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July 16, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 25, 2009

Case Number: TSO-0720

This Decision concerns the eligibility of XXXXXXXX (the individual) to hold an access authorization (or security clearance) 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 should be granted an access authorization. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should not grant the individual an access authorization.

I. Background

The individual held a security clearance from 1984 to 1991. His current employer recently requested a DOE security clearance for him. Issues related to the individual's past illegal drug use, and his candor regarding them, however, caused the local security office (LSO) to obtain authority to initiate an administrative review proceeding.

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 had deliberately misrepresented or omitted significant information during the DOE access authorization process over the course of many years, and engaged in conduct that tended to show that he was not honest, reliable, or trustworthy. Enclosure to Notification Letter, February 24, 2009 (citing 10 C.F.R. § 710.8(f) and (l)).²

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).

² Criterion F relates, in relevant part, to information that a person has "deliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive (or National Security)] Positions,

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 25, 2009.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his wife, his supervisor, and two friends and co-workers. The DOE Counsel submitted 16 exhibits prior to the hearing, and the individual submitted 37 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 should be not granted an access authorization. The specific findings that I make in support of this decision are discussed below.

III. The Notification Letter and the Security Concerns at Issue

. . . , [or] a personnel security interview . . . on a matter that is relevant to a determination regarding eligibility for DOE access authorization” 10 C.F.R. § 710.8(f) (Criterion F). Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any unusual circumstances which tend 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) (Criterion L).

³ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, including 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.

In the Notification Letter, the LSO sets forth its concerns regarding the individual's eligibility for access authorization and the facts that support each of those concerns. The LSO cites the following derogatory information for its security concerns under Criteria F and L. The individual responded "No" to Question 11A on Personnel Security Questionnaires he completed on June 8, 1984, and April 21, 1987, which read: "Are you now, or have you ever used any narcotic, hallucinogen, stimulant, depressant, or cannabis (to include marijuana or hashish), except as prescribed by a licensed physician?" During personnel security interviews conducted on April 21, 1987, April 2, 2008, and April 22, 2008, the individual stated several times that he had never used illegal drugs, nor had he witnessed anyone else using illegal drugs or been in a situation where such drugs were used. During each of those interviews, the individual also stated that he was entirely forthright and honest in his responses, and when confronted with evidence during the 1987 interview indicating that he had in fact used marijuana, he denied it and considered the information as slander. When he was confronted during the April 22, 2009, interview with a police report indicating that he had been arrested for possession of a controlled substance in 1979, he denied any knowledge of the charge and explained that he believed he had been arrested at that time for public intoxication, not possession of a controlled substance. Finally, on October 24, 2008, during an interview preceding an exculpatory polygraph examination, the individual admitted to the polygrapher that he had used marijuana at a party when he was 16 years old. He told the polygrapher that he had withheld this information from the LSO when he was first considered for access authorization in 1984, because he believed the drug use would disqualify him for the job for which he was applying; he then continued to deny having used illegal drugs throughout the years because (1) he felt he had to provide consistent information to the LSO, and (2) the LSO consistently warned him that the DOE had a zero tolerance policy regarding illegal drug use.

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding the individual's eligibility for access authorization under Criteria F and L. Deliberately omitting or concealing relevant facts in a process for determining eligibility for access authorization demonstrates questionable judgment and lack of candor, and can also raise questions about an individual's reliability, trustworthiness and ability to protect classified information. See Guideline E of the *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).

