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August 12, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing
Date of Filing: April 15, 2009
Case Number: TSO-0734

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (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'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.

I. Background

The individual has held an access authorization, or security clearance, since 2004. On September 25, 2008, the individual took a random drug test that indicated he had used marijuana. He admitted that he had used marijuana once, earlier the same month. This illegal drug use 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 LSO characterized this information as indicating that the individual had used an illegal drug, marijuana, several times in his lifetime including, most

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).

recently, September 2008. Notification Letter, March 6, 2009 (citing 10 C.F.R. § 710.8(k) (Criterion K)).²

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 April 16, 2009.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual and the medical review officer of the facility at which the individual is employed. The DOE Counsel submitted five exhibits prior to the hearing, and the individual submitted nine 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.

² Criterion K relates, in relevant part, to information that a person has “used . . . a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana . . .) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k).

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.

III. The Notification Letter and the Security Concerns at Issue

In the Notification Letter, the LSO cites the following derogatory information for its security concerns under Criterion K. The individual first used marijuana in high school. He then used marijuana numerous times from 1989 to 1991. Finally, he used marijuana one time at a party in September 2008. He tested positive for marijuana on a random test his employer gave him later in the same month, and a second test of his sample confirmed that result.

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding the individual's eligibility for access authorization under Criterion K. Illegal drug use can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment while the individual is under the influence of the drug and because it demonstrates that an individual may be unable or unwilling to comply with laws, rules, and regulations. See Guideline H 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 during a personnel security interview that he used marijuana five to ten times as a junior in high school. Exhibit 1 at 12-13 (Transcript of November 19, 2008, Personnel Security Interview). He did not use any illegal substances for the rest of high school or during his military service. Shortly after he returned to his home town and starting working at a job he would then hold for 16 years, he began smoking marijuana with co-workers. Transcript of Hearing (Tr.) at 42-43. He used marijuana about 60 times from 1986 to 1989.⁴ Exhibit 5 (Questionnaire for National Security Positions signed May 23, 2003) at Question 24. In 1989, he stopped using marijuana because, as he explained at the hearing, he was "just kind of sitting still and spinning [his] wheels," and he "needed to do better for [his] family to succeed." Tr. at 44.

After completing his Questionnaire for National Security Positions in 2003, the individual responded to a Letter of Interrogatory, in which he provided more details about his history of marijuana use. Exhibit 4. He then signed a Drug Certification, by which he agreed not to use marijuana for as long as he holds an access authorization. Exhibit 3.

The individual has not used drugs regularly since 1989. He described his alcohol consumption as drinking a beer occasionally after mowing the lawn on a hot day. One day in mid-September 2008, he ran into a high-school friend whom he had not seen for many years, who invited the individual to a party at his house. The individual rarely socializes, because he works

⁴ Based on the evidence in the record, including the individual's testimony at the hearing, I find that 1986 to 1989, rather than 1989 to 1991 as stated in the Notification Letter, is a more accurate statement of the years during which the individual used marijuana with regularity.

two jobs and spends his free time with his wife and children. He did, however, attend his former friend's party. He drank more beer than was his custom and found himself intoxicated. He recalls at first declining the offer of marijuana and then later accepting it. Shortly thereafter he became violently ill, vomited, and let a friend drive him home. Tr. at 29-30.

Roughly ten days later, the individual was subjected to random drug testing at his place of employment. The medical review officer of the facility testified that the initial results were positive. A second, more sophisticated test on the same sample revealed a level of marijuana metabolites at precisely the threshold for a positive reading; in other words, if the level were any lower, it would be interpreted as a negative result. *Id.* at 7. On the basis of the positive test result, the medical review officer referred the individual to a psychologist to determine whether the individual suffered from a condition, such as substance abuse or dependence, for which treatment was indicated. *Id.* at 9-10. The psychologist reported that he found no evidence of alcohol or drug abuse or dependence, that the individual's recent marijuana use was an isolated event, and that no treatment was necessary. *Id.* at 10; Exhibit E. The medical review officer agreed with the psychologist's opinion. Nevertheless, due to the nature of the individual's work, the medical review officer felt it prudent to arrange for some form of treatment, which the individual actively participated in and completed. Tr. at 11-12; Exhibit D.

