at 51. Finally, Co-worker 1 stated that the Individual spends most of his time with his daughter and would never do anything to jeopardize her safety. Tr. at 38.

### III. STANDARD OF REVIEW

The regulations governing the Individual’s eligibility for an access authorization are set forth in 10 C.F.R. Part 710, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” An individual is eligible for access authorization if such 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). “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”).

Under Part 710, the DOE may suspend an individual’s access authorization where “information is received that raises a question concerning an individual’s continued access authorization eligibility.” 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various 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). 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).

### IV. ANALYSIS

It is beyond dispute that involvement with illegal drugs raises security concerns under Criterion K. 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), Guideline H, ¶ 24 (“Use of an illegal 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. VSO-0113*, 25 DOE ¶ 85,512 (1995) ("The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is further the concern of the DOE that the drug abuser might pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information.").

In addition, criminal conduct raises doubts as to an individual's honesty, reliability and trustworthiness, and raises security concerns under Criterion L. *See* the Adjudicative Guidelines, Guideline J, ¶ 30 ("Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."); *see also Personnel Security Hearing, Case No. TSO-0507* (2007). Based on the evidence in the record, the LSO had ample grounds to invoke Criteria K and L. The issue remaining is whether the Individual has adequately mitigated the security concerns. Because the Criteria K and L concerns are based on the same facts and are closely intertwined, I will address them together below.

In this case, the Individual maintains that, despite his arrest for "Loitering for the Purpose of Engaging in Drug Activity and Possession of Drug Paraphernalia" and the statement in the police report that he admitted to meeting the landscaper to purchase methamphetamines, he is not a user of illegal drugs and he did not attempt to purchase the drugs. He stated that the only reason he admitted to being in the parking lot to purchase drugs was the fact that the security guard kept him in the heat for a long period of time and was physically rough with him, and he wanted to make the ordeal stop.

The Individual's witnesses, who know the Individual well, each testified that they have never known him to use illegal drugs. They also stated that the Individual had not shown any signs typical of involvement with or use of illegal drugs. Rather, they stated that he is a devoted father who spends his free time with his daughter and would never do anything to place her in jeopardy. In addition, each of the witnesses was aware of the Individual's arrest. The testimony of the witnesses regarding what the Individual told them about the arrest is consistent both with the Individual's responses during the PSI and his testimony at the hearing.

Nonetheless, I am unable to conclude that the Individual has resolved the concern arising from this drug-related arrest. The Individual has not brought forth any evidence to corroborate his explanation for the events leading to his arrest. While it is conceivable that the Individual's assertions are true, nothing in the record supports his version of the events leading to his arrest. Rather, the evidence in the record strongly supports the conclusion that the Individual was arrested while attempting to purchase illegal drugs. First, the Individual was arrested with a significant amount of cash, \$600, in his wallet, \$300 of which he alleged was for a utility bill. The Individual did not specify why he was carrying the additional \$300. Second, the police report indicates that the Individual admitted to the police officer that he was in the parking lot, meeting the landscaper, to purchase drugs. The Individual's testimony at the hearing attributing his admission to a combination of a physically aggressive security guard and a long period of heat exposure appears to be an attempt to explain away a damaging fact in the record. He did not make that argument during the PSI. This suggests to me that this excuse, raised for the first time

at the hearing, was an afterthought and not genuine. Third, despite his assertion that he did not do anything wrong, the Individual pled guilty to disorderly conduct in order to avoid a conviction for a drug-related offense. Finally, although I believe the Individual's witnesses testified candidly and honestly, none of them were present at the time of the arrest and, therefore, their perception of the Individual's arrest is informed only by what the Individual told them. Consequently, although their testimony that they have never known the Individual to be a user of illegal drugs is favorable, it is significantly outweighed by the uncontroverted facts in the record.

Based on the foregoing, there is simply insufficient evidence in the record to support the Individual's explanation for his arrest. Therefore, I must conclude that the Criteria K and L concerns raised by the Individual's August 2008 arrest remain unresolved.

## V. CONCLUSION

Upon consideration of the record in this case, I find that there was evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criteria K and L. I also find that the Individual has not presented sufficient information to fully resolve those concerns. Therefore, I cannot conclude that restoring the Individual's 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 Individual's suspended access authorization should not be restored at this time.

Diane DeMoura  
Hearing Officer  
Office of Hearings and Appeals

Date: July 17, 2009