IV. Findings of Fact

The individual admitted at the hearing that he used marijuana on one occasion when he was 16 years old and in high school. Transcript of Hearing (Tr.) at 64. In 1979, when he was 18, he was arrested for public intoxication, unlawfully carrying a weapon, and possession of a controlled substance. Exhibit 9 (police reports). The individual was placed in jail overnight, and all charges were dropped. *Id.*

When the individual was being considered for a security clearance in 1984, he completed a Personal Security Questionnaire that included the question: "Are you now, or have you ever used any narcotic, hallucinogen, stimulant, depressant, or cannabis (to include marijuana or hashish), except as prescribed by a licensed physician?" He answered "No" to that question. Exhibit 15. Shortly thereafter, he was granted an access authorization, which he maintained until 1991, when he acquired a new position and no longer needed the clearance. In 1987, while still holding his clearance, he completed another Personnel Security Questionnaire, which contained the same question, and he responded in the same manner. Exhibit 14. On the same day in 1987, the individual participated in an interview conducted by the LSO. In the course of that interview, he stated repeatedly that he had never used illegal drugs. Exhibit 13 (Transcript of April 21, 1987, Personnel Security Interview) at 39, 40, 41, 46. He also stated that he had never been in a situation where illegal drugs were being used, *id.* at 44, and when told that the LSO had information that he had used marijuana, he stated that the information was wrong and was slander. *Id.* at 40.

In 2007, the individual assumed a new position and his employer requested access authorization for him. While evaluating the individual's application, the LSO conducted two additional personnel security interviews. In each of the interviews, the individual was questioned regarding his illegal drug involvement, and he again consistently responded that he had never used any illegal drugs. Exhibit 10 (Transcript of April 2, 2008, Personnel Security Interview) at 12; Exhibit 7 (Transcript of April 22, 2008, Personnel Security Interview) at 11, 12, 15. He also stated that he had never seen anyone using illegal drugs. Exhibit 7 at 15.

In the April 2008 interviews, the individual was also questioned about his 1979 arrest for possession of a controlled substance. His adamant denial of any knowledge that illegal drugs were involved in that arrest led to his voluntary participation in an exculpatory polygraph examination. Exhibits 4, 5, 6. It was during the interview preceding this polygraph examination that the individual revealed to the polygrapher that he had in fact used marijuana on one occasion as a 16-year-old. Exhibit 4 (Polygraph Examination Report); Tr. at 67, 98, 99. Neither the pre-polygraph interview nor the polygraph examination itself provided any additional insight into the facts underlying the 1979 arrest, however. Based on the evidence in the record, I find that the individual was intoxicated and taken into police custody; that he was kept overnight in jail and released in the morning, with all charges against him dropped; that a passenger in his car, who was not taken into custody, had left a controlled substance in his car; that the individual learned that fact the next morning when the passenger asked him what happened to his drugs. Tr. at 87. I further find that the individual believed he had been arrested only for public intoxication, knew the charges had been dropped, had no knowledge that a police report existed regarding his arrest, and never saw a copy of the police report until the LSO interviewer showed it to him in 2008. *Id.* at 87-88.

V. Hearing Officer Evaluation of Evidence

The LSO's security concerns regarding this individual are predicated on two incidents involving illegal drugs that occurred when he was a teenager, roughly thirty years ago. It must be noted, however, that the LSO's concerns relate not to his use of illegal drugs, but to his failure to provide accurate information about those incidents. In its Notification Letter, the LSO does not allege that the individual currently uses illegal drugs or may do so in the future, and I need not address such a concern in my decision. Instead, I will focus solely on the LSO's concerns that fall within Criteria F and L, which relate to whether he deliberately misled the LSO and whether his behavior demonstrates that he is dishonest, unreliable, or untrustworthy.

The individual admits that he deliberately concealed his teenage use of marijuana from the LSO while holding a security clearance from 1984 to 1991. This conduct alone raises a substantial security concern, which is exacerbated by the fact that the individual perpetuated the concealment as recently as April of 2008, during two personnel security interviews. Deliberately providing false information, especially when reminded of the need for being truthful, demonstrates that the individual employed questionable judgment, which raises questions about an individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline E. As Hearing Officer, however, my evaluation of an individual's eligibility for access authorization does not end with such a finding. I must consider all of the evidence before me that relates to the individual's character and personal history, including any information that tends to mitigate the concerns that this activity raised, with the object of rendering an adjudication on the basis of the "whole person" and not merely a series of events taken out of context. *See* Adjudicative Guidelines at ¶ 2(a). A common-sense consideration of all the evidence leads me to conclude that, though some of his alleged falsifications were not deliberate, as discussed below, there remains sufficient doubt about how honest and reliable the individual will be in his future interactions with the LSO.