The individual has stated consistently that he did not use marijuana or any other illegal drugs from 1989 until September 2008. Exhibit 1 at 16; Tr. at 31.⁵ The consistently negative results of numerous random drug tests support this assertion. Tr. at 8 (medical review officer's testimony that all employment drug tests before September 25, 2008 were negative), 41 (individual's testimony that all military drug tests were negative); Exhibits A, B (facility's fitness-for-duty nurse stating that all employment drug tests before September 25, 2008 were negative). The medical review officer also provided support for the individual's assertion that the September 2008 incident was an isolated event. He testified that, given the date of the incident the individual provided and the fact that the reported level of marijuana metabolites "just barely went over the threshold on the confirmatory cut-off," the test results were consistent with one-time usage. While acknowledging the great number of variables that affect the detection of marijuana use, the medical review officer expressed his opinion that the test results would have been higher had the individual engaged in more frequent marijuana use. Tr. at 20-21.

V. Hearing Officer Evaluation of Evidence

The individual's use of marijuana falls into two periods of his life, separated by a large block of time. Most of the marijuana use that raises a security concern occurred long ago: first, when the individual was a junior in high school, and later during a three-year period at the start of his first full-time civilian job. This period of marijuana use, though extensive, ended in 1989, when the individual was 22 years old. The second period is the present, and includes the September 2008 party at which he drank to intoxication and then used marijuana.

⁵ He also testified that he has not used any illegal substance since then. Exhibit 1 at 20.

While acknowledging the individual's drug use in the past, I find the crux of the LSO's security concern correctly rests on the individual's use of marijuana within the past year. Facts in the record that mitigate this concern include the individual's completion of a prescribed treatment program, undertaken as an abundance of caution, and evidence that the individual has never been diagnosed with a substance abuse problem. I also take into consideration the individual's testimony that he does not associate with individuals who use illegal drugs and has no intention of attending parties in the future that could place him in the situation in which placed himself in mid-September of last year. *Id.* at 32-34, 36, 43. *See* Adjudicative Guidelines at Guideline H, ¶ 26. Finally, I am convinced that he has accepted responsibility for his actions, and has expressed genuine remorse for them. At the November 2008 Personnel Security Interview, he stated, "I know what I did was wrong. And it was a very, very, very bad case of misjudgment." Exhibit 1 at 30. At the hearing, he testified that the ramifications of his marijuana use, including the hearing, are "probably the most embarrassing thing that I've ever had to go through in my life," for both himself and his family. *Tr.* at 35, 53.

After considering all the evidence, however, I conclude that the mitigating factors discussed above do not prevail in this case. The individual freely admits that he used marijuana once within the past year. But he did not come forward with that information until he was the subject of a positive drug screen. Although he testified at the hearing that he had no recollection of signing a Drug Certification in 2003 until it was shown to him during his November 2008 Personnel Security Interview, *Tr.* 50, he was clearly aware that the DOE does not condone illegal drug use while holding a security clearance, at least at the time he signed the Drug Certification.⁶ Moreover, as an employee subject to random drug screenings, he knew that his employer did not permit such use. Nevertheless, he did not report his use affirmatively. In addition, it appears that the individual used marijuana at the September 2008 party after he had become intoxicated. Although those circumstances may demonstrate that the individual did not willfully use marijuana, they do not reassure me that the scenario will not recur in the future. From his expressions of regret and commitment, he clearly intends not to use marijuana in the future, whether willfully or not, but it remains to be seen whether his intentions will successfully guide his actions. Finally, this most recent use of marijuana cannot be mitigated as youthful indiscretion or an incident from the distant past. *See* Adjudicative Guidelines at Guideline H, ¶ 26. Its recency, in fact, is its most troubling aspect. Although the individual abstained from illegal drug use for 19 years before the September 2008 party, less than a year has passed since that event. The testimony of family and close friends who could attest to the individual's current lifestyle and associations, especially in conjunction with the medical review officer's opinion, might have supported his assertion that he will not repeat his error. After careful consideration

⁶ By signing the Drug Certification, the individual agreed not to "use . . . illegal drugs . . . at any time, in any country, in any job in which I have been given a DOE access authorization." Exhibit 3. I note that the LSO did not invoke Criterion L in its Notification Letter concerning the individual's breaking this commitment. *See* 10 C.F.R. 710.8(l) (which relates, in relevant part, to information that a person has "[e]ngaged in any unusual conduct . . . which tend[s] to show that the individual is not honest, reliable, or trustworthy. . . . Such conduct or circumstances include . . . violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.") Nevertheless, I must consider the fact that he made and then breached that agreement as a "relevant and material factor[]" under Criterion K. 10 C.F.R. § 710.7(c).

of the evidence before me, however, it is simply too early for me to predict with confidence whether, despite his expressed commitment to avoid parties, alcohol, and illegal drugs, he will be successful. I am not convinced that the risk of recurrence is sufficiently low to restore the individual's access authorization.

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 Criterion K. 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 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.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: August 12, 2009