Criterion F: Deliberately Withholding Information

The individual presented explanations for his failure to provide accurate information to the LSO regarding his teenage use of illegal drugs. These explanations, if accepted, would mitigate the LSO concerns under Criterion F. The explanations differ for each of the alleged incidents of illegal drug use, and must be addressed separately.

With respect to his use of marijuana as a 16-year-old, the individual now freely admits that he did smoke marijuana once at a party. He explained that he deliberately stated that he had not used any controlled substances when he was first being considered for access authorization in 1984, because he feared he would be disqualified for the position for which he was applying. Exhibit 4. Having denied using illegal drug use once, he felt compelled to be consistent in his responses to the LSO and, for that reason, he continued to deny past illegal drug use each time the question was raised: on his 1987 Personnel Security Questionnaire, and during three subsequent personnel security interviews, once in 1987 and twice in 2008. *Id.*; Tr. at 65. The interviewers' recitations, during each interview, of the DOE's zero-tolerance policy for illegal drug use and of the penalties for perjury only enhanced the individual's concern for the

repercussions that could befall him were he to come forward with the truth. Exhibit 4; Tr. at 65-66. At the hearing, the individual testified that he seized the opportunity to admit his teenage marijuana use at the pre-polygraph interview, not for fear that the polygraph examination would establish the falsehood of his statements to the LSO, but rather because he perceived he was in a forgiving and supportive circumstance: he had recently received training regarding a DOE- and company-sponsored safety improvement plan that emphasizes “blameless” errors and fosters open communication, Individual’s Exhibit B at 1, and he liked and identified with the polygrapher, in whose presence the individual did not feel threatened. Tr. at 67.

The individual’s stated rationale for withholding this information from the LSO does not mitigate the security concern raised by this behavior. Even if I accept that he came forward with the truth voluntarily, for whatever reason, the fact remains that he deliberately prevented the LSO from learning the truth about his past for many years, reaffirming the falsehood at least four times and as recently as last year. I recognize that the individual did not hold a security clearance from 1991 to 2008. Tr. at 68. Nevertheless, he misled the LSO regarding his youthful marijuana use from 1984 through 1991 and, of even more concern, reaffirmed the falsehood at his personnel security interviews in April of 2008. Were I to consider his falsifications during the period 1984 to 1991 mitigated on the basis of his youth at the time, or on the basis of the passage of nearly two decades, his recent falsifications would still remain serious concerns under Criterion F. In decisions regarding falsification concerns, Hearing Officers have compared the amount of time the individual maintained the falsehood to the amount of time he had been truthful. *See, e.g., Personnel Security Hearing*, Case No. TSO-0394 (2006) (six months of honesty does not mitigate a nine-month period of dishonesty); *Personnel Security Hearing*, Case No. TSO-0302 (2006) (ten months of honesty does not mitigate 16 years of dishonesty); *Personnel Security Hearing*, Case No. VSO-0440 (2001) (18 months of honesty mitigates a six-month period of dishonesty).⁴ In the present case, the individual withheld the truth from the LSO for at least seven years (1984 through 1991) while he held an access authorization, and then again in 2008, and revealed the truth about seven months before the hearing. After carefully considering the facts and rationales surrounding the individual’s falsification and recent admission of the truth, I cannot conclude that the individual has mitigated the LSO’s concerns in this regard.⁵

⁴ Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, 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>.

⁵ The individual referred to four OHA Hearing Officer decisions as instructive. In each decision, the individual’s access authorization was granted or restored. Three of these decisions, however, concerned individuals who were charged with having used illegal drugs in the past but not with falsifying information to the LSO, which is the critical area of concern in the present case. The security concerns at issue in the fourth decision he cites are more on point, as the individual had not only used marijuana in the past but had also denied such use on a Questionnaire for National Security Positions, the successor form to the Personnel Security Questionnaire. *See Personnel Security Hearing*, Case No. TSO-0628 (2008). That case is clearly distinguished from the present case, however. In both cases, the individuals falsified information in the process of obtaining an access authorization many years ago, while quite young, and later had their security clearances terminated because they obtained new work for which a clearance was not needed. In the cited case, however, when the individual reapplied for access authorization as a mature adult, she immediately set the record straight; she had falsified only one time, 13 years

As for the individual's arrest for possession of a controlled substance, I find that the individual has mitigated the LSO's concern under Criterion F. He believed he had been charged with public intoxication; he was kept overnight in jail and released the next morning with all charges dropped. I am convinced from the record that the individual had no idea that he had been charged with any violation other than public intoxication until he was shown the police report in April 2008. He was offered and accepted the opportunity to demonstrate his belief by submitting to an exculpatory polygraph. Clearly, the contemporaneous police records establish that he was charged with possession of a controlled substance. But they also establish that the charges were dropped. They do not establish, however, that the individual ever had any knowledge of the charge and, in light of the individual's explanation, I conclude that he did not. Because he did not know that he had been arrested for possession of a controlled substance until he was confronted with the police report in April 2008, I find that he did not deliberately withhold that information from the LSO. Consequently, I find that the individual has mitigated that portion of the Criterion F charges that relate to his falsification of information regarding this arrest.

Criterion L: Honesty, Reliability and Trustworthiness

A number of witnesses testified that the individual is an upstanding member of his community, with a well-deserved reputation for honesty, integrity, and reliability. Tr. at 11-12, 19 (testimony of wife); 27, 29, 34 (testimony of supervisor); 39-41, 53, 56 (testimony of long-time friends). Two witnesses indicated that the individual does not have a deceptive nature, and that his falsification is out of character. *Id.* at 34, 61. Nevertheless, the fact remains that the individual has behaved in a dishonest and unreliable manner by making false statements to the LSO. Maintaining the falsehood for many years raises legitimate concerns about trustworthiness and judgment. His explanation for steadfastly reiterating his denial of marijuana use—that once he lied, he had to maintain the lie, for fear of prosecution for perjury or for fear of running afoul of the zero-tolerance policy—only exacerbates those concerns. I find that the individual employed questionable judgment when he responded to the stress of being reminded to be truthful by deliberately not being truthful. The question remains whether he would also employ questionable judgment in a more stressful situation: Could the LSO count on him to step forward if he were to compromise, even inadvertently, classified information in the future? Fearing repercussions that might follow reporting a compromise of classified information, he might decide not to reveal the breach. Based on his prior lack of candor in his dealings with the LSO, I am not convinced that he would reliably respond in an appropriate manner. Moreover, because the individual adamantly maintained his lie (even in the face of perjury) when stressed by the threats of zero tolerance and prosecution for perjury, he may be subject to pressure, coercion, exploitation, or duress in the future. I cannot predict with any assuredness that he will interact with the LSO in an honest and reliable manner in the future. Therefore, the individual

before the hearing. In contrast, the individual in the present case falsified repeatedly, both when young and also as recently as one year ago.

has not mitigated the LSO's Criterion L concern with respect to withholding his use of marijuana as a teenager.⁶

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria F 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 sufficient evidence to mitigate the security concerns. I therefore cannot find that granting 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 granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: July 16, 2009

⁶ For the same reasons I found that the individual mitigated the Criterion F concerns regarding his 1979 arrest, I find that he mitigated as well the Criterion L concerns regarding that arrest.